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### The fragility of rightness. Adjudication and the primacy of practice

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"We can say [...] that men have equal dignity, meaning by this simply that they all satisfy the conditions of moral personality [...]. And being alike in this respect, they are to be treated as the principles of justice require."<sup>176</sup>

## **4 The Fragility of Justice I. Rawls' Theory of Justice as moral background theory of law and adjudication**

### **1 Introduction**

This chapter offers a discussion of Rawls' *A Theory of Justice* because this theory may support a stabilizing approach to adjudication or, as we saw, a morally and epistemically reassuring way of accounting for the moral quality of adjudication.<sup>177</sup> At first sight Rawls' theory is a strong candidate because it is a *normative theory* of political morality and as such it has, at least at the outset, the formal features of a final commensurans, the kind of viewpoint on which a stabilizing approach hinges. Content-wise Rawls' theory is also a plausible candidate as it shows considerable fit with Western constitutional democratic legal orders and their adjudication. This theory can explain and conceptually anchor a range of values that these legal orders are committed to, such as liberty rights and a range of social-economical rights.<sup>178</sup> So, as a normative background theory of law and adjudication Rawls' theory potentially has strong justificatory and explanatory force.

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<sup>176</sup> Rawls, *A Theory of Justice*, 291.

<sup>177</sup> Rawls' conception of justice as laid out in *A Theory of Justice* is preferred here as candidate for a background theory of law in a constitutional democracy above the account of justice as introduced in *Political Liberalism*. This because the former has a comparatively better chance to justify a reliance on legal commensurability where adjudication in a constitutional democracy is concerned. This is not to say that elements of *Political Liberalism* will not be used in the discussion in this chapter. However, these will only be brought up if and in so far they are consistent with the claims made in a *Theory of Justice*. Rawls' *Political Liberalism* and in particular the principle of political legitimacy it holds will be discussed in more detail in the next chapter, which deals with Nussbaum's theory of justice that bases her account of political legitimacy on Rawls' political liberalism. Cf. Ibid; Rawls, John, *Political Liberalism* (New York: Columbia University Press, 2005).

<sup>178</sup> Cf. Rawls, *A Theory of Justice*, 171.

This chapter is an introductory chapter to Rawls' theory of justice. First we shall see that Rawls introduces justice as the first virtue of society that has as its rationale to protect the dignity of each and every citizen. Because of Rawls' interpretation of dignity his theory will be presented as predominantly Kantian (2.1). Subsequently, I will point out that it also has an Aristotelian twist to it (2.2). The chapter then briefly discusses Rawls' conception of adjudication (3). We shall see that this conception indeed squares well with a stabilizing approach to adjudication. The chapter ends with some concluding remarks (4).

It will not be until the next chapter that I will go into the question whether Rawls' theory of justice can validate a stabilizing approach to adjudication.

## **2 Rawlsian justice. Kantian with an Aristotelian twist**

### 2.1 Protecting 'noumenal selves'

In *A Theory of Justice* Rawls makes it clear -albeit often implicitly- that the central value of a just society is the equal dignity of citizens.<sup>179</sup> Equal dignity is not simply one among other values that society should strive for, it is the value that according to Rawls gives all other values their final point and is the basis for all legitimate claims of citizens. Equal dignity is the all-encompassing rationale behind a just society and Rawls' conception of justice is an attempt to give substance to this value for the context of Western constitutional democracies.<sup>180</sup>

Rawls is well aware that by itself the value of equal dignity is far too indeterminate to function as a premise in a process of deductive reasoning leading to a determinate viewpoint of justice. Nonetheless he presents justice as the explication of the ideal of equal dignity in terms of what rights and duties citizens should have. This ideal "is manifest in the content of the principles to which we appeal", Rawls says.<sup>181</sup>

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<sup>179</sup> For a direct reference to the notion of dignity see: *Ibid.*, 513. There Rawls states that his theory offers a rendering of the notion of equal dignity, albeit that the principles of justice are not deduced from it. This because according to Rawls it is precisely the notion of equal dignity that needs interpretation: "[...] once the conception of justice is on hand, [...] the ideas of respect and human dignity can be given a more definite meaning."

<sup>180</sup> *Ibid.*, 527.

<sup>181</sup> *Ibid.*, 513.

