I. SOCIAL AND POLITICAL PHILOSOPHY

An Interpretation of Rawls's Difference Principle as the Principle of the Welfare State

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Abstract

Wolfgang Kersting argues that Rawls's writings do not contain any foundation or rational grounding for the welfare state, as his principles of justice only aim at solving distributional problems between partners in cooperation. But the citizens who most need the help of the welfare state—the unemployed, people incapable of working, pensioners, the sick—are not cooperation partners as they can't provide for themselves. The paper argues that Kersting's interpretation is mistaken by taking a closer look at Rawls's concept of cooperation. It defends the common interpretation of Rawls as the liberal philosopher of the welfare state and shows that he ethically justifies it with his difference principle.

The normative theory of justice, which Rawls published in 1971, is still regarded as the most important contribution to contemporary political philosophy.[1] That his theory, which he calls "justice as fairness," still dominates contemporary debates can be seen by the fact that alternative positions are often presented as a response to it. Rawls is usually understood as a "welfare-state liberal"[2] or as the philosopher of

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1 John Rawls, *A Theory of Justice* (Cambridge: Belknap Press of Harvard University Press, 1971).

2 Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), 66. Jonathan Wolff talks about the "left-wing welfarism

Social Democracy. The well-known German political philosopher Wolfgang Kersting challenges this seemingly uncontroversial interpretation. He claims that Rawls's writings do not contain any foundation or rational grounding for the welfare state, as his principles of justice only aim at solving distributional problems between partners in cooperation.[3]

Against Kersting this paper argues not only that Rawls conceives of a just society as a welfare state, but ethically justifies it with his theory. According to the central thesis of the paper, the core of Rawls's philosophical grounding for the welfare state is the "difference principle" and the closely linked "principle of redress." Taking a closer look at Rawls's concept of cooperation, the paper shows that Kersting's interpretation is mistaken, defending the common interpretation of Rawls as the liberal philosopher of the welfare state.

The first two sections of this paper lay out the main thoughts of Rawls's theory of justice. The first section explains Rawls's two models of justification for his two principles of justice. The second section clarifies Rawls's difference principle and shows how he develops it from his general conception of justice, which is strictly egalitarian. The third and the fourth sections focus on Rawls's rational grounding for the welfare state. The third section examines Kersting's arguments for his claim that Rawls's writings do not contain any rational foundation for the welfare state. In scrutinizing and criticizing Kersting's arguments, the section points out that Rawls's various statements on his conception of "cooperation" are contradictory. The fourth section focuses on self-respect, the principle of redress and once more on the difference principle. In doing so, the section elucidates the central ideas of Rawls's rational foundation for the welfare state. The fifth and final section

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defended by Rawls" (Jonathan Wolff, *Robert Nozick. Property, Justice and the Minimal State* (Cambridge/Oxford: Polity Press/Basil Blackwell, 1991), 1).

[3] Wolfgang Kersting, "Einleitung," in *Politische Philosophie des Sozialstaats*, ed. Wolfgang Kersting (Weilerwist: Velbrück, 2000), 31-32; Wolfgang Kersting, *John Rawls zur Einführung*, 2, corrected edition (Hamburg: Junius, 2004, first edition: 2001), 94.

confronts this foundation with Robert Nozick's influential critique, and shows that in a pluralist society Rawls's conception of justice can never become the subject of an "overlapping consensus."

1. The Main Ideas of Rawls's Theory of Justice

1.1. The Principles of Justice and their Two Models of Justification

In his theory of justice Rawls tries to demonstrate that in an "initial contractual situation"[4] free and rational persons would unanimously decide on two principles of justice. In classical modern contract theories, like the one constructed by John Locke, the original agreement concerns entry into a particular social system and the origin of a specific legal system and government, which is rationally justified by this concord.[5] On the contrary, the original consensus in Rawls's normative theory of justice relates to principles of justice which are justified by a contractualist method. Rawls understands the "initial contractual situation" or "initial choice situation" as a "purely hypothetical situation."[6] The "original position"[7] is hypothetical because it is not a real historical situation. Rather, it is a condition into which every reader of Rawls's theory can enter through a number of considerations. In the "original position," any information which could lead to a partial decision is withheld from the people who choose principles of justice. In order that the result of the choice can be considered as a pure result and description of the sense of justice, the knowledge of one's own

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4 Rawls, *A Theory*, 15.

5 John Locke, *Second Treatise of Government*, ed. Richard Cox (Arlington Heights: Croft, 1982), cf. Manuel Knoll, "John Locke als Vordenker der Grundprinzipien des demokratischen Verfassungsstaates," in *Der Staat des Liberalismus. Die liberale Staatstheorie von John Locke*, ed. Samuel Salzborn, series Staatsverständnisse ed. Rüdiger Voigt, Baden-Baden: Nomos, 2010, 216-17. For Rawls's understanding of the history of political philosophy from Hobbes to Sidgwick cf. John Rawls, *Lectures on the History of Political Philosophy*, ed. Samuel Freedman (Cambridge: Harvard University Press, 2007).

6 *A Theory*, 18, 12.

7 Rawls distinguishes between the terms "initial situation" and "original position". He understands the "original position" as a specific interpretation of the "initial situation" which is "most philosophically favored" (ibid., 18).

conception of a good life, of one's position in society, of class membership and social status, of one's own capabilities, such as intelligence and strength, must be disregarded.[8]

For Rawls, the "original position" is not determined merely by the information deficit included in it. In it, the persons choosing do have knowledge of the social conditions to which the selected conceptions of justice are applied and of their fundamental desires and interests as human beings.[9] Finally, Rawls defines an appropriate choice situation, for which terms and conditions have to be established accurately, as a situation that guarantees a fair agreement. According to him, the participants in this situation chose two principles of justice from a list of common conceptions of justice.[10] In order to resolve this problem of choice, which is central in his theory of justice, Rawls integrates elements of the "theory of rational choice," according to which persons who choose rationally are trying to maximize their interests.[11] With his theory, Rawls wants to give reasons for his conception of justice and show that it is preferable to competing conceptions like perfectionism, and especially to the utilitarianism of Bentham, Mill and Sidgwick.[12]

In addition to the contractualist method, Rawls uses a coherence theory for the rational foundation of his two principles of justice. In the literature, it is disputed which method for the rational grounding of morals takes precedence in his theory of justice.[13] The coherence model

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8 Ibid. 13, 46, 48. According to Rawls's famous statement the "principles of justice are chosen behind a veil of ignorance" (ibid.).

