Does Global Spread of Liberal Democracies Promote Consensus on Justice?

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Abstract

Persons and nations agree on the importance of justice but disagree on its requirements. In *The End of History and the Last Man* Francis Fukuyama argues that human history moves towards liberal democracy as the final ideal for all societies. It is conceivable that liberal democratic societies will converge to similar conceptions of justice and that global spread of liberal democracies will promote consensus. This paper tries to show that consensus on justice is, nevertheless, unlikely, due to reasonable disagreement. Reason does not give a single rational or reasonable solution to conflicting demands of justice. This means that apart from reason, other factors play a role in what is regarded as just. Jurisdiction is influenced by tradition and zeitgeist. This explains why also liberal democracies, which may recognize similar principles of justice, still arrive at differing rankings of these principles and divergent results of jurisdiction in time and place.

Keywords : consensus, global justice, John Rawls, liberal democracy, reasonable disagreement

Introduction

Persons and nations agree on the importance of justice but disagree on its requirements. The disagreements are reflected in interpersonally different conceptions of justice and differing legal rules in different societies. More than three centuries ago Michel de Montaigne and Blaise Pascal described the considerable contrasts in laws and rules of justice between different societies, cultures and times. Pascal:

> Three degrees of latitude reverse all jurisprudence; a meridian decides the truth. Fundamental laws change after a few years of possession; right has its epochs . . . A strange justice that is bounded by a river! Truth on this side of the Pyrenees, [is] error on the other side.' [2)]

If justice is concerned with protection of fundamental and universal human needs and values, then boundaries of nations seem morally irrelevant. The protean guises of justice described by Montaigne and Pascal can, at least partly, be explained by different forms of government and by a

variety of cultures and beliefs.

In *The End of History and the Last Man* Francis Fukuyama argues that human history moves towards liberal democracy as the final ideal for all societies. The ultimate political form of government would be a democracy founded on the principles of liberty and equality. Fukuyama's belief is supported by the steady increase of the number of liberal democracies in the world during the latest decennia.

It is conceivable that citizens of liberal democratic societies will arrive at similar conceptions of justice, and that global spread of liberal democracies will promote consensus on what social and global justice require. Most citizens of nations that share a liberal democratic government agree that liberal democracy is a fair form of government and that individual liberty and equality should play a major role in a just basic structure of society. Thus, between liberal democratic nations there is already more or less consensus on these aspects of basic justice. This may suggest that, within and between these societies, consensus is achievable on other matters of basic justice as well. However, in liberal democracies too, there are a variety of divergent views about the right rules of justice. This diversity is partly caused by the pluralistic character of liberal democratic societies, that is, by differences in comprehensive beliefs, [3] moral outlooks, personal interests and aims.

John Rawls thought that disagreements about justice can be avoided or transcended by an appeal to impartial reason, detached from specific interpersonally different interests, beliefs and conceptions of the good, and, instead, related to the general interest and to the basic structure of society, which enables all free and equal citizens to live according to their own plan of life. Rawls's confidence in the unifying power of impartial reason is based on the Kantian assumption that reason detached from merely personal interests and aims, will lead to 'eternal', universally applicable, and single right answers to moral conflicts. On the last page of *A Theory of Justice* Rawls summarizes his view on the unifying and universalizing power of reason as follows:

> Once we grasp this [rational] conception [of justice], we can at any time look at the social world from the required point of view. . . This standpoint is also *objective* . . . (I)t enables us to be *impartial*, even between persons who are not contemporaries but who belong to many generations. Thus to see our place in society from the perspective of this position is to see it *sub specie aeternitatis*: it is to regard the human situation not only from *all social* but also from *all temporal* points of view. . . . (In this way people) can, whatever their generation, bring together into one scheme all individual perspectives and arrive together at *regulative principles that can be affirmed by everyone*." [4]

Rawls suggests that the contingent differences in place and time between rules of justice will disappear – at least with respect to questions of basic justice – if free and equal citizens will make proper use of impartial reason. Indeed, it is conceivable that impartial reason leads to convergence of judgments. In Rawls's original position, behind the veil of ignorance, people are detached from

biased judgments because they are ignorant of their personal characteristics, aims, interests and circumstances. Rawls expects that this promotes impartial reasoning and consensus on basic principles of justice amongst reasonable people. An important condition is that people are free and equal and have the opportunity to deliberate freely and without coercion on the best arrangement of society. Also Jürgen Habermas believes that under conditions of what he calls 'uncoerced communicative action' people will arrive at rational consensus about moral principles. [5)]

Aim

We will investigate whether the global spread of liberal deliberative democracies in combination with the exercise of impartial reason has, at least in principle, the capacity to promote consensus on basic rules of social and global justice. I will question the unifying and universalizing power of reason and of unconstrained rational deliberation amongst free and equal people. Montaigne and Pascal, who lived before the Enlightenment, did not believe that human reason would lead to univocal and uniform justice. Montaigne, who is most famously known for his skeptical remark "Que sais-je?" "What do I know?," thought that we cannot trust our reasoning because thoughts just occur to us: we don't truly control them. Pascal too did not believe that reason could resolve the controversies about justice: "Nothing, according to reason alone, is just itself." Both thinkers were influenced by Herodotus who thought that 'custom is the king of all'. Pascal concludes:

