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# THE FAIRNESS OF LAW. AN OUTLINE FOR A RAWLSIAN LEGAL THEORY

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## ABSTRACT

In this essay I wish to outline a project of philosophical scrutiny aiming to elaborate a Rawlsian legal theory. To do this, we need not only carefully to analyse the writings of John Rawls, but also try to utilise his categories to the very special case, namely, the concept of law. This requires an approach to justice as fairness from the lawyers' standpoint. One relatively short essay is obviously not enough to do this. What I may try to do, is to point out the most important ideas I plan to use and briefly to outline the line of thought leading to a substantive conception of law. I call this conception "a cooperative conception of law". The initial ideas I examine in this essay, are: The idea of fair social cooperation, the idea of well-ordered society, complemented by the idea of reasonable and rational citizens. I will focus on them in the three first sections. In order to demonstrate the fundamental bonds between justice and law, I draw on the idea of original position, a subject of the fourth section. Finally, I try to sketch out how those basic Rawlsian ideas may be worked up into a cooperative conception of law.

**KEY WORDS:** John Rawls, theory of justice, contractualism, justice and law, justice as fairness, reciprocity, normative political theory.

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In everyday discourse we tend to see the law as a set of rules founded on justice. Such an understanding is dictated by the common sense, to that very extent, that in many cases we would very likely use the expressions "it is prescribed by law" and "justice so requires" as synonymous. That assertion, however, requires philosophical scrutiny and elaboration, and may take multiple versions thereafter. Certainly, many contemporary theorists of law and politics, even when generally standing in the very

distant positions, agree on the need to recognize the important (though not necessarily fundamental) bonds of law and justice. There are many crucial points that make a contemporary Thomist and a Kantian very distant from each other. But that particular assertion of law as stemming from justice is the one they both share.

Despite its wide recognition, this approach has also been repeatedly questioned. For instance Niccolò Machiavelli in his famous treaty *The Prince* assumes that the law is nothing but one of many tools to maintain power and effectively pursue the interests of the ruler.<sup>1</sup> This type of thinking rejects the prominence of justice, and puts the power in the first place. In this case, political power determines all other phenomena of social life, including laws. That makes justice equally subordinated, with no independent claim to determine the content and adjudication of law. This approach is today repeated by some political realists, may be also found in extreme version of legal positivism, in Marxism likewise. All of such claims have very ancient ancestry. Directly or indirectly, they all stem from the position that may be found in Plato's *The Republic*. It is expressed in the middle of the Book I, when Thrasymachus defines justice as the interest of the stronger. He says:

And the different forms of government make laws democratical, aristocratical, tyrannical, with a view to their several interests; and these laws, which are made by them for their own interests, are the justice which they deliver to their subjects, and him who transgresses them they punish as a breaker of the law, and unjust. And that is what I mean when I say that in all states there is the same principle of justice, which is the interest of the government; and as the government must be supposed to have power, the only reasonable conclusion is, that everywhere there is one principle of justice, which is the interest of the stronger.<sup>2</sup>

Socrates, who is the opponent of Thrasymachus in that part of the dialogue and the main character of the whole work, tries to defend justice, at first by trying to show the assumptions of his opponent as self-defeating. It doesn't go smoothly, however, and the virtue of justice is attacked in many ways, to mention only the Glaukon's argument, that acting

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1 See for instance Niccolò Machiavelli, *The Prince*, Chap. XVIII, where the law is considered to be one of the possible means of fight.

2 Plato, *The Republic*, Book I, 338e, transl. B. Jowett.

justly may very likely bring a man to social and personal depravation.<sup>3</sup> Nevertheless, Socrates takes the challenge. Throughout the whole dialogue he takes pains to defend the virtue of justice as the most prominent feature of healthy (that means guided by reason and virtue) human soul and, although only secondly, best-ordered state.

In many contemporary debates concerning law and morals we may hear the echoes of this ancient conversation. Although the particular controversies of those discussions may be very diverged, they very often recall one and the same underlying question, raised by Plato in his *Republic* – does the law arise from (transcendental or natural) precepts of justice, or it simply comes from (concrete and empirical) political power? If we follow Thrasymachus in that matter, and perceive the law as derived from political power, justice itself will not be of any special theoretical interest. In that case, any public justification of polices or legal acts would be conceived as nothing but a façade, or a costume of the interest (of the ruler or some social group), that is actually being pursued. Conversely, if we adopt the approach of Socrates and take the challenge to defend the prominence of justice in the society, also by trying to show that the idea of justice should fundamentally determine the concept of law, we will be obliged to carry out thorough investigations focused on justice that shall bring us to two points: (1) a conception of the priority of justice, that is a conception of a society guided by justice, and (2) a satisfying (that is meeting the requirements of scientific method, especially those of explanatory power) theory of fundamental bonds between justice and law.<sup>4</sup>

Such a philosophical objective may be reached in many ways, but, in my view a least, one of possible strategies has not been sufficiently worked up yet. What I mean here is the famous theory of justice as fairness, created by John Rawls. Although he was not a jurist, not even a legal philosopher in a strict sense, his wide-known conception of justice can be reasonably developed into a substantive conception of

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3 *Ibidem.*, Book II 358c.

4 It want to emphasize that I recall Plato here only to show the ancient origin of the controversy, with no attempt to connect Rawls to Plato, or to defend Plato's particular positions. Although Plato, unlike Rawls, deemed people fundamentally unequal, and (in *The Republic* at least) did not put as much trust in the law as Rawls does, it is worth to recall him here. In my view at least, any philosopher defending the prominence of justice is in the position of the Platonic Socrates.

law grounded on justice, especially when we take into account the late works of Rawls<sup>5</sup>. In this essay I wish to outline a project of philosophical scrutiny aiming to elaborate a Rawlsian legal theory. To do this, we need not only carefully to analyse the writings of Rawls, but also try to utilise his categories to the very special case, namely, the concept of law. This requires an approach to justice as fairness from the lawyers' standpoint.

One relatively short essay is obviously not enough to do this. What I may try to do, is to point out the most important ideas I plan to use and briefly to outline the line of thought leading to a substantive conception of law. I call this conception "a cooperative conception of law". The initial ideas I will examine are: The idea of fair social cooperation, the idea of well-ordered society, complemented by the idea of reasonable and rational citizens. I will focus on them in three following sections. In order to demonstrate the fundamental bonds of justice and law, I draw on the idea of original position, a subject of the fourth section. Finally, I try to sketch out how those basic Rawlsian ideas may be worked up into a cooperative conception of law.

