

Liberal Constitution-Making

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1.1 Introduction

The main purpose of the paper is to theoretically flesh out a representative constitution-making process. It rests upon an initial account of liberal legitimacy of an action. I will secondly elaborate different theoretical demands, or duties, such a process must heed in order to become legitimate and just (the *a priori* method (Barry 1995:196)). I will *briefly* operationalize the ideal conditions (the empirical method (Barry 1995:196)). The last, but important, point to be made is the relationship between normative theory and realistic utopia. The argument presented will weigh alternatives originating from modern liberalism, with a goal that everyone should accept, or be able to accept, how authority is organized (Nagel 1991). I will not plunge myself into the rightness, or meta-ethics, or consider principles of liberalism as to how true they might be, but rather use it as a moral theory.¹

A constitution is a consistent and comprehensive answer on how people should live together in society. The answer is also the aim of normative political theory: An application of different conceptions of morality to design systems of power that people can accept (Scanlon 2000; Nagel 1991). As Nozick describes the core-consideration:

“What persons may and may not do to one another limits what they may do...to establish such an apparatus” (1974:6 – my emphasis).

The importance of creating a theoretical construct is the assumption that defects in the basic structures, established by a constitution, is caused because it “came about in the wrong way, according to deficient rules, and in a deficient institutional framework” (Habermas 2001:774).

1.2 Representational Justice

Democratic representation is a more complex ordeal than Rousseau explains when...

“...people is free only during the election of members of parliament. As soon as they are elected, slavery overtakes it, and it is nothing” (1978).

Such a functional assumption of democratic representation ends when “one man one vote” has been attended. This paper holds representation to be a more extensive ordeal – one of justice. If one did not have such an approach, representation would become illegitimate and

¹ For my purpose, it is sufficient to refer to Rawls' conclusion that “political liberalism can be understood as the view that under the reasonably favorable conditions [...] makes constitutional democracy possible...” (1988: 275).

even be equivalent to slavery.² The account of justice is a foundation for how and why other aspects of constitution-making are permissible. With other aspects I mean for instance the requirement of explicit and unambiguous rules regulating deliberations.

“...the task of philosophy is merely to clarify the moral point of view and the criteria for democratic legitimacy through an analysis of the procedural requirements for a rational debate” (Eriksen 2003:8).

The liberal principles of justice as a “*moral point of view*”, deduce rules that dictates a representative constitution-making process. A further implication is a presupposition of legitimacy where rules and principles are attended.³ The basic problem that needs to be solved with respect to constitution-making and a constitution is: How can the process be stable and just and at the same time include free and equal citizens profoundly divided by different conceptions of the good? Scanlon’s conception of justice, what constitute “moral wrongness, will serve as the moral point of view.

“An act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behavior which no one could reasonably reject as a basis for informed, unforced general agreement” (Scanlon 1982:110).

The central element in this quotation is “*no one could reasonably reject*”, and creates a great deal of room for deliberation. At the same time it sets restrictions while it works as a fundamental condition for what is legitimate. One can say that what is legitimate for a constitution-making process to pursue is everything no one could reasonably reject to. No one in this regard underlines the demand within normative theory that morality must be applicable to all meaning everyone (Malnes 2002). There are two main principles one must incorporate in order for differences to exist without reasonable rejections – *equality* and *autonomy*. Rules will be derived from principles which create a deontic approach reflecting justice. Constitution-making in line with justice must attend these rules (Alexy 1989).

1.2.1 Equality and Autonomy

The strict liberal model of constitution-making emphasizes the individual as the origin and functionally founding entity of representation. As a consequence, they are a *de facto*

² It is even more important to set demands to an assembly that cannot be replaced compared to parliamentary election. Pitkin holds accountability to be the most important aspect of representation (1972:57). This I hold is true within parliamentary traditions, but a constitution-making process is of a different nature, and must be treated accordingly.

³ Legitimacy is to be understood entirely as a moral concept derived from principles of rationality. This excludes e.g. legality as a source to derive what is legitimate. As Eriksen puts it: “*Morality is not absolvable in positive law*” (2003:12).

foundation of all competence and signatures of the constitution.⁴ An individual's value is based on equal worth, not only equal right to participation. The assumption has tremendous impact on the functional aspect of representational justice. Each person ought to be ensured equal input *during* the process – elections alone become insufficient. Rawls provide a twofold account of those who serve as input. First is the insufficient aspect:

“All sane adults, with certain generally recognized exceptions, have the right to take part in political affairs, and the precept one elector one vote is honored as far as possible” (Rawls 1993:195).

The second aspect to be incorporated is that individuals are moral persons, who ought to have a conception of their good (a rational plan of life), combined with a sense of what is just (a desire to apply and to act upon principles of justice) (Rawls 1999:442).⁵

*The liberal legitimacy of an action*⁶ can be substantiated by an argument in three parts. The *first* part is the transcendental notion that shapes the core of any action made during deliberation.⁷ It involves an absolute duty, or restriction on the action, that everyone must heed whatever the result may be. Not because each person necessarily wants to, but because it is the only logical choice in order to enter the field of argumentation – one must transcend to a level guided by moral considerations where everyone can agree. It shapes the point of departure for deliberation – the common platform. Nagel describes how the transcendental notion can be applied to actions:

“[as we] can remove ourselves in thought from our particular position in the world and think simply of all those people, without singling out as I the one we happen to be” (Nagel 1991:10).

It constructs a framework for decisional autonomy (discretion), and encloses what can be done (Alexy 1998:213). The weak function of a mere restriction is rested upon the fact that not everyone wants to participate where a pure impartiality is the only condition to act. An action which is universal become confined to what everyone can agree ought to be, initiated

⁴ This is coherent with what one ought to expect from modern contract-theory. Although most theories stipulate a hypothetical contract, the best method of guaranteeing such a contract is a constitution.

⁵ Since this outline suggests that the input must have a certain age and certain cognitive skills in order to serve as input, it does not leave young people or mentally handicapped outside what constitute equality, but rather does not give them the right to participate while they are not developed sufficiently to act right. They are still citizens representatives serve as natural guardians of all meaning everyone.

⁶ An action implies something performative that leads to a practical outcome. It is an external manifestation of any state. Most common, though, is the speech-act, and since my aim is to assess a constitution-making process, which is a deliberative process, it is sensible to mainly refer to this. I will nevertheless not confine myself, and therefore I maintain the use of the word “action”.

