



UvA-DARE (Digital Academic Repository)

The fragility of rightness. Adjudication and the primacy of practice

van Domselaar, I.

Publication date
2014

[Link to publication](#)

Citation for published version (APA):

van Domselaar, I. (2014). *The fragility of rightness. Adjudication and the primacy of practice*. [Thesis, fully internal, Universiteit van Amsterdam].

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

“One cannot agree to a principle if there is a real possibility that it has any outcome that one will not be able to accept.”²³⁴

“A focus on real cases and on empirical facts can help us to identify the salient features that a political theory should not efface or ignore.”²³⁵

5 The Fragility of Justice II. Rawls’ residues of justice and their bearing on adjudication

1 Introduction

In the previous chapter we discussed the central features of Rawls’ theory of justice as a normative theory of political morality that may support a stabilizing approach.

The upshot of the present chapter will be that in spite of its aspirations Rawls’ theory will lead to *residues of justice* and as a consequence a stabilizing approach to adjudication cannot be maintained. That Rawls’ theory does lead to residues will be argued for under the headings of the ‘conflicts of justice argument’ (2), the ‘conceptual poverty argument’ and (3) the ‘under-determinacy argument’ (4). As part of these arguments I will also show how these residues bear upon the moral character of adjudication by discussing concrete legal cases. It must be borne in mind that in the discussion of these legal cases the implications of Rawls’ theory for adjudication are at stake, not the moral quality of the *actual* practice of adjudication itself. The chapter ends with some concluding remarks (5).

2 Rawls’ residues and their bearing on adjudication

2.1 Justice as internally conflicted

As a proponent of normative moral theory befits, Rawls holds that in a just society genuine conflicts of justice will not occur. He highly relies on the conflict-solving potential of justice. Justice as he understands it can rationally resolve all kinds of

²³⁴ Ibid., 151.

²³⁵ Nussbaum, Martha C., *Women and Human Development. The Capabilities Approach* (Cambridge: Cambridge University Press, 2000), 11.

conflicts in a way that is compatible with the "freedom and equality of citizens as moral persons."²³⁶

Contrary to this far-reaching claim, this section argues that conflicts of justice are part and parcel of a Rawlsian society, i.e. a society that complies with the demands of justice. These conflicts are not so much due to an inconsistency in Rawls' theory, but rather to contingencies in the practical world. These contingencies may be such that the values that justice aims to protect prove impossible, meaning that the realisation of one value will imply infringement of another.²³⁷

One category of conflicts that may arise is that between citizens' rights to the protection of the basic liberties as guaranteed by the first principles of justice.²³⁸ In the previous chapter we saw that these basic liberties include freedom of thought, freedom of conscience, the political liberties, freedom of association, the freedoms specified by the liberty and integrity of the person and the rights and liberties covered by the rule of law. Rawls understands these liberties as "a framework of legally protected paths and opportunities."²³⁹ We also saw that these are not absolute, but can be restricted, albeit only for the sake of liberty itself.²⁴⁰ Such restrictions should be

²³⁶ Rawls, 'The Basic Liberties and Their Priority', 54.

²³⁷ Brett Scharffs offers an instructive description of impossibility: "The term 'impossibility' usually refers to states of affairs, either choices or acts. For example, your being in both New York and Paris right now is an impossibility; they are jointly impossible states of affairs. But values might also be impossible if the realization of one necessarily makes it impossible to realize the other. For example, honesty and tact may be impossible, at least in certain situations. Ways of living one's life may also be impossible. It is jointly impossible to live the life of a Tibetan monk and live the life of a movie star." Cf. Scharffs, 'Adjudication and the Problems of Incommensurability', 1395.

²³⁸ See for discussion on (the possibility of) conflicts of rights also: Shapiro, Daniel, 'Conflicts and Rights', *Philosophical Studies* 55, 3 (1989); Wellman, Christopher Heath, 'On Conflicts between Rights', *Law and Philosophy* 14, 3/4 (1995); Eddy, Katharine, 'Welfare Rights and Conflicts of Rights', *Res Publica* 12 (2006).

²³⁹ Rawls, *Political Liberalism*, 325.

²⁴⁰ Here I draw on Hart's succinct summary of the restrictions that Rawls allows for. Cf. Hart, H.L.A., 'Rawls on Liberty and Its Priority', *University of Chicago Law Review* 40, 3 (1973), 542.

governed by the principle of the common interest: they are only permitted if they are "in an appropriate sense equally to everyone's advantage."²⁴¹

Indeed, as to this principle Rawls himself optimistically holds that it can be secured for all citizens. As he puts it: "under reasonably favourable conditions, there is a practical scheme of liberties that can be instituted in which the central range of each liberty is protected."²⁴²

Rawls offers two arguments in support of this claim. First, he stresses that institutions that bear responsibility for the realisation of justice have sufficient leeway to adapt the *scope* of the basic liberties so as to make them fit into a coherent scheme that can be equally guaranteed to all. In reaction to Hart's critique on the wide ranging scope of (Rawls' first formulation of) this first principle, Rawls asserted that the principle merely protects an equal right to a "fully adequate scheme" of basic liberties rather than an equal right to "the most extensive total system of these liberties".²⁴³

As a benchmark to determine whether such a scheme is indeed "fully adequate" Rawls states that this will depend on whether it will provide citizens the institutional means for an "adequate development and the full and informed exercise of both moral powers."²⁴⁴

By clever institutional arrangements this benchmark can be met, or so Rawls holds. The second argument that Rawls offers has an empirical flavour: he suggests that history supports his optimism. According to Rawls history has shown that the 'central range of applications' of the basic liberties can indeed be secured to all citizens, that is, under favourable conditions.²⁴⁵ "The historical experience of democratic institutions and reflection on the principles of constitutional design suggest that a practicable scheme of liberties can indeed be found", Rawls says.²⁴⁶

The value of endeavours to secure the first principle in practice notwithstanding, we may question whether these arguments suffice to support Rawls' rather far reaching

²⁴¹ Rawls, *A Theory of Justice*, 217.

²⁴² ———, 'The Basic Liberties and Their Priority', 11.

²⁴³ Cf. Ibid; ———, *Political Liberalism*, 333.

²⁴⁴ Rawls, *Political Liberalism*, 333.

²⁴⁵ Ibid., 298.

²⁴⁶ ———, 'The Basic Liberties and Their Priority', 11, 12; Scanlon, Thomas, 'Adjusting Rights and Balancing Values', in *Fordham Law Review* (2004), 1482.

claim where the occurrence of conflicts of justice is concerned. As to the first argument: sure, by deploying an abstract and general criterion such as an 'adequate scheme' Rawls indeed gives leeway to institutions to reduce the scope of the basic liberties. By so doing he indeed makes it more likely that genuine conflicts between these liberties can be avoided. However, reference to this leeway can hardly serve as an argument for the claim that the application of the first principle will not lead to conflicts. At least not if theory comes before practice and this principle is to have substantive meaning, something which Rawls himself emphatically underscores. That is, Rawls underscores the moral import of the first principle and its priority over other values by referring to his 'deep' understanding of what it means for citizens to have a conception of the good, and to be genuinely committed to a religious, philosophical or moral conviction. With this principle Rawls claims to be sensitive to the fact that "an individual recognizing religious and moral obligations regards them as binding absolutely."²⁴⁷ The first principle protects "forms of belief and conduct the protection of which we cannot properly abandon or be persuaded to jeopardize [...]", Rawls says.²⁴⁸ This principle protects citizens' most deeply held ideas, ideas that are "non-negotiable."²⁴⁹

However, the substantive meaning of the first principle cannot be upheld if Rawls at the same time allows the scope of protection of these liberties to be adapted so that conflicts will not, or are not likely to arise. Practice will then determine the substance of justice, rather than vice versa. Anyway there is no guarantee that the first principle can still do the 'protective work' that Rawls' wants it to do.

Neither is reference 'history' a strong argument for corroborating the claim that the application of the first principle does not lead to genuine conflicts. Against the background of the rather frequent occurrence of social conflicts between citizens' liberties, at least on the 'phenomenological level', mere reference to 'history' does not yet explain why the interests of the 'losing' citizens did not fall within the 'central range of application' of the basic liberties. That social conflicts (supposedly) have been solved as a matter of social fact does not imply that these conflicts have been *genuinely* solved, that is, without a genuine moral loss in the sense of a violation of a

²⁴⁷ Rawls, *A Theory of Justice*, 182.

²⁴⁸ ———, *Political Liberalism*, 312.

²⁴⁹ *Ibid.*, 311.

legitimate claim of justice of the losing citizen. So far the remarks on the arguments that Rawls' gives to support the claim that the first principle of justice does not lead to genuine conflicts.

Besides these critical remarks on the weakness of Rawls' argumentation to support a rather strong claim, let us now descend to the level of the 'example' as a further support for the contrary claim that in a society that lives up to Rawlsian justice genuine conflicts between citizens' legitimate claims do occur. Staying with the first principle of justice, such conflicts may for instance arise between the right to freedom of conscience on the one hand and the rights to equality and to the protection of integrity on the other hand. The scope of protection that is needed for one liberty does not necessarily fit with the scope of protection that is needed for the other liberty, while both 'scopes' may be indispensable for realizing the benchmark that Rawls himself has set: to provide for the institutional means for an "adequate development and the full and informed exercise of both moral powers."²⁵⁰

More concretely, such conflicts may arise when for instance Christian Orthodox schools refuse to employ Christian Orthodox homosexual teachers because of their homosexuality. In such a situation the schools may claim the liberty to refuse homosexual teachers and the teachers may as a matter of equality claim the right to work at such a school.²⁵¹

In such a case a genuine conflict of justice may occur. As to the right of homosexual teachers: discriminatory policies of Christian Orthodox schools detrimentally affect the social conditions for self-respect for Christian Orthodox gay teachers. Not being

²⁵⁰ Ibid., 333.

