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# Reasonableness and Law



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course be *incorrect*. We must check it against the fixed points of our considered judgments at different levels of generality. We also must examine how well these principles can be applied to democratic institutions and what their results would be, and hence ascertain how well they fit in practice with our considered judgments on due reflection: that is, we may be led to revise our judgments” (Rawls 1995, 139; italics added).

Where does this new awareness come from? We have to simplify matters to a good extent here, but it can be said to have its root in two sources. The first one has to do with the constructivist procedure of the original position: for Rawls, “at the first stage, justice as fairness abstracts from the knowledge of citizens’ determinate conceptions of the good and proceeds from shared political conceptions of society and person that are required in applying the ideals and principles of practical reason” (Rawls 1993, 141–42). This reference to practical reason brings out an important aspect of the construction, which is to say that the original position is built proceeding from a self-representation rooted in our moral experience, and this means that the position itself and the principles issuing from it must be such that they “find support in our common experience” (Bagnoli 2007, 266). As Habermas (1999a, 61) has observed, this should prompt us to inquire whether “the central concept of the person on which the theory ultimately rests” is “sufficiently neutral to be acceptable from the interpretive perspectives of different worldviews.” The second reason why Rawls now views it as only a conjecture that the principles selected in the original position are the most reasonable choice has to do instead with what Rawls calls the “burdens of judgment,” which he brings into play to explain the fact of reasonable pluralism. The burdens of judgment, in other words, are “sources of reasonable disagreement,” accounting for “the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgment in the ordinary course of political life” (Rawls 1993, 55–56)—and a willingness to appreciate the difficulties involved in the public use of reason, and to accept the consequences this entails for such a use of reason, therefore accounts in part for what it means to be reasonable according to a political conception of justice. Indeed, these difficulties affect not only the use of “theoretical” reason but also, and more importantly, the use of practical reason: they affect us in our practical and moral capacities as rational and reasonable agents. As examples of such burdens, Rawls mentions the difficulties involved in arriving at “an overall assessment” of an issue because “there are normative considerations of different force on both sides” of the issue, or because we are “forced to select among cherished values,” or again because we have to figure out priorities and make adjustments among different values, restricting each based on what the others require (*ibid.*, 57).

Both of these considerations tie in with the fact of a pluralist society: the plural comprehensive conceptions in it are sources of reasonable disagreement (whence the need to keep them out of the original position) and so are the burdens of judgment (recognizing which is part of what makes us reasonable). This brings up the problem of how—given such a society, one whose pluralism is very real and concrete—we might come to accept the outcome of a construction framed, by contrast, on the basis of an abstraction, an ideal rendering of our common experience

as autonomous moral agents. Rawls argues that the way to go about securing such an acceptance is to look for a common ground, a core set of ideas that everyone may come to accept regardless of whatever other values they may cherish and whatever deep conceptions of the good they may be committed to. This can be achieved by distinguishing the political from the metaphysical: the metaphysical pertains to the conceptions of the good that citizens espouse in a pluralist society, and it includes an account of truth in moral judgment; the political, by contrast, marks out a sphere in which such conceptions are neither challenged nor upheld, and in which no attempt is made to formulate true moral judgments. This narrower sphere delimits the problem of justice, considering which we instead concern ourselves exclusively with the institutional framework of society understood as a basis of coexistence: the principles worked out within this sphere are moral principles only insofar as they address the problem of what a fair society should look like, which means that they do not cover the whole of morality, for otherwise they would have to pick up content that would turn them into comprehensive conceptions of the highest good. The strategy, therefore, is to confine justice within the bounds of the political, and this envelopment (by separation from the metaphysical) makes possible what Rawls calls an “overlapping consensus”: the political conception can then function as a “module” that can fit into the different metaphysical conceptions of the good, thus enabling people holding these conceptions to endorse principles framed for a fair and well-ordered society. In short, we have here a strategy that consists delimiting the domain of the political in such a way that it does not spill over into the metaphysical, where a variety of conceptions exist that cannot be made to cohere. This way, by building on a common fund of ideas not rooted in any of the deep conceptions of the good, principles can be worked out that may become a focus of agreement on the part of all these conceptions, precisely because such an endorsement does not require accepting deep propositions about moral truth (such as only some, though certainly not all, conceptions of the good could possibly subscribe to).