> Custom creates the whole of equity, for the simple reason that it is accepted. It is the mystical foundation of its authority; whoever carries it back to first principles destroys it. [6)]

My conclusion will show some similarities, but also some differences. I will argue that neither within nor between liberal democracies rational deliberation and the exercise of impartial reason will lead to consensus on questions of justice. Like Herodotus, Montaigne and Pascal, I think that people will remain divided about several important questions of justice. Unlike these thinkers, I do not believe that continual disagreements and changes of justice in time and place are mainly due to insufficient human knowledge (Montaigne's 'Que sais-je?'), moral relativism (Herodotus' 'custom is the king of all' and Pascal's 'custom creates the whole of equity'), human volatility or other human shortcomings. Rather, I think that they are largely caused by the fact that justice is a multifaceted concept, the aspects of which can be ordered and integrated in many reasonable but different ways.

John Stuart Mill argued that '. . . justice is not some one rule, principle, or maxim, but many, which do not always coincide in their dictates'. Henry Sidgwick arrived at a similar conclusion: 'the different elements included in the notion of Justice . . . are continually liable to conflict with each other'. Also John Rawls speaks of 'conflicts of justice'. [7)] And James Griffin and Andrew Clapham recognize that human rights may conflict. [8)]

As we will discuss below, the multiple aspects and rules of justice often lack, due to their

incomplete comparability, comparative weights that are rationally determinable. That is why they must receive their weights from other sources than reason alone in order to resolve conflicts between competing demands and rival directives of justice. To some extent Herodotus, Montaigne and Pascal seem to be right that custom, tradition and background beliefs of the members of the relevant nation, rather than reason, generate the ultimate rules of justice. One of the differences with the past is that more or less homogeneous mono-cultural societies have changed into pluralistic and multicultural ones. The consequence is that background beliefs are not (completely) shared anymore. As source of weight assignment a *common* background culture has been replaced by a *dominating* background culture, shared by citizens belonging to the majority. The weights assigned to competing demands of justice by the majority determine what is regarded as just. Because majorities differ in time and place, justice will continue to differ and change within and between liberal democratic societies. At least, this is what this paper will try to show.

Overlapping consensus

A prevalent Western idea is the belief that growth of knowledge and the use of reason will finally resolve conflicts of values and lead to convergence of judgments and consensus. This might mean that rational and reasonable deliberation – detached from merely personal aims, interests and conceptions of the good – results in agreement on the requirements of justice. This agreement must be seen as a so-called 'overlapping consensus', which is not based on one specific metaphysical, moral or philosophical foundation, but can be supported by different reasonable comprehensive beliefs. Rawls's devices of the original position and the veil of ignorance and the use of public reason amongst free and equal citizens might lead to an overlapping consensus on the requirements of justice. If we assume that this can be achieved *within* a liberal democratic society, it is conceivable that consensus *between* liberal democratic societies will be achieved as well. Charles Taylor argues as follows with respect to the question 'what it would mean to come to a genuine, unforced international consensus' on justice and human rights:

> I suppose it would be something like what Rawls describes in his *Political Liberalism* as an "overlapping consensus." That is, different groups, countries, religious communities, and civilizations, although holding incompatible fundamental views on theology, metaphysics, and human nature, and so on, would come to an agreement on certain norms that ought to govern human behaviour. Each would have its own way of justifying this from out of its profound background conception. We would agree on the norms while disagreeing on why they were the right norms, and we would be content to live in this consensus, undisturbed by the differences of profound underlying belief.

I shall argue that an overlapping consensus on more than minimal justice [9)] is unlikely, even in

principle. Disagreements about the requirements of justice are not merely, probably even not mainly, caused by lack of knowledge, bias, imperfect human nature, non-compliance, insufficient sense of justice, or insufficient rationality or reasonableness. Instead, I think that the difficulty to achieve consensus on the requirements of justice is, to a large extent, caused by three characteristics of justice itself:

1. Justice is a multifaceted concept.
2. The multiple aspects of justice generate manifold directives, which may lead to conflicting demands.
3. The competing aspects and demands of justice are incompletely comparable so that their comparative weights are not always rationally determinable.

These characteristics easily lead to conflicts of justice itself, that is, clashes between rival demands of justice, which are not always rationally resolvable, even not in principle. Even removal of all human shortcomings such as insufficient knowledge, non-compliance, bias or insufficient rationality and reasonableness would not yield a single rational, reasonable and impartial solution to conflicts between competing demands of justice. If so, then the exercise of impartial reason will not lead to the same 'rankings of justice', and will, consequently, not yield consensus. In other words, the disagreements between people *on* justice reflect conflicts *of* justice themselves. Let us successively discuss the above three characteristics of justice to make this more clear.