²⁵¹ See for a socio-legal discussion of these conflicts as they occur in the Netherlands: Oomen, Barbara, Guijt, Joost et al., 'CEDAW, The Bible and the State of the Netherlands: The Struggle over Orthodox Women's Political Participation and their Responses', *Utrecht Law Review* 6 (2010); Oomen, Barbara, 'Between Rights Talk and Bible Speak: The Implementation of Equal Treatment Legislation in Orthodox Reformed Communities in the Netherlands', *Human Rights Quarterly* 33 (2011). Oomen et al. observe that in the Netherlands Christian Orthodox communities feel threatened by the state. They perceive state-intervention through special legislation regarding the political participation of women, marriage issues, homosexuality and the inoculation of children as acts of 'equality-totalitarianism', endangering their communities.

permitted to work at a particular place purely because one is a homosexual and therefore considered to be sinful or an inferior person is likely to genuinely damage one's sense of self-worth. It in any case compromises the value of equal moral worth, the freedom of the person, the freedom from psychological oppression, physical assault and dismemberment, things that Rawls aims to protect through the first principle. To be safeguarded from this kind of discriminatory treatment is the core of the first principle, i.e. an *equal* right to an adequate scheme of these liberties.

As to the claim of the Christian Orthodox schools: Rawls' own views on the substantial import of the basic liberties implies that if Christian Orthodox schools are not allowed to refuse, suspend or dismiss teachers who are (practicing) homosexuals, it is a restriction of the core -and not merely the periphery- of the freedom of conscience, the freedom of assembly, the freedom of education included.

Take the liberty of conscience. Let us assume that Christian Orthodox communities sincerely hold that homosexuality seriously conflicts with God's law and with the purpose of life as it is laid down in the Bible.²⁵² Let us also assume that the role and place of (their interpretation of) the Bible in daily and spiritual life of these communities is pervasive and all encompassing.²⁵³ If the state forces members of such Christian Orthodox communities to revise a crucial element of their conception of the good, we cannot but conclude that from the viewpoint of Rawls' theory the integrity of their religious beliefs is endangered. Such enforcement may boil down to requiring an existential split from those Christians. On the one (public) hand they must give up the Bible as their absolute source of authority, making them 'bad Christians', while on the other (private) hand they are free to choose, practice and live by their religion. In addition, from Rawls' viewpoint the liberty of association is also put in peril if Christian Orthodox schools are not allowed to refuse homosexuals as teachers. This liberty aims to secure the protection of practices in which citizens can realize "the ends and excellences to which they are drawn."²⁵⁴ It is through this liberty that

²⁵² See for instance: Oomen, 'Between Rights Talk and Bible Speak: The Implementation of Equal Treatment Legislation in Orthodox Reformed Communities in the Netherlands', 192.

²⁵³ Ibid., 183.

²⁵⁴ Rawls, *A Theory of Justice*, 476. Rawls deems this liberty also to be crucial for the freedom of conscience: "unless we are at liberty to associate with other like-minded citizens, the exercise of conscience is denied." Cf. ———, *Political Liberalism*, 313.

religious groups can guarantee the stability of their forms of life, which is only possible if they have sufficient control over “the laws and rules that govern their association, either directly by taking part in its affairs themselves or indirectly through representatives [...]”.²⁵⁵

To deny that both liberties will in fact be violated in their core seems at odds with the reason why Rawls’ is so serious about the first principle of justice in the first place: because it holds the indispensable institutional means for citizens to develop and live in accord with their most deeply held beliefs.²⁵⁶ In addition, Rawls does seem convinced that one cannot freely ‘cherry pick’ the elements of one’s religion that are convenient at a particular time and place. Rawls does not see religion, as Stephen Carter has put it, as “a kind of hobby: something so private that it is as irrelevant to public life as the building of model airplanes.”²⁵⁷

Surely one can object that Rawls’ theory simply is not meant for the protection of interests such as those of Christian Orthodox schools, because they violate the legitimate interests of fellow citizens or because they are immoral themselves.²⁵⁸

However, such objections overshoot their mark -at least if only supported by the empirical fact of a conflict, i.e. the fact that a particular exercise of liberty is not compatible with the legitimate exercise of liberties by another citizen. The fact of conflict by itself cannot lead to the conclusion that the interests of one of the parties involved do not *deserve* theory's protection. If we take seriously Rawls’ own commitment to provide to all citizens a set of liberties through which they can genuinely develop and exercise their moral powers, then the situation as described above may well be qualified as a conflict of justice. The interests at stake on both sides cannot but be seen as part of “the central range of application” that these liberties aim to protect.

Of course conflicts between citizens’ right to freedom of conscience and their right to equality represent only one of the (categories of) conflicts that may occur in a

²⁵⁵ Rawls, *A Theory of Justice*, 476.

²⁵⁶ *Ibid.*, 182.

²⁵⁷ Carter, Stephen L., 'Evolutionism, Creationism and Treating Religion as a Hobby', *Duke Law Journal* 1987, 6 (1987), 978.

²⁵⁸ Rawls, *A Theory of Justice*, 230.

Rawlsian society.²⁵⁹ Whether such conflicts arise will depend on clever reflection, but most of all on the extent to which the practical world proves to be ‘friendly’ towards Rawls’ aspirations. It will depend on the extent to which the values that Rawls’ theory aims to protect as matters of justice and hence of equal dignity, will also prove compatible in practice. In his aspiration for a morally harmonious political order Rawls in any case underestimates the inescapable fact that genuine conflicts may regularly occur. He “evade[s] the conflicts of substantive goods that competition among (and within) particular basic liberties commonly reveals.”²⁶⁰ It is more realistic to acknowledge that genuine conflicts of justice will be part of a just society and that as a consequence residues of justice will occur, other than as negligible incidents. These residues result from the resolution of said conflicts, entailing a genuine moral loss, a violation of one of the values that Rawlsian justice is committed to protect.

2.1.1 Conflicts of justice in adjudication

The fact that when applied to society Rawls’ principles of justice may lead to genuine conflicts between citizens’ legitimate claims and hence to residues of justice bears on the moral character of adjudication. Because justice can lead to genuine conflicts, when applying this viewpoint judges may be confronted with a legal case in which they have to resolve such a conflict. Justice itself will then not provide any guidance to the judge -except in some cases where justice may provide reasons stemming from the rule of law-. Even if citizens’ most basic interests are at stake, interests that Rawls’ theory aims to protect, the outcome of such decisions will then depend on other factors than the ‘moral point of view’. From the viewpoint of Rawls’ theory these judicial decisions in such cases will thus lack any justificatory (moral) ground. Theory itself cannot provide any answer as to why a ‘losing’ citizen must bear the burden of the decision. What is more, again, in case these conflicts occur the resolution by the judge will lead to a genuine moral loss, an infringement of the interests that Rawls’ theory seeks to protect. I will illustrate this by a legal case that concerns the conflicts of justice that we discussed above.

²⁵⁹ We can for instance also think of conflicts between the right to privacy and the right to freedom of expression as they nowadays occur because of the possibilities that internet offers.

²⁶⁰ Gray, John, 'Where Pluralists and Liberals Part Company', *International Journal of Philosophical Studies* 6, 1 (2001), 29.

The case of *Arwin Mitchel*²⁶¹

Arwin Mitchel worked as a biology teacher at a Christian Orthodox school. He loved his job and he was generally admired for his teaching qualities. Arwin knew that the board of the school was most negative about homosexuality, so he kept his sexual orientation secret. However, after some years Arwin got depressed for having to hide such an important aspect of his identity. On advice of his psychiatrist Arwin decided to be more open about his homosexuality. To this end and as a first step Arwin's partner would now and then pick him up after classes. But already after a few times, Arwin was dismissed. The school argued that Arwin's homosexual relationship and particularly him being so open about it violated the fundamentals of the denomination of the school.

Thereupon Arwin went to court and requested that his dismissal would be declared void as it was based on discriminatory grounds. He also asserted that the discrimination caused him severe psychological pain, because one way or the other he was in fact asked to give up on who he was: a Christian Orthodox homosexual teacher.

The board of the school argued to the contrary that Arwin's homosexual behaviour was an objective reason for dismissal as the denomination of the school was founded on a particular interpretation of the Bible, which qualifies homosexuality sinful as it does lying, adultery, fornication, and drunkenness. According to the board it would be completely inconsistent with the foundations of the school to employ homosexual teachers, not in the least because teachers are supposed to be role-models. Not allowing the school to refuse or dismiss homosexual

²⁶¹ For this case I predominantly draw on the case law of the Netherlands Institute for Human Rights -previously The Equal Treatment Commission-. One of the tasks of this Institute is to assess complaints about discrimination. It thereby applies a variety of national and international anti-discrimination rules and provisions. An important relevant national law is the Equal Treatment Act. For the case above article 5 paragraph 1 under c of this Act is particularly relevant. This rule prohibits discrimination of teachers by special schools merely because of their homosexuality. The decisions of this Institute are, however, not legally binding and cannot be enforced. Cf. Netherlands Institute for Human Rights, June 15 2007, Judgment nr: 2007-100; Netherlands Institute for Human Rights, April 29 1999, Judgment nr: 1999-38; Rechtbank 's-Gravenhage, November 2 2011, ECLI: NL: RBSGR:2011:BU3104. See for cases in which Islamic teachers are refused by Christian Orthodox schools: Netherlands Institute for Human Rights, May 9 2011, Judgment nr: 2011-74; Netherlands Institute for Human Rights, May 12 2006, Judgment nr: 2006-93.

teachers would also violate the liberty of conscience and the privacy of the parents who want their children to be educated in a Christian Orthodox way.

In a case like this a judge may due to contingent facts find himself stuck between two impossible claims, which from the viewpoint of justice can both be seen as legitimate. In trying to serve the principles of justice through his interpretation of settled law the judge may on the one hand feel duty-bound to protect the homosexual teacher against discrimination, while on the other hand he may feel he must protect the freedom of conscience, of education and of assembly of the school and the parents of the students. As in this case justice is internally conflicted, it does not offer the judge a viewpoint in terms of which he can rank the interests at stake. The decision can therefore not be justified by the viewpoint of justice itself. Moreover, in case such conflicts occur, Rawls' viewpoint can neither exhaustively solve the conflict, nor 'dismantle' this conflict as only an 'apparent conflict' that is merely the result of the irrationality of (one of) the parties involved. That is, whatever the judge will decide, his decision will come with a genuine moral loss, a serious infringement of the basic rights of one of the parties involved. In this case justice is far from functioning as a commensurans: it cannot guide the reasoning of the judge, nor will it lead to morally reassuring outcomes. Even if the judge lives up to his professional responsibility, the decision he takes does not fit the demands of a stabilizing approach to adjudication. Justice cannot prevent that such a decision lacks a final *justificatory* ground and will harm the legitimate interests involved.