9 Ibid., 126-130.

10 Cf. the list ibid., 124.

11 Ibid., 16-17. In a publication from 1985 Rawls declares that it "was an error" in *A Theory of Justice* " (and a very misleading one) to describe a theory of justice as part of the theory of rational choice" (John Rawls, "Justice as Fairness: Political not Metaphysical", *Philosophy & Public Affairs*, Vol. 14 (1985): 237 [fn. 20]).

12 Rawls, *A Theory*, VII-VIII, 15.

13 Cf. Norbert Hoerster, "John Rawls' Kohärenzmodell der Normenbegründung," in Otfried Höffe, *Über John Rawls' Theorie der Gerechtigkeit*, ed. Otfried Höffe (Frankfurt am Main: Suhrkamp, 1977). Karl Ballestrem argues that Rawls does not have two different theories of justifying norms (Karl G. Ballestrem, "Methodologische Probleme in Rawls' Theorie der Gerechtigkeit," in Otfried Höffe,

of justification is inspired by the ideal of a consistent system without contradictions.[14] Its starting points are our "considered judgments" or "considered convictions of justice."[15] In the ideal case, these are the result of the exercise of our "moral capacities" and especially of our "sense of justice." In order to get to them, "we can discard those judgments made with hesitation, or in which we have little confidence" and those which are "likely to be erroneous or to be influenced by an excessive attention to our own interests."[16] As examples for "considered judgments" Rawls mentions the judgments "that religious intolerance and racial discrimination are unjust."[17] According to the coherence model of justification, the considered judgments or convictions are regarded as "provisional fixed points which we presume any conception of justice must fit."[18] A contradiction between these convictions and a principle of justice causes doubt in the validity of the principle. But such a contradiction can also lead to a questioning and revision of our considered judgments or convictions.

The considered judgments, which Rawls mentions as examples, do not lead to contradiction. Rather, they are included in his first principle of justice which reads in its final formulation in *A Theory of Justice*: "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for

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Über John Rawls' Theorie der Gerechtigkeit, ed. Otfried Höffe (Frankfurt am Main: Suhrkamp, 1977), 118). According to Robert Paul Wolff, who investigates the logical status of the argument in *A Theory of Justice*, Rawls gives besides his concept of rational choice and besides his rational reconstruction of considered moral convictions a third answer: "Rawls also has an extremely powerful commitment to an Idealist conception of the harmonious and organic society." According to Wolff, the logical status of Rawls' theory is not clear (Robert Paul Wolff, *Understanding Rawls. A Reconstruction and Critique of A THEORY OF JUSTICE* (Princeton: Princeton University Press, 1977), 180-191, 190).

14 Cf. Hoerster, "John Rawls' Kohärenzmodell der Normenbegründung," 74, and Susanne Hahn, *Überlegungsgleichgewicht(e). Prüfung einer Rechtfertigungsmetapher* (Freiburg (Breisgau)/München: Alber, 2000).

15 Rawls, *A Theory*, 19, 47.

16 Ibid., 47.

17 Ibid., 19, cf. 206.

18 Ibid., 20.

all."[19] This principle doesn't display any innovative character. Neither does Rawls claim such a character for it. Rather, the principle declares that the right of the individual to the classical liberal civil and human rights is a command of justice. With this Rawls reverts to the modern bills of rights. As these also contain the liberty of religion and conscience, they coincide like Rawls's first principle with his judgment that religious intolerance is unjust. Contrary to the older bills, Rawls's first principle also postulates the political liberties of the citizens of a democracy like "the right to vote and to be eligible for public office."[20]

If the principles of justice can be substantiated by both the contractualist theory and coherence theory method, they are regarded as well justified. On the one hand, the contractual situation has to be determined in such a way that it consists in terms and conditions that are reasonable and strong enough that they lead to principles.[21] On the other hand, the principles derived from it have to correspond to our considered judgments or convictions of justice, which can be reversed and modified if needed:

> This state of affairs I refer to as reflective equilibrium. It is an equilibrium because at last our principles and judgments coincide; and it is reflective since we know to what principles our judgments conform and the premises of their derivation.[22]

This quote shows that Rawls combines his two methods for the rational foundation of norms in the concept of the reflective equilibrium. The term "equilibrium" expresses the coherence between the considered judgments of justice and the principles. The term "reflective" refers to the detailed knowledge of this coherence as well as to the terms and conditions of the original position from which the principles are derived.

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[19] Ibid., 302.

[20] Ibid., 61, 221-228; cf. 228-234.

[21] Rawls declares as his ideal that the acknowledgement of the principles "is the only choice consistent with the full description of the original position" (ibid., 121). Cf. the arguments leading to the two principles of justice (ibid., 150-161).

[22] Ibid., 20.

Though Rawls concedes that the reflective equilibrium can be destabilized by new considerations, the justification process has come to a temporary end with it. The reflective equilibrium unites the contractualist and coherence theory method in a way that leads to "the mutual support of many considerations, of everything fitting together into one coherent view."[23]

1.2. Rawls's Eegalitarianism: His General Conception of Justice and the Difference Principle

Though frequently contested in the literature, Rawls's conception of justice is clearly egalitarian.[24] An egalitarian conception of justice negates the natural and social inequalities of people and aims at establishing equality in the arithmetic or numeric sense among them.[25] From this perspective, distributions are *ceteribus paribus* better, if they are more egalitarian. That Rawls should be understood as a representative of egalitarian thought is seen most clearly in his general conception of justice and its anthropological basis, as well as in his central principle of justice he calls the difference principle.[26]

Rawls understands human society as a "system of cooperation" in which the central conflict revolves around the question, how the goods

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[23] Ibid., 21.

[24] As this subchapter will show, Rawls's difference principle justifies social and economic inequalities. This is one reason why Rawls is often not regarded as an egalitarian. Cf. detailed references to the literature on Rawls's contested classification as an egalitarian (Krebs, Angelika, *Arbeit und Liebe. Die philosophischen Grundlagen sozialer Gerechtigkeit* (Frankfurt am Main: Suhrkamp, 2002), 109).

