



FACULTY OF LAW

Lund University

Christopher Dominey

**The Justice Problem: Individualising
consensus in a dissenting world of
moral pluralism**

JAMM04 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Professor Karol Nowak
Term: Spring 2015

Contents

ACKNOWLEDGMENTS	3
SUMMARY	4
ABBREVIATIONS AND KEYWORDS	5
1 INTRODUCTION	6
1.1 Delimitations	10
1.2 Disposition	12
1.3 An ideal theory of Justice	13
2 OVERVIEW OF THE JUSTICE PROBLEM	14
2.1 Justice, Politics, Law and Human Rights	16
2.2 Tackling the concept of what is good (morality and objectivity)	18
2.3 The politics of human rights	22
3 WHAT IS THE ISSUE WITH THE KANTIAN TRADITION?	24
3.1 The Kantian Influence: Are Politicians or Theorists to blame?	27
3.2 Rawlsian and Hayekian perceptions of justice	28
3.3 The Rawlsian restatement: Why is Rawls so unworkable?	34
4 THE LIMITATION OF THEORY	43
4.1 The Problem with relativising	45
4.2 The importance of relativising	50
5 THE CURRENT FRAMEWORK: HUMAN RIGHTS, TERRITORIALISM, POWER AND A FAILURE OF JUSTICE	52
5.1 Accountability: Attempts to redress the justice balance	63

5.2 National, regional and global adjudication of justice	66
6 ANSWERING THE JUSTICE PROBLEM	77
7 CONCLUDING REMARKS	83
BIBLIOGRAPHY	84

Acknowledgments

I wish to express my sincere thanks to Professor Karol Nowak, Director of the Master programme in International Human Rights Law at Lund University and supervisor of this research, whose hard work and dedication not only to supervision but also to the direction of the LL.M at Lund, has encouraged and guided my research.

I also take this opportunity to express gratitude to the teaching staff on the LL.M programme. Their emphasis on innovation and encouragement to think freely and openly has provided me with the necessary tools to produce the following research.

It goes without stating that I am eternally grateful to my family and friends for their love and support throughout my time at Lund and before.

Finally, I would like to thank the Fundación Internacional Baltasar Garzón. The three months I spent at the organisation provided me with an excellent starting point for considering my research.

Summary

Justice, in the broadest sense of equality and fairness, is a cornerstone aspect of our abilities, as human beings, to lead individual lives in the way we choose according to what we see as the right or the good way to live.

A catalyst for any debate over a theory of justice, Immanuel Kant's work provides a fundamental basis from which we should begin to understand why society, with justice as a key aspect, is shaped in the way it is. His work has influenced many of the legal philosophers considered to provide seminal instantiations of justice. It is the work of these thinkers that carries great importance as a point of departure for reconceptualising an understanding of justice.

The current system of International law privileges State authorities as the dominant ideology whose objective standards of justice are permitted to represent the moral identities of each individual found on their territories. However, in a modern day world, transnational issues affecting justice must lead us to believe that such a nationalist view is no longer sufficient. Issues including increasingly prevalent cross-border crime, government and non-governmental regimes intent on systematically destroying the identities of individuals in favour of their own ideologies and the relative ease of ever-increasing migration meaning our understanding of the 'citizen' no longer carries such relevance, suggests there is a need to reconceptualise justice processes. Not only should we ensure that individuals have the right to lead autonomous lives in tolerance of individual identity, but in the face of severe destruction to the quality of individual lives, any imbalance deserves effective redress.

In respect of modern societal developments however, theory can only take us so far. Not to disregard the pertinence of justice-based theory, a balance must be struck between theoretical and empirical considerations to allow us to effectively respond to an ever-pressing need, not only to understand why justice needs to be reconceptualised, but most importantly, how to achieve it.

Abbreviations

CI	Kant's Categorical Imperative
ECHR	European Court of Human Rights
HRC	The United Nations Human Rights Council
IACHR	Inter-American Court of Human Rights
UDHR	United Nations Declaration on Human Rights
UN	United Nations

Keywords

**Justice – Kant – Human Rights and Justice – Law and Justice –
Corrective Justice – Distributive Justice – Rawls – Finnis – Hayek –
Justice as Fairness – Universal Jurisdiction**

1 Introduction

Justice in all its senses is a complex and vast forum where discussion has raged for centuries about its substantive content. Contextually, the human rights regime makes an attempt at ensuring a just society in the sense of equality and fairness. For the layperson however, a sense of justice, in a similar vein as a sense of human rights, is a term that often means something different to each individual. It is a term that each human being understands but is, on further reflection, unable to provide a concrete definition thereof. The sense of justice is quite simply, a notion inherent to the individual and is subject, undoubtedly to change according to social, economic and personal influences on the life of that individual. Any attempt at explaining what constitutes a sense of justice will often be substantiated with terms including, but not limited to, human rights, good, right, society, law, politics, objectivity and morality. The notion of justice, unlike any other component part of our lexis, is a notion entrenched so deeply in the concept of the self that the task to define justice, given these considerations, is extraordinarily complex. What results is that finding a consistent and workable narrative to support each individual understanding of justice is a task rendered seemingly only possible by the vague and uninformed.

It is relatively simple to provide an abstract, yet coherent definition in which each individual can find his own understanding and adapt it to himself. But to do this would be to deeply undermine the importance of defining justice. Indeed the rationale behind the task to define justice is as important as the notion itself. Why is it so pertinent though? Surely, any definition engenders considerations that there must be attainable agreement. Partly, I will submit, this is because we are, at some level at least, altruistic individuals¹ and in being as such, we find it necessary to define notions that deeply affect not

¹ Samuel Freeman, 'Original Position' (*The Stanford Encyclopaedia of Philosophy*, Summer 2014) < <http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=original-position> > accessed 20 May 2015

only ourselves as individuals but also our community, politically, legally and in our day-to-day lives. However, it is the second part of that statement with which I am concerned. I submit that the notion of justice and the provision of such is so intrinsically linked to our ability to lead lives as functioning individuals, that in the absence of a workable and adaptable definition, the very concept of humanity would face destruction. To live in a society that we can define, in whichever way we choose, as a just society, is a cornerstone element of civilisation. Throughout history, we have witnessed societal attempts at providing justice. We have witnessed its apparition in the criminal, in the social, in the individual and in the political. Justice, I will submit, is so fundamental to enable us to function in our everyday lives as individuals that without a coherent understanding of its function, our ability to live our lives would be seriously impaired. And, perhaps most pertinently, when an individual feels that something is unjust, it cannot help but be felt that at some level, the basic structure of the society in which we live, has failed.

The seriousness of the task of defining justice understood, it is now imperative to navigate the numerous understandings of justice in an attempt to provide substantive meaning to such teleological considerations of why we need justice. Overall, the somewhat standard definitions of justice to which we are accustomed have become, I will submit, dogmatic² and have served to exacerbate tensions in a legal boxing match, where the winner is not defined as the one who throws the most punches, but instead the one whose punches are most pleasing to the audience. Legal philosophers in one corner are extremely protective of approaches to the notion of justice where universalism is the key element.³ In an open playing field where there is no need to be tied to concepts of territoriality, sovereignty, political bias or

² Satoshi Fukuma, 'Rawls in Japan: A Brief Sketch of the Reception of John Rawls' *Philosophy* (2014) 64:4 *Philosophy East and West* 887

³ Such an understanding is promulgated primarily by the work of Immanuel Kant and has served as the basis for much theory on the subject of justice. See further Immanuel Kant, *Groundwork For The Metaphysics Of Morals* (Allen W Wood tr, 1st edn, Yale University Press 2002) <http://www.inp.uw.edu.pl/mdsie/Political_Thought/Kant%20-%20groundwork%20for%20the%20metaphysics%20of%20morals%20with%20essays.pdf> accessed 26 May 2015.

efficiency, legal philosophers have developed their notions independent of the so-called reality of societal norms.⁴ Prima facie, their task seems more straightforward. However, as I will establish, what can result from such ontological arguments is that the overall definition becomes somewhat disconnected from the reality of global society. On the other hand, practitioners⁵ are confronted with the relativist task of conforming to pre-established boundaries, both legal and political in recognition of the fact that the provision of justice should be suitable for the multitudinous traditions, cultures and autonomous⁶ individuals existing within the societies in which they govern. If they fail, society fails.

‘If...principles of justice are realized faithfully and consistently in our society, these principles will bring about a deep transformation in the contemporary political and social-economic situation.’⁷

Dogmatic positioning on the concept of justice as I will submit, led to its semantic demise. The understanding of justice has been subjected to such an extraordinary quantity of definition attempts that it has almost become devoid of meaning. The purpose of this thesis therefore is to recalibrate an understanding of justice in order to lead the way in establishing a framework for the converging points between the philosophical and the social, political traditions. A point where the definitions converge substantially enough to provide us with a workable and adaptable understanding of justice to satisfy the needs and requirements of a modern day society.

I will submit, following a Rawlsian view,⁸ we are born with a sense of altruism.⁹ Thus, even though, as previously stated, justice is a deeply individual concept, it is without a doubt due to an inherent human need to

⁴ As an example, John Rawls’ theory of the original position is seen as utopian.

⁵ I have used the notion of practitioners to refer to all those who are not legal philosophers. In other words, those who are connected by virtue of their professions to the day-to-day functioning of society.

⁶ Here, I employ the Razian understanding of autonomy. See further Joseph Raz, *The Morality of Freedom* (Oxford 1986) chs 14-15

⁷ Fukuma (n 2)

⁸ Freeman (n 1). John Rawls’ philosophy is based on the idea that our individual attributes are luck-based and a just society is about redressing such imbalance.

⁹ *ibid*

belong that we feel a need to make our individual concepts of justice attainable for the community as a whole.¹⁰ Equally, our global state-centric normative foundation in which norms are promulgated by state authorities that do not distinguish between groups or individuals is suited to establish a convergence of individual norms suitable for promulgation to the entire community. In other words, a shared sense of justice, must in order to be appropriate for individuals found on the territory of a state, apply without prejudice.

As a corollary, it is a true assertion to make that the necessity for a workable notion of justice itself provides us with a reason to assess its plausibility. In essence, our society requires laws to be just because, for one reason or another, we cannot all have what we want. I will discuss further the principles giving rise to this assertion further on in this paper. However, I will argue that an obsession with defining and making useful the concept of justice has given rise to acceptance of a philosophical understandings of justice on a level incompatible with modern day thinking. It may be noted at this point that I have avoided purposefully usage of the term ‘citizen’. This, as I will go on to establish is because many legal commentators, academics and philosophers use citizenship as a device for providing hegemony for a particular notion of justice.¹¹ I will argue that this is no longer the case and is ultimately, not relevant to a recalibration of the notion suitable for adaptation in a modern day world.

The need for such deliberation of theory and practice cannot be understated. Globally, the understanding of the nation state is changing and governments are no longer in a position of monopoly to promulgate laws and regulations that conform to one standard of justice. Instead, the effects of globalisation of legal culture has meant that as a global society, it is now more imperative

¹⁰ Roy Baumeister and Mark Leary, ‘The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation’ (1995) 117 *Psychological Bulletin* 497

¹¹ For an interesting overview of the relationship between justice and the citizen, see Andrew Mason, ‘Citizenship and Justice’ (2011) 10 *Politics, Philosophy and Economics* 263 and Margaret Somers, *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights* (CUP 2008)

than ever to find a point of convergence that can fulfil our individual sense of justice, even when the norms promulgated by our governments fail to do so. The pertinence of a feeling of justice is so important that an objective promise to individuals must be made, regardless of State boundaries, that in situations where their own feelings of justice and safety in the face of threats to our capability to exercise our daily lives is menaced. We must ensure that justice remains a concept central to each individual and fundamental to the changing society in which we live.

1.1 Delimitations

The following paper is a qualitative, rather than quantitative examination of the concept of justice in relation to the way we live our lives as individuals. In this regard, I have not attempted to analyse and commensurate each and every definition of justice that has ever been provided.¹² Indeed, to do so, would go far beyond the requirements of such a paper and would suffer as appearing as a mere listing of concepts and understanding. With a plethora of concepts containing so many various facets, it would be impossible to remain coherent in their examination. Instead, the following paper contains a critical examination of theories of justice stemming from the Kantian Enlightenment tradition.¹³ It is these theories that I feel represent most effectively the theoretical foundations on which we have built the dominant concept of the nation state and the dominant understanding that it is the state and state organs that are the ultimate interlocutors of justice. It is also these practitioners in whose works the link between human rights and justice is most apparent. In this regard, although the principle aim will be to examine

¹² For further works on the notion of justice, the work of Amartya Sen for example provides an interesting basis for a differing understanding of the concept.

¹³ Robert Johnson, 'Kant's Moral Philosophy' (*The Stanford Encyclopedia of Philosophy*, Summer 2014) <plato.stanford.edu/archives/sum2014/entries/kant-moral/> accessed 20 May 2015. See further Immanuel Kant, *Groundwork For The Metaphysics Of Morals* (Allen W Wood tr, 1st edn, Yale University Press 2002) <http://www.inp.uw.edu.pl/mdsie/Political_Thought/Kant%20-%20groundwork%20for%20the%20metaphysics%20of%20morals%20with%20essays.pdf> accessed 26 May 2015.

the concept of justice in its entirety from its foundations, I have opted, in order to ensure coherence, to make some presuppositions about the link between justice and human rights. These will become apparent as the paper progresses; however, I have taken for granted the capability of human rights to provide the most appropriate arena for the most suitable instantiation of the notion of the ‘good,’ a notion, as we will see, tied heavily to the provision of justice. Equally, this paper should not be construed as a teleological analysis; I make the assumption that justice is a fundamental cornerstone of a functioning society for in the Mill-ian tradition,¹⁴ the marketplace of ideas is representative of the search for truth and the quantity of ideas that have dominated academic and political discourse surrounding the concept of justice is immense. For that reason, I permit myself the opportunity to take for granted the idea that justice is a principle that we, as a society and as individuals, need.

The aim of the paper is to fill the theoretical deficit left by such divergence between theory and practice and will aim to propose criteria for the basis of any reconceptualisation of the notion of justice.

In establishing my criteria, will use the following authors; Immanuel Kant, John Rawls, John Finnis, Friedrich von Hayek, Joseph Raz and Hannah Arendt. The discussion however will focus on those authors most directly influenced by the common good assertion of Kantian ethics.

In order to achieve the complex task of navigating the well-trodden theoretical paths of justice definition, I will consider notions of objectivity and morality in an attempt to understand from what bases the legal philosophers on whose work we base much of today’s practice, purport to identify the criteria for establishing justice in the modern day world.

Overall, it is through frustration with the notion of justice and the reality of its application in the modern day world that I have attempted to provide a

¹⁴ Jill Gordon, ‘John Stuart Mill and the “Marketplace of Ideas”’ (1997) 23 *Social Theory and Practice* 235

coherent platform for the concept of justice to begin to make sense. The paper should serve as an Archimedean point from which the ontology of the notion of justice should be clear. It is, I will submit, only if we are able to clarify the foundations of justice that we will be capable of implementing centuries of debate in a modern world, without disavowing groups or individuals of their own senses of justice.

1.2 Disposition

To navigate the complexities of the various notions of justice, I will in chapter two provide an overview of the theories with which I am working and the debates with which I am concerning myself in order to provide room for a suitable recalibration of the theory of justice. I will also establish the link with human rights and the arena in which justice can most efficiently be fostered through human rights and legal mechanisms. In chapter three, I will problematize the issue of justice within the context of the theories established in chapter two and seek to establish an understanding of the outstanding issues in the modern day world that suffer at the hands of justice within the already established notions. I will then continue, in chapter four, to provide alternative empirically based theories that may guide the notion of justice to be more workable. In chapter five, I will seek to provide an overview of political solutions to justice and finally, in chapter six I will aim to come to a conclusion about the notion of justice and propose a workable standpoint from which justice can best be achieved. Such a standpoint will be tested not only for empirical functionality but also for theoretical quality.

The debate surrounding the concept of justice has centred for too long around terminology that is out of date and stagnating¹⁵. The universality against cultural relativism debate is a highly prevalent and important debate in human rights, but its ubiquity is putting the proverbial brakes on the

¹⁵ Anthony J Langlois, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (CUP 2001) 123

progression of any effective enforcement mechanism for providing justice.¹⁶ We are stuck between philosophical and political tensions, where more theory seems to be the only answer to establish some form of consensus. All in an attempt to establish the best method for providing justice in a modern world without disenfranchising groups, communities and religions whose faith in their individual convictions provide a fundamental basis for the way in which they lead their lives but at the same time not succumbing to unbridled relativism.¹⁷

1.3 An ideal theory of Justice



Fig. 2 – The starting point construction of a workable theory for justice

In Figure 2 above, I submit my construction of what would be required from an ideal theory of justice. Aware that the components are in part self-

¹⁶ *ibid* 115-116

¹⁷ Cass Sunstein, 'Incompletely Theorized Agreements in Constitutional Law' (2007) 74 *Social Research* 1

contradictory, the figure should seek to represent the pluralism of a modern day world and thus I will attempt to respond accordingly.

