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**Meaning of resources
in social inclusion**

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Chapter 1

Inclusion. Social Theoretical Considerations on Rawls' Theory of Justice

Jochen Ostheimer

ABSTRACT

In his theory of justice, Rawls writes about the just society. For methodological reasons, he excludes certain groups who actually belong to the society, as we know it. Amongst them are persons with severe disabilities. This article argues that this group of persons can and should be included in Rawls' theory. The notion of society as a cooperative community which often is understood in narrow, economic terms is decisive for the development of this argument. More consistent, however, is a broad and cultural interpretation.

Keywords: Justice, Rawls, disability, contractualism, cooperation, society

Introduction

In a sense, John Rawls describes his theory of justice in terms of a story. In a primordial, pre-social situation, people discuss very basic, normative principles, according to which they wish to build a society. If one remains within the context of this narrative, then the question arises, "who is allowed to participate in these negotiations?". Leaving the level of the story, and proceeding to analyse the theory, which includes the concept of the original position, then it may be asked, which groups of persons are to be included in the theory, and which are to be deliberately excluded or inadvertently overlooked? Within the story, what can be considered as participation, and can be analysed from the point of view of a social theory, as a matter of inclusion and exclusion. Which groups of people are present in Rawls' theory of justice, and which are excluded? Furthermore, upon what shall such inclusions and exclusions be based?

The following considerations take a social theoretical point of view, i.e. they reflect Rawls' concept of society. The focus is directed to the social theoretical exclusion of people with disabilities, who were initially overlooked in Rawls' concept of an "ideal theory."

From the point of view of “theory aesthetics” (Nassehi, 2003, pp. 16–17, 82–85), it will be determined, by which internal structural means Rawls’ theoretical model attempts to make this exclusion plausible. In following this analysis, the slight differences between the various books and essays by Rawls shall not be discussed, because these considerations are systematic and not relevant to the historical development of Rawls’ thinking. In the next step, various critical objections are discussed, and in the last step, an own approach to the social theoretical inclusion of people with disabilities is developed.

Creating a Social Contract

In order to form an ethical basis for his principles of justice, Rawls develops a contractual argument. As an intellectual experiment, citizens – or strictly speaking, parties that represent all citizens, but this difference is not relevant – discuss the basic social order, the so-called political conception of justice, being subject to certain conditions, which should guarantee impartiality, and thereby a moral point of view. These terms have come to be included in the notion of the original position.

Decisive in such contractualist arguments, as Rawls points out very clearly, is the refinement of the conditions of the discussion, i.e., of the original position. Both the initial assumptions and the result must match the considered judgment of an average member of modern society. It must be possible to bring this into a reflective equilibrium, and to create a coherent, comprehensive result (Rawls, 1975, pp. 37–39, 628; Nida-Rümelin, 2002, pp. 24–27; Nida-Rümelin, 2006, pp. 89–98). If discrepancies exist, the conditions of the original position may be modified, the principles of justice may be amended, and/or the critical judgment as well as the normative supportive beliefs may be corrected. Correspondingly, it is “not proper to treat the concept of the social contract as an instrument of ultimate cause, but as a clarifying instrument of hermeneutic constructivism” (Kersting, 2000, p. 82; Maus, 2006, p. 85) which in a critical reflection explains the moral foundation of a culture.

Social Theoretical Exclusions

Parties representing all social groups, according to their socioeconomic status, participate in the original deliberation. Rawls cites the example of ordinary workers, without specifying the notion of social groups. In particular, he doesn’t give any criteria concerning what constitutes a social group. Instead, it is crucial for him that all social groups are represented, and that all participate on an equal footing, in the negotiations. All the groups that belong to the society are to be involved in the deliberations. Who then belongs to society, according to Rawls?