## Society perceived as a system of cooperation

Since any theory of justice is supposed to provide a set of reasonable criteria for fair distribution of basic rights, goods, resources, or capabilities within the society, it is not surprising that according to Rawls "[f]ully to understand a conception of justice, we must make explicit the conception of social cooperation from which it derives" (*TJ*, § 2: 9). Therefore it is also a natural starting point for our inquiries. In the mature, constructivist methodology of *Political Liberalism* or *Justice as Fairness: A Restatement* the concept of society and social cooperation therein is revealed by a complex set of ideas, however the leading position is given to the idea of society as a fair system of cooperation. As Rawls wri-

5 In this essay I mostly draw on the major works of Rawls: *A Theory of Justice*, The Belknap Press of Harvard University Press, Cambridge: MA, 1971 (further: *TJ*); *Political Liberalism*, Columbia University Press, New York 1995 (further: *PL*), and *Justice as Fairness: A Restatement*, ed. Erin Kelly, The Belknap Press of Harvard University Press, Cambridge: MA, London 2001 (further: *JaF:R*). In spite of the fact that I frequently refer to *A Theory of Justice*, I try to take into account all relevant alterations Rawls made in his philosophy.

tes, “[w]e use this idea as the central organizing idea in trying to develop a political conception of justice for a democratic regime” (*JaF:R*, § 2: 5).

Before we take a closer look into this idea, let us first consider the concepts of society and social cooperation presented in *A Theory of Justice*. That will enable better comprehension of the idea of society as a fair system of cooperation. The concept of society is introduced at the very beginning of the book, where the author assumes “to fix ideas”, that “a society is a more or less self-sufficient association of persons who in their relations to one another recognize certain rules of conduct as binding and who for the most part act in accordance with them. Suppose further – the author continues – that these rules establish a system of cooperation designed to advance the good well-being of those taking part in it” (*TJ*, § 1: 4). Such an understanding of the society clearly stems from the liberal and the Enlightenment tradition. The society is then not regarded as a substantive being, independent from the individuals, but it is perceived as a system of cooperation – something entirely derived from those who are involved in the cooperative ventures. That means not only that the social whole exist only as far as the individuals do, but also that all the purposes and values of the social whole are derived from the purposes and the values of the individuals. The latter means that the individuals are considered each separately, not collectively, in the sense that everyone seeks his own interest, but at the same time it is assumed that each needs to cooperate with others in order to pursue it. As Rawls writes:

The society is a cooperative venture designed to mutually benefit, however, is usually marked by the convergence of interests of both, as well as their conflict. There is a convergence of interests, since social cooperation enables a better life for all, than if it ran on its own. It is a conflict of interest, because no one is neutral, and is distributed as a result of increasing the benefits of cooperation, as to achieve its objectives, each prefers larger than a smaller share of the benefits (*TJ*, § 1: 5).

This set of characteristics is a Rawlsian version of those specified in David Hume’s writings. According to the latter, it is only sensible to philosophize about the “the cautious, jealous virtue of justice” when certain social circumstances are assumed.<sup>6</sup> To Hume, and to Rawls as well,

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<sup>6</sup> See David Hume, *An Enquiry Concerning the Principles of Morals*, sec. III, pt. I. See also Brian Barry, *Theories of Justice*, University of California Press, Berkeley and Los Angeles, 1989, 154–160.

we need to assume certain conditions under which the social cooperation is “both possible and necessary” (*TJ*, § 22: 126). Those conditions are, first of all: “moderated scarcity” of resources, and the “limited altruism” of the individuals. The first means that in order to lead a decent life, one needs to cooperate with others, while all necessary resources or goods are “not so abundant that schemes of cooperation become superfluous, nor are conditions so harsh that fruitful ventures must inevitably brake down” (*TJ*, § 22: 127). The second means that people are “neither angels nor devils”, to use Hart’s expression.<sup>7</sup> That means that the cooperating individuals do not suffer envy or malice on the one hand, but on the other “they (...) have their own plans of life”, which “lead them to have different ends and purposes, and to make conflicting claims on the natural and social resources available” (*Ibidem*). What Rawls means here is that the circumstances of justice inevitably entail mutual interdependence of the individuals, but despite the fact that altruistic motivation in real life is not excluded, each individual considers himself entitled to protect his own interest. We shall come back to this problem in the section devoted to the original position.

As one might see from the above one, the underlying problem of any theory of justice is therefore the inescapable tension between an individual and the social whole; or in other words, the need for reasonable coordination of the interests of all individuals involved in social cooperation. If a theory of justice is to be liberal, it must “take seriously the distinction between persons” when adjudicating those conflicted claims, so that each individual interest be taken separately (*TJ*, § 5: 27).<sup>8</sup> The initial point of developing a solution to this problem is, in the Late Rawls, the idea of society as a fair system of cooperation. Once we have gone through the introductory remarks, let us now take a look into this idea in more detail.

It is worth indicating that this idea is seen as an implicit idea, present in all democratic societies. To the Late Rawls, the initial point for the philosopher aiming to develop the conception of justice for a modern

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7 Herbert L.A. Hart, *The Concept of Law*, Clarendon Press, Oxford 1961, p. 192.

8 It’s worth to recall that this one of main Rawlsian arguments against utilitarianism. To Rawls, utilitarianism “conflates all persons into one through the imaginative acts of the impartial sympathetic spectator” (*TJ*, § 5: 27). See also: Wayne Proudfoot, *Rawls on Individual and the Social*, „The Journal of Religious Ethics”, V. 2, No. 2, 1974.

democratic society is to “look to the public political culture of a democratic society, and to the traditions of interpretation of its constitution and basic laws, for certain basic familiar ideas that can be worked up” (*JaF:R*, § 2.1: 5). The idea of society as a fair system of cooperation is therefore perceived as an element of the tradition and political reality; an element at least implicitly accepted by the citizens of democratic states as the idea determining major political institutions, such as the constitution, basic rights, or judicial procedures (see *PL*, I, § 2.3). That is why it gives a general framework not only to a theorist who aims at working out a plausible conception of justice, but also to the one that seeks the fundamental bonds of the latter with the law.