2 Overview of the Justice Problem

The question as to what justice is has undoubtedly by now attained quasi-adage status. It is useful in the pursuit of an answer to firstly deconstruct the accepted visual representation of justice. Adorning courthouses and governmental buildings globally is the image of Lady Justice; a blindfolded Goddess, carrying a sword and scales. Since the Roman times, such iconography has been used to represent Reason (the sword), the balance of arguments (the scales), and, since the 15th Century, the blindfold that is representative of objectivity. Together with her Goddess-like attributes, Lady Justice is seen to represent what justice means. In terms of being useful in a modern day world, objectivity, equality and reason are all evidently key facets of a legal system, and equally, facets most commonly found in human rights discourse. At the very least, the depiction of justice as such represents justice as fairness; a key element, as we will go on to see, of John Rawls' politically liberal theory of justice.¹⁸

As an alternative argument, however, and one on which the foundations of the problematisation of justice exists, is proposed by Cass Sunstein. Sunstein refutes such a depiction of justice. He states that most importantly, justice is not a single figure, not blind and certainly incapable of balancing human goods in manner suitable to be depicted as a scale.¹⁹ Sunstein's response is a reaction to the neo-Kantian ideology of justice that we will go on to examine in chapter three. However, his refusal of the traditional image of justice demonstrates the tensions that exist in the discourse surrounding the topic. In essence, he states that justice must represent much more than can be confined to a single representation in the form of a Goddess, and

¹⁸ John Rawls, *A Theory of Justice* (Harvard University Press 1971) 3

¹⁹ Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733

each of these considerations must be weighed in order to provide an accurate and workable account of the notion of justice.

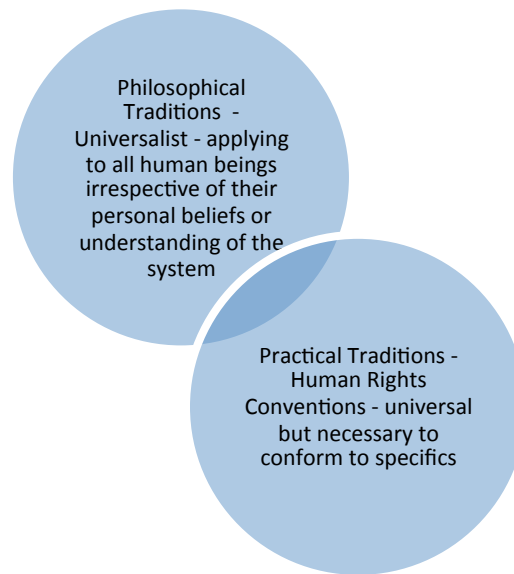


Fig. 1 – The Justice Problem: The second lending itself to the image of Lady Justice.²⁰

Indeed, for centuries, the concept of justice has consistently received both political and scholarly attention in attempt to inject some substantive content into a notion that, as I have argued, has become devoid of meaning. The development of a useful concept of justice has led to legal philosophers attempting to define a notion of justice suiting to all regardless of individual characteristics. Practitioners on the other hand have been faced with the task of defining justice in numerous contexts in order to ensure that individuals can live day-to-day lives with a sense of justice. These are tasks, as we will go on to establish that are strived for by the human rights project.

Making useful the concept of justice has given rise to widespread hegemony of philosophical understandings of justice on a level arguably incompatible with modern day thinking.

On the one hand, influenced by the Kantian tradition, legal philosophers such as John Rawls,²¹ Hannah Arendt and John Finnis have attempted to

²⁰ According to Langlois (n 15) 110

provide a narrative that makes society ‘fair.’ On the other hand, those who reject the Kantian tradition establish a compromise that does not require a single narrative for protection of justice. The practitioners who must promulgate norms in order to achieve justice are stuck in a void between the two. In other words, not only do they try to achieve a common, universal standard, but at the same time, must conform to the realities of a State-based model of law.

2.1 Justice, Politics, Law and Human Rights

As it has previously been established, this paper will examine the notion of justice through its relationship with human rights. It is in this normative arena that notions of justice have been most discussed. It goes significantly beyond the scope of this paper to establish the exact nature of the link between justice and law, although some clarification on the topic will be provided for in the following paragraphs. As a paper grounded in the provision of justice through legal mechanisms, it will be assumed in order to provide a consistent narrative, that justice in whichever way in which it is understood can be best accommodated by legal mechanisms. It is undisputed that in the current model of the nation State being sovereign over its citizens, the norms promulgated by the State authorities and adjudicated upon by judges, as organs of the State are the norms that are currently in place to satisfy individual and communal notions of justice. I will go on to establish why this is so important, however, the provision of justice in the form of human rights instruments is premised on the idea of the nation State as the provider of the conditions for justice to flourish through promulgated norms. Thus, the relationship of justice and law will not be further elaborated upon.

²¹ John Rawls sets out his principles for fairness and explains the relationship with Kantian philosophy in *A Theory of Justice* (n 18) preface

It is however important to make a distinction between distributive and corrective justice as such provides the foundations for the rest of the paper. The definition of which I find most clearly expressed by William Lamont who states that 'Distributive Justice is the creation of a system of rights (and consequently of duties and obligations) according to the principle of 'equality of consideration' for all; and 'rights 'are protected fields for activity within which individuals or groups may pursue their interests. Corrective Justice comes into operation when the scheme created by distributive justice has been infringed; and it may take the form either of Reparation or of Punishment.'²² The following paper advocates for a tool in order to prevent, as far as possible, the need for correctional justice.

The key concept on which we will focus is the relationship between justice and human rights, for it is human rights that are often seen as the vessel through which justice can be best achieved in the distributive sense.

As previously mentioned, for the layperson, an attempt to describe the notion of justice will incorporate lexis including the good, dignity, and morality in addition to equality. As justice is often inexorably linked to the concept of what is good, and by association, human rights is also heavily tied to the notion of what is good, I will firstly seek to establish an acceptable notion of what is good within the context of a legal system (to fit in with the concepts of justice and law) which will, in turn, demonstrate the reasoning for which the provision of justice is most representative through human rights discourse and language.

²² William D Lamont, 'Justice: Distributive and Corrective' (1941) 16 *The Journal of the British Institute of Philosophy* 3

2.2 Tackling the Concept of what is Good (morality and objectivity)

As far as justice and human rights are debated concepts, to develop an understanding of what is objectively good we must navigate an amalgamation of considerations, both individual and communal. For that reason, and for the purposes of developing a meaning to communal values, I will examine the notion in relation to the work of John Finnis. Finnis, a natural lawyer, believes, in contrast to legal positivists, that there is a link between law and morality and that any legal system must be based upon moral principles as well as social norms in order to function as a legal system.²³ This incorporates the understanding that the provision of justice is key to the effective functioning of any legal system.

Finnis' critique stands as a critique of the nature of law that I will apply to the context of justice and human rights. He states that the test for the validity of law requires taking into account morality as well as the sources of law. He frames morality as a set of seven 'goods' that, he claims are objectively true.²⁴ As we will go on to see, objectivity is an underlying issue in all the discourse surrounding justice, however, like Rawls and Kant, Finnis recognises in his seven goods that there must be some objectivity in a legal system that seeks to commensurate supposedly incommensurable values.

Finnis' theory serves to establish the conditions for good legislation. He states, in recognition of plurality, that to pass a law is not unrelated to morality but is to promote some sort of human purpose in morality. Finnis relates the human aspect to law to the concept of the good in a legal system. In doing so, he does assume that the average individual's moral values are

²³ John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2001) ch

²⁴ *ibid*

good.²⁵ This could be theoretically overcome by Anthony Langlois' assertion that rules for justice should be discursive but not arbitrary;²⁶ however, this will be discussed further on in the paper.

What is clear is that Finnis' objective conception of the good pays great attention to what is of value to each individual. A most just law he contends will be more capable of fulfilling his seven objective goods, if it pays attention to individual values. To overcome inconsistencies in the moral agenda of each individual however, Finnis establishes a mechanism for control. He proposes that the ideal individual's viewpoint is the viewpoint that promotes his seven goods, and that is how to establish what should be the most just instantiation of the law. In other words, in comparing such a 'perfect' viewpoint with other viewpoints of those who do not hold, arguably, perfect viewpoints because their views do not fulfil his seven objective goods, he proposes, it can only then be understood what a just law is.

In sum, Finnis' understanding of the law proposes common goods, which the perfect law will take into account, and it is only if a person's viewpoint values those common goods that it will be a just law.²⁷

Indeed, for Finnis, law is a requirement of one of his seven goods; the 'practically reasonable point of view.' His seven goods²⁸ cannot be realised alone and therefore the law provides a 'practically reasonable point of view' to coordinate common activity between individuals, thus resolving any potential conflict.

For Finnis, the notion of what is good therefore is a norm that promulgates seven goods, known collectively as moral evaluative objective criteria. Human rights undoubtedly claim to do the same. Human rights, for Finnis, would help us to develop those seven goods²⁹ by coordinating our activity and individual viewpoints.

²⁵ Brian Bix, *Jurisprudence Theory and Context* (Sweet and Maxwell 2012) 77-79

²⁶ Langlois (n 15) 150

²⁷ Finnis (n 23) ch 1

²⁸ The seven goods according to Finnis are: life, knowledge, play, aesthetic experience, sociability, practical reasonableness, and religion.

²⁹ Finnis (n 23) 1

I will go on to establish the importance of a defining such a global definition of justice, however, for natural lawyers like Finnis, there is a scale of legal systems defining their ability to protect the seven goods. In extreme examples, (Finnis uses the example of the Nazi regime³⁰) the seven goods are destroyed and thus, such a legal system cannot constitute a just system for it focuses on destroying the seven moral criteria that make a society objectively good. Finnis sees this as a spectrum that includes at one end, the focal meaning of law (a just society) and descending from this instantiation, variations that fail to meet the focal meaning of what is objectively good.

Finnis attempts further on in his essays to answer the pluralism debate.³¹ He is aware that the set of goods he proposes are incommensurable; he believes that each manner of living life will undoubtedly create conflict. As I have already submitted, no individual has the same understanding of justice. However, Finnis' argument is that law becomes a requirement of 'practical reasonableness' as it provides a structure through institutional mechanisms that in turn permit the individual to live by the seven goods.

Finnis' theory is useful for a de facto understanding of the relationship between justice and law, and justice and human rights. His theory also allows us to garner a deeper understanding of concepts necessary to tackle when attempting to establish a workable theory of justice. Both morality and objectivity are claims that have been debated within justice theory along with the roles they play in ensuring a system is just. I will go on to examine these criteria further on in the paper.

Now that we are capable of understanding that there is strong theoretical relationship between human rights and justice, I will advance that empirical implementation only serves to exacerbate matters further.

Depending on the basic understanding of human rights to which one subscribes, the gradual hardening of the notion of rights inherent to each

³⁰ *ibid*

³¹ *ibid* ch 10

individual human began internationally with the Universal Declaration of Human Rights on the 10th December 1948³² as a response to the atrocities of World War II. As the first statement concretising the notion of human rights, and most importantly the obligation on States to respect human rights, the UDHR has arguably concretised into customary international law,³³ thus binding States to the obligations created therein. In its preamble, the UDHR states that ‘inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.’³⁴ Notably, this was the first declaration that tied the notion of human rights to the notion of justice. The relationship of human rights and justice was concretised at that moment and repeatedly reproduced in all human rights instruments and in the Charter of the United Nations.³⁵ It seems logical that the notions of human rights and justice therefore go hand in hand, and that any understanding of justice should seek to hold a similar function to human rights; to create the conditions for human dignity, equality and fairness to flourish, theoretically represented in Finnis’ work.

Evidently, the concept of justice was debated long before any discussion of human rights. As Jack Donnelly states, ‘Plato, Burke, and Bentham all had theories of distributive justice, yet no one would ever think to suggest that they advocated human rights.’³⁶ However, justice since the Kantian tradition has always had a link to fairness and equality, and similarly, these are the principles that the human rights instruments seek to protect. If we accept that justice, in some vein, is about fairness, then Donnelly’s argument has some strength. He states that the ‘recognition and protection of human rights will...open up lines of communication between people and government, spur the provision of basic services through the recognition of economic and

³² Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) preamble

³³ Hurst Hannam, ‘The Status of the Universal Declaration of Human Rights in National and International Law’ (1995) 25 Ga. J International and Comparative Law 287

³⁴ UDHR (n 30) preamble

³⁵ United Nations, Charter of the United Nations, (adopted 24 October 1945) 1 UNTS XVI (UN Charter)

³⁶ Jack Donnelly, ‘Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights’ (1982) 76 The American Political Science Review 303

social rights, and provide to dispossessed groups regular and important channels for demanding redress.³⁷ To what extent human rights and justice can be equated to fairness will go on to be established, however, the consistent reiteration of the notion of justice in human rights instruments must lead us to believe that justice is an aim of human rights and thus the two are inextricably linked.

The problem with human rights when regarded as a vessel for the provision of justice is that, as Cass Sunstein points out, the human rights project is highly suited to what I have represented in the bottom circle (See Fig. 1).³⁸ Human rights, due to the necessity to ‘fit in’ with a State-centric political promulgation of norms, must fit in with one image of justice. They are a product of a specific time, place and political agenda as Sunstein points out and therefore can never be truly universal or provide a just, in the sense of equal, view. They are subject, as Sunstein considers, to the same critiques as the iconic image of justice,³⁹ elaborated upon in the first part of this paper.

2.3 The Politics of Human Rights

It is worth briefly noting the background of the human rights project and some of the arguments relating to their implementation. This will provide us with the necessary foundation for proceeding with an understanding of how justice can best be implemented. Indeed, one of the cornerstones of the relevant debate surrounding the human rights regime as instruments for providing equality and fairness to each individual is the universality and cultural relativism debate. This debate, as we will go to establish, is extremely pertinent to justice discourse because it requires some analysis of the capability of human rights to attach themselves to the individuals whom they purport to protect, whilst remaining universal.

³⁷ *ibid*

³⁸ Sunstein (n 19)

³⁹ Langlois (n 15) 110

The debate is substantiated mostly with claims that universalism is a product of Western imperialism and thus norms which do not necessarily ‘fit’ within the by-product of Western thought regarding how the world should be run, are not worthy of the human rights regime.⁴⁰

We should remain aware that although particularly pertinent to the justice debate, the centre of my argument is focused on relativism; avoiding the disenfranchisement of minority cultures with an overarching view of human rights. Instead, I argue that this undermines the very notion of justice.

I will go on to establish, in hegemony of the theory put forward by Anthony Langlois,⁴¹ that the universality debate is unsolvable and what instead should be protested against is that human rights are ‘a philosophy of the nature of humankind’ but instead as a political tool for implementing values where they agree. This provides some effective convergence on the usefulness of human rights and avoids the universality debate.

However, before I seek to provide a vantage point for overcoming the issues justice faces, it would be prudent to problematise supported justice theory. The universality debate is a debate that interestingly finds its foundations in the theory of justice itself.

⁴⁰ Global Policy Forum, ‘Cultural Relativism vs Universalism’ (*Global Policy Forum*) <<https://www.globalpolicy.org/home/163-general/29441.html>> accessed 23 May 2015

⁴¹ Langlois (n 15) 11

3 What is the issue with the Kantian tradition?

The vast quantity of debate centred on implementing a workable notion of justice can be traced to the Enlightenment era of Kantian ethics. Indeed, the works of authors dealt with in this paper have been influenced even remotely by Kantian ethics and have proposed theories flowing from the ideology based on concepts in which universalism and objectivity are strong corollaries. Such an understanding of Kantian ethics, for modern day authors critical of Enlightenment theory represents an ‘undermining of the hope of justice by reducing it to the scope of one ideology.’⁴²

Kantian theory is vast. And it is far beyond the aim of this paper to provide a critical examination of each of its facets. Indeed, even authors influenced by his work have not, by their own admission, performed a copy-paste exercise of his works.⁴³ However, it seems prudent to provide an overview of his theory in relation to a theory of justice.

The key aspect of Kantian ethics that I wish to discuss further is, and which is evident in many of the works influenced therefrom is the aspect that Kant considers the fundamental basis of our moral duties. He calls this the Categorical Imperative.⁴⁴ Kant’s Categorical Imperative incorporates notions of objectivity and morality into the reasons for which we act as human beings. It is an imperative to act, regardless of individual morality and it applies to us as human beings, unconditionally by virtue of our nature as rational agents.⁴⁵ As Julia Driver points out, the imperatives classed as

⁴² *ibid* 133

⁴³ Robert Taylor, *Reconstructing Rawls: The Kantian Foundations of Justice as Fairness*, (Pennsylvania State University Press 2011)

⁴⁴ Kant (n 3) 31. See further Johnson (n 14)

⁴⁵ *ibid*

Categorical are binding because they are based on reason, rather than contingent facts about an individual.⁴⁶ In contrast, the Hypothetical Imperative is a command that is based on the individual desires of an individual. In contrast to the CI, it is not binding but allows us to satisfy a want if we choose to follow the imperative. It is however only the CI that is morally binding and, thus, from a modern stance, it is the CI forms the basis of law.

Arguably, the first formulation of the CI in terms of universality⁴⁷ was in his seminal work, 'Groundwork'. In his writings, Kant states that an individual must 'act only in accordance with that maxim through which you can at the same time will that become a universal law.'⁴⁸ A reason for acting must effectively 'pass' four steps in order to be morally permissible to act. Although it is unnecessary to discuss each of the four steps, most saliently, one of those four steps requires an alteration of reason for action in the context of a universal law and only permits morally valid action in the event that the action could provide a universal basis in 'a world governed by this law of nature.'⁴⁹ Most pertinently, Kant's position is reliant on the idea that it would not be permissible to act in a certain way if that act were self-contradictory once established as a universal norm.