Like most contract theorists, Rawls builds upon the concept of the fundamental equality of all citizens. They are equal in terms of their moral capacities, and thus in terms of their status, as moral subjects. They have two moral assets, namely a sense of justice and the ability to formulate, to revise and to follow an idea of what is important in life, that is, a concept of the good. Moreover, they are equal in terms of their abilities. Although the fundamental equality of the members of society is indeed based on experience in general, nevertheless it is an axiomatic establishment. On the whole, it is believed that citizens “have the necessary

assets and skills to be normal and cooperative members of society throughout their lives” (Rawls, 1998, pp. 159, 86–87, 104). The mention of the whole lifetime means that childhood and old age as anthropologically normal phases of human development cannot rationally and reasonably be regarded as grounds for the diminishing of one’s civil status. The same applies to minor illnesses and injuries (Rawls, 1998, p. 87; Rawls, 2003, pp. 264–268). However, Rawls would have had to take into consideration that in light of the costly state of advanced medicine the expenditures for severe illness and in the last phase of life may be significantly higher than for people with disabilities. Rational partners in this discussion would certainly be expected to take this into account.

Although the assumption of equality is fundamental and far-reaching, it is still not comprehensive. In his theory of the just society, Rawls calls for four prior methodical exceptions, to respond to actual power asymmetries, and which Rawls hereinafter treats differently (Rawls, 1998, pp. 87–88; Rawls, 1975, pp. 34–556). First, the society consists of people. Non-human beings, especially animals, or, according to the Gaia concept, biospheres, species, or the earth as a whole (Lovelock, 1982), are excluded from consideration, and are thus beyond the scope of justice. Secondly, the society is closed, in the sense that only by birth one enters, and only by death one exits. Matters of immigration or international relations are not an issue. These aspects are treated later in Rawls’ “The Law of Peoples” (Rawls, 1999). A third exception concerns future generations. Yet, Rawls is able to methodically integrate this group in further considerations with the “principle of just savings” (Rawls, 1975, § 44) as the central concept. Fourthly, and this is the relevant aspect here, he establishes a condition for the status of a citizen, as being dependent upon a minimum level of relevant assets for social cooperation. The mere fact of being human is not enough. This fourth exception applies to people with severe disabilities, people with severe dementia and people who are permanently in a coma. Without clarifying whether these three cases must be treated differently, disability will become the reference point of the following considerations. Examining this exception, it is to be noted that Rawls initially proposes an “ideal theory,” which focuses on the “normal case” (Rawls, 1998, pp. 384, 86–87, 93, 277–278; Rawls, 1975, p. 118; Rawls, 1992a, p. 122) and so certain special difficulties are not taken into consideration. This is methodologically quite understandable. However, Rawls never takes the step toward a “real world” theory. He even himself considers it questionable whether his approach is able to close this gap (Rawls, 1998, p. 88; Rawls, 2003, p. 270). He considers the obligations to people with disabilities as obvious, and due to this, the conception of justice as fairness must be extended accordingly, or possibly supplemented by another concept (Rawls, 2003, p. 270). As a matter of fact, people with disabilities are not part of the ideal concept of society, and they are not involved in discussions and decisions about the normative basic order of the society (Nussbaum, 2010, p. 58).

This article argues that the exclusion of people with severe disabilities both from the deliberations in the original position, as well as from the application of the two principles of justice is inconsistent. The criticism of Rawls’ theory is developed within the framework of this theory itself, and not, for example, from the vantage point of a communitarian or a Capability approach.

Critical objections to Rawls' theory

The marginalization of people with disabilities from the theory of justice is widely criticized. Here are presented five approaches which try to justify the consideration of people with disabilities in Rawls' theory of justice. They will be briefly addressed and critiqued. Afterwards, my own line of thought shall be submitted.

A comprehensive and multifaceted critique comes from the pen of Kittay. It addresses both people with disabilities, as dependents, as well as those who care for them as family members, volunteers or professionals, whom she calls "dependency workers". This second aspect, which is however only scarcely convincing, will not be pursued here.