Justice as a multifaceted concept

It is often believed that in the case of conflicting opinions at best only one of them can be true. This belief is especially prevalent amongst Western people. They usually think in terms of contrast: If view *A* conflicts with view *B*, at least one of these views must be wrong: either *A* is right and *B* is wrong, or *B* is right and *A* is wrong. Asian people, by contrast, often think in less contrasting terms: if *A* is right, this does not necessarily mean that *B* is wrong. Suppose two persons *P* and *Q* disagree about what, in a particular case, is required by justice. Person *P* thinks *A*, while person *Q* thinks *B*, is required. If both *A* and *B* are related to relevant aspects of justice, *P* and *Q* may both be right, although they have a conflict. A condition for this possibility is that justice is indeed a multifaceted concept and that the different aspects of justice, although they may clash, do not constitute a logical contradiction. Most contemporary theorists do recognize that justice is a multifaceted concept, the aspects of which are related to multiple values and interests, such as

- *liberty*: basic liberties (e.g. freedom of speech, freedom from discrimination, freedom of religion)
- *equality*: equal opportunities, equal basic liberties, distribution of advantage according to

equality (equal resources, or equal welfare, etcetera)

- *desert/merit*: distribution of advantage according to desert and merit
- *need*: distribution of advantage according to need
- *efficiency*: distribution of advantage according to efficiency
- *respect*: right to respect; social basis of self-respect
- *non-discrimination*: right to non-discrimination
- *privacy*: right to privacy
- *security*: right to security

We might call these aspects 'values of justice'. The plurality of these values creates two possible problems:

- *Incomplete compatibility*. The plural 'values of justice' cannot always be combined harmoniously. Although they do not constitute a logical contradiction, they may contingently conflict with each other or with other important interests.
- *Incomplete comparability*. The values of justice and the competing demands connected with them can not always be completely compared in the sense that reason cannot always answer the question which aspect of justice outweighs the other in cases of conflict.

Let us discuss each problem successively.

Incomplete compatibility

Plural 'values of justice' cannot always be combined harmoniously. They may mutually conflict, or clash with other important interests. For instance,

- free speech may clash with non-discrimination, social cohesion, security or privacy;
- distribution of welfare according to need may conflict with distribution according to desert or efficiency.

As Isaiah Berlin argues, 'not all good things are compatible, still less the ideals of mankind.'[10] Thomas Nagel believes that different views on the preferred organization of the society often represent competing values that cannot be reconciled, and that such values may not only be contingently but sometimes also inherently conflicting:

> . . . values in many cases clash with one another non-contingently, not just because of the limitations of resources, but because their realization are to some degree incompatible.[11]

John Rawls, referring to Isaiah Berlin, expresses a similar view:

[T]he full range of values is too extensive to fit in any one social world; . . . there is no social world without loss. . . The basic error is to think that because values are objective and hence truly values, they must be compatible. In the realm of values, as opposed to the world of fact, not all truths can fit into one social world.[12)]

The incomplete compatibility of values means that societies have to choose between different realizations of these values.

The same applies to 'values of justice'. The following table gives an example of two societies *A* and *B*, which assign different weights to different interests relevant for the distribution of welfare, assuming that these interests cannot all be realized optimally in one and the same society:

	Weights assigned to			
Society	*Maximization of welfare*	*Equality*	*Merit/Desert/ Liberty*	*Need/Concern for the worst-off*
A	**+ + +**	**+**	**+ + +**	**+**
B	**+**	**+ + +**	**+**	**+ + +**

Due to the well-known incentive mechanism the more libertarian society *A* produces more welfare at the cost of its equal distribution. And its emphasis on merit, desert and liberty in the distribution of welfare is at the expensive of concern for the worst-off and need. By contrast, the more egalitarian society *B* pursues a greater equality in the distribution of welfare at the cost of total welfare. And its emphasis on need and concern for the worst-off is at the expense of merit and desert. Neither society *A* nor society *B* succeeds in optimally realizing all relevant values simultaneously. The big question is how to determine which society is – all things considered – the best one. How to know, for instance, whether the more libertarian society *A*, which produces more welfare, is overall better than the more egalitarian society *B*, which is fairer? Similarly, how to determine whether it is just to restrict particular liberties, such as freedom of speech and press, in order to protect privacy, social cohesion and public security? In order to answer these questions we have to determine the *relative weights* of the values under consideration, for instance, the weight of welfare compared to the weight of fairness; the weight of free expression compared to that of privacy or non-discrimination; the weight of need compared to the weight of desert, etcetera. This constitutes the second problem, which we will now discuss.

