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Michał RUPNIEWSKI*
https://orcid.org/0000-0002-1701-5204

LAW AS JUSTICE? RAWLSIAN FOUNDATIONS OF NON-POSITIVISM[1]

Abstract

Background: This paper offers an interpretation of John Rawls's philosophy as applied to jurisprudence.
Research purpose: The purpose is to interpret the ideal of the original position as a device of non-positivist jurisprudence, which help us to better understand the theoretical bond between justice and law, as well as make a case for non-positivism.
Methods: Analytical jurisprudence, conceptual analysis, reflective equilibrium
Conclusions: The paper argues that Rawlsian original position can be applied in constructing a non-positivist conception of law, and that within the Rawlsian scheme moral considerations are indispensable when determining legal validity.

Keywords: John Rawls, non-positivism, jurisprudence.

1. Introduction

What is the role of justice in the domain of law? Is justice simply an attractive political ideal that may (or may not) be pursued through law-making, or is it, perhaps, an intrinsic element of laws themselves? Is the validity of laws always affected by some ideal principles of justice, or does it depend solely on the contingency of social facts? A variety of answers has been given to these questions, either in political philosophy or in jurisprudence. What seems to be missing, however, especially in the contemporary times of extreme specialization, is a *genuine dialogue* between the two mentioned disciplines. Obviously,

* PhD, University of Lodz, Faculty of Law and Administration, The Department of Political and Legal Doctrines; e-mail: mrupniewski@wpia.uni.lodz.pl

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a number of great contemporary thinkers have tried to integrate political philosophy and jurisprudence into one cohesive theoretical framework[2]. What is much more rarely observed, however, is the readiness to obtain genuinely new insights about law from a political philosophy *sans* jurisprudence, such as found in the thinking of John Rawls. In this paper, I will achieve this by examining John Rawls's methodological approach to justice, which is both political and philosophical in nature. My study will be guided by the underlying query of how Rawls could be situated within, and how he could more directly contribute to, existing jurisprudential debates.

The main issue analysed in the paper is therefore *the nature of the bonds between justice and law, according to Rawls' theory applied to jurisprudence*[3]. More precisely, I will attempt to examine how Rawls should be situated among the three jurisprudential schools: legal positivism, classical natural law theory, and non-positivism. The boundaries between these schools are blurry and open to argument, therefore the paper starts with an explication what, for the limited purposes of this discussion, is meant by the labels used (Section 2). Once this has been done, a brief outline of the two alternative paths of interpreting Rawls is provided, namely, the positivist and the non-positivist ones (Section 3). This paper argues for the latter, chiefly at the *conceptual* level. Namely, it is argued that the concept of law and the concept of justice have a certain affinity toward each other, which can be shown by interpreting Rawls's idea of the original position. As a further result of this, the legal point of view can be shown as not fundamentally different from the moral point of view, taken up by the parties to the original position. In this sense, the latter may be regarded as a device of non-positivistic jurisprudence (Section 4). The paper's thesis is that the Rawlsian original position can be applied to construct a non-positivist conception of law, and that within the Rawlsian scheme moral considerations are indispensable when determining legal validity.

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[2] To name just one example, Ronald Dworkin depicted his theory as a unified 'tree structure' of moral-political-legal web of interpretative concepts. **R. Dworkin**, *Justice for Hedgehogs*, Harvard University Press, Cambridge, MA 2011, p. 405.

[3] I assume at least some general acquaintance with Rawls's theory on the side of the reader. An instructive introduction can be found in **K. Kędziora**, *John Rawls. Uzasadnienie, sprawiedliwość i rozum publiczny*, Wydawnictwo Uniwersytetu Łódzkiego, Łódź 2019.