One critical point that Kittay brings forward concerns the Rawlsian theory of the person. Kittay reproaches Rawls for circumventing human vulnerability (Kittay, 1997, p. 222; Kittay, 1999). She is right, in that vulnerability is not an issue for Rawls. But it is covered by the familiar notions of normality, on which Rawls' thoughts are based. If vulnerability, however, is understood as an anthropological statement, it belongs to what Rawls calls a "comprehensive doctrine", and thus cannot serve as a starting point of political philosophy, since any such theory cannot be based on such presuppositions.

Furthermore, Kittay proposes to include the circumstances of justice, which Rawls takes from Hume, namely the aspect of dependence (Kittay, 1997, p. 227; Rawls, 1975, § 22; Barry, 1989, pp. 152–163, 179–183). Certainly, vulnerability cannot be equated with the objective circumstance of scarcity. But for Rawls it is sufficient that such needs call for appropriate means, and that these are in fact at least moderately scarce. Therefore, it is strategically sensible for this theory to omit what is not necessarily required, in accordance with Occam's razor. Furthermore, Kittay demands that the list of basic social goods be expanded, so as to include special care needs. Her intention is sensible. However, she argues on the wrong level of concreteness, and her considerations do not reflect the abstractness of the social goods (Kittay, 1997, pp. 236–237). Income and wealth represent the part taken for the whole all material goods and expressly include health care (Rawls, 1992b, p. 179; Rawls, 2003, p. 265).

Moreover, Kittay brings out that the social bonds which arise from relationships of dependency and care are more basic and stronger than are political and economic relationships, to which Rawls refers. But this finding is not sufficient to support the postulate of another principle of justice which is to socially institutionalize care (Kittay, 1997, pp. 234–235).

On the whole, Kittay brings out some problematic points in Rawls' theory. However, her arguments do not ordinarily take place on the proper level of abstraction. Rawls assumes four levels of normative setting, where the veil of ignorance is lifted gradually: the political conception of justice, the constitution, the legislation and finally the executive actions of the state administration and the jurisdiction (Rawls, 1975, § 31). Most of Kittay's claims belong to the level of ordinary legislation, and not to a political conception of justice.

Another stimulating interpretation comes from Stark. The central point of reference of this analysis is the assumption of full working capacity. Stark proposes to maintain this suggestion in the concept of the original position, while leaving it aside on the level of the constitution (Stark, 2007, p. 138). On this level of concretisation, those who vote on the constitution would determine the highest possible social minimum, which is limited only by the requirements of efficiency, which are laid down in the difference principle. This guaranteed minimum covers the particular needs of people with disabilities. The normative basis for their claims would therefore not be the difference principle, but the guarantee of a social

minimum. Rawls treats such a guarantee of a subsistence level of material assistance only tangentially and unsystematically. It is placed beside the two principles of justice, sometimes it is even prior to them, but it shall not be enshrined in the constitution (Rawls, 1998, pp. 71–72, 258, 330–331; Rawls, 2003, pp. 85, 199–203; Rawls, 1975, pp. 308–311). It thus remains on the whole a foreign body in Rawls' theory, which however, probably could be inserted into it.

According to Rawls, the drafting and adoption of the constitution is the second step of concretisation, after the resolution of the political conception of justice. On this level, the veil of ignorance is lifted a little. Stark's assumption is that the voters for the constitution, in contrast to the parties in the original position, know that people are not always and entirely able to cooperate, therefore it may seem to fit Rawls' methodological guidelines. But the real question is why it can be presumed that the parties in the original position have a false knowledge, namely the adoption of the full working capacity of all citizens. This presumption is not a broadly harmless abstraction, but an idealization which introduces additional presumptions in the argument, without being suitably substantiated (O'Neill, 2006, pp. 34–37). Stark skips this problem. She may and must ignore it, because she accepts as self-evident the concept of society as a cooperative community in a narrow sense (the criticism of this social theoretical conception is undertaken in section 5).