The idea of society as a fair system cooperation consists of three most important elements:

- (a) Social cooperation is distinct from merely socially coordinated activity — for example, activity coordinated by orders issued by an absolute central authority. Rather, social cooperation is guided by publicly recognized rules and procedures which those cooperating accept as appropriate to regulate their conduct.
- (b) The idea of cooperation includes the idea of fair terms of cooperation: these are terms each participant may reasonably accept, and sometimes should accept, provided that everyone else likewise accepts them. Fair terms of cooperation specify an idea of reciprocity, or mutuality: all who do their part as the recognized rules require are to benefit as specified by a public and agreed-upon standard.
- (c) The idea of cooperation also includes the idea of each participant’s rational advantage, or good. The idea of rational advantage specifies what it is that those engaged in cooperation are seeking to advance from the standpoint of their own good. (*JaF:R*, 6, par 2.2, compare: *PL*, 49, I, § 3.2)

*Ad (a):* The first feature does not seem to require any special explanations. Let us point out, however, the important links between this element and our preliminary remarks. I evoked Plato’s *The Republic* there, in order to indicate that two basic approaches to the relation between power, justice, and law should be distinguished. Whether we put power in charge, and by doing so equally subordinate justice and law to the political stranglehold, or we try to develop a conception of the priority of justice, that would determine the power through laws. The first feature of the idea of society as a fair system of cooperation constitutes the first step

to work out a conception of the second kind, namely, a conception of the priority of justice. Rawls says here that the model of central authority managing the actions of individuals through the coercive orders cannot serve as a plausible paradigm for the concept of cooperation. It is because the notion of the latter requires some form of equality in association; an association of fairly situated, autonomous agents. That entails equal subordination of each actor to the same (properly legitimized) standards and procedures, provided by a public conception of justice. This aspect of the idea of society as a fair system of cooperation is extended and elaborated in more detail in the idea of well-ordered society, into which we shall take a closer look in the next section.

*Ad b) and c):* Those features of the idea of fair cooperation cover issues that are more complex, but at the same time crucial to our inquiries. This is, first of all, the concept of reciprocity, which specifies some essential aspects of the notion of fair terms of cooperation. The notion of reciprocity is not supposed to provide a substantive conception of justice – this is of course the task for the procedure of construction, where the principles are chosen in the original position. What the idea of reciprocity is able to do is to indicate the kind of moral motivation of the parties choosing the principles of justice, and a general manner in which their individual interests are coordinated.<sup>9</sup> The idea of reciprocity sets out a model in which cooperating actors: (1) try to maintain reasonable balance between individual and general good, and (2) do so by endorsing publicly justified principles of justice, which are to be obeyed for their own sake. The second aspect means that the binding force of the principles is derived not from particular wants, desires or well-being of any particular cooperating individuals, but from the reasonable content of the principles. Thus the principles themselves, together with the general conception of society as a fair system of cooperation, yield moral motivation in the persons. The principles are ‘reasonable’ in the sense that they are supposed to be acceptable for reasonable agents, regardless of their particular positions in the cooperative system, as the particular bargaining powers must not determine the content of the principles.

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<sup>9</sup> The concept of the interest equates here with the pursuit of one’s own good, according to the rational plan of life, that each individual is assumed to have. In this point of the inquiry, the common understanding of those terms is sufficient. We shall examine those issues in more detail further in the essay.



In other words, the foundation of the principles of justice is Kantian rather than Hobbesian. To Hobbes, any rule of social cooperation, called by him *lex naturalis*, is “a Precept, (...) found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved.”<sup>10</sup> What it entails is that an individual acts in accordance with the principles of the law of nature (equivalent to Rawlsian principles of justice) motivated merely by his own self-preservation, or some form of pleasure. As a consequence, the rules of *lex naturalis* are at the end of the day the rules of prudence, understood as technical rationality of self-preservation. To Kant, by contrast, such a justification cannot serve as a proper basis of the moral rules since in such case they would be lacking any general binding force. Thus we need to invoke the universal lawgiving of practical reason, and deem the moral law binding *a priori*, that is, determining the will by its form only.<sup>11</sup> Admittedly, Rawls tries to escape from such judgments as they are of purely metaphysical nature, but he is nonetheless close to Kant in the sense that his principles of justice are grounded solely in their reasonable content, adequate to the political ideal of free and equal citizens and their fair cooperation. Particularly, the principles are not grounded in rational calculus of individual advantages, nor in general welfare they would produce.

Let us now return to the first mentioned aspect of reciprocity, which constitutes a model of fair cooperation in terms of proper balance between opposing individual interests and requirements of the general good. The model of justice as reciprocity is situated between two other ones – justice as a mutual advantage, and justice as impartiality. They are the opposing models that the reciprocal model tries to combine. Justice as mutual advantage is radically individualistic: each participant’s consent to the principles of justice is derived from the benefit that is anticipated to come along with the cooperation under these rules. Therefore this model is usually developed with the methodology of mathematics, particularly this of game theory. Since each participant in the cooperation rationally calculates his own advantage, this model permits to introduce the bargaining power of the parties as a factor that determines

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<sup>10</sup> Thomas Hobbes, *Leviathan*, Chap. XIV.

<sup>11</sup> See Immanuel Kant, *The Critique of Practical Reason*, Book I, Chap. I.

the content of the principles of justice.<sup>12</sup> Conversely, the justice as impartiality approach is focused only on some form of general welfare, or common good, and the individual interest is deemed completely irrelevant. Altruism as the moral motivation of individuals is here assumed, together with the primacy of the general good over the individual good.

Justice as reciprocity draws from both models. In a fair system of cooperation one should definitely be entitled to pursue the individual good, according to each participant's own conception thereof. On the other hand, merely an individual interest, even that of higher order or some particular value, must not be the sole basis of the social cooperation, and some form of common good must be introduced. In this case the term "common good" means the background conditions that might be reasonably anticipated to allow each participant to gain the proper advantage from the cooperation in which he takes part in. According to the requirements of reciprocity, this shall be done in such a way that every citizen should be able to be a fully cooperating member of society, and no one should be aggrieved by morally irrelevant (i.e. arbitrary) circumstances. Rawls puts it in this way: "[a]s understood in justice as fairness, reciprocity is a relationship between citizens expressed by the principles of justice that regulate a social world in which everyone benefits judged with respect to an appropriate benchmark of equality defined with respect to that world" (*PL*, I, § 3.2: 17).

The key difference between reciprocity and mutual advantage is as follows: the latter requires merely a situations in which the benefit of each participant increases, and no one takes advantage of his fellows,<sup>13</sup> whereas the former demands a set of rules and general conditions in which each participant may pursue his legitimate interest, irrespective of his particular social position. Thus, each of these models operates on a slightly different level. As Cathrine Audard puts it: "[t]he difference between mutual advantage and reciprocity is much clearer if the contrast mutual benefits as the results of inter-individual interactions with reciprocity as a feature of the social world itself. Reciprocity is built into the system of rules and social practices that regulate social institutions and create social cohesion, and it is not left to individual decisions. It is, in other words, a structural

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<sup>12</sup> See for instance: David Gauthier, *Morals by Agreement*, Clarendon Press, Oxford 1986, pp. 117–161.