2. Isolating the three jurisprudential standpoints

Legal positivism will be understood as a theory claiming that in order to determine the content of a norm, legally valid in a given situation, one should ultimately appeal to its sources, rather than to its merits[4]. That makes one perceive the law as a social, empirical phenomenon. In contrast to that, *classical natural law theory* claims that the law is 'an ordination of reason for the common good by one who has the care of the community, and promulgated'[5]. While it does not automatically entail radical opposition to legal positivism (law's 'promulgation' entails that it is posited), the classical natural law arguably perceives the very validity of legal norms as fundamentally bound with moral standards of justice, determined by human good or comprehensive fulfilment. This means that law is both social and *intrinsically moral* in nature.

These two alternative approaches yield two quite different perspectives on determining *what the law is*. Insofar as human good and justice belong to the *merits* of law (and not its sources), positivists perceive legal validity as ultimately independent from human good and justice (or, more broadly, from moral value). I say *ultimately,* because some positivists, known as inclusive positivists, accept moral considerations as determinants of the content of valid law. However, these moral considerations are conditioned by some further social facts (behaviour of officials or legislators), that is, by their social sources[6]. For a classical natural lawyer, to the opposite, the question of what is the law binding in a case is inseparable from the issue of *what is the human good or fulfilment in question*. According to John Finnis, for example, the law (at least in the focal sense) is valid not only because it was once made, or has been recognized, but also because it 'consist of rules and principles closely corresponding to requirements of practical reason' that is, with basic human values[7]. In this sense, one may say that while legal positivism *separates* law from morality[8], the classical natural law theory *connects* the two spheres in a particularly strong way.

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4 **J. Gardner**, *Legal Positivism: 5 and ½ Myths*, The American Journal of Jurisprudence 2001/46, p. 199.

5 **Th. Aquinas**, *Treatise on Law*, Hackett Publishing Company, Indianapolis and Cambridge 2000, p. 6

6 **D. Lyons**, *Review: Principles, Positivism, and Legal Theory*, The Yale Law Journal 1977/87 (2), p. 425.

7 **J. Finnis**, *Natural Law and Natural Rights*, Oxford University Press, Oxford 2011, p. 282.

8 Gardner emphasizes that legal positivists do not deny that there is some necessary connection between law and morality (one of them being that the sole generality of law, by treating like

However, the above distinction does not exhaust possible further options. One may find approaches that repudiate the positivistic commitment to the ultimately social character of the law's validity, but at the same time do not adhere to the straightforward connection between law and basic human values or fulfilment, in the way the classical natural law theory does. Instead, this 'third way' focuses on *legal reasoning*, striving to proof that the questions concerning law's validity ultimately involve moral considerations. The latter, however, do not depend on *ethical* theories about the good of human persons, but rather on ideals and values of *public morality*, such as justice, rule of law, freedom, or equality[9]. For the purposes of this paper, such approaches will be referred to as *non-positivism*. Non-positivism may be explicated as a reversal of inclusive legal positivism. Inclusive positivists allow incorporation of moral values into the law in some cases, but claim that this is contingent, and that at the end of the day law's validity is rooted in social sources. Non-positivist think the opposite way – while there may be laws that derive their validity solely from other, higher laws, officials' decisions (or other relevant social facts), the *moral merits, or moral correctness* of these higher laws or social facts are among the ultimate reasons for the law's validity. Although social facts are indispensable for the law to emerge, one ultimately finds 'the effect on legal validity that stems from moral defects or demerits …'[10]. The chief proponent of this kind of a theory is Robert Alexy, from whom I have just quoted. According to Alexy, the commitment that positivists have to social sources of law makes their account

cases alike, has some resemblance to justice, **J. Gardner**, *Legal Positivism…* p. 223). Still, the *sphere of aims that law may have* is certainly sharply separated from *the sources of legal validity*, according to positivism. As Scott Shapiro puts it: "Regardless of the merits, the law is just what certain people think, intend, claim, and do around here" (**S. Shapiro**, *Legality*, Harvard University Press, Cambridge, MA and London 2011, p. 118). And he endorses this view despite claiming that it is constitutive of law to have moral aims – that at the very root of legality there lays a need to respond to moral problems that arise in non-legal social activities (*Ibidem*, pp. 212–214).

