

Marzena Dyszy

Śląski Uniwersytet Medyczny w Katowicach

ORCID: 0000-0002-9384-8689

**THE IDEA OF LIBERTY:
JOHN RAWLS AND HERBERT LIONEL
ADOLPHUS HART**

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SUMMARY

The above article illustrates the argument between Herbert Lionel Adolphus Hart and the issue of liberty as it was depicted by John Rawls. Rawls in his *Theory of Justice* claims that justice requires that every person enjoys the greatest possible liberty which is possible to reconcile with the liberty of other people. Following such a principle it may be assumed that liberty can only be limited in the name of the liberty of others. H.L.A. Hart does not share such a standpoint. He points out that liberty can be limited not only because of itself, but also due to some social and economic progress. Moreover Hart claims that the idea of liberty presented by Rawls differs from his point of view concerning the possible limitation of the law of property. In fact Rawls admitted that his deliberations in his subsequent work, namely *The Political Liberalism*, arise from the critical view of Hart presented in his work *Rawls on Liberty and its Priority*.

Key words: liberty; justice; John Rawls; H.A.L Hart; original position

STRESZCZENIE

Niniejszy artykuł prezentuje spór dotyczący pojęcia wolności tak jak jest ono rozumiane przez H.L.A. Harta oraz koncepcją wolności przedstawioną przez Johna Rawlsa w jego *Teorii sprawiedliwości*. Rawls w swojej teorii utrzymywał, że sprawiedliwość wymaga, aby każda osoba cieszyła się jak największą wolnością możliwą do pogodzenia z takimi samymi wolnościami innych. A zatem wedle tej zasady wolność może być ograniczana jedynie w imię wolności innych. H. A.L. Hart nie podziela tego poglądu. Twierdzi on, że wolność może być ograniczana nie tylko z powodu niej samej, ale również ze względu na postęp społeczny czy ekonomiczny.

Hart uznaje ponadto, że koncepcja wolności przedstawiona przez Rawlsa jest niezgodna z jego ujęciem dopuszczalnych ograniczeń prawa własności. W istocie Rawls przyznaje, że jego rozważania zawarte w *Liberalizmie Politycznym* wiele zawdzięczają krytyce Harta przedstawionej w eseju „Rawls o wolności i jej priorytecie”.

Słowa klucze: wolność; sprawiedliwość; John Rawls; H.A.L. Hart; sytuacja pierwotna

John Rawls intended to establish what moral principles should govern the basic structure of a just society. He claimed that “the problem should be approached: by asking, not simply what principles are desirable and feasible, but what principles would we choose from an impartial standpoint, concerned as we are to establish arrangements which are both desirable and feasible?” (Kukathas, Pettit, 2007, p. 36). The answer offered by Rawls is that “we would choose to be governed by two principles of justice, the first guaranteeing fundamental individual liberties (of speech, association and worship, among others), and the second ensuring that social and economic inequalities are arranged to offer the greatest possible benefit to the worst-off in society, while upholding fair equality of opportunity. These are the principles that would be chosen by the parties to the hypothetical contract agreed to in the original position” (Kukathas, Pettit, 2007, p. 36).

John Gray claims that John Rawls in his *Theory of Justice* follows the long liberal tradition, ascribing the priority to the liberty. The priority

over other values. According to Gray, while attributing the priority to liberty, Rawls demands no choice between competitive freedoms (Gray, 2001, p. 114). Rawls makes a distinction between “the freedom persons have, thanks to their basic rights and liberties [...] and the worth of this freedom, as estimated through the second -principle scores” (Pogge, 1989, p. 127). Rawls expresses this in his *Theory of Justice* as follows: “Freedom as equal liberty is the same for all; the question for compensating for a lesser than equal liberty does not arise. But the worth of liberty is not the same for everyone. Some have greater authority and wealth, and therefore greater means to achieve their aims. The lesser worth of liberty is, however compensated for, since the capacity of the less fortunate members of society to achieve their aims would be even less were they not to accept the existing inequalities whenever the difference principle is satisfied [...]. Taking the two principles together, the basic structure is to be arranged to maximize the worth to the least advantaged of the complete scheme of equal liberty shared by all” (Rawls, 1971, p. 204–205).

However this assumption is not shared equally by other thinkers or philosophers. For example, Herbert Lionel Hart in his essay *Rawls on Liberty and Its Priority* writes: “No book of political philosophy since I read the great classics on the subject has stirred my thoughts as deeply as John Rawls’s *Theory of Justice* (Hart, 1983, p. 223). Still apart from his admiration of Rawls’s philosophy, Hart expresses his doubts concerning “the relationship between justice and liberty” (Hart, 1983, p. 223). First of all Hart writing about liberty and basic liberties notices that “throughout his book Rawls emphasizes the distinction between liberty and other social goods” (Hart, 1983, p. 226), and Rawls’s “principle of greatest equal liberty is [...] accompanied by a priority rule which assigns to liberty, or at least to certain forms of liberty institutionally defined and protected, a priority which forbids the restriction of liberty for the sake of other benefits: liberty is only to be restricted for the sake of the liberty itself.

