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Composing a more plausible way to global justice

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# Abstract

In this thesis I discuss the possibility of a framework for global justice in a world in which individuals have different ideas about what is valuable in life, but a shared idea on how to live together (overlapping consensus). This framework has to be global, I argue, instead of national, and should receive priority over rights and duties that are founded on ties and memberships such as friendships or nationality. Lastly, I propose a more stable procedure to determine the principles of justice by combining elements of different procedures that are already offered by other authors. Additionally the procedure, I argue, would lead to a more stable society than several previously offered procedures, because it includes the demand of maintaining the circumstances in which justice is possible for future generations. Further philosophical research is requested on the inclusion of animal rights and matters of non-ideal theory and further empirical research is requested on the motivation of individuals and, most notably, on the circumstances of justice.

Keywords: global justice, overlapping consensus, original position

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**Used abbreviations:**

* [TJ] = *A Theory of Justice*
* [PL] = *Political Liberalism*
* [LP] = *The Law of Peoples*

# Chapter 1: The need for a shared foundation

## §1.1: Introduction

Over the last decades citizens and states are increasingly confronted with international, often global, collective action problems. Because of globalization and digitalization there is an increased number of collective action problems and an increased awareness of their existence. Examples of this are the Arab Spring, climate change and the working conditions in some countries in the so-called third world, such as clothing factories in Bangladesh. Although these events would also influence individuals and states before, we are now aware of the circumstances in many parts of the world and we can act consciously on what we know. But with power, and knowledge, comes responsibility. Instead of searching for complicated ethical questions, they knock on our door in the shape of migrants, images of and reports on floods in other countries and documentaries on the way in which our cloths are produced. Many scientists, including (political) philosophers, have tried to figure out how to deal with these issues and have provided the world with many insights and further questions on these topics. However, one recurring question makes it difficult to combine these insights: how can individuals jointly find a solution, while they have different ideas about what life is about? Every theory that presents an answer to a particular global justice problem has to argue that this answer is universal, meaning it also holds for other individuals, cultures, states, etcetera.

The debates mentioned above have so far provided us with many useful and important dots on our map of global justice, but it is difficult for individuals and states to grasp the extent of the responsibilities they have without a global framework that they can use to link and understand these responsibilities. For example, instead of showing that an individual has a responsibility to welcome 10.000 immigrants in one’s country, eat less meat and turn of the lights during the day, we can state that each individual has the duty to allow other individuals to live a good life, followed by the observations that migration and climate change influence the possibilities of individuals in particular ways that might give rise to specific rights and duties. A framework of global justice can both provide global principles of justice and increase the understanding of individuals and states of these duties. This can also enhance the value of research that has been conducted on more particular issues.

This thesis does not provide a map in the shape of a grocery list of principles of justice. Instead, it presents a procedure that we can use for discovering what the global framework should look like. This means that this procedure allows us to make a grocery list of principles today, but also one in next week that is better suited for the needs of that moment. The procedure that is offered in this thesis is not the only procedure that has been offered to think about global justice, but this procedure combines elements of previously offered procedures to avoids important deficits with regard to stability of the procedure and of the usability of the outcomes of the procedure. This thesis thus contributes scientifically by offering a more stable procedure to determine a more stable framework of global justice.

## §1.2: The scope of this project

In this thesis I am arguing in favor of a framework of global justice and a particular procedure to determine this framework. This framework has been offered before, but then as a foundational work to answer to questions of national justice instead of questions of global justice. This foundation is the global overlapping consensus, a concept that is first mentioned in the book *Political Liberalism* (Rawls, 1993)[[1]](#footnote-1). The main idea of the global overlapping consensus is that individuals in this world do not need to share the same idea about what is important in life, nor about how to distinguish right from wrong, as long as all individuals share a (political) conception on how to live together. I will argue that global principles of justice that can be supported by individuals that hold an overlapping consensus are a desirable starting point from which we can further specify how we should act in issues of global justice. Secondly, I will propose a procedure that we could use to determine the global principles of justice. My research question will be:

*“In a world where individuals hold different ideas about aims in life, are global principles that can be supported by individuals that are part of an overlapping consensus desirable and if so, how can we determine their content?”*

## §1.3: The building plan for this thesis

In order to answer the research question, this thesis has the following structure. First, the problems that a global framework of justice is to solve will be presented more clearly and in more abstract terms (Chapter 2: The need for justice and an overlapping consensus) by using Brian Barry’s separation between first-order and second-order impartiality (Barry, 1995). Secondly, I will discuss some important features of *A Theory of Justice*, written by John Rawls (1971) and some influential critiques of it, which are necessary to understand the meaning of the overlapping consensus, how it is reached and why it is necessary in order to have an overlapping consensus in order to speak of justice. This chapter will end with a description of the overlapping consensus as it is presented in *Political Liberalism* (Rawls, 1993).

With a clear understanding of what the overlapping consensus is for and what it looks like, the readers will be presented with the debate on the universality of justice. Should we treat all individuals in the exact same (just) way or are there reason for treating some persons differently from others (Chapter 3: The universality of justice)? I will first present several authors that argue that special rights and duties that derive from memberships (nations or cultural groups) and ties (family or friendships) should be assigned priority over the global framework of justice, followed by authors that argue that the global framework of justice is of primary importance. I will argue in favor of a global framework of justice with universal reach that allows special rights and duties, but specifies under what circumstances and to what extent.

In Chapter 4 I will present several influential procedures to support our deliberation on global justice that have been offered so far. The plausibility of these theories will be made more visible by structuring them by the use of four questions. After the discussion of the previously proposed procedures to global justice, I will argue in favor of combining elements of the previously presented procedures into a new more plausible procedure.

In Chapter 5 I will reflect on the outcomes of this thesis and propose some routes we can take next in order to further understand what global justice entails.

In this thesis I have abstained from the use of gender-specific language. I ask for the understanding of the reader for small inconveniences in the text due to the lack of gender-neutral anaphors.

# Chapter 2: The need for justice and an overlapping consensus

## §2.1 Introduction

In order to clarify the relevance and the meaning of the overlapping consensus and the way it is given shape, this chapter will provide an overview for the reader of the history of the overlapping consensus. I will start by explaining when and why we need principles of justice. Secondly I will discuss different perspectives on justice by discussing Barry’s distinction between theories of justice as mutual advantage and theories of justice as impartiality, as presented in *Justice as Impartiality* (Barry, 1995). I will argue in favor of theories of justice as impartiality.

After presenting why and when justice is important and how I describe justice in this thesis, I will introduce and discuss one of the most plausible and most extensive ways to argue in favor of a certain set of principles of justice: the original position as described in *A Theory of Justice* (Rawls, 1971). I will not begin further back in history due to practical reasons and because I believe, and with me many others, that [TJ] is a strong and quite extensive account of justice. This makes it a suitable starting point for going deeper into the matter. Since I am exploring the possibility of using the overlapping consensus, I will also discuss the critiques of [TJ] that are (indirectly) related to the overlapping consensus.

As the final part of this chapter I will discuss *Political Liberalism* (Rawls, 1993). In this discussion I will clarify why the overlapping consensus was introduced and how one should perceive it. At the end of this chapter the reader will understand why and when there is the need for an overlapping consensus and what the general idea is of the overlapping consensus. The discussions on the shape of the overlapping consensus (Chapter 3) and how to determine its content (Chapter 4) will be postponed until later in this work.

## §2.2: Justice: why, when and what?

### §2.2.1: Introduction

Accommodation types differ for the uses are different. Theories on ethics also differ for in different circumstances other values are more fitting. Justice is a value that is neither necessary nor possible in every situation. The situations in which the need for justice arises, are situations that embody the circumstances of justice. In this section I will first discuss the purpose of justice, including the circumstances in which principles of justice are required. The second part of this section will describe different ways to perceive justice.

### §2.2.2: The why and when of justice

Let us start by comparing principles of justice with traffic rules. Traffic rules guide our behavior in interactions with other traffic users. We know when we are to give way to someone or when we should drive slower to prevent bothering someone else and to ensure that conflicts of interest lead to dangerous situations. However, we are not told when to have fun, whether we should smile at other drivers or how we should act gently. This means traffic rules are not informing us how to treat others, but they inform us on what would be minimally required of us in interactions with others.

Principles of justice share with traffic rules that they guide our behavior in interactions with others around us. Justice is restricted to interactions: we can tell someone that one is being to hard on oneself, but we might call this a lack of compassion instead of a lack of justice. Secondly justice is informing us on our minimum requirements, so there are plenty of values left that can further determine what the best thing would be to do in a particular situation. Therefore justice provides us with clarity on how to resolute conflicts of interests in order to facilitate all those involved in driving through life safely.

Would traffic rules be necessary if there would be no other traffic users? Would principles of justice be necessary if there would be only separated non-interacting individuals? No. The need for traffic rules and principles of justice arise only under certain circumstances. These circumstances are called the circumstances of justice (Rawls, 1971: 109[[2]](#footnote-2)). The circumstances of justice consist of an objective and a subjective component. The objective component contains that multiple persons are geographically together on a certain place at the same time with sufficient resources around to enable a stable society, but insufficient resources to make cooperation superfluous[[3]](#footnote-3). Additionally none of the persons involved can dominate all the other persons. The subjective component contains that all individuals involved have roughly similar needs and interests, while having different conceptions of the good.

This is a good moment to explain the terms conception of the good and conception of the right, as they are fundamental concepts for understanding the overlapping consensus. A conception of the good is how one perceives one’s (rational) plan of life. It therefore has to do with how one assigns purpose to one’s life (or in terms of the traffic metaphor: the final destination). The conception of the right is the way one perceives the ordering of the conflicting claims that persons make. It therefore has to do with a fair procedure to resolve conflicts (or in traffic terms: the traffic rules, since these rules assign priority among conflicting claims).

When individuals have different conceptions of the good, while having roughly similar needs, they have conflicting claims on the same natural and social resources available.

The circumstances of justice are not a metaphysical claim on the nature of justice, but rather an observation of real-life situations. Traffic rules will be used if there are multiple traffic users in a certain place and time. For this to happen, the conditions need to be as such that there are not enough roads for all traffic users to reach their destination without being in each other’s way. However, for people to obey traffic rules there also need to be enough roads. Traffic users have roughly the same needs (a road to go somewhere else, often as quick as possible), but different destinations and different ways of driving. Traffic rules, as principles of justice, will only be obeyed in situations that are embodied by the circumstances of justice.

With an answer to why and when we need justice, there is still the question how to come to principles that resolve conflicts of interests. Barry (1995) has provided a simple and sound overview of theories of justice, which will be presented next.

### §2.2.3: The what of justice

#### §2.2.3.1: Introduction

There are many books on principles of justice and why the presented principles would be just. Barry has presented a useful distinction these theories of justice, by distinguishing them in two large families of theories of justice (1989). The first family perceives justice as founded on mutual advantage, where the second family perceives justice as founded on impartiality. In a following work Barry (1995) mentions three characteristics of theories of justice that can be used to understand the fundamental differences between these families: (1) the **motivation** of people to act justly, (2) the **criteria** that are the foundation of just principles and (3) the **connection** between (1) and (2). I will use these three characteristics to explain the broader families of theories of justice.

#### §2.2.3.2: Justice as mutual advantage

In justice founded on mutual advantage, the goal of justice is to ensure that all individuals involved can pursue their own life plans better while obeying to the principles of justice than without these principles. The idea behind this family of theories is that people are **motivated** by self-interest and therefore will not agree to obey to principles of justice which will not positively influence their situation. The situation in which there are no principles of justice is called ‘the state of nature’[[4]](#footnote-4). The **criteria** for principles to be just is therefore that the situation of all involved are improved by these principles when compared to the state of nature.

The **connection** between the motivation and the criteria seems hard to make. Barry (1995) explains this point by stating that if individuals are assumed to be self-interested, these individuals will not stick to principles which were advantageous for them at some moment in time, but are not advantageous to them anymore. This means the principles of justice will not be stable: the principles of justice will quickly lose their meaning to the individuals that are to be guiding by the principles of justice.

The fact that the connection between the motivation of the parties involved and the criteria on which principles are called just cannot be made, meaning the theory is inconsistent, there are also two other strong objections. The first is that theories of justice that found justice on mutual advantage promote a continuous race and struggle for power. The second, which is related to the first, is that theories of justice that found justice on mutual advantage cannot offer justice to individuals who for some unfortunate reason are not able to offer other individuals an advantage by cooperation if compared to the state of nature.

The ‘struggle for power argument’ is based on the idea that the power balance has a big role to play in whether cooperation is advantageous or not. Image that Mike has all the food in a large area and a gun, while Jonathan has nothing but a body and time. Now Jonathan works for Mike, while Mike offers Jonathan just enough food for subsistence. In this situation both Mike and Jonathan are better off than without any cooperation, but does that mean this division is fair? Demanding Mike to offer more food to Jonathan is not fair, for then Mike does not benefit and Mike can shoot Jonathan if Jonathan does not agree. As one can see, the power balance has a very big influence on the shape of the principles of justice. If power balances shape which principles are just, then it is likely for all the individuals involved to try to increase their power as quick as possible in order to create more favorable principles of justice.

The second objection is that this perception of justice does not match up with the intuition that persons who cannot offer others any advantage are left outside of the scope of justice. Imagine M’Kwabe and Adhir, who share the work and benefits of a farm. Adhir accidentally hits M’Kwabe with a car. After this accident M’Kwabe can no longer work on their farm. According to justice that is founded on mutual advantage, Adhir can kick M’Kwabe out of the house and wish M’Kwabe good luck solving things on one’s own without any cooperation (state of nature), for this is preferable to Adhir over a situation in which Adhir has to take care of M’Kwabe (principles of cooperation). Assuming it was a very unfortunate accident, M’Kwabe has nothing to offer to Adhir any longer and therefore is placed outside of the scope of justice. In this example I have increased the severity of the case by adding that Adhir has hit M’Kwabe with the car, but if someone else had driven the car the main point of this argument would be the same. The main point is that justice also demands of us to offer at least something to those that cannot offer us advantages in a cooperation.

#### §2.2.3.3: Justice as reciprocity

A special branch of the family of justice as mutual advantage is justice founded on reciprocity. Although this theory is still based on the idea that the principles of justice should provide an advantage to all involved when compared to the state of nature, the motivation of those involved is said to be a combination of self-interest and a desire to uphold a fair bargain. This means that the individuals involved want to live up to agreements that they have made before along the lines of justice of mutual advantage. The individuals will stick to these agreements, also if it is no longer to their own advantage. Therefore this branch should lead to stable principles of justice. However, changes in power do change what is a fair outcome of these principles, so the individuals involved will still be tempted to increase the amount of power they have. Additionally, as is the case for justice as mutual advantage, there is still no justice for those lacking the ability to improve the situation of others when comparing cooperation with no cooperation.

#### §2.2.3.4: Justice as impartiality

The second family in theories of justice is justice founded on impartiality. In this family of theories individuals are said to be **motivated** to behave fairly in general and the **criteria** on which just principles are to be determined is that individuals can endorse the principles under conditions of equality. The conditions of equality are present if differences in power do not influence the outcomes of the principles of justice and there is freedom of choice to the individuals involved. The **connection** between the motivation and the criteria is clear and plausible: individuals are motivated to behave fairly to others, where fairly is (minimally) given shape by principles that all individuals can endorse under conditions of equality.

Since differences in the power balance neither change the principles or justice nor what would be the fair outcome of these principles, these family of theories will not promote an race for more power for the purpose of changing what is just. Secondly, the principles are fair and since individuals have the motivation to behave fairly, the principles of justice will be stable. Thirdly, there is a place for those that cannot offer an advantage to others. Which place this is, differs among theories. Remind that justice is about the minimum requirements and each theory can argue for a lift or lowering of the bar of minimum requirements.

An objection to perceiving justice as founded on impartiality is that it does not seem to be consistent with everyday actions. Self-interest of a person or a group seems to play a big part in the motivation of individuals in their behavior. The premise of justice as founded on impartiality that individuals are motivated to behave fairly therefore seems questionable. Individuals may not see behaving fairly as part of their life plan and therefore they may be unwilling to behave fairly.

However, we can perceive this conflict as a more practical conflict instead of a theoretical or normative conflict. It is true that justice as founded on impartiality will be more difficult to achieve, for in the world as we know it the power balance seems to be a very important factor. The fact it is so, does not mean the status quo is right or wrong. Right and wrong is determined by the content of justice. This means justice as a concept is more than an explanation of the current situation: justice is also a normative concept. The lesson learned from theories that define justice as founded on mutual advantage is that self-interest is an important motivation and we should true to take this into account when we are trying to create a world that is more just from an impartial point of view. Justice as founded on impartiality is however the road towards providing us with a guide on what is right and wrong with regard to resolving conflicts of interests in a world in which cooperation is necessary.

So how is one to define principles of justice which are founded on impartiality? Barry describes the original position as one of the most plausible procedures to think about just principles, where just is interpreted from the perspective of justice as impartiality[[5]](#footnote-5) (1995). The original position as introduced by Rawls in *A Theory of Justice* (Rawls, 1971) will be discussed next, followed by the most influential critical reactions.

## §2.3: A famous theory of justice founded on impartiality: *A Theory of Justice*

### §2.3.1: Introduction

*A Theory of Justice* (Rawls, 1971) might be one of the most influential books in the history of political philosophy (Kymlicka, 1990) and is seen by Barry as one of the strongest and most complete accounts of justice as impartiality (1995). In this section I will discuss the features of [TJ] that are important to understand the discussion on the overlapping consensus. The features important for the discussion on/of the overlapping consensus are the goal of [TJ], the focus on a fair procedure instead of fair outcomes in [TJ], the procedure suggested in [TJ] to argue in favor of particular outcomes, the main outcomes of the procedure and the position that is take in [TJ] on the meta-ethical discussion between whether principles of justice are to be created top-down (through ratio) or bottom-up (through intuitions). I will discuss these features in the order of mention.

### §2.3.2: The goal

The main aim of *A Theory of Justice* was to provide an alternative to classical utilitarian and intuitionist theories (Rawls, 1971: 3). Utilitarians hold that we should maximize the overall sum of happiness: the right thing to do is the act that leads to the highest overall sum of well-being. This is of such importance (grand value) that maximizing the overall sum of well-being dominates all other values in cases of conflicts between values. Intuitionists hold that we should treat each case on its own. Intuitionists do not refer to a grand value that can inform us on how to resolve conflicts of interests. Instead, we research what is right by using our intuition in each situation. Rawls believed that utilitarianism was disrespectful to individuals, since individuals are to be treated as ends-in-themselves instead of means[[6]](#footnote-6). Intuitionism on the other hand did not provide a stable (lasting over time) and universal (for each case) theory of justice. The aim of [TJ] was to offer a more appealing theory than utilitarianism that would be stable and universal. The name of this account is ‘justice as fairness’ (ibid.: 3-4, 10).