[25] According to Aristotle, equality in the arithmetic or numeric sense exists if two people have the same amount of the same good or if two objects have the same weight (Aristotle, *Politics*, trans. Harris Rackham, Aristotle in twenty-three volumes, XXI (Cambridge/London: Harvard University Press, 1977), 374-75, 1309 b 29-34).

[26] In addition, Rawls's egalitarianism is confirmed by his first principle of justice which calls for "*equal* liberties," and as well by the second part of his second principle which demands a "fair *equality* of opportunity" (Rawls, *A Theory*, 302); "Equal Liberty" is the title of chapter IV of *A Theory of Justic*e, which mainly deals with the details of Rawls's first principle).

which are produced by cooperation should be distributed. Accordingly, the primary subject of the two principles of social justice is "the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation."[27] Rawls's theory of social justice doesn't concern a concrete or single distribution of goods but the whole institutional constitution of a society which he calls its "basic structure."[28] The basic structure distributes determined social values or "primary goods"[29] of which people would rather get more than less. The two principles of justice relate to exactly these distributional problems. They are a "special case of a more general conception of justice that can be expressed as follows.

> All social values—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage.[30]

This general conception of justice constitutes the core of the particular principles that Rawls tries to substantiate in his theory. The anthropological basis of this conception is a moral and therefore also normative concept of the person. Moral persons

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[27] Ibid. 7, 4. Rawls understands justice as the "first virtue of social institutions" (ibid., 3).

[28] The basic structure of the society is composed out of its most important institutions: "By major institutions I understand the political constitution and the principal economic and social arrangements. Thus the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family…Taken together as one scheme, the major institutions define men's rights and duties and influence their life-prospects, what they can expect to be and how well they can hope to do." (ibid., 7)

[29] Rawls defines primary goods as "things every rational man is presumed to want. These goods normally have a use whatever a person's rational plan of life. For simplicity, assume that the chief primary goods at the disposition of society are rights and liberties, powers and opportunities, income and wealth." (ibid., 62, cf. 395-399)

[30] Ibid., 62.

> are distinguished by two features: first they are capable of having (and are assumed to have) a conception of their good (as expressed by a rational plan of life); and second they are capable of having (and are assumed to acquire) a sense of justice, a normally effective desire to apply and to act upon the principles of justice, at least to a minimum degree.[31]

Rawls moral concept of the person is the basis for the equality of the individuals in the initial choice situation, as well as "a sufficient condition for being entitled to equal justice."[32]

As Rawls's general conception of justice calls for a distribution of all social values that allots *everyone the same*,[33] it has to be understood as an egalitarian conception.[34] In a subsequent mental step, Rawls differentiates his general conception in respect to the distribution of income, wealth and other primary goods and modifies it to the difference principle. Despite this move he sticks to the general conception because one is only allowed to deviate from the strictly egalitarian conception if this is to "everyone's advantage." The

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[31] Ibid., 505.

[32] Ibid. Not everyone will agree with Rawls's fundamental anthropological conviction that all persons are equal as moral persons. According to Aristotle, for instance, people have an extremely different moral worth corresponding to the degree in which they can develop their ethical virtues and their prudence (*phronêsis*) and thus are able to perfect their character and their practical reason (cf. Manuel Knoll, *Aristokratische oder demokratische Gerechtigkeit? Die politische Philosophie des Aristoteles und Martha Nussbaums egalitaristische Rezeption* (München: Fink, 2009), chap. VI. 1). As incompatible fundamental anthropological convictions exist, no consensus about a proper interpretation of the "initial situation" can be reached (cf. fn. 7 of this paper).

[33] To "everyone the same" does not necessarily mean that in a distribution everyone gets allotted exactly the same social values or primary goods. It can also mean that everyone gets a bundle of goods which he considers as at least as good as the bundles that the others get.

[34] Rawls's general conception expresses a "*presumption* in favour of equality." It is a "substantive egalitarian principle which assumes that all departures from equality have to be morally justified." (Norman P. Barry, *An Introduction to Modern Political Theory*, Third Edition (Houndmills: Macmillan Press, 1995), 153, italics by Barry)

difference principle makes an "implicit reference to equal division as a benchmark."[35] The final statement of the difference principle in *A Theory of Justice* reads:

> Social and economic inequalities are to be arranged so that they are […] (a) to the greatest benefit of the least advantaged, consistent with the just savings principle.[36]

The difference principle allows certain inequalities of, for instance, power or wealth. But it holds these inequalities only to be justified if by them *everyone* is better off than before: "If certain inequalities of wealth and organizational powers would make everyone better off than in this hypothetical starting situation, then they accord with the general conception."[37] However, the difference principle in its final version doesn't talk about the benefit of "everyone" but only about "the least advantaged." As will made clear later on, for Rawls the benefit of "the least advantaged" is connected to the benefit of everyone.

The difference principle can be explained by a society with a division of labor, in which inequalities are permitted in order to create incentives to work more and to perform better. If these incentives lead to a growth of the sum of the generated goods, they can be distributed in a way that everyone is better off than in a society without incentives.[38] However, Rawls declares explicitly that the difference principle is a "strongly egalitarian conception in the sense that unless there is a distribution that makes both persons better off (limiting ourselves to the two-person case for simplicity), an equal distribution is to be

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35 John Rawls, *Political Liberalism*, expanded edition (New York: Columbia University Press, 2005), 16.

36 Rawls, *A Theory*, 302. The "just savings principle applies to what a society is to save as a matter of justice" (ibid., 288). Cf. the chapter on *The Problem of Justice between Generations* (ibid., 284-293).

37 Ibid., 62.

38 Cf. Peter Koller, "Die Grundsätze der Gerechtigkeit", in: Otfried Höffe (Hg.): *John Rawls, Eine Theorie der Gerechtigkeit*, ed. Otfried Höffe, series: Klassiker Auslegen, Vol. 15 (Berlin: Akademie, 1998), 47-48.

preferred."[39]

The phrasing of the difference principle raises the question which group of persons counts as the "the least advantaged." In the revised edition of *A Theory of Justice*, which Rawls worked on in the beginning of 1975 for the German edition of the book, a new paragraph is inserted which roughly defines this group:

> To fix ideas, let us single out the least advantaged as those who are least favored by each of the three main kinds of contingencies. Thus this group includes persons whose family and class origins are more disadvantaged than others, whose natural endowments (as realized) permit them to fare less well, and whose fortune and luck in the course of life turn out to be less happy, all within the normal range.[40]

Applied to the current German situation, one would think of a person whose parents live on welfare benefits (Harz IV), who doesn't have any specific gifts or talents, and who had more bad luck in life than average.