2.2 Justice as conceptually poor

Another reason why Rawlsian justice leads to residues of justice concerns the relative 'poverty' of its conceptual framework. For this conceptual poverty argument I draw on the work of Amartya Sen and Martha Nussbaum.²⁶² Both have convincingly argued

²⁶² Cf. Sen, Amartya, 'Equality of What? ', in *The Tanner Lectures on Human Values*, ed. McMurrin, S. (Salt Lake City: University of Utah Press, 1980), 31-53; ———, 'Justice: Means versus Freedoms', *Philosophy and Public Affairs* 19 (1990); Nussbaum, *Women and Human Development. The Capabilities Approach*, 88-89; Nussbaum, Martha C., 'Rawls and Feminism', in *The Cambridge Companion to Rawls*, ed. Freeman, Samuel (New York: Routledge, 2003); ———, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, US: Harvard University Press, 2006), 22-25, 81-92; ———, *Creating Capabilities: The Human Development Approach* (Cambridge, US: Harvard University Press, 2011); Alexander, John M., *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum* (Hampshire: Ashgate, 2008); Robeyns, Ingrid and Brighouse, Harry, 'Introduction: Social Primary Goods and Capabilities as Metrics of Justice',

that Rawls' primary goods do not suffice as a metric of justice because they are insensitive to crucial differences between citizens, differences that affect their opportunity to lead a humanly dignified life. Such differences are for instance those between citizens' physical or mental characteristics and differences between their social positions. As Sen has famously put it: "the primary goods approach seems to take too little note of the diversity of human beings. If people were basically very similar, then an index of primary goods might be quite a good way of judging advantage. But, in fact, people seem to have very different needs varying with health, longevity, climatic conditions, location, work conditions, temperament and even body size. So what is involved is not merely ignoring a few hard cases, but overlooking very widespread and real differences."²⁶³

The critique of both Sen and Nussbaum boils down to it that a viewpoint of justice that reduces citizens' needs to a set of primary goods, does not really treat them as equals. If we want to protect the value of equal dignity, justice should be cognizant of a range of differences between citizens conceived as empirically situated creatures.²⁶⁴ In his *Political Liberalism* and in direct response to Sen Rawls asserts that in a just society in spite of all their differences citizens will not "fall below the line", they will have more than the "minimum essential capacities required to be a normal cooperating member of society."²⁶⁵ Rawls thinks that his principles of justice in fact sufficiently deal with these differences, as the very point of two of these principles was to compensate for and mitigate them.²⁶⁶

in *Measuring Justice*, ed. Robeyns, Ingrid and Brighouse, Harry (Cambridge: Cambridge University Press, 2010).

²⁶³ Sen, 'Equality of What? ', 215-216.

²⁶⁴ Nussbaum, *Women and Human Development. The Capabilities Approach*, 69.

²⁶⁵ Rawls, *Political Liberalism*, 183. All this is not to say that Rawls commits himself to the view that citizens can indeed genuinely exercise their moral powers, even if their most rudimentary needs are not met. However, Rawls explicitly states that justice will not (yet) be in play in these situations. If justice is to be a relevant virtue at all, at least some minimal requirements must be met. Conditions may in any case not be "so harsh that fruitful ventures must inevitably break down." Cf. ———, *A Theory of Justice*, 110.

²⁶⁶ Rawls, *Political Liberalism*, 326. See for a critical discussion of this claim: Daniels, Norman, 'Democratic Equality: Rawls's Complex Egalitarianism', in *The Cambridge Companion to Rawls*, ed. Freeman, Samuel (Cambridge: Cambridge University Press, 2003).

More generally, throughout his work Rawls is keen to stress that justice is not tantamount to securing equal happiness. Happiness “always presumes a degree of good fortune” and therefore can never be secured as a matter of justice.²⁶⁷ Where some of the differences between citizens may indeed influence their happiness, they do not affect their dignity, for all can still lead a life in which they develop and use their moral powers. Citizens can be asked to “revis[e] and adjust [...] their ends and aspirations in view of the all-purpose means they can expect, given their present and foreseeable situation.”²⁶⁸

Also, Rawls relies on the fact that for each citizen there will be social unions available that can provide for the support that citizens as embedded creatures need to lead a life in accord with dignity. In these social unions that fit their particular position citizens can acquire a sense of self-esteem and they can train and further their abilities and talents.²⁶⁹ And for the genuinely unlucky ones, Rawls stresses that their plight can be addressed at the legislative stage.²⁷⁰

These (potential) replies do not go to the heart of the critique of Sen and Nussbaum, i.e. that other dimensions than the primary social goods are relevant as a matter of equality when determining citizens’ legitimate claims. That is, Rawls does not offer an argument as to why for instance the distribution of income and wealth should be decisive in determining ‘the least advantaged’ group. In this regard Benjamin Barber rhetorically asked why the “unemployable, self-deprecating wealthy suburban housewife or the self-respecting, overburdened welfare mother or an overtaxed undervalued assembly line worker or the alienated, anomic college dropout” do not qualify as the least-advantaged also.²⁷¹

²⁶⁷ Rawls, *Political Liberalism*, 184; ———, *A Theory of Justice*, 360.

²⁶⁸ Rawls, *Political Liberalism*, 189.

²⁶⁹ ———, *A Theory of Justice*, 388.

²⁷⁰ ———, *Political Liberalism*, 184.

²⁷¹ Barber, Benjamin, 'Justifying Justice: Problems of Psychology, Measurement, and Politics in Rawls', *The American Political Science Review* 69 (1975), 667. See for this point also: Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 115.

Particularly if we take Rawls' Aristotelianism and egalitarianism seriously -a dimension of Rawls' theory that we discussed in the previous chapter²⁷²-, it seems more fitting to hold that for Rawls substantial differences between citizens' capacities to converse the social primary goods into valuable functioning are in fact relevant. As to his Aristotelianism: Rawls himself holds that in order to be good, a life must be constituted by a range of intrinsic goods and excellences. If these goods and excellences are lacking, human life is dull and superficial and self-esteem is in jeopardy also.²⁷³ He finds such situations genuinely troublesome.

As to Rawls' egalitarianism: the rationale of the principle of equal opportunity and the difference principle is to prevent that citizens' opportunities and chances in life are largely determined by *undeserved* inequalities.²⁷⁴ The influence of these inequalities should be mitigated, meaning that the advantages that befall those who are favoured by nature and society also work for the good of the least-advantaged. However, if justice simply ignores citizens' *actual* ability to make valuable use of the primary goods, these Aristotelian and egalitarian concerns cannot be fully honoured.

Because of their conceptual poorness Rawls' principles of justice are thus insufficient to realize the aspirations of his theory.

Rawls merely assumes that in a just society citizens will have the necessary intellectual, physical and moral capacities, he assumes that there will be social unions available to support them, and he assumes that his principles will sufficiently mitigate the effects of undeserved differences between citizens. However, these assumptions are no arguments for not making justice more sensitive to differences between citizens' concrete positions.²⁷⁵ Not in the least because actual reality points to the contrary: it shows us that a 'fair' distribution of the primary social goods can lead to outcomes in which citizens do fall 'below the line', situations in which they -beyond their own clear fault- are not able to convert the primary goods into valuable functioning.

²⁷² There we saw that Rawls' theory aims to address the interests of the 'noumenal selves' but also to satisfy the fundamental needs of concrete empirical human beings.

²⁷³ Rawls, *A Theory of Justice*, 386.

²⁷⁴ *Ibid.*, 86.

²⁷⁵ Cf. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, 108-109.

Take the position of divorced mothers in Western constitutional democracies. It is widely known that these women face serious obstacles to and have specific needs for the realisation of their ends.²⁷⁶ Often they have little opportunities to pursue a (well-paid) professional career and are likely to either live on social welfare or work for relatively low wages. They also tend to have problems with their emotional and physical health and with social integration due to the burdens that their position brings. This precarious position is due to a complex and interrelated amalgam of factors such as limited 'human capital' (professional education, training and job experience), parental responsibilities, a lack of adequate child-care provisions²⁷⁷ and gender norms and role models that are dominant in society.

However, Rawls' viewpoint of justice does not recognize the position of these mothers as salient, let alone unjust and hence as a problem that society should be concerned with or try to overcome. This because their position is not due to a

²⁷⁶ See for instance: Peterson, Richard R., *Woman, Work and Divorce* (New York: State University of New York Press, 1989); Kamerman, Sheila B. and Kahn, Alfred J., 'Single-parent, Female-Headed Families in Western Europe: Social Change and Response', *International Social Security Review* 42, 1 (1989); Franz, M., Lensche, H. et al., 'Psychological Distress and Socio-Economic Status in Single Mothers and their Children in a German City', *Social Psychiatry and Psychiatric Epidemiology* 38, 2 (2003); Casey, Timothy and Maldonado, Laurie, "Worst Off. Single-Parent Families in the United States. A Cross-National Comparison of Single Parenthood in the U.S. and Sixteen Other High Income Countries', (New York: Legal Momentum, 2012). In the Netherlands divorced mothers have a five times higher chance to structurally end up below the poverty-line with little prospect of change for the better, compared to married women with children. Cf. Brakel, Marion van den and Lok, Reinder, 'De Inkomenssituatie van Alleenstaande Moeders: Trends and Dynamiek', (Den Haag: Statistics Netherlands, 2010). A task force of a Dutch trade union also observed that divorced women have low self-esteem and a high stress-level due to poverty and the difficulty they experience trying to combine duties of care and being the sole breadwinner of the family. See: Vrouwenbond, FNV, 'Manifest Meer Kansen voor Alleenstaande Ouders in Lokaal Beleid', (FNV, 2010).

²⁷⁷ Nussbaum stated in this regard: "a poor single mother may frequently be forced to choose between high quality care for her children and decent living standards, since some welfare rules require her to accept full-time work even when no care of high quality is available to her." Nussbaum, *Creating Capabilities: The Human Development Approach*, 37.

violation of justice.²⁷⁸ It does not stem from an unequal distribution of basic liberties and neither is it the result of a violation of the principle of equal opportunity: it is not primarily due to discrimination on the labour market or a lack of chances for primary or secondary education.^{279 280}

This position does not qualify as a violation of the difference principle either, as it is unlikely that divorced mothers will be identified as the 'least-advantaged group'. Their low income is -partly- due to the fact that they work part-time, their poor work-experience and their lack of professional training. Even if they would be part of the 'least advantaged' group, it would result in a claim for higher wages or a higher level of welfare and thus leave the other obstacles and needs that characterize their position as they are: unnoticed.²⁸¹

In brief, not being due to a violation of justice the plight of divorced mothers is one that in Rawlsian society will be understood as entered into voluntarily and one for which these mothers can be held responsible.²⁸² Although their position may give these women reasons for regret, shame and anger, it is not unjust.