### §2.3.3: Fairness by procedure instead of outcomes

Justice as fairness is focused around the idea of pure procedural justice ([TJ]: 10-15, 75). Procedural justice contains principles of justice deriving from a fair procedure, instead of the other way around (Barry, 1965: 97-98, 102-103). Because Rawls wants to offer a theory of justice without referring to one conception of the good, pure procedural justice is offered as an alternative to procedures in which there is a clear right and wrong end result: “*…pure procedural justice obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed.*” ([TJ]: 75).

Rawls has offered and defended a particular procedure to think about principles of justice. This procedure is founded on the idea of a hypothetical contract, which makes it a contract theory. A contract theory is a theory in which certain principles of justice are defended on the ground that these principles would be the outcome of an imaginary fair situation in which individuals sign a contract together. In *A Theory of Justice* the fair procedure that leads to the determination of just principles of cooperation, is called the original position (Rawls, 1971).

### §2.3.4: The original position

The original position is a hypothetical gathering of persons (‘the parties’), which is designed to make us think about what is fair. The parties are ‘free and equal persons’ (Freeman, 2016). Equal means the persons are of equal moral importance. The goal of the gathering is for the parties to agree upon a set of principles, which will inform the basic structure of their cooperation. By the basic structure, Rawls means the “*major social institutions*” ([TJ]: 6) that are part of the scheme of cooperation. The principles of justice are to “*govern the assignment of rights and duties in these institutions and they are to determine the appropriate distribution of the benefits and burdens of social life*” ([TJ]: 47). The principles are to be general (without using particular persons or definitions), universal in application (they hold equally for everyone), consistent with general use (if all the individuals that are involved would use these principles, then the principles would not be self-conflicting[[7]](#footnote-7)), public (everyone will know about and support the principles), ordering on conflicting claims (assign priority to some claims over others) and final: the principles are decisive in determining what would be just ([TJ]: 116).

To have a hypothetical gathering with the persons debating about principles of justice they will use to organize their cooperation might not yet lead to fair outcomes: the persons might have differences in natural talents and bargaining power, which could result in unfair principles (ibid.: 118). In order for this risk to be countered, the meeting takes place behind a veil of ignorance. The veil of ignorance stands for a condition of distancing oneself from being a particular individual (with a particular conception of the good, particular talents, a class, a generation and a particular society). However, behind the Veil the persons remain to know that people have a certain set of talents and characteristics, and they have general psychological, social and societal knowledge ([TJ]:119). For instance, a person behind the veil of ignorance knows that the society for which the principles of justice are designed, is subject to the circumstances of justice ([TJ]: 111). This veil of ignorance creates a stronger variation of the one who divides the cake does not know which piece will go to whom. Each representative is required to be rational, meaning each representative is able to ‘*…have a coherent set of preferences between the options open to him. He ranks these options according to how well they further his purposes; he follows the plan which will satisfy more of his desires rather than less, and which has the greater chance of being successfully executed.*’ ([TJ]: 124). In the original position neither power nor envy influences the process, since this would lead to arrangements in which everyone could be worst off. Instead, the system will lead to a system is which envy and other “*destructive feelings are not likely to be strong*” ([TJ]: 125). The motivation of the people is therefore a mixture, because the representatives in the original position will be driven by self-interest, but they are forced into offering each other fair terms by the veil of ignorance. Rawls argues in favor of this mixed motivation for individuals can be motivated by ties and association, but they do not need to be. It is best, according to Rawls, not to have principles of justice “…*depend upon strong assumptions.*” ([TJ]: 112). Lastly, the representatives are aware of the necessity of stability, meaning that the principles of justice that are the outcome of their deliberation should be able create and maintain the support of those that life under these principles when they are embodied in the basic structure of society.

To cut it short, the original position with the veil of ignorance with rational not envious people is to lead to principles of mutual cooperation that free and equal citizens can reasonably (and does without the use of force) endorse ([TJ]: 122-123).

### §2.3.5: The principles of justice

In the original position, Rawls suggests, people will agree on two principles of justice[[8]](#footnote-8). These two principles focus on the division of social primary goods. Primary goods are goods that each individual can use as means to lead a decently fulfilling life. Primary goods can consist of natural primary goods and social primary goods ([TJ]:54). The division of natural primary goods is influenced, but not provided by the basic structure of society. On the other hand, social primary goods are provided by the basic structure of society. The idea behind primary goods is that each person should be free to pursue one’s goal in life. Citizens however are not allowed to make claims that transgress the limits that political principles of justice impose. This idea is called ‘*the priority of the right over the good*’ ([TJ: 27-28], for an explanation of the difference between the good and the right, see §2.2.2). At first a society is to determine what is fair, and then the individuals who have different life aims should find a way to pursue their life plans, limited by this framework of fairness. However, according to Rawls the parties also need to have a ‘thin’ conception of the good in the original position. The ‘thin’ conception of the good involves what is necessary to reach the principles of justice, such as the premise that social primary goods are rationally, and generally desirable.

The two principles of justice which will be used to divide social primary goods are ([TJ]: 266):

* “Each person is to have an equal right to the most extensive total system of basic liberties compatible with a similar system of liberty for all.
* Social and economic inequalities are arranged so that they are both:

(a) To the greatest benefit of the least advantaged, consistent with the just savings principle, and

(b) Attached to offices and positions open to all under conditions of fair equality of opportunity.”

The two principles also have an order. The first principle comes prior to the second. This means “…the basic liberties can be restricted only for the sake of liberty.” (ibid.). This prohibits the use of one social primary good, such as wealth, for political domination. This prioritization is meant to ensure that someone with a lot of money cannot make use of money to deny someone else the right to vote, to associate, to speak freely or make use of another political right or liberty[[9]](#footnote-9). The priority of equality in opportunity ((b)) comes prior to the greatest benefit of the least advantaged ((a)). The primary goods that are included in the theory are rights, liberties, opportunities, income and wealth and the social bases of self-respect ([TJ: 54-55]). The social bases of self-respect are defined as the idea that one perceives one’s life plan as worth pursuing and that one has confidence in one’s abilities to fulfil one’s intentions.

### §2.3.6: Balancing between ratio and intuition, theory and outcome: the reflective equilibrium

Rawls does neither claim that these principles are complete, nor that they will provide us with the right answers in all cases of non-ideal theory ([TJ: 267]). Ideal theory is theory on what would be desirable in a perfect world, while non-ideal theory is theory on what we are to do in the world we currently live in. Rawls does not claim to present us a guide on how to act in each everyday situation, but states that if we think that certain outcomes of the original position are unjust (for instance by imagining the results of certain principles in everyday situations), then we have to reconsider both the procedure and our judgments and intuitions. In the end, we have to either adjust the procedure, for instance by changing the shape of the original position or the veil of ignorance, or we have to change how we perceive the outcome by changing our judgments or intuitions. This process of going back and forth between the procedure and the outcomes is called the “reflective equilibrium” ([TJ: 18]).

The reflexive equilibrium combines our ratio and our intuitions, since we think about fair principles and a fair procedure (ratio) and test it by looking at whether we judge the outcomes as being fair (intuition). This combination makes the reflective equilibrium a new possibility in a meta-ethical debate between theorists and anti-theorists (Fotion, 2014). Theorists hold that justice, or ethics in general, is deducible: if only we find the one perfect principle of justice, then the entire system of justice can be deduced from this. For example, utilitarians can determine whether an action or principle is right or wrong, based on the key principle, or grand value: maximization of well-being[[10]](#footnote-10). Anti-theorists argue that the world is too diverse to have one key principle, that we do not need a theory for we have our intuitions, that theories are too abstract to be guiding us and that theories lack objectivity (ibid.).

It may be clear that for us our intuitions on justice matter and they are too important to neglect completely, but it also seems implausible to reduce justice to the status quo of intuitions. The reflective equilibrium provides a way of combining ratio with intuition[[11]](#footnote-11).

## §2.4: Fundamental critiques of *A Theory of Justice*

### §2.4.1: Introduction

As mentioned before, the reactions to *A Theory of Justice* were many. Although many responses were criticizing a certain part of the theory, the theory was generally praised for being such an elegant, fully developed theory. The critiques that were delivered, can be structured in three strands:

* Critique on the goal (Taylor (1985), Walzer (1983), MacIntyre (1988), Ackerman (1980))
* Critique on the procedure (Dworkin (1977), Sandel (1982), Ackerman (1980))
* Critique on the outcomes Rawls suggests (Dworkin, 2000; Kymlicka, 1990; Ackerman, 1980)

I will discuss the critical reaction on the goal of universal principles (§2.4.2)[[12]](#footnote-12) and the critical reactions on the procedure (§2.4.3) in the order of mention. I will not reply to arguments against the outcome Rawls envisioned (two principles of justice), since I am neither discussing nor defending these particular outcomes in this thesis.

### §2.4.2: Critique on the goal

#### §2.4.2.1: Introduction

Many authors in this strand of critique belong to the anti-theorists (Fotion, 2014), though they may not agree on being assigned this label by other authors. The critiques of the goal can again be separated in criticisms against the universality, rationality, extensiveness, perfectionism and choice for ideal theory.

#### §2.4.2.2: Against universality

Michael Walzer (1983), Alisdaire Macintyre (1978; 1988), Charles Taylor (1985; 1992) and Bruce Ackerman (1980) argue against the idea of universal principles. Walzer concedes that the original position is an elegant procedure to invent fair principles of justice, but argues that individuals would not be willing to obey to universal principles. The reason for this refusal is that they will prefer to live their lives within a more complete set of principles provided by their own local culture instead of using a universal set of principles (1993: 14[[13]](#footnote-13)). The original position, according to Walzer, can have its uses, one of them being that individuals of a specific culture can use the original position to reexamine their moral principles and try to structure it (differently). However, Walzer denies the idea that the original position can lead to usable outcomes if the representatives would include individuals of multiple cultural backgrounds for the following reason: “*By themselves, though, these universal or almost universal prohibitions barely begin to determine the shape of a fully developed or livable morality. They provide a framework for any possible (moral) life, but only a framework, with all the substantive details still to be filled in before anyone could actually live in one way rather than another*.” (Walzer, 1993: 23). MacIntyre and Taylor make likewise points. Moral and political judgment depends on the perspective and language of individuals, so it is not desirable to try to abstract from these judgments. An original position would in this situation be useless (MacIntyre, 1978; 1988; Taylor, 1985; 1992). Bell summarized this point by saying “*liberals who ask what is just by abstracting from particular social contexts are doomed to philosophical incoherence and liberal theorists who adopt this method to persuade people to do the just thing are doomed to political irrelevance*” (2016). This is another way of explicating the debate between theorists (which are doomed to be irrelevant) and anti-theorists (which are doomed to be incoherent).

*A Theory of Justice* is not actually targeted by this critique for three reasons. Firstly, justice is a concept of minimal requirements instead of providing a full moral account. The minimum could theoretically be all-encompassing (such as certain forms of utilitarianism in which is stated that each act and policy should be focused on achieving the highest possible overall sum of well-being), but a theory of justice does not need to provide answer for every matter in order to be useful. Maybe it is correct that the principles of justice leaves crucial matters up to particular cultures, but that does not mean it is a meaningless exercise. In fact it can provide individuals of different cultures with the possibility to live together. According to Rawls, societies nowadays are rarely made up out of citizens that have similar cultural beliefs (1993). Therefore a minimalist shared foundation is a very meaningful exercise (this point will be treated in more detail in §2.5: A renovation: *Political Liberalism*). Secondly, Walzer concedes that the original position can be a way of reexamining principles of justice. By using a theory and our intuitions we can reshape some and improve them. This will, according to Walzer, not lead to something entirely new, for it is still an inner process that includes our intuitions, but it still can produce some changes in our moral convictions.

#### §2.4.2.3: Against rationality

Another critique of [TJ] from MacIntyre is related to rationality in theories of justice founded on impartiality. As mentioned before in §2.2.4, *A Theory of Justice* belongs to the family of justice as impartiality and therefore is a target of this critique as well. According to Barry (1995) there are three ways of reading MacIntyre’s critique: theories of justice as impartiality are (1) rational (trying to pursue a certain plan in life) and therefore focused on self-interest, but thus not focused on offering the other individuals fair principles of cooperation, (2) contentious and/or (3) state to be neutral towards conceptions of the good, while they are not.

The first critique is clearly based on two wrong assumptions. Firstly, MacIntyre assumes the citizens and the representatives of these citizens to be the same, while they are not. Secondly, MacIntyre neglects the fact that the veil of ignorance in the original position is meant to ensure that the rational representatives will decide on fair principles of cooperation.

The second critique is taken by Barry to be a compliment, more than a critique (1995). According to Barry a theory of justice may be contentious: it is not meant to write down what everyone already agrees upon, but to try to explore the content of justice and deliberate on it. This is a more or less hidden critique of anti-theorists, which can hardly argue in favor of changing a status quo which seems very unjust (Fotion, 2014).

In response to the final critique, it should be noted that liberal theories of justice can contain a full or a thin conception of the good. A theory of justice with a full conception of the good will have at its core a grand value, for example autonomy. The principles of justice are meant to achieve the outcome which is best according to this particular grand value – individuals are therefore told which value is (most) desirable.

On the contrary, theories of justice that define justice as founded on impartiality contain a thin conception of the good. This thin conception of the good does not entail that these theories advocate the maximization of a particular grand value, nor that there is a judgment on which value is (more) desirable (than others). Principles of justice that are based on a conception of justice founded on impartiality are meant to enable citizens with different life plans to cooperate. This does not mean there is no judgment or value involved at all, but it is far less substantive than a full conception of the good.

#### §2.4.2.4: Against being too extensive

The final critique I will discuss, while discussing critiques of the goal of *A Theory of Justice*, is a critique from Ackerman. Ackerman (1980) has offered a different procedure to principles of cooperation and criticizes Rawls on the goal (which I will treat here), the original position (§2.4.3) and the outcomes (which I will not treat for it is outside of the scope of this thesis).

According to Ackerman, Rawls is trying the impossible in *A Theory of Justice*, for Rawls is trying to make people have the same conception of the good. Instead of a shared set of principles that would be the result of an original position, Ackerman argues in favor of a modus vivendi (1980). The modus vivendi is a live-and-let-live way of living. Conflicts in means are to be solved by a dialogue (although debate would be a better name for it), which is regulated by three principles: rationality, consistency and neutrality. **Rationality** means that each time one has (or wants) power (or more means than someone else), one has to provide a reason for having that power (or unequal amount of means)(ibid.: 4). **Consistency** means that the reason provided by someone in a dialogue must be consistent with all other reasons that this person has provided before in this and other dialogues (ibid.: 7). **Neutrality** means the reasons may neither depend on valuing oneself more than another person, nor on valuing one’s own conception of the good more than the conception of the good of a different person (ibid.: 9-10). The goal of the modus vivendi is a procedure to solve problems on the spot by these principles, while never coming to a consensus of general principles of justice, which is the goal of [TJ]. Paradoxically[[14]](#footnote-14) Ackerman explains the argument and the way in which the principles are to work by a hypothetical situation. In this hypothetical situation a representative selection of humans goes to a new planet with one resource: manna. For further information, I refer the reader to this book for many helpful dialogues in the book itself.

Ackerman has provided us with a clear and easy-to-read explanation of the modus vivendi. However, the critique from Ackerman that the goal of *A Theory of Justice* is unrealistic for it pursuits a shared conception of justice which is too extensive, seems implausible for (at least) the following two reasons: the first reason denies that the representatives in the modus vivendi has a less extensive shared conception of justice than the representatives in the original position, while the second reason denies that the outcome of the modus vivendi as presented by Ackerman would lead to a less extensive shared conception of justice.

Firstly, the individuals that are included in the modus vivendi have to share a conception of fair dialogues that is presented by Ackerman. Since all citizens have to pass a ‘behavioral test’ before being allowed to be a citizen in the liberal society, this shared conception is not optional for being a full citizen. Also political participation, among other things, can be restricted on the ground that one would want to use power to change the liberal character of the state or undermine its functioning (Ackerman, 1980: 80-99). These features show that individuals in the liberal society as described by Ackerman must have a thin, shared conception of justice as well for the society to function. The question is why each person would deny the equality of humans, while accepting that a debate is to be solved by neutrality (Wissenburg, 2009)? The answer is this is highly implausible. I grant Ackerman that the preconditions may not be extensive, but I deny that the shared conception of justice of representatives prior to entering into dialogues is significantly less extensive than the one required prior to entering into the original position.

Secondly, the representatives in Ackerman’s theory either already have a hidden, pre-given set of principles of justice (apart from the behavioral test), or the representatives are not really representatives, but actual persons fully dependent on their argumentative qualities and individual sense of argumentation in order to determine the content of the principles of justice. These two interpretations arise from the following. Arguments that are used in one dialogue also have force in the following dialogues. A society, which is organized by the dialogue principles of Ackerman’s modus vivendi will after a great amount of dialogues have a clear view on which arguments count and which one will not. If one knows in great detail which arguments are allowed and which one are not, then it is easy to determine the principles of justice related to these systems of argumentations. From here the two interpretation parts.

The first road, the one of the hidden, pre-given set of principles, proceeds in the following way. The representatives are representing all individuals in a given world. They (intuitively) already know and agree on which arguments are valid and reasonable and which arguments are not, but they need the dialogues to uncover these principles[[15]](#footnote-15). These representatives, in order for the procedure to lead to fair principles of justice, are attributed intellectual qualities, such as being able to come up with good arguments and able to think about and recombining all the arguments that have been presented before. After a certain amount of dialogues, they could draw their principles of justice from looking at all the dialogues they have had over time. This way could also be called the asymptotic way, for the representatives will continuously approach their hidden, pre-given set of principles of justice through their ongoing dialogues. This road seems most consistent with Ackerman’s idea of justice for Ackerman specifically states that the explorers are “*you and I (and the rest of us)*” (Ackerman, 1980: 31) and are “*representing each of the cultures generated by mankind in the course of social life on earth*” (ibid.: 33). If these representatives are indeed meant to reinvent a particular set of principles of justice, which are hidden for them and the reader, then the modus vivendi would not include a less extensive account of justice than the original position.

Before asking how Ackerman’s theory could be less extensive, I will first present the second interpretation. In the second way, the principles of justice rely on the content of the actual dialogues and the qualities of the individuals involved. The individuals therefore cannot really be called representatives of all individuals and cultures. We also cannot assign particular talents or skills to these individuals, such as intelligence or reasonableness, for this would mean we already have a normative pre-given idea of how their dialogues should proceed (which would lead us to a pre-given set of principles which would, how strange, match our current convictions). In this scenario there is no universal and extensively shared set of principles of justice. The downsides of this interpretation is that the skill of argumentation would be very important. Additionally, imagine the situation in which one incredibly intelligent person would become a citizen in a society of less-gifted fellow citizens. All the known principles of justice would be changed in a matter of moments. This would mean that the principles of justice of a society would not be stable. This is related to the critique from Wissenburg (1999) that the modus vivendi only provides impartial justice for those individuals (and conceptions of the good) involved, but not for those individuals (and conception of the good) which are not involved. Therefore the outcomes are not impartial to all possible conceptions of the good, which means the modus vivendi is not entirely impartial. This downside is related to all multi-person contracts[[16]](#footnote-16), which involve multiple actual persons. The other possibility is a single-person contract, for which the multitude of persons is irrelevant, since all the individuals involved are to end up with the same mindset. In [TJ] the representatives come to the same conclusion because they are like-minded. Maybe they need a dialogue to come to the smartest solution, but this is, as Wissenburg mentions, mostly aesthetical (1999). However, a single-person contract is impartial to all (reasonable) conceptions of the good instead of only those involved in a particular dialogue.