9 The contention that the ideal of the rule of law is "inherently moral" has been contested (**M. Kramer**, *On the Moral Status of the Rule of Law*, The Cambridge Law Journal 2004/63 (1), pp. 65–97. The argumentation for the moral essence of the rule of law offered by Simmonds seems sufficiently compelling for our purposes – according to Simmonds, the rule of law imposes certain constraints of action that a straightforwardly immoral or wicked regime would not have any reason to respect. Analogically, one may argue that the general ideal of the rule of law imposes certain requirements that cannot be kept by fundamentally wicked or twisted laws (**N.E. Simmonds**, *Straightforwardly False: The Collapse Of Kramer's Positivism*, The Cambridge Law Journal 2004/63 (1), pp. 98–131.

10 **R. Alexy**, *On the Concept and the Nature of Law*, Ratio Juris 2008/32 (3), p. 287.

merely fact-oriented, that is, explaining legal activity in terms of social facts only. In Alexy's view, while those *factual* elements are necessary, they do not exhaust the vital elements of law's nature, which has also an *ideal* dimension. Alexy argues that from within – from what he calls 'the participant's perspective' – one simply cannot escape interpreting the law in a way that includes moral considerations[11].

The non-positivistic reliance on moral merits determining law's validity, in a manner detached from ethical presuppositions about the good of the persons (as present in the classical natural law theory), seems to be shared by a variety of thinkers, despite large differences they may otherwise have. For instance, Dworkin's interpretativism[12], or even some versions of (inclusive) legal positivism, can be regarded as further instances of non-positivism, to the extent to which they perceive public morality as an indispensable component of determining the content of the law. For instance, the self-proclaimed inclusive positivist theory of W.J. Waluchow seems to be in fact non-positivistic, insofar as it contends that 'the very meaning or content of our laws is to some extent based on considerations of public morality'[13]. Despite possibly remaining ambiguities or borderline cases, I will not push the issue of demarcation between the three schools any further. What is vital for our discussion is that there is a possible third standpoint between the strong positivist commitment to the ultimate character of social sources on the one hand, and the classical natural law theory (heavily dependent on an ethical theory of the human good and fulfilment) on the other. Insofar as justice is part of public morality, as well as a content-related moral merit of law, it is included as one of the 'ideal' determinants of legal validity. I will rely on Alexy as a paradigm case of non-positivism so understood.

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11 **R. Alexy**, *The Argument from Injustice: A Reply to Legal Positivism*, Oxford University Press, Oxford 2004, pp. 35–68.

12 **R. Dworkin**, *Law's Empire*, Harvard University Press, Cambridge, MA 1986.

13 **W.J. Waluchow**, *Inclusive Legal Positivism*, Oxford University Press, Oxford 1994. pp. 232–233. Another problematic case is that of the influential Scottish philosopher N. MacCormick. As Michał Sopiński rightly points out, MacCormick's focus on legal reasoning led him from Hartian legal positivism towards some acceptance of Dworkin's interpretivism (**M. Sopiński**, *Ewolucja teorii rozumowania prawniczego Neila MacCormicka*, Archiwum Filozofii Prawa i Filozofii Społecznej 2019/1, p. 72).

3. Two alternative jurisprudential interpretations of Rawls

Let us now come back to our main issue, which is how the philosophy of Rawls may be situated within, as well as contribute to, jurisprudential debates. Rawls' theory of justice, likewise his account of political liberalism, did not discuss these problems in depth, so there is certainly room for different interpretations. Roughly, Rawls' theory of justice is just that, and despite some general remarks about the rule of law[14], or the theory of civil disobedience[15], one simply cannot say that he takes an explicit stance in jurisprudential controversies. His tentative definition of a legal system goes as follows:

> A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled[16].