⁷ Transcendental philosophy is, in contrast to the empirical conditioned conception of the good, a priori (Kant 1991:91-2). It is an *a priori* use of principles to judge what is right within different empirical contexts. Kant explains that the principles give a full guarantee of the validity and stability of all the parts which enter into the deliberation. A transcendental notion is

by the *a priori* reasoning prior to choosing what proper action one ought to take. One has to, as a representative, incorporate a universal demand for representational justice as a precondition for deliberation, and set a common platform for representatives. If representatives only attended an empirically conditioned reason, void of rational principles, there would not be any common platform and therefore no deliberation (Kant 1790). Assertions made during deliberation must therefore have an inherent claim to equality in order to comply with justice (Alexy 1989). This can only be safeguarded if a transcendental notion is set prior to actions.

The *second* part of an action's legitimacy is a supplement to the transcendental notion. Rawls holds that perfect impartiality, inherent in the first part, alone is altruistic (Rawls 1993:54). He explains altruism, or in this case benevolence, to be:

"...at sea as long as its many loves are in opposition in the persons of its many objects" (Rawls 1999: 166).

Legitimacy must include a more realistic and dynamic character in order to reach justice. It needs to cope with the duality inherent in human nature – that individuals act upon principles of justice, but complement it with a rational plan of life. Nagel describes it as the tension between the personal and the impersonal standpoint (1991:10-21). Rawls explains that impartiality is desirable, but liberal theory cannot demand reasonable people to lead their life according to a notion of a general good.⁸ The reasonable is to be perceived of as a universal, or public, reason that in itself ignores the stubborn realities of individuals' rational nature (Rawls 1993:53). This stubbornness can be referred to as the personal standpoint (Nagel 1991). The principle of individual rationality, autonomy, as opposed to a principle of reasonableness must become a part of deliberative settings (See Sibley 1953).⁹ In order to strengthen the argument one must include a maximization of individual utility. As this is the second brick in the construct of liberal legitimacy of an action, it is natural to assume that the first part precedes it. This calls for a maximization of individual utility as long as the universal character of the transcendental set restrictions. Personal, or rational, aspirations can

therefore an expression of pure reason implying *a priori* knowledge that can be conceived by all persons as *right*. A transcendental notion is a necessary ingredient in reaching a reasonable agreement (See Kant 1991).

⁸ This is obviously one of his criticisms of utilitarian theory where pleasure for as many as possible is a general good.

⁹ The principle of rationality is established prior to any action and is, at its core, the choice of life the individual has, but in order to reach a constitutional settlement one must engage in a deliberative manner, and that calls for the establishment of the transcendental notion. If it were not applied, there would simply be no good reason to engage in a deliberative setting.

move freely within certain boundaries.¹⁰ The second part is where individuals' choices and realization of conceptions of a good can be fulfilled because of the rightness of circumstance (Habermas 2001:769). The first part can thus be stated as the assurance of equality, whereas autonomy is safeguarded in the second, and is what is implied when "the Kantian and the Hobbesian line are joined" (Alexy 1996:213).¹¹

The *third* part, which is necessary to make the substantiation of liberal legitimacy complete, is a psychological premise about a general human interest in reaching justice. This part ensures that those persons that act, are doing it according to their rational plan of life, but are bound up sufficiently by the demand of the transcendental notion. This would imply an aspiration towards autonomy as a collective outcome of accumulating the respect of equality inherent in the first part. An action is therefore the outcome of *a desire for reasonable agreement* as the ethos of participants within deliberation. The third part makes this approach comprehensive – transcendental notion is an appeal to the ability to *act* impartial, which as a consequence has a presupposition that is universal in character. The ability holds that it is necessary to make people act upon principles of impartiality because it is irrational to engage in deliberation without the ability to make remissions within the realm of conceptions of good. The respect for other's autonomy is not sufficient for representatives to *be* impartial, but force one to sustain a transcendental point of departure due to the fact that you need other's to respect *your* autonomy – it becomes the only logical choice to make. Nino deepens the notion of how legitimacy is employed during deliberation:

"It is desirable that people determine their behavior only by the free adoption of principles that, after sufficient reflection and deliberation, they judge valid" (Nino 1991:138).

This validity is what I alluded as the application of a transcendental notion become the only logical choice. The concluding claim is: "Whoever gives justifying reasons for something raises claims to equality, freedom from force, and universality, at least as far as the justification is concerned" (Alexy 1996:216). If an action complies with justice, it has also expressed those rules which are latent within the liberal principles of equality and autonomy.

¹⁰ If the reasonable boundaries are established, the following reasoning takes place: "When I ask myself what reason the fact that an action would be wrong provides me with not to do it, my answer is that such an action would be one that I could not justify to others on grounds I could expect them to accept" (Scanlon 2000:4).

¹¹ See for instance the Kantian imperative as reflecting the transcendental basis (Kant 1988:49) and the Hobbesian notion of self-preservation (Hobbes 1973: 64-5).

The intent of a legitimate action is a claim to justice (Alexy 1989).¹² The contribution of e.g. assertions, complying with principles of justice, is the same as making an entry into the domain of deliberation (Alexy 1996:215). The action of greatest appeal to justice is the one that concludes deliberation, and also makes the total process more able to reach justice.¹³

“A norm can only find universal agreement in a discourse if the consequences of its general observance for the satisfaction of everyone’s interest can be accepted by all” (Alexy 1996:211).

Nagel explains legitimacy as the fulfillment of unanimity. Justice is reached when the entire process can be labeled legitimate (1991:33), and the outline of justice works as a fundamental condition for knowing what a legitimate action consists of. The representatives must heed the rules that are derived from the principle of equality and autonomy in the process of constitution-making. I will now turn to these rules.

1.3 *A Priori* Rules of constitution-making

The way in which modern liberal theory would ensure legitimate representation in a constitutional assembly can be stated through Scanlon’s rules for an original position (See Barry 1995:67-72).¹⁴ This *a priori* method qualifies a kind of moral introspection – a search towards what rules can be judged reasonable. I will treat rules within the original position as theoretical demands deduced from equality and autonomy which set a direct reason to be concerned with other people’s point of view:

“Not because we might, for all we know, actually be them, or because we might occupy their position in some other possible world, but in order to find principles that they, as well as we, have reason to accept” (Scanlon 2000:191).

This complies with a central demand to legitimacy – actions need to be justified to the people that must live by their consequence.

1.3.1 Perfect Knowledge

All the parties know of themselves and each other, where everyone comes from and what kind of preferences they have. This demand can be contrasted with Rawls’ original position and the “veil of ignorance” (if it were applied to my context). His original position prohibits any knowledge of others, and even oneself, to establish the transcendental platform. His approach lacks a convincing element compared to deliberative theory: Who can engage in

¹² An action that denies it would lead to a performative contradiction – one part of the action contradicts another part of the action. A speech-act with a performative contradiction: “I am at a feast of friends, and I do not have any friends”.

¹³ Legitimacy is established by an action that complies with justice. Justice itself is not necessarily reached.