For the mentioned reasons Ackerman’s critique of the goal of *A Theory of Justice* does not seem plausible. In the first interpretation of the modus vivendi, the pre-requisites, and the conception of justice that would be the result of the procedure, would be just as extensive as in *A Theory of Justice*. In the second interpretation Ackerman’s principles of justice would be less extensive, but at the price of being dependent on the individual talents, particular dialogues and which conception of the good are involved. Further critique from Ackerman (of contract theories) will be discussed in §2.4.3.

### §2.4.3: Critique of the procedure

Rawls argues in favor of particular principles of justice by the use of a hypothetical situation in which the parties deliberate on the principles of justice they will adopt in their cooperation (the original position). This deliberation is to lead to a contract: the parties would agree on a certain principles of justice. This makes *A Theory of Justice* a contract theory. A contract theory is criticized for being irrelevant, since persons in a hypothetical situation may come to a certain agreement, but this situation is never made reality (Walzer, 1993; Dworkin, 1977). The circumstances are different, so why would I stick to an agreement I struck in (or contract I signed for) another situation? Differences in the circumstances can exist with regard to the value of goods, but perhaps also for the importance of principles and values. For instance, the difficulty of providing a certain medicine might change our perspective on whether we as a collective body of citizens have a duty to provide it. It does not seem fair to expect me to keep a promise that is made in a totally different situation (Dworkin, 1977).

*A Theory of Justice* can withstand this critique. The representatives in the original position are not actual people making a contract and the representatives in the original position are never hold to keep their agreement in the (totally different) real world. Imagining a perfect contract situation is a way of thinking about what is right and wrong ([TJ]: 104). The rules of the contract situation should seem natural and plausible, if we accept the goal of thinking about principles of justice ([TJ]: 16-17). We might deny that the rules of the contract situation that Rawls has chosen are plausible (and several authors have denied that), but it does seem a plausible idea to think about the most plausible principles of justice by asking oneself what the outcome would be of a situation perfect for the purpose of finding these most plausible principles of justice. It also does seem plausible to sign a contract that sticks in a situation in which one is not actively involved (yet). This is in fact how any type of law or rule works at this moment: individuals agree on traffic rules outside of being part of the traffic at that moment and can be reasonably asked to comply with traffic rules while starting to take part in traffic. These rules need to be adjusted if the circumstances change, but the ways in which these rules can be adjusted are also agreed upon.

A more persuasive argument is provided by Sandel (1982) and Walzer (1985). They argue that the single-person contract (the contract is which all persons are like-minded and therefore the multitude is irrelevant (Wissenburg, 2009) is unrealistic for individuals are not able to make meaningful choices while distancing themselves from their own context, most importantly their relationships and their culture. Humans cannot guide their reasoning without these aspects.

Rawls anticipated this critique in *A Theory of Justice*: “*…it may be said that the persons in the original position know so little about their situation that a rational agreement upon principles of justice is impossible*.” (Rawls, 1971: 348). Rawls replies that one can still behave rationally based on what one does know (ibid.). Rawls is often criticized on ignoring the value and constitutive importance of culture and communities (Sandel, 1982). I disagree with this criticism and will explain why with the following argument. Imagine we would allow parties to know their conception of the good during their deliberation (following Sandel). The parties will then argue rationally on principles of justice, but do so by refereeing to arguments that derive from the person’s conception of the good (for example “because God wants it”). These arguments will not be valued by those that do not have the same conception of the good, the same community and/or the same culture (for example they do not believe in God or answer to a different God). From this point on we could decide one of the parties is right and the other parties are wrong, but this would only recognize the value of one of the conceptions of the good and its related culture and community. This choice would deny the value of the communities that are said to be wrong. This problem is unsolvable for how is one ever to decide which conception of the good is right without sharing the conception? Rawls proposes, instead, to find principles of cooperation without referring to particular conceptions of the good. For this purpose Rawls asks us to distance ourselves from our conceptions of the good by putting up a veil of ignorance. Rawls does not propose that individuals in their lives should not or would not live in communities or should not or would not engage in meaningful (cultural) relationships. On the contrary, Rawls promotes persons to engage in communities by granting each community equal respect by not allowing one community to preside over the other.

The final critique I will discuss in this section is a critique provided by Ackerman of contract theories in general, while also specifically targeting the original position as presented in *A Theory of Justice*. According to Ackerman a contract theorist is adjusting the contract procedure in such a way the desired outcomes will come out of it (1980: 341). For example, the representatives in the original position will put such a large emphasis on liberty that they will agree on certain liberties, or the veil of ignorance will include talents but not general knowledge on talents, so they will agree on distributive rules on this matter. According to Ackerman the contract procedure therefore is not neutral: the theorist is already deciding on which outcomes are fair prior to determining the shape of the procedure, which means the procedure is based on the author’s own conception of the good. If individuals are to reach an outcome through the reflective equilibrium though, they may do the same as a contract theorist and continuously adjust their contract procedure until they end up at a procedure that will have their own desired outcomes as a result (1980). According to Ackerman, the modus vivendi (see also §2.3.3.1: On the goal) does not have this downside. The three principles (Rationality, Consistency and Neutrality) ensure a fair dialogue between the individuals that make up the representative selection of humans, without deciding on what the individuals will find important – they may choose which goods they see as primary.

As was the case with the argument against the goal (§2.3.3.1), the provided argument can be turned against the modus vivendi equally. Ackerman provides a hypothetical situation to show how the principles of dialogue would work, that is manipulated as well. Paradoxically the hypothetical situation involves only one material resources – remember one of the critiques from Ackerman is that contract theorists already decide for their representatives which goods are of primary importance. Additionally the representative selection of humans are going to a new world where there are no borders, no current injustices, etc. Although I find this a logical choice, since it would be too complicated to include all features of the world, it is hard to see how Ackerman is not equally manipulative. Secondly I think that the liberties that are presented by Rawls in *A Theory of Justice* are basic for enabling a society to include individuals who have different conceptions of the good. A society that is to be regulated by the modus vivendi as presented by Ackerman would probably require the liberties that are assigned by the first principles of justice in [TJ] equally, in order for its citizens to lead a fulfilling life. The choice of Ackerman to not mention these principles, or not mention them equally visible, does not mean that they are not required. The critique that they are too extensive therefore does not seem plausible.

I have treated the different critiques of *A Theory of Justice* that are related to the overlapping consensus. Some of the critiques, such as the argument that individuals would not accept principles that would be the outcome of the original position, are treated more specifically and extensively in this work. Also the overlapping consensus will be introduced.

## §2.5: A reformulation: *Political Liberalism*

### §2.5.1: Introduction

In *Political Liberalism*, Rawls (1993) continues to support many parts of *A Theory of Justice*. Rawls however starts the argumentation from a different point: reasonable pluralism. This change in starting point is of great help in arguing against the critiques on the importance of knowing one’s culture and community before being able to meaningfully deliberate on principles of justice. Firstly, I will present the main line of argument as presented in *Political Liberalism* with regard to the overlapping consensus, before discussing the key differences between [TJ] and [PL].

### §2.5.2: Reasonable pluralism

In *Political Liberalism*, Rawls is adding some context to the search for principles for a stable and just society of free and equal citizens. This addition in context is the “fact of reasonable pluralism” (ibid.: 36), which means that two persons with the same evidence and the same capacity to reason, might still choose differently because of their concepts of the good [PL]. This means that, in a democratic society, with free and equal citizens, persons will not reach a consensus on laws or rules, even with the same capacity to reason (Rawls, 1997). According to Rawls, the ideas and principles from [TJ] will not lead to a stable society, since the differences in conceptions of the good will lead to conflicts (ibid.: 140-144). Rawls then asks the following question, which is the main research question of *Political Liberalism*:

* + *“How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical and moral doctrines?”* (Rawls, 1993: 4)

Rawls starts answering the research question of *Political Liberalism* by introducing the concept of public reason.

### §2.5.3: From public reason…

Public reason stands for the idea that arguments have value in political decisions only if all free and equal citizens may reasonably be expected to endorse the foundation of these arguments. This means the arguments cannot gain their strength from one particular conception of the good, but must provide a public basis of justification. The arguments that can be used are therefore impartial between the many non-public doctrines. A doctrine refers to a system of believes. Public debate is based on reasonableness (whether it can be shared by all) instead of around truth. The focus on reasonableness instead of truth is an elegant way that allows individuals that hold different doctrines to remain neutral about doctrines of other persons.

From here, Rawls stresses the importance of political power. Political power is the power of free and equal citizens as a collective body. Since political power is very important for it transfers the possibility of coercion deriving from the collective body of free and equal citizens[[17]](#footnote-17), citizens will want political power and values to be based on grounds they can all share (or to put it in more simple terms: founded on public reason)(ibid.:60-62). For example, Rawls takes a church denying a constitution for it will not offer salvation as an example of an unreasonable doctrine: *‘…it proposes to use the public’s political power – a power in which citizens have an equal share – to enforce a view on constitutional essentials about which citizens as reasonable persons are bound to differ uncompromisingly.*’ (ibid: 138).

In a society, with the fact of reasonable pluralism, centered on the public basis of justification, only certain doctrines can be included. These doctrines are to be **reasonable**, **comprehensive** doctrines. **Comprehensive** means that the doctrine covers the major religious, philosophical and moral aspects of human life consistently and coherently, it tells one how to balance values and which values are important and the doctrine has a foundation (which can be changing of time). To be clear, Rawls emphasized that one could also combine beliefs and values that originate in multiple different existing comprehensive doctrines in order to draw a comprehensive doctrine of one’s own. For instance, one could combine values and beliefs from Christianity, Buddhism and a comprehensive conception of liberalism. **Reasonable** means they are willing to propose fair terms of cooperation and prepared to abide them and willing to recognize and accept both the concepts of reasonable pluralism and the public basis of justification.

Only reasonable comprehensive doctrines can be part of the just society Rawls envisages, since only public reason can lead to a shared political conception in a societies with citizens that hold different comprehensive doctrines. If one is willing to work together under fair terms, and recognizes reasonable differences in values and views, one might be able to come to terms with others who do the same. Rawls recognizes there might be difficulties in distancing oneself from faith, since *believing* means that one thinks it is true. The impartial liberal overlapping consensus therefore insists that it is not about what is true, but about what can reasonably be expected to be shared by people with different reasonable comprehensive doctrines.

Barry opposes the view of Rawls that people may be convinced of the truth of their beliefs, including their conception of the good, while still being reasonable. According to Barry (1995) individuals must be skeptical in order to be reasonable: they do not take their conception of the good to be the one true conception of the good. Barry supports this statement with an example: if one claims to have experienced a divine revelation and succeeds in providing a sufficiently precise description, then the person who had the revelation and the audience should be able to make equal judgements on its truth. If the audience does not believe in the truth of this experience, then the person who had the experience should doubt the truth of the divine revelation as well.

I propose a combination of both Rawls’s and Barry’s views. Imagine a person, Yonathan, who holds there is one true God that shaped the world and all individuals, and gave them different beliefs. Yonathan advocates the equality of all individuals for they are all God’s children, but does not demand the other individuals to share this faith: that would be impossible according to Yonathan’s conviction. Yonathan does not need to doubt the presented convictions in order to be reasonable. A friend of Yonathan, Amirah, holds that there is one God and God has chosen some individuals (the messengers) to tell all the other individuals the true meaning of life. Amirah personally listens to the advice of the messengers and believes it would be best for all to do so, but Amirah is not certain of the idea that the messengers are indeed chosen as such that Amirah demands all others to do the same. Yonathan is dogmatic and has a reasonable conception of the good, while Amirah is skeptical and has an unreasonable conception of the good. Both are able to endorse principles of justice that resolve conflicts of interests between individuals with different conceptions of the good. It seems that skepticism is not an argument against the view of Rawls and Nagel, but an addition to it.

A final feature individuals need in order to be part of a just reasonably pluralistic society is that they put their trust in other persons and institutions that do their part in society (condition of reciprocity). Rationality, reasonableness and trust are all necessary elements in order to reach a stable society, which means future generations will be able to deal with different life aims in society as well, due to a shared reasonable political conception.

### §2.5.4: … through the right and the good…

Rawls in *Political Liberalism* continues to argue in favor of the priority of the right over the good. This is shown by the demand for a public basis of justification: individuals are to assign priority to the idea that the arguments are founded on beliefs that can reasonably be endorsed by all others over the possibility to use arguments that are founded on their own comprehensive doctrine. The principles of justice that are the result of a deliberation with impartial arguments are final determine how to prioritize conflicting claims (right). Claims that derive from life plans that are in conflict with the impartial principles of justice will therefore have no moral value. Therefore the life plans that are assigned moral value (good) are limited by the principles of justice (right). The importance of the priority of the right over the good derives from the idea that the use of coercive power cannot be legitimized on grounds that cannot be reasonably shared by all citizens. Individuals are, just as in *A Theory of Justice*, responsible for the aims they have in life: they are responsible for adjusting their life plans and expectations to the situation in which they find themselves.

A conception of the good is still necessary for impartial principles of justice to be necessary for two reasons. Firstly, a conception of the good provides a citizen with meaning. This is part of liberal theories in general: liberty is valuable, because it is important that people value their actions and belief in the meaning of them (Kymlicka, 1990)[[18]](#footnote-18). Impartial principles of justice are meant to enable citizens with different life paths to cooperate. If citizens do not have this life path, then what problem is to be solved by the principles of justice? Some conceptions of the good might flourish less in the liberal society as described by Rawls, since the neutrality (with regard to comprehensive doctrines) of the state will still lead to some comprehensive doctrines to flourish more easily than others. Rawls writes on possible extinction of certain comprehensive doctrines: “*But if a comprehensive conception of the good is unable to endure in a society securing the familiar equal basic liberties and mutual toleration, there is no way to preserve it consistent with democratic values as expressed by the idea of society as a fair system of cooperation among citizens viewed as free and equal*.” (Rawls, 1993: 198). Secondly, individuals must see each other as free and equal citizens and themselves as bearers of rights. Otherwise they will not accept claims of other persons or make claims themselves.

Rawls denies the necessity of a comprehensive liberal doctrine, and sticks to advocating a political liberal doctrine. The difference is that the political conception would not educate a specific life aim, but only educate what is necessary to become fully cooperating members of society. For instance, a comprehensive liberal doctrine would educate autonomy or liberty as part of one’s life plans, while the political liberal doctrines would educate liberty so all can pursue their own life plans[[19]](#footnote-19).

### §2.5.5: … to the overlapping consensus

Individuals that hold a reasonable comprehensive doctrine are able to share an overlapping consensus. The overlapping consensus means that all individuals in life may differ on the comprehensive doctrine they hold, their aims and talents, but they share a political conception allowing them to cooperate fairly in society. The political conception is basically a shared conception of the right: citizens agree about how conflicting reasonable claims are to be treated and what reasonable means. The political conception is part of a comprehensive doctrine, but it is likely to be the only part that is shared between the different reasonable comprehensive doctrines individuals hold. Individuals themselves may decide on how the political conception is related to the remaining part of one’s comprehensive doctrine, as long as it will receive priority over other elements.

For the purpose of clarity, I will return to the traffic metaphor. One person may think that listening to reggae music and smiling to other drivers while driving is necessary to have a fulfilling ride for a Rastafari book writes so (conception of the good), while another person one had a divine experience that informs the person that driving in silence while ignoring the faces of all traffic users is the only true way to have a fulfilling ride (conception of the good). However, both agree that they cannot demand of the other person to copy their behavior (music / silence, smiling / ignoring) for this behavior is founded on parts of their comprehensive doctrine that cannot be expected to be shared by others (Rastafari book / divine experience). This means they both accept that the traffic rules are based on public reason (conception of the right). Additionally they agree that the one who enters an intersection first is to be given way by the other (conception of the right) and that it is important to hear and see the other participants in the traffic well enough to be save for all citizens to participate in the traffic (limiting the music of the Rastafari and the ignoring of the other traffic participant). Both can decide for themselves how they relate the prioritization of safety over the remaining part of their comprehensive doctrines: maybe the Rastafari book contains a note on the importance safety, or they had a previous experience that changed the value they assign to safety.

The overlapping consensus thus is strictly political: it does not take a stance on which conception of the good life would be more true or valuable than others, nor does the political conception fully inform one on how to act in particular issues (a traffic user that has to give way, but may do so with a smile or without). The citizens that can maintain an overlapping consensus hold reasonable comprehensive doctrines and can act rationally to their doctrines. This means they are both reasonable and rational. The overlapping consensus is founded on public reason, which means the citizens are not indifferent to truth, but seek a political overlapping consensus, while leaving the comprehensive doctrines to the citizens themselves.

Rawls denies the necessity for a comprehensive liberal doctrine to be useful or a thinner consensus to be realistic. A thinner consensus as the modus vivendi (Ackerman, 1980) either is equally comprehensive or unstable. A comprehensive liberal doctrine would be unreasonable for it would take away the idea that individuals can assign their own meaning to their lives. The theory is purely procedural for a reason: it sets the stage for deliberation and reflection in a reasonably pluralistic society, including citizens that hold a doctrine made up of elements of multiple comprehensive doctrines.

A final matter with regard to the overlapping consensus, is the way in which is can be achieved. Rawls writes an overlapping consensus is possible for the reason that people can change their comprehensive doctrines over time. This process of change is greatly supported by the fact that people rarely link their actions to their comprehensive doctrines. For an extensive example of how an overlapping consensus can come into existence, I refer the reader to *Political Liberalism*.

### §2.5.6: A brief comparison between *A Theory of Justice* and *Political Liberalism*

So how are citizens free and equal to determine the content of an overlapping consensus in [PL]? For this Rawls returns to [TJ]: the original position. The adjustments to the original position that are described by Rawls do mostly seem adjustments in the presentation. In *A Theory of Justice* the parties in the original position do not know their conceptions of the good, but they know there are multiple possibilities. In *Political Liberalism* this is specified to the awareness of the fact of reasonable pluralism. This is an aesthetical difference mostly. Secondly, the parties in [PL] know they deliberate on finding a shared political conception only, where only public reason is allowed to determine this conception. In [TJ] the same spirit is present, but it is not as well specified and though it is clear [TJ] does not provide answers for everything, the distinction is drawn less clearly.

In [PL], just as in [TJ], all procedures and principles are deduced from one starting point, which is defended by our intuition: people are of equal moral value. This is not something rare. In fact Dworkin mentioned before that theories of justice nowadays all take equality as a main feature (1977; see also Kymlicka, 1990). The differences lie in how to offer equality.