Evidently, the Kantian influence on principles underlying the nature of justice is vast. For, this is exactly the problem. He states that Enlightenment ethics makes assumptions about the competence of reason to be objective, 'to establish neutral rules and independent criteria and to search out and tell an account of the universal history of humanity.'⁵⁰ Langlois' critique of Kant is illustrative of a prevailing lack of relevance to the modern day world. Underlying his critique is the understanding that it would be an almost insultingly reductive to assume that reason is capable of being objective; the idea that a human being's reason for action cannot be reduced

⁴⁶ Julia Driver, *Uneasy Virtue* (CUP 2007) ch 3

⁴⁷ Johnson (n 3). See further Kant (n 3) 50

⁴⁸ *ibid*

⁴⁹ *ibid*

⁵⁰ Langlois (n 15) 170

to the universal for each individual has their own concept of morality. As John Finnis states, what is morally reasonable for one person may not be morally reasonable for all.⁵¹ The Kantian tradition fails in the face of modern considerations of what we require from a workable notion of justice. As Langlois states, we should be ‘aiming at returning thinking about justice to that which witnesses the power of ideas to enhance the lives of the marginalised and oppressed.’⁵²

Joseph Raz provides an interesting alternative to the universality debate, again demonstrably influenced by the Kantian ethical tradition. I will, for the sake of my argument, outline Raz’s theory of what is law and apply that to the Kantian perspective. Joseph Raz, as a hard positivist believes that for a legal system to function, it must be authoritative.⁵³ However, described as a hard positivist, Raz refutes the natural lawyer’s claim that there is any relationship between the law and morality. Raz considers that if an individual inside a legal system must resort to his or her own personal morality in order to make a decision about the validity of a norm, that legal norm cannot be considered authoritative and therefore, it is legally invalid.⁵⁴ Although this permits some form of authoritative universality, it fails to take into account the traditions, culture and morality of each individual, affirming the State as the ultimate arbiter of justice in providing one singular view of the way in which an individual should live their life. Evidently, I submit, in problematising justice, any authority claimed by the law that does not take account of individuals whom it affects, fails to be a completely just system. Thus, we encounter the same issue as encountered in the Enlightenment tradition of justice. The problem is, as many commentators have established, that we cannot reduce X number of ideologies to one ideology without disenfranchising at least one group in society, thus evidently not providing the conditions for a just, equal and fair society.

⁵¹ Finnis (n 23) ch 10

⁵² Langlois (n 15) 173

⁵³ Joseph Raz, *The Authority of Law* (Oxford 2009) p 90

⁵⁴ *ibid* 49-50

In sum, Kant's Categorical Imperatives highlights a link between justice and law based on adjusted individual morality to suit universal values. Finnis believes true individual morality is when it conforms to his understanding of what is commonly regarded as good. Finally, Raz's argument is that individual moral reasoning is irrelevant for law. In this regard, we witness a scale useful to deconstruct objectivity, morality, and subjectivism.

3.1 The Kantian Influence – are politicians or theorists to blame?

American political philosopher John Rawls is regarded as one of the prevalent voices on the notion of justice.⁵⁵ His theories of justice as fairness and political liberalism are theories that have provided the theoretical basis for animating liberalist democracies in the implementation of an overarching notion of justice for their citizens. David Gordon, writing in the *American Conservative* notes that Rawls' maître d'oeuvre, his '*Theory of Justice*' was at the time of its publication, the 'most important work in moral philosophy since the end of World War II.'⁵⁶ The prevalence of his work in both legal and political traditions has led to a plethora of critiques that have deconstructed Rawls' theory in applying it to the modern day. Rawls even stated awareness of the limitations of his theory in his work '*Political Liberalism*' where he makes it clear that it fails in the face of International Law,⁵⁷ because it conforms to specific political agenda present only at State level. This is exactly the Archimedean point from which I will look at Rawls' theory. It is an onerous task, in a world where the rate of globalisation is rampant, to maintain the relevance of a theory that purports

⁵⁵ David Gordon, 'Going off on the Rawls' (*American Conservative*, 28 July 2008) <<http://www.theamericanconservative.com/articles/going-off-the-rawls/>> accessed 23 May 2015

⁵⁶ *ibid*

⁵⁷ John Rawls, *Political Liberalism* (Columbia University Press 2005). See further Cécile Fabre and David Miller, 'Justice and Culture: Rawls, Sen, Nussbaum and O'Neill' (2003) 1 *Political Studies Review* 4

to incorporate notions of objectivity at State level, but from a closer reading arguably fails to do so in a cohesive, relevant manner.

Given the saliency of Rawls' account of justice, I shall now seek to provide a comprehensive understanding of his theory in relation to the task of problematising justice in the modern day climate. I will assess Rawls' theory in light of the critique presented by Friedrich Hayek, also a liberalist thinker, whose critique of Rawlsian justice is centred on the Hayekian understanding justice as a 'social mirage.'⁵⁸

3.2 Rawlsian and Hayekian perceptions of Justice

As Kantian theory, Rawls' theory of justice is complex and incorporates, through his writings; diverging ideas that seek to form the basis of a politically liberal conception of justice. I will firstly look at his theory flowing from '*A Theory of Justice*' and then continue to examine his theory in '*The Law of the Peoples*' and '*Political Liberalism*'.

The Rawlsian tradition of justice is based, firstly on the concept of distributive fairness and secondly on the concept of a politically liberal society. The notion of justice is a prevalent issue for Rawls, and at the start of his work '*A Theory of Justice*', he states that justice is the 'first virtue of social institutions.'⁵⁹ I submit that Rawls' theory is interesting to analyse because of his attachment to a strongly liberal theory of justice. In his work, he challenges other liberal thinkers who do not necessarily dispense with the idea of justice but do want to limit its role. A Rawlsian understanding of justice is heavily linked with notions of fairness and objectivity, but less, as previous thinkers, with morality.

⁵⁸ Andrew Lister, 'The "Mirage" of Social Justice: Hayek Against (and For) Rawls' (2013) 25 *Critical Review: A Journal of Politics and Society* 409

⁵⁹ Rawls, *A Theory of Justice* (n 18) 3

Rawls believes in a concept of distributive justice behind a veil of ignorance⁶⁰ which concerns the idea that true equality can only be established if we as human beings are unaware of the share of the human market that we will receive in the first place. His critique is based on the idea that the State must follow a framework in order to provide distributive justice for the citizens of that State. In other words, Rawls' theory can be reduced to a universalist standpoint. What will become apparent through using Rawls in defining justice in modern day society is that he believes that what is right should come before what is good, and society should be made just, by adhering to the right before it adheres to the good. In this way, Rawls avoids the notion of individual morality and individual conceptions of what it means to lead a good life, which it should be noted, stands in stark contrast to the view of John Finnis.

Contrastingly, for a philosopher like Friedrich Hayek, justice is not about the economic aspects of society as Rawls states, but rather is concerned where one individual intentionally transgresses the rights of another person.⁶¹ For Hayek, justice can only be explained in the presence of intentional action. Unlike Rawls, Hayek approaches individual acts in society and states that the aggregate outcome or the distribution of wealth is neither unjust nor just because it is unintended.⁶² It is an unforeseen outcome of X number of individual intentional acts. For Hayek, if justice can only occur through intentional action, then the outcomes of the share we receive cannot be regarded as a matter of justice.⁶³

In other words, in terms of human rights it is only when a human rights instrument unfairly favours one group over another in society that that intention will constitute an unjust action. Natural differences between individuals are not constitutive of injustice.

⁶⁰ Rawls, *A Theory of Justice* (n 18) 118

⁶¹ Friedrich Hayek, *Law Legislation and Liberty, Volume 2: The Mirage of Social Justice* (vol. 2 Routledge and Kegan Paul 1976)

⁶² Lister (n 58)

⁶³ Professor Lord Raymond Plant, 'Liberal Government: Justice' (King's College London, 2013).

Hayek states that the natural distribution of wealth (as an example) in society is something caused by the fact that we have no workable criteria for distributive justice but rather vague theoretical notions.⁶⁴ In other words, if some individuals are rich and some are poor, that is nothing to do with justice. I submit that human rights, under the Hayekian tradition form a control mechanism in which to correct the balance. In contrast to Rawls, Hayek proposes a corrective intentional framework caused by uneven distribution. Although for Hayek an uneven distribution of wealth is not relevant to justice because it is the result of unintentional action, surely this would mean that human rights instruments seek to ‘tip the balance’ in favour of a more just system.

Hayek maintains that justice and injustice are irrelevant to societal distribution due to natural fact. He claims that the human market is very likely to reward the natural abilities that each individual has. And these are likely to be even more extravagantly rewarded in a market where the State plays no role. For that reason, Hayek states that we must regard the market as morally arbitrary.⁶⁵ The distribution of talent is a result of a genetic lottery and an individual cannot claim to deserve something on the basis of considerations over which there can be no control.⁶⁶ Justice or injustice is created where there is intention to alter that distribution.

For Rawls, justice is created where that distribution is already unfair.

Hayek would most certainly agree therefore that human rights allow states to exercise control over the distribution of rights to their citizens, redressing the balance and making the system more just.

In fact, in his work, Hayek goes on to say that, what is just and unjust is the way in which society deals with natural facts. A purely market order would accept differences between individuals as a reflection of natural facts and will go on to say that for this reason, people deserve the rewards.⁶⁷

⁶⁴ Lister (n 58)

⁶⁵ *ibid*

⁶⁶ Plant (n 63)

⁶⁷ *ibid*

Overall Hayek's argument incorporates the idea that justice is purely a matter of intention and an understanding of what is just, and unjust is about how a society responds to those facts. Hayek's argument aids us in clarifying the Rawlsian approach to justice.

The Hayekian view is an important aspect to gaining an understanding of a workable notion of justice because it provides us with a comparative tool for understanding the Rawlsian politically liberal concept of justice.

Rawls' theory is that justice is important for two reasons, one of which I have already advanced in the opening of this paper. Firstly, because we as human beings are beings with a degree of altruism, and secondly because we can do far more together than we can do separately.⁶⁸

For Rawls, if we are concerned about whether or not we receive a fair and equal share of the market, or in our case, whether the rights that are bestowed on us are bestowed equally, then, we as individuals must be concerned about the nature of justice.⁶⁹ Rawls' theory does not attempt to advance a view about the exact nature of the justice itself. Instead his work is focused on an attempt to understand how to have criteria for distributive justice in a society in which the social product is collaborative. Rawls' understanding of the notion of justice is important because he states that society is based on concepts of collaboration and cooperation. It is only through objectivity of reason that we can ensure justice in the distributive sense.

As previously stated, for Rawls, the only way to ensure a fair and just society is for the right to prevail over the good. Indeed, he maintains that there must be some kinds of impartial justification in order to avoid the self-interest individuals have in following their own conception of what is good.

⁶⁸ Alexander Kaufman, 'Rawls's Practical Conception of Justice: Opinion, Tradition and Objectivity in Political Liberalism' (2006) 3 *Journal of Moral Philosophy* 23

⁶⁹ Rawls, *A Theory of Justice* (n 18) 103

In order to do this, Rawls establishes that there must be a fair set of principles that allow the State to overlook the personal attributes of each individual.⁷⁰

Rawls hypothesizes the situations in which an individual would be able to form a general idea of justice, from behind their veil of ignorance, by overlooking but not ignoring their own personal values and conception of what is good.⁷¹ He says that individuals would favour equal liberty. In other words, under the veil of ignorance, individuals would be unaware of which social end of the distribution they would be, they would choose principles which would protect the position of the worst off. In this regard, Rawls argues, no particular person would receive a favourable distribution and society would be just.

In application to a modern day context, the idea would be that a just society would be a society governed by laws under which an individual is unaware in advance to what extent they would be a beneficiary of those laws. Fairness in this sense is to adopt a principle under a veil of ignorance.

In restating his theory in '*Political Liberalism*', Rawls makes a clear attempt at addressing the various problems associated with pluralism in a modern society that have formed the basis of my examination thus far.⁷² Rawls' theory in practice is to state that justice is a fundamental aspect to any society and in order to implement the notion, the social and political institutions are in place to create a suitable framework. In other words, in the context of diversity of moral values, Rawls attempts to create a mechanism for achieving just laws. He sees his work as the striking of a balance between diversity and necessity.⁷³

⁷⁰ *ibid* 4

⁷¹ It is important to make a distinction at this point that the Rawlsian tradition asks individuals to make a perception of justice without knowing what their personal attributes will be. He doesn't suggest that those personal attributes should be ignored.

⁷² Rawls, *Political Liberalism* (n 57)

⁷³ Plant (n 63)

Although Rawlsian theory has been critiqued by scholars and practitioners alike as being an idealistic notion of justice that is unworkable, Rawls is clear on his assertion that we live in a world of modern scarcity, not in a world of abundance. Indeed, if this were true, there would be no need to even discuss the notion of justice because we would all get what we wanted.⁷⁴

The ultimate difference for the purposes of this essay between the two liberal thinkers is their idea of the role of the State. Hayek's view tends towards demonstrating the illusory aspect to the Rawlsian tradition. He maintains that the luck of the draw is something that has nothing to do with justice because it is unintended. Rawls states that Hayek's view would lead to a society underpinned a set of entirely morally arbitrary attributes over which we have no control. Hayek maintains that there should be no barriers in society stopping people from achieving what they want. Rawls' view is that the attributes are associated with luck and so the only way to ensure justice is to pass laws that remove the lottery of each individual's draw in the social market.⁷⁵

Rawls bases his view on the ideas that we must find a moral framework without accepting the Hayekian viewpoint that the outcomes of the markets are unintentional and therefore nothing to do with justice.

Couched in terms of human rights, for Rawls, it is important to provide a compensatory mechanism for those who end up in a worse position.

However, Rawls' argument goes further than that. He states, in a similar vein to the work of John Finnis that despite the existence of pluralism, we are capable of identifying a range of primary goods that each individual needs in order to pursue their perception of the good. Justice, for Rawls is about the distribution of those goods.

⁷⁴ *ibid*

⁷⁵ Rawls, *A Theory of Justice* (n 18) 276

Access to these goods should be equal and thus for Rawls, the government cannot allow access to be down to a morally arbitrary distribution of attributes. There must be some kind of compensatory justice mechanism in place to reshape.

In explanation of his theory, Rawls does not suggest that each member of a society will recognise the fundamentalist value of these ideas. Instead, he advances, in *'Political Liberalism'* a theory of reflective equilibrium, stating that 'if each member reflected carefully and fully upon his or her political beliefs, he or she should judge, in reflective equilibrium, that this set of ideas in fact embodies the values that he or she views as fundamental.'⁷⁶

Rawlsian theory is best reflected in a universalist conception of human rights therefore. In a just society, rules and laws will restrict the cost of failure and will put a limit on equality in order to ensure that every citizen can live together as citizens of the same kind of society. The emphasis on the Rawlsian tradition is the emphasis on the same. Undoubtedly influenced by the Kantian tradition, Rawls attempts to provide an answer to the justice problem by promulgating laws that promote sameness.

3.3 The Rawlsian restatement: Why is Rawls so unworkable?

Despite Rawls' prevalence as a great liberalist thinker, it is difficult to ignore the plethora of critique levelled at his theories. I submit that in a modern globalised world, not only is the need for just laws and policies greater than ever, but the conception of justice deriving itself from the Kantian tradition of universal principles serves only to disenfranchise large classes of society.

My process of deliberation regarding the theories of legal philosophers focuses principally on the presupposition of a notion of territoriality or

⁷⁶ Kaufman (n 68) See further; Rawls, *Political Liberalism* (n 57) 164

nationalism. I can't help but feel that the effects of globalisation serve to break down the traditions of a State-centric world for providing justice. This is the reason for which I believe there is an increased pertinence in making sense of theories of justice.

Before I make my opening gambit concerning the issue of territoriality, it would be prudent to assess the shortcomings of modern day instantiations of the Kantian traditions. Indeed, as many critics of Rawls have established in problematising Rawlsian theory, primarily, it prioritises communal State-centric values over those of the individual.

It is important to state at this point that although Rawls has always remained a liberalist, his theory underwent a vast restatement from his position in '*A Theory of Justice*' to his position in '*Political Liberalism*'. Rawls rewrote his theory to further develop his thoughts on cultural values.⁷⁷ He no longer proposes a theory of justice free from the pressures of the real world, but instead gives an account of a political theory of liberty. This is summarised well by Japanese philosopher Kawamoto who in his study on Rawls expresses the idea that Rawls makes a 'shift from an ideal theory of justice to real politics in light of a variety of global social changes in the 1990s including, inter alia, the Gulf War and the abolition of apartheid in South Africa.'⁷⁸ This has served to reduce Rawlsian theory to the political liberalist criteria for justice that we understand today.