The considerations of Lister, as another critic of Rawls, are not focused on personal or social theory, nor do they suggest corrections to the original position. Instead, Lister proposes a new interpretation of justice. The objective of distributive justice, as Lister envisions it, is the establishment of valuable relationships, in which all parties mutually recognize each other as morally equal. In a second step, he argues that the difference principle shall be restricted by the condition of reciprocity. The commands of distributive justice are limited by the reasonable expectation that all participate in joint cooperation. This requirement, however, is to apply only to those who are capable of cooperating, but are unwilling, but not to the unfit (Lister, 2011, pp. 107–109). This at least leaves open the possibility that even people with strong impairments are covered by the principles of justice.

These considerations imply that Rawls' assumption of the ability to cooperate must be dropped. For it is contradictory to the more fundamental assumption of moral equality. Thus, Lister suggests an ethical embedding of the elements of the theory of rational choice, just as Rawls does in some statements. The starting point of Brighouse's considerations is the assessment that people with severe disabilities are a normal part of any society. Hence, they cannot be treated as exceptions in a theory of justice, as is the case in Rawls' ideal theory (Brighouse, 2001, pp. 538–539). To account for this population adequately, an extension of Rawls' theory is necessary, but to continue to be in accord with the Rawlsian theory, three restrictions must be taken into consideration. The supplementing must be based on the list of basic social goods, recognize the primacy of the principle of freedom and develop a principle limiting the redistribution in favour of the worst-off (Brighouse, 2001, p. 540).

Brighouse sees the two-staged main task in modelling the original position in a manner, in which differences in the distribution of natural talents are respected by the parties and at the same time compensation measures are effectively limited. To solve the first part of the task, Brighouse suggests subdividing the original position in two phases (Brighouse, 2001, pp. 549–558). The first one corresponds to that which is described by Rawls. In the second phase, the parties are aware of the results of the first round of decision, and take into account the fact of disability in a special way. They thus deliberate on additional support for

the disabled members of society. Hence, in contrast to the difference principle, the focus on the relatively best worst social situation is no longer prior, and the reflections are not guided by the maximin rule, but by the criterion of acceptability. This criterion could be determined from the perspective of the key concept of the social bases of self-respect. A second approach is based on the guiding principle of correcting impairments in natural amenities by medical-technical measures. Such options are ever more available, the further the technical and economic development of society has progressed. This will be all the more the case, the more incentives are offered to individuals to be productive, so that by analogy with the fair savings principle, an intrinsic limit is to be put on the promotion of expenditures for disabled people.

The much-touted problem in a Rawlsian society, which Brighouse also widely discusses, is that redistribution will not end. The issue arises when the difference principle is interpreted according to one side only: All resources must be made available to the poorest, in agreement with the principle of the distribution of basic goods to the needy, until another population group threatens to slip to the lowest level. This focus on the benefits for the worst-off must be complemented however, by the perspective of efficiency: Redistribution must not bring long-term harm to economic growth, and thus the social development of prosperity, because this is detrimental to all, and therefore also for the poorest (Kersting, 2000, pp. 106–109). This inherent limit is included in the difference principle. Brighouse ends with this criterion, too. Although he formulates many thought-provoking insights on this path, his road is unnecessarily cumbersome.

Nussbaum presents the most extensive critical review. Her objections and corollaries – and Nussbaum sees a family relationship between Rawls' theory and her approach, in which Rawls' "own concerns are developed, rather than replaced" (Nussbaum, 2010, p. 21) – are complex and highly differentiated, so that hereinafter only certain important aspects shall be singled out. Similarly to Kittay, Nussbaum also rightly points out that with regard to the way a society deals with people with disabilities, two aspects have to be addressed. In addition to potential claims by the persons affected, which are discussed in this article, with regard to the de facto social practice, the burden of those people caring for people with disabilities must be considered. This is about the value and appreciation of nursing, primary care and education work (Nussbaum, 2010, p. 144; Krebs, 2002; Ostheimer, 2012). These aspects, however, have their firm place within the scope of the difference principle, and do not provide any special challenge for Rawls' theory.