<sup>13</sup> See D. Gauthier, *Morals...*, p. 117.

feature of the well-ordered society. The reciprocal scheme has structural value as a system of rules, not simply in view of its *outcomes*.<sup>14</sup>

In this introductory section I hope to have provided the Reader with basic Rawlsian statements on the society and social cooperation that are relevant to our inquiries. Indeed, the conception of law that I wish to outline in this essay is grounded in the conception of social cooperation governed by reciprocal, publicly recognized rules, which make the whole process fair. The cooperative conception of law perceives the legal principles as stemming from the moral rules of social cooperation. In order to work it up properly, we need first to reveal in more detail the public role of justice in the society. Thus this is the main aim of the following section.

## The role of justice. The idea of well-ordered society

As I have emphasized at the beginning of the essay, the problem of the priority of justice in political community is as old as political philosophy. To Plato, justice serves as the most prominent virtue, harmonizing the other virtues, ordering both human soul and each member of the state (members are deemed fundamentally unequal) in a proper social position, according to his very nature. Aristotle does not seem to be far from Plato, however he strongly binds the concept of justice with a particular kind of equality of individuals that set up the political whole, when he writes: “It is thought that what is just is something that is equal, and also that friendship is based on equality, if there is truth in the saying „amity is equality”. And all constitutions are some species of justice; for they are partnerships, and every partnership is founded on justice.”<sup>15</sup> Justice is then seen as a touchstone for every political community. The Rawlsian notion of justice is very similar in this respect, as justice is supposed to “establish the bonds of civic friendship” among individuals, considered

<sup>14</sup> Cathrene Audard, *John Rawls*, Acumen, Stockfield 2007, p. 38.

<sup>15</sup> Aristotle, *Eudemian Ethics*, VII, 1241b, transl. by H. Rackham. Calling forth Aristotle at this particular point may be quite puzzling for the Reader, as he is the founder of the philosophical tradition opposite to that of Rawls, namely of the virtue ethics. Nonetheless, according to some scholars at least, Aristotle considers justice as the notion central to every government, and the key idea for political philosophy. See for instance: Fred D. Miller, *Nature, Justice, and Rights in Aristotle's Politics*, Clarendon Press, Oxford 1995, p. 67.

as free and equal citizens regarding justice as a basis for their political community. As he writes:

(...) while men may put forth excessive demands on one another, they nevertheless acknowledge a common point of view from which their claims may be adjudicated. If men's inclination to self-interest makes their vigilance against one another necessary, their public sense of justice makes their secure association together possible. Among individuals with disparate aims and purposes a shared conception of justice establishes the bonds of civic friendship; the general desire for justice limits the pursuit of other ends. One may think of a public conception of justice as constituting the fundamental character of a well-ordered human association. (*TJ*, § 1: 5)

One should acknowledge, though, a very important difference between the Rawlsian and the traditional view on justice as the foundation of political community. To Rawls, the primary subject of justice is the basic structure of society, understood as “the way in which the main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time (*JaF:R*, § 4.1: 10, see also *TJ*, § 2: 6). In such a view, justice is inevitably bound to institutions which are managed by the state, and regulated through laws. In the classical political thought it was not the case, at least not directly. “Justice” was primarily seen as an individual virtue (i.e. a disposition of an individual), enabling a person to do what is due to others and to prevent harm.<sup>16</sup> A just government was therefore a just one indeed only if ruled by the virtuous.<sup>17</sup> To Rawls, by contrast, justice is not directly a characteristic of a citizen or a ruler, but refers di-

16 See for instance Aristotle, *Nicomachean Ethics*, 1163b 15. Following this difference between the ancient and modern political philosophy, Bernard Yack argues precisely that “Aristotle never provides us with a systematic account of the determinate rules and principles that should guide distributive justice in political communities” (B. Yack, *The Problems of a Political Animal. Community, Justice, and Conflict in Aristotelian Political Thought*, University of California Press, Berkeley and Los Angeles 1993, p. 130nn.)

17 See for example a Platonic idea expressed in his *Republic* (V, 473 c-d), that unless philosophers, i.e. the just people, become kings, there can be no just and harmonious state. I am grateful to Simon Weber for his significant help in the matter concerning different notions of justice present in the contemporary and the classical political thought.

rectly to public institutions. An institution is defined as “a public system of rules, which defines offices and positions with their rights and duties, powers and immunities, and the like”. Thus the institutions as “realized and effectively and impartially administered” are first of all what is just or unjust (*TJ*, § 10: 55). It doesn’t mean, however, that Rawls ascribes no duties to individuals,<sup>18</sup> nor that he is, strictly speaking, virtue-neutral.<sup>19</sup> What is worth to emphasize, though, is the importance of law and law-making process in such a view on justice. Obviously, institutions have a legal form and are erected and amended through judicial procedures of various kind. That means that the conception of justice as fairness must be interpreted in its close relation to jurisprudence. Since a public conception of justice provides normative grounds for the mutual cooperation, it must be able to adjudicate competing claims. Therefore one should perceive justice as a public tribunal, enabling reconciliation of the citizens in case of a conflict.

The conciliatory nature of justice as fairness is expressed well in the idea of well-ordered society, as it is an idea of society “effectively regulated by a public conception of justice” (*JaF:R*, § 3: 8). This idea enables us to specify further the first feature of the idea of society as a fair system of cooperation that I already have discussed. It is a purely normative idealization,<sup>20</sup> and covers three crucial features:

First, and implied by the idea of a public conception of justice, it is a society in which everyone accepts, and knows that everyone else accepts, the very same political conception of justice (and so the same principles of political justice). Moreover, this knowledge is mutually recognized: that is, people

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18 See *TJ*, § 18, where principle of fairness is discussed, or the essay *The Idea of Public Reason Revisited*, “University of Chicago Law Review”, 64, Summer 1997, where the idea of duty of civility is elaborated.

19 See *PL*, V, § 5: 190–195, where Rawls directly addresses the issue of political virtues. See also Stephen Macedo, *Liberal Virtues*, Clarendon Press, Oxford 1990.

20 I want to emphasize here that I perceive the idea of well-ordered society not as a political utopia, nor a political ideal, but as a methodological tool enabling a theorist to tackle the reality. In this respect the idea of “well-ordered society” operates in a way similar to the one that a notion of “uniform linear motion” operates in Newtonian physics. Off course, idealization in practical philosophy is much more open to questioning than in physics. Further to this topic see Onora O’Neill, *The Method of A Theory Justice* [in:] Otfried Höffe (ed.), *Eine Theorie der Gerechtigkeit*, Akademie Verlag, Berlin 1998, pp. 33–38.

know everything they would know if their acceptance of those principles were a matter of public agreement.

Second, and implied by the idea of effective regulation by a public conception of justice, society's basic structure—that is, its main political and social institutions and the way they hang together as one system of cooperation—is publicly known, or with good reason believed, to satisfy those principles of justice.