Rawls understands the difference principle, "strictly speaking," as "a maximization principle."[41] Therefore he distinguishes two cases in applying it. The first case is that in which the socioeconomic constitution of the society is set up in a way that "the expectations of the least advantaged are indeed maximized."[42] The socioeconomic constitution, which determines the distribution of income and wealth, is "perfectly just" if no "changes in the expectations of those better off can improve the situation of the worst off."[43] Though Rawls doesn't explain this state in more detail, it should be achieved if neither a higher nor a

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39 Rawls, *A Theory*, 76.

40 John Rawls, *A Theory of Justice*, Revised Edition (Cambridge: Belknap Press of Harvard University Press, 1999), 83. In the original edition Rawls already makes two suggestions to define "the least fortunate group" (Rawls, *A Theory*, 98).

41 Rawls, *A Theory*, 79.

42 Ibid.

43 Ibid.

lower taxation of the better off could increase the income of the state and thus raise the sum of the transfer payments for the benefit of the least advantaged.[44]

The second case is "that in which the expectations of all those better off at least contribute to the welfare of the more unfortunate. That is, if their expectations were decreased, the prospects of the least advantaged would likewise fall. Yet the maximum is not yet achieved. Even higher expectations for the more advantaged would raise the expectations of those in the lowest position."[45] Though such a socioeconomic constitution is not the best, Rawls designates it as "just throughout." On the contrary, an unjust socioeconomic constitution prevails, if the expectations of the better off are excessive: "If these expectations were decreased, the situation of the least favored would be decreased."[46]

Explaining the difference principle, Rawls limits himself "to the two-person case for simplicity," more precisely to the comparison of "the most favored representative man" to "the least advantaged man."[47] However, his supposition is that the expectations of all persons and social positions are "chain-connected: that is, if an advantage has the effect of raising the expectations of the lowest position, it raises the expectations of all positions in between. For example, if the greater expectations for entrepreneurs benefit the unskilled worker, they also benefit the semiskilled."[48] A judgment if an increase of the expectations of the better off is just or not depends therefore only on whether it improves the expectations of the least advantaged. It requires no comparison with the situation of a hypothetical equal distribution, which is called for by the general conception. In applying the difference principle one simply maximizes the situation of the least advantaged.[49]

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44 Ibid., 285-286.
45 Ibid., 78.
46 Ibid., 79.
47 Ibid., 76.
48 Ibid., 80.
49 Ibid., 75, 80.

Rawls's second principle of justice, which lays down when social and economic inequalities are justified, is composed of two parts. It consists not only of the difference principle but of the principle of fair equality of opportunity. Its final version in *A Theory of Justice* reads:

> Social and economic inequalities are to be arranged so that they are […] (b) attached to offices and positions open to all under conditions of fair equality of opportunity.[50]

Rawls distinguishes between fair and formal equality of opportunity. The latter is given if "all have at least the same legal rights of access to all advantaged social positions."[51] This principle alone doesn't produce the result that people with similar capabilities and skills have really similar life chances, because a person's membership in a certain social class strongly effects how good her chances in fact are, and how well she can use her legal rights. Merely formal equality of opportunity finally means inequality of opportunity, because children from privileged families have much better chances to get desirable and well-paid jobs than children whose parents live on welfare benefits. On the contrary, the principle of fair equality of opportunity demands "that positions are to be not only open in a formal sense, but that all should have a fair chance to attain them."[52] This means that those with the same level of talent and ability and the "same willingness to use them, should have the same prospects of success regardless of their initial place in the social system."[53] In applying this principle the education system, especially equal chances to get a good education, plays a primary role.[54]

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[50] Ibid., 302.

[51] Ibid., 72. Thomas Pogge criticizes: "Rawls's notion of formal equality of opportunity is rather vague" (Thomas W. Pogge, *Realizing Rawls* (Ithaka: Cornell University Press, 1989), S. 196).

[52] Rawls, *A Theory*, 73.

[53] Ibid.

[54] Ibid. Thomas Pogge objects to Rawls "that he offers no tenable specification of fair equality of opportunity at all" (Thomas W. Pogge, *Realizing Rawls* (Ithaka: Cornell University Press, 1989), 196).

In his theory, Rawls assigns the first principle of justice priority over the second and the principle of fair equality of opportunity priority over the difference principle. The priority of the first principle of justice over the second means that the basic liberties of the political system can only be limited if they would otherwise "interfere with one another" but not in order to create more welfare or to reduce socioeconomic inequalities.[55] Rawls sees in the priority of the basic liberties a central advantage of his theory compared to utilitarianism which—according to some scholars—allows the limitation of the liberties of some citizens in order to maximize the total sum of utility or satisfaction in a society.[56]

A Theory of Justice, first published in 1971, has been understood by some scholars, e.g. Axel Honneth, as the way in which Rawls tries to justify the timeless validity of the two principles of justice.[57] As a reaction to this, in his publications since the 80s Rawls emphasized that his conception of justice as fairness does not depend on "claims to universal truth" which he would "like to avoid."[58] Furthermore, he made it clear that his conception was framed to apply to what he called the basic structure "of a modern constitutional democracy."[59] However, a thorough reading of *A Theory of Justice* shows that the book doesn't claim that the principles of justice are "necessary truths or derivable from such truths."[60] Rather, Rawls asserted that of the "traditional views" his conception of justice "constitutes the most appropriate moral basis for a democratic society."[61]

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55 Rawls, *A Theory*, 42-44, 64, 244, cf. the second priority rule, ibid., 302-303.
56 Ibid., 3-4, 14, 22-27, 151-152, 156.
57 Axel Honneth, "Einleitung," in *Kommunitarismus. Eine Debatte über die moralischen Grundlagen moderner Gesellschaften*, ed. Axel Honneth, 3rd Edition, (Frankfurt am Main: Campus, 1995), 11.
58 Rawls, "Justice as Fairness: Political not Metaphysical," 223.
59 Ibid., 224.
60 Rawls, *A Theory*, 21.
61 Ibid., VIII.