¹⁴ Scanlon has not articulated any original position in any Rawlsian sense. It is constructed by Barry.

any representative constitution-making process not knowing who you are or, more importantly, who you represent?¹⁵ The main difference is that the principles of justice are reached because perfect knowledge as the only logical choice. When Scanlon's condition is applied, one builds a more fair deliberation because it can be representative. Actions comply with justice due to a reciprocal need to get people to deliberate with you and hence create a transcendental notion the point of departure. The "veil of ignorance" makes deliberation impossible because of its undemocratic nature. Rawls' demand for equality is not fostering any representative process. The desire to comply with justice must nevertheless be a natural process, based on the duality within human nature, not a process where actors construct equality by ignoring differences.

Rawls' theory, if it were applied to my design, says that members of a constitution-making assembly do not know who they represent and consequently have priority for the worst off because they might be them. The consequence is that it lacks foothold in democratic theory.¹⁶ It is illegitimate to ignore the needs of the ones who are more wealthy than the poorest, but nevertheless not rich. As Nagel points out: "Those wealthier are the ones who must give – they are often the ones who's life is about to change – why are we not listening to them"? When applying Scanlon's view, they know who they represent and can make deliberations for that respective population. The result is something that no one can reasonable reject to because of everyone's equal influence during deliberation.

Perfect knowledge is therefore derived from the respect for autonomy. In order to have autonomy, one needs to know its content, rational plans of life, and the demand for the reasonable within deliberations. If the demand is to be achieved, as the principle of autonomy suggest, one needs knowledge for and of the representatives in the constitution-making process.

1.3.2 A Desire for a Reasonable Agreement

All the representatives must be motivated by a desire for a reasonable agreement. This motivation ensures the contracting parties to have a priority of right over good, and never to

¹⁵ Rawls argues that when the principles of the Original Position are adopted by the parties, they move to a constitutional assembly (1999:172), I hold that this application is unreasonable because "equality" is given too much weight.

¹⁶ In "Law of Peoples", Rawls *assumes* that liberal toleration acquires democratic states to tolerate undemocratic states (2001:59). If not having democracy is permissible, it cannot be an intricate part of his theory of justice. This might explain why Rawls do not believe that a liberal conception of justice needs foothold in democratic theory. I stand to the contrary.

reject representative's actions as long as they rest within boundaries of justice. As Barry formulates this task:

"...we should ask what happens when ends are pursued in a context that constraints demands by a requirement of reasonableness" (1995:121).

The deliberations itself appeals to the representatives to make an effort to promote legitimate actions so justice can be promoted further. Representatives must base their arguments upon a transcendental notion as a point of departure, for then to be free to engage in a more utility maximizing way. The platform is established because of a desire to reach an agreement, and can only be built upon the understanding that impartiality must be the departure for any agreement to become reasonable. As Barry underlines a misconception about aspirations towards justice:

"Some writers appear to believe that a theory of justice must somehow pick people up by the scruff of the neck and force them to behave justly, regardless of their beliefs or inclinations. This is an absurd demand" (1995).

The desire comes around as the only logical choice to make, not by force, but by free will; the deontic perspective is therefore attended because representatives and the represented wants to. Those not entering deliberations with aspirations towards reasonable agreement are not interested in solving problems at hand, or not even capable of understanding what the most logical thing to do is. A no-agreement becomes desirable to them. This kind of behaviour departs from liberal theory where legitimacy of a system is dependent on their being nothing anyone reasonably can reject to. Accordingly, justice is not reached, but rather a *modus vivendi* – an institutionalized conflict. Representatives that do not initiate deliberations with a transcendental notion are therefore not a serious member of the process, and should not be allowed to enter the field of argumentation (Alexy 1989). The representatives must realize that the only way to be heard is to be forthcoming on others' legitimate claims. If not, other representatives would not have any reason to communicate.

1.3.3 All-Inclusive

All-inclusiveness stem from the principle of equality. Everyone affected, and even potentially affected, by the consequence of the action, must be included. Everyone who can make an assertion must be represented in deliberations (Alexy 1989). A reasonable agreement can only be reached by all parties. Everyone affected must be able to shape and make assertions. This cannot be done directly due to the multitude of voices that wants to be

heard. The election of representatives makes the world smaller. Accordingly, everyone who can speak would participate to the same extent through representatives.

The entity that is to be represented is, according to justice, the individual. A certain amount of individuals elect one representative. Further, the representatives conduct the deliberations on their behalf. This means that groups such as ethnic communities, nationalities or groups with other characteristics (such as language) cannot be a source for representation.¹⁷ These features are illegitimate for a liberal process where individuals are to be regarded as equal input. However, it may occur that a very homogenous population, that has properties similar to groups, elect one representative, and this representative conducts the deliberations as if he represented one specific culture, territory or nationality or even sexuality and race. This is legitimate, and can be the outcome of a tentative liberal mandate due to the aggregation of individuals' equal preferences. One can rather say that one reasonable conception of the good elected the representative. Explicitly allowing group-representation fails however to comply with individuals as the origin of all competence.

Another aspect that must be ensured is that the constitution, as outcome, must reflect all-inclusiveness irrespective of any temporal-spatial context. This means that all, meaning everyone, must be reflected as the prime concern of the constitution at any point in time. This however, cannot be ensured at one point in time, while social arrangements, conceptions of the good, the nature of a reasonable rejection etc. change in course of time.

1.3.4 The Agreement is to be Unforced

One important aspect within liberal theory is that reasons for an action are to be unforced. Reasons given for an action are to convince because they hold a claim to justice.¹⁸ The action can even be the right one, but as long as reasons are backed by force, one cannot accept the action as legitimate. An action is chosen when it makes an appeal to justice in a reasonable manner – it is to convince. A poem by Juvenal, cited in Kant, serves as an illustration:

“Be a good protector, likewise an impartial judge. If you are ever called upon to witness in a disputed case – even though Phalaris should order you to speak falsely and commit perjury by moving his bull close, know that it is the greatest sin to prefer life to honor and, for life's sake, to destroy the reason for living” (Kant 1991:187).¹⁹

¹⁷ The obvious exception is the representation of minorities. By their very nature, they are not able to elect a representative due to the practical necessity of imposing a threshold for electing a representative. Therefore they must be guaranteed representation. I will not follow any assumptions further due to its manifold of topics that also need consideration.

¹⁸ This is one actors claim to justice, meaning how the principles of justice are best accommodated (Alexy 1996).

¹⁹ The tyrant Phalaris used to shut his victims up in a bronze bull, in which he roasted them alive.