The method involved in working out such principles based on our common moral and political experience is that of reflective equilibrium, which in this process plays a twofold role: on the one hand, it serves to build moral content into the original position and, on the other hand, it serves to evaluate the principles deriving from that construction. In this second role, the method can be used to settle the question of whether the principles of justice are acceptable and can become the focus of an overlapping consensus.<sup>8</sup> Equilibrium is achieved once the intuitions used in constructing the original position “can no longer” be rejected “with good reasons” by the members of a given society. In this process, “the concept of justice *worked out* on this basis must nonetheless be examined once again as to whether it can expect to meet with acceptance in a pluralistic society” (Habermas 1999a, 60–61). It is a process that unfolds as “the veil of ignorance is gradually raised during the

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<sup>8</sup> Habermas (1999a, 59–61) accordingly argues in this regard that two different criteria guide the process toward a reflective equilibrium; that is, there is involved not only a test of “consistency” but also one of “acceptability.”

successive steps of framing the constitution, of legislation, and of applying law” (ibid., 58). In the course of all this activity, we witness a progressive justification and validation of the principles of justice that ultimately leads to an overlapping consensus, at which point we will have a shared political conception backed by a full justification. Rawls envisions three stages toward reflective equilibrium, and hence three stages toward an overlapping consensus: at the first stage (pro tanto justification), the political conception is assessed on its own merits without taking into account the fuller conceptions of the good through which it may be filtered, the idea being to see whether a freestanding political conception is really “complete” enough to stand on its own;<sup>9</sup> at the second stage, the focus shifts instead to the citizens, who will each fit a number of alternative conceptions of justice into their “own comprehensive doctrine” of the good, this to see which of those political conceptions makes the best fit within the enclosing worldview, and so which of them receives the strongest justification<sup>10</sup>; there is finally the stage that Rawls calls a “wide” reflective equilibrium, where we all take up the other’s point of view, and together we all try to hammer out a conception of justice that everyone can fit into their own comprehensive doctrine, the idea being, in this case, to see whether that single conception can receive public and mutual support. It is at this third, public stage that we get an overlapping consensus (Rawls 1995, 143–44).

But this procedure can not be carried through unless its different participants, and the conceptions of the good they carry along with them, are reasonable—which means that these people are committed to the single conception of justice they worked out together, and will therefore consider it as having an overriding force should it come into conflict with their individual conceptions of the good.<sup>11</sup> At this point we have a functional overlapping consensus, which unfolds in the open space of public reason. This is a forum framed by an agreement on basic principles and guidelines on which basis we proceed to thrash out “questions of fundamental political justice.” These divide into “constitutional essentials” and “matters of basic justice,” the former concerning the question of “what political rights and liberties [. . .] may reasonably be included in a written constitution,” and the latter concerning “the basic structure of society, and so [. . .] questions of basic economic and social

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<sup>9</sup> For Rawls (1995, 142–43), a “political conception [. . .] is complete” when “the political values specified by it can be suitably ordered, or balanced, so that those values alone give a reasonable answer by public reason to all, or nearly all, questions concerning constitutional essentials and basic justice.”

<sup>10</sup> Habermas (1999b, 89–90) considers this second passage as “similar to the Golden Rule: it filters out anything that does not appear *from my viewpoint* to qualify for equal acceptance by all reasonable persons. Precisely those principles [. . .] which [. . .] are in the equal interest of everybody given *my understanding of the political sphere*.”

<sup>11</sup> As Habermas (1999b, 91) observes, the types of conflicts (or disagreement) that may emerge are actually three: “those concerning (a) the definition of the domain of the political matters, (b) the ranking and reasonable balancing of political values, and finally and most importantly (c) the priority of political over nonpolitical values”.

justice and other things not covered by a constitution.”<sup>12</sup> Public reason might be described in this sense as the reasonable *in action*, as it were, since it embodies “the underlying ideas of citizens as free and equal persons and of society as a fair system of cooperation over time,” and it comes alive when people so conceived undertake to figure out how “these ideas can be interpreted” and “how to [. . .] order, or balance, political principles and values.” The reason for such balancing is that the open space of public reason is framed by “a family of political conceptions of justice, and not by a single one,” that is, “a family of reasonable political conceptions” (Rawls 1999b, 581–82).