Incomplete comparability

It is questionable whether assignment of determinate weights to the relevant values or aspects of

justice is possible. To put it differently: it is doubtful whether there is a right answer – or a single right answer – to the question *which* relative weights are to be assigned to the values under consideration. This doubt is caused by the incommensurability of the relevant values. Two values are incommensurable if they cannot be appropriately reduced to a single value, so that their amounts cannot be measured and compared on a common cardinal scale.[13)]

A consequence of incommensurability is that the relevant values cannot be weighed on a single scale. Reason *under-determines* the comparative weights to be assigned to incommensurable values. As Rawls summarizes the problem: 'There is no single standard that assigns them their weight.'[14)] If this is correct, then it is unlikely that the exercise of public reason lead to consensus on the right thing to do if demands of justice mutually conflict or if they conflict with other incommensurable interests. The exercise of public reason is compatible with widely different weights, and, therefore, widely different 'rankings of justice' to use Amartya Sen's phrase to indicate orderings of principles or values of justice.[15)]

Reasonable disagreement

The earlier Rawls of *A Theory of Justice* differs from the later Rawls of *Political Liberalism*. Rawls seems to have given up his belief that impartial reason leads to consensus on principles of justice and their ordering. He admits that several principles and several rankings of these principles may be "reasonable". Rawls recognizes that there are many political values, many reasonable selections and combinations of values, and many reasonable ways of weighing these values.[16)] He concludes: 'Public reason does not ask us to accept the very same principles of justice.'[17)] Reasonableness and rationality do not offer an agreed upon solution precisely because there are many reasonable and rational solutions. The relevant reasonable principles of justice may have divergent and conflicting contents and may therefore cause reasonable disagreement instead of consensus. In that case reasonable disagreement prevents not only consensus on a conception of the good but equally prevents consensus on principles of justice and their ordering. The fact that the disagreement on conceptions of justice is reasonable does not alter the fact that there is no consensus about the question which reasonable but conflicting principles of justice are to be chosen and how they should be ordered.

Given the adaptations Rawls has made in *Political Liberalism* one may wonder whether the core of his original theory has changed. Rawls's aim was to achieve consensus on complete principles of justice, as the following quotations show:

> [A] conception of right must impose an ordering on conflicting claims. This requirement springs directly from the role of its principles in adjusting competing demands. … It is clearly desirable that a conception of justice be complete, that is, able to order all the claims that can arise (or that are likely to in practice). And the ordering should in general be transitive: if, say,

> a first arrangement of the basic structure is ranked more just than a second, and the second more just than a third, then the first should be more just than the third.' [18)]
>
> Institutions are just when . . . the rules determine a proper balance between competing claims . . .[I]f men balance final principles differently, as presumably they often do, then their conceptions of justice are different. The assignment of weights is an essential part of a conception of justice. If we cannot explain how these weights are to be determined by reasonable ethical criteria, the means of rational discussion have come to an end. [19)]
>
> The principles must be specified so that they yield a determinate conclusion. [20)]

The later Rawls seems to have given up these aims and to have replaced them by the aim to achieve consensus on a *set* of *reasonable* systems rather than on one single right system. This change raises the following question. How do we choose a particular system of justice given the fact of reasonable disagreement? Rawls argues that a democratic decision has to resolve the controversy if reasonable reasons continue to clash.[21)] But this leads to a choice of a particular system or regulation not endorsed by all reasonable people for the very reason that there is often severe (although reasonable) disagreement about the right principles of justice and their ordering. In other words, the recognition that there is a set of reasonable systems and rankings instead of a single right one, makes it implausible that consensus will be attained on the specific system and ranking of principles. Democratic decisions cannot take away this predicament because they do not lead to stable and consistent principles of justice and do not turn reasonable disagreement into consensus. Majorities vary not only between, but change also within, liberal democracies. This makes justice dependent on time and place and on conceptions of the good adhered to by the majority of the relevant democratic society. Each society chooses the principles and rankings of justice that are in line with the tradition and background beliefs of the dominant culture.

To give an example with respect to basic liberties as 'values of justice', all liberal democracies will agree on the importance of these liberties, but they may clash. John Gray argues in his *Two Faces of Liberalism* with respect to the choice and ordering of basic liberties as follows:

> Only if basic . . . liberties cannot make incompatible demands can justice be insulated from conflicts of value. If basic liberties clash, there is no way of avoiding judgments of importance among the human interests they protect. Manifestly, such judgments will vary with different conceptions of the good. The argument of which among a set of rival liberties is to be protected, and in what degree, is then inescapably an argument about the good. At that point, conflicts of value re-emerge at the core of political philosophy, and the Rawlsian enterprise faces ruin. Once it is allowed that important liberties may be rivals, we are not far from accepting that their conflicts have no solutions which are acceptable to all reasonable persons. In that case, different mixes of liberties may be right in different societies. Even in a single society, people may reasonably differ as to how the claims of rival freedoms, or rival

> components of the same freedom, are best reconciled. . . . As a result, liberal regimes can no longer be marked off from all others by protecting any particular combination of liberties. All regimes embody particular settlements among rival liberties.[22)]

What applies to basic liberties, equally applies to other competing values of justice. This shows that, if justice is a multifaceted concept the aspects of which cannot always be optimally realized simultaneously, then each society will have to choose between different systems and rankings of justice.