In this restatement, Rawls refutes 'claims to universal truth, or claims about the essential nature and identity of persons'⁷⁹ Alexander Kaufman argues that such an antithesis to his previous works constitutes a mere retraction of his theory in order 'ensure political stability by appealing to the situated views of actual citizens'.⁸⁰ Kaufman argues that paradoxically, Rawls' theory must 'make any concessions necessary to assure that each citizen will

⁷⁷ Kawamoto Takashi, 'Beyond utilitarianism: An introduction to the study of John Rawls' *A Theory of Justice* (1985) 18 Bulletin of Atomi University. See further Fukuma (n 2)

⁷⁸ Fukuma (n 2)

⁷⁹ John Rawls, 'Justice as Fairness: Political, not Metaphysical' (1985) 14 *Philosophy and Public Affairs* 223

⁸⁰ Kaufman (n 68)

find the theory acceptable'.⁸¹ In explanation of his theory, Rawls does not suggest that each member of a society will recognise the fundamentalist value of these ideas. Instead, he advances a theory of reflective equilibrium, stating that if each member reflected carefully and fully upon his or her political beliefs, he or she should judge, in reflective equilibrium, that this set of ideas in fact embodies the values that he or she views as fundamental.⁸² As such, objective morality is prized over the subjective.

The debate over the universalist nature of the Rawlsian tradition is derived from a Communitarian critique. Communitarians stress the importance of particularist values, maintaining that universalist values, first and foremost, are unjustified if they are not linked with a form of moral community. Equally, communitarians maintain that the Rawlsian method of deriving values from abstract principles such as his veil of ignorance is incoherent because it does not take into account a community-based view of morality. Communitarians disavow the role of the State in this sense because they believe that it is not the role of the State to interfere with the community's morality.⁸³

The Communitarian position however is often criticised as being too relative.

However, as I will go on to establish, too much relativism in the Communitarian sense, may lead to an uncontrolled sense of relativism where the State has no role. In attempting to provide a workable role for justice to play, it must be conceded that the State has a central role to play in addressing imbalances between communities and individualist, thus requiring a compromise between the liberalist and the communitarian critiques of justice.

Professor Petersmann in his article on Theories of Justice and Human Rights puts the argument against Rawls squarely in the context of relativist

⁸¹ *ibid*

⁸² Kaufman (n 68) See further; Rawls, *Political Liberalism* (n 57) 164

⁸³ Dr. Christoph Kletzer, 'Liberalism And Its Discontents' (King's College London, 2013).

critique.⁸⁴ He states that ‘Rawlsian justice, in the sense of the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation, continues to differ from country to country.’⁸⁵ He concedes that Rawls’ fundamental principles may be universally agreed upon, however, states that there is little coherency between other principles differing between cultures. Empirically, he states that in this regard, human rights instruments promote the minimum standard of justice that must be promoted by all States, allowing for differences between cultures.

Joshua Cohen provides us with a practical understanding of this issue that I will elucidate in chapter five.⁸⁶ This argument remains premised on the notion that it is possible to establish an understanding a common good and it is that understanding of the common good that gives a basic understanding of justice. I will reiterate at this point however that this pushes towards a universalist standard and will disavow cultures where there is disagreement even regarding the minimum standard. As we have established, this promotes inequality and unfairness, essential cornerstones of any instantiation of justice.

However before moving on to testing theory against the practical critiques of the current global system, it is imperative to gain a full understanding of why the neo-Kantian traditions are now failing to provide a suitable record of justice for the current globalised market.

Cécile Fabre from the London School of Economics advances a critique of the Rawlsian tradition that focuses on the principles he elaborates in his work *‘The Law of the Peoples’*.⁸⁷ In his writing, Rawls attempts to identify a set of principles by which liberal and non-liberal societies can govern their

⁸⁴ Professor Dr. Ernst-Ulrich Petersmann, ‘Theories of Justice, Human Rights, and the Constitution of International Markets’ [2004] 37 *Loy. L. A. L. Rev* 407. See further; Rawls, *A Theory of Justice*, (n 18) 6

⁸⁵ *ibid*

⁸⁶ Joshua Cohen, ‘Minimalism about Human Rights’ (2004) 12 *Journal of Political Philosophy* 90

⁸⁷ John Rawls, *The Law of Peoples* (Harvard University Press 1999)

interaction and through which, we are able to class societies as ‘decent’ or ‘non-decent’ according to these principles.⁸⁸ Indeed, on page 65 of the *‘Law of the Peoples,’* as elaborated upon by Fabre, Rawls sets out in his criteria that decent hierarchical societies protect the human rights of its members, are governed by a common good idea of justice and incorporate the idea of a consultation hierarchy.⁸⁹ This is qualified further on in his work as ‘allowing an opportunity for different voices to be heard and which will allow the common good idea of justice to be reformed over time, in such a way to reflect the needs and interests of society.’⁹⁰

In examining Rawls’ criteria, Fabre presents, in my view, a powerful critique, which provides us with a highly relevant basis for critiquing a modern day application of Rawlsian principles.

She comments that a requirement of Rawls’ theory is that each member of society must belong to a certain group, which, in a politically liberal society is defined by the State, however, he does not provide any further elaboration on exactly what membership of a particular group means. In practical terms, we are confronted regularly by a proliferation of human rights instruments to pertain to new groups and thus it begs the question that in absence of a coherent definition of what constitutes a group, Rawls theory serves to disenfranchise individuals whose membership status is unknown. Fabre gives the example of homosexuals and asks whether under a Rawlsian understanding, should their personal convictions be given any weight at all in a society that does not consider them a group.⁹¹

Fabre goes on to critique Rawls’ depiction of a common good idea of justice, giving rise to similar issues that have already been discussed in this paper. Fabre comments that although dissent is permitted in a Rawlsian society, he clearly states that dissent is only permitted from the government’s interpretation of what constitutes the common good, not the actual substantive content of the notion itself. Fabre uses the same example as previously mentioned in advancing the hypothesis that in a society where

⁸⁸ Fabre (n 57). See further; *ibid* 63

⁸⁹ Rawls, *The Law of Peoples* (n 87) 65

⁹⁰ Fabre (n 57). See further; Rawls *The Law of Peoples* (n 87) 72

⁹¹ *ibid*

LGBT marriage is seen to run against the values held most fundamental to the society, ie. the common good idea of justice, any challenge to that would not argue for injustice according to Rawlsian theory, but rather that the view deemed to be common in that society is simply unacceptable for that particular person. In other words, the fundamental values of each State do not necessarily need to reflect each individual in that society.

In this respect, I will submit, that a Rawlsian understanding of justice supports the plight of oppressive regimes whose interpretation of a 'just' society may not be favourable to its citizens which is not a requirement for a 'just' society according to Rawls.

Fabre's critique presents an interesting facet to the Rawlsian tradition of universalist values and also, in my opinion, highlights the basis for my thoughts on nationalism as a criteria for justice.

Highlighting a similar issue in an empirical context, Satoshi Fukuma describes the effect of the Rawlsian tradition on the Japanese society.⁹² He concedes that since a change of government from an 'English style constitutional monarch to a Prussian-style monarchical constitution',⁹³ there has been a tendency for academics in Japan to focus less on Rawls' work. Amongst those who have, Fukuma cites Tanaka Shigeaki and states, affirming the previously mentioned assertion, that Rawls' theory presents an ideal theory of justice, however 'is unsatisfactory when it deals with individual injustice such as punishment for crimes, war, conscientious objection and civil disobedience.'⁹⁴ This evidently reinforces the State-centric universalism on which our global society is based and therefore fails to be a truly 'just' system.

Fukuma also cites another Japanese philosopher Iwata Yasuo, whose approach to Rawls demonstrates that we must be careful when analysing his work. It is an important facet of his thinking that 'free and equal citizens', 'well ordered societies' and a 'fair system of cooperation' are principles on

⁹² Fukuma (n 2)

⁹³ *ibid*

⁹⁴ Tanaka Shigeaki, 'John Rawls theory of "Justice as Fairness" (1973) The Annals of Legal Philosophy. See further Fukuma (n 2)

which Rawls builds his theory and are ultimately, very relevant issues that deserve incorporation in any attempt to modernise a theory of justice.⁹⁵ In this respect, it would be foolish and significantly in contradiction to the aim of this paper to reductively analyse Rawls stating his theory has no relevance because of the promotion of universalism and a State-centric ideology. It is indeed Fukuma's assertion that 'we must prevent Rawls' research from falling into mere dogmatics.' This must remain the case, even in the face of critiques such as that of William Galston, who states it should still not be overlooked that even this set of 'fundamental ideas' would be 'rejected by many individuals and groups who form important elements of that culture.'⁹⁶ In other words, even asserting the presence of fundamental principles that govern any society is ignorant of the pluralistic nature of our society.

Similarly, Kaufman comments that the 'mere fact of any dissent would constitute a decisive objection to Rawls' argument'.⁹⁷

What is interesting in Fukuma's review of Japanese philosophy on Rawls is that he also uses Kawamoto to deconstruct flaws existing in the Rawlsian tradition. As I have already stated, Rawls' theory has been criticised as succumbing to the political pressures of the 1990s. He states that the advocating of an 'overlapping consensus' to form a common idea of good justice is a fallacy and instead of representing true objectivity, it is a succumbing to a liberalism that has been 'cultivated in the public political culture of Western democracies.'⁹⁸ Interestingly, this critique levelled at Rawls suggests that his conceding of some normative authority in developing his final theory, to relativist notions has not been done in the image of his own description of a just society. It favours Western traditions and attempts to transplant and implement them in the guise of an 'overlapping consensus'.

⁹⁵ Fukuma (n 2)

⁹⁶ William Galston, 'Pluralism and Social Unity [1989] 99 4 Ethics 711

⁹⁷ Kaufman (n 68)

⁹⁸ Kawamoto (n 77)

As a liberalist himself, Fukuma advocates a notion of robust liberalism that does not fall foul of a ‘Western’ understanding of justice.⁹⁹ Such liberalism will, he states, truly cultivate the ‘interpretative autonomy of a self-interpreting being¹⁰⁰’ and in contrast to Rawls will recognise the value of individual identity rather than associating it with luck, as Rawls’ theory does. Fukuma adds that such an approach, means ‘that we should be liberated from the ego-centric desire for power and accept others in order to make room for the possibility of self-transcendence for freedom.’¹⁰¹ In other words, justice can only be achieved once it is accepted that each individual’s identity is made of varying facets and only in accepting this are we able to establish some form of consensus that, in turn, allows the government to promulgate just laws that are fair and equal to all their citizens. This is in contrast to Rawls whose overlapping consensus is based on the results of a reflective agreement on fundamental principles.

In ‘*Political Liberalism*’ Rawls develops a complex and demanding test for the reflective equilibrium, requiring that each individual partake in due reflection on their convictions in order to come to a decision about the fundamental values of a society.¹⁰² Interestingly, Rawls couches the due reflection requirement in the context of the reasonable person, and the judgment must be of a sufficient standing to persuade all reasonable persons that it is indeed reasonable.¹⁰³ In this respect, Rawls incorporates a notion of objectivity in his theory. However, as Kaufman comments, ‘these arguments must be designed to persuade possessors of relatively unflawed critical faculties with broad an unbiased perspectives’.¹⁰⁴ In a pluralistic society, this would be a near impossible standard.

Indeed the fact that members of a particular tradition may reject fundamental ideas is not an issue for Rawls’ theory because for him, if an objective standard is followed, then the fundamental notions will correspond to the views of the reasonable person. Rawls criterion for objectivity ‘tests

⁹⁹ Fukuma (n 2)

¹⁰⁰ *ibid*

¹⁰¹ *ibid*

¹⁰² Rawls, ‘*Political Liberalism*’ (n 57) 384

¹⁰³ *ibid* 119

¹⁰⁴ Kaufman (n 68)

the persuasiveness of the reasons offered in support of the conviction.’ In this respect, his theory in *‘Political Liberalism’* follows a two-stage test; the first, the original position and the second, the reasonable test to cultivate an overlapping consensus. In other words, he maintains that those who reject the fundamental ideas are not acting as rational agents and therefore are not objective in their personal views. However, Rawls argues that such a position will undoubtedly create stability in a society and in this respect, his argument is political. A ‘just’ society for Rawls is based on the establishment of these principles from the original position behind the veil of ignorance to the development of an overlapping consensus from the reasonable point of view. The issues that this poses need not be restated at this stage.

4 The Limitation of Theory

For Anthony Langlois on Gray, ‘political philosophy bears no relationship to the lived experience of people or politics.’¹⁰⁵

It is a common adage in the attempt to make coherent any principles that must be applicable and workable to human beings to say that there is a limit to theoretical considerations. We take for granted works of those who are considered the great thinkers throughout history in attempting to deconstruct the nature of the principles that are relevant to individuals in their daily lives. However, the pertinence of the justice debate cannot be understated, and most importantly, it can be noted throughout the arguments I have advanced in this paper so far, that in problematising the work of theorists who are regarded as the greatest legal philosophers, the same obstacles continue to present themselves. In other words, it is the shared sense of awareness that such theories as Rawls’ veil of ignorance, overlapping consensus and fundamental ideas are relevant, however, their relevance remains in the abstract. In this regard, Anthony Langlois makes a very important assertion in his work on politics and justice, when he affirms that ‘the degree of abstraction is forced to escalate when any attempt to understand justice is prescribed.’¹⁰⁶ I submit to the accuracy of this opinion. Indeed, it seems to be the tendency of legal theorists to apply unworkable design models to practical issues in order to explain and provide a concrete definition in the face of adversity. This simply does not work.¹⁰⁷

Let us take an example provided by Ronald Dworkin as an illustrative demonstration of where theory is self-limiting. I will not focus on Dworkin’s understanding of law or of the nature of a just system for the reasons already outlined in the first section of this paper. However, the aspect of Dworkin’s theory that I submit is useful to establish the limitation

¹⁰⁵ Langlois (n 15) 169

¹⁰⁶ *ibid* 108

¹⁰⁷ For further analysis on the interaction between theory and practice in weighing values, see Aleksandar Peczenik, ‘Law, Morality, Coherence and Truth’ (2007) 7 *Ratio Juris* 146

of theory is his understanding of the work of a judge.¹⁰⁸ I have already debated the relevance of the judge as, an organ of the State, as representing the ultimate arbiter in correctional justice. Dworkin's theory sees the judge being represented as Herculean. In deliberation of a case before him, for Dworkin, all of the reasons for justification of the decision he makes regarding the case constitute law.¹⁰⁹ In other words, the judge is theoretically required to take into account all theoretical values in his distribution of a just outcome. Cass Sunstein notes that this is not possible and gives two reasons.¹¹⁰ First, he says that it is beyond a judge's time and capacity to do so. Secondly he notes that there are too many factors at play involved in the politics of judging for a judge to be able to do so.¹¹¹ Sunstein, a staunch critic of the Rawlsian tradition maintains that in the same respect, practitioners avoid theorising for the reason that it is time consuming, and most interestingly, in his commentary on Rawls states that 'citizens are more concerned with seeking agreement on what to do rather than exactly how to think.'¹¹²

This, I will submit, forms the basis of the limitation to theory. Attempting to theorise at an abstract, metaphysical level increases the burden on politicians and judges whose work must relate to the realities of an ever-changing global and pluralistic world.

Ronald Dworkin stated in his work that principles of fairness and justice have a settled though abstract meaning but what, for example, is construed as cruel and unusual punishment will vary.¹¹³ Thus emphasising the difficulty encountered when trying to theorise the practical.

¹⁰⁸ Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) 15-19

¹⁰⁹ Maleiha Malik, 'Dworkin And The Law' (King's College London, 2012)

¹¹⁰ Langlois (n 15) 108. See further; Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733

¹¹¹ *ibid*

¹¹² *ibid* Sunstein

¹¹³ Donnelly (n 36)

4.1 The Problem with relativising

It will undoubtedly be understood from a reading of this paper that my submission is based on the idea that assuring a notion of justice should flow, not necessarily from the universal, but, in order to be just, take into account individual culture and tradition, and that a just law must incorporate individual perceptions of morality in order to do so.

The cultural relativism and universality debate has gained primacy in international deliberations, in particular, in response to globalisation and an ever-growing push towards the prevalence of an international community.

It is also through this section that I will begin to introduce relevant human rights discourse where this debate is prevalent.

I have already outlined the link between justice and human rights and my view that human rights mechanisms, in achieving equality, are the ultimate method towards redressing equality imbalance existing in society. I will elaborate on that further in this section.

In the following section, I will continue to outline reasons for which too much relativising can in fact undermine any search for a reconceptualisation of the notion of justice.

Cultural considerations have long formed a part of international human rights discourse. The need for reconciliation of often heavily entrenched cultural interests with the universalist requirements of international human rights obligations has proved, for States and practitioners alike, an almost impossible task to overcome and reaches to the very heart of the concept of human rights and their effective application within each State. As already established, the fundamental principle of pluralism is that the notion of what is 'good' can vary and, in this regard, where universalists argue that overriding principles can serve to commensurate incommensurable values, pluralists or relativists assert that there is be no overriding principle that

takes preference.¹¹⁴ As we will go on to establish however, both parties maintain the fundamental need for conflict resolution to ensure that equality can be guaranteed to the groups targeted by human rights provisions and to ensure that justice can flourish.¹¹⁵

On the 5th December 2013, Resolution 21/3 of the United Nations Human Rights Council¹¹⁶ came into force. The Resolution, whilst reiterating the universal nature of human rights makes a call for a deeper understanding and sensitivity to traditional values in the application of international human rights standards. The significance of such a declaration must not be understated. Indeed, despite previous attempts to incorporate cultural considerations into human rights discourse, the Resolution is representative of¹¹⁷ the first and most definitive statement of the United Nations to date that seemingly contradicts Roosevelt's 'indivisible, inalienable, universal' adage that launched human rights into the international arena in 1948.¹¹⁸ It is a push at the global level, to promote an understanding the most equality can only be understood from a subjective approach.