Now, what are the features of the reasonable that account for public reason and make it possible? There are three features in particular, which can be described as attributes of citizens, of conceptions of the good, and of political conceptions respectively. Let us consider each of these three cases in turn. Where citizens are concerned, “reasonableness consists in the willingness to propose and honour fair terms of cooperation, to treat others as free and equal citizens capable of and interested in exercising the moral powers, and to recognize the burdens of judgment.”<sup>13</sup> We can appreciate from this description that reasonableness is a threefold “virtue or disposition” of citizens, and it can be amplified as follows. (a) “The first feature of this disposition is the willingness to propose and honour fair terms of cooperation”: this means that “a reasonable citizen is willing to propose terms that she believes others could accept, and to abide by those terms, provided that others are willing to do so as well.” For this reason “fair terms of cooperation minimally involve relations between citizens that are more than mutual advantage but less than altruistic promotion of the general good.” As has been pointed out, these fair terms of cooperation “correspond to an idea of reciprocity: all persons involved are ‘to benefit in an appropriate way as assessed by suitable benchmark of comparison.’”<sup>14</sup> (b) Second, “reasonable citizens propose principles, laws and institutions that are consistent with a consideration of others as free and equal [. . .] on the basis of their having the capacity for the two moral powers, at least to a minimal degree.” (c) And third, there is a “willingness to recognize and accept the consequences of what Rawls calls the burdens of judgment.” In sum, “the terms of social cooperation must be fair as judged by a suitable benchmark of comparison,” in keeping with the basic idea that “citizens must be treated as free and equal” (Boettcher 2004, 604–07).

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<sup>12</sup> For Rawls (1999b, 575), questions of basic justice refer “only to discussions of those questions in [. . .] the public political forum.”

<sup>13</sup> That is how Boettcher (2004, 606) paraphrases this statement by Rawls (1995, 134): “When attributed to persons, the two basic elements of the reasonable are, first, a willingness to propose fair terms of social cooperation that others as free and equal may endorse, and to act on these terms, provided others do, even contrary to one’s own interest; and, second, a recognition of the burdens of judgment and accepting their consequences for one’s attitude (including toleration) toward other comprehensive doctrines.”

<sup>14</sup> Boettcher (2004, 604): “This benchmark must based on a moral standard [. . .] which treats persons with equal concern and respect.”

The same three criteria apply as well to comprehensive doctrines and to political conceptions. Where comprehensive doctrines are concerned, this means that they must include a “principle of toleration”: “Reasonable doctrines are comprised of beliefs not inconsistent with the ongoing willingness to accept a fair distribution of social benefits and burdens, to regard others as free and equal, and to recognize the burdens of judgment” (ibid., 607–08).

Finally, we have what Rawls calls a “family of reasonable political conceptions.” A conception in this family “must satisfy three criteria. It must (1) include a list of basic rights, liberties, and opportunities, (2) prioritize these rights, liberties, and opportunities over concerns for the general good and perfectionist values, and (3) provide ‘measures ensuring for all citizens adequate all-purpose means to make effective use of their freedom’.” Rawls specifies here a “criterion of reciprocity as the ‘limiting feature’ of this family, suggesting that reasonable political conceptions justify constitutions that meet this criterion.” This means that “the balance of political values that our nonpolitical beliefs support must not only be reasonable. This balance must also be ‘one that can be seen to be reasonable by other citizens’” (ibid., 609–11).