In the general conception of justice there is no such priority rule and no requirement that liberty must be as extensive as extensive as possible, though it is to be equally distributed unless unequal distribution of it being justified as being to everyone's advantage" (Hart, 1983, p. 226).

Hart ponders what is the meaning of liberty for Rawls and he focuses on the distinction between freedom and other social goods – a distinction made by Rawls: "All social values liberty and opportunity, income and wealth, and the bases of self-respect are to be distributed equally unless an equal distribution of any, or all, of these values is to everyone's advantage" (Rawls, 1971, p. 62). The doubts expressed by Hart result from the fact that "the basic liberties to which Rawls's principle thus refers are identified by the parties in the original position from behind the veil of ignorance as essential for the pursuit of their ends, whatever those ends turn out to be, and so determining the form of their society. Not surprisingly, therefore, the basic liberties are rather few in number, and Rawls gives a short list of them which he describes in the index as an 'enumeration' [...]. They comprise political liberty, that is, the right to vote and be eligible for public office; freedom of speech and of assembly; liberty of conscience and freedom of thought; freedom of the person, along with the right to hold personal property; and freedom from the arbitrary arrest and seizure" (Hart, 1983, p. 228–229).

Writing about limiting the liberty for the sake of liberty, Hart considers the principle that "basic liberties may be limited only for the sake of liberty" (Hart, 1983, p. 232) and he notices that Rawls expresses this principle in several different ways, namely: "He [Rawls] says that basic liberties may be restricted or unequally distributed only for the sake of a greater 'system of liberty as a whole', that the restriction must yield 'a greater equal liberty'" (Hart, 1983, p. 233). However what astonishes Hart is the issue what "is to limit liberty for the sake of liberty?" (Hart, 1983, p. 233) and he claims that "Rawls speaks as if the system of basic liberties were self-contained, and conflicts within it were adjusted

without appeal to any other value besides liberty and its extend” (Hart, 1983, p. 233). However it should be noted that according to Rawls, the basic liberties should be treated as a system. The value of such a liberty under the common conditions depends on the other liberty. It is also important to resolve if a given institution or law limits the liberty or if it simply controls it. In his opinion there are some necessary rules to be followed in a discussion. (Rawls, 2009, p. 300). Hart does not seem to be convinced and he retorts: “In that case it might be plausibly be said that only the quantum or extent of liberty was at stake;[...] the restriction imposed in the name of public order or security, to which Rawls often refers, may be justified simply as hindering greater or more extensive hindrances to liberty of action. But there certainly are important cases of conflict between basic liberties where, as in the simple rules of debate case, the resolution of conflict must involve consideration of the relative value of different modes of conduct, and not merely the extend or the amount of freedom” (Hart, 1983, p. 234). And he admits in the further part of his work: “I cannot myself understand, however, how such weighing or striking of a balance is conceivable if the only appeal is, as Rawls says, to ‘a greater liberty’” (Hart, 1983, p. 234).

Hart refers to the considerations of Rawls concerning his belief that parties in the original position will rank the liberty over any material goods. Hart comments on this assumption as follows: “The core of this argument seems to be that it is rational for the parties in the original position, ignorant as they are of their own temperaments and desires and the conditions of the society of which they are to be members, to impose this restriction on themselves, prohibiting exchanges of liberty for other goods because ‘eventually’ or ‘in due course’ in the development of that society the desire for liberty will actually come to have a greater attraction for the. But it is not obvious to me why it is rational for men to impose on themselves a restriction against doing something they may want to do at some stage in the development of their society because at

a later stage [...] they would not want to do it” (Hart, 1983, p. 245). As it was pointed out by David A. Reidy in his article ”Political Authority and Human Rights”, H.L.A. Hart “sets out the conditions necessary and sufficient to genuine legal obligations. Famously, these are two. First, valid legal rules valid within the system must be generally obeyed. Second, officials must accept and honor in their official conduct the criteria of legal validity” (David A. Reidy, 2007, p. 181). What is more the same author writes in the further part of his article: “Hart goes on to note that there can be no genuine legal obligations in the absence of formal and natural justice” (David A. Reidy, 2007, p. 181).