Most pertinently, the relevance of the cultural relativism debate concerning the United Nations Human Rights Council is as regards the case of so-called vulnerable groups, whose social, political and legal position is not only highly dependent on the volition of the State¹¹⁹ in which they reside but seemingly through such a Resolution, whose procedural and substantive

¹¹⁴ Martin Freeman, 'The Morality Of Cultural Pluralism', (1995) 3 International Journal Of Children's Rights 1

¹¹⁵ Christopher Dominey, 'LGBT And The Rights Of The Child: To What Extent Does Resolution 21/3 Of The United Nations Human Rights Council Make Room For State-Oriented Bias In The Balancing Of State And Individual Interests?' (LLM, Lund University).

¹¹⁶ United Nations Human Rights Council Resolution 21/3, 'Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind: best practices' (adopted 5 December 2013) UN Doc A/HRC/RES/21/3. See further; Resolution 12/21 (adopted 12 October 2009).

¹¹⁷ Cai Wilkinson, 'Putting "Traditional Values" Into Practice: The Rise and Contestation of Anti Homopropaganda Laws in Russia'(2014) 13:3 Journal of Human Rights 363

¹¹⁸ UDHR (n 32)

¹¹⁹ Due to its nature, the UN Human Rights Council has often received criticism relating to political bias.

marginalisation may effectively be legitimised by the statements of an international body.¹²⁰

In such cases, Western media accord no justification to relativist principles that might limit the application of international human rights norms, provides a biased starting point to which many commentators limit themselves.¹²¹

A pertinent example is the discussion surrounding the rights of the LGBT community. Carlos Ball in his article argues the State may set policies based in part on moral judgments related to sexual orientation under three conditions. He says that moral considerations at issue must have empirical support and those considerations must be consistent with the nation's constitutional values.¹²²¹²³ These final considerations are represented in Rawlsian theory; the understanding of the fundamental values held at State-level.

This however, does not alter the fact that the State, in practice must promulgate laws reductively in accordance with one ideology. This has caused issues in the Russian state where there have been claims that Russia is using this practical limitation in order to assert some kind of moral sovereignty over its citizens. However, such issues of nationalism will be discussed in the following section.

The difficulty of ensuring fairness through promulgating laws and policies that are not reductive and ensure fair representation for individual identity is that this a vast and complex task that undoubtedly would, to use the words of Ronald Dworkin, require a Herculean law maker in order to choose.¹²⁴

¹²⁰ Christopher Dominey (n 114)

¹²¹ Christopher Dominey, 'Compatibility Of Gender And Other Provisions In Islamic Shari'a Law And International Human Rights Law Operating With A Liberal Paradigm' (LLM, Lund University)

¹²² Christopher Dominey (n 114)

¹²³ Carlos Ball, 'The Proper Role of Morality in State Policies on Sexual Orientation and Intimate Relationships', (2011) 35 New York University Review of Law and Social Change

81

¹²⁴ Langlois (n 15). See further Dworkin (n 102) 42

Indeed, as an additional facet, Alexander Kaufman asks the question whether ‘deliberators located within a tradition can plausibly be expected to reassess the tradition itself. Aren’t politically liberal deliberators in fact required to relativize their judgments to the culture in which they are located?’¹²⁵ Kaufman negates this question in terms of Rawlsian theory, saying that there must be common values in order to generate the substance of a theory of justice.

The true liberal tradition however means that any common values must be a product of a ground of political deliberation; a political conception of justice cannot justify the use of the coercive force of law without rendering true the idea that the views of each member of society deserve equal respect.¹²⁶ This is where relativism is indeed necessary; a person’s entire identity deserves respect in order for the laws that apply to them to be considered just.

There remains the possibility however that relativism can go to far. I submit that over-relativisation will lead to too much defragmentation of the values that are imperative to adhere to the State-centric conception of the law. If each value is attempted to be taken into account then, evidently, this will lead to a lack of stability, with different standards being applied to different individuals in the administration of justice, leading to ultimately, an unjust result.

In the context of respect for the Islamic tradition, Abdullahi An-Na’im argues that to be culturally sensitive to the norms applicable in Shari’a law must not engender an extreme form of cultural relativism where different standards are applied depending on the normative system to which the individual adheres.¹²⁷

The prevailing view regarding the universalism and cultural relativism debate is that governments in creating a just system should take into account

¹²⁵ Kaufman (n 68)

¹²⁶David Estlund, ‘The insularity of the reasonable: Why political liberalism must admit the truth’ (1998) 108 *Ethics* 252

¹²⁷ Abudallahi An-Na’im, *Islam and Human Rights* (Mashood A. Baderin ed, Ashgate 2010) 3-20

when promulgating their laws, each individual tradition of each individual culture existing within the State.

However, the underlying assumption that is made when suggesting as such, is that because we can regard each way of life as a valid way of living, the argument effectively is that ‘we should be able to live by any of the traditions ‘on offer.’ Indeed, the concept of relativism is premised upon the assumption that there is no objective way of judging the values of each individual in society.¹²⁸ Radical relativists, following a Communitarian critique, will assert that there can be no objective standard because subjective views are incommensurable. However, in his work on incompletely theorised agreements, Cass Sunstein puts a brake on concept of radical relativism.¹²⁹

He advances the idea that in order to promote and promulgate laws that are ‘just’, the process should not be based on the arbitrary and ultimately lazy assumption that there is no way to commensurate values. He says that in order to provide a workable notion of justice, we should work within the framework of justice as discursive and not arbitrary.¹³⁰ To arbitrarily assign equal value to all individual values would engender similar issues to those already stated in this section; an over-fragmentation of standards that should be applied. Sunstein maintains that justice is not about unbridled relativism and is certainly not about promoting values in acute cases. He advances the idea of good faith incomplete theorisation of justice and this is a concept that forms the basis of my criteria for a workable notion of justice, which I will elucidate at a later stage in the paper.

I submit equally, following Langlois’ understanding, that if we begin to accord value arbitrarily, this would lead to an effective undermining of the concept of justice as a whole. Although I will deal with acute cases of ideology in the next section, it is important to note, that to continue with unbridled relativism would ordinarily allow us to say that regimes such as

¹²⁸ Langlois (n 15) 167

¹²⁹ Sunstein (n 19)

¹³⁰ *ibid*

that of the Nazis could be regarded as just, if that represents the fundamentalist view of the population of the time.

4.2 The Importance of relativising

Ultimately however, we must remain aware that even in the face of so-called unbridled relativism, it is imperative not to disenfranchise groups in our society whose values are fundamental to their way of life.

The basic premise behind the human rights regime is to provide individuals with a tool for leading lives according to the values they prioritise. It is not about establishing an overlapping consensus of values but rather recognising the value in individual versions of morality. It is about equality, fairness and toleration.

The project is about recognising the individuality of our citizens and ensuring that those that have a duty towards each individual promote their individuality. It is for this reason that human rights as a mechanism for providing justice are so pertinent. Jack Donnelly phrases this as human rights providing the basis of a claim against the duty holder.¹³¹ Not only therefore do human rights control the assignation of justice to individuals but they provide individuals with a control mechanism against the State who, in the current international system, holds the duty to promote justice.

Commentators have focused on the importance of human rights to a 'just' society in a vast collection of academic commentary.¹³² Ulf Petersmann states that, and I see it as necessary to quote in full, '...inalienable human rights have become part of national and international constitutional law; as

¹³¹ Donnelly (n 36)

¹³² See for example, Chris Brown, *Sovereignty, rights and justice: international political theory today* (CUP 2002) and in the context of specific human rights; Sally Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press 2006)

such, they must be the guiding principle for theories of justice aimed at empowerment of individuals through protection of equal basic rights, non-discriminatory competition, satisfaction of basic individual needs, and the democratic self-government that is necessary for personal self-development in dignity.¹³³ Human rights, in this respect are about distributive justice; they guide government where groups are marginalised by the societies in which they live.

The universalist nature of these values will be discussed in the next section, however, it should be understood that I take a fundamental and most broad view that human rights are to ensure respect for each individual. The regime in which this is implemented pertains to a universalism with which I am uncomfortable, however, this will be assessed in the next section.

The various regional adjudicative bodies for human rights have also reiterated the key importance of individual values in structuring a concept of justice. In the seminal case from the European Court of Human Rights of *Loizidou v Turkey*,¹³⁴ the Grand Chamber stated that it is the task of the Court to ensure that individual rights are respected to the highest degree, taking away the emphasis on the values enshrined in objectivity.

‘The dynamic evolution of regional and global integration law illustrates that justice remains a never-ending regulatory task and cannot related to one value, be it equality or any other, but only to the complex value system of a man, a community, or mankind.’¹³⁵

¹³³ Petersmann (n 84)

¹³⁴ *Loizidou v Turkey* [1996] ECHR, 23 EHRR (ECHR).

¹³⁵ Petersmann (n 84)

5 The current framework: Human rights, Territorialism, Power and a Failure of Justice

Peg Birmingham sums up effectively the problematic of the current State-centric system. 'The problem of reducing human rights to a political principle of liberalism is that this again equates rights with the status of the citizen.'¹³⁶ In this respect, the liberal State, for its citizens, represents the most favourable view of what is just. This, arguably, is a statement against the most concrete original understanding of human rights.¹³⁷

The adage levelled at the current framework of international human rights is that it favours the West. It is the product of Western ideals that fail to take into account the complexities and specifics of a non-Western notion of human rights. The underlying assumption made in such a critique contextualises the foundations of the justice problem. The human rights regime has been criticised as reductively collating principles and agreements on the substantive values that are important to each individual into one ideology that is reminiscent of a Western perception of human rights.¹³⁸ It fails to represent the notion that these principles may not be valuable to all cultures and all traditions.

It is my understanding of such an argument that a further facet to the problematisation of justice is the character of the international legal context in which human rights norms have developed. The problem in this case,

¹³⁶ Peg Birmingham, *Hannah Arendt and Human Rights: The Predicament of Common Responsibility*, (Indiana University Press 2006) 8

¹³⁷ UDHR (n 32)

¹³⁸ Nicholas Kahn-Fogel, 'Western Universalism and African Homosexualities' (2009) 15 *Oregon Review of International Law* 315

representing the quote at the opening of this section, is the fact that the distribution of human rights is through a State-centric system.¹³⁹

International Law, taking its origins more or less from the Peace of Westphalia prescribes the requirements for Statehood *prima facie*, in the Montevideo Convention on Statehood in 1933.¹⁴⁰ Although the requirements have been significantly debated and extended since 1933, for the purposes of this paper, the prescription of Statehood following the requirements of the Montevideo Convention, in my opinion, has led to a decline in the ability of individuals to have their personal identities and values fully recognised.

The concept of State sovereignty contained in the UN Charter affirms this view.¹⁴¹ It is for individual governments to implement the human rights norms that they presume to be relevant to the citizens on their territory. The current international order is based on an attempt to implement a universalism at State level. What this effectively means is that, each individual government is placed in a position where they are required to promulgate laws that represent their ideology. Even a democratically elected government operating in a liberalist tradition would be unable to implement more than one ideology. Of course, it is understood that a requirement of an efficient government is stability and as already stated, a lack of stability would be caused by an over-fragmentation of the ideologies it promulgates, thus leading to an instable and ultimately unjust system.

Although the human rights project has been supported as redressing the balance, the concept of the nation State and the distributive nature of the human rights project under international law mean that States are sovereign to implement their own ideologies and promulgate the rights that are felt to

¹³⁹ The discussion in this chapter takes its origins from the Hobbesian account of the citizen, and a justice as a state of nature. See further; David Burchell, 'The Disciplined Citizen: Thomas Hobbes, Neostoicism and the Critique of Classical Citizenship' (1999) 45 *Australian Journal of Politics & History* 506.

¹⁴⁰ The Montevideo Convention on Rights and Duties of States (adopted 26 December 1933) article 1 165 L.N.T.S. 19 (Montevideo Convention)

¹⁴¹ United Nations, Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI (UN Charter) preamble

represent their citizens. Thus representation of individual morality is blocked by the State and the effective representation thereof is rendered an even harder task.

This is perhaps best understood from a religious perspective. To take a salient example, as a minority religious order in a liberalist system, the United Kingdom provides an example of a liberal democracy that has made attempts to validate Shari'a norms in certain circumstances. Under section 1 of the United Kingdom Arbitration Act 1996¹⁴², parties are free to choose the method of arbitration in order to resolve their dispute. As a result, Shari'a councils are accorded normativity and may operate subject to requirements relating to public morality.¹⁴³ Indeed, contemporary Islamic scholars claim that a modern interpretation of Islam does not support cruel or degrading punishments,¹⁴⁴ and as a result, the Shari'a councils do not operate such a policy. Although arbitration by such councils is permitted under the Arbitration Act, the UK executive has been very clear in stating that their judgments carry no legal validity.¹⁴⁵ According to journalist Joachim Wagner, using Islamic values in Islamic arbitration is a threat to constitutional values because they are side lined in favour of a Shari'a-based interpretation.¹⁴⁶ The UK is undoubtedly aware of this and permits, but does not fully incorporate or apply Shari'a norms.

It is however imperative to understand that 'Muslim law is still superior and dominant over English law in the Muslim mind and in the eyes of the Muslim community'.¹⁴⁷ In this regard, Muslims, as we will see, do not

¹⁴² Arbitration Act 1996, s 1

¹⁴³ *ibid*

¹⁴⁴ Sarah Glazer, 'Sharia Controversy: Is there a place for Islamic law in Western countries?' *CQ Global Researcher* vol. 6 (1) (3 January 2012)

¹⁴⁵ Rebecca Maret, 'Mind the Gap: The Equality Bill and Shari'a Arbitration in the United Kingdom', (2013) 36 *Boston College International and Comparative Law Review* 1

¹⁴⁶ Joachim Wagner, 'Islamic Justice in Europe: 'It's Often a Dictate of Power' (*Der Spiegel Online*, 1 September 2011) <<http://www.spiegel.de/international/germany/islamic-justice-in-europe-it-s-often-a-dictate-of-power-a-783843.html>> accessed 23 May 2015

¹⁴⁷ Ihsan Yilmaz, 'The Challenge of Post-Modern Legality and Muslim Legal Pluralism in England' (2002) 28 *Journal of Ethnic and Migration Studies* 343

separate the legal from the religious¹⁴⁸ and as such a compromise must be sought in order for pluralism to flourish within the liberal community.¹⁴⁹

The problem, very clearly demonstrated by the operation of Islamic norms in liberal democracies is that States must promulgate one idea of justice. In doing so however, it very clearly disenfranchises large sections of the population.

Rationality is however an important principle and we cannot ignore the argument that fundamentally, all humans are the same and in that respect, that is argued to stand over religion as a measuring stick for justice.¹⁵⁰

In order to remain faithful to a theoretical foundation that may serve to facilitate the process of creating a workable understanding of justice notions, it would be useful to problematize the current system of international law with reference to the work of Hannah Arendt. Her view on justice and human rights differed substantially from the politically motivated liberal understandings of justice illustrated by legal philosophers more heavily influenced by the Kantian tradition. Indeed, the key aspect of Arendtian justice is that she believed in an ontological foundation for human rights rather than a teleological foundation. In other words, Arendt's belief was that human rights are with us since birth; that the basis for human rights is the event of natality itself.¹⁵¹ In such a statement, Peg Birmingham argues that Arendt criticizes the Kantian tradition, stating that philosophers with this mind were naïve in their understanding of humanity.¹⁵²

Arendt's viewpoint was that we hold a right to have rights due to our nature of humans and that the rights of every individual should be guaranteed by humanity itself.¹⁵³ John Rawls' response however remains faithful to the current model of international law. For Rawls, the idea of a 'free citizen is

¹⁴⁸ John Rehman, 'The Shari'a, Islamic Family Laws and International Human Rights Law' (2007) 21 *International Journal of Law, Policy and the Family* 108

¹⁴⁹ Christopher Dominey (n 120)

¹⁵⁰ Langlois (n 15) 61

¹⁵¹ Hannah Arendt, *The Origins of Totalitarianism* (Mariner Publishing 1973)

¹⁵² Birmingham (n 136)

¹⁵³ Arendt, *The Origins of Totalitarianism* (n 151) 106

still determined by a liberal political conception and not by any comprehensive doctrine which extends beyond the category of the political.’¹⁵⁴

I have made it clear in previous sections of this paper that theory has its limitations and thus I am not proposing that the Arendtian method of conceptualizing human rights should provide a basis for a practical and workable definition of for justice. However, Arendt’s critique is useful in order to demonstrate the shortcomings of the State-centric system in implementing a common ideology. For that reason, the discussion of Arendtian based theory is brief.

Thus, in the face of a system where the State is the ultimate arbiter of justice and can implement the perception of justice it chooses, the argument advanced by Joshua Cohen seems to be the most appropriate.¹⁵⁵ He states that in the face of huge disagreement, we are forced to work with a minimalist conception of justice and human rights in order to seek to encourage the maximum participation of States. In other words, if human rights instruments conform to the idea of negative liberty in the sense that they set the minimum standard thus leaving a wide margin of appreciation to States, this has been seen as a solution to the issue of the international State-centric model. It will encourage States to promulgate a theory of justice based on the most central values that the international community endorses.