Jurisdiction in different societies

The rational indeterminability of the right choice between different rankings of justice is reflected in empirical data regarding geographical and temporal differences in jurisdiction. Different democratic societies make divergent choices between 'rankings of justice'. Each nation or culture develops and emphasizes some aspects of justice and human existence. As discussed above, no culture or nation is capable of simultaneously realizing all aspects of justice and other human interests in an optimal way.

Somewhat oversimplified and generalized, eastern cultures stress the importance of values such as social harmony, respect for authority and tradition, and family relationships. Western cultures, by contrast, emphasize the importance of personal autonomy and individual liberal rights. The idea of an overlapping consensus may partly work in the sense that different principles of justice or human rights are recognized from different cultures and background beliefs and with different justifications. But the recognition of similar principles is not sufficient to achieve consensus about justice. Especially if different cultures, beliefs or moral outlooks have differing justifications for the agreed upon principles, these may prevent consensus on the *rankings* of these principles and on the question what is the right thing to do when the principles clash. Thus, an overlapping consensus on separate principles is not sufficient for consensus on what justice requires, because the agreed-upon principles can be weighted, ordered and integrated in different reasonable ways, resulting in different and sometimes opposing conclusions about what is the right thing to do in the name of justice. Charles Taylor:

> All this must lead to differences of practice, of the detailed schedule of rights, or at least of the priority ordering among them. In practice, these differences may not emerge in variant schedules of rights. They may be reflected in the way a given schedule is interpreted and applied in different societies. After all, entrenched charters have to be applied by courts, and the courts make their interpretations within the framework of the moral views prevalent in their society.[23)]

Note that Taylor recognizes that courts interpret the schedules according to the 'moral views prevalent in their society.' Because the prevalent views differ in different societies, consensus on the schedules of rights is not sufficient to lead to similar interpretations and outcomes. Therefore, Taylor emphasizes that the different nations or cultures must strive to go on towards 'a fusion of horizons.'[24] However, a fusion of horizons will not easily result in consensus, precisely because within one and the same horizon (within one and the same culture) the rankings of justice differ as well.

Examples

We will now discuss concrete examples of different liberal democratic societies making rankings with respect to human rights and distributive justice which differ in time and place.

Example 1: Nationalism and patriotism versus individual liberty and freedom of conscience More than half a century ago, in the USA state West Virginia, all schools were required to conduct courses of instruction in history and the Constitutions of the United States and to teach the ideals of Americanism. All teachers and pupils were required to participate honoring the Nation by saluting the American flag. Students who belonged to the Jehovah's Witnesses, whose religion forbade them to salute or pledge to symbols, including symbols of political institutions, refused to take part in these ceremonies. The Supreme Court of the United States concluded that the Free Speech Clause of the First Amendment to the United States Constitution protected students from being forced to salute the American flag. Recently, a similar controversy occurred in Japan, concerning the national flag and the national anthem. Some teachers refused to sing the national anthem. The Supreme Court decided that it was constitutional for a school principal to make teachers stand up and sing the national anthem together in front of the national flag at a graduation ceremony.

In the tension between social cohesion/unity and nationalism/patriotism on the one side and freedom of speech, belief and conscience on the other, the jurisdiction in two liberal democratic societies, Japan and the USA, resulted in opposite decisions. Both societies recognize the importance of social unity and individual liberty. But, probably partly due to different traditions and customs, the weights assigned to them differ, resulting in opposite judgments of justice.

Example 2: Freedom of press versus privacy (I)
Recently Mr Dominique Strauss-Kahn, the French director of the International Monetary Fund was arrested in New York on charges of attempted rape of a chambermaid in the Sofitel hotel. Newspapers published photos of the arrested and handcuffed Strauss-Kahn on the front- or cover page. The French characterized the photos of the handcuffed suspect as insulting and unfair. A commentator said this was the "first time in the history of France that a top-level official is treated

like a common criminal whose guilt is already established." The French philosopher Bernard-Henri Lévy, a friend of Strauss-Kahn, wrote a piece in defense of him. Lévy stressed that the accusations of attempted rape have not yet been proven. "Nothing in the world" Lévy writes, can justify a man being thus thrown to the dogs." The main cause of the indignation about the publicly shown arrest and accusation of Strauss-Kahn is the violation of the 'presumption of innocence', the principle that a suspect is regarded as innocent until proof to the contrary has been provided. In France, it is illegal and punishable to show pictures of suspects before they have been convicted, because it would violate the presumption of innocence principle. The former French justice minister Elisabeth Guigou said she found the photos of Strauss-Kahn on the front page of newspapers and magazines a sign of "brutality and incredible cruelty". She said she was happy that the French don't have the same judiciary system as the Americans. According to her, the American system "is an accusatory system," while in France, she says, "we have a system that is more protective of individual rights." The former French justice minister explains the publication of the photos as the violation of an individual right. This sharply contrasts with the situation in the US. There, the freedom of press gets priority and is nearly unlimited. We may explain this, at least partly, as a clash between two values: on the one side the value of the suspect's privacy and the value of 'presumption of innocence', versus, on the other side, the value of press freedom. These values are regarded as important and are, therefore, protected by rights. If this explanation is correct, this seems to imply that there is a clash not only between these values, but also between the rights that protect these values: the right to 'privacy' and 'presumption of innocence' versus the right to press freedom. In his recent book *On Human Rights* Griffin writes that if the resolution of conflicts between human rights is not to be arbitrary, one must know how to attach weight to them.[25] The French and the Americans resolve this conflict in opposing ways. The French assign more weight to the right to privacy and to presumption of innocence, while Americans attach overriding importance to freedom of speech and press.