According to John Gray the criticism of Rawls’ theory presented by Hart poses a great challenge for liberalism. If the idea of the greatest liberty refers only to some specific concepts of good or to the liberal systems, one needs to understand that there is no one universal system of liberties that would be approved by all rational men. Both liberal and non-liberal systems understand the concepts of the good life differently. Liberties which are protected by the liberal system seem to be the result of a compromise between competitive ideas. No liberal system is able to guarantee all liberties. Gray claims that the concept of the ideal liberal system in which demands concerning all important liberties are provided is not coherent. All liberal systems are entangled in the conflict of values (Gray, 2001, p. 116). As it was pointed out by Thomas Pogge: “the difficulties arise even in truly favorable conditions in which the basic liberties can be effectively established for all. A social system under truly favorable conditions is presumably advanced enough economically to *render feasible* economic institutions under which the most urgent needs are met, but the feasibility of such institutions hardly entails their existence. Those in the worst socioeconomic position may in fact be malnourished, illiterate, and destitute. It is not at all clear why the parties should demand that in such situations political efforts and social resources be devoted to the effective establishment of the basic

liberties even though the poor would largely be unable to take advantage of them. H.L.A. Hart has raised this problem in a clear form” (Pogge, 1989, p. 140).

Political Liberalism by John Rawls was supposed to be a response to Hart’s criticism. In his lecture “Basic Liberties and its Priority”, Rawls “offers a series of replies to objections, along with some changes to and elaborations of his theory of justice, which go to provide a deeper understanding of the Kantian nature of his moral philosophy” (Kukathas, Pettit, 2007, p. 120). Actually, “the development of Rawls’s thought [...] brings him to a new [...] view of the nature and the role of political philosophy” (Kukathas, Pettit, 2007, p. 120–121).

According to Samuel Freeman, “in one of the few critical reviews to which Rawls explicitly responded, H.L.A Hart commented on two gaps in Rawls’s treatment of liberty in the first principle. First, the grounds upon which the parties in the original position adopt the basic liberties and agree to their priority are not adequately explained. Second, no satisfactory criterion is given by Rawls by specifying and adjusting the basic liberties to one another when they conflict. Hart also contends that the idea of the most extensive system of basic liberties in Rawls’s first principle is problematic since it suggests maximizing the extent of liberty” (Freeman 2009, p. 53). And what is more, “Hart also contends that the idea of the most extensive total system of the basic liberties in Rawls’s first principle is problematic since it suggests maximizing the extend of liberty. But in some cases, Hart says, the idea of maximum liberty makes no sense, while in others it leads to absurd or unacceptable consequences” (Freeman 2009, p. 53). Actually, in response to Hart’s article, “Rawls refined the argument for the basic liberties, basing them (and justice as fairness as a whole) in an ideal of democratic citizens as free and equal persons” (Freeman 2009, p. 54).

As John Rawls himself admits in his work *Justice as Fairness. A Restatement*: “Since the basic liberties have special status in view of

their priority, we should count among them only truly essential liberties. We hope that the liberties that are not counted as basic are satisfactory allowed for by the general presumption against legal restrictions, once we hold that the burden of proof against those restrictions is to be decided by the other requirements of the two principles of justice. If there are many basic liberties, their specification into a coherent scheme securing the central range of application of each may prove too cumbersome. This leads us to ask what are the truly fundamental cases and to introduce a criterion of significance of a particular right or liberty. Otherwise we have no way of identifying a fully adequate scheme of basic liberties of the kind we seek” (Rawls, 2003, p. 112). Rawls seems to be aware of the fact that “a serious defect in *Theory* is that its account of the basic liberties proposes two different and conflicting criteria, both unsatisfactory. One is to specify those liberties so as to achieve the most extensive scheme of the liberties [...]; the other tells us to take up the point of view of the rational representative equal citizen, and then to specify the scheme of liberties in the light of that citizen’s rational interests as known at the relevant stage of the four stage sequence” (Rawls, 2003, p. 112). However, as Hart maintained “the idea of the extend of basic liberty is useful only in the least important cases, and citizens’ rational interests are not sufficiently explained in *Theory* to do the work asked of them” (Rawls, 2003, p. 112).

So as to respond to Hart’s criticism, Rawls attempts to come up with a better criterion. He is aware that the criterion proposed by him so far is that “the basic liberties and their priority are to guarantee equally for all citizens the social conditions essential for the adequate development and the full and informed exercise of their two moral powers in what we have referred to as the two fundamental cases “ (Rawls, 2003, p. 112). That is why he refers to the first “fundamental case” and claims that it is “connected with the capacity for a sense of justice and concerns the application of the principles of justice to the basic structure and

its social policies. The equal political liberties and freedom of thought are to ensure the opportunity for the free and informed application of the principles of justice of justice to that structure and to its policies by means of the full and effective exercise of the citizens' sense of justice. All this is necessary to make possible the free use of public reason" (Rawls, 2003, p. 112–113). Further in his considerations Rawls focuses on the second fundamental case, which in turn is "connected with the capacity for a (complete) conception of the good (normally associated with a comprehensive religious, philosophical, or moral doctrine), and concerns the exercise of citizens' powers of practical reason in forming, revising and rationally pursuing such a conception over a complete life. Liberty of conscience and freedom of association are to ensure the opportunity for the free and informed exercise of this capacity and its companion powers of practical reason and judgement" (Rawls 2003, p. 113).