In my view, while this definition does not seem controversial (almost all takes on the concept of law would be able to incorporate it in some form), Rawls's theory as a whole urges us to reflect on the issue of the relations of justice and law also at the jurisprudential level. After having isolated the three alternative standpoints, we can now further specify our initial question, and ask: *is it the case that justice, understood as a content-related merit of laws, influences legal validity, and how*?

The answer offered by the classical natural law theory must be excluded, for the simple reason that Rawls's theory of justice was aimed to avoid the reliance on full theory of the good or human fulfilment. Therefore, instead of taking as a point of departure the basic human values or the good in the comprehensive sense, relies on 'the primary goods', that is, on 'things which is supposed a rational man wants whatever else he wants'[17]. These goods are aimed to avoid presuppositions regarding detailed conceptions of the good life; rather, they are to enable the pursuit of divergent conceptions. Rawls gives a provisory list of basic goods, which consists of: 'rights and liberties, opportunities and

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[14] **J. Rawls**, *A Theory of Justice*, Harvard University Press, Cambridge, MA 1971, pp. 235–243.

[15] *Ibidem*, pp. 363–382. It is remarkable that Rawls theorizes civil disobedience chiefly in political aims, as involving a question of 'the nature and limits of the majority rule' (*Ibidem*, p. 363), rather than legal validity as such.

[16] *Ibidem*, p. 235.

[17] *Ibidem*, p. 92.

powers, income and wealth'[18], as well as 'social basis of self-respect'[19]. His subsequent, more comprehensive account on goodness of persons present in Part III of *A Theory of Justice* is introduced as the basis of the considerations about political stability, and hence is outside the scope of our interest. Likewise is classical natural law theory.

What about the remaining two jurisprudential schools? While non-positivism is an intuitively appealing interpretation[20], which this paper will also support, the positivist direction is also a genuine option. Especially if we consider the further development of Rawls's theory of justice and his political liberalism. One of the central normative claims of the latter is that the legitimacy of political power cannot depend solely on a comprehensive doctrine, but must be always grounded in some political values that all free and equal citizens can endorse. This may very well *require* the separation of law and morality, in the positivistic sense reconstructed in this paper. Principles of justice certainly must constitute an aim of laws, but it may very well be the case that they constitute an *external* aim – a value that should be pursued through law, but is not constitutive of law[21].

A detailed argumentation *against* the positivistic interpretation is something I cannot do here. However, the argumentation *for* non-positivism will, hopefully, suffice to discharge that burden. Due to constraints of space, I will set up my non-positivist interpretation as based on one main tenet. Namely, I will offer an interpretation of transforming the original position, originally presented as a device representing the conception of justice, into a device representing the conception of legality. An important advantage of the non-positivistic interpretation over the positivistic one is that it is the former which may give us some new insights about law. Going for the positivistic interpretation is another way of saying that Rawls has not too much to say about law as such. To the contrary, if non-positivism is pursued, there arises a hope of developing a genuine, Rawlsian foundation or a separable contribution to the tradition of non-positivism.

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18 *Ibidem*.

19 **J. Rawls**, *Political Liberalism*, Columbia University Press, New York 1996, p. 181.

20 To the extent Dworkin can be considered a non-positivist, he gave his own set of arguments for a non-positivistic reading that is, Dworkin's own interpretativist view (**R. Dworkin**, *Rawls and the Law*, Fordham Law Review 2004/72, pp. 1387–1405).

21 See for instance the book by Liam Murphy and Thomas Nagel (**L. Murphy**, **T. Nagel**, *The Myth of Ownership*, Oxford University Press, Oxford 2002). Despite assuming a Rawlsian justificatory background, the authors seem endorse some form of positivistic approach.