Example 3: Freedom of press versus privacy (II)

There are several other examples of conflicts between rights that are resolved differently. Consider the following one, which concerns publication of photographs of Princess Caroline of Monaco.[26] Princess Caroline had instituted legal procedures against a German magazine. This magazine had published photos that, according to Princess Caroline, formed a breach of her privacy. The judges of the German Court had to weigh freedom of expression and press freedom against protection of the Princess's right to privacy. Press freedom is regarded as an important value that ensures access to information for all. The German Court favoured the interests protected by press freedom. On appeal, the judges of the European Court of Human Rights, by contrast, favoured the protection of the Princess's privacy.[27] The clash between the relevant rights and the different relative weights that can be assigned to them are mirrored in the disagreement even between judges. This disagreement between 'impartial experts' supports the view that disagreement on justice need not

be caused by bias or insufficient knowledge, but may be a sign of the rational irresolvability of conflicting aspects of justice itself.[28)]

Example 4: Free speech versus right to non-discrimination

In 2005 the French right-wing politician and former president of the Front National (National Front) party Jean-Marie Le Pen, was sentenced for statements made about Muslims in France in a 2005 interview with *Le Monde* daily newspaper. He was fined 10,000 euros for 'incitement to discrimination, hatred and violence towards a group of people because of their origin or their membership or non-membership of a specific ethnic group, nation, race or religion.' In 2008 the French Court of Appeal held that Le Pen's freedom of expression was no justification for statements that were an incitement to discrimination, hatred, or violence towards a group of people, and fined him again. In 2009 the French Court of Cassation dismissed Le Pen's appeal, rejecting his arguments that his statements were not an explicit call for hatred or discrimination and did not single out Muslims because of their religion. His reference to Islam, Le Pen argued, was not aimed at a religious faith but at a political doctrine. In 2010 the European Court of Human Rights declared Le Pen's application inadmissible. Finding that Le Pen's comments had presented the 'Muslim community' as a whole 'in a disturbing light that would likely to give rise to feelings of rejection and hostility,' the Court observed that the effect was to set the French against 'a community whose religious convictions were explicitly mentioned and whose rapid growth was presented as an already latent threat to the dignity and security of the French.'

In the Netherlands a similar trial took place in the same period. A member of parliament, Geert Wilders, was charged with inciting hatred and discrimination. Wilders had made offensive anti-Islamic statements in speeches, articles and in his controversial film Fitna about the Koran. He contended that the Islam is no religion but a backward and violent ideology. He compared Mohammed and the Koran with Hitler and *Mein Kampf*. Recently Wilders was acquitted by the Amsterdam Court.

This striking difference in result between similar trials with similar charges in two Western-European liberal democracies reminds us of Pascal's finding that 'three degrees of latitude reverse all jurisprudence'.

Similar changes in jurisdiction occur with changes in time in one and the same liberal democracy. In 1996 the Dutch politician Hans Janmaat was sentenced for incitement to hatred and discrimination against foreigners. Janmaat was against a multicultural society: immigrants should either assimilate into Dutch culture, or return to their country of birth. Janmaat made, amongst others, the following statements: "Holland is not a country of immigration", "full=full", "we will abolish the multicultural society, as soon as we get the chance and power". Unlike Wilders, Janmaat was convicted, although his offensive utterances did not significantly differ from those made by Wilders fifteen years later. This reminds us of Pascal's finding that "fundamental laws change after a few years of possession; right has its epochs." In the 1980s and 1990s a taboo on discussing

negative aspects of immigration existed in the Dutch political climate, but in the period that followed this taboo completely disappeared. Recently Meindert Fennema, professor of political theory of ethnic relations at the University of Amsterdam, argued that Janmaat was convicted for statements that are now commonplace due to changes in the political climate. Parallel to these changes jurisdiction changed as well.