### **3 The Judgment of Reasonableness According to Rawls: Aims and Criteria**

#### ***3.1 Reasonableness as Reciprocity and as Proportionality***

The idea of reasonableness in Rawls lies in the domain of practical reason and is aimed at outlining a “perspective from which moral norms and principles can be judged in an impartial manner.” The way to go about making this judgment of impartiality about norms and principles is to proceed under conditions imposing “suitable constraints on the rational choice of participants” (Habermas 1999b, 81). As the idea of a contract under specially framed constraints makes clear, this is part of Rawls’s intersubjective reading of Kantian autonomy, and we have in the agreement (in the parties’ consent) a procedural criterion for deciding when a norm or principle is impartial; in other words, we can tell that an outcome (a principle) is impartial if it is agreed to under procedural conditions preventing the parties from making partial judgments. And the tool for modelling such procedural conditions is the idea of the reasonable: this is the idea in light of which to understand what conditions can guarantee an impartial outcome. We do this by setting up the procedure as a limitation on the parties’ rational autonomy: it is through this limitation that we can model the reasonable; the reasonable, in other words, is seen in this procedural framework as a guideline narrowing down our range of possibilities whenever we find ourselves moving about in a social or public context. By establishing such a procedural guideline, we give the reasonable a unitary structure consisting in its unique function, which is to make possible a consensus constructed as the outcome of an impartial procedure.

That, in summary, is the account of the reasonable put forward by Rawls in *A Theory of Justice* and in *Kantian Constructivism in Moral Theory*. The difference in comparison to *Political Liberalism* lies in the different method of construction (with its accompanying conception) and in the greater extension of the reasonable. In the first account, the reasonable is constructed through a reflective equilibrium whose main ingredient is a conception of the person understood as an autonomous moral agent<sup>15</sup>: the aim, therefore, is to set out a foundation for morality; in the second account, by contrast, the discussion is all about exploring the possibility of social cooperation, which is envisioned as happening by way of a political agreement, and the focus accordingly shifts to the use of public reason, which now serves as a basic vehicle toward that possibility. In the former case, we are looking to frame an impartial procedure, and we do that by bringing into the procedure what we understand to be the essential capacities and interests of moral persons; in the latter case, where our main interest is instead the possibility of social cooperation, we consider what the least demanding requisites are for such cooperation to succeed, and we condense them in the idea of public reason: at the core of this idea we find a conception of reasonableness, which serves as the basic tool of social cooperation, enabling such cooperation by way of what Rawls calls the idea of reciprocity. Reasonableness-as-reciprocity thus becomes the minimum requisite for enabling cooperation in pluralistic societies. In this role, reasonableness (nested into which is an idea of reciprocity) ceases to act as a moral foundation of justice and serves instead as the basic criterion of public reason, a criterion understood both as a tool of social cooperation and as a political value having its own inherent worth.

This change is clear when Rawls (1999b, 614) compares his two formulations of public reason: “In the first, public reason is given by a comprehensive liberal doctrine, while in the second, public reason is a *way of reasoning* about political values shared by free and equal citizens.” Hence public reason, formerly a component in a moral doctrine, now takes on the guise of a constraining argumentation and decision-making scheme whose basic criterion is a conception of reasonableness as reciprocity, which means that reasonableness now serves as a limitation on argumentation, limiting in light of the idea of reciprocity the range of substantive views that can be brought to the table in the process of argumentation. Let us break this down as follows: we have the idea of reciprocity understood as the minimum *enabling* condition of social cooperation; and around this idea we build a conception of reasonableness, serving in its own turn as a *limiting* condition selecting the kinds of arguments (the conceptions of the good and of justice) that individuals can conceivably offer for consideration in the attempt to reach a consensus, one which

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<sup>15</sup> As Rawls (1999c, 42–45) himself emphasizes, a theory of justice is built by drawing on the main moral conceptions available: these provide the raw material that we bring in at the top end of a reflective equilibrium. Which also suggests that equilibrium, as a rational device by which to align “principles and judgments” on due reflection, also acts to filter out those basic moral conceptions in history that prove inadequate with respect to the aims of justice, thus serving in this dual role: not only as a constraint on rationality, but also as a condenser of such moral conceptions as are available to us from history.

is qualified (or constrained at source) and which for this reason can back with the force of legitimacy the decisions that will be made (*ibid.*, 578).