²⁷⁸ Of course, the critique that Rawls does not adequately address gender-injustices is nothing new. In her renowned book *Justice, Gender, and the Family* Suzan Moller Okin notoriously criticized Rawls for not addressing gender-injustices, in particular as they exist in the family. In the chapter 'Vulnerability by Marriage' Okin points to the socio-economical downfall that divorced mothers experience after divorce; where men's income status improves after a divorce, the position of women and their children "deteriorates seriously", and comes with "serious social and economic dislocation". Cf. Okin, Susan Moller, *Justice, Gender and the Family* (New York: Basic Books 1989), 161. See for Rawls' reply to this critique: Rawls, John, 'The Idea of Public Reason Revisited', *The University of Chicago Law Review* 64, 3 (1997). For a discussion of gender-injustices in relation to Rawls' primary goods see also: Nussbaum, 'Rawls and Feminism'; Robeyns, Ingrid, 'Gender and the Metric of Justice', in *Measuring Justice*, ed. Brighouse, Harry and Robeyns, Ingrid (Cambridge: Cambridge University Press, 2010).

²⁷⁹ Cf. Rawls, *A Theory of Justice*, 63; Freeman, *Rawls*, 90.

²⁸⁰ Cf. Rawls, *A Theory of Justice*, 176.

²⁸¹ Think for instance of the difficulties these women face in combining their professional tasks with responsibilities of care. Accommodating for these obstacles would thus be to move to another framework. Cf. Robeyns, 'Gender and the Metric of Justice', 226.

²⁸² Rawls, *A Theory of Justice*, 82.

However, if we take Rawls' Aristotelian and egalitarian concerns seriously, we have reason to qualify the position of divorced mothers as residues of justice. Their position is not only undeservedly worse compared to that of divorced men, but it is also such that they have little opportunities to pursue a conception of the good that includes the ingredients for a flourishing life. It lacks a range of human goods that Rawls himself sees as prominent in any valuable life, such as meaningful work, friendships and all kinds of social cooperation for which he acknowledges that citizens depend on others.²⁸³ From that perspective the position of these divorced mothers comes with burdens that we do not want them to bear.²⁸⁴

Another example that supports the conceptual poorness argument is the way Rawls' principles of justice work out for cognitively challenged and socio-economically weak consumers on the financial service market.²⁸⁵ This group of consumers will be

²⁸³ Ibid., 363.

²⁸⁴ Nussbaum, Martha C., 'Justice for Women!', *The New York Review of Books*, October 8 1992.

²⁸⁵ The topic of consumer protection is not often linked to the notion of social justice. It is generally held that social justice does not apply to contract law and hence neither to consumer law. However, the pervasive effects that (the legal validation and enforcement of) contracts can have on citizens' lives is a good reason to understand contract law including consumer law as a legal institution to which the requirements of social justice do apply. See for a discussion of Rawlsian justice in relation to contract law: Kordana, Kevin A. and Tabachnick, David H., 'Rawls and Contract Law', *The George Washington Law Review* 73, 3 (2005). See for a discussion about the justifiability of consumer protection: Posner, Richard, 'The Question of Consumer Competence', <http://www.becker-posner-blog.com/>. See for an interesting article on consumer protection on the financial service market: Benston, George J., 'Consumer Protection as Justification for Regulating Financial Service Firms and Products', *Journal of Financial Service Research* 17, 3 (2000). See for a general discussion of consumer protection: Deakin, Simon, "Capacitas: Contract Law and the Institutional Preconditions of a Market Economy", in *CBR Research Programme on Corporate Governance* (Cambridge: Centre for Business Research University of Cambridge, 2006); Morgan, Fred W., Schuler, Drue K. et al., 'A Framework for Examining the Legal Status of Vulnerable Consumers', *Journal of Public Policy and Marketing* 14, 2 (1995); Duivenvoorde, Bram, 'The Protection of Vulnerable Consumers under the Unfair Commercial Practice Directive', *Journal of European Consumer and Market Law* 2 (2013).

more likely than their fellow citizens to enter into adverse or even detrimental contracts, for instance agreeing to high interest rates. Due to their vulnerable socio-economical position they will also be hit harder by the consequences of such contracts than others would.²⁸⁶

If we take Rawls' principles of justice as decisive, their position and the potential outcomes for them can be left to themselves. In a society that complies with these principles a state is not allowed to interfere with the contracts between citizens, except for the protection of liberty itself.²⁸⁷ As citizens are assumed to have the moral powers necessary to make valuable use of the primary goods, the contracts concerned are taken as expressions of free choice.²⁸⁸ From the viewpoint of Rawls' principles -of course, other things equal- the 'will' theory of contracts²⁸⁹ can be embraced, which implies that the protection of party autonomy is the main rationale behind contract law. "[P]romises are inviolable and consumer assent to contract terms should be strictly interpreted and enforced", will then be the maxim.²⁹⁰ The contractual obligations and duties of consumers, banks and other commercial parties operating on the financial service market will be established independently of the actual cognitive powers of consumers and of the consequences of these contracts. Concepts such as

²⁸⁶ Cf. Duivenvoorde, 'The Protection of Vulnerable Consumers under the Unfair Commercial Practice Directive', 72.

²⁸⁷ Rawls' difference principle can also offer an argument for a rather *laissez-fair* approach to contract law. Cf. Kordana and Tabachnick, 'Rawls and Contract Law', 614-616.

²⁸⁸ Again, Rawls assumes that in a well-ordered society "the moral powers are realized to the requisite minimum degree". He holds that "[o]nly scattered individuals are without this capacity or its realisation to the minimum degree". Cf. Rawls, *A Theory of Justice*, 442-443; ———, *Political Liberalism*, 302. See for a critical discussion of assuming the rationality of consumers: Jacoby, Jacob, 'Is it Rational to Assume Consumer Rationality? Some Consumer Psychological Perspectives on Rational Choice Theory', in *Working Paper* (New York: New York University, 1999).

²⁸⁹ See for a defence of such a theory: Fried, Charles, *Contract as a Promise: A Theory of Contractual Obligation* (Cambridge: Harvard University Press, 1981).

²⁹⁰ Cf. Silber, Norman I., 'Observing Reasonable Consumers: Cognitive Psychology, Consumer Behaviour and Consumer Law', *Loyola Consumer Law Reporter* 2, 3 (1990), 69.

‘average consumer’²⁹¹, ‘reasonable’, ‘duty of care’, or ‘abuse of circumstances’ will not be based on actual empirical realities with regard to the rationality of consumers or the consequences of their purchases and obligations. They are based on a benchmark that assumes that consumers have sufficient moral and intellectual powers to make meaningful and responsible use of their freedom of contract. As Rawls has put it, we should “not look behind the use which persons make of the rights and opportunities available to them in order to measure the satisfaction these give.”²⁹²

Sure, from the viewpoint of Rawls’ principles of justice it is not ‘anything goes’ where the freedom of contract is concerned. Under strict conditions regulative rules are justified. Such rules may for instance focus on the protection of well-defined and exceptional groups of seriously incapacitated citizens for whom the conditions of justice do not (yet) apply and whose legal personality can therefore (temporarily) be denied. Also, in case of clear abuse or deceit contracts may be annulled. In these situations the will of the consumer and hence the contract cannot be said to be an expression of a citizens’ moral powers.²⁹³ For all other situations it is either a form of unwarranted paternalism or a matter of policy that is indifferent from the perspective of justice, if consumers nonetheless receive protection because of their specific position.²⁹⁴

²⁹¹ See for a brief discussion of this standard in the Dutch context: Duivenvoorde, Bram, ‘De ‘Gemiddelde Consument’ als Rationele Actor’, *WPNR* (2010). See for a discussion of the notion of ‘reasonable consumers’ against the background of empirical findings as to the limits and errors in the consumer decision-making process: Silber, ‘Observing Reasonable Consumers: Cognitive Psychology, Consumer Behaviour and Consumer Law’. Silber argues (p. 69) contrary to the wariness of neo-formalist legal theorists that in the US “courts and legislatures appropriately take into consideration consumers’ cognitive limitations in developing regulations and “reasonable consumer standards”. See: Kordana and Tabachnick, ‘Rawls and Contract Law’, 627.

²⁹² Rawls, *A Theory of Justice*, 80.

²⁹³ Kordana and Tabachnick, ‘Rawls and Contract Law’, 628.

²⁹⁴ For instance, whether a concrete consumer has a claim to damages because of an extreme and idiosyncratic reaction to a product he has purchased will then be a matter of strong discretion rather than of ‘rights’. Cf. Morgan, Schuler et al., ‘A Framework for Examining the Legal Status of Vulnerable Consumers’. Similarly, to improve the quality of consumer decisions can be a legitimate social goal, but it is not a requirement of justice. In this regard it

As was the case for the position of divorced mothers: against the background of Rawls' Aristotelian concerns, ignoring the special position of cognitively challenged and socio-economically vulnerable consumers on the financial service market can lead to residues of justice. Ignoring the specific obstacles that this group of consumers experiences in fact reinforces the impact that natural and social accidents have on their chances to lead a humanly dignified life.

Sure, if a cognitively and socio-economically weak consumer makes an 'irrational' choice and buys a suit he cannot afford, the consequences of such a purchase are relatively minor. Such a purchase will not have an overall incapacitating effect. However and as said, things may be different with contracts on the financial service market.²⁹⁵ Due to poor solvability, the complexity of the products and the often high interest rates on loans, financial products are likely to lead to problematic debts for this group, that is, debts that deeply influence their lives.²⁹⁶ High debts more often than not have negative consequences for the physical, emotional and psychological health of the debtors and often lead to social isolations and domestic problems.²⁹⁷ If we take

remains to be seen how from the perspective of Rawls' principles we must evaluate the policies of the Directorate General for Health and Consumers of the European Union that aim to promote the financial education of consumers and to raise the level of awareness of consumers "so that they are better equipped to make informed, considered and rational choices in financial services." Cf. http://ec.europa.eu/consumers/rights/fin_serv_en.htm (visited on September 2012).