2. Rawls's Rational Grounding for the Welfare State

2.1. Community of Cooperation or of Solidarity? Does Rawls in fact Justify the Welfare State?

In the introduction to the volume of essays on the welfare state that he edited in 2000, Wolfgang Kersting declares that in Rawls's writing one searches in vain for the rational grounding for the welfare state that the literature incessantly attributes to him.[62] Kersting maintains that Rawls left the problem of the rational grounding for the welfare state simply out of consideration.[63] According to his central argument, Rawls's principles of justice only aim at solving distributional problems between partners in cooperation. On the contrary, the addressees of the collective systems of security and of the provision of the welfare state—the unemployed, those unable to work, pensioners, the sick and the mentally and physically challenged—are not cooperation partners, as they are unable to provide for themselves.[64] According to Kersting, Rawls has merely developed rules for the community of cooperation but not for the community of solidarity. Rawls's difference principle is not of use as the principle of the welfare state.[65] Kersting wants to see the appraisal of Rawls as the political philosopher of Social Democracy to be reversed on grounds of what he calls a deficiency of Rawls's theory of justice.[66] Kersting's interpretation limits the scope of Rawls's theory of justice and decreases its worth for the contemporary capitalist societies, in which gainful employment and self-sufficiency are no longer the prevailing models.

Supporting his interpretation, Kersting mentions a quote of Rawls from a text that was published in 1980. The central point of this quote was already inserted in 1975 in the revised edition of *A Theory of*

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62 Kersting, "Einleitung," 31. Cf. the chapter *Differenzprinzip und Sozialstaatsbegründung* that contains in many paragraphs the identical text, Kersting, *John Rawls zur Einführung*, 90-95.
63 Kersting, "Einleitung," 33.
64 Ibid., 32.
65 Ibid., 31-32.
66 Kersting, *John Rawls zur Einführung*, 94.

Justice. In the quote Rawls declares that his conception of justice assumes the ideal notion

> that all citizens are *fully cooperating members of society* over the course of a complete life. This means that everyone has sufficient intellectual powers to play a normal part in society, and no one suffers from unusual needs that are especially difficult to fulfill, for example, unusual and costly medical requirements.[67]

In accordance with this and in connection with his definition of "the least advantaged," in 1975 Rawls declares that he wants to exclude "hard cases," "so that the questions of health care and mental capacity do not arise."[68] His intention is to focus on "relations among those who in the everyday course of things are full and active participants of society."[69] As reasons for this he mentions that the relations among the "citizens engaged in social cooperation" are the "first problem of justice" and that if the difference principle "fails for this case, it would seem to fail in general."[70]

To be sure, Kersting is right that Rawls developed his conception of justice on the basis of the idea "of a society as a fair system of cooperation over time, from one generation to the next."[71] But Kersting's argument raises the question of what Rawls holds to be "fully cooperating members of society." Rawls's statements on this concept are contradictory. On the one hand, he explains that the conditions a citizen has to meet in order to count as a fully cooperating member of society are clearly weaker than Kersting assumes. These conditions

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[67] John Rawls, "Kantian Constructivism in Moral Theory", *The Journal of Philosophy*, Vol. 77, No. 9 (1980), 546 (italics by M.K.); cf. Kersting, *John Rawls zur Einführung*, 94.

[68] Rawls, *A Theory of Justice*, Revised Edition, 83-84.

[69] Ibid., 84.

[70] Ibid.

[71] Rawls, *Political Liberalism*, 15; cf. Rawls, *A Theory*, 4. Rawls points out: "Fully to understand a conception of justice we must make explicit the conception of social cooperation from which it derives." (ibid., 9-10)

result from Rawls's moral concept of the person. According to this concept, every person is able to fully cooperate if she has "a capacity for a sense of justice and for a conception of the good" up to a minimum degree.[72]

On the other hand, Rawls defines a "fully cooperating member of society" by the unrestricted ability to work, as is typical for modern western work societies. In line with this meaning Rawls declares that after an illness or accident the aim "is to restore people by health care so that once again they are fully cooperating members of society."[73] In looking for the most appropriate conception of justice, Rawls wants to put such temporary disabilities aside as well as "permanent disabilities or mental disorders so severe as to prevent people from being cooperating members of society in the usual sense."[74]

Though Rawls's conception of justice as fairness relates to the normal case of citizens fully able to cooperate, it entails or renders possible solutions for those unable to provide for themselves. His idea of a fair social cooperation has as its basis the idea of reciprocity, especially the reciprocity of one's own contribution and one's own benefit.[75] However, he combines it with a model of intergenerational relationships which includes the members of society which are not yet or not any more capable of cooperating, "so that the benefits produced by everyone's efforts are fairly distributed and shared from one generation to the next."[76] Nevertheless, Rawls does not make it clear

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[72] Rawls, *Political Liberalism*, 19; cf. 183 and fn. 31 of this paper. In another article Rawls defines a "fully cooperating member of society" as "someone who can take part in, or who can play a role in, social life." (Rawls, "Justice as Fairness: Political not Metaphysical," 233)

[73] Rawls, *Political Liberalism*, 184.

[74] Ibid., 20.

[75] Ibid., 16. More precisely Rawls locates the idea of reciprocity, which he makes especially explicit in *Political Liberalism*, "between the idea of impartiality, which is altruistic (being moved by the general good), and the idea of mutual advantage understood as everyone's being advantaged with respect to each person's present or expected future situation as things are." (ibid., 16-17) Cf. ibid., XLII ff., 50, 54, as well as Rawls, *A Theory*, 14.

