

The “Basic Structure of Society” in the Political Philosophy of John Rawls

[*Politeia*, 2008 27(1):28-46]

Prof D.F.M. Strauss
Dean's Office
Faculty of the Humanities
UFS, P.O. Box 339
Bloemfontein 9300
South Africa
(dfms@cknet.co.za)

Abstract

The main contribution of Rawls to political philosophy is found in his *Theory of Justice*. On the basis of a thorough and encompassing investigation of all the main works of Rawls this article argues that the *Theory of Justice* is crucially and fundamentally dependent upon what Rawls designates as the *primary subject* of justice, namely the *basic structure of society*. The original position and the veil of ignorance turned out merely to claim an absence of knowledge regarding the position of any participant within society, but it did not intend to eliminate the basic structure of society with all its ‘positions’. In fact, it is argued that the idea of a differentiated and stratified society forms the ultimate foundation of Rawls's contract theory. In order to understand his orientation it was therefore necessary to enter into a more detailed analysis of his notion of the *basic structure of society*. In doing this certain crucial ambiguities in the thought of Rawls came to light, particularly in connection with his rejection of (unspecified) universal basic principles and the limited scope of particular principles of justice and their correlated subjects. It is argued that Rawls here closely approximates the distinction between *modal laws* (principles) – holding for all possible kinds of entities, and *type laws* – holding for a limited class of entities only. Finally it is shown that in spite of the holistic (universalistic) inclination of his view of the *basic structure of society* one does find an alternative line of thought in his works, one that could be compared to the views of Althusius (17th century) as well as the two prominent figures in the Netherlands of the 19th and early 20th centuries, Groen van Prinsterer and Abraham Kuyper (not to forget Habermas). The way in which this article unveils fundamental tensions and ambiguities in Rawls's thought is indeed novel and not found in the critical literature, not even in the recent *The Cambridge Companion to Rawls*.

The central role of the *basic structure of society* in Rawls's thought¹

Talisse quotes the philosopher Thomas Nagel saying that John Rawls is “the most important political philosopher of the twentieth century (Talisse, 2001:5). It seems therefore worth-while to investigate a key conception in the political thought of such an eminent thinker.

On the one hand John Rawls's theory of justice is indebted to diverse sources in (political) philosophy and on the other it produced a configuration in which many key elements within this tradition are transformed. From Greek political thinking he inherited his view of justice as a moral virtue. The awareness of norms and principles leads him to a characterization of the human being as a *moral person* – closely related to the Kantian view of moral autonomy and the categorical imperative (the issue of constructivism). From early modern theories of a social contract he takes over the idea that the initial agreement is hypothetical and non-historical (PL:271). The way in which Rawls deviates from the radical atomistic (individualistic) assumptions of modern contract theories (Hobbes, Pufendorf, Locke, Rousseau and Kant) is found in his assumption that the contracting parties are heads of families (see Rawls, 1978: 128, 146): “For example, we can assume that they are heads of families and therefore have a desire to further the well-being of at least their more immediate descendants” (TJ:111).²

This deviation points in another direction. Rawls does not want to proceed merely on the basis of *individuals* in his theory of justice, for repeatedly and emphatically he claims that the *basic structure of society* is the *primary subject* of justice. Throughout his argumentation this structure is acknowledged³ – almost always understood as being the subject of justice. Yet it does happen that he reverts this relation of priority, for example when he states that a “theory of justice depends upon a theory of society” (Rawls, 1978:84).

The importance of the basic structure of society is also seen from the fact that both the *veil of ignorance* and the *original position* intend to strip those participating in the contract from any knowledge of their particular *position* within society. This provision only makes sense if the entire argument rests on the background assumption that this basic structure has room for diverse positions. His contract theory therefore seems to be “well-informed” by background assumptions regarding the basic structure of society, since the latter underlies his emphasis that participants should not know anything about their position in it.

Before the contract there are no “principles of justice” in force. Justice is also not simply an extension from an individual to society as a whole, because it can only emerge from a joint decision by rational individuals: “Instead of supposing that a conception of right, and so a conception of justice, is simply an extension of the principle of choice for one man to society as a whole, the contract doctrine assumes that the rational individuals who belong to society must choose together, in one joint act, what is to count among them as just and unjust” (CP:132).⁴ Not having knowledge of one's position does not entail that the structured multiplicity of possible positions within the social system are *eliminated* as well, because this “basic structure of society” is the presupposition of the entire argument.

No one deserves his greater natural capacity nor merits a more favorable starting place in society. But, of course, this is no reason to ignore, much less to eliminate these distinctions. Instead, the basic structure can be arranged so that these contingencies work for the good of the least fortunate. Thus we are led to the difference principle if we wish to set up the social system so 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 (TJ:87)

What is assumed about society in the background becomes manifest in the two principles of justice emerging from the contract (that which Rawls “believe[s] would be agreed to in the original position” – TJ:52). The first principle of justice embodies the idea of basic (free and equal) liberties: “First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.” And the second is specified as: “Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all” (TJ:53).⁵ In the *Preface* to the revised edition of *Theory* Rawls succinctly formulates his ripened conception by referring to the “the principle of the equal liberties and the principle of fair equality of opportunity” (*Preface to Revised Edition*, TJ:xiv).