4. The original position as device of non-positivistic jurisprudence

As commonly known, Rawls had presented his conception of justice in a way which resulted in a rediscovery of the contractual tradition of Locke, Rousseau, and Kant. In his argumentative strategy, Rawls used the idea (which he considered an idea implicit in the tradition) of imaginary individuals who choose regulatory principles governing their social cooperation from one generation to another. The principles of justice are supposed to work at the institutional level, i.e., they are to govern the social system rather than individual conduct. The chief task of the chosen principles (alongside the subsequent laws and policies) is 'adjusting the claims that persons make on their institutions and one another'[22], however the second task is performed indirectly i.e. also through institutions[23]. Once the parties agree on the principles, they leave the original position and move further on, choosing the constitution and producing subsequent laws, according to the chosen principles of justice[24]. The original position is then a counter-factual device of representation (a thought experiment, if you like) which models fairly situated agents who deliberate on the first principles of the fair basic structure of society[25]. In other words, the construction of the original position embodies the legitimate reasons for choosing some substantive conception of justice as the most adequate ground for institutions of a democratic society[26]. The unbiased position of the parties to this original agreement is secured by the 'veil of ignorance' – the restrictions on their knowledge which prohibit information concerning individual endowment and social situation of the parties. In simple words – since the parties are aware of the general circumstances only – they don't know who they are in terms of social and natural advantages – and at the same time they want to protect

[22] **J. Rawls**, *A Theory…*, p. 131.

[23] **J. Rawls**, *Political Liberalism…*, pp. 257–270.

[24] This is the idea of 'the four stage sequence', see **J. Rawls**, *A Theory…*, pp. 195–201.

[25] **J. Rawls**, *Justice as Fairness: A Restatement*, Harvard University Press, Cambridge, MA 2001, p. 17.

[26] In this paper I do not discuss the conception of justice Rawls said the parties would choose. He called this conception "justice as fairness". For our purposes it is enough to mention that the conception combined the priority of familiar basic liberties with the egalitarian account on distributive questions, supporting the least advantaged members of society and establishing fair equality of opportunity. My analyses do not depend on the particular conception of justice that Rawls argues for. Rather, the aim of this peace is to demonstrate that whatever conception of justice would be chosen, and whatever conception of law would be, they assume analogical standpoint, and thus analogical forms of reasoning.

their own interest rationally, they will choose the principles securing everyone's legitimate interest, including that of the worst-off.

Now, how can we use the original position to shed some light on the way in which justice influences legal validity? Again, under the positivistic interpretation, the original position would be regarded as merely providing guidelines for the policies of the government, perhaps also providing moral legitimation of the political authority as such, but not much more. If the positivistic thesis is maintained, there is no need to refer to principles of justice when some particular legal norm is to be identified or a legal decision made[27]. Therefore, under this interpretation, the original position it is not a device of legal analysis of any sort. Even if a constitution or other laws are inspired by justice, the legal reasoning must not go beyond the law, and remains separated from moral reasoning on justice modelled in the original position.

The non-positivistic interpretation argues that the reasoning in the original position *may be useful as an inherently legal reasoning*, and the original position itself can provide legal reasons. In other words, the principles of justice are not only political, but also legal principles, and the point of view in the original position is also the point of view of a rational agent pursuing legal reasoning. The original position is a complex method consisting of the following elements: the circumstances of justice, the formal constrains of the concept of right, the veil of ignorance, and the rationality of the contracting parties[28]. The part that is most relevant for our inquiry is the formal constraints, so I will focus on them first. Speaking briefly, the formal constraints of the concept of right constitute the minimal formal requirements for any moral conception. I will argue that they are also the requirements for any conception law, and reveal its moral nature. Before I make my point clearer, I will reconstruct the Rawlsian formulation of them. It is important to emphasize that the formal constraints do not suffice to choose the most reasonable conception of justice – their role is to clarify what is a moral conception in more general terms, or what formal conditions a moral conception must meet to be presented as an alternative to the parties deliberating on justice. The separate argument, which I do not discuss here, leads Rawls to his two principles of justice. On the other hand, as we will see in more detail in a moment, the formal constraints are not completely neutral and rule out some conceptions at the outset. Let us now take a closer look at them.