[76] Rawls, *Political Liberalism*, 16.

how the provision for the old who retire from the working life should be regulated in a just way. The sub-chapter of *A Theory of Justice* which deals with *The Problem of Justice between Generations* neither mentions the model of an inter-generational contract nor the issue of annuity insurance.[77] The central topic of the sub-chapter is rather the problem of how much a society should justify saving for the benefit of future generations. While discussing this, the thought of an inter-generational contract, according to which the respective future generation should pay the old-age pension of the preceding generation with their contributions to annuity insurance, doesn't enter Rawls's perspective.[78]

In the preface to the "revised edition" of *A Theory of Justice*, Rawls explains that in the meantime he has distinguished more strictly between a "property-owning democracy" and a "welfare state."[79] The former system strives for a "steady dispersal over time of the ownership of capital and resources by the laws of inheritance and bequest."[80] Contrary to the welfare state, it is not primarily concerned with protecting all citizens "against accident and misfortune" through "unemployment compensations and medical care." Though in his preface he expresses a clear preference for the "property-owning democracy," Rawls declares explicitly that welfare assistance "to those who lose out through accident or misfortune" "must be done."[81] Of his conception of justice he expects, as he states in *Political Liberalism*, that it "yields reasonable answers"—at least partly—"to the problem of

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77 Rawls, *A Theory*, sub-chapter 48, 284-293. In *Political Liberalism*, Rawls calls his statements concerning the problem of "our duties to future generations" in *A Theory of Justice* as "defective." (Rawls, *Political Liberalism*, 20. Cf. a solution of this problem, which Rawls holds to be better, ibid., 20 (fn. 22), and ibid., 273-274)

78 Rawls's even goes that far to claim: "It is a natural fact that generations are spread out in time and actual exchanges between them take place only in one direction" (Rawls, *A Theory*, 291). With the latter he means that "those who live later profit from the labor of their predecessors without paying the same price." (ibid.)

79 Rawls, *A Theory of Justice*, Revised Edition, S. XIV.

80 Ibid.

81 Ibid.

providing for what we may call normal health care."[82] The problem of illness and accident "can be dealt with, I believe, at the legislative stage when the prevalence and kinds of these misfortunes are known and the costs of treating them can be ascertained and balanced along with total government expenditure."[83]

Already in the sub-chapter of *A Theory of Justice* in which he enters more concretely into the details of the institutions of a just society or of its basic structure, Rawls proclaims that its government "guarantees a social minimum."[84] It does this "either by family allowances and special payments for sickness and employment, or more systematically by such devices as a graded income supplement (a so-called negative income tax)."[85] In addition the government has to take care that the principal of fair equality of opportunity is socially enforced. Besides the normal institutions "the government tries to ensure equal chances of education and culture for persons similarly endowed and motivated either by subsidizing private schools or by establishing a public school system."[86]

Rawls not only conceives of appropriate welfare state institutions for the just society but makes statements about its political system. The government is subdivided into four branches. Rawls devotes special attention to the "transfer branch" and the "distribution branch." The transfer branch which "guarantees a certain level of well-being and honors the claims of need" is responsible for ensuring the social minimum.[87] In consideration of a "just rate of savings" it fixes the total income of the least advantaged which is composed of earning plus

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82 Rawls, *Political Liberalism*, 21.
83 Ibid., 184.
84 Rawls, *A Theory*, 275.
85 Ibid.
86 Ibid.
87 Ibid., 276. According to Michael Walzer, who argues in *Spheres of Justice* for an "expanded American welfare state," the social good "welfare" should be distributed "to each according to his socially recognized needs." (Michael Walzer, *Spheres of Justice. A Defense of Pluralism and Equality* (New York: Basic Books, 1983), 90-91, cf. 84-91)

transfers.[88] In doing so the aim is, according to the difference principle, to maximize the expectations of the least advantaged. But this doesn't mean, as it might appear, a very high social minimum. Because if the proportional taxes on expenses and income were too high, it would have a detrimental effect on "the appropriate savings" and on the "economy efficiency" and thus reduce the expectations of the least advantaged.[89] On principle, taxation is a task of the distributive branch which not only collects the proportional taxes on expenses and income, but "imposes a number of inheritance and gift taxes, and sets restrictions on the rights of bequest."[90] The aim of the distribution branch is to favor a "wide dispersal of property" as well as to get the financial means which are necessary for the redistribution and the maintenance of the welfare state.[91]

2.2. Self-respect, The Principle of Redress and The Difference Principle—The Central Ideas of Rawls's Rational Foundation of the Welfare State

Rawls clearly constructs a just society as a welfare state. This raises the question of how the institutions of the welfare state can be derived from his principles of justice, and respectively, how they are rationally founded by his theory. Concerning the education system the answer has already been implied. The principle of fair equality of chances primarily calls for equal chances to get education. This requirement can be politically implemented by educational institutions that aim at making it possible for equally talented persons to have equal chances to get education. According to the difference principle, the distribution of the resources in the field of education should aim at improving the expectations of the least advantaged.[92]

An important deduction of the welfare state as a whole emerges

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88 Rawls, *A Theory*, 276-77, 303-04.
89 Ibid., 285-86.
90 Ibid., 277.
91 Ibid.
92 Ibid., 101.

from Rawls's general conception of justice, from which he develops his two principles. This conception calls for a distribution of all social values or primary goods according to which as a rule everyone should get the same. One of the primary goods which Rawls mentions in his general conception, which social bases are to be distributed equally, is "self-respect" or "self-esteem."[93] Self-respect is "perhaps the most important primary good." Rawls claims that his conception of justice as fairness "gives more support to self-esteem than other principles."[94] He defines self-respect first of all through "a person's sense for his own value, his secure conviction that his conception of the good, his plan of life, is worth carrying out. And second, self-respect implies a confidence in one's abilities, so far as it is within one's power, to fulfill one's intentions."[95] As a necessary precondition for realizing one's own conception of a good life, society has to provide the citizens at least with the social minimum. Without it, and without the necessary institutions of the welfare state, they cannot achieve self-respect. That his two principles of justice guarantee every citizen the social minimum and the freedom to realize their conception of a good life and thus their "highest-order interest," is for Rawls a strong argument for them.[96] In addition, he claims that through the priority of the basic liberties and "the public affirmation of the status of equal citizenship for all," his principles secure men's respect for one another and thus self-respect.[97]

For Rawls, men's respect for one another, which secures their sense of their own value and thus their self-respect, is expressed by a constitution that is ordered within the meaning of his two principles of justice. Because such a constitution is set up in a way that the contingencies of social origin and natural gifts cannot be exploited but result in a mutual benefit.[98] No one can claim it as a dessert to be born in