²⁹⁵ See for a general discussion of cognitive limitations of consumers: Eisenberg, Melvin Aron, 'The Limits of Cognition and the Limits of Contract', *Stanford Law Review* 47, 2 (1995). In this article Eisenberg canvasses empirical research regarding cognitive abilities that are relevant for contracting. The main cognitive limitations he designated are: "bounded rationality, optimistic disposition, systematic underestimation of risks, and undue weight on the present as compared with the future."

²⁹⁶ Cf. Ommeren, C.M. van, Ruig, L.S. de et al., 'Huishoudens in de Rode Cijfers. Omvang en Achtergronden van Huishoudens met een Risico op Problematische Schulden', (Zoetermeer: Panteia, 2009), 61. This report describes the scope and the background of households which have problematic debts or run the risk of getting into debts. One of the factors mentioned is risky behaviour on the financial service market.

²⁹⁷ Cf. Hulshoff, Caro, *Psychische Klachten en Schulden: Preventie en Hulpverlening bij zowel Immateriële als Materiële Problemen. Een Onderzoek bij Allochtone en Autochtone*

Rawls' theory to indeed protect not only the needs of 'noumenal' selves, but in an Aristotelian vein also the needs of citizens as concrete empirical creatures, these situations can be qualified as residues of justice. This because other than due to their own clear fault citizens will not be able to genuinely develop and exercise their moral powers.

To summarize: in this section I have argued that when applied to society, because of its conceptual poorness justice will lead to residues of justice, situations that are at odds with the substantive goals to which Rawls' theory is (also) committed.

2.2.1 Conceptual poverty of justice in adjudication

In this section we shall see how the conceptual poverty of Rawls' principles of justice and the residues it produces or allows for bear upon the moral character of adjudication. When used as a background theory of law and adjudication justice cannot prevent that judges will as a matter of their professional responsibility in their interpretation of settled law turn a blind eye to information related to the ability of a citizen to convert the primary goods into valuable functioning. This may lead to genuine loss, at least from the viewpoint of the concerns that Rawls' theory aims to address. Rawls' conception of justice can therefore be said to be too narrow a viewpoint to genuinely warrant a reliance on legal commensurability and hence to validate a stabilizing approach to adjudication. To put it in more technical terms: because of its conceptual poverty Rawls' conception of justice lacks the kind of 'representative adequacy' that a measure needs if it is to function as a commensurans.²⁹⁸ In this section I will discuss several legal cases in support of this claim: two of these cases concern the position of divorced mothers; in the other two the position of cognitively challenged and socio-economically vulnerable consumers is at stake.

The case of *Jamie Muller*²⁹⁹

Cliënten (Amsterdam Riagg-Zuid Oost, 1997); Gathergood, John, 'Debt and Depression: Causal Links and Social Norm Effects', *The Economic Journal* 122, 563 (2012).

²⁹⁸ I discussed this feature of a commensurans in chapter 2.

²⁹⁹ This case and the next case to be discussed draw on the following cases: Centrale Raad van Beroep, January 30 2008, ECLI:NL:CRVB:2008:BC5172; Rechtbank Rotterdam, June 12 2007, ECLI:NL:RBROT:2007:BA7335; Centrale Raad van Beroep, March 24 2009,

Jamie Muller married her first boyfriend when she was nineteen years old. The couple got three children. Jamie worked close to her home as a dental-assistant and her husband ran a small business of his own. Because of the mental illness of their youngest son, Jamie worked only one morning a week. Conform the advice of her son's medical specialist, she tried to offer him a stable, secure and regular domestic situation and did not to bring him to a care-centre. Leaving her son for too long too often would bring him anxiety-attacks.

At a certain point the couple got into a serious relational crisis and tried counselling, but to no avail. Eventually Jamie's husband wanted a divorce. After the divorce Muller had to work three full days to make a living for herself and her children. Her ex-husband could not afford to pay any substantive alimony.

The dentist however, Jamie's employer, wanted her to work still more hours and also on a variable basis because of his increasing clientele. Jamie refused because of her parental responsibilities. When Jamie was dismissed because of her 'inflexibility', she went to court and disputed her dismissal.

The judge now has to decide whether Jamie Muller's employer had the right to dismiss her. According to settled law -including the civil law code and the collective labour agreement- an employee is not obliged to simply agree to a change in working hours. The employer and employee must come to a 'reasonable' equilibrium regarding working-conditions.³⁰⁰

If the judge, committed as he is to honouring the viewpoint of justice, uses Rawls' principles to give substance to the open norm of 'reasonableness', he will indeed have no reason of justice to assign special weight to Jamie's interests regarding her role as a single mother. From the viewpoint of Rawlsian justice these interests do not have more weight than for instance Jamie's interest to watch television rather than work the requested hours. That Jamie cannot freely delegate her exacting parental responsibilities and that she has a vital interest to keep her job as she is the breadwinner of the family, are factors that at least from the viewpoint of justice do not deserve special weight.

However, if the judge ignores these factors or at least does not assign them special weight, Jamie may beyond her own fault end up in a situation in which she is unable to exercise her moral powers in a meaningful way. If Jamie will indeed be fired, she will not be able to work in her profession -there is no other dentist in her residential area- and as a consequence she will lack the opportunity to gain self-esteem through the use of her professional capacities. She and her children are likely to structurally end up in serious poverty with dire

ECLI:NL:CRVB:2009:BI1015. In the latter case a mother with five children, the youngest two and a half years old, claimed that instead of being punished by a reduction of her welfare of 200 Euro a month for not complying with her obligation to accept work, she should be exempted from this obligation until her youngest daughter went to school.

³⁰⁰ See: Bouwens, W.H.A.C.M, Houwerzijl et al., *H.L. Bakels, Schets van het Nederlandse Arbeidsrecht* (Deventer: Kluwer, 2013), 79-82.

consequences such as social isolation, health problems and emotional distress. If we take seriously Rawls' idea that besides its Kantian interpretation equal dignity also entails honouring the needs of citizens as empirical, situated creatures to a sufficient degree, Jamie's dismissal can be qualified as a genuine moral loss. Holding Jamie responsible for the situation in which she may end up after her dismissal reinforces rather than reduces the detrimental influence of contingent facts on her chances to lead a humanly dignified life. This is at odds with the Aristotelian and egalitarian concerns that Rawls' theory seeks to honour. Here we see that if a judge uses Rawls' viewpoint of justice as a decisive measure when interpreting settled law and determining citizens' concrete legal rights, due to its conceptual poverty this measure will lack the 'representative adequacy' that characterizes a commensurans. The concepts of justice that the judge has to his avail are insensitive to factors that from the viewpoint of equal dignity are in fact relevant when determining citizens' rights. The case of Jamie shows that due to this conceptual poverty of justice, judicial decisions will not be as morally reassuring as a stabilizing approach to adjudication and its reliance on legal commensurability suggest.

Of course the case of Jamie is only one example of how the conceptual poverty of justice bears upon the moral character of adjudication, more specifically on the determination of the concrete legal rights and duties of single mothers. Next I discuss two cases in which the position of cognitively vulnerable and socio-economically weak consumers on the financial service market is at stake.

The case of *Bill Van Dyck*³⁰¹

Van Dyck is 84 years old and lives a very isolated life. Twice a week he goes to the grocery store and once a month to the bank to collect money because he does not trust ATM machines. Van Dyck receives a small pension. One day Van Dyck had a nice conversation with a bank employee. It turned out that the employee also enjoyed fishing. Already the next day Van Dyck returned to the bank because he had enjoyed talking with the employee and he thought him sufficiently reliable to ask him for financial advice.

Van Dyck candidly told the employee that he worried about the financial situation of his seriously handicapped son and that he strongly wished to help him financially. Already for

³⁰¹ The construction of the cases of Bill van Dyck and Lisa Burroughs draws on the following cases: Rechtbank Leeuwarden, August 13 2009, ECLI:NL:RBLEE:2009:BJ5283; Rechtbank Zwolle, March 4 2009, ECLI:NL:RBZLY:2009:BI2318; Rechtbank Utrecht, February 17 2010, ECLI:NL:RBLEE:2009:BJ5283; Rechtbank Amsterdam, November 11 2008, ECLI:NL:RBAMS:2008:BG4885; Rechtbank Utrecht, January 28 2008, ECLI:NL:RBUTR:2008:BC2458.

quite some years he was saving some money for him. The bank employee suggested that Van Dyck could purchase a financial product that came down to the bank lending him money and investing it in stock on behalf of Van Dyck.

One week later Van Dyck, who trusted the employee, signed a special stock-lease contract. But unfortunately for him soon the exchange rates fell. After three years the term of the contract ended and the bank held Van Dyck liable for € 20.000, that is, for the remaining debt including contractual interest as the leased stock was worth far less than the amount of the original loan. Van Dyck was in shock; he had never expected such an outcome to be possible. He was also anxious to forfeit his apartment and he was deeply disturbed by the fact that he had lost all he had saved for his son.

Van Dyck's daughter in law advised him to file a lawsuit and he did. In court Van Dyck (or more precisely his lawyer) argued that he had been in error about the conditions of the contract and that it therefore should be nullified. He thought that the monthly payments were investments in stock and not the payment of interest on the loan.

He moreover argued that the bank had abused his vulnerable position and had violated its duty of care. The bank employee knew that Van Dyck was socially very isolated because he had told him so and he also knew that he had therefore appreciated their talks and came to trust him.³⁰² According to Van Dyck the bank employee could also have known that the contract did not reflect his will, because he had so much stressed his keenness to leave his son some money after his demise. The employee should have known that he did not want to risk all his savings. As part of its duty of care the bank should have warned Van Dyck clearly about the risks of the contract, also because Van Dyck was cognitively vulnerable due to his old age. From the viewpoint of Rawls' principles of justice the judge must interpret the applicable law -other things equal- in a way that ignores Van Dyck's actual cognitive limitations, his socially isolated position and also the consequences of the contract. That is, of course, if the case is not one of clear fraud or deceit, or one in which the minimal cognitive capacities are obviously absent. Once above these benchmarks, the judge may simply assume that the outcome of the contract can be "left to take care of itself".³⁰³

At the same time, if the judge legally effectuates the contract as indeed an expression of Van Dyck's free will, this seems not to dovetail well with Rawls' egalitarian concerns. From the

³⁰² See for a discussion of both kinds of vulnerabilities of older consumers: Yoona, Carolyn, Coleb, Catherine A. et al., 'Consumer Decision Making and Aging: Current Knowledge and Future Directions', *Journal of Consumer Psychology* 19 (2009); Moschis, George P., Mosteller, Jill et al., 'Research Frontiers on Older Consumers' Vulnerability', *Journal of Consumer Affairs* 45, 3 (2011); Yong-Soon, Kang and Ridgway, Nancy M., 'The Importance of Consumer Market Interactions as a Form of Social Support for Elderly Consumers', *Journal of Public Policy & Marketing* 15, 1 (1996).