Both [TJ] and [PL] provide principles of justice for a politically liberal society in which the circumstances of justice (see §2.2.2) are present. Rawls adds that extreme scarcity can reduce one’s possibility to make use of liberty [PL]: 325-326[[20]](#footnote-20), for instance one’s scarcity in money can prevent one from using the freedom to travel. This is again not a metaphysical expression of the meaning of justice, but a practical observation: a just society in which its citizens hold and act upon an overlapping political conception is not viable in every situation.

In both books Rawls simplifies the search for principles of justice by assuming that the citizens of the society that will be founded on these principles can only enter the society by being born into it and only leave by dying (there is no migration). This led to debates on whether the principles of justice as proposed by Rawls could be applied to the world’s society (Beitz, 1975, 2001; Pogge, 1994). The possibility of this application will be discussed in Chapter 3.

Rawls believes the parties in [PL] will come to the same arrangements as in [TJ], being the division of primary goods by the two principles of justice (see §2.3.5). In [TJ] Rawls argues in favor of the division of primary goods, since all persons are likely to have different preferences to use these goods. In [PL] this argumentation becomes more explicit: the parties are likely to divide primary goods fairly, since these are means to lead a fulfilling life, meaning one pursuing one’s own life plans. Not all individuals actually value each of the goods they receive through fair principles of justice, but the individuals that do not can still refuse primary goods if that is part of their life plan. The primary goods are nearly the same as in [TJ], though a little bit more specified. For argumentation and some examples, I redirect the reader to [PL] (Rawls, 1993: 181ff).

To conclude, *Political Liberalism* continues to support the two principles of justice, though slightly adjusted, as described in *A Theory of Justice*, because the basic political rights are of such importance that citizens will demand that these rights have a public basis of justification, and secondly, people will not mind about inequalities when they are to the benefit of the least advantaged. In this way, people are motivated to use their talents while also benefitting society in general.

## §2.6: Summary

In this chapter I have argued in favor of founding justice on, or defining justice by impartiality instead of mutual advantage or reciprocity. I have presented *A Theory of Justice* and the original position as a plausible way to think about justice as founded on impartiality and defended it against some critiques on its goal and the procedure. *A Theory of Justice* did not seem to provide enough clarity of its room for other conceptions of the good though, which has led to a different focus in *Political Liberalism*.

*Political Liberalism* starts by presenting a problem: citizens want to see the state power regulated by principles that they can agree upon, but citizens do not agree on their comprehensive doctrines (the fact of reasonable pluralism). The solution to this problem is a shared conception on how to solve conflicting claims. This shared political conception is called the overlapping consensus and it allows citizens to cooperate together over a longer period of time (stability).

The overlapping consensus is not viable in each situation. The circumstances of justice demand that there is a need for similar resources while having a different idea on how to use these resources and there is an amount of resources that is large enough to make citizens comply to the principles of justice over a longer period of time, while not being large enough to make principles of justice superfluous. The overlapping consensus contains only citizens that hold reasonable comprehensive doctrines and are rational. This means citizens want to offer fair terms of cooperation to other citizens (which will be decided upon by public reason, for otherwise they are not likely to be fair to other citizens) and can act upon their preferences.

The procedure that can make us think about an overlapping consensus, is the original position. In this though experiment we are to think about principles of justice without knowing our particular conception of the good, talents, social class and even society. We however do know that in our society the circumstances of justice will be present and we have general knowledge on societies, talents and conceptions of the good. We know these conceptions of the good are valuable to us and that we will hold different conceptions. In the original position we will come to principles of justice by proposing principles and testing these principles with the use of our intuitions (reflexive equilibrium). In this way the procedure is neither purely deductive, nor inductive.

Rawls expects the two principles of justice to be the outcome of this procedure. I have not argued in favor of these principles for my mission regards the overlapping consensus and the original position as a procedure to uncover a possible overlapping consensus. I do suggest that the first principles (on rights and liberties) might be necessary to ensure that citizens with different conceptions of the good can lead fulfilling lives, which would make them a necessary part of the overlapping consensus.

Before exploring several different procedures that one can use in order to deliberate on the global framework of justice (Chapter 4), I will discuss the key debate related to global principles of justice: does justice have a global reach and if so, should local conceptions of justice give way to a global conception of justice (Chapter 3)?

# Chapter 3: The universality of justice

## §3.1: Introduction

After the presentation of *Political Liberalism*, many authors argued for the desirability of a particular reach of principles of justice. Some authors argued that membership in cultural groups or nations is of such moral importance that a global framework of justice should not be assigned priority over more locally situated conceptions of justice, while other authors argued in favor of the prioritization of a global framework of justice over all other more locally situated conceptions. In this chapter I will argue that global principles of justice that are reasonably supported by individuals that hold an overlapping consensus should be prioritized over local conceptions of justice.

This argument will consist of the following steps. Firstly, I will present a structure published by Barry (1995) to provide clarity on what the debate is about. This structure contains a division in treating particular contexts (first order) and in the general framework of justice (second order) and in treating all persons equal (impartiality) or treating some individuals different than others (partiality). The debate on the scope of the overlapping consensus is mostly on whether global principles of justice, which are impartial on the second order, allow for treating friends, family or compatriots differently from all other persons in particular situations (partiality on the first order). First-order partiality and second-order partiality are conflicting in many situations. For instance, is one to hire a good friend for a job while there are other persons who are more qualified?

Reasons that are provided for treating two persons differently are often founded on membership of a particular group, such as a nation or a cultural group, or ties, such as in family or friendship. These group rights will be discussed secondly, by presenting an explanation of the foundation of group rights by Jones and Long (2015). According to Jones and Long group rights are founded on shared interests, a shared character or both.

Thirdly, I will present the arguments of *The Law of Peoples* (Rawls, 1999) and *National Responsibility and Global Justice* (Miller, 2007). Rawls and Miller argue in favor of assigning duties and responsibilities primarily to peoples (*The Law of Peoples)* or nations (*National Responsibility and Global Justice)*[[21]](#footnote-21). They argue against a prioritization of global rights and duties related to justice over local rights and duties related to justice for a people / nation has a distinct character: it is a cooperation (shared mutual interests) that has a particular identity and culture (shared character).

Fourthly, I will argue that the arguments presented by Rawls and Miller against prioritizing global rights and duties of justice over local rights and duties related to justice are flawed. Membership of a people or a nation does not necessarily coincide with sharing interests or a distinct character and therefore group membership does not seem a plausible reason for denying rights and duties that arise from global principles of justice. Additionally, global principles of justice allow, and limit, national particularity: it is important to recognize the value that membership of a group has for its members, but also that this is only a moral viable argument in certain cases. These cases are determined by the global principles of justice.

Fifthly, the case of nations will be extended to other groups, such as cultural groups. This is a theoretically small step, for the group rights of peoples or nations are founded on the same group rights as the group rights of cultural groups, but of great importance for the universality of principles of justice.

## §3.2: First-order and second-order (im)partiality

To help the reader understand the debates on the reach of the overlapping consensus, I will first present Barry’s distinction between first-order and second-order (im)partiality (1995). First-order refers to how one should act in daily situations, while second-order refers to how individuals should act in general. Traffic rules determine a maximum speed (second-order), but individuals can in a particular situation (first-order) decide on their precise speed. Impartiality refers to treating all persons equally. The maximum speed is in general the same for all citizens. Partiality refers to treating some persons differently than others. Emergency services are allowed to drive at a different speed than others under certain circumstances. First-order impartiality involves treating all persons in the same way in everyday situations, while second-order impartiality means all persons construe a framework of principles which count for all individuals equally.

According to Barry second-order impartiality can allow forms of first-order partiality. For instance, we do not find it unjust for parents to give presents to their own children, while not giving presents to other children. This is a form of first-order partiality (a person treats one’s own children differently than someone else’s children) that is acceptable within a framework of second-order impartiality (all persons are allowed to treat their own children differently than those of others). In this case our intuition informs us that parents are allowed to treat their children differently for they have a particular relationship. Second-order impartial principles determine the situations in which one is allowed to treat persons differently.

In theories of justice several authors argue for first-order partiality, founded on a particular relationship such as the membership of a particular group. Before going into these theories of justice, I will first describe why we would assign special rights and duties to particular relationships.

## §3.3: Reasons for special treatment, rights and duties: first-order partiality

### §3.3.1: Introduction

Jones and Long (2015) discuss the idea of group rights. Group rights are rights and duties that arise from something bigger than an individual. Examples of a group are an interest group, cultural group, a state and a nation[[22]](#footnote-22). Jones & Long discuss the argumentations that other authors have used to argue in favor of first-order partiality and structure them in two conceptions of group rights. The first conception of group rights is called the collective conception. From this conception, group rights as the sum of individual interests. The second conception of group rights is called the corporate conception. From this conception group rights are assigned to something, bigger than an individual, with an own moral standing. An example of this something is a state. States have a moral standing or their own, therefore citizens of a state (even those in later generations) can be held accountable to what previous citizens of that state have done.

### §3.3.2: The collective conception

The collective conception of group rights holds that people have a shared interest which gives right to duties to other persons, but the individual interests are not strong enough on their own to give rise to duties (Jones & Long, 2015). A government does not have the duty to help one cyclist by creating a cycling path in a certain area. However, if there are plenty of cyclists they together do give rise to this duty. If this sum of interests is sufficiently high, it can according to this conception of group rights create a duty for someone else. The cyclists do not need to have anything in common besides an interest: good cycling paths (Jones & Long, 2015). This means members cannot hold a right against themselves: as long as they want something, their interests add up, but as soon as they change their preferences, the total sum of interests is lowered[[23]](#footnote-23). A group right based on the collective conception can make demands against outside members, since it are the numbers that count.

### §3.3.3: The corporate conception

From the corporate conception of group rights one holds that a group can obtain rights and duties by having a separate moral standing. Examples can be families, tribes, nations, states, ethnic groups or religious groups. A group can obtain a group right by a specific shared character, history or tradition (Kymlicka, 1990). If something is valuable to individuals that is in itself not sufficient for giving rise to a right or duty. For instance, we ascribe value to paintings, but not rights, since paintings can be valuable, but they do not have a specific character, history or tradition. The moral standing of the group is not based on its interests and rights, since the interests and rights should derive from the shared identity. A difficult question that has to be answered when dealing with the corporate conception is who or what is really holding the moral standing. An individual has a moral standing, but can act as a member of a group. If this group has a moral standing, then does this transfer the responsibility of ones actions to the group?

The corporate conception can be fair between different groups, for groups can recognize each other as bearers of equal rights[[24]](#footnote-24). An example is a law that support transportation to religious schools. Many political parties that are founded on a particular religious doctrine support this form of state support to religious schools, including those related to a different religion. The individuals in danger are individuals without a particular group, for instance because they do not have a singular source of their identity, but a multitude of elements (Scheffler, 2007). In the example of transportation to religious schools, citizens without a religion are also paying for the transportation to religious schools while they are not making use of it. The rights of these individuals can especially be at stake without public reason. The dangers are also present for members of the group. These members inherited a particular membership and might not be able to dissent, since the group is allowed to deal with the individuals as is given by their shared culture (Jones & Long, 2015). In that sense the abstract group dominates its individuals. This means in some countries a person may hit one’s child, who is part of the group, but not someone else’s, because this child is not part of the group. Even though part of cultures can be changed by individuals, it is generally held that membership of cultural groups is not voluntarily (ibid.). This means that people are born into a group (or not).

### §3.3.4: Both conceptions in one case

Although the collective and corporate conception are different, group rights that derive from these conceptions can be present in a case at the same time: the (rights that are founded on the two) conceptions are not mutually exclusive. An example could be a right to education in a specific language for an ethnic group. The collection of individuals has a group right from the collective conception (their interests add up so as to create a duty to provide them with, say, support for language education), but also a group right from the corporate conception (they have a shared identity and a special moral standing as a group). The difference becomes clear if an individual outside of this ethnic group likes to have education in this specific language as well. From a collective conception the group right now becomes more pressing, since the total sum of interests increases. From a collective conception the group rights remains the same, since the individual is not part of the group with the shared character and therefore this individual has no influence on the group right. It has to be noted that although there is quite some controversy on group rights, there is agreement on the idea that a group right replaces individual rights or the other way around (Jones, 1999).

## §3.4: Special rights and duties because of membership: the case of nations

### §3.4.1: Introduction

In this section I will discuss the theories of global justice by Rawls[[25]](#footnote-25) and Miller. The reason I describe both of them in the same section, is that they argue against limiting first-order partiality by principles of second-order impartiality for similar reasons and they ascribe roughly the same meaning and value to peoples (Rawls) and nations (Miller). I will start by discussing *The Law of Peoples* (Rawls, 1999), followed by Miller’s *National Responsibility and Global Justice* (2007).

### §3.4.2: On *The Law of Peoples*

In *The Law of Peoples* ([LP], 1999) Rawls formulates suggestions on what the foreign policy of a liberal state should look like by presented the society of peoples. The society of peoples consists of all those peoples who choose to implement the ideals and principles of *The Law of Peoples* in their mutual relations. In order for the principles presented in [LP] to still be a political conception instead of a comprehensive doctrine, the principles that are proposed also have to be acceptable to reasonable non-liberal peoples. The peoples who can join the Society of Peoples without being liberal, are called decent peoples: ‘*A (reasonable) Law of Peoples must be acceptable to reasonable peoples who are thus diverse; and it must be fair between them and effective in shaping the larger schemes of their cooperation.*’ ([LP]: 11-12). Liberal peoples will use a national original position in order to come to fair terms of cooperation on a national level, and then take part in the global original position, but non-liberal peoples do not have a national original position. Besides these two categories of peoples, there are three more categories (ibid.: 4-5): (3) the burdened states, which want to become decent societies, but for some unfavorable conditions such as historical, economic and social circumstances, have not yet become one. There is a duty of assistance for liberal peoples to aid these peoples until the point they are decent peoples. There are (4) the outlaw states, which are all states that do not comply to a reasonable Law of Peoples. According to Rawls they are dangerous and therefore they may be invaded. And there are (5) benevolent absolutisms, which “honor human rights, but citizens are denied a meaningful role in making political decisions”. Only liberal peoples and decent peoples are represented in the global original position.

In this global original position, the representatives of liberal and decent peoples would determine the principles of their interactions. Rawls argues in favor of a list of familiar and traditional, though not uncontroversial principles of justice among free and equal peoples (Rawls, 1999: 36-42). For the argumentation, Rawls states that ‘*…the representatives of well-ordered peoples simply reflect on the advantages of these* [the list of eight principles that is borrowed by Rawls from Brierly and Nardin] *principles of equality among peoples and see no reason to depart from them or to propose alternatives*.’ (ibid.: 41) and ‘*…the eight principles are open to different interpretations. It is these interpretations, of which there are many, that are to be debated in the second-level original position.*’ (ibid.: 42). It should however not be stated that the representatives of liberal and decent peoples are only looking at a list of principles that are already provided, but due to practical limitations Rawls uses the presented list as a starting point. Some principles need to be added, while others are superfluous (ibid.: 37).

In [LP] the global original position includes peoples instead of individuals, nations or states. According to Rawls, states are not suitable for they are rational, but not reasonable: states are only acting for the interest of their members, but they do not take interest in offering fair principles of cooperation to non-members. Liberal and decent peoples on the other hand are both rational and reasonable: they want to offer fair terms for cooperation to other peoples (ibid.: 28-29). This does not mean that states should not come into existence, but states should be regulated by the law of peoples. Therefore the sovereignty of states is preceded by the creation of the law of peoples in the global original position.

When we think about global justice we should also not think from the perspective of individuals in the global original position for individuals are part of peoples. Rawls argues for peoples instead of individuals, for individuals are responsible for being a member of a particular people and a people is responsible for its own culture, political system and population size. Several authors have argued that differences in wealth are unjust and that wealthy individuals have a responsibility to poor individuals (Beitz, 2001; Pogge, 2002). According to Rawls the main reasons for differences in wealth between peoples, are differences in the political system, culture and work ethics of the peoples and not the territory or natural resources (ibid., 8-9, 38-39). The differences in wealth therefore do not give rise to any obligations: it is the responsibility of the individuals to change the organization of their peoples.

Rawls argues in favor of taking representatives of peoples over taking representatives of states as the appropriate persons to participate in a hypothetical global original position. The argumentation for this is that states are rational and not interested in offering fair terms to other states, while peoples are reasonable as well as rational. This means (representatives of) peoples are willing to offer fair terms to other (representatives of) peoples. Representatives of peoples are more suitable than individuals as hypothetical participants in a global original position, as individuals should first and foremost be perceived as part of a people. As a collective, individuals that make up a people are expected to take responsibility for their own wellbeing. For instance, they have they duty to make changes in their population size, political conception and culture, before looking outside their people for assistance. This does not mean individuals could not have been represented, but the correct primary unit of moral concern are peoples.

In *The Law of Peoples*, Rawls presents a mixed conception with regard to (im)partiality, Rawls advocates individuals have rights and responsibilities first and foremost to their peoples prior to entities outside of their peoples. However, Rawls also takes a list of human rights to determine which peoples are allowed to be a part of the global original position. These human rights could be seen as impartial principles of justice. These impartial principals however do not compel other societies to protect those who’s rights are violated: a liberal of decent society may influence, or if necessary invade, an outlaw state for the sake of stability (Rawls, 1999). It therefore seems that there are impartial principles (the acknowledgment of particular human rights) that protect one against partial treatment (influences and invasion of liberal and decent societies).

Also with regard to group rights, Rawls presents a mixed conception. In the national original position we are to think as if individuals would attend this gathering behind a veil of ignorance. The individuals are motivated by self-interest, but are forced to propose reasonable principles of cooperation due to their lack of knowledge behind the veil [PL, TJ]. These individuals are not part of a culture or work ethics prior to this original position and are expected to have different conceptions of the good. However, if we deliberate on global justice we should think about a global original position with representatives of peoples instead of individuals, because peoples have an own moral standing that derives from having a distinct character, such a political culture, a political system and work ethics.

### §3.4.3: On *National Responsibility and Global Justice*

Miller (2008b) locates the cause of the debate on first-order partiality versus second-order impartiality by pointing at two striving intuitions. On the one hand we find the current global inequalities strikingly unfair, both on a material and on a civil society level. On the other hand our membership in national political communities is something special[[26]](#footnote-26). Miller proposes as a solution of this conflict that global principles of justice should not necessarily preside over national principles of justice (2007; 2008b) and that there can be a justice gap: one person can have legitimate claim, while no one has the duty to fulfil this claim (2008b).

Similar to Rawls, Miller grounds the need for rights and duties related to nationhood (which is a form of first-order partiality, for compatriots are treated differently than non-compatriots) in the distinct and important moral character of nations. According to Miller, when thinking about our membership in national political communities we realize *“…we are bound by ties of history, common culture, common language, and so forth: we ought to give their interests special weight when considering what forms of distribution or redistribution justice requires. And furthermore, we attach considerable value to collective self-determination: to being able to decide, together with our fellow citizens, what social goals to aim at, and what policies to pursue.*” (2008b: 384). A nation according to Miller has three characteristics:

1. Its members are subject to coercively enforced laws;
2. Its members are engaged in a co-operative practice regulated by a common set of economic and social institutions;
3. Its members share a common national identity that binds them to each other and gives rise to particular obligations not owed to humanity at large.