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93 Ibid., 62, 440.
94 Ibid., 440.
95 Ibid.
96 Rawls, *A Theory of Justice*, Revised Edition, 131, cf. ibid. 131-134.
97 Rawls, *A Theory*, 545, 178-79.
98 Ibid., 179.

a privileged family and thus to have a favorable starting position in life. Therefore a liberal conception of distributive justice tries to correct or compensate such undeserved advantages by demanding for a just society not only a formal but a fair equality of chances.[99] According to Rawls's intuitive view, the liberal conception still has a serious defect. That is, it allows the "distribution of income and wealth" to be "determined by the natural distribution of abilities and talents."[100] Those well endowed in this distribution cannot claim this lucky accident as a merit, neither can those who are born in a privileged family, because the "outcome of the natural lottery" is "arbitrary from a moral perspective."[101] Rawls even goes one step further and proclaims that no one "deserves the superior character that enables him to make the effort to cultivate his abilities…for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit."[102]

For Rawls, it "is one of the fixed points of our moral judgments that no one deserves his place in the distribution of natural assets any more than he deserves his initial starting place in society."[103] This judgment is central for his egalitarian conception of justice. Not only is his "principle of redress" derived from it but the closely linked difference principle. The principle of redress is "the principle that undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are to be compensated for."[104] The principle of redress is to be understood as an egalitarian principle, as it negates the undeserved inequalities between

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99 Ibid., 73.
100 Ibid., 73-74.
101 Ibid., 74.
102 Ibid., 104. In sub-chapter 48 of *A Theory of Justice* Rawls argues against the ethical principle that goods should be distributed according to moral merit or virtue (ibid., 310-315; cf. Michael J. Sandel's critique in *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), part II). This principle is central for Aristotle's political philosophy (cf. Knoll, *Aristokratische oder demokratische Gerechtigkeit?*). Therefore Rawls's claim that his approach to justice doesn't conflict with the tradition of Aristotle is very problematic (Rawls, *A Theory*, 10-11).
103 Rawls, *A Theory*, 311, cf. 104.
104 Ibid., 100.

people and aims at establishing equality among them as far as possible through state redistributions.

The difference principle is not identical with the principle of redress. But like the latter, its intension is to compensate for the undeserved social and natural inequalities and, especially, to mitigate "the arbitrary effects of the natural lottery."[105] If one wishes to set up the social system in a way that "no one gains or loses from his arbitrary place in the distribution of natural assets or his initial position in society without giving or receiving compensating advantages in return," one is "*led to* the difference principle."[106] According to the difference principle, those who "have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out."[107] The acknowledgement of the difference principle means the transition from a liberal to a democratic conception of distributive justice, which "treats everyone equal as a moral person."[108]

Rawls understands a just society as a market-based democracy in which the government raises the revenues "so that it can provide for the public goods and make the transfer payments necessary to satisfy the difference principle."[109] The demand to establish a welfare state with institutions, which redistribute income and wealth, can be derived from the difference principle and the closely linked principle of redress: "The difference principle represents, in effect, an agreement to regard the distribution of natural talents as in some respects a *common asset*."[110] The acknowledgement of the difference principle equals a consideration of the "greater abilities as a *social asset* to be used for the common

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105 Ibid., 74, 101.
106 Ibid., 102 (italics by M.K.).
107 Ibid., 101.
108 Ibid., 75.
109 Ibid., 278; cf. Rawls's statements on the market economy ibid., 270-284.
110 Rawls, *A Theory of Justice*, Revised Edition, 87 (italics by M.K.; the supplement "in some respects" was added in the revised edition, cf. Rawls, *A Theory*, 101).

advantage."[111] Because the difference principle represents an agreement to regard individual talents and abilities as a collective social good that has to serve the common advantage, it has to be understood as the principle of the welfare state. A further argument for this interpretation are Rawls's statements that the difference principle "provides an interpretation of the principle of fraternity" and that it "expresses the fundamental meaning" of fraternity "from the standpoint of social justice."[112] Fraternity implies a "sense of civic friendship and social solidarity" and "is held to represent a certain equality of social esteem."[113]

Against this interpretation of the difference principle as the principle of the welfare state one could still object with Kersting that it does not apply to the citizens that can't provide for themselves but only to those "engaged in social cooperation."[114] The reply to this objection is based on the intuitive moral judgment from which Rawls derives the difference principle, and the principle of redress. If contingent natural and social advantages call for compensation, this moral demand has to be consistently applied to undeserved disadvantages like illnesses, disablement for work or impediments. The argument that natural and social accidents are allowed to influence the social patterns of distribution only conditionally, extends by its logic beyond the community of cooperation to the welfare state community of solidarity. One important reason why, for Rawls, the difference principle, which

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[111] Rawls, *A Theory*, 107 (italics by M.K.). In addition to this Rawls states: "The two principles are equivalent […] to an undertaking to regard the distribution of natural abilities as a *collective asset* so that the more fortunate are to benefit only in ways that help those who have lost out" (ibid., 179; italics by M.K.). In the similar formulations mentioned above Rawls states two times that *the distribution* of natural talents and abilities are considered as *common* respectively *collective asset*. Once he declares merely that the abilities (themselves) are regarded as a *social asset*. From the perspective of scholars like Thomas Pogge and Martin Rechenauer, for who this difference is of great importance, one could reproach Rawls that his diverging formulations cause misunderstandings (Pogge, *Realizing Rawls*, 74, and Martin Rechenauer, "Kontraktualistische Gerechtigkeitstheorien und die Idee eingebetteter Selbste", in *Archiv für Rechts- und Sozialphilosophie*, 95/2009, Heft 1, 72).

[112] Rawls, *A Theory*, 105-106.

[113] Ibid., 105.

[114] Rawls, *A Theory of Justice*, Revised Edition, 84.

rationally grounds this community in the first place, would be chosen in a fair initial situation of choice, is that it ensures that the worst possible position in society is as bearable as possible.[115]

3. The Pluralism and Opposition of Considered Convictions of Judgment. Are The Principle of Redress and The Difference Principle Actually Just?