A reason for an action is only legitimate if it rests upon a respect for equality latent in the transcendental notion. Attending this assumption will make the outcome just for everyone. If force is employed to make others do something they did not intend or wanted to do, it is a matter of not making the transcendental notion a point of departure. Motives of utility maximizing take over that particular role. The consequence is that equality is degraded and the autonomy of some corrupts all others. A justification for an action must show that the representative is interested in defending an action against everyone else's by the power of the better argument. The parties are only to submit to actions that are acceptable to all, meaning everyone. Material strength is for instance illegitimate.

The other aspect of force that will be mentioned is Elster's distinction between upstream- and downstream restraints (2000:105). A constitution-making process do not establish itself. When speaking in ideal terms, an assembly needs an outside authority when convened for the first time. This authority is also responsible for upstream restraints, and can be of two types: A convener, which is the entity that set the mandate to the process, and a selector responsible for selecting representatives.²⁰ Both of these authorities can influence deliberations in a manner so that they can make requests on deliberations through types of convening or selecting that act on their behalf. The creators want their representatives to owe them something in return for appointing them. This kind of restraint is illegitimate because the mandate becomes bound to its origin in one way or the other, and makes deliberations rest upon predisposed arguments not open for compliance. Compliance is a core-characteristic of deliberation; to agree one need to move unbound and able to comply by the needs of others within the deliberative space. If anyone's bound to a kind of origin, the representatives could not become motivated by a "desire for reasonable agreement". If one is to have a productive and all-inclusive assembly, it cannot be admissible to have representatives forced by its creator. This will in turn make a desire for reasonableness as precondition repeal. It is possible to appoint members by elections. If the people themselves decide who represent, the upstream restraint can become legitimate.

The downstream restraint is expressed by those responsible for the ratification of the constitution, which is not the responsibility of representatives, but rather popular consent by referendum. The reasons for having representatives are pragmatic, not definitive; such a

decision is therefore made by citizens. In this way, the citizens can put pressure on the representatives because they do not want to ratify something they do not benefit from, or can live by for that matter; they ought to be able to reject an unreasonable constitution. It restrains representatives' deliberations to the extent that the constitution can be ignored in its whole by the people it was supposed to govern. This mechanism is therefore helpful in order to have an incentive towards creating a collective desire for reasonable agreement. It is in representative's interest to get the job done, and referendums work as an impending danger that creates a self-binding mechanism on the constitutional assembly.

1.3.5 Justice as the Roadmap for Applying Rules

The deliberations are to be informed, which implies that actions, especially assertions, must be intersubjective. Religious denominations are for instance, which by definition are not intersubjective, are not tolerated. A transcendental notion is in its nature informed. It would not be transcendental if any one representative did not understand its intent. Accordingly, representatives are not to be elected if they are incapable of performing actions that are reasonable. One cannot, for instance, have members of a constitutional assembly who make assertions with Christian ethics as point of departure. Value-stratification as a point of departure makes deliberations impossible.

To illustrate this point further: At the bottom of the mountain, the climbing-team can set up general rules on how to make the climb. Initially, everyone must agree with the general rules for climbing mountains, and as such they take the shape of being impartial. When the climbing starts, and the gradient increases, the team must cooperate more. The rules they come up with further are shaped by that particular mountain, and thus cannot be applied to other mountains. The team must nevertheless agree all the way if they are to reach the peak. If only one of them fails to comply, due to a reasonable rejection of the actions taken by the rest of the team, they must climb back to where they all agreed last time. The essential element is that, for everyone to reach the peak, they must agree on how to get there. This can also be stated as representatives giving each other a set of liberties that frames the deliberations to the extent that each representative's autonomy is respected by others. The deliberations are made fair in this way. If a transcendental notion did not set the departure, it

²⁰ The only way of avoiding these restraints is to have an open democratic process. This is not what is meant by selectors. This is rather an institution that appoints representatives.

would be impossible to even begin deliberations, or climbing. Rules deduced from a desire to reach justice must therefore always be all-inclusive.

The transcendental notion enters in the beginning of deliberations – shaping the actions by inclinations that are impartial in nature. If, however, the platform were not set, meaning that the transcendental notion as a *sine qua non* of justice was not met, the incentive to get each person affected to enter deliberations would be gone. There would simply not be any reason to enter, and deliberations as all-inclusive would fail.

1.3.6 Applying Justice

The goal of the process is to assess different alternative actions, which most often is the most convincing assertion. Such a legitimate action is achieved when the other abovementioned demands are attended. Elster substantiates this notion by demanding representatives to proceed with impartial motivations (1998:114). Representatives must have an interest in achieving justice, and in order to achieve it, they consequently need to follow a comprehensible deontic approach. He further calls these motivations a “veil of ignorance”-reasoning, referring to Rawls, but he implies that “ignorance” is imposed as a self-restriction on each representative during rational deliberation. This restriction is what is referred to as the “desire for a reasonable agreement” with the initial application of a transcendental notion. Impartial motivations also comply with Habermas’ assumption that a transcendental notion is not only necessary, but sufficient. It offers a “fallible reconstruction of the normative content to be found in factually unavoidable preconditions for argumentation” (Habermas 1991:195). The impartial motivation, Habermas emphasize, is strong enough “to substantiate the universal claim to validity obligatory for all subjects able to...act, which is raised by a procedurally formulated principle of morality” (1991:194). The fulfilment of justice is thus dependent on a process, which in itself is defined as a series of rules that needs to follow a certain order.²¹

1.4 Representation and Application of Ideal theory

In this section, I will operationalize the ideal theory, meaning how the theoretical demands will be made practical. This can also be referred to as the empirical method: Certain accommodations a political system must implement in order to reach justice (Barry

²¹ If or how justice was reached can therefore only be assessed after a constitution-making process is over.

1995:196). The transcendental notion is for instance the most important accommodation, and hence it must be established how it is practically possible to get there. Every operationalization is relevant to the aspect of representation, but not equally relevant.

1.4.1 A Mandate must create a Neutral Point of Departure

A mandate can create an initial neutral deliberative process among representatives.²² The mandate is as such not in any way to include a conception of the good, but rather attract a neutral stance as it is the formal initiative to the process. It must take the shape of a transcendental *deduction* – the way principles of impartiality are induced into the mandate, and can apply an *a priori* foundation for the deliberations between representatives (Kant 1991:91). The mandate must reflect the principle of equality in a platform for deliberations between conceptions of the good. Hence, when actions are made, they are always based upon a transcendental notion. If it was to have any reflections of *a* good, it could not stand as a serious point of departure for deliberations. Some representatives could therefore have a reason, within the framework of what is reasonable, to reject it. It should lay the conditions straight so that the representatives can engage the deliberations with blank tablets, and make “*present what is not yet present*” according to the rules of a constitution-making process (Pitkin 1972:8-9).