³⁰³ Rawls, *A Theory of Justice*, 76.

viewpoint of these concerns that take citizens' vulnerabilities as empirical creatures seriously, Van Dyck may rightly feel wronged. That is, in this case Van Dyck's vulnerabilities have been exploited in a way that seriously and structurally reduces his potential to exercise his moral powers. Holding him legally responsible would not only legally authorize such exploitation, it would also thwart Van Dyck in realizing his most wanted goal: to provide for an income for his handicapped son. On the basis of Rawls' own concerns we can say that a legal decision to hold Van Dyck fully liable leads to a moral loss, even though it may be in accord with justice.

The case of *Lisa Burroughs*

Eighteen years old, Lisa fell in love with John who was thirteen years older. Lisa worked part-time with MacDonald's and John had a lowly paid job as construction worker. They were both poorly educated. At a certain point in their relationship John decided that he wanted to live together with Lisa. He also wanted to rent a new apartment and furnish it. He came to the conclusion that in order to finance this they had to arrange a revolving credit loan for a grand total of € 60.000, which was rather excessive relative to their budget.

Soon after they got the loan the couple failed to pay the rent. Due to their financial stress -Lisa blamed her boyfriend for having forced the loan on her- the couple broke up. In accord with the terms of the contract the credit company held Lisa severally liable for € 85.000, the grand total of the original loan and the contractual interest. Thereupon Lisa went to court arguing that the credit company violated its duty of care. The company should have known that at the time of the signing of the contract she did not fully understand its consequences. Because of her young age and her lack of experience on the financial service markets the credit company should have informed her about the risks.³⁰⁴ All the more so because during the session with an employee of the company her boyfriend had done all the talking and because her financial position was obviously very weak.

As in the case above, in interpreting the applicable laws and standards from the viewpoint of Rawls' principles of justice, the judge -other things equal- must be indifferent to Lisa's actual moral powers and the decisive role of her boyfriend -that is, if he does not want to risk being all too paternalistic. For the same reason the judge must ignore the detrimental consequences that the contract has for Lisa.³⁰⁵ This outcome can be accounted for in terms of procedural justice. It may not be morally 'reassessed' and is rather to be understood as one of the many complications of everyday life for which a citizen can be held responsible. If there is no clear case of intentional abuse of circumstances or of fraud or deceit, the judge can as a matter of justice decide that the credit company should not have to pay for Lisa's stupidity and that it is reasonable to expect Lisa to have comprehended the terms of the contracts.

³⁰⁴ See also: Steinberg, Laurence, 'Risk Taking in Adolescence: What Changes, and Why?', *Annals of the New York Academy of Sciences* 1021, 1 (2004).

³⁰⁵ Kordana and Tabachnick, 'Rawls and Contract Law', 629.

However, if we take Rawls' egalitarian concerns seriously, to ignore the range of information about Lisa's person and position as an embodied and situated being when determining the legal implications of the contract, is hardly to respect her dignity. Because of her actual cognitive and emotional vulnerability and her precarious socio-economical position, Lisa may rightly feel that she is not respected, but rather is asked to bear the burdens for the good of others and especially for the profits of the credit company.³⁰⁶ Given Lisa's concrete position the contract is lopsided and exploitative and its effectuation may put Lisa in a socio-economically precarious position with long-term consequences for her chances to realize her life-plan. Although this effectuation is in line with Rawls' principles of justice, from the viewpoint of his Aristotelian and egalitarian concerns it also results in a genuine moral loss. Again, here we see how the conceptual poverty of justice bears upon the character of judicial decisions. It impedes a judge who is committed to justice to have a keen eye for the extent to which a concrete citizen is actually experiencing obstacles in using the primary goods in a valuable way. Even though judges may indeed aim to be just, these conceptual limitations lead to genuine moral losses, to morally unsatisfying outcomes. The conceptual poverty makes justice into a standard that is hardly as morally reassuring as Rawls and a stabilizing approach to adjudication suggest.

So far the discussion of cases that show how the conceptual poverty of Rawls' viewpoint of justice affects the moral quality of adjudication.

2.3 Justice as under-determinate

A final reason why Rawls' theory of justice leads to residues of justice is the under-determinacy of justice and connected to this the *strong* discretion this implies for the responsibility bearing institutions and officials concerned.

Rawls is well aware that abstract and general principles of justice produced by philosophy do not by and in themselves suffice for citizens and public officials to know what justice concretely requires. To this end he introduces the 'four stage sequence' -which we already saw in the previous chapter- so as to "to simplify the application of the two principles of justice" for constitutional democracies.³⁰⁷

³⁰⁶ Ibid.

³⁰⁷ Rawls, *A Theory of Justice*, 171. To that end Rawls distinguishes the level of the philosophical principles, the level of the constitution, the level of legislation and policy and that of the application of rules to concrete cases "by judges, administrators, and the following of rules by citizens generally."———, *A Theory of Justice*, 175.

This device is meant to secure that his account of justice will indeed be a “workable political conception” and not merely a theoretical exercise.³⁰⁸ It is this device that according to Rawls can account for the determinacy of justice. With the help of the ‘four stage sequence’ justice will be infused with all kinds of empirically loaded considerations that are to make its application a matter of judgment rather than of choice. Rawls says: “the flow of information is determined at each stage by what is required in order to apply these principles intelligently to the kind of questions at hand, while at the same time any knowledge that is likely to give rise to bias and distortion and to set men against one another is ruled out. Hence, the principle of the rational and impartial application of principles defines the kind of knowledge that is admissible.”³⁰⁹

So, because there will be a considerable body of relevant information available for each institutional level, Rawls relies that there will be little leeway for public institutions, officials or citizens to determine what justice requires.³¹⁰ At the same time he is keen to stress that ‘right answers’ may sometimes be hard to find. For instance, where violations of the first principle of justice can be “clearly seen to be unjust”, Rawls thinks that this is not the case for the application of the second principle of justice that concerns economical and social policies.³¹¹ For this principle “[o]ften the best we can say of a law or policy is that it is at least not clearly unjust.”³¹² In case the four-stage sequence does not give any determinate answers, “justice is to that extent likewise indeterminate”.³¹³ For these situations he holds that society can legitimately “fall back upon a notion of quasi-pure procedural justice: laws and policies are just provided that they lay within the allowed range, and the legislature in ways authorized by a just constitution has in fact enacted them.”³¹⁴

To summarize: with the help of the ‘four stage sequence’ justice will overall offer sufficient normative guidance to determine what justice requires in concrete terms and

³⁰⁸ Rawls, *A Theory of Justice*, 171-176.

³⁰⁹ *Ibid.*, 176.

³¹⁰ ———, *Political Liberalism*, 340.

³¹¹ ———, *A Theory of Justice*, 174.

³¹² *Ibid.*

³¹³ *Ibid.*, 176.

³¹⁴ *Ibid.*

if in certain situations it does not, then its outcomes will fall within the “permitted range”.³¹⁵ In any case, according to Rawls these outcomes will not occasion genuine moral wrongs. This means by implication that if justice allows public authorities and officials strong discretion, Rawls relies on it that this by no means amounts to troublesome arbitrariness or moral loss.

In light of the rather elaborate defence of the determinacy of justice that Rawls offers, one may consider it splitting hairs to nonetheless argue that justice is too under-determinate to realize its substantive goals. However, I think that Rawls’ arguments for the determinacy of justice are more like a reassurance than genuine arguments. That is, Rawls does not explain *how* justice will actually guide the decisions that are to be made on the levels that the ‘four stage sequence’ describes, for instance decisions about what weight to assign to the body of information that is available. This body of information that Rawls declares pertinent and even crucial for the specification of justice is vast, indeterminate and encompasses conflicting views. Thence genuine choices have to be made about selection and attributing weight. However, justice does not offer any guidance for this task as it is precisely this very body of information that is meant to give substance to justice on the practical level. Hence, the ‘specification’ of justice may well be simply the result of contingent or arbitrary facts, in any case of empirical factors that affect the way responsibility bearing institutions and public officials exercise their strong discretion. We have not been offered a reason to a priori assume that the range of specifications is such that citizens’ dignity will be secured, at least if dignity is to have any substantive meaning. So conceived, the ‘four-stage sequence’ may function as a grab bag: the outcomes it produces are, at least from the viewpoint justice, unpredictable and random. They can in no way sensibly be reduced to a shared ‘justice-inhering’ feature, not even their being conducive to or in accord with the value of equal dignity.³¹⁶ As said, these outcomes may even amount to residues of justice, i.e. morally troublesome situations, for instance in the form of (arbitrary) restrictions of citizens’ opportunities to lead a dignified life.³¹⁷

³¹⁵ Ibid.

³¹⁶ Cf. Weithman, Paul, 'John Rawls and the Task of Political Philosophy', *The Review of Politics* 71, 1 (2009), 313.

³¹⁷ Rawls, *A Theory of Justice*, 176.

To illustrate that the under-determinacy of justice and the strong discretion it entails can in practice lead to residues of justice, I will discuss the practical bearing of Rawls' principles of justice on the institution of criminal law and punishment. For in other societal domains where only trivialities are at stake we need not be all that worried about the under-determinacy of justice and we may be more willing to just accept a specification as one that justice allows for.³¹⁸ Residues of justice are perhaps not likely to occur. Things are different for criminal law and punishment as institutions that so intensely influence citizens' lives. For these institutions we do not want to assume too easily that they accord with the demands of Rawls' viewpoint of justice, precisely because the interests that his principles aim to protect are so prominently at stake: the basic liberties.

From this perspective it is quite remarkable that Rawls himself pays little attention to criminal law and the institution of punishment.³¹⁹ He considers these institutions as justified, without spending too many words on the arguments supporting this claim.³²⁰ He holds that a just society needs an effective penal machinery, primarily because "[b]y enforcing a public system of penalties a government removes the ground for thinking that others are not complying with the rules".³²¹ Because of his rather appealing account of criminal law and punishment, Bonnie Honig has stated that Rawls probably understands punishment as "a practice in which there is no moral

³¹⁸ Ibid., 175.