However, an understanding that there is deep disagreement on a lack of a minimum standards for Joshua Cohen, promotes a minimalism conception of justice that is merely procedural.¹⁵⁶ This requires however, at least a base of agreement on what the minimum standard is. In his article, Cohen differentiates the concepts of what he terms substantive minimalism and justificatory minimalism. The idea I have just discussed is an example of the former. Justificatory minimalism advances the same idea that human rights

¹⁵⁴ *ibid* 8

¹⁵⁵ Cohen (n 86)

¹⁵⁶ *ibid*

need to be minimalist in their obligations in order to increase participation however it goes further than substantive minimalism in Cohen's understanding that there can be agreement about the minimal rights, 'as long as no one asks why' incorporating the idea that the basis for human rights is on the idea that there should be some idea of pragmatism, with a 'single body of beliefs for guidance on action'.¹⁵⁷

Overall, the crux of Cohen's statement rests on his assertion that 'if we are looking to assure a conception of human rights is actually accepted from within a wide range of traditions – not simply that it be acceptable – then the content is likely to be driven down to a minimum.'¹⁵⁸

These considerations are interesting in the context of liberal governments whose perceived intention is to provide the fairest and most just environment in which their citizens are able to live.

However, my criticism of the current international model takes a rather more sinister turn, in recognition of the fact that the concept of sovereignty is at the very least, efficient, that is until there is abuse. I have already begun to highlight the relevance in Cass Sunstein's work, whose premise for creating a workable definition of justice lies in the idea that it would be lazy to assign value to acute cases where there is a tendency towards extremism.¹⁵⁹ As already stated, he relies on the idea that justice should be discursive, not arbitrary.¹⁶⁰

This problem is also postulated in Rawlsian theory when he states that rights belong to those lucky enough to have landed historically in a liberal constitutional state. Those states that deny human rights are condemned on the basis of the validity of the liberal state, whose validity in turn, is assumed on the basis of its mere existence.¹⁶¹

¹⁵⁷ *ibid*

¹⁵⁸ *ibid*

¹⁵⁹ Sunstein (n 19)

¹⁶⁰ See Fig. 3

¹⁶¹ Birmingham (n 136) 10



Fig. 3 – When justice values become arbitrary

To problematise, because the model of international law to which we subscribe globally favours the State as the arbiter of justice for its citizens, and therefore ideology must be reduced to State ideology, the ‘acute’ cases of arbitrariness as elucidated by Sunstein, actually become a control mechanism for governments to promote a particularistic view of justice, in the advancement of ideology that suits, not the values of the citizens found on a territory but the values of the authorities in control of a country.¹⁶² Cohen describes this as the idea that ‘basic human rights flow from the responsibility of officials to care for the common good’,¹⁶³ as an observational criticism of the human rights regime to which we currently subscribe.

In this sense, culture and cultural values no longer are inherently related to promotion of justice to a culture, but instead are a mechanism for power. If we are to use the model of a paternalistic government, as Langlois argues, we must advocate the strongest instantiation of that model in order to provide the right environment to ensure law and order. Langlois states that the broadness of the definition of what constitutes cultural values means that it can be used ‘to the advantage of those who would use it to further a particular socio-political agenda...Culture may be subsumed by the State, with the concept of ‘national identity’ being used to regulate cultural difference.’¹⁶⁴ He further expresses that it is the State elites who claim the authority to interpret cultural frameworks. This undeniably is due to the concept of Statehood existing in the international legal order.

¹⁶² Sunstein (n 19)

¹⁶³ Cohen (n 86)

¹⁶⁴ Langlois (n 15) 26

Although it is argued by Langlois that a strong paternalistic government is needed to provide the environment to ensure law and order,¹⁶⁵ such authority can lead to abuse.

To express the idea of culture as power, and the problems raised by adhering to a model of Sovereignty based statehood, I have chosen to use the Russian example.

In recent times, the most successful attempt by a State in gaining hegemony (at the HRC) for a limitation of human rights norms through the advocating of traditional values has been the coming into force of Federal Law Number 135-FZ of the Russian Federation¹⁶⁶. On June 29, 2013, Russian President Vladimir Putin signed into law norms prohibiting “propaganda of non-traditional sexual relations,” including statements about gay, lesbian, bisexual, and transgender relationships, aimed at or in the presence of minors. Despite consistent marginalization of the LGBT community prior to 2013, the hardening of the principle into law received significant condemnation from International Organisations and other States, whose criticisms centre around a violation of Russian obligations under ratified international human rights conventions.

Perhaps most importantly however for our argument, domestically, the Law received prima facie eighty-eight percent public support.¹⁶⁷

Under a Rawlsian viewpoint, this is key because it would mean, under his theory that is nothing to do with justice, for it promotes the fundamental agreement of a common idea of justice within a State. It can simply be unacceptable for the individuals concerned.

A global human rights regime could, redress this issue by providing a tool for making fair the imbalances; however, this is rendered impossible by the State centric model of international law.

¹⁶⁵ Langlois (n 15) 25

¹⁶⁶ Hereinafter referred to as “the Law.”

¹⁶⁷ Christopher Dominey (n 114)

A criticism levelled by Cai Wilkinson at the Law and its justification through the traditional values discourse centres around the way in which Russia's supposed claim that the traditional values it seeks to protect do not arise from cultural differences already existing in Russia.¹⁶⁸ Wilkinson states that in consideration of persistent homophobia in Russia emanating largely from the State, the traditional values discourse has been used simply as a convenient proxy for homophobic values. These homophobic values, translated as traditional values, are then used by the Kremlin to supposedly align itself with its obligations under international human rights law by providing a *prima facie* legitimate derogation therefrom. Wilkinson terms this moral sovereignty.¹⁶⁹

In other words, Putin has sought to impose the traditional values not from a bottom-up approach, as defined by Russian society, but rather as a top-down approach, defined by the State. This, of course, if we refer back to the definition of relativism simply does not fit with cultural relativism but would instead constitute a flagrant disregard for the obligations Russia holds under International Human Rights law.¹⁷⁰

This critique is not new. Indeed, Gulnaz Sharafutdinova terms the moral sovereignty argument as the Kremlin's 'moral campaign.'¹⁷¹ She uses it to establish that the Kremlin's close influence with the Russian Orthodox Church means that their policies and legislation are closely reflective of a Christian morality. She states that in the face of elections, 'the opposition placed the issues of honesty, civic duty, decency and ethics on the table to which the Kremlin reacted with a more traditionalist message of patriotism, traditional values and morals, appealing to the more conservative electorate,

¹⁶⁸ Wilkinson (n 111)

¹⁶⁹ Christopher Dominey (n 114)

¹⁷⁰ *ibid*

¹⁷¹ Gulnaz Sharafutdinova, 'The Pussy Riot Affair and Putin's Démarche from Sovereign Democracy to Sovereign Morality' (2014) 42 *Nationalities Papers: J of Nationalism and Ethnicity* 615

re-appropriating and re-calibrating the opposition rhetoric into one that would fit the Kremlin's agenda.¹⁷²

In other words, the legislation promulgated by the Kremlin is not necessarily, to fit in with the Resolution's traditional values requirement, representative of Russian society, but rather of the Kremlin's desire to impose its own moral values on the people of Russia.

Indeed, a closer reading of such critiques leads us to the conclusion that the positivist conception of the law as a closed normative arena of social norms emanating from the people and promulgated by the State is potentially merely a cloak for enacting the Kremlin's own moral campaign. If this were the case, we are not faced with a case of cultural relativism vs universalism debate.¹⁷³

Instead, in the presence of a moral campaign, culture is used as power, and a destruction of even the overlapping consensus on values promulgated by Rawls.

The example of the recently passed Russian legislation serves to demonstrate that under the international legal model, the ideology of the government is subject to arbitrary hierarchical value judgments on the nature and quality of what is perceived just or representative of the values that a State's citizens hold.

The issue is further exacerbated in particularly acute cases where the government's ideology promotes extremist values, incompatible with any fundamental notion of what is just. It is inevitable to say that although there is no agreement necessarily regarding what exactly constitutes a fundamental value, it would be a complete misunderstanding of the notion of justice, if it were accepted that simply because a government promulgates their ideology, it must be assigned value. This is particularly relevant in

¹⁷² *ibid*

¹⁷³ Christopher Dominey (n 114)

cases of oppressive regimes where the values pertinent to citizens of a State are not taken into account.

An understanding in this respect is particularly well demonstrated by the case of the Cambodian genocide. In dictator Pol Pot's own words, he asserted that the corpus of norms relating to human rights has 'no relevance' to the Cambodian population.¹⁷⁴ Evidently, this demonstrates vast failings of the international State-centric system to provide any sense of justice to the population through the promulgation of laws.

Equally, another aspect to the State-based model for the provision of justice is that in order to redress the balance where citizen's rights have been violated, there should be accountability and the possibility for citizens to see that 'justice has been done'. This plays to a wider understanding of the concept in the sense that it is expected that the Courts as state should play a role in addressing any imbalances of justice. It advocates a view of correctional justice.

The problem is that when the Courts are State organs and thus are subject to the same ideology that is dominant within a particular State, accountability can also be subject to abuse. Indeed, in States who reject the Westminster model of governance, and thus have not incorporated a separation of powers and thus have no independence of the judiciary the opportunity to redress any imbalance in justice is eliminated. The rule of law for example is normally in place to limit arbitrary decision making by judges. However, this is rendered impossible in these normative environments.

To respect the State-based system of sovereignty, the discourse surrounding immunity of heads of state leading to impunity is heavily littered with methods¹⁷⁵ for circumventing the system to ensure that those who violate

¹⁷⁴ See further Donnelly (n 36)

¹⁷⁵ See for example, Michael David, 'Accountability and World Leadership: Impugning Sovereign Immunity' (1999) U. Ill. L. Rev. 1357 and Frederick Rawski, 'To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations' (2003) 18 Conn. J. Int'l L. 103

principles of justice are held accountable in order to provide some access to justice and disallow those governments that use the State based system to promulgate ideologies undermining the very notion of justice from doing so free from restraint.

For Petersmann, the universal recognition of human rights requires a citizen-oriented ‘constitutionalization’ of the traditional state centered international legal system....Yet it seems obvious that the current international economic and legal order is not sufficiently ‘just’ to be durable.¹⁷⁶ Indeed, the Arendtian tradition although already elaborated upon, clarifies the issue by stating that the reason for which we must take responsibility as an international community for violations committed by State actors is to face up to the human capacity to commit evil acts, and it is therefore the responsibility of all humanity to address those issues.¹⁷⁷

Reductively justice is not a case of good vs evil.¹⁷⁸ This is a far too simplistic understanding of the concept. However, it is a criticism of the State system to allow any State to promulgate an ideology that undermines any concept of equality and fairness, as promulgated by the human rights project.

5.1 Accountability: Attempts to address the justice balance

I have already outlined my understanding that due to the State-centric model of the international system, State authorities are forced into defining a notion of objectivity, in order to provide a stable, equal and fair framework to their citizens.

¹⁷⁶ Petersmann (n 84)

¹⁷⁷ Arendt, *The Origins of Totalitarianism* (n 151) 236

¹⁷⁸ This is often how the notion of justice is seen in Japan. See further Fukuma (n 2)

It is my argument however, that in the face of globalisation and a lack of recourse in situations where the above is not the aim of State authorities, the international community has effectively ‘stepped-up’ the level of objectivity in the global hierarchy. In other words, the level of objectivity is now associated not only with State based view on justice, but equally, in the face of failure, a global objective standard applies.

The issues and dynamics of the human rights project in attempting to promulgate global values have already been discussed in this paper and will not be discussed further. Academic discourse surrounding the human rights project and its attempts to universalise an understanding of human rights is vast.¹⁷⁹

The issue however, is that following a politically liberalist standpoint, the human rights regime is premised on the notion that there exists a common notion of the good that can be applied to all parties. The problems associated with such a premise have already been discussed.

In this respect, the human rights project is not the only framework that has been advanced in the international arena for correcting the imbalance of justice caused by objective standards at the State level. Whether an attempt to redress the balance by providing a global understanding of justice is effective is something that remains to be seen. However, I will in the coming sections, briefly outline and discuss the international methods for using global objectivity to redress the justice balance where States are unable or unwilling to do so themselves.

Marginalising the understanding that the human rights regime seeks to promulgate one notion of justice, it should be not insinuated at any point however that the human rights project is completely unsuccessful in its aims. Indeed, its aim is to create a framework that allows human rights to be operable in achieving justice. It is argued that the world is better off with

¹⁷⁹ See further Dr. Claudio Corradetti’s introduction in Claudio Corradetti, *Relativism and Human Rights: A Theory of Pluralistic Relativism* (Springer 2009) 1-5

such a framework than without such a framework. Several reasons are proposed for such an assertion.

Emilie Hafner-Burton and Kiyoteru Tsutsui maintain that the current framework of human rights is not sufficient to be successful in its aims, however, they provide hegemony for the notion of a human rights framework itself. They state that inter alia, the human rights regime initiates processes and dialogues and provides rules and structure to constrain national sovereignty, however maintain that such a structure will take time to become important to a State.¹⁸⁰

I submit, that the State sponsored ideology, only in very few cases, results in a complete rejection of State ideology, thus leading to a breakdown of society as a whole. However, in the cases that do not reach such cases of severity, we cannot ignore that often a government's ideology is tightly linked to the legal culture existing within a State and thus a level of objective justice transcending that of the State will struggle to engender change. Indeed, in very acute cases Hafner-Burton maintain that 'implementing human rights laws requires not only the political will at home, but also the political capacity.'¹⁸¹

If the human rights project is at its very heart aimed at redressing the balance of equality and justice in a State, paradoxically, the system is failing where there is the most imbalance of justice.

Both Hafner-Burton and Tsutsui maintain that norms of justice rarely become institutionalised through International Law. However, some success may be gained through what they propose to be a process of acculturation. Acculturation is the process by which in the face of uncertainty, States will mimic the actions of other States. Thus, in practice, if the human rights regime provides the framework for acculturation where States whose

¹⁸⁰ Emilie Hafner-Burton and Kiyoteru Tsutsui, 'Justice Lost! The Failure of International Human Rights Law To Matter Where Needed Most' (2007) 44 *Journal of Peace Research* 407

¹⁸¹ *ibid*

territorial neighbours hold better records for adhering to human rights norms, will in some respect begin to mimic the political processes.

I however maintain that this is over simplified and must agree with Hafner-Burton and Tsutsui when they state that ‘socialisation and learning require repeated access to target repressors and many of these actors are likely to be marginalised from participation in human rights institutions, remaining isolated from active process of norm inculcation.’¹⁸² The case of the marginalisation of LGBT rights in Russia serves to demonstrate that this point may even be extended to those States who participate highly in international human rights process, in the ever-perpetuating battle between universalism and cultural relativity.

The only usage that the two previously mentioned authors see for an international human rights regime is to prevent slippage into worse violations.¹⁸³ I submit that this alone demonstrates the need for a major rehaul of the human rights regime in the provision of justice.

5.2 National, regional and global adjudication of justice

As already addressed, the human rights project attempts to a priori redress the justice balance by providing minimum standards that transcend the theoretical boundaries of the nation State by holding their applicability to every individual. The two main issues with the project however, as I submit is that States who are unwilling to adopt the human rights project are under no obligation to do so, thus achieving no effect. And in those States who do adopt the norms of an international objective standard for justice, this can still raise concerns of abuse.

¹⁸² *ibid*

¹⁸³ *ibid*

This is the major failing when the Rawlsian politically liberal account of justice is tested.

Equally, the human rights regime is an attempt at a priori addressing of imbalance in the provision of just laws for a State's citizen. In other words, it addresses a future imbalance in the justice system before violations and marginalisation of group and individual values occur, by providing a framework to ensure that this does not occur. This however represents only one manner in which the international community has attempted to provide a higher level of objectivity.

Secondly, cognitive of the fact that, for the reasons detailed in the previous section, the limits of State sovereignty effectively mean that States may choose to reject or accept international justice-promoting norms into their ideologies, internationally, the system also provides for a post facto addressing of the justice imbalance. Although subject to the same concerns regarding State sovereignty, international and regional adjudication of justice has made tracks into breaking down the sphere of impunity associated with rogue States whose will is not to put into effect the values of their citizens, but rather to systematically destroy the quality of lives of their citizens.

I remain aware that the discussion of international adjudication raises the question of transcendence of different corpuses of norms that require different standards and different practices. Indeed, adjudication of violations of justice is a matter for the body of norms known as International Criminal law, whereas those affecting human rights are referred to as International Human Rights law. However, I reject the *lex specialis maxim*¹⁸⁴ of fragmentation of the international legal system, thus preferring to regard every international norm in the same normative sphere. It is beyond this paper to discuss the controversies concerned with putting norms yielding conflicting results in the same sphere, as this is not the focus.

¹⁸⁴ For a definition, see <http://definitions.uslegal.com/l/lex-specialis/> accessed 23 May 2015

Norms of International law that relate to the adjudication of justice are, in theory, in place to provide a form of correctional justice to ensure that marginalised groups whose values are not accounted for, or are indeed, systematically destroyed, retain representation and have access to accountability against the authorities implementing acute ideologies of justice specifically to their detriment.