This whole scheme can be considered through the lens of argumentation, and reasonableness can be understood from this perspective as a criterion of proportionality by which to gauge the values brought into the discussion. This argumentative perspective is lined out in *The Idea of Public Reason Revisited* (Rawls 1999b). Here public reason is presented as an argumentative practice framed around the nested idea of reciprocity, which serves as a criterion by which to assess comprehensive doctrines and political conceptions (to see if they pass the test of reasonableness) as well as to assess the kinds of arguments that can be used in argumentation, as well as the solutions worked out through those arguments. As Rawls (*ibid.*, 574–75, 581) puts it, “when fundamental political questions are at stake [...] the family of reasonable conceptions of political justice” must “satisfy the criterion of reciprocity,” which thereby serves as “the limiting feature of these forms.”<sup>16</sup> Again: “When political liberalism speaks of a reasonable overlapping consensus of comprehensive doctrines, it means that all of these doctrines, both religious and nonreligious, support a political conception of justice underwriting a constitutional democratic society whose principles, ideals, and standards satisfy the criterion of reciprocity.”<sup>17</sup> As we discussed earlier, this criterion can also be formulated as a requirement to pretend from “others what I would regard as acceptable behaviour according to my *moral convictions* if I were in their situation” (Alexy 1989, 75): we are being asked, in other words, to evaluate a situation by “changing roles” with our partner in discussion and to accept the consequences that a decision from that role would entail.<sup>18</sup> Rawls supports the argumentative idea of reciprocity by pointing out that it helps us clarify the political idea of equal citizenship, this being the idea that citizens are equal insofar as they can exercise their two moral powers to a minimum degree. It all fits together: reciprocity strongly suggests “a consideration of others as free and equal,” thereby suggesting that “*citizens* must be treated as free [and] equal” (Boettcher 2004, 604, 607), which is the basic understanding of citizenship on which fair cooperation is founded.

Let us consider now how the idea of reciprocity ties in with that of reasonableness as proportionality. Here, too, the point is to see what claims and arguments can reasonably be put forward in the course of argumentation and decision-making, especially in regard to “constitutional essentials and matters of basic justice.” The forum in which this activity unfolds is that of public reason, which serves to evaluate “what kinds of reasons [citizens] may reasonably give one another when fundamental political questions are at stake” (Rawls 1999b, 577, 574). We work, therefore, from the basic assumption that “public justification is not simply valid reasoning,

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<sup>16</sup> As was just mentioned, the idea of reasonableness applies across the board, describing not only political conceptions but also conceptions of the good. Rawls (1999b, 592), speaks of “reasonable comprehensive doctrines that support society’s reasonable political conceptions.”

<sup>17</sup> Conversely, comprehensive doctrines are *not* reasonable if “their principles and ideals do not satisfy the criterion of reciprocity” (Rawls 1999b, 608–09).

<sup>18</sup> See, in this regard, Alexy (1989, 69–79) with reference to Hare’s principle of prescriptivity.



but argument addressed to others: it proceeds correctly from premises we accept and think others could reasonably accept to conclusions we think they could also reasonably accept” (ibid., 594). And that really clinches the point about the kinds of arguments that can be introduced under “the criterion of reciprocity”: we can only introduce arguments and reasons that “citizens must *reasonably* think that others might *reasonably* accept” (Boettcher 2004, 612). This applies as well to the interpretation of political values such as “liberty, equality, and opportunity”: we are called on to balance these values against one another and work out their meaning, and the appropriate place for this is the public forum, where we “seek claims and arguments that are both reasonable and capable of being widely appreciated as reasonable” (ibid., 612). This can be achieved only on the condition that we “combine valid reasoning [...] and the most accurate survey of the facts and circumstances relevant to the case at hand” (ibid., 614). But there is also a discursive and relational element involved, whereby “a citizen provides what, from her own perspective, is the *most* reasonable claim or argument and what, from the perspective of an addressee, may be considered *at least* reasonable” (ibid., 615). In other words, we are involved here in the activity of assessing political conceptions by balancing the political values they take as their basic constituents (for Rawls, 1993, 241, a conception of justice entails “some combination and balance of political values”), and it is the criterion of reciprocity that we rely on to work out this balance in the public forum, where we engage one another in proposing fair terms of cooperation: “The criterion of reciprocity requires that when those terms are proposed as the *most* reasonable terms of fair cooperation, those proposing them must also think it *at least* reasonable for others to accept them, as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position” (Rawls 1999b, 578, italics added). For Rawls, when we are faced with “different combinations of values, or the same values weighed differently” and “disagreement occurs in balancing values”, “what public reason asks is that citizens be able to explain their vote to one another in terms of a reasonable balance of political values”: Indeed, “the balance of political values a citizen holds must be reasonable, and one that can be seen to be reasonable by other citizens.”<sup>19</sup> As Rawls observes with respect to the issue of abortion and the doctrines that can be brought to bear in such a discussion: “the only comprehensive doctrines that run afoul of public reason are those that cannot support a reasonable balance of political values” (Rawls 1993, 240–43). So, then, claims and arguments can be judged reasonable in this sense only on the condition that they appropriately balance goods and values: we are working out together a way to place goods and values on a scale that ranks them from *most* to *least* reasonable, which involves an effort to achieve a kind of proportionality between such goods and values, a proportionality sought by working from the perspective of what can be presented as reasonable to others, and in doing so we are guided by the idea of