Nussbaum is right with her socio-psychological assessment, that the way people with disabilities are perceived and treated in society has an impact on how society deals with people who are frail, due to age, illness or accident (Nussbaum, 2010, pp. 146, 185–186). Yet, that their claims are morally similar and have to be considered in the same way in the original position, must be argued for explicitly, since Rawls denies this view. Moreover, Nussbaum's argument is too concrete, it does not belong to the original position. It requires more knowledge about the social contexts and the cultural patterns of normality, than can be assumed about the parties.

Furthermore, Nussbaum criticizes that there is a subliminally objectivist understanding of disability in Rawls' theory, which does not consider that many functional impairments are communally shaped by their social contexts, such as regarding the manner in which buildings are constructed or public transport systems are designed (Nussbaum, 2010, pp. 162–163). This, however, does not constitute a major objection to Rawls, because he

does not draft an ethical theory of disability, and therefore such distinctions do not need to be drawn.

Another important question which Nussbaum raises concerns the relationship between justice and rationality. Contract theories ascribe a minimum of reason to the parties for obvious reasons, since otherwise, as everyday experience shows, they were not able to reach an agreement. In the social contract theory, the status as subject as well as object of justice claims is linked with rationality. Consequently, those who have very limited cognitive abilities are not capable of having an active place in the considerations concerning matters of justice (Nussbaum, 2010, pp. 83–84, 98, 186–187), which is not the case for example in a sufficiency theoretical, a human rights or a capability approach. At this point, there is a discrepancy between Rawls' theoretical assumptions and the "well-considered judgment" of many members of contemporary society which should be in a "reflective equilibrium" (Rawls, 1975, pp. 67–73; Rawls, 1998, pp. 72–76). At this point, further reflection is needed.

On the whole, Nussbaum brings out some important aspects which a theory of a just society must consider in view of persons with a severe disability. As it is the case with Kit-tay's criticism, not all of these aspects are significant for the political conception of justice. This implies that they are not situated on the right level of abstraction. Nussbaum's own considerations, which are based on neo-Aristotelian principles and unfold into her version of a capability approach, are not discussed here, even though they are very exciting, because the critical analysis of Rawls' concept is unfolded within the framework of Rawls' theory itself.

The modern society as a cooperative community

The following ideas try to reshape parts of Rawls' theory. They offer a proposal on how people with disabilities can be integrated in Rawls' concept of society. In doing so, they focus on the understanding of society. The Rawlsian society is the modern Western society, with the characteristics of the rule of law and democracy, the division of labour and industrialization, functional differentiation and pluralism. The societal ideal is the "well-ordered society". It is distinguished by the two features of justice and stability. Rawls' understanding of justice is fundamentally founded in these two principles of justice. The property of stability includes inner social peace, the common idea of citizenship, the collectively shared view that on the whole the society is just, and a relatively high economic productivity which helps to mitigate conflicts in matters concerning distribution and provides a material basis for citizens to pursue their own group, or milieu-specific concepts of life. On the whole, the society is to be thought of as a community of cooperation, as "a self-sufficient system of cooperation for all essential purposes of human life" (Rawls, 1998, p. 417, 81–89). People depend on mutual support for their well-being in many ways. They join together for mutual benefit and establish "a system of cooperation that serves the best interests of its participants" (Rawls, 1975, pp. 20, 105) and is intended to enable each to have a better life.

"Cooperation" is the central key to the interpretation of the concept of society. The understanding of the concept of cooperation is decisive for the conceptual determination of who is regarded as belonging to the society. In the writings of Rawls as well as in comments on him, with a certain simplification, one can find a narrow and a broad idea of cooperation, which are both not further discussed in those texts. In a narrow sense, it comes down

to economic cooperation. The respective benefits are material. Cooperation calls for a fundamental equality of abilities and skills of the partners (Rawls, 1998, p. 157; Ostheimer, 2015, pp. 11–16).