The mandate must also be simple, explicit and unmistakable regarding how different entities operate within the process. This will ensure perfect knowledge in the reach justice. It should not leave any loopholes that infringe the principles of equality and autonomy. The mandate creates what Pitkin refers to as the “black box”. The black box serves as the area where representation is conducted. If a representative leaves the box, representation become unreasonable and hence illegitimate. If the representative stays inside the box, everything that is done is an act on other people’s behalf (Pitkin 1972:39).

1.4.2 Create a Watchdog to the Process

If a constitution-making process is to avoid deliberations that are influenced by passion, time-inconsistency, coercive means or other instances that relates to the use of force, it needs a watchdog. To allow for such influence to occur, would obscure the path towards justice. A watchdog is to take the shape of a neutral spectator, much like how a judge would work

²² This means that it does not need to be neutral in any universal respect as long as it is neutral among the representatives. One needs to consider the area the constitution is to be applied.

within a legal-system in exercising objectivity. The watchdog can protect the mandate and ensure that it is attended at all times. If for instance a huge crisis occurs that can influence the representatives' judgment, the watchdog can insist on pausing the assembly in order to wait until the crisis is over. It can also punish representatives that do not comply with the rules prescribed by the mandate. In short, it must be able to take necessary initiatives to ensure that the mandate is attended till the end. The watchdog serves as a protector of the principles of justice, and ensures that respect of the individual is upheld at all time. The claim is that, in order to avoid force of any kind, one needs a controlling mechanism that can serve everyone. The watchdog must be included in the mandate.

1.4.3 Establish a Constitutional Assembly

A constitution ought to be written by a specially convened assembly (Elster 1998:117). Constitutional deliberations are to consider higher law and therefore deliberate on a whole other level than day-to-day politics (which is conditioned and conducted within the framework set by a constitution). Day-to-day politics is in a relation to a constitution, like foam on top of the wave is to the wave itself – the foam is an epiphenomenon totally dependent on the wave. As Locke explains:

“The legislative cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be” (2002:141).

The people must be the ones directly responsible for the shape of institution in charge authority – the basic structures. This responsibility can become a heavy burden if the process is illegitimate.

The assembly must be independent of any upstream restraints made by institutional interests due to their self-interest in preserving matters as they are. The assembly must be able to work freely and also be able to reform the institutions as they do see fit. In liberal theory, it is important to stress that daily politics are preoccupied with solving problems at hand. This could for instance be the range of the welfare-state, fiscal policy, military action and so on. A constitutional assembly is raised above such legislation, and is preoccupied in solving problems concerning how to reach political justice (Rawls 1993:336).

The parliament is such an apparent feature of the basic structures that it must be dealt with by a constitutional assembly. When the assembly has commenced, it must solve

problems within the basic structures, and hence the parliament, executive and even supreme-court might be a part of the problem. They should not have a central role within the process or the ratification when these institutions can be a part of the problem; it disqualifies them for taking any decisions. As Rawls underlines who is the responsible party:

“The justice of the constitution is to be assessed under [just procedure and just result] in the light of what circumstances permit, these assessments being made from the standpoint of the constitutional assembly” (Rawls 1999: 194).

The problem which occurs is that such an additional assembly will create two sets of elites – one for writing a constitution and another for government. A constitutional assembly is nevertheless a condition for ensuring neutral ground necessary for a legitimate process.

1.4.4 The Appointment of Members to the Assembly

There ought to be an election to the assembly by the people, and not by parliament-representatives. These representatives’ influence on such an election would shape the assembly according to parliamentary politics. Electing representatives would make the people both upstream- and downstream restraint; both of these restraints would necessarily complement the process of reaching justice. The impact of a new constitution is profound in the sense that it shapes the basic structures for society. Accordingly, the responsibility ought to be on the people. They alone can decide how they want to be governed. To appoint members of such an assembly by other institutions than the people, is a direct menace to the democratic legitimacy such a assembly ought to have.

Elections to a constitutional assembly ought to follow a proportional system. A constitutional assembly ought to be broadly representative, stressing the need for equal possibilities of influence. The majority system, where the losing candidate’s votes are wasted, is simply not an option. In order for such an election to be achieved, the whole territory ought to be the constituency, and the threshold for becoming a representative as low as possible, allowing for the greatest amount of representatives practically feasible.

1.4.5 Working-Groups must be established

When a constitution is to cover a whole range of issues, it is natural to divide the process into working-groups to ensure deliberations exhaust all possibilities of each part of a constitution (Elster 1998:117). The arrangement of working-groups must also be settled by the mandate. The process, once initiated, should not be able to create working-groups at their

own discretion. Such a process would be the same as if a constitution calls for ad hoc solutions, and a constitution does *not* call for any ad hoc solutions.

Becoming a member of a working-group is the only way in which the representatives can acquire something equivalent to perfect knowledge. Each representative is not able to conduct deliberations in any fair and exhaustive manner, on behalf of the electorate, if everyone can speak their mind anywhere. Each representative is therefore elected by references to working-groups, established before the constitution-making assembly has commenced. They are not elected into the working-groups, but the electorate must be able to elect a representative that can defend their autonomy convincingly in places where perfect knowledge is possible and desirable for the representative. This underlines an electorate's right to actually know what the representative will do.²³

The amount of working-groups must also be exhaustive regarding the span of topics within the constitution. This could most easily be based on an empirical analysis of different constitutional traditions. The amount of working-groups cannot, on the other hand, be confined to tradition due to the fact that the past cannot always predict what is needed in present and future. The authors of a mandate must therefore be able to change both the amount and the content of the working-groups in order to cope with the present context as long as it is done prior to the assembly itself.

1.4.6 Secrecy and Disclosure

A constitution-making process ought to employ both secrecy and disclosure. With total secrecy, representative's different conceptions of the good, their reasonable doctrines, can be acted upon freely. This is the place where deliberations can be hard, controversial and voices be heard. Full disclosure, on the other hand, encourages consensus-building and, what Elster refer to as "*rhetorical overbidding*" (Elster 1998:117). Secrecy allows for more serious and advanced, even technical, deliberations, whereas publicity ensures that agreements are capable of achieving popular support by withstanding the light of day (Elster 1998:117). Secrecy is possible only if everyone are represented, so everyone would sit at the tables behind the closed doors. Representation is a matter of practical necessity – to make the world smaller. Full disclosure for the entire process inhibits flexibility during deliberation and

²³ It also makes it possible to conduct deliberations in secret, since the electorate can anticipate what is to be said behind the closed doors. I will return to this below.

decision-making. If bargaining-positions are revealed to the public, representative's conception of the good will not open for compliance, and the participants will be less likely to arrive at any consensus (Sunstein 1986:895). In Ferrands records on the constitutional assembly of the US, a similar idea occurs:

"...sit with closed doors, because opinions were so various and at first so crude that it was necessary they should be long debated before any uniform system of opinion could be formed. ...by secret discussion no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth, and was open to the force of argument" (1787:479).