Third, and also implied by the idea of effective regulation, citizens have a normally effective sense of justice, that is, one that enables them to understand and apply the publicly recognized principles of justice, and for the most part to act accordingly as their position in society, with its duties and obligations, requires. (*JaF:R*, § 3: 8–9)

This idea has many important aspects deserving extended commentary, however I focus here only on those relevant to the main purpose of this essay. What is worth to emphasize from this point of view is that justice is not perceived as a merely procedural virtue, requiring nothing but to “treat like cases alike”. Serving as a normative basis for the core of most important political institutions, it covers various cases and contains the norms of many different kinds, not only the procedural ones. Better to understand it, let us compare this “extended” notion of justice with this of Herbert L.A. Hart, who would propose to reduce the scope of justice as a feature of law. Considering possible critique of laws from the moral point of view, he wrote:

There are indeed very good reasons why justice should have a most prominent place in the criticism of law arrangements; yet it is important to see that it is a distinct segment of morality, and that laws and the administration of laws may have or lack excellences of different kinds. (...) A man guilty of gross cruelty to his child would often be judged to have done something morally *wrong*, *bad*, or even *wicked* or to have disregarded his moral *obligation* or duty to his child. But it would be strange to criticize his conduct as *unjust*. (...) “Unjust” would become appropriate if the man had arbitrarily selected one of his children for severer punishment than those given to others guilty of the same fault, or if he had punished the child for some offence without taking steps to see that he really was the wrongdoer.<sup>21</sup>

Such an approach, underlain by a conviction that any moral critique of laws should be strictly separated from the law as such, leaves plenty of

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<sup>21</sup> H.L.A. Hart, *The Concept...*, p. 154.

room to other virtues of political and legal institutions, with no priority of justice. Despite being significant, the idea of justice does not embrace too much, and does not have the fixed content that could be regarded as a public normative conception, regulating the entire basic structure of social cooperation. In Rawls, both late and early, a public conception of justice is developed, in order to regulate, directly or indirectly, virtually all important legal institutions. Both in the *Theory* and in the mature *Restatement* the two functions of the basic structure are distinguished. The first regulates the way in which political institutions assign basic rights and duties, and the second concerns the distribution of the goods and burdens emerging from social cooperation (see *JaF:R*, § 4, *TJ* § 2). Thus what not only “the political constitution with an independent judiciary”, but also „the legally recognized forms of property, and the structure of the economy (for example, as a system of competitive markets with private property in the means of production), as well as the family in some form, all belong to the basic structure.” The task of the basic structure is then to provide “the background social framework within which the activities of associations and individuals take place” (*JaF:R*, § 4: 10). It is more than obvious, for a lawyer at least, that such a framework may be realized only through laws. Thus we may deem the system of law stemming primarily from the public conception of justice.

Before we proceed further, one important feature of the basic structure is to be emphasized. I have written that the Rawlsian notion of justice is “extended” and covers virtually all aspects of fair cooperation between persons. It is true, but the notion of justice is at the same time “limited” to the special case of basic structure. What it means is that justice operates on the institutional level only, and does not cover all social practices. That is why we can say that some particular legal construction (e.g. some issue concerning property rights) is unfair and unjust, but we cannot say, in Rawlsian terms, that the structure of some particular church is unjust, or some journalist wrote an unjust article. All of such social arrangements do not belong to basic structure and shall be determined by the public institutions only in case of heavy and evident violation of basic rights. It so, because in political liberalism Rawls strictly separates the basic structure from what he calls “background culture”, i.e. vital activities of civil society (universities, churches, and other associations) that is independent from basic structure and justice is primarily supposed to secure it, not to put constrains thereon (*PL*, VII, § 3). The

public conception of justice is then not comprehensive and covers only some particular matter, namely, the matter of social cooperation through public institutions.

In this section I tried to describe the role of justice in the society understood as a system of cooperation. Re-thinking the idea of well-ordered society inevitably entails the assertion that the public conception of justice in Rawlsian political philosophy is analogous to the familiar notion of *lex naturalis*. It does not mean that Rawls is a natural law thinker,<sup>22</sup> but shows how the notion of justice is extended and covers the whole normative framework of social cooperation of individuals, regarded as citizens. This framework is of normative, but at the same time of extra-legal nature. What is more, the public conception of justice does not consist of procedural rules only, but contains also, as its integral part, the substantive conceptions of the person, rationality, and the like. Therefore it may provide normative standards for laws, standards seen not as separate from, but as intrinsic to laws. To make this explicit, we need to introduce two following ideas – the political conception of the person and the idea of original position. Hence the two following sections.

## Justice and persons. The idea of free and equal citizens

Despite the many times I have referred to the notion of an individual so far, I have not attempted any deeper description thereof. This section is to rectify this lack, since the conceptions of the society effectively regulated by the public conception of justice must be complemented with the conception of reasonable and rational agents who endorse and apply the regulatory principles.<sup>23</sup> Also the conception of law I am hoping to outline in this essay cannot be presented with no reference to some no-

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<sup>22</sup> It would be a huge mistake, however, to classify Rawls as a natural thinker. The natural law approach is inevitably connected to moral realism and entails the assertion of real existence of the independent order of moral values. The Rawlsian approach does not confirm nor reject it, since he does not want to oppose any comprehensive metaphysical view (see *PL*, III, § 1.3), and develop his conception as a political one, that may be shared by many citizens, fundamentally divided by their comprehensive doctrines.

<sup>23</sup> Compare *PL*, III, § 4.1.



tion of the citizen who makes the law, is supposed to obey its precepts, and makes use of legal institutions. To avoid possible confusions, let us start with an important remark. In order to understand the study made in this section we essentially need to remember that Rawls never aimed to produce a full metaphysical doctrine of the person, nor any other kind of comprehensive philosophical anthropology. The primary concern of the early works was adequately to describe the sense of justice that each person supposedly has (see *TJ*, § 9, 69–77). Men and women were of interest only in the respect of being moral persons capable of developing and pursuing conception of the good and exercising the sense of justice. That is why the moral theory could be presented as independent from other philosophical disciplines, like epistemology or philosophy of language.<sup>24</sup> In the late works he departed from metaphysics of the person in even more radical manner. In *Political Liberalism* for instance he is no longer concerned with the moral person as such, but merely with the person as a citizen (see *PL*, II, § 8). That means that the main subject of the political conception of the person developed there is primarily not the moral sense of the persons, but rather their “public, or institutional, identity, or their identity as a matter of basic law” (*PL*, I, § 5.2: 30). Since the conception of the person deeply determines the principles of justice, it also sufficiently shows in what sense the public conception of justice is considered political, not metaphysical, i.e. freestanding and not derived from any particular comprehensive doctrine.