Comprehensively speaking, cooperation is considered to be more than a mere division of labour and market-mediated exchange relationships (Rawls, 1975, pp. 567–574; Hirsch, 2002, p. 13). Therefore, market and price theory are just one example of a cooperation system which is based on a contractualist design (Rawls, 1975, p. 141). The concept of social cooperation, like the related concept of the social good, is a fundamental social theoretical concept in Rawls' theory (Kersting, 2000, p. 72). The society as a whole is a "complex distribution structure" (Kersting, 2000, p. 59), it is a cooperative system in every respect. In this broad sense, rights, freedoms, opportunities, reputation or social positions are social goods which are socially generated and distributed – an idea which is developed more clearly in Walzer (1994) than in Rawls. The same applies to the wide range of culture, such as language, values, lifestyles, world views, philosophical orientations, literature, film, cuisine, etc. They are social goods, because no individual can create them alone. A broad conception of society as a cooperative community designates the factual precondition for the various types of interaction, as well as the normative condition for just cooperation. Only within such a framework inter-individual can barter ever arise, and be judged as morally legitimate. Thus, commutative justice is only a subordinated category, which is limited to a particular sector. The market model is not a comprehensive template for the design of the society, on the whole (Koller, 2004, pp. 62–67).

Inclusion: Being member of the society, participating in the original position and being considered by the difference principle

The ambiguity of the concept of cooperation creates significant difficulties for the interpretation of Rawls' entire theory. When cooperation is interpreted in economic terms, people who are incapable of cooperation are methodically excluded from contractual participation (Rawls, 2003, p. 262), but can be integrated, for example, by a second, subordinated argument, on the basis of solidarity. Therefore, social assistance for this group of people cannot be justified on the basis of arguments of justice, and hence not on the basis of the difference principle, but only in the context of the asymmetric relations of solidarity (Kersting, 2000). For only those can lay claim to social justice, who – to stick to the image – signed the social contract. Of course, it must always be clarified how much the social circumstances affect the lowering of productivity of such people. However, for people with very strong restrictions, the social factor is not significant.

The Veil of Ignorance

In which sense is Rawls' concept of cooperation to be interpreted? Rawls' remarks are not unambiguous. Therefore, the clarification of the notion of cooperation must start with the basic idea of Rawls' theory. An economic understanding of cooperation requires a minimum level of the capacity for work. For it is worthwhile for the fittest to associate only with those who are of similar ability. If this attitude which is based on individual, or one's own

group-based self-interest is made the basis of the contractualist reflection, only existing power relationships are fostered. This is the starting point of Gauthier's theory, according to which the social contract excludes all who lower the average level of welfare (Gauthier, 1986, p. 18; Barry, 1989, p. 163).

Yet, it is a philosophical requirement that the principles agreed on in the original position be "morally right" (Rawls, 1975, p. 142). The result of the decision must not be influenced "by arbitrary contingencies or the social power relations" (Rawls, 1975, p. 142). In order to prevent the exploitation of such morally accidental benefits, the proceedings about the political conception of justice take place behind the "veil of ignorance." The parties in the original position are deprived of essential parts of everyday knowledge. The veil of ignorance, which as an instrument of "epistemological de-individualization" (Kersting, 2000, p. 74; Kymlicka, 1997, p. 76) is part of the repertoire of methods of ethical recognition and justification, conceals three kinds of information: the knowledge of the personal situation and individual preferences, the knowledge of the particular social and living conditions, and the knowledge of the particular ideological beliefs existing in society (Rawls, 1975, p. 160–161; Hinsch, 1997, p. 81; Barry, 1973, p. 10). Hence, the contracting parties do not know the social position of those persons whom they represent, nor can they assess the likelihood with which those persons shall take their position. Likewise, they do not know the dominant social recipes for success, which allow for the advancement of personal and professional success. The concealing of these three kinds of knowledge creates procedural conditions, which are analogous to the formation of morality (Rawls, 1975, pp. 30, 168, 171–173; Höffe, 1987, pp. 48–49; Maus, 2006, p. 77; Hinsch, 1997, pp. 80–81; Dworkin, 1984, pp. 258–259). Every rational bias for one's own benefit is converted into a preference for a generally acceptable arrangement. The drive will remain: Each seeks his own advantage. But the goal is lost in the obscurity of ignorance, so that one's advantage can be sought only in the guarantee that a good minimum position is assured for all. The guidance is based on general principles that are suitable for everyone's pursuit of benefit. Thereby, the procedure guarantees the adoption of a general point of view, and thus, Rawls can maintain the unanimity of the agreement, which functions as the "criterion of practical truth" (Kersting, 1994, p. 270; Rawls, 1975, p. 296).