It is clear that the entire contract theory and its accompanying (agreed upon) principles of justice presuppose the underlying idea of the basic structure of society, i.e. of a differentiated society with its inherent social and economic stratification.⁶ This idea is frequently articulated by employing the phrase: a *well-ordered society*. What is also intimately connected to these ideas is his notion of the *primary goods* of society, for the latter concerns both his principles of justice and their implication for the basic structure of society. He actually differentiates between two domains of application: “... the two principles of justice assess the basic structure of society according to how its institutions protect and assign some of these primary goods, for example, the basic liberties, and regulate the production and distribution of other primary goods, for example, income and wealth” (PL:309). His intention is to account for the way in which a well-ordered society is “effectively regulated by a shared conception of justice”:

The publicity of the rules of an institution insures that those engaged in it know what limitations on conduct to expect of one another and what kinds of actions are permissible. There is a common basis for determining mutual expectations. Moreover, in a well-ordered society, one effectively regulated by a shared conception of justice, there is also a public understanding as to what is just and unjust. Later I assume that the principles of justice are chosen subject to the knowledge that they are to be public (§23). This condition is a natural one in a contractarian theory (TJ:49).⁷

The works and articles published by Rawls are generally seen as making a contribution to *political philosophy* – but they do not reflect any in-depth analysis of issues belonging to the domain of legal philosophy. For example, the word *fair/fairness* employed by Rawls in the phrase “justice as fairness” is not related to the legal or jural context of its semantic domain (including synonyms such as *just*, *reasonable*, *impartial*, *evenhanded* and *non-discriminatory*). His aim is rather to develop a conception designated as “justice as fairness”: “The central ideas and aims of this conception I see as those of a philosophical conception for a constitutional democracy” (*Preface for the Revised Edition*, TJ:xi). His emphasis on *free and equal moral persons* rather shows an affinity with the Kantian idea of *moral autonomy* – where being a moral person entails “having a conception of their good and [being] capable of a sense of justice” (see TJ:17). A similar remark applies to his use of the word *justice* itself, because one does not find a systematic analysis of the relation between law and morality and in particular what is known as justice in the context of

legal ethical principles or *principles of juridical morality* (such as *fault, bona fides, good faith, and equity*).⁸

It seems to be crucial for Rawls that his political philosophy is built upon an understanding of the “principles” or “conceptions” of “justice” and what is primarily correlated with them, namely the *basic structure of society*. Let us therefore proceed by conducting a more detailed analysis of this perspective.

“Justice” and its “primary subject”

We start with an explanation given by Freeman:

Rawls undertakes to show how citizens in a well-ordered society of justice as fairness can come to acquire a *sense of justice*, a disposition to act not simply according to, but also for the sake of justice, as defined by the principles of justice and the legal and social norms that satisfy them (Freeman, 2003:24).

The closing section of this quotation construes a correlation between “justice” and the assumption that “legal and social norms” may “satisfy” the former. A first observation is that Rawls in general always *directly* relates *justice* (or: *principles / conceptions of justice*) to something *subject* to it – in terms of the focus of our current interest: the *basic structure of society*. Indirectly one may of course argue that the arrangement within the basic structure does conform (or does not conform) to the regulating *principles* or *conceptions of justice*. Yet putting alongside each other legal norms and social norms is problematic in a different sense, because Rawls only once employs the phrase “social norms” in a footnote found on pages 442-443 of TJ: “Thus justice as fairness has the characteristic marks of a natural rights theory. Not only does it ground fundamental rights on natural attributes and distinguish their bases from social norms, but it assigns rights to persons by principles of equal justice, these principles having a special force against which other values cannot normally prevail. Although specific rights are not absolute, the system of equal liberties is absolute practically speaking under favorable conditions.”

However, Rawls does not hesitate to refer to “social justice” as an alternative expression for the more generally employed term “justice”. It appears that the phrase “social justice” is normally related to social arrangements pertaining to the division of advantages and the proper distributive shares,⁹ while the term “justice” without any qualification normally intends to designate what he has in mind with his first principle of justice.

The first specification of what is actually meant by Rawls when he employs the phrase under discussion is found early in TJ. It is articulated by explicitly distinguishing between persons who are capable of behaving *just* or *unjust* and institutions and social systems that are said to be *just* or *unjust*.¹⁰ However, his topic is *social justice* which is concerned with the *basic structure of society*, i.e. its major institutions that are responsible for the distribution of fundamental rights and duties as well as the “division of advantages from social cooperation” (TJ:6). He now proceeds to explain what he understands the “major institutions” of society to be:

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 are examples of major social institutions (TJ:6)

From this quotation it is clear that the *social system* or the *basic structure of society* embraces more than merely the major “political” and “economic” institutions of society, for explicit mention is made of “the monogamous family” (reminding us of the *heads of families* participating in the social contract). Yet he is hesitant to ascribe an unqualified universality to the regulating role of justice. His constructivist¹¹ approach, proceeding from justice as fairness, does not assume “universal first principles having authority in all cases.”¹² In fact his remarks evince an awareness of structural differences within a specific society, as well as between different societies: “They do not apply to all subjects, not to churches and universities, or to the basic structures of all societies, or to the law of peoples” (CP:532).¹³

The “structure” of the basic structure of society

Although Rawls normally does not use a qualifying term when *justice* is at stake, such qualifying terms do emerge as soon as he focuses on structural differences within a particular society, for then the initial reference to social justice is expanded in the use of a phrase like “political justice”: “Typically, a constructivist doctrine proceeds by taking up a series of subjects, starting, say, with principles of political justice for the basic structure of a closed and self-contained democratic society” (CP:532). What is unclear and ambiguous in his mode of speech is the relatively *undifferentiated* way in which he frequently employs the idea of *justice* and the (relatively differentiated) correlated *subjects*.