The trials in which le Pen, Wilders and Janmaat were charged of discrimination and incitement to hate concerned a clash between two fundamental rights: the right to freedom of expression and the right to protection against hate speech and discrimination. Both rights lie at the heart of liberal democratic constitutions. How to decide between these rights if they conflict? The constitution does not give a hierarchy of these rights. Neither right is absolute; neither right is prior to the other. As Parekh argues with respect to the Salmon Rushdie affair:

> Free speech is not the only great value, and needs to be balanced against such avoidance of needless hurt, social harmony, protection of the weak, truthfulness in the public realm, and self-respect and dignity of individuals and groups. There is no 'true' way of reconciling them; it all depends on the history, traditions, political circumstances, and so on of a society. . . No single value trumps all others, and their relative importance can only be decided in the light of the social and cultural context and the likely consequences.[29)]

Because the constitution does not give a ranking – and does not indicate the relative weights – of the competing rights and interests, judges themselves will have to balance them. Different countries and different times appear to assign different weights, not only in the past but also in the present. And the differences concern not only nations with different forms of government but also nations with the same liberal democracy.

Example 5: Distributive justice

Like human rights, demands of distributive justice may clash as well, as we have indicated above. And like the former conflicts, the latter ones may be resolved differently in different countries, cultures and times. This is confirmed by the existing divergent distributions of welfare in different societies even with the same background culture. Let us give an example with respect to health care resources. As Anand (2006) stresses, equity in health is plausibly more important than equity in income and welfare. Health care resources are necessarily limited because health is not our only goal and the available budget for realizing all important personal and public goods is not unlimited. Relative scarcity of health care resources increases with the development of expensive health restoring and health improving technologies as happened during the last decennia. Besides, some health care resources (for instance, donor organs) are scarce compared to the demand. If treatments cannot always, and not for everybody, be provided, then choices have to be made. The question of how our limited health care resources should be distributed is one of the most

important and urgent in medical ethics. Because both efficiency and fairness in the distribution of health care resources are literally of vital importance, it is essential to maximally pursue each of them. However, equity may clash with efficiency. Each society will have to balance these values with respect to the distribution of resources in general and with respect to scarce health care resources in particular. The table below concerns the distribution of scarce artificial kidneys to patients suffering from terminal renal failure – in three liberal democratic societies. Different distribution criteria were selected and different weights were assigned to these criteria.[30)]

	Distribution criteria receiving the largest weight
Italy	Equality
UK	Efficiency
USA	Efficiency + need

These inter-societal differences resulted in significantly different distributions of the relevant health care resources: some categories of patients who were eligible for treatment in one society, were excluded from treatment in another.

Lack of consensus

The persistent lack of consensus on justice between and within different liberal democratic societies may be regarded as a sign that belief in the possibility of consensus between free and equal citizens and between liberal democratic societies is unfounded. The later Rawls admits that consensus on a specific ranking of principles is unlikely. He replaces the aim to achieve consensus on concrete principles and their lexical ordering by the aim to achieve consensus on the content of public reason and on a set of reasonable and political principles rather than on a single rational and reasonable system of lexically ordered principles. He recognizes that public reason is compatible with several political conceptions of justice instead of a single one. Public reason allows more than one reasonable answer to questions of justice, because it has many relevant aspects, which can be ordered in many different ways, within the limits of public reason.[31)] Rawls's change of insight has important implications, because it admits the existence of competing reasonable conceptions of justice, even competing reasonable political conceptions of justice, within the limits of public reason. The recognition of the reasonableness of a set of principles does not entail consensus on specific principles and rankings chosen from this set. As Amartya Sen summarizes:

> We have different types of competing reasons of justice, and it may be impossible to reject them all with the exception of just one set of complementary principles that cohere nicely and entirely with each other.[32)]

And:

> At the heart of the particular problem . . . is the possible sustainability of plural and competing reasons for justice, all of which have claims to impartiality and which nevertheless differ from – and rival – each other.[33)]

Conclusion

Global spread of deliberative liberal democracies does not lead to consensus on justice. Justice is a multifaceted concept which may result in competing demands. Reason does not give a single right, rational or reasonable solution to conflicting demands of justice. This means that not only reason, knowledge and context, but also other, more or less contingent and non-rational, factors play a role. As we noted already, Pascal too did not believe that reason could resolve controversies about justice: 'Nothing, according to reason alone, is just itself.' He thought and tried to show that it is *custom* that 'creates the whole of equity, for the simple reason that it is accepted.'[34)] Nowadays too jurisdiction is to a large extent influenced by tradition, dominant background culture and zeitgeist. This explains why also liberal democracies arrive at rankings of justice that differ in time and place, often leading to disparate results of jurisdiction in like cases.

Notes

1）Faculty of Political Science and Economics, Waseda University. The paper is the result of research, conducted for the project 'The Transition from Ideal to Nonideal Theories of Justice' at the Erasmus University Rotterdam. The research was financed by a grant of the Netherlands Organization for Scientific Research (NWO). I thank Professor Masaki Nakamasa for constructive comments on an earlier version of the paper, which I presented at the 7th International Conference Multiculturalism and Social Justice: *Democracy and Globalization*, Ritsumeikan University.

2）Blaise Pascal, *Pensées*, thought 294. Also Michel de Montaigne's famous *Essays* describe the differences in legal systems in different times, countries and cultures. According to Montaigne custom, however arbitrary, is the main explanation of why laws, forms of government and rules of conduct are as they are, and why they differ. See, for instance, chapter I, 23 ('On habit: and on never easily changing a traditional law').