The question of whether the parties in the original position know of the possibility of disability as an anthropological fact, and whether or not they give it due consideration is decisive for the further argumentation. This should be presumed to be true. For in the original position, the parties know "the general facts about human society [...] which arise from common sense and the generally recognized methods of analysis" as well as "the laws of the psychology of man" or "all the general facts which are important for the setting of principles of justice. With respect to general knowledge, that is, general laws and theories, there are no restrictions" (Rawls, 1975, pp. 160–161).

In contrast, Nussbaum reckons that the general knowledge of the parties in the original position encompasses the awareness of which impairments occur frequently, and are therefore considered as normal and others, which are extraordinary. Therefore, they can exclude people with serious disabilities on the basis of reciprocity, because the expenditures which ensure their equal participation in the society are above average (Nussbaum, 2010, p. 168). Yet, this interpretation underscores the fact that the parties decide according to the maximin rule, rather than weighing the benefits of various options.

The Maximin Rule

The decision to be taken by the parties in the original position is one of the most important commitments of all, because the social institutions determined in this way profoundly affect the living conditions of all members of society. Therefore, the parties seek to reach a high level of security, and this means they make their decision according to the maximin rule (Rawls, 1975, pp. 177–181; Rawls, 2003, pp. 156–157). From amongst all the social orders, they choose the one which offers the relatively best position for the worst-off. This is not only rational, it is moreover an interpretation of impartiality. For a choice which is not able to fulfil every wish, is just, if it is the least undesirable option from the standpoint of those to whom it is least welcome (Nagel, 1994, p. 98).

Under the conditions of Western levels of prosperity, this rule of decision-making guarantees that the worst social position turns out in any case tolerably. This is achieved by two principles of justice. The first ensures the fundamental liberties, which nobody will reasonably jeopardise. By this, the absolute priority of the first principle is at the same time justified. Second, the parties would actually vote for an equal distribution of the material goods. But they refrain from this for reasons of efficiency, and so they choose the difference principle in conjunction with the principle of fair equality of opportunity. Rawls' assumption, that the parties in the original position would vote for securing the fundamental liberties and a minimal subsistence, has a high plausibility. Whether this also applies to the difference principle, however, is no longer true to the same extent.

The empirical studies of Frohlich & Oppenheimer suggest that given a secured social minimum for everybody, people would opt for maximizing the average utility (Frohlich & Oppenheimer, 1992; Ladwig, 2002, p. 104–105). According to Brickman however, the subjects' behaviour is more or less similar to that which is described in Rawls' theory. Though, the motivation remains open; the motive for the vote for the difference principle might be compassion, too (Brickman, 1977). According to the study by Mitchell et al., the test results and Rawls' assumption are broadly consistent with one another, if the subjects deem effort and yield as being coupled together only in a weak manner (Mitchell et al., 1993; Elster, 1995; Rawls, 1975, § 49; Rawls, 2003, pp. 188–203). In all these experiments, however, it is questionable whether they are located on the right level of abstraction, in the sense of Rawls' four-stage scale. Mostly, the decisions of the test subjects concern singular distributions, and not the normative principles for governing the design of social institutions.

Social Theoretical Inclusion

Against the background of these considerations, it can now be clarified to what degree moral and cooperative skills are needed of citizens. Assuming, like Rawls does, that the parties in the original position firstly do not know their later position, secondly, know about the possibility of disability, and thirdly vote according to the maximin rule, so as to minimize risk, then the assertion can be justified that persons with disabilities enjoy the same protection of fundamental rights, and that they are covered by the second principle of justice.