However, also what is considered to be *subject* to “justice” appears to be portrayed in questionable terms. The “principles of justice” seem to be capable of expanding their scope by being adoptable to different kinds of subjects: “Rather, they are constructed by way of a reasonable procedure in which rational parties adopt principles of justice for each kind of subject as it arises” (CP:532). At the same time he applies the whole-parts relation to society (to the “social structure”). The formulation of principles of justice “presupposes that, for the purposes of a theory of justice, the social structure may be viewed as having two more or less distinct parts, the first principle applying to the one, the second principle to the other” (TJ:53). Suddenly the *social system* is said to display different aspects – in the sense that what usually is designated as the domain of political justice represents one aspect while social and economic relations constitute the other aspect.¹⁴ In a different context another view is advanced, namely when he characterizes the *basic structure of society* as the primary subject of “political justice.”¹⁵

At this point it should be noted that the political philosophy of Rawls indeed exhibits the influence of conflicting views of society, for on the one hand he wants to maintain continuity with *atomistic* early modern theories of the social contract, evident in his construction of an a-historical, hypothetical “original position” covered by a “veil of ignorance,” and on the other his emphasis on the (pre-supposed) *basic structure of society* and on society as a *social system*¹⁶ alternatively opts for a *holistic* (or: universalistic) view.¹⁷ The effect of this ambiguity is that his understanding of *state* and *society* often exchange roles for frequently society itself is depicted as being *democratic*. This leveling of structural differences results in the portrayal of citizenship to *society* and no longer merely to the state.¹⁸ It is therefore not surprising that the common contemporary practice to refer to *democratic societies* is also amply present in Rawls's thought.¹⁹

The underlying notion of the social system, understood in terms of the whole-parts relation, dictates an encompassing societal assignment of “rights and duties within the basic institutions of society”²⁰ and it is consistent with an embracing understanding of citizenship exceeding the boundaries of the political community as such, for Rawls without hesitation speaks of citizenship within the basic structure of society.²¹ The conception of the *basic structure of society* increasingly turns out to be an encompassing whole embracing its (subordinate) parts, manifest in its “political and social institutions”.²² Seen from this vantage point it should not be surprising that subordinate roles are assigned to specific institutions by the *basic structure of society*. For example, Rawls sets out to investigate “a particular political conception of justice” by “looking at the role that it assigns to the family in the basic structure of society” (CP:595). What is of particular significance here is that a “political conception of justice” assigns a role to the family in the basic structure²³ and also (on the same page) that Rawls straight-forwardly asserts that the “family is part of the basic structure.”

Rawls holds the view that the equal liberties required by the first principle precedes the way in which the *basic structure of society* arranges the inequalities of wealth and authority.²⁴ He consistently asserts “the priority of the first principle over the second” (PL:291) and in addition he defends a serial order (or prioritization) prevailing in the way in which principles are successively realized, even combining the quality of being *absolute* and *holding without exception* to those principles earlier in the ordering:

A principle does not come into play until those previous to it are either fully met or do not apply. A serial ordering avoids, then, having to balance principles at all; those earlier in the ordering have an absolute weight, so to speak, with respect to later ones, and hold without exception (TJ:38).

Justice: universal or limited in scope?

We have seen that proceeding from justice as fairness Rawls does not assume “universal first principles having authority in all cases” (CP:532) and our last quotation highlighted his conception regarding the successive realization of principles of justice where former principles have “an absolute weight.” Since Rawls employs the term “just” in a way that is intimately related to “justice” – for instance when he speaks of *just institutions* (CP:94, 105) or *unjust institutions* (CP:125) – it is worthwhile to compare the scope of “just” and “justice.” Whereas for Rawls justice does not apply universally, we have noted that what is just or unjust at least cuts across laws, institutions, the social system, actions, decisions, judgments, imputations as well as the attitudes and dispositions of persons and even persons themselves.²⁵

Clearly, the opposition between *just* and *unjust* encompasses different *kinds* of entities, configurations and properties. In this regard it closely approximates the equally familiar contrary between *legal* and *illegal*. Principles of justice, by contrast, have the *basic structure of society* as their primary subject, and in this sense their scope is restricted to only one *kind* or *type* of entity – the *basic structure of society*. In terms of Rawls's own emphasis on the strict correlation between “principles of justice” and their primary *subject*, he is on the brink of discovering a number of fundamental *ontological* distinctions operative in the history of Western scholarship.

The first one that is already evident in his own thought is the strict correlation between *law* and *subject* (a principle and what is subjected to it). A law or a principle always *determines* and *delimits* what is subjected to it.²⁶ The second insight concerns the nature and scope of the different *aspects* of reality – such as the physical aspect,

jural aspect, the logical-analytical aspect, the social aspect or the economic aspect. We observed that Rawls holds the view that the *social system* displays different aspects where political justice represents one aspect while social and economic relations constitute another.²⁷ In the third place his remarks about the limited scope of principles of justice, lacking an unqualified universality, approximates an insight into the dimension of many-sided (natural and societal) entities.²⁸ The distinction between aspects and many-sided entities may be combined with the first one by distinguishing between *modal laws (modal principles)* and *type laws (type principles)* – where both kinds of laws hold for correlating subjects. These distinctions may be elucidated with reference to the domain of physical nature and the domain of human interrelations.

In ancient Greece and during the medieval period, it was believed that the laws governing entities on the earth are *different* from those governing celestial bodies. Incorporated in this view was the conviction that *motion* can only be explained through direct ‘contact’ between bodies – ‘pushing’ each other so to speak. But then Newton introduced his law of gravity, positing the idea that entities anywhere in the universe attract each other according to a force directly proportional to their respective masses and indirectly proportional to the square of the distance between them. The force of gravity exercises its effect despite the fact that the attracting bodies may be separated by a vast empty space. Suddenly it appeared that Newton’s formulation brings to expression a physical law that holds universally for all physical entities, locally and in outer space.²⁹ The physical *function, mode* or *aspect* of reality thus has an unrestricted (universal) scope, preferably captured by saying that as *mode of existence* it evinces *modal universality*.³⁰ Von Weizsäcker lucidly explains what the *modal universality* of the physical aspect is all about when he says: “Quantum theory, formulated sufficiently abstract, is a universal theory for all classes of entities” (Von Weizsäcker, 1993:128).

When we broaden our perspective by directing our theoretical attention at other modal aspects or functions of reality – such as the social function, the economic facet or the jural mode – we are still not involved in the *classification of entities* according to the *kinds* or *types* to which they belong. The mere distinction between *economic* and *un-economic* actions, for example, is not specified in any *typical* way.³¹ Both a state and a business enterprise can *waste their money* (and thus act *un-economically*) and both ought to function in a way that is guided by economic considerations of *frugality*. But it is only possible to say this when the economic aspect is understood in its *modal universality*, i.e. when the *typical nature* of the business and the state is disregarded.