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<sup>19</sup> Rawls (1993, 244) notes that, “we want a political conception of justice to be complete: its political values should admit of a balance giving a reasonable answer for all or nearly all fundamental questions.”

reciprocity among equals. Here too, then, reciprocity figures centrally, for it serves as the theoretical foundation on which to balance goods and values and make them proportional to one another.

## 3.2 *Reasonableness and the Basic Liberties*

### 3.2.1 **The Priority and Foundation of the Basic Liberties**

The idea of the reasonable becomes all-important in *Political Liberalism*, in which Rawls undertakes to shift onto a *political* basis the theory he had earlier developed disregarding the distinction between the domain of the political and the wider domain of morality at large. In consequence of this distinction, the idea of the reasonable comes to play a bigger and more central role, not only in providing a foundation for the basic liberties but also in showing how they apply. Let us turn first, in this section, to the question of their foundation.

In the initial account offered in *A Theory of Justice*, the basic liberties were set on a foundation that fell short in one important respect as discussed by H. L. A. Hart (1973, 534–35). That is to say, the theory failed to convincingly explain why the parties to the agreement (the parties in the original position) should choose the basic liberties as primary goods and should agree to make these liberties prior to all other goods.

To fill this gap, Rawls proceeded in the first place by rephrasing his first principle of justice, describing the whole system of the basic liberties no longer as “the most extensive total system,” but as “a fully adequate scheme” (Rawls 1993, 291).

Two closely bound-up ideas can be found at the core of such a revision: the first of these is the idea of a list of basic liberties understood as having priority over all other sorts of goods, and the second idea is that the liberties in this list are tied by a relation of mutual adjustment, making it possible to work out between them an equilibrium and to fit them into a “fully adequate scheme,” as the revised formulation reads.

The full list comprises “freedom of thought and liberty of conscience, the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law” (ibid., 290). These liberties are now understood as forming a “family,” and it is this family which is now given priority, rather than liberty as such or any single liberty in the list.

The foundation on which Rawls rests this priority is a liberal conception of the person: “The basic liberties and the grounds for their priority can be founded on the conception of citizens as free and equal persons in conjunction with an improved account of primary goods” (Rawls 1982, 4).

Rawls uses this conception to establish a connection between the basic liberties (with their priority as a family) and the fair terms of cooperation among equals. In other words, the basic liberties are made to fit into the conception setting out fair terms of cooperation among equal persons, and the problem of justifying the priority of the basic liberties can therefore be recast as the problem of setting out

the reasonable conditions making it possible for such equals (the citizens in a liberal society) to agree on the terms of their cooperation in society.

The greater weight of this justification falls on the liberal conception of the person, which proves essential in two important respects: in framing the conditions subject to which the parties in the original position are to reach an agreement (understood as offering a *provisional* justification), as well as in showing the possibility of an overlapping consensus (understood as offering a *final* justification).

The liberal conception of the person in the original position describes not the parties but the people they represent, namely, the free and equal citizens of a well-ordered society. This conception of the person enters the original position through the constraints modelling the reasonable. Indeed, these constraints are designed to ensure impartial deliberation among rational parties, so they express a conception of persons as both rational and reasonable, that is, as persons exercising their full moral powers: their rational autonomy in deliberation and their full autonomy as representatives of citizens in a liberal society.