The account that Rawls gives of human dignity is predominantly Kantian.<sup>182</sup>

According to Kant the dignity of humanity (*Menschenwürde*) is based on the idea that human beings have a special nature as free and independent beings and are able to live in accord with a conception of the good. As Kant puts it: “[t]he will is thought of as a faculty of determining itself to action in accordance with the representation of certain laws. And such a faculty is to be found only in rational beings.”<sup>183</sup> This notion of a rational being that has a free will is the notion of a *causa noumenon* (*homo noumenon*), independent of any sensible conditions. This as opposed to the idea of a human being as a *phenomenon* (*homo phenomenon*), a sensible creature that is subject to and determined by empirical laws.<sup>184</sup> It is this first aspect that according to Kant is the source of dignity and the reason why human beings deserve respect. This rational faculty gives human beings their absolute worth, makes them ends in themselves.

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<sup>182</sup> In several places in his work Rawls claims that his theory is Kantian in nature and origin. See for instance: Ibid., xviii, 101. Essays in which Rawls defends his conception of justice explicitly in Kantian terms are for instance: Rawls, John, 'Kantian Constructivism in Moral Theory', *The Journal of Philosophy* 77, 9 (1980); ———, 'The Basic Liberties and Their Priority', in *The Tanner Lectures on Human Values* (Michigan: University of Michigan, 1981).

Whether Rawls is right in presenting his conception of justice as a neo-Kantian approach is a recurring topic in both moral and political philosophy. For instance, Oliver Johnson argues that Rawls in presenting Justice as Fairness as Kantian “must radically misinterpret Kant. For the conception that he has of man’s nature as a moral being is basically opposed to, rather than consonant with, that held by Kant”, cf. Johnson, Oliver A., 'The Kantian Interpretation', *Ethics* 85, 1 (1974). For a similar critique see: Budde, Kerstin, 'Rawls on Kant', *European Journal of Political Theory* 6, 3 (2007). Budde argues that Rawls “forces onto Kant's theory a Rawlsian interpretation which crucially alters Kant's theory”. See for the claim that Rawls’ Justice as Fairness should be interpreted in Kantian terms: Hampton, Jean, 'Contracts and Choices: Does Rawls Have a Social Contract Theory?', *The Journal of Philosophy* 77, 6 (1980); Darwall, Stephen L., 'A Defense of the Kantian Interpretation', *Ethics* 86 (1976).

<sup>183</sup> Kant, Immanuel, *Grounding for the Metaphysics of Morals: On a Supposed Right to Lie because of Philanthropic Concerns*, trans. Ellington, James W. (Indianapolis: Hackett Publishing Company, 1993), 35.

<sup>184</sup> ———, *Critique of Practical Reason*, trans. Abbott, T.K. (New York: Prometheus Books, 1996), 74.

“Now I say that man, and in general every rational being, exists as an end in himself and not merely as a means to be arbitrarily used by this or that will.”<sup>185</sup>

In this Kantian vein Rawls argues that citizens should be treated as equals because in essence they are equally rational and free, i.e. they have the capacity for an effective sense of justice and the capacity to form, revise and rationally pursue a conception of the good.<sup>186</sup> For Rawls these capacities bring the “claims of justice into play”.<sup>187</sup>

In order to know what equal dignity exactly implies for these claims of justice, Rawls notably introduces the idea of the ‘the original position’ as the justificatory connection between the value of equal dignity and the substance of justice.<sup>188</sup> The original position represents the viewpoint of the Kantian ‘noumenal’ selves, the viewpoint of the moral personality of an essentially free and rational creature.<sup>189</sup> It epitomizes what citizens as moral creatures can be thought to agree upon when it comes to the distribution of the burdens and advantages of living in society.<sup>190</sup>

Not surprisingly, the original position is predominantly arranged in such a way that it excludes all kinds of considerations that may stem from more situated, embodied perspectives. It is meant to constrain (the influence of) the motives that may result from the perspective of citizens when conceived of as *homo phenomenon*, a being subject to empirical laws. The metaphor that expresses these constraints is that the parties in the original position are situated behind a ‘veil of ignorance’: they do not know their place in society, their social class or status, their fortune in the distribution of natural assets and abilities, their intelligence and strength, their conception of the good, the particular features of their personal psychology and the particular circumstances of their own society.<sup>191</sup> For similar reasons internal contingencies such

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<sup>185</sup> Kant, *Grounding for the Metaphysics of Morals: On a Supposed Right to Lie because of Philanthropic Concerns*, 35.