Modal laws hold universally without any specification – universities, businesses, states, families and sport clubs all have to observe the general meaning of economic norms insofar as they all function within the general modal structure of this aspect. The modal universality of every aspect entails that all possible kinds of entities (“objects”) function within all modalities of aspects.

The law holding for a specific kind or type of entities, by contrast, does not hold for every possible kind or type of entities. Such a type law nonetheless still has its own universality, for its universality is *specified, typified*. The type law³² for being a state is universal in the sense that it holds for *all states*. But because not everything in the universe is a state, this type law is specified – it applies to states only.³³ Likewise businesses and states belong to different *kinds* of societal entities, and this *typical difference* is seen in the different ways in which they function in the economic aspect of reality. Therefore the function of a state and the function of a business within the economic aspect evince typical differences: clearly *business*

economics differs from *state economics* (a business cannot “tax” its clients, but the state does tax its citizens).

The idea of type laws account for the structural uniqueness and distinctness of diverse societal collectivities and it provides an alternative understanding of a differentiated society that does not confuse entities belonging to different types. Max Weber, for example, simply equates a business enterprise and the state by referring to the latter as a large scale business (Weber, 1918:15) – thus confusing two distinct societal type laws. Applied to a differentiated society the idea of type laws enhances a proper understanding of diverse societal collectivities transcending the relatively undifferentiated way in which Rawls constantly speaks of the *basic structure of society*.³⁴

In general one can therefore say that *modal laws* encompass all possible kinds of entities, whereas *typical laws* (type laws) only hold for a limited class of (natural and social) entities.³⁵

Insofar as Rawls understood the opposition between *just* and *unjust* in its universal scope, applying to individuals, associations and the “*basic structure of society*,” he clearly came close to an acknowledgement of what we have in mind with *modal universality*. The modal universality of the jural³⁶ aspect of reality enables the typical function of every societal collectivity within this aspect and it embraces every individual human being also functioning within the jural aspect.

Moreover, the inherent limitations acknowledged by Rawls in respect of his idea of “principle of justice” and the lack of universality attached to these principles and their primary subject (the *basic structure of society*) show how closely he approximated the idea of a *type law*.³⁷

However, without explicitly entering into an analysis of these distinctions Rawls did not benefit from the liberating thrust entailed in them. The first benefit would have been a realization that merely referring to “principles of justice”³⁸ is confusing, for although this phrase appears to designate *modal jural principles*, he actually aims at what we called a *type law*. This is clearly seen from the fact that the primary subject of justice is the *basic structure of society* – and the latter concerns the major (political, social and economic) societal institutions.

In the second place Rawls could have benefited from the insight that every societal institution in principle functions in all aspects of reality,³⁹ for it entails that the major “political,” “social,” and “economic” institutions equally function within the jural (and other) aspects of reality. At the same time this state of affairs contains a fundamental critique on the entire approach of Rawls.

The fundamental problem of his political philosophy is enclosed in the *single* qualification attached to the principles governing the *basic structure of society* – they are said to be principles of *justice*. There are two options: (i) understand “justice” in a modal (functional) sense or (ii) attach an institutional meaning to it. If option (i) applies the problem is that even in his own explanation of the parts of the basic structure of society he had to take recourse to other qualifying or differentiating terms, such as *political*, *social* and *economic*! If the *law for* the basic structure is claimed to be found in “principles of justice” then their *primary subject* ought to display the same character. Consequently, taking recourse to the said alternative qualifying terms (*political*, *social* and *economic*) highlights the inability of his approach to arrive at an efficient characterization of what we designated as the type laws for distinct societal collectivities. If option (ii) is assumed, by attaching an institutional meaning to the

principles of justice, the latter actually take on the role a type laws, generating the problem that every type law determines multi-“aspectual” entities, i.e. many-sided entities that function in more than one aspect *at once*. In addition the different “parts” of the *basic structure* (or the *social system*) appear to require alternative qualifying functions in spite of the fact that they all invariably also function within the *jural aspect* of reality.⁴⁰

This problem is made worse to the extent in which Rawls accepted the idea of a social system, for within the context of such a view the whole-parts scheme prevails and according to this scheme the intrinsic uniqueness of societal collectivities cannot be accounted for.

Given this *element of inconsistency* in Rawls's thought we conclude this analysis by briefly investigating some places where he succeeded in transcending the distorting implications of an application of the whole-parts relation to the *basic structure of society*.

The positive side of the ambiguity in Rawls's thought

He senses the ambiguity entailed in applying his “principles of justice” to all the social institutions and associations considered by him to be a part of the basic structure of society. He maintains that “churches and universities are associations within the basic structure” but in the same context explicitly concedes that “for churches and universities different principles are plainly more suitable” (PL:261). His own assessment here is that at “first sight the contract doctrine may appear hopelessly unsystematic: for how are the principles that apply to different subjects to be tied together? But there are other forms of theoretical unity than that defined by completely general first principles” (PL:261-262).

The sought after *unity* is evident the moment diverse societal collectivities are observed from the perspective of (the modal universality of) a particular modal aspect (such as the jural mode) – for we pointed out that they all function in every aspect. Insofar as distinct “social institutions and associations” all function within the jural aspect they are all subject to (modal) jural principles (perhaps a more well-defined form of “principles of justice”),⁴¹ just as they are all, owing to their function within the economic aspect, subject to modal economic principles.

Rawls's remark that there are “other forms of theoretical unity than that defined by completely general first principles” illustrates that he does realize that type laws are not universal in an unspecified sense, for every type law solely holds for a *limited class of entities*. The type law for being a constitutional democracy⁴² does not apply to universities or churches. Rawls does “not assume that variation in numbers alone accounts for the appropriateness of different principles” for rather it is “differences in the structure and social role of institutions that is essential” (PL:262).