Disclosure is something that should not show any distinct representatives arguments, but rather a formal announcement of the process itself and the accomplishment so far. Accordingly, the light of day works as a disinfectant on the assembly. This means that there is a collective responsibility among the representatives to make the deliberations be both legitimate and relevant, which consequently enhance the strength of a transcendental notion as the point of departure (Sunstein 1986:897).

1.4.7 How to Ratify a Constitution

The constitution must be subject to popular ratification by referendum, explicitly formulated in the constitution and not ratification by the representatives of the assembly or parliament (Elster 1998:117). All citizens in the territory where the constitution is to govern must be able to cast their vote as a way of voicing their opinion. This complies with the *a priori* demand for all-inclusiveness and is the simplest way to guarantee equal participation – one man one vote. It further demands the assembly to make the constitution comprehensible and familiar to the citizens.

Even though you have elected representatives to the process, it is not their decision how it is to be ratified. They had an electoral mandate to make a constitution; a referendum is needed in order to control their work. This is the legitimate aspect of downstream restraints. Every representative must satisfy their electorate by considering how justice is reflected in the constitution. It would them consider a transcendental notion as a point of departure in order to avoid reasonable rejections.

Referendum is also a necessity if deliberations are kept in secret. The citizens must accept the secrecy if the process is representative. Secrecy becomes an unfortunate necessity that reflects a need to have an ability to make reasonable rejections.

1.4.8 The Paradox of Democracy Solved Through Revision

The paradox of democracy is that each generation wants to decide for themselves, unbound by past generations, what kind of constitutional settlement the future needs (Elster 2000:115). Jefferson however holds:

“The earth belongs to the usufruct of the living, and that the dead have neither rights or powers over it”
(Jefferson 1984:959).

There is nothing in liberal theory that indicates that constitutions ought to be decided once and for all and then live forever. What are meant by all-inclusive are not those who are dead, alive and yet to be born, but rather those who live. One generation cannot foresee every future problem for the society in question and predict they will “live happily ever after” according to *their* constitution. They are not allowed to put fetters on a society forever in order to safeguard something that might be a necessity conditioned by contemporary circumstances. A constitutional assembly must be arranged at fixed intervals.

“Every constitution..., and every law, naturally expires [after a generation]. If it be enforced longer, it is an act of force and not of right” (Jefferson 2004).

Convening representatives to a constitution-making process can therefore be arranged after each generation.²⁴ This will make the constitution more adaptable to new problems facing the society it regulates and still maintain workable *lex superior*. Revision does not imply that a constitution is dead in the water after each generation, but rather that the constitution can be adjusted through the right procedures where the assembly sees fit.²⁵

Adjustments reflect the need to incorporate moral deliberation as a contemporary reflection of the need for amending rules or establish new ones. The dynamics can be illustrated by *constructive intuition*, and is a method adopted as a way of reasoning during constitutional revision. It is complementary to the transcendental notion as the departure for the deliberation. Representatives have several moral intuitions, which is an immediate awareness sparked by strong convictions.²⁶ The representatives can by way of reasoning, arrive at fundamental moral standpoints that comply with the temporal-spatial context. If then, the rules set by the old constitution prior to the intuition, do not comply with the

²⁴ This is usually reckoned between twenty-five and thirty years.

²⁵ If the process is legitimate, and the *ethos* of the constitutional society in question complies with the demands set by liberal principles of justice and especially the third criterion of the legitimacy of an action that says individuals have a desire to act upon the principles of justice, there would not be any major change.

intuition, it is necessary to evaluate both the rules within the constitution and the intuition. The intuition does not create a necessity for amendment, it is not a touchstone for constitutional rules, but intuitions that cannot be dismissed without further ado have a certain authority (Rawls 1999:42-44). The intuition becomes constructive. When representatives act upon the intuition, one can dismiss the eternal validity of certain constitutional rules. They are rather intuitively correct when implemented, and one needs representatives to check these assumptions after each generation.²⁷

1.5 Representational Justice as a Realistic Utopia

Although a constitution-making process does not become entirely legitimate, one is not to conclude with a metaphysical pathos. The amount of individuals a constitution potentially may harm is the prime concern for an ideal theory with strict demands. Hence, an ideal process becomes more rigid than historical assemblies have been.

1.5.1 The Theory as a Realistic Utopia²⁸

Some may object to the use of ideal demands to a constitution-making process. Either they are too hard or because ideals are under so much scrutiny that it is pointless to judge one more permissible than the other. A further objection is the claim of a human cognitive deficit among representatives (Elster 2003). To accommodate these objections one must establish a comprehensive theory with clear-cut deductions, which at the same time acknowledge and use the motivational deficit by letting deliberations in a representative process be the only logical choice. Hence, the alternative actions the representatives can choose from become valid due to just procedure (Kymlicka 2002:6; Rawls 2001:11; Nagel 1991:21).

There are two basic demands to a realistic utopia. The *first* is that the empirical method *must* rest upon principles of justice, whereas the operationalizations vary according to the temporal-spatial context. It is, *secondly*, based on a sense of morality that is ideal, meaning that demands to reach justice are extreme, if not impossible. A theory of justice must therefore not confine itself to what can be done (ought implies can), but also set goals

²⁶ Kant speaks of intuitions as a motivational force for reason in time and space (See e.g. Kant “Axioms of intuition” in “Critique of Pure Reason” 1991). Intuition has in this regard much the same intent as Larmores’s reference to the application of an “Aristotelian Insight” (1987), which is more an empirical conditioned way of reasoning.

²⁷ Nevertheless, principles, as distinct from rules, stipulated by a constitution is unamendable because principles are fundamental in nature, meaning justified by themselves.

²⁸ One of the important notions of normative political theory is to present an ideal of collective life. Such theory is a mere utopia “if reasonable individuals cannot be motivated to live by it” (Nagel 1991:21). When, however, the utopia is realistic,

that are high, and even too high. Consequently, it becomes intrinsic that the rules point out the *right* direction – that deductions from principles are correct. The empirical method is conditioned by the practical solutions available, how justice is reached will vary.