<sup>186</sup> Rawls, *A Theory of Justice*, 513; ———, ‘Kantian Constructivism in Moral Theory’, 525.

<sup>187</sup> Rawls, *A Theory of Justice*, 44, 448, 505-506. The fact that Rawls sees these moral capacities as giving rise to claims of justice explains why he holds that animals are not protected by the principles of justice.

<sup>188</sup> *Ibid.*, 102-168.

<sup>189</sup> *Ibid.*, 255.

<sup>190</sup> *Ibid.*, 118-119; Freeman, Samuel, *Rawls* (New York: Routledge, 2007), 143.

<sup>191</sup> *Ibid.*

as needs, strivings and desires are also excluded from the reasoning in the original position. Moral creatures should not be construed as being 'stuck' to their empirical or situated nature.

So, by these constraints on the reasoning leading to justice Rawls aims to secure that in the end justice will be the viewpoint of 'moral personality' as such. Being equal in their moral nature, the participants in the 'original position' all have the same interests, or so is the idea: "we can view the choice in the original position from the standpoint of one person selected at random", Rawls says.<sup>192</sup>

In addition Rawls asserts that the things that citizens as 'noumenal selves' need are the 'primary social goods'. According to Rawls each citizen needs these goods, regardless of his empirical characteristics such as his religion, his sexual preference and his talents. The primary social goods that Rawls designates are basic liberties, freedom of movement and free choice, powers and prerogatives, income and wealth, and the social basis of self-respect.<sup>193</sup> Again, these goods do not describe the basic needs of actual 'flesh and blood' creatures. The list is not to be understood as the "outcome of a purely psychological, statistical, or historical inquiry."<sup>194</sup>

As to the distribution of these goods Rawls proposes the following principles of justice as the distributive principles that the parties in the 'original position' will agree upon:

“1. 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. Social and economic inequalities are to be arranged so that they are both: a) to the greatest benefit of the least advantage, consistent with the just savings principle, and b) attached to offices and positions open to all under conditions of fair equality of opportunity.”<sup>195</sup>

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<sup>192</sup> Rawls quoted in: Hampton, 'Contracts and Choices: Does Rawls Have a Social Contract Theory?', 317.

<sup>193</sup> Cf. Rawls, *A Theory of Justice*, 92; ———, 'Kantian Constructivism in Moral Theory', 526.

<sup>194</sup> Freeman, Samuel, ed., *Collected Papers. John Rawls* (Cambridge, US: Harvard University Press, 1999), 314.

<sup>195</sup> Rawls, *A Theory of Justice*, 266.

Rawls moreover presents these principles as lexically ordered, giving priority to the protection of the basic liberties over the other social goods.<sup>196</sup> These liberties may only be restricted for the sake of liberty itself, not for serving the common good, economic and social advantages, any given religious or metaphysical values or ‘truths’.<sup>197</sup>

Rawls compares these principles of justice with Kantian categorical imperatives. By this he means to emphasize their uncompromising normative force.<sup>198</sup> Moral personality or dignity is “beyond all price” and hence the viewpoint of justice that aims to protect this dignity holds unconditionally.<sup>199</sup> “These principles are [...] given absolute precedence so that they regulate social institutions without question and each frames his plans in conformity with them. Plans that happen to be out of line should be revised”, Rawls states.<sup>200</sup> Indeed, it is this absolute status of justice that we also find in Rawls’ famous phrase on the first page of his *Theory of Justice*: “Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override”.<sup>201</sup>

Of course, the fact that justice is considered a final and exhaustive viewpoint for assessing the claims of citizens implies that if society complies with the demands of these two principles, citizens can be held responsible for dealing with their plight. Rawls is clear: if justice has been done “[...] the question is settled. The claims of existing social arrangements and of self-interest have been duly allowed for. We cannot at the end count them a second time because we do not like the result.”<sup>202</sup>

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<sup>196</sup> Ibid., 132.

<sup>197</sup> Ibid., 54.

<sup>198</sup> ———, ‘Kantian Constructivism in Moral Theory’, 522.

<sup>199</sup> ———, *A Theory of Justice*, x,11, 513, 213, 223.