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[27] **J. Raz**, *The Argument from Justice, or How Not to Reply to Legal Positivism*, in: **G. Pavlakos** (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy*, Hart Publishing, Oxford and Portland 2007, pp. 17–35.

[28] **J. Rawls**, *A Theory…*, p. 118.

The first formal constraint discussed by Rawls is that of *generality*. The characteristic feature of the general conceptions is that it is 'possible to formulate them without the use of what would be intuitively recognised as proper names, or rigged definite descriptions'[29]. This condition seems an obvious one from the original position's perspective, for one of the basic elements thereof is the ignorance concerning the specific identity of the parties. When you cannot identify yourself or others as this particular individual, you cannot reasonably put forth the principles which refer to any definitively recognizable individuals or associations. The other reason for the generality condition is that the chosen principles are supposed to serve their role in perpetuity, 'and the knowledge of them must be open to individuals in any generation'[30]. It may not always be easy to determine whether a moral conception is general or individual. Rawls is well aware of that, but he thinks that the intuitive demarcation is enough for his purposes. Any principle enabling identification of some object not as an example of a class but as this or that particular individual or association is excluded. For instance, a principle of justice saying that 'the social inequalities should be to the maximal advantage of the Rothschild Group' would be rejected as not meeting the generality constraint. First of all, in the original position you are not allowed to know who is a Rothschild banker and who's not, nor you are aware that the Rothschild Group exists. Second, you cannot reasonably formulate such a principle as it makes sense only if this particular financial group exist. Such a principle would make sense only for some generations, not for all of them.

The generality constraint is closely connected to (but still separate from) the second one – universality in application. To meet this condition, principles must, Rawls writes, 'hold for everyone in virtue of their being moral persons'[31], or, in the modified version compatible with political liberalism, they must be able to 'be applied without inconsistency or self-defeating incoherence to all moral agents, in our case, to all citizens in the society in question' (2001, 86)[32]. Although the deep implications of this change may turn out grave, the guiding idea is the same for both versions – the principles must be applicable in the same

[29] *Ibidem*, p. 131.

[30] *Ibidem*.

[31] *Ibidem*, p. 132.

[32] **J. Rawls**, *Justice as Fairness*…, p. 86. It is important to note that the universality condition changed with so called "political turn" in Rawls's philosophy. Briefly, this turn led him to endorse his conception of justice as fairness not as true and universal moral theory, but as a political conception, most reasonable and adequate to democratic societies.

way to all who are supposed to cooperate in the social system regulated by those principles. They bind everyone the same, and should be assessed with a view to everyone complying with them. A principle banning tall reddish men to marry would be perfectly general, but would fall short of meeting the universality condition. The same holds for a principle stating that only noble class members can be honourable and only they can be offended in terms of harming their dignity.

The two constraints presented above are relatively uncontroversial, and common to modern moral theories. The third one – that of publicity – adds something that is less obvious. Even for Rawls, the applicability of that condition is limited. As he writes, 'this condition is applied to political conceptions, not to moral conceptions generally', so it is valid for moral conceptions for the basic structure (i.e. the system of public institutions) only. In case of political conceptions, says Rawls, the conception must be presented as public, in the sense that the principles must be eligible for being accepted and endorsed as publicly known and explicitly recognised 'moral constitutions of social life'[33]. The publicity condition is explicitly taken from Kant[34], and its result is that both esoteric moral rules and rules obeyed unconsciously cannot stand as social morality for a democratic society.

The deep consequences of this condition are crucial for our inquiry. Publicity, as a requirement for principles, establishes likeness between justice and law, in the sense that the specific features of law, and specific features of public morality, overlap to a considerable degree. Why is it so important? Consider a claim, that made by Mill or Smith, saying that publicity is not relevant for moral principles which can be obeyed esoterically, or even unconsciously. Recall that Mill accepted the greatest-happiness principle as the supreme principle of morality but at the same time he held that *on this very principle* it is far enough that everyone pursues their own aims, contributing indirectly to the total social sum of happiness. This idea is close to the economic doctrine of Adam Smith – the general wealth of the nation is produced as the result of individual endeavours made with no view to their consequences for the common good. In both cases we don't need the principles to be public – they can be very well regarded as effectively binding even though no one is actually conscious of realizing them. Henry Sidgwick put this in extremely sharp way, saying that 'a Utilitarian may reasonably desire, on Utilitarian principles, that some of his conclusions should

[33] **J. Rawls**, *A Theory…*, p. 133.