Political theory must be able to explore the next logical step for society (Nagel 1991). By setting demands for justice that are too high for any process, the next logical step becomes a realistic utopia. The theory must nevertheless allow the process to evolve naturally towards justice, rather than facilitating revolution. The process must attend the demands as far as possible even though the outcome does not comply with justice. The main reason for a sense of justice to become out of reach is the innate human inability to sacrifice, equivalent to a cognitive deficit (It relates to the third requirement for legitimate action, meaning a lack of a general human interest in reaching justice). It is nonetheless human, and reflects the *first* of six demands for a realistic utopia, the demand for realism:

“The limits of the possible in moral matters are less narrow than we think. It is our weaknesses, our vices, our prejudices that shrink them.” (Rousseau cited in Rawls 2001:7ff).

The demand cuts down in two. *First*, it needs to be realistic in the sense that it is based upon principles in which stability for the right reasons is the outcome. *Second*, is that the principles justice rests upon, must be desirable for the social- and political arrangements. Although it differs in degree, every citizen in a modern democracy enjoys the principles of equality and autonomy through large rights-catalogues given to each citizen in their own right. As such, citizens are conditioned by justice which creates a reasonable stability, although in different contexts and to different extents. The realistic nature of the principles enters when they are desired and understood by everyone as a conception of the right. The consequent outline of the *a priori*- and empirical method explains how the principles should be attended to when forging a constitution. It also explains that in order to aspire according to a rational plan of life, one needs a platform that is transcendental in character. If this is not attended to, there would not be any reason for people to cave by the needs of others. If no one agreed, in the end, when such a point of departure was established, there would not be any reason to believe that the principles were attended. This is why the transcendental notion becomes the hallmark. One can assume that since the citizens are conditioned by these

this is the very condition that is attended – reasonable people would not present any reasonable rejection against the kind of situation the theory prescribes (See also the outline of realistic utopia in Rawls 2001).

principles, they would find them realistic. This assumption is the foundation for the following outline of realistic utopia.

The *second* part of realistic utopia is that the theory must be ideal. An ideal is regarded as perfect, or supremely excellent, in its kind. Hence, an ideal becomes out of reach and something one ought to aspire towards. The ideal is equivalent to universality of outcome. The accomplishment of universality, within normative political theory, is what is meant by *justice* (Alexy 2002:366; Rawls 1999:5). This is also what makes it utopian, but since the utopian ideal complies with the two demands for being realistic, meaning that reasonable people would live by it, it becomes intrinsic to follow the ideal as far as possible even though it is out of reach. The pace of society, and individuals' right to autonomy, implies that justice at one moment in time is reached one way, whereas the next moment in time has another way. Reaching justice is therefore pointless in societies that are evolving. The need for an ideal that goes further than the Kantian notion of "ought imply can", become evident through the question: If the ideal is something a society can reach, what then? It would mean that moral deliberation ceased, thus creating the finality of morality, a fulfillment of human aspiration. This is not something that complies with a liberal sense of justice. Moral deliberation is the outcome of the respect of autonomy, and liberal societies must respect that individuals choose a rational plan of life as they see fit. As long as these differences occur, and that religious, moral and philosophical conceptions of the good are conditioned by the temporal-spatial context, what people can reasonably reject to will also change, and hence justice cannot truly be reached. The demands of the empirical method are therefore in constant flux, and justice serves as a guiding mechanism for these demands. It is not supposed to be reached, but rather complied with as far as possible.

The *third* part is that the realistic utopia must involve all aspects needed to reach justice, meaning that it must be comprehensive. If all the demands were met, and justice is not reached, meaning the toleration of equality and autonomy, the theory is a performative contradiction. If the theory is incomplete, in the sense that it is not comprehensive, the outcome will leave some aspects unattended. The unsettled issues will create a *modus vivendi* which in its very nature does not comply with justice. The demands put forth by theory are very general, and many underlying issues are not given any explicit solution. This does not mean that the overall framework of the empirical method is wrong, but rather that it is not detailed enough. An example is the minority-issue which deliberately is left

unattended. Another issue is the practical application of what threshold is to be implemented within the election of representatives. The reason for not indulging on such issues is that some sort of selection must be made – not that they are unimportant.

The *fourth* requirement is that citizens must be able to acquire an understanding of justice. Individuals are conditioned by a rights-based civic virtue. As such, stability can be reached due to the possession of alternatives to act with upon right reasons.

“...most important of all, which is not graven on tablets of marble or brass, but on the hearts of the citizens.[...] I am speaking of morality, of custom, above all of public opinion; [...] on which none the less success in everything else depends”
(Rousseau 1978).

The development of civic virtue is a process that is conditioned by the political and social arrangements of the society in question. The outcome of a constitution-making process must therefore take this problem seriously, and not set the stage for a kind of “liberal revolution”. The process must take into account the Habermasian notion of history as a self-correcting process. Legitimacy cannot be reached if assertions are not truth-claims dependent on civic virtue (Alexy 1989), they must let the principles of justice become an intrinsic part of their lives in order to cope with the implications of assertions founded on a liberal sense of justice. If not, it would be without justification, and not true. Any assertion made during deliberation must be backed by reasons, and if the population have not got the proper education through the political- and social framework, call it the civic culture, reasons become unfounded and not unjust.²⁹ As such, the lack of civic culture does not lead the theory astray. On the contrary, the theory as a realistic utopia becomes stronger. The realistic utopia provides a framework that is flexible on how far one can go in order to reach justice. Therefore, in order for deliberation to follow the demands representational justice provide, it must be contained by what actually can be done.

The *fifth* part of realistic utopia is that autonomy must be established. This demand within a realistic utopia sets the stage for conceptions of the good to freely be acquired. The autonomy is a central element and portrays the very reason for representatives to be elected in the first place. The liberal sense of justice cannot have a principle of equality as the single criterion due to the simple fact that equal treatment requires diversity with regard to conceptions of good. The choice of a rational plan of life is at the core of what is meant by

²⁹ It rests upon the notion that “you cannot defend what you cannot define”.

liberty, and as such the very purpose to safeguard in a legitimate manner. The respect of liberty is what makes certain societies able to be “united in diversity”. Autonomy must therefore, with regard to representational justice, be respected prior to any kind of deliberation. If denied, others would not have any incentives to engage in deliberations. This respect is settled as the representatives apply a transcendental notion as a point of departure, as a precondition for the respect of autonomy.

The *last* part is that autonomy must be respected. With the application of principles, the development of civic virtue and an established framework for autonomy, the continued respect for autonomy becomes the only logical choice to make. Toleration develops while respect of other people’s choices in life is trusted to be reasonable. While the principles stand for the establishment of justice, the durability would condition a civic virtue which established trust and toleration, which ensures a continuation of representational justice. The respect of autonomy grants it continuity and is what makes deliberation possible. The respect of autonomy further requires a prior commitment to equality that states that the only possible way one can go on living freely, according to a conception of the good, is to allow everyone else to do it within a reasonable framework.