The parties decide on principles of justice and choose primary goods on the basis of what the people they represent would want as free and equal citizens: the goods someone will want depend on the kind of person he or she is. For a person conceived as Rawls does, the primary goods are not “all-purpose means” but the basic liberties, which enable people to exercise their two moral powers as free and equal citizens.

It is, therefore, this conception of the person, along with its companion conception of society, which explains the basic liberties—freedom of speech, thought, association, and so on—and which accounts for their absolute priority over all other primary goods. It is the liberal conception of the person, and of a person’s rational interests, which explains why someone should not want to trade off the basic liberties with other kinds of primary goods. This answers Hart’s objection: the reason why no tradeoffs are possible is that a *citizen* in a well-ordered liberal society has a higher-order interest in exercising his or her two moral powers (which is what the basic liberties and their priority are for).

There is, too, the question of stability. The basic liberties and their priority become stable once the conception of the person on which they are founded—a conception now understood as a normative and political ideal—becomes the focus of an overlapping consensus. An overlapping consensus should not be mistaken for a mere compromise among rational people seeking to maximize their personal utility; it is rather something that citizens achieve if they can reach an agreement on basic matters of justice despite the different conceptions of the good that shape the other areas of their lives. It is therefore an agreement among people in a liberal society, and in the result it will make stable the choice made in the original position with respect to the primary goods, understood as goods necessary for the citizens’ exercise of their two moral powers: “Citizens are thought to have and want to exercise these (moral) powers whatever their more comprehensive religious, philosophical, or moral doctrine” (Rawls 1999a, 517). We thus have different conceptions of the good held by people who, as citizens, regard one another as free and equal, and who—despite their diversity—are willing to come together and see if they can agree on the terms of their future cooperation. They are willing to do so precisely because

they are acting on a conception of themselves as liberal citizens bound by a sense of mutual respect, and the consensus they will attempt to reach will cover the basic liberties: these are viewed as indispensable to citizens exercising their capacity for a sense of justice and their capacity for a conception of the good under reasonable conditions of fair social cooperation, and the priority of the basic liberties (a priority understood as an enabling condition) therefore makes full sense and gets its final justification in light of the need to bring stability to a social arrangement so construed. This sets the basic liberties and their priority on a twofold foundation: on the one hand, we have here a way to enable people to realize their two moral powers as free and equal, rational and reasonable, members of a liberal society conceived as a fair scheme of cooperation among citizens who respect one another; on the other hand, by making this scheme with its embedded priorities the subject of an agreement, the citizens bring stability to their cooperation. In short, the primacy of the basic liberties has a dual foundation in a conception of the person as a reasonable member of a liberal society and in a need to make this a stable and feasible scheme of cooperation.

### 3.2.2 The Status and Application of the Basic Liberties

In the “political” account of justice as fairness, Rawls justifies the priority of the basic liberties by drawing on the two companion ideas of the person as “liberal” citizen and of social cooperation as based on a reasonable agreement.

In *Political Liberalism*, Rawls (1993, 294–99) ascribes a special status to the basic liberties and points out three features of their priority: first, they take priority as a family of liberties, and as such they carry absolute weight over the public good and over perfectionist values; second, none of these liberties can be limited except for the sake of other basic liberties; which brings in the third feature, namely, none of the basic liberties can be said to carry absolute weight with respect to any of the others, in the sense that if they should come into conflict, we should adjust them to one another until we achieve a coherent, adequate, scheme secured as such (as a scheme) for all citizens equally.

This last point is further clarified through the distinction between restricting the basic liberties and regulating them: only their restriction is ruled out; their regulation, by contrast, is permitted and indeed may even prove necessary in order to combine them into a coherent scheme or to make them practicable (as when a format is established for a public debate). The only sort of regulation that is disallowed is the kind that would undermine what Rawls refers to as the “central range of application” (*ibid.*, 297), understood as that core part of their application which enables citizens to adequately develop and fully exercise the two moral powers.

The basic liberties, then, get adjusted to one another until they form into a fully adequate scheme. And they get specified by degrees at different stages: in the original position at first, and then at the constitutional, legislative, and judicial stages. Yet this process of specification is not left to happenstance: it must instead be guided by clarifying, in the original position, the basic liberties special role and central range of application (*ibid.*, 334–40).