<sup>200</sup> Ibid., 495.

<sup>201</sup> Ibid., 3.

<sup>202</sup> Ibid., 117. This uncompromising character of justice is also indicated by the ‘priority of rightness’ that Rawls defends, which -inter alia- entails the idea that citizens’ conceptions of the good should always be adapted to what justice allows for. Cf. ———, *A Theory of Justice*, 27-30, 437-439. It is also expressed by the fact that Rawls sees his theory as a theory of pure procedural justice. Once the principles of justice are agreed upon, there is no independent viewpoint available in terms of which citizens’ position can be morally assessed. Cf. ———, *A Theory of Justice*, 89.

Of course, all this is not to deny that Rawls does -albeit rarely- take notice of the fact that the protection of equal dignity, and hence the implications of justice for everyday life can indeed be experienced as painful and troublesome. Justice may lead to loss, frustration and a sense of sacrifice on the part of citizens. “Not everyone always benefits by what the two principles require if we think of ourselves in terms of our more specific positions”, he states.<sup>203</sup> Certain forms of life may even die out -“no society can include within itself all forms of life”- and this may be reason for regret. But, if these consequences are allowed for by justice and hence are not due to “arbitrary bias or injustice”, then from a moral point of view society needs not be bothered by them.<sup>204</sup>

What is more, if society is just and citizens are reasonable they can escape from their situated or phenomenal perspective, ‘step back’ and establish that from a moral point of view they do have reason to accept their positions. For Rawls justice means “to discard as irrelevant as a matter of social justice much of the information and many of the complications of everyday life.”<sup>205</sup> By taking responsibility for the contingencies that characterize their position, citizens can even realize their higher order desire to express their moral nature: as citizens they are not determined by these contingencies and always have a choice in how to deal with them.<sup>206</sup>

## 2.2 Concrete needs also count: an Aristotelian twist

Admittedly the aforementioned Kantian account of dignity and the ensuing Kantian interpretation of Rawlsian justice is not the whole story. In substantiating what dignity entails for the viewpoint of justice, Rawls does also assign considerable weight to the needs of citizens as embodied, empirically situated beings. Other than a ‘purely Kantian’ theory of justice would suggest, Rawls holds that justice is also to protect the interests of citizens that stem from the more embodied dimension of being human. Citizens should as a matter of justice also be provided the necessary means so as to be able to develop and exercise their moral powers.

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<sup>203</sup> Rawls, *A Theory of Justice*, 85.

<sup>204</sup> ———, *Political Liberalism*, 197.

<sup>205</sup> ———, *A Theory of Justice*, 76.

<sup>206</sup> *Ibid.*, 503.

One could say that this gives an Aristotelian twist to Rawls' theory of justice.<sup>207</sup> In both his ethical and political philosophy Aristotle underscored citizens' inescapable dependency and vulnerability regarding the realisation of their good. This dimension of dependency and neediness comes forward for instance where Aristotle discusses the importance of the quality of social practices for the moral development of citizens. "[...]it does not make a small difference whether people are habituated to behave in one way or in another way from childhood on, but a very great one; or rather, it makes all the difference of the world", Aristotle says.<sup>208</sup> In a similar vein Aristotle discusses the importance of (civic) friendship and all kinds of goods as necessary constituents of leading a flourishing life.<sup>209</sup> Finally the dependency of citizens on society is of course most prominently expressed in Aristotle's notorious and elusive proposition that human beings by their nature are "political animals". Citizens need society in order to flourish.<sup>210</sup>

In Rawls' *A Theory of Justice* the attention for citizens' dependency and neediness as concrete embodied beings surfaces especially in the third part of the book.<sup>211</sup> There he expresses sensitivity for "human desires and needs, their relative urgency and cycle of recurrence, and their phases of development as affected by physiological and other

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<sup>207</sup> From a neo-Kantian point of view one could also dub this the 'impure side' of Rawls' conception of justice. For a thought provoking discussion of the 'impureness' of Kant's ethical theory see: Loudon, Robert B., *Kant's Impure Ethics. From Rational Beings to Human Beings* (Oxford: Oxford University Press, 2000), 167.