Overall, the International Criminal Court¹⁸⁵ and the various regional Human Rights Courts¹⁸⁶ aim to overcome the issues relating to objectivity at the State level, and instead purport to oversee the correct administration of justice in its broadest sense at both international and regional levels. Of course, this does not mean that there has been a rejection of the fundamentalism of State sovereignty, but rather an attempt to promote justice in systems where States are unfairly doing so.

To demonstrate such intervention, Article 13 of the Rome Statute¹⁸⁷ provides for the investigation into a case by the United Nations Security Council, even when States have not become Ratifying Parties of the Statute and reject the notion of the International Court.

Often, reasons cited for the rejection of the adjudication of the international and regional courts is that they promote a Western-based ideology, the concern of which has already been addressed. In this regard, the adjudication of the ICC has been cited as been representative of Western control and as a court for African leaders.¹⁸⁸ Courtenay Griffiths QC maintains that violations committed by Western leaders will ever be adjudicated before the Court.¹⁸⁹ The reasons for which are not in the scope

¹⁸⁵ Hereinafter referred to as the "ICC"

¹⁸⁶ Inter alia, the ECHR and the IACHR.

¹⁸⁷ Rome Statute of the International Criminal Court (adopted 17 July 1998, last amended 2010) UNGA Article 13 (Rome Statute)

¹⁸⁸ Azaliah Mapombere, 'Thoughts On The ICC: What Is "Africa's" Alternative?'

<<http://jushumanis.org/thoughts-on-the-icc-what-is-africas-alternative-azaliah-mapombere/>> accessed 23 May 2015

¹⁸⁹ Courtenay Griffiths QC, 'Solutions To International Law' (Oxford University, 2013)

of this paper, but instead I attempt to provide an overview of the reasons for which an international justice ideology is not always sufficient.

As I have previously stated, my view of the term justice is in its broadest sense; ensuring equality, conditions for autonomous living, and the taking into account of all traditions and ways of life that do not fulfil the conditions necessary to activate the Millian harm principle.¹⁹⁰

For this reason, I permit myself the opportunity to discuss the Courts for the promotion of human rights in the same section as discussion concerning the criminal justice system. The criminal justice system is, as I see it, a way of redressing the balance in more acute cases where violations require penal action, rather than economic or other sanctions.

Similar criticisms have been levelled at these Courts, even by liberalist democracies that seek to implement a notion of justice in accordance with international guidelines. A notable example is the ruling of the European Court of Human Rights that prisoners should be permitted the opportunity to vote.¹⁹¹ The Prime Minister of the United Kingdom made a statement to say that such a ruling is incompatible with the legal culture of the United Kingdom and thus the United Kingdom will not be following the judgment. Despite sanctions imposed, the rule remains as such.¹⁹²

Finally, returning to the justice norms adjudicated by criminal bodies. In serious cases, penal action is required. However, at the highest level of global objectivity, this is not only been permitted as justiciable for the ICC, but these are seen as violations that should be subject to universal jurisdiction. I return once again in favour of the Arendtian view that ‘in one form or another, men must assume responsibility for all crimes committed

¹⁹⁰ David Brink, ‘Mill’s Moral and Political Philosophy’ (*The Stanford Encyclopedia of Philosophy*, Fall 2014) <<http://plato.stanford.edu/entries/mill-moral-political/>> accessed 23 May 2015

¹⁹¹ *Hirst v United Kingdom* [2005] ECHR, 19 BHRC (ECHR)

¹⁹² Dominic Casciani, ‘Prisoners Will Not Get The Vote, Says David Cameron - BBC News’ (*BBC News*, 2015) <<http://www.bbc.co.uk/news/uk-politics-20053244>> accessed 23 May 2015.

by human beings and that all nation share the onus of evil committed by all.¹⁹³

This view represents a primitive understanding of the concept of universal jurisdiction which is an extraterritorial extension of State's jurisdictional claim over a case that has no connecting factor the State itself. Under normal circumstances, jurisdiction can only be claimed under international law if there is a connecting factor to the State claiming jurisdiction; active personality, passive personality or territoriality. In other words, a State must normally have a legitimate interest in prosecuting the violation. For the purposes of our discussion, I am interested in the potential justice value of a claim by a State that has no direct relationship to the State or individual in which the violation has been committed.

There are even efforts to see universal jurisdiction for the worst violations incorporated into the body of customary international law, thus obliging all States to conform regardless of their volition.

In essence, universal jurisdiction represents the ultimate attempt at redressing the balance. It allows any State to prosecute an individual for crimes committed in another State where that State fails or is unwilling to address the concept of justice. If another State deems that its ideology is sufficient to align itself with international justice norms that permit universal jurisdiction, then it is able within that ideology to prosecute the individual in that State. It is applying one State's objective moral criteria to a national of another State.

Currently, universal jurisdiction is called for, for what have been deemed by the international community as the most serious disregards for justice. A controversial departure from the State-centric model of international law, universal jurisdiction provides a corrective control mechanism to address the imbalance.

The strongest case for universal jurisdiction in the provision of justice for instances of slavery is not difficult. It is, both under customary international

¹⁹³ *Hirst v United Kingdom* (n 160)

law condemned as an international crime and has been subject for over 200 years to jurisdiction by any state.

Bassiouni, states the reasons for which, in his article on Enslavement as an International Crime.¹⁹⁴ He looks historically at the Declaration of the Congress of Vienna in 1814 where the crime of slavery was related to piracy. Since then, he states, there have been 47 Conventions from 1874 to 1996 which have related to slavery, He makes it clearer that the case for universal jurisdiction is simpler in the case of slavery related to piracy because evidently, the need for universal prosecution of pirates on the High Seas is clear and defined. In that respect, the same should arguably apply to the case of slavery.¹⁹⁵

Bassiouni then looks further at the case of slavery in terms of the sexual exploitation of persons. He states that in this case, a case for universal jurisdiction can also be easily made out because the exploitation usually takes place on the territory of one state and in the case of trafficking, many states. In this regard, the jurisdictional regime that should apply should allow all states to prosecute due to the nature of the crime.

Finally, Bassioni looks at sexual exploitation in the context of war crimes. In this context, and as we have previously established, the legal regime applying to war crimes should also apply to cases of slavery. In other words, in all relevant treaties, there is a requirement for all signatory States to take effective measures to prevent and suppress slavery.

Bassiouni' states that although a number of societies have considered slavery morally repugnant, it has evolved from a moral offense to an international crime. He states that currently there are 79 instruments relating to slavery internationally.¹⁹⁶

Equally, he looks at the intention of the drafters of each of these instruments and states that the aim, in the early stages was to create universal jurisdiction for slavery.

¹⁹⁴ Mahmoud Cherif Bassiouni, 'Enslavement as an International Crime' (1991) 23 New York University Journal of International Law and Politics 445

¹⁹⁵ *ibid*

¹⁹⁶ *ibid*

Although it may be possible to state that States have sufficient legislative basis to prosecute using stronger bases of jurisdiction, the issue remains however that slavery, in the modern world is manifesting itself in such a way that it is difficult, and indeed would be erroneous to attempt to apply the existing legislative framework to an expanding range of contemporary slavery practice.

Bassiouni uses the case of child trafficking as a seminal example of where there is an effective legislative gap between the jurisdictional regime contained in the legal instruments relating to slavery and the practice in states. He states that States are able to circumvent international instruments by stating that their practice is for the benefit of the children. Indeed, what this means in practice is that there is a lack of legislation and legal mechanisms in the countries where slavery is extremely prominent. The issue, for Bassiouni regards the threshold for the relevant slavery legislation. He makes it clear that the requirement of the international instruments relating to slavery is that of ‘total and physical control by one person over another.’¹⁹⁷ The issue is that these kinds of requirements present an extremely high and unattainable threshold for contemporary cases of slavery where there may not be total control present. In this case, in order for States to be deterred from and effectively unable to circumvent these controls is to subject the crime of slavery to universal jurisdiction. In this respect, even in contemporary practice of slavery, a State that condemns in its entirety any form of slavery would be capable of prosecuting the perpetrators of what has long been considered a crime of international nature and in this respect, produce an objectively just result.

However, the process of creating universal jurisdiction has been based on consensus. For slavery, the level of consensus has been extremely high and the number of international instruments would point to legitimising objectively global morality.

This perhaps is illustrative of a reality where agreement on fundamental rights is acceptable and can be subject to international oversight.

¹⁹⁷ Mahmoud Cherif Bassiouni, *International Criminal Law: Sources, Subjects, and Contents* (3rd edn, Brill 2008) 543

Sonja Boelart-Suominen summarises succinctly the legal basis for a claim of universal jurisdiction.¹⁹⁸ It is imperative to note at this stage that the legal basis for jurisdiction is, as stated by Boelart, is no need for a link such as the nationality of the perpetrator nor for any other connecting factor between the suspect and the country in which the suspect is tried. This is demonstrative of the called for mandatory universal jurisdiction for those who commit grave breaches of the Geneva Conventions.¹⁹⁹ It is equally important to note at this stage that asserting jurisdiction on no other grounds other than the principle of universality will undoubtedly impinge on the sovereignty of the State that would, under normal circumstances claim a more direct basis of jurisdiction. Thus, it is an accepted principle that states should normally consent to universal jurisdiction or for universal jurisdiction to take its basis in legislation, which has become, through State practice and *opinio juris*, accepted as a principle of customary international law. As regards the Geneva Conventions, State practice demonstrates that they are part of customary international law. Thus, the need for consent is, under the current model vitiated by consistent state practice and *opinio juris*.

In other words, agreement has been so high, that a global level of objectivity on the moral criteria for being just in these circumstances is classed as agreed upon.

In order to address issues with State sovereignty, I will discuss an interesting theory that seeks to demonstrate that universal jurisdiction does not undermine the current system.

Anthony Sammons' article discusses the proposal that the principle of universal jurisdiction has indeed been under-theorised, which has indeed led to a loss of legitimacy in its application.

¹⁹⁸ Sonja Boelart-Suominen, 'Grave Breaches, Universal Jurisdiction and Internal Armed Conflicts: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for all Armed Conflicts?' (2000) 5 *Journal of Conflict and Security Law* 63

¹⁹⁹ International Committee of the Red Cross, Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949) 75 UNTS 287 (Geneva Conventions)

Sammons refers to the sheer quantity of war criminals, as an example, as illustrative of the need for national courts to retain jurisdiction, because a State is not acting correctively if it fails to redress the imbalance of justice in serious cases. Therefore, in order to legitimise the application of the principle, Sammons describes state sovereignty as analogous to a bundle of sticks. In other words, sovereignty is an amalgamation of rights.²⁰⁰

He claims that states are increasingly subject to international validation of their government²⁰¹ and that due to international law which imposes obligations that a state must meet continuously in order to maintain legitimacy under the international system. He qualifies this further by stating that the norms that recognise a State's sovereign rights with regard to the internal population are not absolute, which in turn implies that States are always subject to international oversight.²⁰²

Sammons places the idea of sovereignty within the context of transferable authority; if sovereignty is able to pass from one state to another as occurred to German sovereignty after World War II, then that sovereignty should be able to pass to the international community. Within the bundle of sticks analogy previously alleged, criminal justice as a concept is a notion that can also be passed internationally.

The reason, without such international intervention, is that war criminals are able to take advantage of fora where there is an absence of a legitimate criminal justice system that can or will prosecute their actions; a criticism I have already stated to be represented in the current model of International law.

In the face of the unlikelihood of prosecution, Sammons claims that the State ceases to act like a true sovereign and therefore its territory becomes analogous to terra nullius²⁰³. He claims that this is the exact basis of the lack of evolution of the principle. He states that most commentators in response

²⁰⁰ Anthony Sammons, 'The Under-Theorization of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts' (2003) 21 Berkeley Journal of International Law 111

²⁰¹ In this case of this paper, the government's justice based ideology.

²⁰² *ibid*

²⁰³ *ibid*

to the question as to the reasons for the existence of universal jurisdiction claim that it is because of the nature of the crime, which effectively, makes little sense.

Instead, as Sammons states, universal jurisdiction arises from a State's incapacity to punish the perpetrators themselves, thus it is not the heinous nature of the crime which is the basis of universal jurisdiction but rather that that aspect of state's sovereignty has been passed to the international community and in that respect, the remaining vacuum is analogous to terra nullius.²⁰⁴

He continues to state that conceding a part of sovereignty to international mechanisms seems logical. Indeed, it is commonly accepted that when a state cannot meet its obligations vis-à-vis its citizens, those citizens have the right to ask the international community. This would be an effective way of addressing justice imbalances. Thus, according to Sammons, for the principle to function correctly, its basis must arise from the terra nullius basis required for piracy.

The word heinous for Sammons therefore is only a factor that indicates a transfer of sovereignty and acts as a barometer.²⁰⁵ For example, the reason for which crimes classified as Jus Cogens norms are classified as such is because they threaten all mankind, are peremptory and are therefore higher on the barometer. In other words, where the threat to justice is higher, the argument for a transfer of sovereignty to the international community is also higher.

If it can be accepted that the right to universal jurisdiction belongs squarely to the international community, it is arguable that when a State proceeds with prosecution, it acts as the de facto agent for the international community. In this respect, the idea of objective ideology is seen to be split. A State can objectively promote its own ideology, but citizens have the ability to enact correctional justice through accountability by looking to an international objectivity transcending the justice system of the State, when their idea of morality is systematically destroyed.

²⁰⁴ Where territory does not belong to a State, any State can assert jurisdiction. See further; <http://definitions.uslegal.com/t/terra-nullius/>

²⁰⁵ Sammons (n 199)

Of course, this is only applicable where the violation of individual values is so high, that the only way to address the justice imbalance is to enact penal sanctions.

As previously stated, however, the concept of universal jurisdiction, as well as international adjudication in general represents a post facto correction of justice misalignment, which is not the aim of this paper.

The aim of this paper was to present a tool from which just laws could be promulgated in a distributive sense, rather than a correctional sense.

Justice in this sense should not constitute an ‘afterthought’ where tools for justice only are applicable after justice violations have been committed.

6 Answering the Justice Problem

Before I discuss a possible conclusion, albeit incomplete, I will advance the theory that I find most suited to answering the questions that this paper has inevitably given rise to. I remain faithful to my assertion that we need to move away from the universality and cultural relativism debate, according weight to Cass Sunstein's argument that we cannot find consensus in a world where there is so much dissent.²⁰⁶ I instead advocate a much wider reading of universalism. A universalism where, faced with the realities of a State-centric justice system, we are forced to concede some form of objectivity to moral choices in our behaviour towards each other in order to function as society.

Continued debate on universalist against culturally relevant versions of justice does nothing to add to debate. It is for that reason that I find Sunstein's critique of Rawls and proposal of a theory of incomplete theorisation of justice to be most attractive.²⁰⁷

I have demonstrated in this paper, that there is vast academic and political discourse surrounding how best to ensure our society is just, and because of its pertinence, academics and practitioners alike have poured over usefulness and quality in determining arguments that allow us to be more just in the way each State governs society. I have demonstrated, in effect that the theory to which we subscribe is too much. It effectively over-theorises the concept.²⁰⁸

²⁰⁶ Sunstein (n 19)

²⁰⁷ *ibid*

²⁰⁸ Over-theorisation in contrast to Sunstein's proposal of under-theorisation.

In his work on incomplete theorisation, Sunstein advances the view that we must have an overall framework that allows us to take into account cultural differences but at the same time does not try to find a point of convergence on each of the differences that we encounter. In Sunstein's own words, 'incomplete theorisation is at a practical and moral level more suited to a world of diverse plurality.'²⁰⁹ His comparison is made to complete theories. The Rawlsian understanding of justice for example, is a complete theory because it attempts to answer every question posed, and in doing, so is forced into the abstract.

Judges, he says, already work in this manner. They don't take into account every principle and theory as that would be impossible. Instead they work on the basis of agreed principles.

In Langlois's critique of Rawls and Sunstein, he makes the assertion that 'justice is done by recognising the impossibility of a utopian original position, and instead we should strive for virtuous political opinion.'²¹⁰

This is liberalism in its most modern form.

For Sunstein, an incomplete theory of justice does exactly what it says on the tin. It allows flexibility without have to find commensurability on every single point of difference. He says, 'When the authoritative rationale for the result is disconnected from abstract theories of the good, or the right, the losers can submit to legal obligations, even if reluctantly without forced to renounce their largest ideals.' And in comparison to complete theories, Sunstein argues that 'incomplete theorisation is the way in which a society deals with moral and ethical issues, such developments are able to occur without having to shatter a rigid and calcified theoretical structure at each juncture.'²¹¹ Complete theorisation, he argues means that every particularity must be derived from a total theory.

²⁰⁹ Sunstein (n 19)

²¹⁰ Langlois (n 15) 11

²¹¹ Sunstein (n 19)

Although prima facie, it seems that Sunstein's theory looks towards finding a common good, he explains that his theory is very different from the Rawlsian tradition. His theory where there is disagreement prefers to move towards particularity, attempting to obtain a consensus on a concrete outcome among people who do not want to turn to political philosophy. The Rawlsian tradition however asks us to look more into the abstract when there is disagreement. I have demonstrated that his usage of overlapping consensus and due reflection aim to circumvent disagreement. This is not what Sunstein's theory advocates.