A group right is thus founded on at least a distinct character (“*common national identity*”) and possibly on a collective shared interest (“*co-operative practice*”). The distinct character also comes with responsibility: if cultural differences between nations lead to material and civil inequalities between these nations, then it would be unjust to demand citizens of the wealthier nation to redistribute some of their wealth to the other nation (2008b: 388).

Miller does acknowledge that individuals might not be fully responsible for how their nation fares. Miller explains this by two dimensions: the constraint dimension: the extent to which a nation controls the global system, and the control dimension: the extent to which individuals control their nation. However, Miller and Rawls are on the same page with regard to the idea that domestic factors have a very strong influence on a nation’s situation (Miller, 2008a: 560) and with regard to holding individuals responsible for their governments. Miller support this by mentioning that the cultures or beliefs of the individuals support the nation’s system (Miller, 2008b: 386)[[27]](#footnote-27).

Miller does not propose a denial of all impartial principles in *National Responsibility and Global Justice*. Instead a minimum of global human rights is proposed, which is truly shared by all[[28]](#footnote-28). These rights consists of a list of minimum capabilities each person should have. Besides a set of capabilities, Miller argues in favor of principles of fair cooperation between nations. The surplus of cooperation must be fairly shared by the participants of this cooperation.

## §3.5: The cosmopolitan perspective

### §3.5.1: Introduction

The different arguments in favor of partiality on the ground of membership of a nation have been opposed mainly by cosmopolitans. Cosmopolitanism has three main features: (1) individualism: the ultimate units of concern are individuals (instead of groups), (2) universality: the status of ultimate unit of concern attaches to every living human being equally and (3) generality: this special status has global force (Pogge, 1992: 48).

In this section I will discuss the main cosmopolitan critiques of assigning an important moral character to nations (§3.5.2: Own nation first?) and of denying the priority of second-order global impartial claims over first-order national partial claims (§3.5.3: On priority).

I will mainly focus on the cosmopolitan critiques for these critiques provide the greatest challenge to the theory Miller proposes.

### §3.5.2: Against nationality as a good ground for special rights and duties

One strand of critiques is arguing against the idea that membership of a nation is a reason for first-order partiality. I will only present the three most fundamental critiques here.

Firstly, several authors deny that a nation includes individuals that has a shared interest. Pierik (2008) and Bader (2008) argue that nations often go against the will of their members.

Secondly, the members of a nation are not (equally) responsible for the wellbeing of their nation (Tan, 2008). Since the place of birth is random (Beitz, 2000; 2001) and citizens cannot always influence the unsound policies of their nations (Pogge, 1994; 1998), citizens cannot be held responsible for the results of the collection of members of a nation. Some members may have a lot of influence, but if this is the case, then there is also a different amount of responsibility (Pierik, 2008). A nation cannot be seen as a unified actor, for there is no deliberation between the individuals and there is not a shared decision-making procedure (Petit, 2007).

Thirdly, the members of a nation do not share a particular shared characteristic suitable for assigning a moral character to nations. There are large cultural differences within a border, often larger than with some individuals outside of a nation’s border (Arneson, 2016). Gilbert (2000) adds that a shared culture is not what demarcates a cultural or ethnic group: the only distinguishing feature is group membership. However, in order to receive a special moral status one would expect the membership of a group to depend on a certain shared characteristic. Group membership without any shared ground for assigning membership seems to random to be morally important.

Some authors have argued that memberships are valuable to their members and therefore have value. I do not deny this argument, but state that it is an argument that derives from the wellbeing of individuals, instead of the wellbeing of a larger entity with a moral character (such as a nation).

### §3.5.3: Against the prioritization of nations over a global framework

The second strand of critique argues that global principles of justice (second-order impartiality) determine under which circumstances special treatments (first-order partiality) are allowed. This strand of critiques can be summarized by presenting two arguments:

Firstly, global principles of justice that treat individuals equally can still support special rights and duties that derive from relationships (Tan, 2008; Brock, 2005a; 2015). We can agree that parents all over the world are allowed to treat their own children differently from all the other children in the world. It is important that the global framework receives priority though, for this framework informs us when special treatments are justifiable (Brock, 2005b). Brock presents a case to clarify this point: two people are in a critical condition and you can only save one of them. If one of the persons is a family member of you, you are allowed to choose to save your family member. However, as soon as we adjust the case slightly by changing the condition of your family member from critically wounded into non-critically wounded, the outcome changes as well: we must now help the stranger instead of our family member. This example shows how an impartial framework determines to what extent we are allowed to treat persons differently in particular situations (Brock, 2005b; Tan, 2008)

Secondly, and related to the first argument, not all special ties give rise to rights and duties. We might agree that members of a nation should be granted the right to speak their own language for this is valuable to them. However, if a nation is mistreating its members, then we would no longer see equal moral value in the ties between a nation and its members. This is another way of showing that global principles of justice shape when and how special treatment of compatriots could be legitimate.

### §3.5.4: Conclusion on the case of nations

Rawls and Miller have both argued for special rights and duties to members of a nation. A nation is a collective for it involves a shared cooperation with shared interests, and more importantly for it involves a shared culture and identity. A procedure to fit this conception would be to have a global original position with representatives of the nations involved.

Several authors have denied the plausibility of the arguments by Rawls and Miller. Nations do not have a distinctive cultures feature, nor significantly share the same interests. Often individuals outside of the nation have more in common with regard to interests and culture than with at least some compatriots. Therefore nationhood is not a plausible reason for limiting the overlapping consensus by special ties and national conceptions of justice.

Additionally, if nationhood would be a reason for special rights and duties, these rights and duties should be limited by global principles of justice. The overlapping consensus contains a similar conception on under which circumstances ties are morally relevant for justifying special treatment of some over others.

## §3.6: Extension to other areas

The reasons for determining the moral relevance of special ties to a nation by using a framework of global (impartial) principles of justice, count equally for other ties as well. Cultural groups that are not part of a nation or a state are also denied moral claims that preside over global principles of justice, for the global principles of justice decide on the moral relevance of the tie of persons within a cultural group and cultural groups are distinguishable only by membership, which is an implausible argument for rights and duties that preside over global principles of justice.

In this section I will treat two issues briefly. The first is extreme cosmopolitanism and the second is the possibility of supporting involuntary ties. I will treat these issues here for they both greatly influence which conceptions of the good could be held among citizens that cooperate together while holding an overlapping consensus.

An extreme cosmopolitan argues that all individuals should be treated equally under all circumstances unless partial treatments would contribute to living up to the global impartial principles of justice. For instance, parents can justly treat their children different from other children for this is the best way to fulfil the global duty to take care of children [[29]](#footnote-29). The main argument for this view is that if we would accept the premises that 1) all individuals are morally equal under all circumstances, and 2) we show moral equality by treating individuals equally, then 3) we should treat individuals equally under all circumstances.

Liberal authors will not deny the first premise, but the second premise and the conclusion are not entirely plausible. I may treat my children as moral equals, but this does not mean that I will treat them equally under all circumstances. There can be a difference in needs, talents or other characteristic that legitimately influences my treatment to them. There is however a stronger argument. Justice is not the value that is given priority because of its own value, but justice is necessary for individuals to pursue their own values and life plan in a fair way. An extreme cosmopolitan would demand of individuals to have a conception of the good that does not allow for relationships (relationships cannot exist if all persons are to be treated equally (Scheffler, 1999)), nor would a value different from justice find much room. An overlapping consensus cannot include principles of justice that would limit all individuals in a manner so strong that they individuals can barely pursue the life path they perceive to be their own.

The second issue, involuntary ties, seems more difficult. Involuntary ties involve ties that are not chosen, though the fact that they are not chosen does not mean that they are not appreciated or valued. Scheffler (1999) stresses that liberals have difficulties with accepting rights and duties related to involuntary ties, because of the importance of choice in liberal though. Behind the veil of ignorance, a liberal imagines being in an involuntary tie that one does not like and decides not to assign moral priority of this tie over the global framework of justice. Cultural communities are however often involuntary, whether experienced in this way or not, and state neutrality would make it hard for cultural communities to protect themselves from cultural hybridization (ibid.). For instance, in the case of immigration Scheffler suggests that immigration changes both the immigrant and the host country (2007), so if a nation is not allowed to protect its culture by limiting immigration, than this will lead to a change in the national culture. Walzer made this point as well in stronger words, stating that cultural hybridization due to toleration of cultures will turn people into dissociated individuals that no longer have a community, nor a conception of the good (1997).

An overlapping consensus will lead to principles of justice that can be endorsed by individuals of all reasonable comprehensive doctrines – not just the existing ones. Therefore it is unlikely that the political conception will include the idea that individuals can be bound by involuntary ties. However, ties are very valuable and can receive a moral under conditions that are limited by global principles of justice. I agree with Rawls that those cultures that cannot maintain themselves without state support, founded on principles of justice endorsable by all individuals that hold a reasonable comprehensive doctrine, cannot be a part of a just reasonable pluralistic society (Rawls, 1993). This also does not mean that individuals will deny each form of state support to cultures. In an original position we might agree that transportation to schools based on a particular reasonable comprehensive doctrine should be funded partly by the state and we might even agree on financial support for reasonable comprehensive doctrines in general. However, we will not predetermine which reasonable comprehensive doctrines will receive support, nor would we support unreasonable comprehensive doctrines.

## §3.7: Conclusion on the universality of justice

With regard to the different arguments on the scope, I would like to make four observations that are important for the next sections.

Firstly, in the world as we know it, members of nations, states and cultural groups are not demarcated by having shared interests nor by having particular shared characteristics different from their membership. Memberships, just as ties such as friendship, are valuable and give rise to rights and duties: they do not exist without this special treatment. However, these rights and duties should be circumscribed by global principles of justice that can be endorsed by all individuals that hold a reasonable overlapping consensus.

Secondly, involuntary ties are not valuable in each case and cannot be a reason for state support for particular existing comprehensive doctrines. The overlapping consensus might include state support for reasonable comprehensive doctrines in general, but it will exclude unreasonable comprehensive doctrines.

Thirdly, I see a genuine tension between global human rights and locality of morals. If (1) communities apart from each other may differ as they please and (2) justice consists of regulating the interactions, then I do not see how (3) there is a place for global human rights that have any other target than those interactions. Further argumentation is needed to explain how (1) and (2) cannot lead to (3). One might reply there is a difference in global human rights and how we are to divide welfare[[30]](#footnote-30): there can be global human rights such as a right to safety, without a duty to redistribute welfare. This route would lead to a so called floor level approach: one assigns a minimum of basic goods or capabilities to all individuals, possibly without any principles on how to treat goods or capabilities that rise above this minimum. I argue that the universal human right to receive a minimum in basic goods or capabilities must then be prioritized over (national) partiality in order to be plausible.

Fourthly, and related to the issue of involuntary ties, the overlapping consensus can be held by individuals that either hold reasonable comprehensive doctrines, or are skeptical about their own doctrine in a way that makes them reasonable.

The previous observations show a clear picture. The overlapping consensus is desirable, for it decides which ties are morally relevant as a ground for treating some different from others. The overlapping consensus is a shared political conception, on which individuals holding different reasonable comprehensive doctrines can found their global principles of justice. Before individuals invoke memberships, such as nations or cultural groups, and assign moral value to them, these principles of justice should determine which memberships and ties are morally relevant for rights and duties that are to be acknowledged by other individuals. Since the global principles of justice are limiting the moral relevance of nations, it seems plausible to use a procedure, such as a global original position including all individuals instead of representatives of groups. The moral relevance of these groups might well be present, but this cannot be determined prior to the procedure that is to determine principles of global justice.

A global original position seems a viable option, but it is not the only procedure to determine what principles of justice would be chosen by individuals that share a reasonable political conception (which is the overlapping consensus). In the following chapter I will discuss different procedures that have been introduced by authors to fulfil the same purpose as a Rawlsian global original position.

# Chapter 4: The way to determine a global framework of justice

## §4.1: Introduction

In previous chapters the desirability of global principles of justice has been confirmed and I have argued that a global original position can guide us into thinking about the content of global principles of justice. This does not mean that I argue for using an original position as described in *Political Liberalism* (Rawls, 1993) while expanding its reach. There are more global original positions possible. We might for example find that a different veil of ignorance would support us better in our (inner) deliberation.

In this chapter I will start by introducing a list of four important questions with regard to an original position. The purpose of these four questions is to structure the different types of original positions and provide insight in their differences (the procedural questions, §4.2).

Secondly, I will return shortly to *Political Liberalism* and discuss two amendments that have been made to it in order to make it a global original position. Caney (2001) argued for a global principle of equality of opportunities, meaning differences in wealth may only arise if they are related to offices which are fairly open to all (principle 2A in [TJ], see §2.3.5 for a description of the two principles of justice). Moellendorf (2002) argued in favor of a global difference principle, which means differences in wealth may only arise if they are in the benefit of those that are the least well-off (principle 2B in [TJ], see §2.3.5). I will discuss Caney and Moellendorf together for their arguments and answers to the four procedural questions are quite similar and mostly an expansion of *Political Liberalism*.

Thirdly, I will discuss Brock (2005a; 2005b; 2009) and Nussbaum (2006). Brock and Nussbuam argued in favor of a floor level approach, which means all persons in a society should have a minimum of a certain set of goods or capabilities for that society to be just. A global original position should set these minima. Brock made some adjustments with regard to the veil of ignorance and argued that representatives should, and want to, agree on a floor level of basic needs instead of focusing on the division of primary goods. Nussbaum argued in favor of a floor level of capabilities instead of primary goods[[31]](#footnote-31).

Fourthly, Barry has introduced an alternative way to give substance to an overlapping consensus in the first and second part of *A Treatise of Justice* (Barry, 1989; 1995). In these parts Barry mentioned the Scanlonian approach or Scanlonian original position to reach an impartial agreement of justice[[32]](#footnote-32) (§4.4). Although many issues with regard to how the Scanlonian approach would work were postponed until part three of A Treatise of Justice, which unfortunately never has been published[[33]](#footnote-33), I will discuss the Scanlonian approach for it is radically different from the other approaches. This approach will therefore offer a different perspective on, a different way to think about, global principles of justice.

After presenting the different original positions that have been offered, I will discuss the possibilities and argue in favor of particular choices with regard to the procedure to think about the content of principles of global justice (§4.7).

One might notice that I will include only contract theories as procedures to determine the content of global principles of justice. The reasons for this have been described in the previous chapters, but no explicit argument was made for only using contract theories for the purpose of determining the content of global principles of justice. I will do that now by referring back to what I said previously: firstly, I argued in favor of justice as founded on impartiality (§2.2) for this is more consistent than justice as founded on mutual advantage. This choice is also a matter of defining justice: I define justice as more than an explanation of the status quo determined by power balances, but see justice as a fair way to prioritize in claims that are made on the same resources. Secondly, political power should be grounded on reasons that all citizens could reasonably endorse (§2.5.3), because 1) political power is an expression of the power of the citizens as a collective body, 2) citizens are of equal moral value, and 3) in order to represent the source(s) of its power, the state, the wielder of this power, should act in line with reasons that those that are represented could reasonably endorse. The use of political power is thus grounded in the hypothetical consent of those that are represented by it. If the strength of the outcomes is gained from the hypothetical consent of the people, then we speak about a contract theory. The shared political conception that is the starting point of the deliberation of individuals on the principles of justice that regulates their cooperation, is the overlapping consensus.

## §4.2: The questions

### §4.2.1: Introduction

In this section I will explain and argue in favor of a certain set of questions to which an answer is necessary in order to determine how we can best think about the content of global principles of justice. Although I will argue for four particular questions, it is possible there are more pressing questions out there that I have not included. The choice in the list of questions is based both on their importance, which will be discussed during the presentation of the questions, and on the fact that they are often central in the presented theories of global (impartial) justice. The questions I will defend in this chapter are the following:

1. What is the domain of the principles that are to be determined by the contract?
2. What is the metric of the result, being the content that is under discussion[[34]](#footnote-34)?
3. What are the characteristics of the parties that the contract regulates?
4. What ensures equality in moral concern for each individual?

The domain refers to which (inter)actions are regulated by the principles of justice. Are all interactions included, of just the interactions in public, or with the state? The metric refers to which unit we are looking at when measuring justice. Examples are primary goods (manna, money, education) or capabilities (ability to migrate or to play sports). I will treat the domain and the metric together for they both decide what the goal is of the procedure.

The characteristics of the parties relates to what we know about all individuals that are hypothetically regulated by our thought experiment. The final question relates to the features of the procedures that will make us show equal moral concern for each individual while we use the procedure[[35]](#footnote-35).

### §4.2.2: The goal

The goal of the procedure of coming to the global overlapping consensus encompasses two dimensions, the domain(s) and the metric of the result. I will explain these dimensions in the order of mention.

The domain refers to the parts of the world’s society which are influenced by the principles that are part of the overlapping consensus. Therefore the question about the domain also determines which subjects or domains are untouched by the overlapping consensus. For example, in Chapter 3 I have already mentioned that Miller (2007; 2008b) argues in favor of regulating interactions between nations. When we think about global principles of justice while following Miller’s line of thought, we would set the goal of our procedure on formulating which principles ensure fair trade, yet the goal of the procedure would not necessarily include a search for international justice with regard to development aid, health care, education and migration[[36]](#footnote-36).

The metric of the result, also referred to as the content of the debate, refers to possible means of providing justice to all. This can for example be done by assigning rights, providing and redistributing certain goods, providing opportunities or capabilities to all individuals in the world. If we know that we want to protect fair trade between individuals, we can do that by assigning rights, for instance a right to a shared surplus of trade and/or by providing all individuals with a fair equality of opportunity to trade. The metric of the result is very important, since the differences between the metrics have large consequences for the world. For instance, there is a large difference between assigning all individuals the right to freedom of movement, the right to the means to move around and the right to a particular division of wealth, which enables individuals to do as they see fit, including the option to buy means in order to move around.

One might argue in line with Ackerman’s critique of contract theories that defining the metric is too much of a way to shape the outcomes (§2.4.3). However, without reducing the amount of metrics that we can use while thinking about global justice, we would quickly strand in the details of which metric to use in which situation, while we do not yet have a consensus on the broad outline. I hold that we as a community can come to better theories of justice if we postpone the details for the moment until we have reached more of a consensus on the main issues.

If one can answer to which domains a contract is related and by what means a contract is to divide, the goal of the contract situation is clear. This means that we have a clear understanding of what is expected of us if we enter the procedure to determine the substance of global principles of justice.

### §4.2.3: On the parties

If we think about global justice, then it is very important how we perceive those that are regulated by it. For instance, if we believe that individuals might become dissociated without active state support to comprehensive doctrines, then we are very likely to include a principle on perpetuity of the state that includes state support to (reasonable) comprehensive doctrines.