[34] *Ibidem*.

be rejected by mankind generally; or even that the vulgar should keep aloof from his system as a whole, insofar as the inevitable indefiniteness and complexity of its calculations render it likely to lead to bad results in their hands'[35]. In some cases, then, Utilitarians argue that their chief principle need not be *consciously* followed by anyone – it is enough that they are *in fact* followed.

In opposition to Utilitarianism, Rawls imposes the publicity condition, which means that *eligibility for general social recognition* is an essential element of the substance of moral principles, at least in the public domain. It entails that whenever one advocates for something, one must advocate openly, upon principles addressed to the general public: since the principles are regarded as 'moral constitutions of social life', they are supposed to be endorsed by all as free and equal citizens. This means that whenever one claims that a maxim is suitable as a principle for the basic structure of a society, one must also lay an open claim to publicity and universality in its application. This is, in my view at least, very close to the claim to correctness that Alexy considers the constitutive element of law. Not only the ideal of transparency in the process of legislation, but also the requirement of publication of laws, along with the prohibition of their retro-active effect, point to *publicity* as an important requirement for law, at least for the primary rules directly regulating behaviour. In democratic regimes, laws bind everyone in the same manner, so they must be universal in application. If so, laws are closely connected to social morality conceived in a Rawlsian manner. The congruence of formal constraints on law and morality shows, at a minimum, that justice and law are similarly general, similarly universal in application, and require similarly public recognition.

The above considerations may be not enough to demonstrate what I intended. After all, this paper is in search of something more demanding than some formal similarities between legal and moral principles (which is something that the positivists obviously do not deny). In order to show the peculiarity of interpreting Rawls as a non-positivist, we will reconsider the above-indicated similarity between justice and non-positivistic concept of law in the broader context – the context of the original position as a whole. Alexy says that law (or the legal system) inevitably claims its own correctness, that is, accordance with basic values of public morality. Rawls says that every principle presented as principle of justice must be general, universal in application, and public[36].

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[35] **H. Sidgwick**, *The Methods of Ethics*, Macmillan, London 1907, p. 490.

[36] In *A Theory of Justice* Rawls adds also the other conditions – finality and imposing an ordering of conflicting claims (**J. Rawls**, *A Theory*…, pp. 133–136).

But does this entail that particular, material public values are something that ultimately influences legal validity?

The pressing question that arises from the above is therefore the following: on what basis can one say that not only the formal constraints, but also material value-judgement, directly bind legal considerations, and why should a reasoning in the original position be a legal reasoning as well? The answer is, according to my reading, that the original position represents not only a conception of justice together with *a priori* conditions of every sensible moral conception, but also a conception of law, or at least the a priori conditions that obtain for any conception of law. Let us reconsider the role of justice – we have said that justice regulates basic structure in the first place. The basic structure of society ensures fair cooperation, as the essential role of public institutions is to adjudicate competing claims fairly. The original position, then, seeks agreement on the basic rules of social cooperation. The contracting parties, regarded as trustees of groups and individuals they represent, determine the general conditions under which subsequent individual decisions and cooperative activities take place[37]. For Rawls, 'justice is the virtue of practices where there are competing interests and where persons feel entitled to press their rights on each other'[38]. Law seems to have the same purpose and function, and thus it can be regarded as a device of social cooperation, aspiring toward justice. Most of the legal system, from a trivial regulation which side of the road cars should take to complicated investment banking laws, serves the same purpose – to determine the rights of individuals and groups so that everybody knows his rights and duties as well as the scope of their decision-making power. Once this is settled, fruitful social cooperation becomes possible. Law, exactly like justice, may be seen as 'grammar of fair cooperation'[39]. If that is true, then the law must be interpreted in the light of contracting parties, and every interpreter of law (both in authoritative, or non-authoritative context) *may be perceived as a trustee of these contracting parties*. In this sense, the original position can be then regarded as providing not only principles of justice, but also a proper point of view to *assess, interpret, make sense of, and develop* basic legal principles as well as specific legal rules. Understood in this way, law becomes strongly interconnected with morality, as a device of social cooperation. This has consequences not only for law-making,