Although still embedded in the idea that it concerns “parts of the social structure” (and “how they fit together”) Rawls for all practical purposes acknowledges distinct type laws, i.e. “different principles for distinct kinds of subjects.”⁴³ Advocating the idea of “principles of justice for each kind of subject” also closely approximates the nature of *type laws*.⁴⁴

In passing we may note that although it seems that Rawls upholds a strict correlation between regulating principles and what is regulated by them (the law-subject correlation), there is a subtle influence of the Neokantian dualism between *facts* and *values* (principles) discernable in his thought. Heinrich Rickert and particularly Max Weber caused most of the 20th century sociologists to consider social relations (the social system) in purely factual (a-normative) terms. By contrast the

category of *culture* then became the store-house of values, beliefs, norms, principles, language, meanings and symbols. Weber designates culture as a “value concept” (see Weber, 1949:76-77).⁴⁵ In terms of his four function paradigm (AGIL: adaptation, goal-attainment, integration and latency) the well-known sociologist Parsons also assigns a *merely factual* character to the *social system* and distinguishes it from “institutionalized culture” (see Parsons, 1961:30, 34).

Rawls continues this legacy in his understanding of the *factual givenness* of the *basic structure of society*. If the *basic structure of society* were truly regulated by normative principles (*principles of justice*) in the sense that it was determined and delimited by and conforming to structural principles underlying its existence, then it cannot exist *apart* from this underlying and conditioning principle(s). Yet Rawls conceives the basic structure in its own right and only *afterwards* argues that it is reasonable to attempt to find special regulating principles for it: “The problem here is to show why the basic structure has a special role and why it is reasonable to seek special principles to regulate it” (PL:265).

However, the most remarkable statement of Rawls in this regard not only reminds one of the contribution of Johannes Althusius (early 17th century – see Althusius, 1603 and Woldring, 1998) but also of the idea of societal “sphere-sovereignty” introduced by the two prominent cultural and political leaders from The Netherlands, namely Groen van Prinsterer (19th century) and Abraham Kuyper (late 19th and early 20th century – see Kuyper, 1880) who further elaborated this idea. Rawls writes:

Indeed, it seems natural to suppose that the distinctive character and autonomy of the various elements of society requires that, within some sphere, they act from their own principles designed to fit their peculiar nature (PL:262).

The idea of “own principles” that reflects a “peculiar nature” “within some sphere” is almost literally found in the thought of Johannes Althusius in his restriction of the whole-parts relation to its meaningful application.⁴⁶ Where Rawls employs the phrases “own principles,” “peculiar nature” and “within some sphere” Althusius mentions *typical laws*, *species of association* and the *nature of each*: “Proper laws (*leges propriae*) are those enactments by which particular associations are ruled. They differ in each species of association according as the nature of each requires” (Althusius as translated in Carney, 1965:16).

Surely these insights are still presented within a context of ambiguity, for although Rawls does recognize “different principles for distinct kinds of subjects” this view continues to be embedded in his universalistic (holistic – i.e. “whole-parts”) understanding of the relationship between these *sphere-sovereign societal entities* and the *social structure* of which they are *parts*: “But it is the distinct purposes and roles of the parts of the social structure, and how they fit together, that explains there being different principles for distinct kinds of subjects” (PL:262).

Concluding remark

Rawls's theory of justice is thoroughly embedded in and indebted to his understanding of the *basic structure of society*. His relatively undifferentiated notion of “principles of justice” is frequently left behind particularly when he explains in more detail what the *basic structure of society* is all about, for in the latter case he constantly employs differentiated qualifying terms, such as *political*, *social* and *economic*. Although his

emphasis on free and equal moral persons as well as his use of the idea of a hypothetical and a-historical social contract reveals his atomistic (individualistic) affinities, his understanding of the *basic structure of society* in terms of the whole-parts relation opts for an opposing position, one that is universalistic (holistic). Nonetheless we saw that amidst this ambiguity one does find alternative formulations in his political philosophy evincing an insight into the unique nature and distinct spheres of diverse societal entities – closely approximating ideas earlier formulated by Althusius, Van Prinsterer and Kuyper (sphere-sovereignty).⁴⁷ What Rawls needed in order to explore this positive side of his thought is the (briefly discussed) distinction between *modal laws* and *type laws*.