³¹⁹ In his article 'Two Concepts of Rules' Rawls does state that "[t]he subject of punishment, in the sense of attaching legal penalties to the violation of legal rules, has always been a troubling moral question". Nonetheless in his *Theory of Justice* he hardly discusses the issue. Cf. Rawls, John, 'Two Concepts of Rules', *The Philosophical Review* 64, 1 (1955); Rawls, *A Theory of Justice*, 209-212, 237, 276.

Rawls' rather appealing attitude towards the institutions of criminal law and punishment fits within the liberal tradition that sees punishment as a legitimate institution. Cf. Bedau, Hugo Adam and Kelly, Erin, 'Punishment', in *The Stanford Encyclopedia of Philosophy*, ed. Zalta, Edward N. (Stanford: Metaphysics Research Lab, Stanford University, 2010). For an argument that the institution of punishment does not fit within liberalism see: Hanna, Nathan, 'Liberalism and the General Justifiability of Punishment', *Philosophical Studies* 145, 3 (2009).

³²⁰ Honig, Bonnie, 'Rawls on Politics and Punishment', *Political Research Quarterly* 46, 1 (1993), 151.

³²¹ Rawls, *A Theory of Justice*, 211.

anguish, no unruly excess, no joy in another's suffering, no troublesome doubts, only a sense of justice.”

In any case, the under-determinacy of Rawls' principles of justice surely does not warrant an epistemically and morally reassuring picture of these institutions. These principles give little guidance as to how the institution of criminal law and the penal machinery should work, i.e. what kind of deeds should be criminalized and what kind of sanctions should be imposed in reaction to these deeds. Consequently, there is no guarantee whatsoever that the outcomes that justice allows for are compatible with equal dignity, the overall value that Rawls' theory seeks to protect.

Of course the first principle of justice, that of equal liberty, does point out that liberty is to be restricted only for the sake of liberty itself and that the requirements of the law and hence the demands of justice as regularity should also be observed.

Legislation and policy and their application to individual cases should not be biased. Citizens “must be able to know what the law is and should be given a fair opportunity to take its directives into account [...]”, Rawls states.³²²

We could again take recourse to the ‘four-stage-sequence’ that according to Rawls helps to make the viewpoint of justice more determinate. With respect to workings of the institutions of criminal law and punishment, on the level of legislation, policy and adjudication the following information may be used to do so: common sense views and expert knowledge about the chances of recidivism, views about the detrimental consequences of imprisonment to delinquents and their families, views about (the perceived) lack of safety and security in society, views about the retributive and preventive functions of penal law, views about free will and factors determining criminal behaviour and about the personal responsibility of delinquents for their behaviour, views about society's demand for punishment, and more.³²³ However and as said, justice itself does not provide any guidance how and on what grounds to select or rather ignore certain knowledge and views. Neither does it give any guidance in how to weigh the considerations stemming from the body of ‘selected knowledge and views’. Except for the all too general and unspecific ‘constraints’ that Rawls’

³²² Ibid., 212.

³²³ See for an interesting article on the influence of (beliefs of public officials about) public preferences on criminal justice policy: Roberts, Julian V., 'Public Opinion, Crime, and Criminal Justice', *Crime & Justice* 180, 16 (1992).

device of the original position offers, institutions and public officials will from the viewpoint of justice have strong discretion to decide whether and how to criminalize certain deeds and whether and how to react to these deeds.³²⁴

Take the way some societies deal with habitual ‘petty-offenders’, often people with psychiatric diseases who are home- and jobless and who frequently commit petty crimes that cause a lot of nuisance to society.³²⁵ In a ‘just’ society members of parliament may propose to be ‘tougher’ on this group in reaction to an increase of such petty crimes and public indignation. They could pass a law that allows the imprisonment of these repeat petty-offenders for a considerably longer period than fits the actual crime. These petty-offenders will then be punished relatively harsh, not so much because of the seriousness of their crimes, but because of the nuisance they cause to society.

Other politicians may adversely argue that it is common knowledge that many of these repeat petty-offenders have a history of drug-addiction, have some combination of psychiatric problems or even personality disorders, and have learning difficulties as well. They can point out that members of this group are notoriously in adverse socio-economic positions and need special help rather than punishment. They can argue that repeat petty offenders do not fit "into the prison community, where they are vulnerable and defenceless."³²⁶

At the same time, if arguments based on genuine knowledge with respect to the precarious psychological, economical and social position of these offenders and their need for help are not given due weight, their punishment may even further reduce

³²⁴ Cf. Rawls, *A Theory of Justice*, 212.

³²⁵ This sociological concept of ‘repeat petty offender’ was already in use in the second half of the last century and was coined to focus on a particular group of delinquents who did not often receive attention compared to the more spectacular and menacing types of crime. Irwin Deutscher defined the repeat petty offender as "a person who is defined legally as a criminal because his behaviour involves the persistent breaking of certain laws -usually city ordinances. He is arrested on such charges as being drunk in public view, committing public nuisance, disturbing the peace, loitering, trespassing, vagrancy, family disturbance and so on." Cf. Deutscher, Irwin, 'The Petty Offender: A Sociological Alien', *The Journal of Criminal Law, Criminology, and Police Science* 44, 5 (1953).

³²⁶ Goderie, Marjolein, 'Problematiek en Hulpvragen van Stelselmatige Daders', (Utrecht: WODC, Ministry of Justice, 2009).

their chances to develop and exercise their moral powers. Their liberties and chances will then be sacrificed simply because of the actual power-relations in parliament as an empirical fact, without a moral reason.

Or take the way a just society may deal with children and adolescents who commit crimes. Making use of the discretion that justice allows for, the legislator may for instance decide that juvenile delinquents between sixteen and eighteen years old who have committed serious violent crimes, must be tried and punished under adult penal law.³²⁷ Such a decision could be based on the importance of protecting the liberties of fellow citizens, on the consideration that the brains of these adolescents are almost fully developed and that violent adolescents should be given a stronger signal that their behaviour is not tolerated in society: these and many other considerations are allowed for by the 'four-stage-sequence'. These considerations may outbalance the contrary ones leading to the opposite conclusion that juveniles in this age-category should not be tried and sentenced as adults. Contrary considerations could be that adolescents have not yet fully developed their brain and personality, that they often need specific care and treatment, that adolescent delinquents often have suffered from a "rotten social background" that seriously impeded a normal development of their moral powers and many others.³²⁸

If the legislature happens to decide in favour of the more austere and repressive adult regime, this decision may come with residues of justice. For instead of providing these adolescent citizens the necessary societal and other support for them to become morally competent, society makes their chances to ever lead a dignified life dim and grim.³²⁹ As said, what Delgado has coined a "rotten social background" could point to

³²⁷ In the Netherlands the general rule is that delinquents who are older than twelve and younger than eighteen years have to be judged under the special juvenile criminal law. However, if the delinquent is older than sixteen the judge can decide to apply regular adult criminal law if he sees ground for this in the personality of the defendant, the circumstances under which the criminal deed is committed and/or the severity of the crime. Cf. article 77b of the Dutch Penal Code.

³²⁸ Cf. Delgado, Richard, "Rotten Social Background': Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?', *Law and Inequality* 9, 3 (1995).

³²⁹ Cf. Brink, David O., 'Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes', *Texas Law Review* 82 (2004), 1571.

society not living up to Rawls' ideal and hence to a responsibility of society to help these juvenile delinquents and compensate them for their backward conditions and positions.³³⁰ If they instead receive unfit treatment and the stigma of having been imprisoned this can be seriously harmful and may haunt them for the rest of their lives.

It goes without saying that both examples are not to support the claim that punishment should be abolished -although one might of course consider arguing for it. Here the point has been that, other things equal, Rawls' justice does not offer a reason of justice to prefer a particular way of dealing with the groups of delinquents mentioned, even if one of the possible decisions may result in an outcome that seriously affects their chances to lead a life in accord with dignity. Research for instance suggests that imprisonment has serious effects on the (mental) health of convicts, especially on that of adolescents, and that it reduces their chances of social integration and intimate relationships, that it increases the likelihood of a breakup of their families and that it reduces their fair chances of finding a job and generating income in the future.³³¹

Also, it has been observed that imprisonment affects the chances and expectations of the children of convicts, indicating that "the effects of imprisonment on inequality are transferred inter-generationally."³³²

So, what we can establish is that because of the under-determinacy of justice the institutions of criminal law and punishment are certainly more troublesome than Rawls himself suggests. With Bonnie Honig we can indeed say that criminal law and

³³⁰ For instance by making room for a criminal defence based on socio-economical deprivation simpliciter. See: Delgado, "Rotten Social Background': Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?'

³³¹ Cf. Schnittker, Jason and John, Andrea, 'The Long-Term Effects of Incarceration on Health', *Journal of Health and Social Behaviour* 48, 2 (2007), 117; Apel, Robert and Sweeten, Gary, 'The Impact of Incarceration on Employment during the Transition to Adulthood', *Social Problems* 57, 3 (2010).

³³² Cf. Wildeman, Christopher and Western, Bruce, 'Incarceration in Fragile Families', *The Future of Children* 20, 2 (2010). Fritsch, Travis A. and Burkhead, John D., 'Behavioral Reactions of Children to Parental Absence due to Imprisonment', *Family Relations* 30, 1 (1981).

punishment in a Rawlsian society “draw[...] on a palimpsest of justifications because no single set of assumptions or beliefs is capable of putting our doubts to rest.”³³³

To summarize, even in cases where citizens’ most basic interests are at stake the principles of justice -despite the ‘four stage sequence’- are too under-determinate to secure outcomes that in one way or another can sensibly be reduced to the value of equal dignity. These outcomes may amount to residues of justice, i.e. morally troublesome situations, for instance in the form of (arbitrary) serious restrictions of citizens’ opportunities to lead a dignified life.³³⁴

2.3.1 Under-determinacy in adjudication

The under-determinacy of Rawls’ principles of justice, the strong discretion it leads to and the residues of justice it allows, bear on the moral character of judicial decisions. Due to the strong discretion that the legislator and policy-makers sometimes have, also where fundamental interests of citizens are at stake, judges will as a matter of justice be duty bound to apply laws and policies that may seriously threaten the value of equal dignity. Above that, due to this under-determinacy judges themselves will sometimes also have strong discretion because the law is unclear. In those cases judicial decisions cannot sensibly be reduced to justice itself. These are situations in which the principles of justice cannot sensibly function as a commensurans or final justificatory ground that offers an exhaustive reason for a citizen to accept a particular decision. Moreover, because of its under-determinacy justice cannot prevent that the value of equal dignity will be compromised in and through adjudication. Rather to the contrary, because of the strong discretion that judges have -other things equal- their decisions may well lead to a genuine moral loss. Such an outcome flies in the face of a stabilizing approach to adjudication that relies on normative theory to prevent both arbitrariness and genuine moral losses. I will illustrate these implications of Rawls’ theory for the practice of adjudication by discussing two cases in which the workings of criminal law vis-à-vis a concrete citizen is indeed at stake.