3）The idea of a 'comprehensive belief' or 'comprehensive doctrine' is taken from John Rawls. A comprehensive doctrine includes conceptions of what is of value in life and gives life its meaning.

4）John Rawls, *A Theory of Justice*, revised edition (Cambridge, Mass.: Belknap Press of Harvard University Press, 1999), p. 514, emphasis added.

5）Habermas disagrees with Rawls about the necessity to bracket one's personal comprehensive belief in deliberation about morality in general and justice in particular.

6）Blaise Pascal, *Pensées*, thought 294

7）John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), p. 154.

8）James Griffin 'When Human Rights Conflict', in *On Human Rights* (Oxford: Oxford University Press, 2008), chapter 3 ('When Human Rights Conflict'). And: Andrew Clapham, *Human Rights, A Very Short*

Introduction (Oxford: Oxford University Press, 2007), pp. 114-115.

9）Minimal justice concerns minimal conditions needed for leading a decent human life as mentioned in John Rawls's *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 2000), pp. 78-85: for instance, freedom from slavery, liberty of conscience and security of ethnic groups from genocide.

10）Isaiah Berlin, 'Two Concepts of Liberty', in I. Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969) p. 167.

11）Thomas Nagel, 'Pluralism and Coherence' in Dworkin, Lilla, Silvers (eds.), *The Legacy of Isaiah Berlin* (New York: The New York Review of Books, 2001), p. 106.

12）Rawls, *Political Liberalism*, p. 197 fn. 32.

13）A cardinal scale is a scale of units on which (differences in) amounts of value can be (roughly) measured and expressed in numbers of units (for instance, as follows: 'the amount of value v_1 is (roughly) 3 units of value more than, or (roughly) twice as large as, the amount of value v_2').

14）Rawls, *A Theory of Justice*, p. 32

15）Amartya Sen, *The Idea of Justice* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 2009) pp. 194-207.

16）Rawls, *Political Liberalism*, p. 240.

17）Ibidem, pp. 226, 240, 241.

18）Rawls, *A Theory of Justice*, pp. 115-116.

19）Ibidem, p. 37.

20）Ibidem, p. 56. See also p. 65.

21）Rawls, *Political Liberalism*, pp. 216ff

22）John Gray, *Two Faces of Liberalism* (Cambridge/Oxford: Polity Press, 2000), pp. 81-82

23）Charles of Taylor, 'Conditions of an unforced consensus on human rights', in Joanne R. Bauer and Daniel A. Bell (Eds.), *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999), pp. 137-8.

24）Ibidem, p. 138.

25）Griffin, *On Human Rights*, p. 66.

26）I borrow this example from Clapham, *Human Rights, A Very Short Introduction*, pp. 114-115.

27）Clapham, *Human Rights, A Very Short Introduction*, p. 114.

28）Another example, given by Clapham concerns the noise caused by aeroplanes, during the night, at Heathrow Airport in London. A Chamber of the European Court of Human Rights had to adjudicate in a case in which residents near Heathrow Airport made a claim against the Government that the noise levels at night were an unjustifiable interference with their private lives. The Chamber had to weigh right to privacy against the economic interests connected with the nocturnal flights. The Chamber favoured the privacy of the residents near Heathrow Airport. However, on appeal, the *Grand* Chamber put the Government in the right because of the putatively weightier economic interests. These examples show that privacy, freedom of expression and economic interests may mutually conflict. And the conflicting judicial judgments of the judges (in the latter case even amongst the judges of one and the same European Court of Human Rights), reflect and are indicative of the conflicting character of these rights and its rational irresolvability.

29）Bhikhu Parekh, *Rethinking Multiculturalism. Cultural Diversity and Political Theory* (Cambridge, Mass: Harvard University Press, 2000), pp. 304-5, 320.

30）Guido Calabresi and Philip Bobbitt, *Tragic Choices. The conflicts society confronts in the allocation of tragically scarce resources* (W.W. Norton & Company, 1978), pp. 161-91.

31）Rawls, *The Law of Peoples*, pp. 140-1: '[T]he content of public reason is given by a family of political conceptions of justice, and not by a single one. There are many liberalisms and related views, and therefore many forms of public reason specified by a family of reasonable political conceptions. Of these, justice as fairness, whatever its merits, is but one'. Rawls, *Political Liberalism*, p. 226: '[W]e differ as to which principles are the most reasonable of public justification. The view I have called "justice as fairness" is but one example of a liberal political conception . . .'; and, p. 240: 'One difficulty is that public reason often allows more than one reasonable answer to any particular question. This is because there are many political values and many ways they can be characterized;' and p. 241: '[P]ublic reason does not ask us to accept the very same principles of justice . . .'

32）Sen, *The Idea of Justice*, p. 201

33）Ibidem, p. 12.

34）Blaise Pascal, *Pensées*, thought 294