Furthermore it is important how much we know about the world if we think about principles of justice. For instance, in a Rawlsian original position ([TJ], 1971) we still have general knowledge on for example political systems and economy. However, this general knowledge is related to the world that we live in and might not be correct for a perfectly just world that we could hypothetically create through a different original position. It is therefore important to specify what characteristics we attribute to the world that we are thinking about.

### §4.2.4: On the equality in moral concern

The final question that has to be answered is how the equality in moral concern for each individual is ensured in the procedure. In original position this can be done by the veil of ignorance, by demanding unanimity on the end result, among other possibilities.

The how questions should however be preceded by the why question: why should we have equal moral concern for each individual?

The easy answers are that 1) none of the authors mentioned in this thesis hold otherwise and 2) it is up to those that deny the equal moral value to provide an argument[[37]](#footnote-37).

The honest and technical answer is that one cannot. Like in mathematics, one starts with certain premises to build more complicated theories. The premise that individuals are of equal moral value and deserve equal moral concern are premises that we intuitively accept without being able to provide a solid argument. This is not to state that there are no societies in this world that show unequal moral concern or morally value individuals differently. However, the reasons provided for this inequality are not endorsable by individuals holding a reasonable conceptions of the good, for it does not seem possible to provide a reason for this inequality that is neutral to any conception of the good.

### §4.2.5: Why not other procedural questions?

Although one may agree that the procedural questions that I propose are plausible for the purpose of determining the procedure to think about global principles of justice, one might also doubt my choice of. I will not argue against all questions that I have not used, for many questions are relevant though, as I argue, less relevant than the four I will use to structure different original positions. However, I will provide arguments for excluding two questions that may seem strikingly important: why are there not more specific outcomes included? and why is there no attention to the institutions that are to implement the global principles of justice?.

The former question will not be treated for the questions I treat are procedural questions. As mentioned in previous chapters, this thesis does not offer an argument in favor of a particular set of principles of justice. Although a contract theory is often used for the purpose of legitimizing a set of outcomes, my aim in this thesis is different: I argue in favor of a particular procedure to determine the content of global principles of justice, that would by definition have support from individuals that hold reasonable comprehensive doctrines that together have an overlapping consensus in their political conception. This does not mean specific outcomes are not important. Specific outcomes are important for they show what the theory will lead to in practice. For many readers the specific outcomes are the most exciting part of a proposal for a procedure to think about justice for they can test their intuitions by looking at the outcomes of the procedure, or, as is perhaps done more often, test the theory by looking whether their own intuitions match with the outcomes. The fun of the reader is valuable, but not a sufficient reason for presenting possible expected particular outcomes. There is however also another reason for refraining from presenting expected outcomes. The argumentative strength of a procedure is all too often neglected if the expected outcomes are judged undesirable by other authors.

The latter question is not discussed for it would require more space than I could permit myself to take in this thesis to carefully treat the question and it is not of first importance. I do not need to treat the matter of implementation before treating which rights and duties exist, if any (Miller, 2008a; Tan, 2008; Arneson, 2015)[[38]](#footnote-38).

Therefore, in the following sections I will discuss different original positions using the four questions I have presented.

## §4.3: *Political Liberalism* and slight amendments

### §4.3.1: Introduction

In this section I will return shortly to *Political Liberalism* and discuss three amendments that have been made to it in order to make it a viable global original position. Beitz argued in 1975 that *A Theory of Justice* could be applied to a world’s society and in 2001 that Rawls in *The Law of Peoples* mistakenly argued for thinking about justice from the perception of peoples. Caney (2001) argued in favor of a global principle of equality of opportunities. This entails that differences in wealth may only arise if they are related to offices which are fairly open to all. In fact, this is the first part of the second principle that was presented by Rawls in *A Theory of Justice* (see §2.3.5 for a description of the two principles of justice). The second part of the principles of justice by Rawls for used by Moellendorf (2002), who argued in favor of a global difference principle. The differences principle entails that differences in wealth may only arise if they are in the benefit of those that are the least well-off. I will discuss Caney and Moellendorf together for their arguments and answers to the four procedural questions are quite similar and mostly an expansion of *Political Liberalism*.

### §4.3.2: Recap: the original position as presented in *Political Liberalism*

Since I have already discussed the procedure described in *Political Liberalism*, I will limit myself to presenting a review of the original position as presented in *Political Liberalism* based on the four procedural questions. I will start with summarizing the goal (domain and metric of the result), followed by the characteristics of the parties and the way of ensuring equal moral concern for each individual.

In *Political Liberalism* Rawls does not make significant changes in the original position, though providing a different formulation for some of its features. The goal of the original position as presented in *A Theory of Justice* is similar to the goal in *Political Liberalism*: to agree upon a set of principles, which will inform the basic institutions of their cooperation as free and equal citizens (Rawls, 1971). The domain is restricted to the basic structure of society, of which the size and importance must not be underestimated. It does not include acts of benevolence or kindness, nor is it meant to inform us on right and wrong in our daily actions. The metrics that are used are threefold. A set of liberties come prior to all further principles. Other primary goods are regulated by fair equality of opportunies (2A) and in the advantage of the least-advantaged.

The citizens that are to hypothetically use the principles of justice are rational and reasonable, meaning they are interested in and capable of shaping and pursuing their own life aims (rational) and willing and capable of offering fair terms to others, accepting that they might have another conception of the good (which is also reasonable). We are aware of differences in classes, talents and conceptions of the good that exist, but should treat the case as if we are deprived on knowledge on our own class, talents and conception of the good. This is also the way to ensure that we have equal moral concern for each individual, while we are determining the content of the global principles of justice. As argued by Wissenburg (1999), the original position as presented by Rawls in *A Theory of Justice* and *Political Liberalism* is aesthetically a deliberation by multiple persons, but in practice one rational person behind the veil of ignorance would suffice to come to fair principles of cooperation, that can be endorsed by all individuals (currently existing and future generations) that hold a reasonable conception of the good. That one person is (meant to be) the person that is thinking about global justice.

### §4.3.3: Introducing the amendments to *Political Liberalism*

Several authors have taken [PL] as a starting point to think about global justice. They argued that that a global society is much like the society Rawls had described in [PL] (Tan, 2004; Brock, 2005a, 2005b; Nussbaum, 2006; 2015)). Beitz already expanded [TJ] towards the global scale in 1975 and since [PL] did not contain fundamental changes in the principles and perhaps even provided further reasons for going global, Beitz did not make many adjustments to the argument as presented in 1975 while arguing in favor of a global original position, where representatives would represent all individuals in this world.

Caney (2001) argued for using principle 2B on a global scale: social and economic inequalities should be arranged so that they are attached to offices and positions open to all under conditions of fair equality of opportunity. According to Caney all individuals should have equal opportunities, in which a country should not matter (ibid.), nor regional identity or ethnicity (2008).

Moellendorf (2002) takes principle 2A as main subject by arguing for the principle that social and economic inequalities are arranged globally so that they are to the greatest benefit of the least advantaged (the so-called global difference principle), though in more recent years Moellendorf has also argued in favor of equality in opportunities (2009).

Beitz, Caney and Moellendorf answer the procedural questions in similar ways. They answer the procedural questions in a way that Rawls answers the procedural questions on a national level, but Rawls did not advocate a global original position from the perspective of individuals that are not necessarily a part of their nations (1999).

## §4.4: Nussbaum

In 2006, Nussbaum published *On the Frontiers of Justice: Disability, Nationality, Species Membership*. In this book, Nussbaum declared that *A Theory of Justice*, and later *Political Liberalism*, provided strong and extensive arguments for its principles, but both books were incomplete on three issues: humans with disabilities, individuals living in other societies than the liberal society as described in [TJ] and [PL], and species other than the human species. According to Nussbaum, these three groups were on the frontiers of justice. In addition to making a case for the expansion of the scope from the national to the global society,

Nussbaum makes a case for using capabilities as the metric of the outcome instead of primary goods (2006). The key argument is that not all individuals are equally capable of converting resources (such as money) into what they want to use the resources for (such as travelling). Another argument is that individuals may be seen as the worst-off in some capabilities, while being far better off if one would look at some other capabilities. For instance, if we compare the capabilities of a person without full leg functioning living in Germany and a doctor in Nigeria, we generally expect the Nigerian doctor to be better off if we would measure the capability they have to move, where the German person generally is better off with regard to the capability they have to participate politically.

According to Nussbaum, there are certain capabilities that are seen as minimally required for having agency (2015), which means someone has the capability of leading a meaningful life. The primary focus on minimal requirements is typical for a floor level approach. The capabilities that are necessary, are: life, bodily health, bodily integrity, senses, imagination & though, emotions, practical reason, affiliation, other species, play and control over one’s environment (2006). The domain of Nussbaum’s capabilities is more substantial than the domain of the principles of justice as presented by Rawls in *A Theory of Justice* and *Political Liberalism*. We may not be sure for all capabilities, because Nussbaum and Rawls are more specific in different ways, but some capabilities are surely not organized by Rawls, such as affiliation to other species, or play. Rawls meant to set the boundaries of justice in which the needs for these capabilities could be settled by individuals themselves, possibly by other theories than a theory of justice.

Nussbaum believes the presented list of capabilities are universal. The only step towards implementation that is needed, is a way to determine a minimum level of each capability for all individuals(2015)[[39]](#footnote-39). Several authors have argued that the list of capabilities as presented by Nussbaum is too substantial, that it is not agreed upon all over the world and that there seems no strong reasonable argument for the presented capabilities (reasonable, as in acceptable to individuals holding different conceptions of the good). Sen, who initiated the capability approach, differs from Nussbaum in this respect: Sen does not offer a list of central capabilities, for Sen believes that capabilities are context-bound (Robeyns, 2013) and therefore should be determined by public reason in a national setting.

There is a fundamental difference in opinion between Nussbaum and Rawls with regard to their perception on when one is respectful to individuals with a disability. This difference becomes visible in the arguments they used to defend the metric they use. Rawls argued (though indirectly) against the use of capabilities, for according to Rawls “*… it is assumed that the members of society are rational persons able to adjust their conceptions of the good to their situation.*” ([TJ]: 81). Individuals who have less talents or a disability should adjust their conception of the good to their situation and no one should judge this as being less fulfilling (ibid.). Nussbaum argues in favor of respecting individuals by providing them with equal capabilities, while Rawls argues in favor of respecting individuals by the liberty for each person to adjust one’s own conception of the good with regard to one’s personal situation.

Furthermore the domain is expended towards relationships and made more specific on many other capabilities. The equality of moral concern is not provided by the procedure, but by the metric of the outcome: the capabilities themselves ensure equal moral concern. If one denies that the original position should focus on the capabilities as presented by Nussbaum, but instead one should decide for oneself which capabilities are of primary importance, then one might just be Gillian Brock. The Brockian original position will be discussed next.

## §4.5: Brock

Inspired by *Political Liberalism*, Brock (2005b; 2009) also argues in favor of an original position, but a different one than Rawls has presented to us. In fact, the only similarity with regard to the procedural questions is the veil of ignorance as the method to ensure equal moral concern.

In the Brockian original position the representatives (or delegates as Brock calls them) are mainly concerned with debating on ‘*what basic framework governing the world’s inhabitants we can reasonable expect to agree on as fair*’ (2011: 85). Brock continues by stating that global justice entails that all should be enabled of leading a decent life, which requires us to focus on enabling need satisfaction, protecting basic freedom(s), fair terms of cooperation and arrangements safeguarding the division of these important goods. When writing about need satisfaction, it should be noted that Brock has been supporting the prioritization of basic needs. Basic means that “*satisfying it is a necessary condition for human agency (means one has to be able to deliberate and choose)*” (2005a: 340). According to Brock, basic needs are (i) physical and psychological health; (ii) security; (iii) understanding; (iv) autonomy; and (v) decent social relations (2009). It is not clear whether the representatives will come up with these basic needs or that this is part of the assignment that we receive before starting our (inner) debate.

According to Brock most individuals alive at this moment would choose basic needs as the way to regulate their society, and their approval ratings of this method would increase over time[[40]](#footnote-40), for it would be a good compromise between safety for all and allowing for the effects of motivation (= desert)(Brock, 2005a).

The goal of the Brockian original position thus differs from the goal in *Political Liberalism*: the domain of the Brockian original position is limited to need fulfilment, basic freedom, fair terms of cooperation and the arrangement necessary to safeguard these. The dominant metric is basic needs. The reader may rightly ask what the main difference is between needs and capabilities. There is no real difference between Nussbaum and Brock on the metric, since Brock uses the terms interchangeably (Brock, 2005b). The differences are twofold. Firstly, Brock uses an original position to ensure impartiality, contrary to Nussbaum. Secondly, the goal of the Brockian original position is to do more than agreeing on basic needs (such as agreeing on principles of fair trade), but the list of basic needs is far less substantial than the list of capabilities as presented by Nussbaum.

The image we are to have of the parties and the world they live in while thinking about justice, is also different in the Brockian original position. Firstly, we are to think of the world as it is approximately now. We are aware that some people are more collectivistic (they experience themselves as being part of a group prior to being an individual), while others are more individualistic (they see themselves primarily as individuals, though possibly taking part in groups as well). Additionally, we know that there are different communities on different levels, such as nations, tribes and global institutions. We are to remind ourselves of 1) the existence of global collective action problems and on how problematic they are, and 2) the fact that each person is dependent on others in certain times of one’s life. We will think about the dependence of babies and elderly, and include individuals with handicaps as well. The veil of ignorance hides the knowledge we have of the society we life in, conception of the good and population sizes (Brock holds that if we would know our odds of being part of a certain population, we might gamble for being part of a certain population[[41]](#footnote-41)). Brock argues that if we know more about the world that we think about, we will have a more meaningful (inner) discussion on what justice would entail, for we will be aware of which conflicts between duties could arise. We are to perceive the motivation of individuals as having little concern for others, especially with regard to those who are at a greater distance (2007). This is exactly why Brock expects individuals to accept a floor level approach: individuals would not want to allocate much of our resources to individuals we do not know. According to Brock, this version of the original position can be endorsed by all cultural communities, also those communities that do not value liberty as much, because people may pursue each conception of the good, including collectivistic conceptions.

The only procedural question that the Brockian original position answers in the same way as the original position as described in *Political Liberalism* is the fact that the veil of ignorance is used to ensure equal moral concern for all, especially since also disabled persons are included. The idea is that while there is still limited concern for other persons, the veil of ignorance ensures that we, while thinking about justice, would come up with fair principles of cooperation.

Brock has argued that we are reasonable in the original position, but additionally there is also a veil of ignorance. This may seem to be a double mechanism for the veil of ignorance and the motivation to offer a fair agreement have the same effect. The value of the veil might however also be that it denies me to propose principles of justice that are only related to my particular reasonable conception of the good.

## §4.6: Barry / Scanlon

The final strand of procedures that one can use to determine the shape of an overlapping consensus that will be discussed, is the contract theory of ethics by Scanlon that is best described in *What we owe to each other* (1998). The main thought of this theory has been used by Barry (1995) to argue in favor of a Scanlonian original position. First I will describe shortly Scanlon’s account of ethics. Secondly, I will show how this account is extended by Barry into a Scanlonian original position and what this means for the way this procedure can lead to global principles of justice. As mentioned previously, Barry has never presented a full account of the Scanlonian original position for this was postponed until part three of *A Treatise of Justice*, which has never been completed.

In *What we owe to each other*, Scanlon starts by explaining what ethics is about. According to Scanlon all individuals have the notion of using language to justify their acts to others. Right is the opposite of wrong. An act is wrong “*if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that no one would reasonably reject as a basis of informed, unforced general agreement*” (Scanlon, 1998: 110). Some parts of the definition require further explanation. Firstly, one should notice the reasonable rejection regards a set of principles for the **general** regulation of behavior. The set of principles, disallowing an act, should therefore be reasonably rejected in all cases with similar circumstances, instead of only that one case. Secondly, the terms informed and unforced require further explanation. Informed means that people know who they are and what their preferences and characteristics are, while agreeing on principles of justice (as opposed to procedures that use a veil of ignorance). Additionally, individuals are informed in the sense that they do not propose principles on the basis of false beliefs, even if these believes would be reasonable for the person to have. False beliefs consist of superstition and false beliefs about the consequences of actions. For instance, we know that a frontal collision of a car with a truck leads, unfortunately, to the loss of lives and not just to nausea. Unforced means that one party is not powerful enough to force others into an otherwise unreasonable agreement. For instance, if Sam is the only person with a gun, then principles on restriction of the use of force will be reasonably rejected, for Sam can provide all other participants in the contract with a reason to reject: they would otherwise be shot by Sam. To include the condition of equality in power means that the Scanlonian theory of ethics is part of theories that see justice as impartiality. In *Justice as Impartiality* (1995), Barry suggested that we can imagine that all individuals in a contract situation have a veto power that they can use to block the proposed principles of justice.

This theory is different from previous theories in its answers to each of the four procedural questions. The first question covers the domain of the overlapping consensus. In *What we owe to each other*, the theory is telling us about right and wrong, which is far more extensive than a strictly political conception. It is however not clear how one is to determine the strength of reasons that could reasonably reject a principle and there is no help in how to formulate these reasons (ibid: 360). The metric of the result is unclear and could differ for each case. For instance, I may grant that there is a minimum level of fair capabilities for all individuals that we imagine to be a part of Scanlon’s procedure. If there are no disallowing principles of general regulation that cannot be reasonably rejected as a basis of informed, unforced general agreement, then I can use this metric to ensure all individuals a minimum in certain capabilities.

The representatives, or the contracting parties are not exactly the same as those that are bound by the contract. According to Scanlon, all individuals that have existed, exist and will exist are part of the contract procedure (1998). Those that are not capable of signing a contract can be made a part of the procedure through trustees. It is not possible to include those that would live if one makes certain decisions. For instance, a drug-addicted parent cannot be sued for the influence of using drugs on the child for the clean child never came into existence[[42]](#footnote-42). While signing the contract the parties do not hold false beliefs: this is an impossible precondition to the contracting parties for how is one to know which beliefs are false (see also Barry, 1995)? Related to this point, I wonder whether Scanlon holds that there are true beliefs as well. If there are false beliefs, then what other types do we have and how are we do find these? Another difference is that individuals are strongly motivated by the wish to justify their actions to others. Although other authors state that the contracting parties have to be reasonable[[43]](#footnote-43) when we think about justice, the formulation of Scanlon signals more emphasis on this notion than other authors do. Rawls and Brock both hold that it cannot be assumed that individuals will show an extensive moral concern for others (Rawls, 1971) or that this concern should even be assumed narrow (Brock, 2007). This might however also be a difference between ideal and non-ideal theory: Scanlon may propose the idea that perfect justice (ideal theory) would be what individuals would agree on that are strongly motivated by the justifiability of their actions to others, while Rawls and Brock both search for ways in which we can reach justice with the individuals we have (non-ideal theory), which are assumed to be limitedly concerned with others. Since the original position is not an actual existing situation, it is difficult to separate what the authors would recommend as part of ideal theory and which features they include as part of non-ideal theory. The idea of a veto power can be a different way of ensuring equality in power in the contract situation. If individuals are strongly motivated by their desire to justify their actions while abstaining from force and while being well-informed, they do not seem to need this veto. However, a veto seems a different way from the veil to think about what principles would be acceptable to all contracting parties in the absence of power differences.