³³³ Honig, 'Rawls on Politics and Punishment', 121.

³³⁴ Rawls, *A Theory of Justice*, 176.

The case of *John Gadget*³³⁵

As a result of a serious car accident John Gadget suffers from a posttraumatic frontal brain syndrome with epilepsy. He lost his job and in the end also his house. John is now homeless and starts to develop a serious alcohol problem. He spends his days in the streets, drinking, uttering aggressive speech and causing a lot of annoyance to his environment. One day John is arrested and brought to court. The public prosecutor wants him to be sentenced under the special regime for 'repeat petty-offenders' to two years imprisonment because of a long list of minor offences he has committed and because of the probability of recidivism. Gadget's lawyer argues by contrast that Gadget should receive adequate treatment in terms of healthcare, rather than be imprisoned. He moreover asserts that because there is no adequate care available in prison, recidivism is even more likely if John is sentenced to 'naked imprisonment'. He is sure that John's psychological situation will rapidly deteriorate if he does not get treatment.

In this case settled law allows the judge the discretionary power to identify, weigh and balance the relevant considerations when deciding whether to apply the regime for repeat petty-offenders or not. He also has discretion in how to weigh the fact that prison cannot offer John the treatment he needs. If the judge as part of his professional responsibility takes Rawls' principles of justice as his guide these will fail to offer him any direction: the judge can decide one way or the other. Neither do these principles show that certain facts that characterize Gadget's concrete position are of particular importance for the decision to be made. From the viewpoint of justice it is for instance indifferent whether the judge is sensitive to the argument that prison has no adequate treatment to offer.

If the judge decides that treatment is not a necessary condition for imposing the repeat petty offender-regime and if he sentences John to two years of imprisonment, this decision lacks a justificatory ground -by the same token another judge could have decided differently-. Moreover, from the viewpoint of the concerns that Rawls' theory aims to address -to provide for citizens' legitimate claims as both 'noumenal' and as 'phenomenal' creatures- such a decision may come with a genuine moral loss. That is, John will be sanctioned in a way that does not reflect his standing as a citizen with equal dignity -the sanction is 'more severe' than can be explained by the seriousness of his crimes-. Such a decision reflects that John's interests as a citizen who -if anything- is in need, are sacrificed for the good of his fellow citizens, even if this may be fatal for his chances to lead a human dignified life.

This case illustrates that Rawls' viewpoint of justice proves to be too under-determinate to function as final commensurans and to warrant a reliance on legal commensurability. It does not offer the necessary guidance so as to secure that citizens' dignity will be genuinely

³³⁵ For the discussion of this case I took inspiration from: Rechtbank Maastricht, May 29 2007, ECLI:NL:RBMAA:2007:BA7011; Rechtbank Utrecht, December 23 2005, ECLI:NL:RBUTR:2009:BL0134; Hoge Raad, March 24 2009, ECLI:NL:HR:2009:BH1451; Rechtbank Leeuwarden, November 10 2005, ECLI:NL:RBLEE:2005:AU5923.

honoured where the determination of their legal rights and duties is concerned. Hence, although fully in accord with Rawls' principles of justice, the resulting decision does not fit well with the moral reassuring picture that a stabilizing approach to adjudication presents us.

The case of *Melvin Bates*³³⁶

Melvin is a boy of sixteen who has lived in the streets since he was twelve. Later he was put in a residential school for male juvenile delinquents, a school well known for its extremely strict regime. When Melvin left this school after three years, he was home- and jobless. He soon supported himself by aggressively robbing supermarkets and casinos, threatening the employees with a gun, a knife or an axe.

Melvin was caught and brought to court. The public prosecutor requests the judge to sentence him under adult criminal law. He supports this request by a declaration of a psychiatrist stating that Melvin has never learned to emotionally attach himself to others and that he has a violent personality that makes recidivism very likely. He also refers to the fact that some of the victimized employees have been seriously traumatized by the extreme violence that Melvin used.

Melvin's lawyer emphatically asks the judge not to try Melvin under adult law. He pleads that Melvin must receive adequate treatment befitting his age and his age related needs, as he had an extremely traumatic and violent childhood. He also argues that the residential school has focussed solely on discipline and structure and did not teach its pupils how to socialize and deal with real life situations. At this school Melvin had structurally learned to repress his emotions instead of learning how to cope with them. The lawyer corroborates this claim by submitting empirical research on (the detrimental effects of) the regime of this particular school. He asks for a decision that is sensitive to Melvin's needs as he is still a minor, a decision that would open a perspective on a 'normal' life in the future.

In this case the law allows the judge considerable leeway to assess whether Melvin Bates must be tried under adult law. According to settled law the judge must take a decision on the basis of the extremity of the deeds, the personality of the defendant and the likeliness of recidivism. If a judge aims to decide in accord with justice, he will not get any guidance from Rawls' principles of justice. How he should assess and weigh all the facts, is from the viewpoint of Rawls' principles up to him -except for the formal demands of the rule of law-.

³³⁶ For this case I have drawn on the following cases: Rechtbank Amsterdam, May 7 2010, ECLI:NL:RBAMS:2010:BM3738; Hoge Raad, 22-11-2005, ECLI:NL:HR:2005:AU3887; Rechtbank Leeuwarden, October 20 2005, ECLI:NL:RBLEE:2005:AU4637; Rechtbank Amsterdam, April 4 2009, ECLI:NL:RBAMS:2009:BH1795. In the latter case a sixteen years old juvenile delinquent was sentenced to twenty years imprisonment for a brutal murder. In the sentence the judge considered the calculating attitude of the accused.

From this viewpoint and on the basis of the relevant psychiatric reports the judge may come to the conclusion that Melvin is unfit for penitentiary measures for juveniles that aim for rehabilitation and resocialisation, because his personality is 'beyond repair'. The judge may also assign considerable weight to the fact Melvin lacks any vocational training and does not have a home and argue that these facts make the chances of recidivism quite high, which points to sentencing in accord with adult law. From the viewpoint of justice -other things equal- and in accord with these considerations the judge may decide that Melvin must be sentenced to twelve years imprisonment.

At the same time and again: if we take Rawls' (Aristotelian and egalitarian) concerns seriously such a judicial decision is troublesome. If the value of equal dignity indeed means that citizens conceived of as concrete embodied creatures should be provided an equal chance to develop and realize their moral powers at least up to a certain threshold level, we cannot but hold that Melvin has not received such an equal chance. The decision to sentence Melvin to twelve years imprisonment increases the influence of the hardships that Melvin suffered beyond his fault rather than to diminish and compensate for it.³³⁷ The decision, although fully in accord with justice, implies that Melvin is 'given up'.³³⁸ But, given the fact that Melvin has never had an opportunity to develop his moral personality, this boils down to a genuine moral loss. This all the more so because another judge could well have made another decision by using his discretionary power differently: he could have seen Melvin as someone who deserves a chance, as someone "who deserves' to be seen as a kind of victim of life, one who did not get the support that life should have provided."³³⁹

Again, what these cases show is that Rawls' viewpoint of justice gives judges a legal license to make rather 'free' choices. It grants them strong discretion, for instance in deciding whether to apply and how to interpret valid or settled law, and how to substantiate open and vague legal norms, also when substantive interests of citizens

³³⁷ Cf. Nussbaum, Martha C., 'Victims and Agents. What Greek Tragedies can Teach us about Sympathy and Responsibility', *Boston Review*, February/ March (1998).

³³⁸ As the examples are drawn from Dutch jurisprudence, in this regard it is of interest that the Committee on the Rights of the Child would like the Netherlands to sentence juvenile delinquents in accord with adult law. Cf.

<http://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-NLD-CO3.pdf>.

See for a brief discussion of the sentencing of juvenile delinquents in the Netherlands: Doek, Jaap, 'De Jeugdige Delinquent: Toepassing van het Strafrecht voor Volwassenen en het IVRK', *Tijdschrift voor Familie- en Jeugdrecht* 5 (2001).

³³⁹ Cf. Nussbaum, 'Victims and Agents. What Greek Tragedies can Teach us about Sympathy and Responsibility'.

are at stake. The under-determinacy of justice allows for judicial decisions that from a moral point of view are to some extent unintelligible because they cannot be reduced to the principles of justice, possibly arbitrary and perhaps also leading to a genuine moral loss.

3 Conclusion

The argument pursued in this chapter is that contrary to Rawls' own idea about the practical bearing of his principles of justice, these principles lead to residues of justice. These residues are situations in which citizens, other than due to negligible incidents, suffer a genuine moral loss that is sometimes due to arbitrary exercise of state-power. We have seen that even if all requirements of justice are fulfilled, these principles do not lead to a morally harmonious and transparent political order. A fully 'just' political order is (still) messy, painful, unintelligible and causing genuine moral losses. It was argued that the reasons for this are that Rawls' viewpoint of justice can be internally conflicted, is conceptually poor and under-determinate.

Through a discussion of concrete legal cases I showed how each of these reasons and the resulting residues of justice bear on the practice of adjudication. We saw that due to these residues Rawls' viewpoint of justice in any case cannot do the work that is necessary for the establishment of legal commensurability and hence it cannot ground a stabilizing approach to adjudication. Rawls' viewpoint of justice lacks the characteristics of a commensurans: it lacks sufficient action-guiding force because it is sometimes internally conflicted and under-determinate and it misses 'representative adequacy' due to its conceptual poorness. So, if a legal order and adjudication fully comply with his demands of justice, this practice will still be morally troublesome, messy, arbitrary, unpredictable and to some extent unintelligible. Rawls' theory of justice does not warrant a morally reassuring picture of adjudication. It does not bring the 'victory' of moral theory over the troublesome phenomenology of adjudication.