[37] **H. G von Manz**, *Fairneß und Vernunftrecht*, Georg Olms Verlag, Hildesheim, Zürich, New York 1992, p. 41.

[38] **J. Rawls**, *A Theory*…, p. 129.

[39] **W. Kersting**, *Gerechtigkeit und öffentliche Vernunft, Über John Rawls' politischen Liberalismus*, Mentis, Paderborn 2006, p. 46.

but also for the concept of legal validity and ways of determining it. If one can perceive legal reasoning as, ultimately, reasoning of a trustee of parties to the original position, then justice and law are not bound merely contingently. Rather, determining the content of valid law always involves a moral standpoint and moral principles.

5. Conclusions

In this paper I hope to have given a convincing interpretation of Rawls' political philosophy, and, what goes hand in hand with it, a strong case for non-positivism. Indeed, if the relevance of morality in the public sphere is supposed to be practically meaningful, and justice is really supposed to be 'the first virtue of social institutions', the very validity of law must be somehow influenced by its justice. Rawlsian theory of justification, particularly the original position, were developed in order to provide a non-positivist account of validity and the content of law. Admittedly, legal practice (both legislative and adjudicatory) is very often faced with problems of a different sort. The specialist knowledge of doctrinal law (legal dogmatics), as well as economics or sociology is often required. But the legal system as a whole, as well as particular legal norms, make claims to justice, and Rawls would agree that 'legal systems that do indeed make this claim but fail to satisfy it are legally defective systems'[40]. As a result of this, when one takes pains to arrive at a legally correct legal decision, one inevitably takes into consideration *also its justifiability*.

In the face of the argument offered in this paper, legal positivism is certainly not ultimately refuted, but seems to face a serious problem. Namely, it appears to be dependent on more assumptions about law and society, or even about human beings, that it normally admits. If my non-positivistic reading of Rawls is correct, the moral merits of legal norms can be separated from their validity only if the *reasonableness of citizens* (the addressees of norms) is considered either non-existent or irrelevant for legal activity. In other words, strong insistence on the exclusive character of social sources of legal validity seems to ignore the fact that a reasonable citizen is able to interpret and judge legal norms independently of their sources, which has consequences for the very content and validity of law.

[40] **R. Alexy**, *The Argument*…, p. 36.

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Michał RUPNIEWSKI

PRAWO JAKO SPRAWIEDLIWOŚĆ? RAWLSOWSKIE PODSTAWY NIE-POZYTYWIZMU

Abstrakt

Przedmiot badań: Artykuł stanowi filozoficzno-prawną interpretację filozofii Johna Rawlsa.
Cel badawczy: Zadaniem realizowanym w artykule jest reinterpretacja idei sytuacji pierwotnej jako narzędzia nie-pozytywistycznej jurysprudencji, co pomaga w lepszym zrozumieniu i uargumentowaniu związku sprawiedliwości i prawa.
Metoda badawcza: analiza pojęć, analityczna jurysprudencja, refleksyjna równowaga.
Wyniki: Teza o stosowalności Rawlsowskiej idei sytuacji pierwotnej do skonstruowania nie-pozytywistycznego pojęcia prawa, teza o niezbędności moralnej interpretacji prawa przy ustalaniu treści normy prawnej.

Słowa kluczowe: John Rawls, nie-pozytywizm, filozofia prawa.