Now that I have discussed the most important presented procedures to determine the content of principles of global justice that can be agree upon by individuals that hold an overlapping consensus, I will argue in favor of a procedure which I see as the most plausible option at this moment for determining the substance of global principles of justice.

## §4.7: A more plausible procedure?

### §4.7.1: Introduction

In this section I will argue in favor of a particular procedure to determine the substance of global principles of justice that are hold by individuals as an overlapping consensus. In order to structure this argument, I will use the four procedural questions. These questions concern the domain of the overlapping consensus, the metric of the result of the overlapping consensus, the characteristics of the representatives that will take part in the procedure that provide more clarity on the overlapping consensus and the way in which equal moral concern is ensured to all individuals. I will take these questions in the order of mention.

### §4.7.2: The domain of the revised procedure

All authors that have been discussed previously, chose a scope that fitted their goal. The goal of the procedure that I am proposing is not to determine what is right or wrong in general, but to determine the content of global principles of justice that would reasonably be endorsed by individuals that hold an overlapping consensus. This overlapping consensus is about second-order impartial principles that puts boundaries on first-order partiality (see Chapter 3). However much I admire the distinction between moral rights and wrongs, the overlapping consensus cannot be expected to encompass every act in life, for this would mean there would be a single conception of the good instead of a multitude. Therefore, the overlapping consensus is limited, correctly I think, to a shared political conception.

The global principles of justice are not viable in a society without the circumstances of justice. The circumstances of justice do not change the definition or shape of the principles of justice. it is merely an observation: justice will not be maintained in societies without the presence of the circumstances of justice. On a world scale changes can be made fairly easily (Pogge, 2002) and there seems to be sufficient resources, but not too much resources, present in the world to speak of global circumstances of justice: justice would neither be unstable, nor superfluous, but the current division of resources is denying certain individuals and their societies both justice and the circumstances of justice. I argue in favor of a duty of assistance (Rawls, 1999; see also §3.4.2), but I would adjust this duty of assistance into a duty to help burdened individuals that life in societies without the circumstances of justice. It would be implausible to expect these individuals, and their societies, to uphold the principles of justice prior to this assistance. The circumstances of justice, by definition, are required prior to the viability and perpetuity of the principles of justice.

Related to the circumstances of justice, but not similar to it, a floor level approach seems very plausible for global principles of justice. The purpose of principles of justice is not to tell us what is right and wrong in each interaction, but to provide us with a framework within which we can mediate between different other values we have as well, so why not literally present a minimum above which all interactions are no longer in the domain of justice? There are some differences in the goods, talents or capabilities of certain parties that still seem strikingly unfair to us even, if all parties are above the floor level, but this would be outside of the domain of justice. We cannot equalize persons and we do not want to equalize individuals, but we do want to support each person in pursuing a reasonable life path.

A final consideration is focused on future generations. If a stable just world is the goal of global principles of justice, then the principles of global justice should include the protection of the global circumstances of justice[[44]](#footnote-44), but also the continuation of the overlapping consensus. This includes education that is necessary to maintain an overlapping consensus, state support for the continuation of sources of reasonable comprehensive doctrines and flexibility in the implementation of the global principles of justice with regard to future reasonable comprehensive doctrines. On the one hand we should not limit justice to the currently held reasonable conceptions of the good for this reduce the stability of the overlapping consensus, but on the other hand we are should not promote the birth of new reasonable conceptions of the good for these new reasonable conceptions are not better than the currently existing ones. We do not need to take into account all possible conceptions of the good, but we do need to maintain flexibility in our laws and regulations to be able to show equal concern for reasonable conceptions of the good that are yet to be held.

### §4.7.3: The metric of the revised procedure

Within a floor level approach, there are still different metrics that can be argued for. In the previous sections liberties, primary goods, basic needs and capabilities have been presented. The most important question is whether we show equal respect to individuals by expecting them to adjust their life plans to their possibilities or by giving them equal possibilities to pursue a similar life plan. The former seems too harsh on persons who can hardly translate primary goods into what they want to use it for, for example individuals that are in need of a lot of expensive medication in order to survive. On the other hand, using a particular list of capabilities (Nussbaum) or basic needs (Brock) seems to have two downsides, which can both be prevented.

Firstly, we as a collective of cooperating individuals may be required to provide capabilities to someone that does not want to make use of all capabilities that we provide, even if we have done so at great expense. We could argue that individuals are provided with options instead of capabilities, so individuals have the possibility to demand for the fulfilment of a particular need, but they may not. This leaves us with some practical issues, such as how and when are individuals allowed to change their needs, but this is no different from changes in preferences of other citizens. The metric needs seems useful for it better expresses the fact that fulfilment of these needs is more than a luxury. I am well aware of the fact that a capability can and does also involve necessities, but I think it is important to be clear on the distinction between the ideal of a shared political conceptions, which consists of agreement on what capabilities all individuals are to have in that domain, and the bare necessities that allow for such a conception to be possible. that it is a floor level approach: capabilities might be interpreted as more of a luxury, even though it involves capabilities that we deem necessary for all individuals in order to call a society just. This clear distinction in the terms needs and capabilities will help both us in the pursuit of particular principles. The needs that are necessary to allow for the enjoyment of the political conception is less likely to be very arbitrary, for we can estimate quite well what is necessary.

Secondly, capabilities that are necessary for agency may well change over time, so we must remain flexible with regard to the needs and capabilities we deem necessary for all individuals in order to call a society just. Instead of using a particular list of needs or capabilities, we could start the procedure of the original position with deciding which capabilities would be necessary for human beings to pursue reasonable conceptions of the good (or needs for enjoyment of the shared political conceptions). With this shift the original position remains to be useful over time, for two hundred years later we are able still to think about what would be of prime importance for pursuing our different life paths through this original position at that moment. This would keep the original position as it is meant to be: as an instrument to think about (global) justice, apart from particular conceptions of the good and apart from time and space. However, it doe stake into account the current world as it is. In that sense the reflective equilibrium is also finding a place in this theory: it allows for principles to change over time and to ensure that principles take into account different generations, but also do not solely reflect the circumstances of one generation in its principles of justice.

### §4.7.4: The contracting parties of the revised procedure

The contracting parties are the parties that are the subject of our thinking about justice. Do we think about individuals, nations or groups? And do we expect them to be selfish, honorable or something else? A clear separation between ideal and non-ideal theory is very important in this respect, because ideal and non-ideal theory influence each other while having different functions. Ideal theory provides us with the dot on the horizon, which we are to reach from our current position with the use of non-ideal theory. Without a distinction we might confuse the mean with the goal and try to reach imperfect justice.

In the previous chapters I have already argued in favor of a global original position with individuals instead of groups (such as nations). We should think about global principles of justice from the perspective of all individuals in the world. I agree with Brock that it seems fruitful to use the current situation to think about what justice would demand of us in the current situation, but I do not take the circumstances that Brock is describing for a general procedure of thinking about global justice (2005b). Maybe the description is correct for the current situation, but the features may change over time and they are not necessary for us at this moment. We should think instead what would be the floor level that we should provide to all individuals. In order to reach this goal I argue that we should assume individuals to be strongly motivated by the desire to justify their actions to others, the current and future generations, by the use of public reason. The use of public reason is important for this ensures that the arguments that are used could be endorsed by individuals that hold a yet unknown conception of the good as well. Thus, in our thinking process regarding the ideal principles of global justice, we think about the principles of justice that would regulate individuals that want to justify their actions through public reason to each other and to the later generations. Additionally the individuals are also rational in the sense that they are to have a life plan, can reflect on this and can make decisions that lead to a fulfilling life with regard to their conception. Individuals do not need to change their life plans, but they are able to do so. We should include thoughts on how to support those individuals that are not able to pursuit their own conception of the good, but this is part of non-ideal theory.

I agree with several other authors that in non-ideal theory we should take into account that some individuals have a strictly individualistic conception of the good, while other individuals have a conception that includes the well-being of other individuals. Also I agree with Brock (2005b) that in the current world we only see limited concern for others, especially far-away strangers. I argue that we should take this into account while thinking about the implementation of global principles of justice, but the motivation of the contracting parties does not change what the right thing would be to do from the perspective of justice (as impartiality).

Lastly, it is possible to include individuals who are not rational or reasonable, but they are part of non-ideal theory for they are not part of a perfectly just world[[45]](#footnote-45). If individuals do not desire to offer fair principles of cooperation, then those who do are not obliged to offer these individuals the same of those who are offering fair terms of cooperation. I find Ackerman’s idea of limiting someone’s rights up to the point where one can be a reasonable citizen promising (1980), but a more extensive treatment of this matter will have to wait until another time.

### §4.7.5: Ensuring equal moral concern of all individuals

If we think about global principles of justice from the viewpoint of reasonable individuals who also want to justify their actions to upcoming generations, then we do not need to add further ways to ensure equal moral concern. We could however still use a veil of ignorance to make it easier for us to distance ourselves from a particular conception of the good. In Chapter two I described that both skeptical unreasonable individuals and dogmatic reasonable individuals could be part of a perfectly just world. If we think about global principles of justice with the use of an original position, we can think about selfish individuals that are behind a veil of ignorance or about reasonable individuals without a veil of ignorance. I theoretically prefer the former, for it seems closest to ideal-theory to imagine the world to be inhabited by individuals that want to be just. Practically I prefer the latter, for it avoids the discussion on the truth or falsehood of particular beliefs and it might be easier for us to imagine what would be fair without being attached to our own position, talents and conception of the good, than to imagine what would be fair if we were reasonable.

## §4.8: Summary

In this chapter I have presented several procedures that have been offered to determine the substance of global principles of justice. In order to structure the discussion, I have used four procedural questions. These questions are related to the domain of the principles, the metric of the result, the characteristics of the contracting parties and the way to safeguard equal moral concern for each of the contracting parties.

After the discussion of the different procedures, I have argued in favor of a procedural which combines elements of several proposed procedures. The domain of this procedure is limited to the floor level, meaning we should decide together what would be the minimum for all individuals to have in order for the world to be just. This includes also the perpetuity of the global overlapping consensus (a shared political conception, based on public reason) and the global circumstances of justice. These principles provide us with possibilities to live a decent life with regard to our own reasonable conception of the good. The metric of the result is options: one might be below a certain minimum with regard to certain needs at a particular moment in time, but will have the option to have fulfilment of this need up to the floor level. The contracting parties are rational individuals that are strongly motivated to offer others and future generations fair principles of cooperation founded on public reason. The way to ensure equal moral concern for all of the contracting parties could be both the veil of ignorance or the idea that the contracting parties have the characteristics that I have described in the previous sentence.

This procedure is stable due to perpetuity of the overlapping consensus and the circumstances of justice, respectful to the current conceptions of the good by not demanding support for all possible reasonable conceptions of the good, to future generations by stability and the demand of justifying our actions to future generations and to future reasonable conceptions of the good by using public reason and by using options (that can be used in the case a new reasonable comprehensive doctrine comes into existence). This procedure is part of ideal-theory for it provides the user of this procedure with a clear idea of what justice would ideally entail in the current world, and one could also use this procedure at a later date with different needs, talents and conceptions of the good. It does not include many instances of non-ideal theory for we should agree on the spot on the horizon prior to determining how to get there.

# Chapter 5: Conclusion: a desirable shared foundation?

In this thesis I have taken up the question how we should give substance to global principles of justice that could be endorsed by individuals that hold a global overlapping consensus. In Chapter 2 I explained the limits of justice. Only if a society is subject to the circumstances of justice, we can expect justice to be upheld in it. Secondly, I argued in favor of justice as founded on impartiality for this leads to a stable conception that matches our intuition that justice is more than an explanation of the status quo in power balances. Justice as founded on impartiality entails that individuals are motivated to offer fair principles of cooperation to others and could endorse principles of justice under conditions of equality. The conditions of equality are present if power differences do not influence which principles of justice are agreed upon and if there is a freedom of choice. A plausible way to think about justice as impartiality is the original position, as presented firstly (though inspired on earlier work by Kant) in *A Theory of Justice* by Rawls (1971). In *A Theory of Justice* Rawls asks us to think about justice by using a hypothetical procedure: the original position. The original position entails that a group of individuals meet and deliberate on the principles that will be used as a foundation of the basic structure of society (main societal institutions, such as the constitution). During this meeting, they do not know their own talents, status, preferences or the particular shape of their society, but they do have general knowledge on societies and their members. In *Political Liberalism* (1993) Rawls emphasized that this procedure is meant to provide a framework for individuals to live together and resolve their conflicting claims on scarce resources (conception of the right) while having different perceptions on their rational plans of life (conception of the good). The premises that 1) members within each society in the world have different conceptions of the good, and 2) the basic structure of society should be based on reasons that all could reasonably endorse, leads to the conclusion that within each society the basic structure should be based on reasons that all could reasonably endorse. This is possible if individuals hold a shared conception on how to cooperate together (political conception), even though they do not hold the same conception of the good. A shared political conception that is held by individuals that have different conceptions of the good, is called an overlapping consensus.

In Chapter 3 I explored the major argument against the idea of global justice and against a global overlapping consensus. This argument is based on the idea of group rights: global principles of justice should not be prioritized over local rights and duties that are based on particular relationships, ties and memberships. The debate on this prioritization is understood by distinguishing special treatment (partiality) from equal treatment (impartiality) and the first-order (daily actions) from the second-order (the framework of justice). The framework of global justice can allow for persons to treat each other differently, but not to any extent and not under all circumstances. The case of nationhood has been presented in-depth, since nationhood is an often mentioned cause for special treatment among compatriots. I have argued that since membership of the nation seems the only distinguishing feature between compatriots and foreigners and memberships are not morally valuable under all circumstances, the impartial framework of justice has a global reach. The impartial framework of justice should allow for memberships and ties to exist, even though this means allowing partial treatment, for memberships and ties are very valuable to individuals, but the impartial framework of justice informs us under what circumstances and to what extent a special treatment is allowed. The impartial framework has to be determined prior to other ties and memberships, which means that if we would use the original position to think about global principles of justice, then we should think of it as a meeting between all individuals in the world, instead of a meeting between (representatives of) peoples, nations or cultural groups.

In Chapter 4 I have taken up the question which global original position would be most plausible for us to use in order to determine the content of global principles of justice that could be supported by individuals that hold an overlapping consensus. Several procedures have been presented and discussed with the use of four procedural questions (domain of the principles, metric of the result, characteristics of the parties and the way to ensure equal concern to all the contracting parties). After discussing several procedures, I have argued for a procedure that combines different elements of most of them. The goal of the procedure that I argue for is to determine a floor-level of stable options for all rational individuals on the globe that are strongly motivated by the desire to offer fair principles of cooperation to others and future generations, based on public reason. Floor-level means that we should think about what the world’s society should minimally provide to all individuals. Stable means that the overlapping consensus should be maintained through education and that the circumstances of justice should be maintained, assuming that justice will not become superfluous due to an abundance of means. Options are capabilities that all individuals can request. A citizen may ask for a floor-level in the fulfilment of particular needs at a given time, but might as well not ask. Whether a citizen has a particular need is up to the citizen in question to decide. Rational refers to being able to have a life plan and make the choices to pursue this life plan.

This original position provides us with a more stable procedure to determine the content of global principles of justice then previous procedures . The global principles of justice are also more stable for they include the idea that a society should maintain the circumstances of justice as well as maintain the overlapping consensus. The procedure is more stable for there is not a pre-given list of capabilities or needs, nor more than a thin conception of the good (equal moral value of individuals) in which the current conceptions of the good are influencing the outline of the procedure. Over time our perception of justice will change due to different amounts of resources, different demand of talents and capabilities and differences in the shape of communities. It is plausible to adopt a way of thinking about global justice that can continue to fit the world in which it is used. Additionally, I argue that we should assume that individuals that live in communities without the presence of the circumstances of justice might become just if they are supported into having these circumstances. One should not blame individuals, nor peoples or nations, for living in unjust societies as long as the circumstances of justice are not present in their communities. This thesis thus provides some specifications to a framework of global justice and proposes a procedure to determine principles of global justice. This framework could be used to give more structure to scientific debates on particular global issues, but could also be used by politicians, interest groups, or other individuals and groups that are actively involved in implementing a perception of justice, to get more insight in particular global issues and in global justice in general. Lastly, both societal and scientific debates can benefit from an abstract framework that everyone involves can agree upon before discussing our differences in particular issues. The debates become clearer for we can better pinpoint the differences and similarities between the various opinions within the debates.

The work in this thesis is however far from finished and it could be made more useful with further research. The first and most important step is a check on the completeness of our contracting parties by researching whether non-human species should be included in the hypothetical global original position as well. I have left other species than the human species out of the picture due to practical limitations, but it is of great importance to decide on whether animals should in fact be part of our primary moral concern. We could include animals in the presented procedure by seeing them as contracting parties through assigning trustees, so the question is whether we should. This decision on the contracting parties comes prior to discussing the outcome of the procedure in particular debates: we should first decide whether animals are included as contracting parties, prior to deciding who is to do what with regard to climate change (which also harms animals). Secondly, I have not treated many issues of non-ideal theory for the time being. I have only briefly touched the subject of justice for future generations, individuals with disabilities and justice for individuals that are unreasonable. These questions require an answer to further specify global principles of justice and increase their usability. Thirdly, it would be very interesting to combine the presented procedure with empirical research in order to come to a more suitable implementation. This can consist of empirical research on the motivation of individuals and on the circumstances of justice. In case of the latter, we could investigate whether there are measurable indicators of the (lack of) these circumstances. Subsequently, we can see whether we can predict at what point particular current societies would fall below the necessary level of resources to uphold justice. The research on the circumstances of justice could be mostly historical research (researching development of justice in different countries and comparing the amount of means available), but it could also include experiments in which groups have to divide goods under different circumstances (to see when the circumstances of justice are present). For instance, we could ask a group of ten subjects to divide a sum of money up to twenty individuals: the ten subjects in the experiment and ten strangers. In this situation, we can look which factors influence their decision, for instance the amount of money that is to be divided, the amount of resources the subjects have themselves, the status of the ten strangers, the relationship between the subjects, matters of desert, etcetera. An experiment to research the moment that justice becomes superfluous, if this moment exists, could be carried out by researching at what moment individuals do not mind that others receive more of a particular good than they do while the others already had more resources. A more solid account on the circumstances of justice would surely be of great scientific and societal help[[46]](#footnote-46). I think that research on animal rights, future generations and motivation is sufficiently present, but it has to be combined with the findings of this thesis in order to expand the use of both strands of research.

# References

Ackerman, B. (1980). Social Justice in the Liberal State. New Haven: Yale University.