Until now, Rawls's conception of justice as fairness has found as many devotees as severe critics. According to Robert Nozick's influential critique of Rawls's notion of natural gifts as common or collective assets, the difference principle requires a "head tax on assets and abilities" and "treats people's abilities and talents as resources for others."[116] In doing this, the difference principle is not taking "seriously the distinction between persons," and is open to the same criticism Rawls levels at utilitarianism.[117] For Nozick, Rawls was only able to avoid the above mentioned objections if he held that between the people and their talents and abilities were an essential difference. But this reading raises the question whether a conception of the person makes sense that attributes "*everything* noteworthy about the person completely to certain sorts of 'external' factors."[118] Nozick's criticism of an understanding of the self which exists independently from its particular qualities and goals was developed at length by Michael Sandel.[119] More important though is Sandel's objection that even if it were possible to deny individuals their privileged claim to their natural gifts, this would not amount to society's claim on them. If there were no strong moral bonds of community and

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[115] Rawls, *A Theory*, 152-157.

[116] Robert Nozick, *Anarchy, State, and Utopia*, (Oxford: Basil Blackwell, 1974), 228-29.

[117] Ibid., 228, cf. Rawls's critique of utilitarianism fn. 56 of this paper.

[118] Ibid., 214 (Italics by R.N.). Presumably as a reaction to Nozick's critique, in the revised edition of *A Theory of Justice* Rawls proclaims: "To be sure, the more advantaged have a right to their natural assets, as does everyone else; this right is covered by the first principle under the basic liberty protecting the integrity of the person" (Rawls, *A Theory of Justice*, Revised Edition, 89).

[119] According to Sandel, Rawls understands the "self as 'essentially unencumbered'" (Sandel, *Liberalism and the Limits of Justice*, 87, cf. Michael Sandel, "The procedural Republic and the Unencumbered Self", in *Political Theory*, 1 (1984)). Cf. a similar critique of Rawls's conception of the person Walzer, *Spheres of Justice*, 260-61.

solidarity between individuals, society's claim to their natural gifts would be as random and arbitrary as that of the individuals.[120]

While the demand for state redistributions implied by the difference principle and the principle of redress should be applauded by those who belong to the group of the least advantaged, many of the most talented and able citizens must feel treated unjustly by these principles. Even if these citizens conceded that from a moral perspective they didn't deserve their gifts, they could nevertheless insist that they are the legitimate owners of these gifts.[121] Because they had a claim to their natural gifts, they had as well a justified claim to the income they could achieve through exercising them. In addition, they could maintain that contrary to many other people they made great efforts and devoted valuable life time in order to develop and cultivate their potentials.[122] Even if these achievements were favored by undeserved family and social circumstances, they would nevertheless be a legitimate source for corresponding claims. For these reasons, proportional taxes on expenses and income to finance state redistributions are unjust.[123]

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[120] Sandel, "The procedural Republic and the Unencumbered Self", 89-90. Cf. a defense of Rawls against Nozick's and Sandel's critique Pogge, *Realizing Rawls*, 63-108, and Rechenauer, "Kontraktualistische Gerechtigkeitstheorien und die Idee eingebetteter Selbste," who defends Rawls chiefly against Sandel and Taylor.

[121] For Nozick, the people have a claim to their natural gifts even though they don't deserve them: "It is not true, for example, that a person earns Y (a right to keep a painting he's made, praise for writing *A Theory of Justice*, and so on) only if he's earned (or otherwise *deserves*) whatever he used (including natural assets) in the process of earning Y. Some of the things he uses he just may *have*, not illegitimately. It needn't be that the foundations underlying desert are themselves deserved, *all the way down*." (Nozick, *Anarchy, State, and Utopia*, 225; italics by R.N.)

[122] Rawls regards earnings in order to cover the costs for „training and education" as justified (Rawls, *A Theory*, 102, 315).

[123] Nozick proclaims: "Taxation of earning from labor is on a par with forced labor. Some persons find this claim obviously true: taking the earnings of *n* hours labor is like taking *n* hours from the person; it is like forcing the person to work *n* hours for another's purpose" (Nozick, *Anarchy, State, and Utopia*, 169). The entitlement theory of justice Nozick advocates in *Anarchy, State, and Utopia* is a clear antithesis to Rawls's conception of justice: "From the point of view of an entitlement theory, redistribution is a serious matter indeed, involving, as it does, the violation of people's rights." (ibid., 168; cf. Barry, *An Introduction to Modern Political Theory*, 173-74)

The judgments of the above mentioned non-egalitarian reasoning can, as well, be seen as considered convictions of justice as those judgments from which Rawls derives the difference principle and the principle of redress.[124] This antithesis between the convictions of justice, about the consequences of natural gifts, poses a serious problem to Rawls's coherence theory method. According to this method, the considered convictions have to coincide with the principles, if they are to count as well founded. However, the problem is that the difference principle coincides with the mentioned convictions as much as it does not coincide with them. Thus, it cannot be founded on a consensus. To this interpretation one might object that the above mentioned judgments of the most able and gifted were not pronounced from an impartial perspective, but from their self-interest. However, is it not the case that the perspective and the self-interest of the least favored lies at the basis of the considered moral judgments from which Rawls derives the difference principle and the principle of redress? Isn't even the minority of all considered convictions truly impartial and, thus, exempt from the relativism of social, historical and cultural value judgments?[125] At any rate, the confrontation of Rawls's egalitarian intuitive convictions of justice with the above mentioned non-egalitarian ones shows that within contemporary western democracies there is an irresolvable pluralism and opposition of considered convictions of justice. Contrary to Rawls's assertion, in a pluralist society his conception of justice can never become the subject of an "overlapping consensus."[126]

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[124] In the original edition of *A Theory of Justice* Rawls declares: "It seems to be one of the fixed points of our *considered judgements* that no one deserves his place in the distribution of native endowments, any more than one deserves one's initial starting place in society." (Rawls, A Theory, 104; italics by M.K.)

[125] As appropriate examples for considered judgments that can reach a consensus today, Rawls mentions that "that religious intolerance and racial discrimination are unjust." (Rawls, *A Theory*, 19, cf. 206). On the contrary, in the Christian middle ages it was considered appropriate to prosecute people with a deviating belief as heretics and to fight against them. Similarly, for a long period in the modern times it was regarded justified to hold slaves and to discriminate against Jews.

[126] Cf. Rawls's idea of an overlapping consensus Rawls, *Political Liberalism*, 9-10, 15, 36 ff., 133-172.

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