The Rawlsian conception of democratic citizenship consist in free and equal status of the citizens. Their freedom and equality is grounded in two moral powers that each citizen is supposed to have “to the requisite minimum degree” (*PL*, I, § 3.3: 19). Namely, the citizens are considered to be both reasonable and rational agents. Those two moral capacities are regarded as complementary. In the following I will focus on the difference between the rational and the reasonable and their relation.

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<sup>24</sup> To specify: Rawls rejects the traditional model of hierarchical philosophical system, where one particular part of philosophy (say, epistemology, or theory of meaning) constitutes the foundation, where-from all other statements are derived. Off course, as he wrote, “no part of philosophy is isolated from the rest”, however “the study of substantive moral conceptions and their relation to our moral sensibility has its own distinctive problems and subject matter that requires to be investigated for its own sake” (J. Rawls, *The Independence of Moral Theory* [in:] S. Freeman (ed.), *John Rawls. Collected Papers*, Harvard University Press, Cambridge 1999, p. 287).

Let us first consider rationality as a moral power of a citizen. In Rawls it equates with the capacity „to form, revise, and rationally pursue a conception of the good” (*PL*, I, § 5.2: 30). “The good” here means what is valuable or what pleases an individual, so his rational judgments are concerned with what is good for himself, and what means are sufficient to gain it. The political conception of the person assumes that each citizen has “a rational plan of life” and that is what determines particular actions and allocation of the means, in order to pursue the conception of the good<sup>25</sup>.

A question then arises, why a rational agent is at the same time a moral agent, not merely one capable of maximizing his advantage. Wolfgang Kersting introduces some crucial analogy here. He writes: „Aristoteles hat das Leben als umfassende menschliche Praxis der Erreichung eines Gutes dient. Das Gut, das wir im Leben anstreben, ist das Glück. Der Rawlsche Begriff des Lebensplan ist ein rationales Pendant zur aristotelischen Konzeption des Lebens als einer integralen ethischen Praxis<sup>26</sup>“. We need to remember that it is only an analogy, but it is indeed a fruitful one. It shows that a power to form and pursue the conception of the good cannot be understood in a reductionist way, as maximizing one’s advantage, nor it can be easily associated with a self-interested egoist. The conception of the good may move the individual in diverged ways. As Rawls writes: “Nor are the rational agents as such solely self-interested; that is, their interests are not always interests in benefits to themselves. (...) Indeed, rational agents may have all kinds of affections for persons and attachments to communities and places, including love of country and of nature; and they may select their ends in various ways” (*LP*, II, § 1.2: 51). This means that a rational agent is a moral agent at the same time. He is not determined by some sort of instincts or compulsive desires. His ends are chosen in the light of reason, thus, according to Rawls at least, are of moral nature.

Notwithstanding the moral dimension of the rational, it suffers from some fundamental lack that makes it insufficient to be the sole basis of justice. To explain this I must recall that the reciprocal model of justice

<sup>25</sup> See *PL*, IV, § 2.1: 176–178.

<sup>26</sup> W. Kersting, *John Rawls zur Einführung*, Junius Verlag, Hamburg 2001, p. 54. There is, however a significant difference between the Rawlsian and the Aristotelian view on the comprehensive ethical *praxis*. To Aristotle, one particular ideal of the good life can be found. In the liberal view it is not permissible, hence each person is entitled to determine the notion of the good in the autonomous way. That is why the material notion of the good life in Aristotle is merely a formal one in Rawls.

requires the principles endorsed and obeyed for their own sake. A solely rational agent would never obey the principles for their own sake, but always as a part of his own conception of the good. It would permit to subordinate justice to one's conception of the good, thus the priority of justice would not have sufficient foundation in the individual moral sense. As Rawls writes: “[w]hat rational agents lack is the particular form of moral sensibility that underlies the desire to engage in fair cooperation as such, and to do so on terms that others as equals might reasonably be expected to endorse” (*PL* II, § 1.2: 52). The reasonable is then strictly connected to justice, to the sense of justice in particular. A reasonable agent is ready “to propose, or to acknowledge when proposed by others, the principles needed to specify what can be seen by all as fair terms of cooperation. Reasonable persons also understand that they are to honor these principles, even at the expense of their own interests as circumstances may require, provided others likewise may be expected to honor them” (*JaF:R*, § 2.2: 6). Thus the reasonable constrains the concepts of the good, as they must not violate the reasonable terms of social cooperation. Thus “[i]n each case the reasonable has priority over the rational and subordinates it absolutely” (*JaF:R*, § 23.3: 82). This subordination, constituting the priority of right over the good, prohibits in compliance with the rules, even when it is to one's advantage.<sup>27</sup> The two moral powers of the citizen make the model of the public conception of justice (understood as reciprocity) complete and provide a foundation for it. If that normative description of a citizen is considered adequate, a public conception of justice may indeed serve the purpose I have discussed in the previous section.

## The original position

In this section I do not aim to recall the idea of the original position in a very detailed way, since it is one of the best-known Rawlsian con-

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<sup>27</sup> Thus, many scholars argue, merely instrumental rationality, underlying the model of justice as mutual agreement, is not sufficient to provide solid grounds for the compliance. See B. Barry, *Justice as Impartiality*, Clarendon Press, Oxford 1995; Wojciech Załuski, *The Limits of Naturalism: A Game Theoretic Critique of Justice as Mutual Advantage*, Kantor Wydawniczy “Zakamycze”, Zakamycze 2006.

structions, and has attracted enormous attention of many distinguished interpreters. What I want to do here is to point out the components that could help us to answer the question of the fundamental bonds between law and justice. Giving the emphasis to the particular description of the parties and the content of the agreement, I will be able to show that the original position not only provides the argument for the principles of justice, but also gives reason to think of them as intrinsic to the concept of law.

Rawls is famous to have rediscovered the contractual tradition (especially that of Locke, Rousseau, and Kant), generalizing it and carrying to a higher level of abstraction (*TJ*, § 3). Trying to provide the arguments for his principles of justice,<sup>28</sup> he developed an idea of the imaginary individuals who select the principles that would regulate their social cooperation from one generation to another. The original position models an agreement of fairly situated agents, who deliberate on the regulatory principles, primarily for the basic structure of society. The crucial feature securing the fairness of the deliberation is the famous “veil of ignorance” that prohibits any knowledge concerning individual endowment and social circumstances of the parties, in order to prevent biased or self-interested judgment as to the plausibility of particular principles. That means that parties to the contract must not draw on their individual position, and must consider only general facts about the social cooperation they are supposed to regulate. The construction of the original position resembles a theory of rational choice, but, unlike the latter, does not claim to forecast the conduct of the real men and woman, nor it claims to describe any historical agreement of them. The purpose of the original position is then purely normative – it is developed as a “device of representation or, alternatively, a thought-experiment for the purpose of public- and self-clarification” (*JaF:R*, § 6.4: 17). The construction of the original position, according to Rawls, embodies the legitimized reasons for choosing a particular conception of justice as the most adequate for a democratic society. The construction, briefly speaking, consists of three

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<sup>28</sup> The original position is only the first step of the full Rawlsian argumentation. As Samuel Freeman writes, “there are three parts to Rawls’s complex argument for the principles of justice”, namely: the original position, the model of basic social institutions rendered by the principles selected in the original position, and the argument concerning stability of the society regulated by the principles and institutions (Samuel Freeman, *Rawls*, Routledge, London and New York 2007, p. 141.

elements: (a) the circumstances of justice, (b) the characteristics of the parties, and (c) the content of the agreement.