Arneson, R. (2002). Equality. In: R. Simon, The Blackwell Guide to Social and Political Philosophy (pp. 85-105), Oxford: Blackwell Publishers.

Arneson, R. (2010). Two cheers for capabilities. In: H. Brighouse & I. Robeyns (eds.), Measuring Justice: Primary Goods and Capabilities (pp. 101-119), Cambridge: Cambridge University Press.

Arneson, R. (2015). Theories, types and bounds of justice. In: D. Moellendorf & H. Widdows (eds.), The Routledge Handbook of Global Ethics (pp. 35-48). London: Routledge.

Arneson, R. (2016). Extreme cosmopolitanisms defended. Critical Review of International Social and Political Philosophy, 19(5), 555-573.

Ashford, E. & Mulgan, T. (2012). Contractualism. In: E. Zalta (ed.), The Stanford Encyclopedia of Philosophy, URL: <https://plato.stanford.edu/archives/sum2016/entries/communitarianism/>.

Bader, V. (2008). Global justice in complex moral worlds: dilemmas of contextualized theories. Critical Review of International Social and Political Philosophy, 11(4), 539-552.

Barry, B. (1965). Political Argument. New York: Humanities Press.

Barry, B. (1989). Theories of Justice. Berkeley: University of California Press.

Barry, B. (1995). Justice as Impartiality. Oxford: Clarendon Press.

Beitz, C. (1975). Justice and International Relations. Philosophy and Public Affairs, 4(4), 360-389.

Beitz, C. (2000). Rawls’ Law of Peoples. Ethics, 110(4), 669-696.

Beitz, C. (2001). Human Rights as a Common Concern. The American Political Science Review, 95(2): 269–282.

Bell, D. (2016). Communitarianism. In: E. Zalta (ed.), The Stanford Encyclopedia of Philosophy, URL: https://plato.stanford.edu/archives/sum2016/entries/communitarianism/.

Brock, G. (2005a). The Difference Principle, Equality of Opportunity, and Cosmopolitan Justice. Journal of Moral Philosophy, 2(3), 333-351.

Brock, G. (2005b). What do we owe co-nationals and non-nationals? Why the liberal nationalist account fails and how we can do better. Journal of Global Ethics, 1(2), 127-151.

Brock, G. (2007). Caney's Global Political Theory. Journal of Global Ethics, 3(2), 239-254.

Brock, G. (2009). Global Justice: A Cosmopolitan Account. Oxford: Oxford University Press.

Brock, G. (2011). How does equality matter? Journal of Social Philosophy, 41(1), 76-87.

Brock, G. (2015). Cosmopolitanism and its critics. In: D. Moellendorf & H. Widdows (eds.), The Routledge Handbook of Global Ethics (pp. 61-71), London: Routledge.

Caney, S. (2001). Cosmopolitan Justice and Equalizing Opportunities. Metaphilosophy, 32(1-2), 113-134.

Dworkin, R. (1977). Taking Rights Seriously. London: Duckworth.

Dworkin, R. (2000). Sovereign Virtue: The Theory and Practice of Equality. Cambridge (MA): Harvard University Press.

Fotion, N. (2014). Theory vs Anti-Theory in Ethics: A Misconceived Conflict. New York: Oxford University Press.

Freeman, S. (2016). Original Position. In: E. Zalta (ed.), The Stanford Encyclopedia of Philosophy, URL: https://plato.stanford.edu/archives/win2016/entries/original-position/.

Gilbert, P. (2000). Peoples, Cultures and Nations in Political Philosophy. Edinburg: Edinburgh University Press.

Jones, P. (1999). Group Rights and Group Oppression. The Journal of Political Philosophy, 7(4), 353-377.

Jones, P. & Long, G. (2015). Universalism, relativism and difference. In: D. Moellendorf & H. Widdows (eds.), The Routledge Handbook of Global Ethics (pp. 82-94). London: Routledge.

Kant, I. (1795). Perpetual Peace: A Philosophical Sketch. URL: <https://www.mtholyoke.edu/acad/intrel/kant/kant1.htm>.

Kant, I. (2011). Groundwork of the Metaphysics of Morals. In M. Gregor & J. Timmermann (eds.), Immanuel Kant: Groundwork of the Metaphysics of Morals: A German–English edition (pp. 1-156). Cambridge: Cambridge University Press.

Kymlicka, W. (1990). Contemporary Political Philosophy: An Introduction. Oxford: Clarendon Press.

MacIntyre, A. (1978). Against the Self-Images of the Age. Notre Dame: University of Notre Dame Press.

MacIntyre, A. (1988). Whose Justice? Which Rationality? Notre Dame: University of Notre Dame Press.

Moellendorf, D. (2002). Cosmopolitan Justice. Boulder: Westview Press.

Moellendorf, D. (2009). Global Inequality Matters. Basingstoke (UK): Palgrave Macmillan.

Miller, D. (2002). Cosmopolitanism: a critique, Critical Review of International Social and Political Philosophy, 5(3), 80-85.

Miller, D. (2007). National responsibility and global justice. New York: Oxford University Press.

Miller, D. (2008a). A Response. Critical Review of International Social and Political Philosophy, 11(4), 553-567.

Miller, D. (2008b). National responsibility and global justice. Critical Review of International Social and Political Philosophy, 11(4), 383-399.

Nussbaum, M. & Cohen, J. (1996). For love of country: debating the limits of patriotism. Boston (MA): Beacon Press.

Nussbaum, M. (2006). Frontiers of Justice: disability, nationality, species membership. London: Harvard University Press.

Nussbaum, M. (2015). Political liberalism and global justice, Journal of Global Ethics, 11(1), 68-79.

Pierik, R. (2008). Collective responsibility and national responsibility. Critical Review of International Social and Political Philosophy, 11(4), 465-483.

Pogge, T. (1992). Cosmopolitanism and Sovereignty. Ethics, 103, 48-75.

Pogge, T. (1994). An Egalitarian Law of Peoples. Philosophy and Public Affairs, 23(3), 195–224.

Pogge, T. (1998). A Global Resources Dividend. In D. Crocker & T. Linden (Eds.), Ethics of Consumption. The Good Life, Justice, and Global Stewardship (pp. 501-536), New York: Rowman and Littlefield.

Pogge, T. (2002). World Poverty and Human Rights, Cambridge: Polity Press.

Rawls, J. (1971). A Theory of Justice. Cambridge: Belknap Press.

Rawls, J. (1993). Political Liberalism. New York: Columbia University Press.

Rawls, J. (1997). The Idea of Public Reason Revisited. University of Chicago Law Review, 64, 765-807.

Rawls, J. (1999). The Law of Peoples. London: Harvard University Press.

Robeyns, I. (2013). The Capability Approach (and Social Justice). In: G. Gaus & F. D’Agostino (eds.), The Routledge Companion to Social and Political Philosophy (pp. 456-466). London: Routledge.

Robeyns, I. (2016). Capabilitarianism. Journal of Human Development and Capabilities, 17(3), 397-414

Sandel, M. (1982). Liberalism and the Limits of Justice. New York: Cambridge University Press.

Scanlon, T. (1998). What we owe to each other. Cambridge: Belknap Press.

Scheffler, S. (1988). Consequentialism and its critics. Oxford: Oxford University Press.

Scheffler, S. (1999). Conceptions of Cosmopolitanism. Utilitas, 11(3), 255-276.

Scheffler, S. (2007). Immigration and the Significance of Culture. Philosophy and Public Affairs, 35(2), 93-125.

Tan, K. (2002). Liberal Nationalism and Cosmopolitan Justice. Ethical Theory and Moral Practice, 5(4), 431-461.

Tan, K. (2004). Justice Without Borders: Cosmopolitanism, Nationalism and Patriotism. Cambridge: Cambridge University press.

Tan, K. (2008). National responsibility, reparations and distributive justice. Critical Review of International Social and Political Philosophy, 11(4), 449-464.

Taylor, C. (1985). Philosophy and Human Sciences: Philosophical Papers 2, Cambridge: Cambridge University Press.

Taylor, C. (1992). The Politics of Recognition. In: A. Gutmann (ed.), Multiculturalism: Examining the Politics of Recognition (pp. 25-73). Princeton: Princeton University Press.

Vanderschraaf, P. (2006). The circumstances of justice. Politics, philosophy and economics, 5(3), 321-351.

Walzer, M. (1983). Spheres of Justice: A defense of pluralism and equality. New York: Basic Books.

Walzer, M. (1997). On Toleration. New Haven: Yale University Press.

Walzer, M. (1993). Interpretation and Social Criticism. The Tanner Lectures on Human Values, 1985. London: Harvard University Press.

Wissenburg, M. (1999). Imperfection and impartiality: a liberal theory of social justice. London: UCL Press.

Wissenburg, M. (2009). Political Pluralism and the State: Beyond sovereignty (2009). London: Routledge.

1. In *Political Liberalism* (Rawls, 1993) the overlapping consensus is presented as viable for a national society instead of a global society. Rawls never thought it desirable to make the overlapping consensus global. I will come to this later. [↑](#footnote-ref-1)
2. Rawls coined the term circumstances of justice, but the content of it is entirely borrowed from other authors, mostly Hume. [↑](#footnote-ref-2)
3. The concept of having enough resources to enable a society to be stable and not enough resources to make cooperation superfluous is called moderate scarcity. [↑](#footnote-ref-3)
4. The state of nature is a debated term. Some authors use it to defend human rights prior to any membership, where others, such as Rawls, do not take it to be a normative concept (Freeman, 2016). [↑](#footnote-ref-4)
5. Although Barry describes the original position as a way to think about justice as impartiality, [TJ] has been said to contain elements of justice as mutual advantage, justice as reciprocity and justice as impartiality (for instance Barry, 1995; Nussbaum, 2006). This will be discussed in the chapter on the overlapping consensus, because this critique was given at a later time and might be even more of a challenge to *Political Liberalism* than to [TJ]. [↑](#footnote-ref-5)
6. In this Rawls follows Immanuel Kant’s third maxim in *Groundwork of the Metaphysics of Morals* (2011 (originally 1785)). [↑](#footnote-ref-6)
7. Rawls borrowed the idea that the principles should be able to be public (*Perpetual Peace*, 1795) and be able to be generally used (*Groundwork of the Metaphysics of Morals*, 2011 (originally 1785)) from Kant. [↑](#footnote-ref-7)
8. Rawls does not state that these two principles would be chosen for sure, but the two principles would be the most desirable option on the list of options provided by Rawls. The list can be found in [TJ] on page 126-127. [↑](#footnote-ref-8)
9. This topic has been extensively treated by Michael Walzer in *Spheres of Justice* (1983) in which the argument is made that there is not enough focus on the domination of one type of good over other types of goods and too much focus on whether a particular good is monopolized. [↑](#footnote-ref-9)
10. I realize that there are many types of utilitarianism. The only important shared feature that is important at this point, is that all theories of utilitarian are centered in the deductibility of ethics. [↑](#footnote-ref-10)
11. For more on this debate, I can recommend to read Nick Fotion (2014). [↑](#footnote-ref-11)
12. Critiques that came after the introduction of the overlapping consensus in *Political Liberalism*, and also apply to it will be discussed in the chapter on the overlapping consensus. [↑](#footnote-ref-12)
13. This critique was mentioned by Walzer before, in the 1985 Tanner Lectures. [↑](#footnote-ref-13)
14. Ackerman criticizes the use of hypothetical situation quite often in *Social Justice in the Liberal State* (1980), while using a hypothetical situation to clarify the modus vivendi. [↑](#footnote-ref-14)
15. This is part of the so called method of reinventing principles of justice. Reinvention refers to the process of using a procedure to reexamine the current intuitions. They will not lead to new principles, for the outcomes are determined by the input, which are the current intuitions. For a nice overview of ways of doing morals, I recommend reading Walzer’s 1985 Tanner Lectures (1993). [↑](#footnote-ref-15)
16. I want to highlight that Wissenburg (1999) calls the modus vivendi a contract theory. Ackerman would not share that characterization, since *Social Justice in the Liberal State* (1980) contains many critiques of contract theories in general. I can however share the observation that it seems like a contract theory in the sense that all the individuals involved have agreed on the proposed procedure, including the behavioral test and the rules that structure the dialogues, to solve their conflicts, which means we could speak of a contract as well. [↑](#footnote-ref-16)
17. Rawls also mentions that history shows a consensus is possible (p. 140). I do not find this a strong, nor the main argument, so I will not stress it further. [↑](#footnote-ref-17)
18. There are also some comprehensive liberal doctrines that defend the proposition that liberty, or autonomy, is valuable in itself. [↑](#footnote-ref-18)
19. For more on this matter, Barry’s Justice as Impartiality, chapter 5-7 can be informative. [↑](#footnote-ref-19)
20. Rawls refers to Hume’s circumstances of justice, which means that the virtue of justice is only to be seen in societies with a conflict of interests and moderate scarcity, excluding both abundance of primary goods and total lack of them. [↑](#footnote-ref-20)
21. I will leave the debate on the differences between peoples, nations and states for later, and I will not treat them in-depth for this would be outside of the scope of this research. [↑](#footnote-ref-21)
22. I am aware of the debates on nations, states, ethnic groups and their relations. Although these debates are insightful, for my current discussion the only observation that matters is that they all make a moral claim on the basis of group rights. For practical reasons I will not discuss these concepts any further, unless specifically necessary for the sake of clarity. [↑](#footnote-ref-22)
23. Jones & Long (2015) do make an interesting adjustment to this statement. They add that it is possible that an individual has two conflicting interests: a stronger one that only that one individual has and a weaker one that is shared by other individuals as well. If the total sum of interests would lead to policy making, then it is possible that this weaker interest contributes to a policy that goes against the greater interest of this particular person. In that case the interests of a person are used against (the greater interests of) this person. [↑](#footnote-ref-23)
24. For more on this topic, I recommend On Toleration by Walzer (1997). [↑](#footnote-ref-24)
25. Rawls did not discuss the membership of nations, but the membership of peoples. I however do not see any significant difference between the peoples as Rawls describe them and nations as Miller describe them for the purpose of examining why they would be a ground for special rights and duties, that could possibly receive priority over a global framework of justice (overlapping consensus). I focus on nations for I find this a linguistically less ambiguous term. [↑](#footnote-ref-25)
26. Scheffler made this point in more general terms in 1988. Scheffler writes it is a fundamental problem of moral philosophy that moral reasoning is universal and generalizable, while there is the commonsense view that individuals form special relationships and personal ties and that these ties can generate certain special duties among those so related. [↑](#footnote-ref-26)
27. Miller adds that the support has to be genuine instead of overly propagated or forced. [↑](#footnote-ref-27)
28. This is likely to be a subtle critique of *Frontiers of Justice* (2006) in which Nussbaum defends a minimum level of capabilities for all individuals. This minimum is according to quite some authors far too extensive to be really shared by all (Robeyns, 2016). [↑](#footnote-ref-28)
29. This example has been put forward by Nussbaum in order to defend extreme cosmopolitanism (1996). The distinction between extreme cosmopolitanism and moderate cosmopolitanism, I borrowed from Scheffler (1999). [↑](#footnote-ref-29)
30. I ignore for a moment the fact that a certain minimum of welfare might be necessary to uphold global human rights. [↑](#footnote-ref-30)
31. It is not clear whether Nussbaum actually support the idea of a global original position. [↑](#footnote-ref-31)
32. Scanlon never used these terms, nor the goal of reaching an overlapping consensus. Barry also did not use the term overlapping consensus as something desirable, but the overlapping consensus is, as argued in §3.an impartial way that allows first-order partialities under impartially determined circumstances. Therefore Barry’s attempt to provide a theory of impartial justice can be related to the concept of the overlapping consensus. [↑](#footnote-ref-32)
33. According to the archivists of Barry’s work there is no Volume 3 of *A Treatise of Justice*, but there is a lot of writing that was likely to go into such a volume. None of this material has been published yet. [↑](#footnote-ref-33)
34. I borrow the term metric from Robeyns (2013: 457), who borrowed it in turn from Arneson (2010: 81)). The metric refers to which units one uses to measure whether justice is present. For instance, one can look at the division of primary goods (manna), capabilities (ability to migrate). Primary goods and capabilities are examples of metrics. [↑](#footnote-ref-34)
35. I will treat the question shortly whether we are to grant equal moral concern to all. [↑](#footnote-ref-35)
36. As mentioned earlier, the question on whether Miller supports human rights or not is not entirely clear. I only use this as an example of what the term domain encompasses. [↑](#footnote-ref-36)
37. In a book chapter by Arneson (2002) difficulties with arguing for equality in moral concern are further examined. One of the reasons Arneson mentions for this difficulty, is that we often draw the line at being human, but each distinct feature that we ascribe to humans for the reason of moral concern, can be countered by particular individuals that do not have that particular feature up to a level exceeding non-human species. For instance, agency or mental capabilities are often written features that distinguish humans from non-human species, but not all human beings have mental capabilities distinguishable from the mental capabilities of animals, nor do humans have them in equal amounts. So, borrowing Arneson’s example, how can one argue against treating Einstein with more moral concern than a less intelligible person? [↑](#footnote-ref-37)
38. I realize that Tan (2004) and Arneson (2015) argue in favor of the possibility of a global government of some form, if that would be the best way to fulfil our second-order impartial duties. However, stating that determining right and duties comes prior to determining who is to enforce these rights and duties and stating we are to fulfil our duties in the ways necessary, even if that would be a world state, is not the same as arguing in favor of a world state. [↑](#footnote-ref-38)
39. I do not go deeper into the matter of rights of non-human species for practical reasons, but I think it is one of the first matters that should be discussed in future research (see also Chapter 5). [↑](#footnote-ref-39)
40. Brock (2005a: 342) supports both statements by referring to an empirical research of Frohlich and Oppenheimer. [↑](#footnote-ref-40)
41. Remarkably Brock states that the representatives will actually be part of the current world by arguing the population sizes are hidden to prevent the representatives will gamble over becoming part of a certain society (2005a: 337). This is an aesthetic point, since, as is the case with the original position as described in *Political Liberalism*, the veil of ignorance ensures that the outcome of one person is the same as the outcome of a discussion between ten persons – so why wouldn’t that one person be the reader? [↑](#footnote-ref-41)
42. For a more thorough description of this debate, I recommend Ashford & Mulgan, 2012). [↑](#footnote-ref-42)
43. Reasonable means that individuals have the desire to offer fair principles of cooperation to the other members of the cooperation. These principles are founded on reasons that all could reasonably endorse (public reason). [↑](#footnote-ref-43)
44. I assume that there will not be an abundance of goods in a way that makes principles of justice superfluous. [↑](#footnote-ref-44)
45. This may sound harsh, but if the definition of justice relates to public reason and the idea that justice is restricted to principles that are reasonably endorsable, or not reasonably rejectable, by all reasonable conceptions of the good, then those that do not want to restrict them in this way are to be called unwilling to act justly. [↑](#footnote-ref-45)
46. There are a few preliminary, published researches on the circumstances of justice, for instance by Vanderschraaf (2006). [↑](#footnote-ref-46)