Endnotes

1. References to the main works of Rawls will be given by using suitable abbreviations, followed by the page number(s): *A Theory of Justice* = **TJ** (see Rawls, 1999); *Political Liberalism* = **PL** (see Rawls, 1996) and *Collected Papers* = **CP** (see Rawls, 1999a).
2. In the 1978 edition of *A Theory of Justice* it is said that “we may think of the parties as heads of families” (Rawls, 1978:128, 146). It reminds us immediately of Aristotle's view of the family as the “germ-cell” of society. A critical assessment of this assumption regarding the heads of families is found in Brennan and Nogge (2000:48-50). Regarding Aristotle's view see his *Politica* Book I (1252a ff., Aristotle, 2001:1127 ff.).
3. Just compare the following places where he refers to the *basic structure of society*: **TJ**: 3, 6, 7-8, 9, 10, 17, 18, 32, 38, 39, 47, 48, 49, 53, 57-58, 72-73, 81-82, 82, 89, 91, 93; 95, 95, 95-96, 99, 136, 154, 156-157, 222, 229, 293-94, 308, 365, 409, 511; **PL**:223, 229, 286, 296, 301, 309, 321, 322, 330, 376, 391, 412, 413, 416, 417; **CP**:130, 134, 156, 164-165, 167, 174-175, 226, 229, 232-233, 234-235, 235, 250, 255, 256, 278, 308-309, 317, 324, 337, 337-338, 339, 356, 362, 365, 367-368, 390, 391-392, 397, 402, 413, 417, 426, 474, 482, 486, 493, 493, 575, 577-578, 583-584, 584-585; 595-596.
4. In the current context we leave aside the problematic consequences of this approach which is actually indebted to the position taken by Rousseau who saw in the social contract the basis of all rights obtained in the post-contractual condition. At the same time he claims that the social contract assigns to the body politic (the *general will*) an absolute power over all its members. Combined with his definition of “freedom” as “obedience to a law which we prescribe to ourselves” (Rousseau, 1975:247) this “absolute power” resulted in the known impasse of his thought, for any person who deviates from the general will is actually disobedient to that person's own will and as a result must be forced to obey in order to be free: “... ce qui ne signifie autre chose sinon qu'on le forcera à être libre” (Rousseau, 1975:246)! [“This means nothing less than that such a person would be forced to be free.”]
5. In his *Political Liberalism* Rawls explains that his “statement of these principles differs from that given in *Theory*” for in this work they read: “a. Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value” (PL:5); and: “b. Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society” (PL:6).
6. It should be noted, however, that Rawls himself never uses the phrases “differentiated society” and “social stratification”. This is remarkable, particularly in the light of the fact that in both TJ and CP he frequently employs the accompanying idea of the “social system” (in TJ 51 times and in CP 66 times – the more specific focus of PL reduced the occurrences of this phrase in this work to merely 6 places). In sociological system theory (for example that of Parsons) the concepts of a “differentiated society” and “social stratification” are indispensable (see Strauss, 2006:146 ff., 173 ff.).
7. Rawls mentions the fact that Locke restricts the right to vote to those who own property and points out that Locke does not accept equal political rights amongst citizens for he “assumes that not all members of society following the social compact have equal political rights” (PL:287).

8. Only in his *Theory of Justice* does Rawls mention the classical idea of justice, “give everyone his due” (TJ:35, 275-276).
9. “A set of principles is required for choosing among the various social arrangements which determine this division of advantages and for underwriting an agreement on the proper distributive shares. These principles are the principles of social justice: they provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation” (TJ:4). Compare his second principle.
10. “Many different kinds of things are said to be just and unjust: not only laws, institutions, and social systems, but also particular actions of many kinds, including decisions, judgments, and imputations. We also call the attitudes and dispositions of persons, and persons themselves, just and unjust” (TJ:6).
11. What is known as constructivism in modern philosophy derives from the early modern motive of logical creation – just compare the thought experiment of Hobbes in which reality is first broken down to a heap of chaos and then afterwards it is rationally reconstructed with the aid of the concept *moving body* – eventually resulting in Kant’s view of understanding as the formal law-giver of nature. The idea of autonomy – humans being a law unto themselves – constitutes constructivism in the sense of constructing the principles guiding human conduct. Since we only in passing mention Rawls’s constructivism a more detailed analysis of the nature and background of this notion will not be given in this context.
12. “In justice as fairness the principles of justice for the basic structure of society are not suitable as fully general principles” (CP:532).
13. Yet in a different context Rawls speaks of “the nonpublic reasons of churches and universities and of many other associations in civil society” – from which it is clear that churches and universities are part of “civil society” (PL:213). In the next chapter a different preference surfaces for there Rawls contends that “different principles” are “more suitable” for churches and universities – but he then nonetheless still places them within the *basic structure*: “because churches and universities are associations within the basic structure, ...” (PL:261).
14. “Thus we distinguish between the aspects of the social system that define and secure equal basic liberties and the aspects that specify and establish social and economic inequalities” (TJ:53).
15. “... the primary subject of political justice is the basic structure of society understood as the arrangement of society’s main institutions into a unified system of social cooperation over time” (CP:596).
16. We have noted earlier that in his *Collective Papers* the phrase “social system” appears 66 times (in TJ it is 51 times and in PL only 6 times).
17. Atomism (individualism) attempts to explain society and societal institutions solely in terms of (the interaction between) individuals. Universalism (holism), by contrast, postulates some or other all-encompassing societal whole or totality (or: structure/system with its parts/subsystems). In line with a holistic frame of mind Rawls explains: “The basic structure is understood as the way in which the major social institutions fit together into one system” (PL:258).
18. Rawls speaks of “a democratic society of free and equal citizens” (see PL:30) and later on in this work remarks: “... we must distinguish between particular agreements made and associations formed within this structure, and the initial agreement and membership in society as a citizen” (PL:275). Note that *citizenship* depicts “membership in society” and not just state-membership. In his work on the law of peoples Rawls also speaks of “citizens of liberal societies” (Rawls, 2002:58).
19. In PL this expression occurs on the following pages: 10, 13, 15, 24-25, 30, 33, 36, 38, 40-43, 61, 65, 70, 79, 90, 95, 134, 136, 154, 175, 177, 198, 205-206, 214, 221, 223, 243, 292, 303, 307, 320, 335, 344, 346, 369, 376, 387, 390, 414, 418, 424, 432 (see also TJ:249, 280, 320, 326, 335).
20. “A set of principles is required for choosing among the various social arrangements which determine this division of advantages and for underwriting an agreement on the proper distributive shares. These principles are the principles of social justice: they provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation” (TJ:4).