To the first component: initially, a situation of rough equality between the parties is assumed.<sup>29</sup> No individual is able to dominate the rest easily, as they are comparable in their physical and mental powers. Secondly, the social conditions are marked by moderate scarcity of resources, understood as we already described in the first section. The circumstances of justice make the social cooperation both possible and necessary. It means that if any individual is to leave a decent life, he has to cooperate with others. Thirdly, Rawls assumes that the parties are mutually disinterested. It does not mean that they are most of all egoists, but merely that any altruistic deeds must be excluded from the argumentation strategy in the original position. The parties to the contract are seen as the trustees of free and equal citizens, and they need to secure the interest of those who they represent. If altruism of the parties were assumed, the argument would not be able to explain the binding force of the principles.<sup>30</sup> To Rawls, “justice is the virtue of practices where there are competing interests and where persons feel entitled to press their rights on each other” (*TJ*, § 22: 129).

To the second component, it is worth to point out that the characteristics of the parties were considerably modified by Rawls within the development of his doctrine. The most important amendment is to consider the two moral powers of the citizens as intrinsic to the original position. In *A Theory of Justice* the reasonable and rational were not strictly distinguished from each other and therefore (although the parties were regarded as rational agents) it was not clear, why and how might they transcend their self-interest and consider the general rules worth to be obeyed for their own sake. The sole assumptions of the veil of ignorance were commonly considered insufficient.<sup>31</sup> In the later works, the parties

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29 It is emphasized and compared with the leading contractualists of the past by Martha C. Nussbaum in her *Frontiers of Justice*, Harvard University Press, The Belknap Press, Cambridge: MA, London 2006, 28–34.

30 A description of volunteers agreeing to do something that is not of their interest directly cannot provide the foundation of any sort of moral obligation. See thereto Thomas Pogge, *John Rawls*, transl. M. Kosch, Oxford University Press, Oxford 2007, p. 61.

31 For instance Brian Barry famously stated that “[i]f you put the wants at the beginning you cannot get anything but wants out at the end” B. Barry, *The Liberal Theory of Justice*, Clarendon Press, Oxford 1973, p.22.

to the agreement are perceived as reasonable and rational representatives or trustees of free and equal citizens. It means that the conditions and constraints introduced by the model of reciprocity are not the outcome, but are already binding in the original position. Moreover, the citizens the parties represent are considered to have a “higher-order interest” to exercise and develop their two moral powers. It means that although the parties do not know their particular conceptions of the good, nor the general metaphysical and ethical views, all citizens share the moral powers and want to exercise them – regardless of the comprehensive doctrine they endorse (see *PL*, II, § 5.2). In my view, such a description of the parties makes it beyond question that the Rawlsian contractualism is not a moral one, in the strict sense. Rawls, in the late works at least, does not begin with morally neutral (naturalistic) premises to work out moral principles. Some basic moral notions and constraints are already present and are binding in the very construction of the original position. The aim of the latter is to work out reasonable principles of cooperation, that are of moral nature as well, but of some particular kind, namely, of legal kind. That is why I propose to call Rawls’ contractualism a “legal contractualism.”<sup>32</sup>

Above mentioned nature of the Rawlsian project is more evident when we consider once again the content of the agreement, namely, the basic structure as the subject of justice. As I wrote, a public conception of justice does not cover any social practices, but only those belonging to basic structure. It means that the parties to the original agreement do not try to construe all possible regulatory principles, but only those of their social cooperation, if they cooperate as citizens. Man and woman are not always regarded as citizens, but they may be parents, believers, businessmen, and the like. In those spheres justice may be put aside, as

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32 It is worth to mention that some scholars have already reached similar conclusions, although proceeding in slightly different manner. For instance Hans Georg von Manz provides a reconstruction of the Rawlsian principles of justice as the legal principles, comparing Rawls with classical German idealists, namely Kant and Fichte. He finds Rawls’ famous “Kantian interpretation”, proposed in *A Theory of Justice* (§ 40) insufficient. He points out, however, that the original position shall be compared not with the ethical, but with the political writings of Kant, and that the concept of right developed in the *Metaphysics of Morals* is close to that of Rawls. See: Hans Georg von Manz, *Fairneß und Vernunftrecht*, Georg Olms Verlag, Hildesheim, Zürich, New York 1992.

they may be regulated by the notion of the good life, salvation, or profit. The principles of justice admittedly determine the family, churches, and entrepreneurship. But they do not do this directly, as those associations have their own aims and maxims, separate and independent from the principles of justice. But virtually all social practices have their institutional, or legal dimension. And this dimension is to be regulated by the principles of justice.

## The cooperative conception of law. A brief outline

Throughout the pages of this essay I tried to interpret selected Rawlsian ideas as the essential categories of the contractual conception of the fundamental bonds between law and justice I call “the cooperative conception of law”. In this approach, we begin with the most general idea of society as a fair system cooperation, specified then by the idea of well-ordered society and the priority of justice, to the idea of reasonable and rational citizens, to the most specific idea of the original position. Having been through all of them, we may easily indicate the main points of the cooperative conception of law.

Since the society is regarded as a system of cooperation, an obvious need of the society is the need for law. The citizens have to cooperate with each other, otherwise, as long as the moderated scarcity of resources is the feature of the social world, they will have no chance to lead decent lives. Although they are mutually disinterested, they strive for solemn grounds for their cooperation as reasonable agents. Merely the contest of individual powers is not enough, and some normative constraints all can accept shall be imposed on the formation and pursuit of their concepts of their good. Since the possible claims are opposing and competing, the need for impartial adjudication arises naturally. The law serves then as a device of cooperation between free and equal citizens. According to the idea well-ordered society, the law has to be subordinated to justice. The citizens will never achieve a common point of view if they don't refer to the public principles. Once they do it, however, they have to embody their consensus in the law, otherwise the uncertainty will not cease to threaten their legitimate interest. Justice is then seen as the most important determinant of the law. The idea of original position shows that this determination does not consist merely in the fact that justice requires

some particular content of the law. The bond between law and justice is more intimate. The *a priori* conditions specified by the original position are the same for justice and for law.