<sup>208</sup> Aristotle, 'Nicomachean Ethics', in *Nicomachean Ethics: Translation, Introduction, and Commentary*, ed. Broadie, Sarah and Rowe, Christoffer (Oxford: Oxford University Press, 2002), 1103b23-26.

<sup>209</sup> *Ibid.*, 1099a31-1099b8.

<sup>210</sup> Cf. *Ibid.*, 1097b10. See for an illuminating interpretation of this phrase Cooper's essay 'Politics and Civic Friendship': Cooper, John M., *Reason and Emotion. Essays on Ancient Moral Psychology and Ethical Theory* (Princeton: Princeton University Press, 1999), 357-377.

<sup>211</sup> In this third part Rawls states that the primary social goods can also be accounted for "by the conception of goodness as rationality, in conjunction with the general facts about human wants and abilities, their characteristic phases and requirements of nurture, the Aristotelian Principle, and the necessities of social interdependence." Rawls, *A Theory of Justice*, 381.

circumstances”, and also for the general facts of social interdependency.<sup>212</sup> There he also discusses a range of goods that any citizen as concrete embodied creature has reason to value, like “familiar values of personal affection and friendship, meaningful work and social cooperation, the pursuit of knowledge and the fashioning and contemplation of beautiful objects [..].”<sup>213</sup>

What is more, in this third part Rawls also discusses psychological laws or tendencies in human behaviour as crucial elements in his thinking about what citizens need in order to lead a good life. Rawls for instance discusses the law of reciprocity that boils down to the idea that it is “a deep psychological fact” that from the moment of birth human beings have a tendency to ‘mirror’ others, a tendency to reciprocity.<sup>214</sup> As a consequence, citizens can only develop their moral nature if they have been raised in a social environment of a certain quality.<sup>215</sup>

The other empirical law that Rawls discusses is the ‘Aristotelian principle’.<sup>216</sup> This law says that citizens naturally enjoy the exercise of their realized capacities (their innate or trained abilities). They will always strive for more complicated and complex activities and hence they need practices in which such activities are exercised.<sup>217</sup>

Friendship, art and the pursuit of knowledge are therefore instances of intrinsically good social practices: “in the design of social institutions a large place has to be made

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<sup>212</sup> Ibid., 372-373.

<sup>213</sup> Ibid., 373.

<sup>214</sup> Ibid.

<sup>215</sup> Ibid., 433. For instance, as to the capacity to form, pursue and revise a conception of the good, Rawls establishes that citizens can only develop this moral capacity if significant others have to a sufficient degree treated them in accord with their worth. “One can only develop a sense of self-worth if others have valued one’s plans, aspirations, thoughts and ideas”, Rawls states. Cf. ———, *A Theory of Justice*, 413. With regard to the other moral capacity, that of acting in accord with a sense of justice, Rawls follows the moral psychologist Lawrence Kohlberg where he argues that citizens will develop this moral power only if both in their upbringing and in later life they have experienced that the manifest intentions of other persons and social arrangements contribute to their good. Cf. ———, *A Theory of Justice*, 433.

<sup>216</sup> Rawls, *A Theory of Justice*, 372-380.

<sup>217</sup> Ibid., 374. As Rawls puts it: “[W]e need one another as partners in ways of life that we are engaged in for their own sake, and the successes and enjoyments of others are necessary for and complementary to our own good”.

for them, otherwise human beings will find their culture and form of life dull and empty.<sup>218</sup>

In the end Rawls holds that a just society is not only a desirable ideal because it can satisfy the claims of the ‘noumenal selves’, the claims that stem from their rational, free and independent nature. He also holds that a just society is desirable because it offers the preconditions for citizens to lead a humanly valuable life, it offers the conditions on which all citizens as a *homo phaenomenon* actually depend.

Surely one could argue that Rawls’ sensitivity for citizens’ actual needs as empirical creatures is not a *moral* concern that his theory aims to address, but a prudential concern. That is, by these considerations Rawls simply tries to meet the feasibility requirement, i.e. the requirement that justice can indeed be realized in practice and gain stable support of citizens.<sup>219</sup> By discussing all kinds of features that citizens share as empirical, situated beings he can show that justice is congruent with citizens’ good, i.e. that citizens have a motive to be just.