21. “This fundamental political relation of citizenship has two special features: first, it is a relation of citizens within the basic structure of society, a structure we enter only by birth and exit only by death; and second, it is a relation of free and equal citizens who exercise ultimate political power as a collective body” (CP:577).
22. “... in parts of the basic structure and its political and social institutions” (CP:585).
23. However, on the next page he does back-paddle slightly: “In order for public reason to apply to the family, it must be seen, in part at least, as a matter for political justice” (CP:596).
24. “This means, in effect, that the basic structure of society is to arrange the inequalities of wealth and authority in ways consistent with the equal liberties required by the preceding principle” (TJ:38-39).
25. For the sake of the current argument we repeat the following quotation: “Many different kinds of things are said to be just and unjust: not only laws, institutions, and social systems, but also particular actions of many kinds, including decisions, judgments, and imputations. We also call the attitudes and dispositions of persons, and persons themselves, just and unjust” (TJ:6).
26. Consider two examples: (i) Physical entities are determined and delimited by physical laws such as the law of energy conservation and the law of non-decreasing entropy. (ii) When the concept of a *circular triangle* is formed it is immediately recognized as being illogical – a circle is circular and a triangle is triangular (proper logical identification and distinction achieved by applying two basic logical principles, namely the principle of identity and non-contradiction).
27. As a synonym for the concept of function the Neokantian philosopher, Heinrich Rickert, employs the notion of *relation concepts* (see Rickert, 1913:68-70).
28. Another well-known Neokantian philosopher, Ernst Cassirer, in 1910 wrote a significant work on the theme: *Substance and Function* (German: *Substanzbegriff und Funktionsbegriff*) – see Cassirer 1910 and 1953.
29. It was simply impossible to explain the effect of this law in terms of the physical mechanism of bodies in “contact with” or “pushing” each other.
30. From Latin we derive the word *mode* (*modus quo*), still alive in expressions such as *modus operandi* and *modus vivendi*. In order to capture the *functional* nature of the different aspects of reality they are also designated as *modal* aspects.
31. The phrase *typical way* intends to refer to various types of entities. The business enterprise, the state and the university represent different *kinds* or *types* of societal collectivities. Each of them functions within the economic aspect of reality in a way that reflects their *typicality* – yet abstracting the general structure of the economic aspect disregards their *typical differences*. Likewise, thermodynamics as a general functional physical discipline abstracts from the typicality of physical entities – it is not interested in the gaseous, solid or fluid state as such.
32. A more familiar designation would be to refer to the *structural principle* for being a state.
33. Regarding physical entities one can use the example of an atom. The type law for being an atom holds for all atoms (*its universality*), but since not everything in the universe is an atom the universality of this type law is restricted to (and therefore solely specified for) a limited class of (physical) entities, namely *atoms* – plainly because not everything in the world is an atom.
34. We shall return to the significance of acknowledging type laws below in connection Rawls's view of the “own principles” of social spheres fitting “their peculiar nature.”
35. Introducing this distinction embodies the concern that contemporary theoretical debates tend to level the typical differences between societal collectivities and that they do not succeed in delimiting the sphere of competence of the state sufficiently.
36. In order to acknowledge the ontic status of this aspect it is designated as the *jural aspect*. Human responses to the normative meaning of this aspect of reality are designated as *juridical*. We tend to confuse what is given in reality (the meaning of the term ‘ontic’ – derived from the Greek word “on” = to be, that what is) with possible human responses to it. For example, instead of referring to biotic, psychic or social (ontically given) phenomena, we mistakenly employ the terms *biological*, *psychological* and *sociological*. A *living plant* is a *biotic* phenomenon – only the scientific investigation of plants is *biological*. Likewise, a young couple walking on campus is a *social* phenomenon that could be investigated by the discipline of sociology.

37. In Political Liberalism he writes: “The first principles of justice as fairness are plainly not suitable for a general theory” (PL:261).
38. The fact that he sometimes talks about *conceptions* of justice regulating the basic structure of society demonstrates the ambiguous status of the modern (Kantian and Postkantian) idea of human autonomy. The impasse in this view is analyzed in Strauss (2006a:71-73).
39. Although he started his theoretical reflections within the domains of legal and political philosophy, Dooyeweerd expanded his analysis or aspects and entities into a general theory of modal aspects and a general theory of what he called individuality-structures. The second Volume of his *magnum opus* is devoted to the theory of modal aspects and the third to the theory of individuality-structures (see Dooyeweerd, 1997-II:3-465 and 1997-III:53-784).
40. A church, a university, a state and a family all have a function in the jural aspect (as well as in other aspects, such as the economic, the social, the cultural-historical and so on). Yet only the state is *uniquely qualified* as a *public legal* community destined to establish a balance and harmony within the multiplicity of legal interests on its territory (and called to restore any infringement of legal interests in a retributive fashion through its competent organs – criminal and civil courts). Every non-political societal collectivity is characterized by a different (non-jural) guiding aspect (such as deepened *logical* thinking in the case of the university; *social interaction* in the club, *moral love* in family life and *faith* in the case of church denominations). This entails that their functioning within the jural aspect merely constitutes an internal *ius specificum* that belongs to the domain *non-civil private law* – distinct from the domain of *public law* where the state operates as a true *res publica* (thing of the public) with its *ius commune* (communal law).
41. Rawls does speak of a “just constitution and basic structure” (PL:401).
42. Rawls does not employ the term “state” all too frequently. The phrase “democratic state” appears 4 times in *A Theory of Justice* and 13 times in *Political Liberalism*.
43. “But it is the distinct purposes and roles of the parts of the social structure, and how they fit together, that explains there being different principles for distinct kinds of subjects” (PL:262).
44. “Rather, they are constructed by way of a reasonable procedure in which rational parties adopt principles of justice for each kind of subject as it arises” (CP:532).
45. This article originally appeared in the *Archiv für Sozialwissenschaft und Sozialpolitik* (in 1904) and is in harmony with Rickert's initial position in his work: *Die Grenzen der naturwissenschaftlichen Begriffsbildung* which appeared for the first time in 1902. Compare the German text in Weber's *Gesammelte Aufsätze zur Wissenschaftslehre* (Weber, 1973: 175-176).
46. Althusius realized that churches and families are not *parts* of the state – this quality is solely applicable to true parts of the state, such as provinces and municipalities: “It can be said that individual citizens, families, and collegia are not members of a realm [i.e. the *state*], On the other hand, cities, urban communities, and provinces are members of a realm” (Althusius, 1603:16).
47. Also Habermas refers to “citizens within their own private spheres of life” (Habermas, 2001:81) and to “differentiated forms of life” (Habermas, 2001:82) In his extensive work on communicative actions he also explicitly speaks of the “own laws” of “specific social spheres.” [“... den sogenannten Eigengesetzlichkeiten einzelner sozialer Sphären” (Habermas, 1995-2:437).]