Although Sunstein's theory is undoubtedly persuasive, Langlois is correct when he notes that even in incomplete theorisation, the fact remains that people will still not agree on the particularities of behaviour, which could pose a major problem in any reconceptualisation of justice.²¹²

The problem of cultural diversity remains. Historically, cultural diversity both domestic and inter-state has always been an intrinsic aspect in understanding the nature of a domestic legal system. In court cases, the identity of the litigant was relevant as the judge could apply different rules depending on the identity and personality of the person before him.²¹³ The destruction of the multi-normative approach and the resulting modern centralist approach to law has developed largely where a unified law became the crucial component for the building of a nation state. Justifiably therefore a modern day centralised state based system of law isn't able to perform all the functions required of it.²¹⁴

Moving away from State-based objective criteria for justice and looking to another normative system, as David Nelken argues, can perform the beneficial task of highlighting justice faults in one own legal system.²¹⁵ In

²¹² Langlois (n 15) 171

²¹³ Maleiha Malik, 'Minority Legal Orders in the UK: Minorities, Pluralism and the Law' (2012) British Academy for the Humanities and Social Sciences

²¹⁴ *ibid*

²¹⁵ David Nelken, "'Comparative Sociology of Law'" in M Travers and R Benakar (eds), *Introduction to Law and Social Theory* (Oxford, 2002) 329-344

other words observing another culture's criteria for, and implementation of legal norms can reveal vast amounts about the legal system itself, and perhaps more favourably, can invariably reveal lacunae in the host nation's own system of justice regulation. However, what is essential for Nelken, is that the method of comparison not be reductive in nature.²¹⁶ A simple, yet crude method of comparison, which Nelken terms as functional equivalence²¹⁷, wrongly assumes that the observer from one legal system can look to another legal system and without detailed reflection, be capable of recognising the similarities and differences let alone go as far as understanding what it is that is distinctive about legal norms in the observed State.

This is an example of where complete theorisation at a level higher than the State based model leads to failure.

It should be recognised therefore that we must move away from over theorising a notion of justice. We do not live in a reality whereby there can be an original position, where our attributes can be fairly divided or where every single tradition and culture can be represented. For this reason, I support that the first criteria for reconceptualising a notion of justice should be the notion of **pragmatism**. We need to make justice a tool to be useful for States, rather than an artefact that is premised on impossible theory.

Rawlsian theory is undoubtedly useful. He makes an attempt to provide us with an accurate narrative of attempting to find convergence in a morally divided world.

In this respect, in a liberal society, there seems to be no authoritative way of reconciling liberty and equality. In other words, there is not only one conception of morality but rather various incommensurable values. If there, it can be agreed upon that these values cannot be realised at the same, it must lead us to the understanding that the Finnis' perfect instantiation of 'just' law does not exist as there will always be collisions between the values that people hold important.

²¹⁶ *ibid* 330-335

²¹⁷ *ibid*

However, **morality** is, in my opinion, also a key aspect to the reconceptualization of justice. Without it, we can say that unjust law in the positivist sense is valid. Justice has a lot to do with morality. If it did not, oppressive dictatorships can be legitimised. We require some form of morally evaluative criteria in order to establish a law is just. However, it would be more coherent to make a claim that there is no moral truth but instead preferences that are relative to each culture.

However pragmatic we remain however, I still maintain that we must strive to move away from the **State dominated system** for providing justice. Groups whose values are destroyed simply have no recourse to ensuring their traditions or ideologies are represented. We must move away from the presupposition as territoriality that reductively requires States to promote one ideology in order to maintain stability.

For that reason, I feel that some international concept of justice should maintain its force. If that is to be in the form of human rights, under theorising would ensure that a framework be made operable in order to ensure the workability of the human rights regime without overstepping relativist limits.

In promoting international intervention, we must not either reductively state that each tradition's ideologies are incommensurate with another tradition's. Through toleration, we simply ARE able to agree on the basic fundamentals that make a States ideology just. We must not fall into the trap of irrational nationalism²¹⁸ where values we stereotypically associate with a State become the control mechanism to halt any agreement.

²¹⁸ Hans Rosling, 'Hans Rosling: 'No Such Thing As Swedish Values' - The Local' (*TheLocal.se*, 2015) <<http://www.thelocal.se/20150513/hans-rosling-im-an-ambassador-for-the-world-in-sweden-connectsweden-tlccu>> accessed 23 May 2015

It is for that reason that I propose that in any **international objective standard**, it must not be overbearing. For this reason I find Sunstein's theory most useful. The international objective standard must act merely as a control mechanism for arbitrary uses of State centric power to enact a certain moral sovereignty. Sunstein's theory allows us to create this framework of agreed norms and still maintain some manoeuvrability in terms of not disavowing groups or traditions of having their traditions take into account. Indeed, an a priori system of overview that allows us to decide different levels of objectivity, such as the post facto system of universal jurisdiction would be useful, allowing us to intervene where a State ideology is destructive.

We must equally, avoid arbitrariness. Not every tradition should be assigned value. To do so, as I have previously stated would be to undermine a useful theory of justice. For that reason, **flexibility** is another key aspect of redefining a notion of justice. It must be capable of taking into account changes in the way groups and traditions are viewed to enable our lawmakers to provide the best conditions possible for groups of individuals to live together in a cohesive society.

7 Concluding Remarks

To make any conclusion, must be considered whether it is even possible to answer the problem postulated at the beginning of this paper. Are we even in a position, empirically to redesign a notion of justice so global that it can be applied to each and every culture, but at the same time ensure that the individual legal culture of each society is respected and maintained. It is, as I have submitted, a task incapable of achievement in a relatively short discussion on the merits of the current theoretical and empirical questions surrounding the best and most effective method for providing a just system for each country.

Any reconceptualisation of a theory of justice however should be about equality, fairness, stability and allowing for cultures where we tolerate each other on the points we don't converge and let the points of agreement form the basis of an minimum international normative framework on which we can agree, and which oppressive regimes can use as a tool for change. We must also implement effective correctional mechanisms for when the framework on which we agree are not adhered to. It is only through achieving these goals will we be able to ensure that our system remains just but not overbearing, allowing each individual to live his life in a way that his sense of justice; the sense that I spoke about in the opening lines of this paper can be respected, ensured, and ultimately maintained. In a world where the importance of providing a just and society in which we live is paramount, surely ensuring some sort of overall common control of that can only be a positive and useful advancement.

Bibliography

Cases

Hirst v United Kingdom [2005] ECHR, 19 BHRC (ECHR)

Loizidou v Turkey [1996] ECHR, 23 EHRR (ECHR)

United Nations Documents

Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

United Nations, Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI (UN Charter)

United Nations Human Rights Council Resolution 21/3, Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind: best practices, (adopted 5 December 2013) UN Doc A/HRC/RES/21/3

Resolution on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res 60/147, (16 December 2005) GAOR 60th Session Supp 14 UN Doc A/RES/60/147

Treaties

International Committee of the Red Cross, Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949) 75 UNTS 287 (Geneva Conventions)

The Montevideo Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19 (1933) [hereinafter Montevideo Convention].

Rome Statute of the International Criminal Court (adopted 17 July 1998, last amended 2010) UNGA Article 13 (Rome Statute)

Legislation

UK Arbitration Act 1996, s 1

Books

An-Na'im A, *Islam and Human Rights* (Mashood A. Baderin ed, Ashgate 2010) 3-20

- Arendt H, *The Origins of Totalitarianism* (Mariner Publishing 1973)
 -- -- *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books 1963)
- Bassiouni M C, *International Criminal Law: Sources, Subjects, and Contents* (3rd edn, Brill 2008)
- Birmingham P, *Hannah Arendt and Human Rights: The Predicament of Common Responsibility*, (Indiana University Press 2006)
- Bix B, *Jurisprudence Theory and Context* (Sweet and Maxwell 2012)
- Brown C, *Sovereignty, rights and justice: international political theory today* (CUP 2002)
- Corradetti C, *Relativism and Human Rights: A Theory of Pluralistic Relativism* (Springer 2009)
- Driver J, *Uneasy Virtue* (CUP 2007)
- Dworkin R, *Law's Empire* (Hart Publishing 1998)
- Finnis J, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2001)
- Hayek F, *Law Legislation and Liberty, Volume 2: The Mirage of Social Justice* (vol. 2 Routledge and Kegan Paul 1976)
- Kant I, *Groundwork For The Metaphysics Of Morals* (Allen W Wood tr, 1st edn, Yale University Press 2002)
- Kukathas C and Pettit P, *Rawls: A Theory of Justice and its Critics* (Blackwell 1995)
- Langlois A J, *The Politics of Justice and Human Rights* (Cambridge University Press 2001)
- Merry S, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press 2006)
- Nelken D, "Comparative Sociology of Law" in M Travers and R Benakar (eds), *Introduction to Law and Social Theory* (Oxford, 2002) 329-344
- Pogge T, *John Rawls: his Life and Theory of Justice* (Oxford University Press 2007)
- Rawls J, *The Law of Peoples* (Harvard University Press 1999)
 -- -- *A Theory of Justice* (Harvard University Press 1971)

-- -- *Political Liberalism* (Columbia University Press 2005)
-- -- *Justice as Fairness: A Restatement* ed. Erin Kelly (Harvard University Press 2001)

Raz J, *The Morality of Freedom* (Oxford 1986)
-- -- *The Authority of Law* (Oxford 2009)

Somers M, *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights* (CUP 2008)

Taylor R, *Reconstructing Rawls: The Kantian Foundations of Justice as Fairness*, (Pennsylvania State University Press 2011)

Journal Articles

Ball C, 'The Proper Role of Morality in State Policies on Sexual Orientation and Intimate Relationships', (2011) 35 *New York University Review of Law and Social Change* 81

Baumeister R and Leary M, 'The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation' (1995) 117 *Psychological Bulletin* 497

Bassiouni M. C, 'Enslavement as an International Crime' (1991) 23 *New York University Journal of International Law and Politics* 445

Boelart-Suominen S, 'Grave Breaches, Universal Jurisdiction and Internal Armed Conflicts: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for all Armed Conflicts?' (2000) 5 *Journal of Conflict and Security Law* 63

Burchell D, 'The Disciplined Citizen: Thomas Hobbes, Neostoicism and the Critique of Classical Citizenship' (1999) 45 *Australian Journal of Politics & History* 506.

David M, 'Accountability and World Leadership: Impugning Sovereign Immunity' (1999) *U. Ill. L. Rev.* 1357

Donnelly J, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) 76 *The American Political Science Review*

Estlund D, 'The insularity of the reasonable: Why political liberalism must admit the truth' (1998) 108 *Ethics* 252

Fabre C and Miller D, 'Justice and Culture: Rawls, Sen, Nussbaum and O'Neill' (2003) 1 *Political Studies Review* 4

- Freeman M, 'The Morality Of Cultural Pluralism' (1995) 3 International Journal Of Children's Rights 1
- Fukuma S, 'Rawls in Japan: A Brief Sketch of the Reception of John Rawls' Philosophy' (2014) 64:4 Philosophy East and West 887
- Galston W, 'Pluralism and Social Unity [1989] 99 4 Ethics 711
- Gordon J, 'John Stuart Mill and the "Marketplace of Ideas"' (1997) 23 Social Theory and Practice 235
- Hafner-Burton E and Tsutsui K, 'Justice Lost! The Failure of International Human Rights Law To Matter Where Needed Most' (2007) 44 Journal of Peace Research 407
- Hannam H, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995) 25 Ga. J International and Comparative Law 287
- Kahn-Fogel N, 'Western Universalism and African Homosexualities' (2009) 15 Oregon Review of International Law 315
- Kaufman A, 'Rawls's Practical Conception of Justice: Opinion, Tradition and Objectivity in Political Liberalism' (2006) 3 Journal of Moral Philosophy 23
- Lamont W D, 'Justice: Distributive and Corrective' (1941) 16 The Journal of the British Institute of Philosophy 3
- Lister A, 'The "Mirage" of Social Justice: Hayek Against (and For) Rawls' (2013) 25 Critical Review: A Journal of Politics and Society 409
- Malik M, 'Minority Legal Orders in the UK: Minorities, Pluralism and the Law' (2012) British Academy for the Humanities and Social Sciences
- Maret R, 'Mind the Gap: The Equality Bill and Shari'a Arbitration in the United Kingdom', (2013) 36 Boston College International and Comparative Law Review 1
- Mason A, 'Citizenship and Justice' (2011) 10 Politics, Philosophy and Economics 263
- Peczenik A, 'Law, Morality, Coherence and Truth' (2007) 7 Ratio Juris 146
- Petersmann E, 'Theories of Justice, Human Rights, and the Constitution of International Markets' (2004) 37 Loy. L. A. L. Rev 407
- Rawski F, 'To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations' (2003) 18 Conn. J. Int'l L. 103

Rehmann J, 'The Shari'a, Islamic Family Laws and International Human Rights Law' (2007) 21 *International Journal of Law, Policy and the Family* 108

Sammons A, 'The Under-Theorization of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts' (2003) 21 *Berkeley Journal of International Law* 111

Sharafutdinova G, 'The Pussy Riot Affair and Putin's Démarche from Sovereign Democracy to Sovereign Morality' (2014) 42 *Nationalities Papers: J of Nationalism and Ethnicity* 615

Shigeaki T, 'John Rawls theory of "Justice as Fairness' (1973) *The Annals of Legal Philosophy*.

Sunstein C, 'Incompletely Theorized Agreements' [1995] 108 *Harvard Law Review* 1733

-- -- 'Incompletely Theorized Agreements in Constitutional Law' (2007) 74 *Social Research* 1

Takashi K, 'Beyond utilitarianism: An introduction to the study of John Rawls' A Theory of Justice' (1985) 18 *Bulletin of Atomi University*

Wilkinson C, 'Putting "Traditional Values" Into Practice: The Rise and Contestation of Anti Homopropaganda Laws in Russia', 13:3 *Journal of Human Rights* 363

Yilmaz I, 'The Challenge of Post-Modern Legality and Muslim Legal Pluralism in England' (2002) 28 *Journal of Ethnic and Migration Studies* 343

Websites

Brink D, 'Mill's Moral and Political Philosophy' (*The Stanford Encyclopedia of Philosophy*, Fall 2014) <<http://plato.stanford.edu/entries/mill-moral-political/>> accessed 23 May 2015

Casciani D, 'Prisoners Will Not Get The Vote, Says David Cameron - BBC News' (*BBC News*, 2015) <<http://www.bbc.co.uk/news/uk-politics-20053244>> accessed 23 May 2015

Freeman S, 'Original Position' (*The Stanford Encyclopedia of Philosophy*, Summer 2014) <<http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=original-position>> accessed 20 May 2015

Global Policy Forum, 'Cultural Relativism vs Universalism' (*Global Policy Forum*) < <https://www.globalpolicy.org/home/163-general/29441.html>> accessed 23 May 2015

Gordon D, 'Going off on the Rawls' (*American Observer*, 28 July 2008) < <http://www.theamericanconservative.com/articles/going-off-the-rawls/>> accessed 23 May 2015

Johnson R, 'Kant's Moral Philosophy' (*The Stanford Encyclopedia of Philosophy*, Summer 2014) < plato.stanford.edu/archives/sum2014/entries/kant-moral/> accessed 20 May 2015

Global Policy Forum, 'Cultural Relativism vs Universalism' (*Global Policy Forum*) < <https://www.globalpolicy.org/home/163-general/29441.html>> accessed 23 May 2015

Rosling H, 'Hans Rosling: 'No Such Thing As Swedish Values' - The Local' (*TheLocal.se*, 2015) <<http://www.thelocal.se/20150513/hans-rosling-im-an-ambassador-for-the-world-in-sweden-connectsweden-tlccu>> accessed 23 May 2015

Unpublished Lectures

Griffiths C, 'Solutions To International Law' (Oxford University, 2013)

Kletzer C, 'Liberalism And Its Discontents' (King's College London, 2013)

Malik M, 'Dworkin And The Law' (King's College London, 2012)

Plant R, 'Liberal Government: Justice' (King's College London, 2013)

Unpublished Essays

Dominey C, 'LGBT And The Rights Of The Child: To What Extent Does Resolution 21/3 Of The United Nations Human Rights Council Make Room For State-Oriented Bias In The Balancing Of State And Individual Interests?' (LLM, Lund University)

Dominey C, 'Compatibility Of Gender And Other Provisions In Islamic Shari'a Law And International Human Rights Law Operating With A Liberal Paradigm' (LLM, Lund University)

Magazine Articles

Glazer S, 'Sharia Controversy: Is there a place for Islamic law in Western countries?' *CQ Global Researcher* vol. 6 (1) (3 January 2012)

Newspaper Articles

Wagner J, 'Islamic Justice in Europe: 'It's Often a Dictate of Power' (*Der Spiegel Online*, 1 September 2011)

<<http://www.spiegel.de/international/germany/islamic-justice-in-europe-it-s-often-a-dictate-of-power-a-783843.html>> accessed 23 May 2015

Blog Articles

Mapombere A, 'Thoughts On The ICC: What Is “Africa’s” Alternative?'

<<http://jushumanis.org/thoughts-on-the-icc-what-is-africas-alternative-azaliah-mapombere/>> accessed 23 May 2015.