However, this understanding comes at the cost of playing down the normative bearing that Rawls does attribute to knowledge about these needs. For one thing, Rawls clearly asserts that general empirical knowledge about the needs of human beings is part of the reasoning in the original position.<sup>220</sup> As the outcome of the reasoning in the ‘original position’ represents the ‘moral point of view’, by implication it cannot have but *moral* bearing. Hence, being part of the considerations in the original position, citizens’ dependency and vulnerability are constitutive for what justice requires.

Next, the moral bearing of this needy and dependent aspect of citizenship is also implied by the egalitarian aspirations that Rawls holds. That is, according to Rawls justice must “mitigate the influence of social contingences and natural fortune” on the kinds of lives that citizens can lead.<sup>221</sup> The moral quality of social institutions depends on their “tendency to counteract the natural inequalities deriving from birth, talent, and circumstance, pulling those resources in the service of the common good”.<sup>222</sup>

These egalitarian aspirations have led for instance to the principle of equal

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<sup>218</sup> Ibid., 377.

<sup>219</sup> Ibid., 6, 19, 191, 347, 395, 580.

<sup>220</sup> Ibid., 16.

<sup>221</sup> Ibid., 63.

<sup>222</sup> Nagel, Thomas, 'Rawls on Justice', in *Reading Rawls* (New York: Basic Books ), 3.

opportunity, the difference principle and the principle of the fair value of political rights. These principles are meant to prevent, address or compensate certain empirical inequalities in order to secure that citizens will genuinely be able to develop and exercise their moral powers, at least to a sufficient level.<sup>223</sup> It goes without saying that said egalitarian aspirations, and hence these principles, cannot be understood without Rawls attributing moral import to the empirical situations of citizens, i.e. without him being convinced that it matters from a moral point of view to what extent citizens' needs are met, needs that stem from their situated, enmattered nature.

To summarize, Rawls' theory of justice is predominantly Kantian in the sense that the determination of citizens' basic claims in society hinges on a rather abstract conception of citizenship. On the other hand his theory comes with an Aristotelian or empirical twist in that justice is also to address the basic needs of citizens when conceived of as empirically situated beings. Justice as the central virtue of society thus has to address different dimensions of citizenship, the dimension of moral personality and the dimension of dependency and neediness regarding citizens' potential to exercise their moral powers.

### **3 Rawls' conception of adjudication. A version of a stabilizing approach**

As it befits a normative theory of political morality, in Rawls' theory of justice adjudication plays a crucial role in the realisation of the principles of justice.

Adjudication is one of the institutions through which these principles are implemented. Conversely, if adjudication complies with these principles, it can be understood as a morally justified practice.

In order to understand Rawls' conception of adjudication, his notion of the 'four stage sequence' is crucial.<sup>224</sup> Through this device Rawls gives insight in how justice is to be applied in the context of a constitutional democracy. By this device Rawls aims to "simplify the application of the two principles of justice."<sup>225</sup> It describes four

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<sup>223</sup> Rawls' 'loose' remarks on education throughout his *Theory of Justice* can also be understood in this egalitarian light. Education is a social good that can secure that citizens have to some extent equal chances to develop their moral powers. For that reason "resources might better be spent on the education of the less rather than the more intelligent, at least over a certain time of life." Rawls, *A Theory of Justice*, 101.

<sup>224</sup> Ibid., 101-160, 171-176.

<sup>225</sup> Ibid., 171.

institutional levels through which the principles of justice are to be realized: that of the philosophical principles, that of the constitution, that of legislation and policy and finally the level of the application of rules to concrete cases “by judges, administrators, and the following of rules by citizens generally.”<sup>226</sup> Hence adjudication is one of the institutional ways in which the principles of justice are effectuated vis-à-vis concrete embodied citizens. This is also implied by Rawls’ discussion of the implications of his account of justice for concrete legal cases and his assertion that courts can be understood as instances of ‘public reason’, informed as they are by a public conception of justice.<sup>227</sup>

What is more, Rawls holds that adjudication -as part of the general requirements of the rule of law- is crucial for realizing the first principle of justice, the one that protects equal liberty. According to Rawls adjudication is indispensable for the realisation of *formal* justice, a constitutive element of the first principle. Law and adjudication publicly and regularly establish the “grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled. If the bases of these claims are unsure, so are the boundaries of men’s liberties”, Rawls says.<sup>228</sup> Against this background it is not surprising that for Rawls the ideal judge aims “to give justice, to decide cases fairly in according with what the law requires.”<sup>229</sup> In a just society the law more or less complies with the principles of justice and hence a judge should follow the law in order to render justice. More than anything a Rawlsian judge should possess certain cognitive competences, an ability for analytical thought and the “[j]udicial virtues such as impartiality and considerateness [that] are the excellences of intellect and sensibility [..].”<sup>230</sup>