Literature

Althusius, J. (1603): *Politica methodice digesta* [Collection of Systematic Political Views] (1603, 3rd Edition 1614), The Politics of Johannes Althusius; an abridged translation of the 3rd ed. of *Politica methodice digesta*, Atque exemplis sacris et Profanis illustrata / Althusius, Johannes; translated, with an introduction by Frederick S. Carney. London: Eyre and Spottiswoode. See also the complete translation: Althusius, J. 1979. *Politica methodice digesta of Johannes Althusius* (Althaus), with an introduction by Carl Joachim Friedrich. New York: Arno Press.

- Aristotle. 2001. *The Basic Works of Aristotle*. Edited by Richard McKeon with an Introduction by C.D.C. Reeve. (Originally published by Random House in 1941). New York: The Modern Library.
- Brennan, S. & Noggle, R. 2000. *Rawls's neglected childhood*. In: Davion and Wolf, 2000 (pp.46-72).
- Carney, F.S. 1965. *The politics of Johannes Althusius*; an abridged tr. of the 3rd Edition of *Politica methodice digesta* [Collection of Systematic Political Views], with an introduction by Frederick S. Carney. London: Eyre and Spottiswoode.
- Cassirer, E. 1910. *Substanzbegriff und Funktionsbegriff*. (Berlin), Darmstadt: Wissenschaftliche Buchgesellschaft, 1969.
- Cassirer, E. 1953. *Substance and Function*. (first edition of the English translation of *Substanzbegriff und Funktionsbegriff*: 1923); New York: Dover.
- Davion, V. and Wolf, C. 2000. *The idea of political liberalism: Essays on Rawls*. New York: Roman & Littlefield.
- Dooyeweerd, H. 1997. *A New Critique of Theoretical Thought*, 4 Volumes, A Series, The Collected Works of Herman Dooyeweerd, General Editor D.F.M. Strauss. Lewiston: The Edwin Mellen Press.
- Freeman, S. 2003. *The Cambridge Companion to Rawls*. Cambridge: University Press.
- Freeman, S. 2003a. *Introduction*. In Freeman 2003.
- Habermas, J. 1995-1 & 1995-2. *Theorie des kommunikativen Handelns*. [Theory of Communicative Action] Volume 1 & Volume 2. Frankfurt am Main: Suhrkamp Verlag (Fourth revised Edition, 1987 – ‘Taschenbuch’ Edition 1995 – originally published in 1981).
- Habermas, J. 1998. *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*. [Facticity and Validity. A Contribution to a Discourse Theory of Law and the Constitutional State under the Rule of Law] Frankfurt am Main: Suhrkamp Edition (first Edition 1992).
- Habermas, J. 2001. *The Postcolonial Constellation, Political Essays*. Cambridge, Massachusetts: Polity Press
- Kuyper, A. 1880. *Souvereiniteit in eigen kring*. Amsterdam: Rodopi. (Presentation at the Inauguration of the Free University of Amsterdam, October 20, 1880.)
- Parsons, T. 1961. An Outline of The Social System, in: *Theories of Society*, Vol.I, edited by Parsons, Shills, Naegele and Pitts, 1961a.
- Parsons, T. 1961a. *Theories of Societies*, edited in collaboration with Shills, Naegele and Pitts, New York: The Free press of Glencoe.
- Rawls, J. 1978. *A theory of justice*. Oxford: Oxford University Press (first edition 1971).
- Rawls, J. 1996. *Political Liberalism*. Revised Edition. Cambridge: Harvard University Press.
- Rawls, J. 1999. *A theory of justice*. Revised Edition, Cambridge: Harvard University Press.
- Rawls, J. 2001. *Collected Papers*. Edited by Samuel Freeman. Cambridge Massachusetts: Harvard University Press.
- Rawls, J. 2002. *The Law of Peoples*. Harvard: Harvard University Press.
- Rickert, H. 1913. *Die Grenzen der naturwissenschaftlichen Begriffsbildung*, Tübingen: J.C.B. Mohr (1902) 1913².
- Rousseau, J.J. 1762. *Du contrat social*, 1762, In: Rousseau 1975.
- Rousseau, J.J. 1975. *Du contrat social et autres oeuvres politiques*. Paris: Editions Garnier Frères.
- Strauss, D.F.M. 2006. *Reintegrating Social Theory – Reflecting upon human society and the discipline of sociology*. Frankfurt am Main: Peter Lang.
- Strauss, D.F.M. 2006a. The mixed legacy underlying Rawls's Theory of Justice, In: *Journal for Juridical Science*, 31(1):61-79.
- Talisse, R.B. 2001. *On Rawls*. Belmont: Wadsworth.
- Van Prinsterer, G. 1847. *Ongeloof en revolutie: een reeks historische voorlezingen*. Leyden: Luchtmans.
- Von Weiszäcker, C.F. 1993. *Der Mensch in seiner Geschichte*. München: DTV.

- Weber, M. 1918. *Parlament und Regierung im neu geordneten Deutschland*. München: Dunkler & Humblot.
- Weber, M. 1949. *The Methodology of the Social Sciences*, translated by E.A. Shills and H.A. Finch, New York 1949.
- Weber, M., 1949a. "Objectivity" in Social Science and Social Policy. In: Weber, 1949.
- Weber, M. 1973. *Gesammelte Aufsätze zur Wissenschaftslehre*, 4th edition. Tübingen: J.C.B. Mohr Verlag.
- Woldring, H.E.S. 1998. The Constitutional State in the Political Philosophy of Johannes Althusius. In: *European Journal of Law and Economics*, 5:123-132 (Kluwer Academic Publishers).