The parties in the original position may methodically exclude disability without self-contradiction only under the condition that they know that they cannot be affected by disabili-

ities. Such knowledge is indeed impossible behind the veil of ignorance, but Rawls adds it as a part of the definition of the person to his concept of the original position: People are able to cooperate to a sufficient degree. Therefore, it remains to be explained whether this obvious counterfactual restriction can be substantiated.

Rawls cites two weak arguments: “The consideration of these difficult cases would prematurely raise questions that could lead us beyond the theory of justice and also distract our moral perception to people who are very different from ourselves, whose fate invokes in us pity and fear” (Rawls, 1975, p. 118; Rawls, 1998, p. 87; Rawls, 2003, p. 262). The fact that these people are very different from “us” would need to be spelled out in detail within an anthropological theory. That people elicit pity and fear (in whom?), is still not a sufficient reason to exclude them from philosophical reflection. It may be a legitimate consideration that the questions come at the wrong time. Yet, the right time never actually comes about in Rawls’ theory.

A third reason stems from the methodological concept of the original position. Rawls varies in this respect between the formulation of a moral point of view and the acceptance of a rational-egoistic perspective, with reference to the theory of rational choice. The latter focuses on individual advantage. Cooperation with partners with weak power is irrational. If this line be traced further, Rawls would need to substantiate, at least according to which criteria the boundary is to be drawn. For the greater the ability to work, without regard to how it should be measured, the higher are the average results the participants can expect. But it is precisely Rawls’ main concern of to conceive of the situation of decision in a way that morally accidental circumstances will be given no consideration or weight. Therefore, they disappear behind the veil of ignorance: “If we start with the basic ideas [that natural endowments, social circumstances and good fortune are morally arbitrary] [...] as the underpinnings of the difference principle, it must seem quite bizarre to claim that people who enjoy less than rude health (mental and physical), and especially those afflicted with a disease that gives rise to ‘unusual and costly medical requirements,’ create peculiar difficulties for a theory of justice. Search conditions are, we might think, the paradigm of this kind of undeserved misfortune, whose translation into actual disadvantage Rawls describes as arbitrary from a moral point of view” (Barry, 1989, p. 244).

For these reasons, a specified minimum level of moral and cooperative capabilities is to be rejected as prerequisite for being taken into consideration in the discussions and decisions in the original position. Furthermore, the concept of society as a cooperative community is to be understood in a broad sense, as indeed Rawls himself explicitly writes in some places. Thus, people who are not able to work can nevertheless appeal to the difference principle and participate in intra-societal exchange. The social care for this group of persons is a statutory duty in a well-ordered society.

The common moral belief can be maintained and is consistent with the basic concept of Rawls’ contractualist theory that people with strong disabilities are entitled to just treatment, and are not to be regarded as mere objects of charity. So, it is not necessary to abandon the contract theoretical concept. It is also not necessary to ascribe to the parties in the original position an altruistic orientation or strong moral convictions. Nor is it necessary to expand the list of basic social goods which are a guideline for the deliberation of the parties in the original position or to replace them with capabilities. It is enough to move away from the narrow concept of cooperation and its implications and to draw realistic people – and

Rawls indeed is a proponent of close ties to realism – and to impute this realistic picture of the person to the parties of the original position.

Conclusion

To claim a just standard of treatment in society requires having participated in resolving the political conception of justice by a delegate. Of course, the original position is only a thought experiment. Transferring these considerations from the imaginary to a factual level, the exclusion of people with severe impairment of their ability to work in the ideal theory means that they are beyond the realm of social justice. Their participation in society is not assured. The salient point of the argument for or against this theoretical exclusion is the understanding of society as a cooperative community. Both narrow and broad interpretations find clues in the texts of Rawls. Here a wide, socio-cultural interpretation was given preference, which leads to quite a few further changes in Rawls' theory of justice. In particular, the strategic rational calculation of advantage of the parties in the original position needs to be modified. The profit of this interpretation lies in greater consistency as well as in the strengthening of the reflective equilibrium.

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