Indeed, as will be clear by now, Rawls’ conception of adjudication fits the description of a stabilizing approach to adjudication. For him adjudication can in the end be conceived of as the expression of a prior moral measure that can exhaustively cover all that is relevant from a moral point of view. If the law more or less complies with the background principles of justice, and if the judge has applied this law fairly to the

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<sup>226</sup> Ibid., 175.

<sup>227</sup> ———, *Political Liberalism*, 236.

<sup>228</sup> ———, *A Theory of Justice*, 207.

<sup>229</sup> Ibid., 355.

<sup>230</sup> Ibid., 453.

particular case, the consequences of these decisions can be defended exhaustively to the losing citizen. The burdens of such a decision can be construed as an expression of a genuine equilibrium between 'self and others', between the good of society and that of individual citizens. These burdens are conceived as fair rather than as an unjust exploitation of contingencies of nature or social circumstances, not as burdens that we do not want citizens to bear.

Rawls is not concerned with legal uncertainty and the discretion that judges may have because of the indeterminacy of law and justice. To phrase it in the words of David Carlson, for Rawls “[t]he legal universe is complete and filled. Right answers are available, even if sometimes difficult to discern.”<sup>231</sup> Hence, as the judge always has a guiding measure to this avail, in fulfilling his professional responsibility he does not need to feel responsible for causing burdens. The principles of justice and the law precede adjudication, so that in its moral essence adjudication is a purely constative activity, not performative.<sup>232</sup> Through his cognitive powers the judge in fact establishes what is already the case. Strictly speaking his personality or his will is not the cause of a legal decision and its consequences. Consequently, citizens only have a legitimate complaint if the judge fails “to apply the appropriate rule or to interpret it correctly”.<sup>233</sup> However, these situations need not worry us because they are corrigible, they can be overcome. Once law and the practice of adjudication comply with the demands of justice, complete moral harmony can be realized, or so is the idea. In so far as the phenomenology of adjudication is nonetheless experienced as troublesome, it is an irrational understanding of a phenomenon that we need not be concerned with. If adjudication complies with the demands of justice, at least from a moral point of view all is well. Thus, in this sense Rawls relies on justice to function as a final commensurans and hence to warrant a reliance on legal commensurability in the practice of adjudication.

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<sup>231</sup> Carlson, David Gray, 'Jurisprudence and Personality in the Work of John Rawls', *Columbia Law Review* 94 (1994), 1833.

<sup>232</sup> Ibid.

<sup>233</sup> Rawls, *A Theory of Justice*, 207.

#### **4 Conclusion**

This chapter discussed Rawls' *A Theory of Justice* as it presents a normative theory of political morality that is a strong candidate to be the normative moral background theory of law and adjudication in Western constitutional democracies. As such it can possibly validate a stabilizing approach to adjudication.

I presented Rawls' theory as Kantian with an Aristotelian twist. The Kantian nature of Rawls' theory was located in the fact that the value of equal dignity that justice is to serve is grounded on a Kantian conception of the person. Equal dignity implies that a just society must respect citizens in their rational, free and independent nature, a nature that they all equally share. Accordingly, the legitimate claims of citizens are to be deduced from a perspective that largely abstracts from citizens' actual needs, desires, states of affairs and particular embedded positions.

At the same time Rawls' theory comes with an Aristotelian twist in that it also seeks to secure the needs that citizens as vulnerable and needy creatures have, in order for them to lead a good life. As such Rawls' conception of justice also aims to put under the control of reason all kinds of contingencies that may influence citizens' chances to genuinely develop and exercise their moral powers.

Finally, this chapter briefly discussed Rawls' conception of adjudication. It was established that -as it befits a normative theory of political morality- this conception is a version of a stabilizing approach to adjudication. In the next chapter, we shall see whether Rawls' normative theory of political morality can in fact validate such a stabilizing approach, that is, whether justice can fulfil the function of final commensurans.