I opened this essay with the challenge put forth by the Platonic Thrasymachus, who regarded both law and justice as the interest of the stronger. The cooperative conception of law answers to that challenge by developing a conception that makes the fairness of law its constitutive feature. According to this approach, if the law turns out incapable of any public justification, not aspiring toward justice in any respect, it is not the law at all. The main reason for this is that the arbitrary will of the ruler founded on his power cannot provide the foundation for any law, if we understand it as proposed in this essay. An act of violence will stay what it is, regardless of its form or name.

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#### STRESZCZENIE

Michał Rupniewski

### SPRAWIEDLIWOŚĆ PRAWA.

### ZARYS RAWLSOWSKIEJ KONCEPCJI FILOZOFICZNO-PRAWNEJ

Przedmiotem niniejszego artykułu jest „kooperacyjna koncepcja prawa”, stanowiąca wynik określonej interpretacji filozofii politycznej Johna Rawlsa. Choć ten ostatni nie był jurystą, a nawet trudno mówić o nim jako *par excellence* filozofie prawa, jego koncepcję sprawiedliwości (wraz z przynależącymi do niej koncepcjami społeczeństwa oraz osoby) można rozwinąć w kierunku, który pozwoli uzyskać interesujące, nowe spojrzenie na prawo jako zjawisko szczególnie istotne z punktu widzenia współczesnych społeczeństw. Takie zadanie wymaga szczególnego rodzaju interpretacji dzieł Rawlsa, dokonanej z perspektywy prawniczej. Zadanie interpretacyjne nie polega zatem na modyfikacji idei proponowanych przez Rawlsa, lecz na ich gruntownym zbadaniu i wypracowaniu takiej koncepcji prawa, która pozostawałaby z nimi w ścisłym związku, zachowując spójność. Rezultatem tak pomyślanej interpretacji jest przyjęcie tezy, iż prawo jest instrumentem społecznej kooperacji jednostek, rozumianych jako rozumni i racjonalni obywatele, posiadający status wolnych i równych członków społeczeństwa demokratycznego. Co istotne, prawo jest w tej koncepcji pojmowane jako „definitywne”, czy też „istotowe”, powiązane ze sprawiedliwością.

W ramach jednego artykułu nie sposób uczynić tego w sposób pełny, nie możliwe jest też poddanie proponowanych rozwiązań koniecznej krytyce. Moim celem jest



zatem jedynie przedstawienie podstawowych idei i relacji między nimi, składających się na rozwijaną w moich badaniach koncepcję prawa. Rozumowanie prowadzące do przyjęcia tezy o kooperacyjnym charakterze prawa można sprowadzić do dwu najistotniejszych punktów: (1) przyjęcia priorytetu sprawiedliwości, to znaczy, w przypadku Rawlsa, przyjęcia koncepcji społeczeństwa efektywnie regulowanego przez publicznie podzielaną koncepcję sprawiedliwości, oraz (2) przyjęcia, „definitywnego” związku sprawiedliwości i prawa. Tego ostatniego dokonuje się poprzez wykazanie, iż słynna „sytuacja pierwotna”, czyli eksperyment myślowy nakładający aprioryczne warunki na pojęcie sprawiedliwości, nakłada te same warunki na pojęcie prawa.

Całe rozumowanie przebiega od najbardziej ogólnej idei społeczeństwa jako systemu kooperacji, poprzez ideę społeczeństwa dobrze urządzonego, uzupełnioną przez ideę rozumnych i racjonalnych obywateli, do najbardziej szczegółowej idei sytuacji pierwotnej. Pierwsza badana idea nakazuje patrzeć na społeczeństwo jak na wzajemne stowarzyszenie jednostek, mające na celu korzyść własną każdego kooperującego. Zakłada się tutaj, iż jednostki kooperują w warunkach umiarkowanego niedoboru zasobów (to znaczy w sytuacji, która zarazem umożliwia, jak i wymusza społeczną kooperację). Idea społeczeństwa jako sprawiedliwego systemu kooperacji traktowana jest jako fundamentalna idea organizująca cały liberalno-demokratyczny porządek instytucjonalny, przyjmowana *implicite* w społeczeństwach demokratycznych. Składa się ona z trzech podstawowych elementów. Po pierwsze, wymaga ona, aby kooperacja nie była zaledwie „społecznie koordynowanym działaniem”, to znaczy na przykład działaniem sterowanym przez autorytarne polecenia władzy centralnej, lecz aby warunki kooperacji określone były przez publicznie uznane przez samych kooperujących normy i procedury. Po drugie, idea sprawiedliwej kooperacji wymaga, aby owe publiczne zasady ustanawiały sprawiedliwy wzajemny stosunek między obywatelami; zasady sprawiedliwości, koordynujące interesy jednostek, muszą być do zaakceptowania dla każdego w ten sam sposób, niezależnie od zajmowanej pozycji społecznej. Po trzecie, wymaga ona przyjęcia jakiegoś racjonalnego dobra czy korzyści każdego kooperującego. Zasady są zatem przyjmowane z perspektywy jednostkowego dobra, nie zaś z perspektywy, powiedźmy, bezstronnego obserwatora.

Ta najbardziej ogólna idea jest w dalszej części artykułu dookreślona poprzez idee społeczeństwa dobrze urządzonego oraz ideę wolnych i równych obywateli. Owe idee wyjaśniają, na czym polega priorytet sprawiedliwości, oraz wskazują na odpowiadającą temu priorytetowi koncepcję instytucjonalnej czy też prawnej tożsamości obywatelskiej. Ta ostatnia polega ona na założeniu, iż każdy obywatel posiada władze moralne racjonalności i rozumności, a na mocy ich posiadania każdemu przysługuje status wolnego i równego innym obywatelom. Tak pojmowane jednostki przyjmują, na poziomie polityczno-prawnym, wspólną koncepcję sprawiedliwości, do której odwołują się jako do ostatecznego trybunału w razie konfliktów interesów.

Kiedy już przedstawiona jest koncepcja priorytetu sprawiedliwości, w kolejnej części artykułu przedstawia się analityczne argumenty za przyjęciem fundamentalnego, czy też definicyjnego, związku prawa ze sprawiedliwością. Czyni się to za pomocą wskazania, z jednej strony, iż formalne warunki nałożone na pojęcie sprawiedliwości są identyczne dla pojęcia prawa, z drugiej strony, iż prawo jest jedyną realistyczną drogą aplikacji zasad sprawiedliwości. W ostatniej sekcji dokonuje się syntezy argumentów, formułując tezę o prawie jako instrumencie sprawiedliwej kooperacji, definitywnie powiązanym ze sprawiedliwością.