In Freeman's opinion, "In Rawls's response to Hart, he explains in detail how each of the basic liberties is needed if free and equal individuals are to be in a position to exercise and develop one or the other moral power. He argues first that liberty of conscience and freedom of association are crucial to the exercise of capacity for a rational conception of the good" (Freeman 2009, p. 55–56). In fact without these freedoms an individual is not able to examine different values or "philosophical, religious, and moral doctrines and come to a decision about which way of life is most suited to their characters" (Freeman 2009, p. 56). In fact, "the basic idea here is that freedom of conscience and association are needed to come to an informed decision about the moral, philosophical, and religious principles that provide authoritative guidance for people in deciding and acting upon their fundamental beliefs and values" (Freeman 2009, p. 56).

As it was noticed by Thomas Pogge, "Rawls could easily vindicate his claim to be presenting the maximum solution by abandoning the two

principles and proposing that the general conception (or some even less specific maximin criterion) be applied across the board, irrespective of social conditions. Yet by leaving open how the various social primary goods are to be weighted vis-à-vis one another, the general conception gives very little guidance for its own application and thus avoids the difficulties associated with the special conception only at the price of imposing significant risks of another sort. Seeking to safeguard the interests of those they represent in a definite and a clearcut way, the parties would prefer a detailed and specific criterion of justice” (Pogge 1989, p. 141).

John Rawls is undoubtedly one of the most significant and influential political and moral philosophers of the twentieth century. His work has actually shaped the contemporary discussion concerning the social, political as well as economic justice in philosophy, political science and other social disciplines. Rawls theory proved to be not only powerful and influential, but it also appeared to be controversial in some assessments.

The above article presents the argument between Herbert Lionel Adolphus Hart and some followers of his thought and John Rawls and his theory of liberty. Rawls claims in his *Theory of Justice* that justice requires that every person enjoys the greatest possible liberty that is possible to reconcile with the liberty of other people. According to this principle, the liberty can only be limited in the name of the liberty of the others.

Actually Herbert Lionel Adolphus Hart does not share this view. He points out that liberty can be limited not only because of itself, but also due to some social and economic progress.

Hart claims moreover that the idea of liberty presented by Rawls is different than his standpoint concerning the possible limitation of the law of property. Actually the following opinion expressed by Hart in his essay *Essays in Jurisprudence and Philosophy* seems to be of vital

importance in his deliberations: “I think the apparently dogmatic course of Rawls’s argument for the priority of liberty may be explained by the fact that, though he is not offering it merely as an ideal, he does harbour a latent ideal of his own, on which he tacitly draws when he represents the priority of liberty as a choice which the parties in the original position must in their own interest, make as rational agents choosing from behind the veil of ignorance. The ideal is that of a public-spirited citizen who prizes political activity and service to others as among the chief goods and could not contemplate as tolerable an exchange for such activity for mere material goods or contentment [...]. It is, of course, among the chief ideals of liberalism, but Rawls’s argument for the priority of liberty purports to rest on interests, not on ideals, and to demonstrate that the general priority of liberty reflects a preference for liberty over other goods which each every self-interested person who is rational would have. Though his argument throws much incidental light on the relationship between liberty and other values, I do not think that it succeeds in demonstrating its priority” (Hart 1983, p. 247).

In fact, Rawls admitted that the deliberations in his subsequent work – *The Political Liberalism* – arise from the critical view of Hart included in his work *Rawls on Liberty and Its Priority*. Rawls in one of his lectures “The Basic Liberties and Their Priority” writes: “It was pointed out by H.L.A. Hart that the account in my book *A Theory of Justice* of the basic liberties and their priority contains, among other failings, two serious gaps. In this lecture I shall outline, and can I do no more than outline, how these gaps can be filled. The first gap is that the grounds upon which the parties in the original position adopt the basic liberties and agree to their priority are not sufficiently explained. This gap is connected with a second, which is that when the principles of justice are applied at the constitutional, legislative, and judicial stages, no satisfactory criterion is given for how the basic liberties are to be further specified and adjusted to one another as social circumstances are made known [...]. I shall

outline how the basic liberties and the grounds for their priority can be founded on the conception of citizens as free and equal persons in conjunction with an improved account of primary goods” (Rawls 2005, p. 391). However, Rawls emphasizes the difference between him and Hart: “These revisions bring out that the basic liberties and their priority rest on a conception of the person that would be recognized as liberal and not, as Hart thought, on considerations of rational interests alone” (Rawls 2005, p. 392).

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