When autonomy is established and respected, the theoretical demands will move dialectic between the *a priori* method and the empirical method, with the latter continuously conforming in a just manner to what circumstances permit. It will condition how arrangements of basic structures vary time goes by.

To conclude the outline of the theory as a realistic utopia, the goal of the theory can be summed up as followed: Representational justice as a realistic utopia sets impossible, but necessary, goals to guide history as a self-correcting process underpinned by the principles of equality and autonomy. Representational justice does not stand for a constitutional settlement that is provided once, for all and forever, but includes the important notion of constitutional revision. If a constitution, as a contract, were not to include revision at fixed intervals, the constitution would not embrace moral deliberation derived from the principle of autonomy.

1.5.2 Why justice does not need to be reached

Elster concludes on different terms, but the point remains that “the boat must be rebuilt in the open sea” (Elster 2003). One must take into account the practical circumstance where the

constitution is to be forged, and the people that forge it. Both are inevitably conditioned by a temporal-spatial context. The deontic nature of representational justice serves as guiding-mechanisms for justice; it means that any consequence reflects the degree to which an action attended these principles. The interesting question then becomes: What is a reasonable discrepancy from justice? *First*, one cannot demand more than a reasonable shift in the status quo; people's way of life cannot change too dramatically before rejections become reasonable. *Secondly*, that the shift is towards an increase in the status of the principles of justice. As long as such progression is evident it becomes acceptable. Inherent in a liberal sense of justice, is a latent openness for change. One ought to see the empirical method as reflecting a call from a temporal-spatial context on how to best accommodate contemporary problems, and not in any way a call for solutions that are conceived as eternal. The reason is that:

“the role of this power in forming other and more rational conceptions of the good and in revising existing ones must not be overlooked. There is no guarantee that all aspects of our present way of life are the most rational for us and not in need of at least minor if not major revision” (Rawls 1993:312-3),

As such, the operationalizations within the empirical method can be scrutinized by conditioning them to comply with the constant flux of moral deliberation, and not a revision of the two founding principles of equality and autonomy and the ideal conditions derived from them. Representational justice as a realistic utopia is therefore a guiding mechanism, and not something that must be reached. Legitimacy is, on the other hand, a continuum between a state of nature and justice, whereas the latter is fully legitimate, the first is void of legitimacy and hence the direct opposite of justice. Any process ought to become as legitimate as possible.

References:

- Alexy, Robert (1989). *A Theory of Legal Argumentation*. Oxford: Oxford University Press.
- Alexy, Robert (1996). “Discourse Theory and Human Rights”. *Ratio Juris* Vol.9 No.3: 209-35.
- Alexy, Robert (1998). “Law and Correctness”. *Current Legal Problems* 51: 205-221.
- Alexy, Robert 2002. “*A Theory of Constitutional Rights*”, New York: Oxford University Press.
- Barry, Brian (1995). *Justice as impartiality*. Oxford: Clarendon Press.

- Elster, Jon (1998). "Deliberation and Constitution making", in Jon Elster *Deliberate Democracy*. Cambridge University Press. USA.
- Elster, Jon (2000). *Ulysses Unbound*. Cambridge University Press. USA.
- Elster, Jon (2003). *Ideal and Reality in Constitution-Making*. Unpublished manuscript.
- Eriksen, Erik O. (2003). "Democracy, Law and the question of correctness". Paper prepared for the ARENA-workshop "Constitutional Rights through discourse". ARENA: Oslo.
- Ferrand, Max. (1787). *The Records of the Federal Convention of 1787*. CCCLXVII. Vol 3.
http://memory.loc.gov/cgi-bin/query/D?hlaw:4:./temp/~ammem_4LAO:
- Habermas Jürgen (1991). Erläuterungen zur Diskursethik, in Jürgen Habermas (ed.) "Erläuterungen zur Diskursethik", 119-226. Frankfurt: Suhrkamp.
- Habermas, Jürgen (2001). "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?", *Political Theory*. Vol. 29 No.6: 766-781.
- Hobbes, Thomas (1973). *Leviathan*. London: Dent.
- Jefferson, Thomas (1984). *Writings*. Merrill. New York
- Jefferson, Thomas (2004). *Thomas Jefferson to James Madison, 1789. ME 7:459, Papers 15:396*.
[online] <http://etext.lib.virginia.edu/jefferson/quotations/jeff1000.htm>
- Kant, Immanuel (1991). *Critique of Pure Reason*. London: Everyman.
- Kant, Immanuel (1790). "Science of Right". In Immanuel Kant: *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*. USA: The Lawbook Exchange. [online]
http://www.knuten.liu.se/~bjoch509/works/kant/science_right.txt
- Kymlicka, Will. (2002). *Contemporary Political Philosophy – An Introduction*. New York: Oxford University Press.
- Locke, John (2002). *The Second Treatise of Government and A Letter Concerning Toleration*. New York: Dover Publications Inc.
- Larmore, Charles (1987). *Patterns of Moral Complexity*. Cambridge: Cambridge University Press
- Malnes, Raino (2002). "Gode Grunner. En Introduksjon til Normativ Argumentasjon", in Pia H. Axell (ed.) *Med forskerblikk på verdier*. Oslo: The Research Council of Norway.
- Nagel, Thomas (1991). *Equality and Partiality*. New York: Oxford University Press.
- Nozick, Robert (1974). *Anarchy, State and Utopia*. New York: Basic Books.
- Nino, Carlos S. (1991). *The Ethics of Human Rights*. Oxford: Clarendon.
- Pitkin, Hannah F. (1972). *The Concept of Representation*. Berkeley, California: University of California Press.

- Rawls, John (1988). "The Priority of Right and Ideas of the Good". *Philosophy and Public Affairs*. Vol. 17, No. 4: 251-276.
- Rawls, John (1993). *Political Liberalism*. New York: Columbia University Press
- Rawls, John (1999). *A Theory of Justice – Revised Edition*. New York: Oxford University Press.
- Rawls, John (2001). *Law of Peoples – with the idea of public reason revisited*. London: Harvard University Press.
- Rousseau, Jean J. (1978). *On the Social Contract*. Ed. R.D. Masters. New York: St. Martin's Press.
- Scanlon, Thomas (1982). "Contractualism and Utilitarianism", in Amartya Sen and Bernard Williams (eds.): *Utilitarianism and Beyond*. Cambridge: Cambridge University Press.
- Scanlon, Thomas (2000): *What We Owe to Each Other*. Cambridge Mass.: Harvard University Press.
- Sibley W.M. (1953). "The Rational Versus the Reasonable". *The Philosophical Review*. Vol. 62, No. 4, pp. 554-560. Canada: University of Manitoba
- Sunstein, Cass R. (1986). "Governmental Control of Information". *California Law Review*. Vol. 74: 889-921.