



Rawls' Difference Principle:

A test for social justice in contemporary social
policy

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Helen Taylor

DECLARATION

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Summary

“Political philosophy as a critical activity starts from the practices and problems of political life”
(Tully 2002, p. 536)

This thesis addresses a number of topics which are not normally combined: John Rawls, homelessness, and social policy. The research is a piece of applied philosophy which seeks to address claims about a disconnection between philosophical frameworks and tangible political problems. It argues that there is a role for philosophers, and philosophical frameworks, within the policy-making process. By applying philosophy to policy we can create normative accounts of the development and impact of legislation.

The philosophical framework used within this research is John Rawls’ conception of justice as fairness. The work outlines the liberal principle of legitimacy and argues that Rawls’ concept of reasonableness can, and should, be used to justify the intervention of policy in individuals’ lives. The concept of reasonableness can be used as a regulatory mechanism in order to test whether social policy meets a standard of social justice. The metric used for this standard is whether the worst off in society have the capacity to create and pursue a conception of the good, a central capability of citizens as effective agents. Through modifying or emphasising certain Rawlsian concepts, the research develops the Difference Principle as a regulatory test to be applied to social policy.

The final part of the research provides this initial application. The Housing (Wales) Act is used as a case study to assess whether the test as developed is able to create normative interpretations of specific pieces of legislation. It identifies a particular legal tool – the *Pereira* Test – as problematic on a normative account. The application of the Difference Principle demonstrates that this particular legal tool undermines individuals’ ability to safeguard their fundamental interests, and their capacity to create and pursue a conception of the good.

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Introduction

The Role of Political Theory

The role and purpose of political theory is an ongoing debate within the discipline, with the contemporary debate beginning in the 1970s, often attributed to the publication of Rawls' *A Theory of Justice*. This debate focusses on discussions about whether political theory should engage with practical politics in terms of both content for research and aiming for tangible practical outcomes. The question arises of whether the discipline has a normative role to play in addressing concrete issues, or whether the role of political theory is to provide robust theoretical accounts of why certain situations in society are the case.

Marc Stears argues that the discipline of political theory should choose topics where concrete contributions can be made. He states that the role of political theory "is a question of seeing political theory as part of the process we call 'politics' and that process is one of change, of engagement, and of drama" (2005, p. 347). He heavily criticises the apparent shift away from the discipline of doing this, commenting "the period from around 1970 to the turn of the century was marked by a dismal disconnection between theoretical endeavour and empirical investigation" (2005, p. 326). Stears attributes this disconnect to the shift to an emphasis on Anglo-American analytic moral philosophy which is "woefully detached from the realities and contingencies of the social and political world in which real citizens live" (2005, p. 326). Feminist theorists Judith Squires and Wendy Martineau support this critique and link this shift to the use of a particular type of ideal theory "most famously adopted by John Rawls" (2012, p. 524). The contention here is that political theory has strayed from an emphasis on engaging with practical politics, and has become confined to pure theoretical engagement. Stears, Martineau, and Squires criticise this withdrawal from practical application within the discipline, noting that it leads to an inability to undertake the critical work that political theory should. These theorists assert that there is a normative duty for political theory to undertake critical work that focusses on engagement in society.

Most recently, this issue of the role of political theory has been debated in more informal settings of academic discussion, such as Prospect magazine. Drawing on R.G Collingwood's comments that academic discussions should stay in the world of 'make-believe', Christopher Fear questions whether political philosophers "know that their world is mostly make believe" (2013) and contests that academia is in fact an internally-coherent language world, which "doesn't work beyond the context of its rabbit-hole" (2013). Fear suggests that "perhaps it is best that it doesn't" (2013). On this account, political theory has an abstract role and political philosophy should be kept in academia, and not applied to practical politics. Fear denies that there is a role for political philosophy to

contribute to tangible debates on the subjects that it engages in, and no normative duty to engage with society or subjects of (in)justice.

More specifically to this thesis, the “dismal disconnect” (2005, p. 326) from the 1970s onwards, heralded by Stears, has been attributed to the work of John Rawls. It is Rawls’ emphasis on a contract approach to justice, created through ideal theory that is the focus of these criticisms. As previously noted, Martineau and Squires criticise the disconnection between theory and practice which they attribute to the shift to ideal theory following Rawls’ publication of *A Theory of Justice*. They state “the attempt to arrive at moral norms through isolated thought experiments of the theorist are on this view seen as much a part of the problem as the solution to addressing various patterns of inequality” (2012, p. 530). They criticise the starting point of Rawls’ justice as fairness as a thought experiment on justice, arguing that this starting point condemns the theory to abstraction. The theorists assert that since the 1970s, political theory more generally has become “too disconnected from actual concrete conditions of injustice...thus failing in its own professed remit” (2012, p. 523). In doing so, political theory has become “isolated and introspective” (2012, p. 524) with a lack of concrete impact.

Highlighting that this shift in methodology coincides with the decline of the welfare state, Martineau and Squires further criticise the lack of engagement in empirical studies regarding this decline. They state that this lack of attention to contemporary political situations impacts on the nature of discussions that are being had within the discipline of political theory on broader concepts such as social justice and equality. Martineau and Squires state “a clear bifurcation between idealised abstraction and applied empirical inquiry sustained the disconnection between normative claims about the meaning of ‘justice’ and empirical studies of political institutions” (2012, p. 525). By not engaging with other disciplines on broad changes in society, political theory becomes even more removed and unable to adequately address the critical issue of equality and justice. Furthermore, they note that as well as this methodological shift occurring conterminously with the decline of the welfare state, it also took place within the context of globalisation and the demise of the nation-state. This leads them to comment that “it becomes harder to sustain the myth of the political theorist as a monological source of authority on the meaning of justice” (2012, p. 525). The great changes within contemporary society, if ignored by political theorists, undermine the critical force of the discipline itself. For Martineau and Squires therefore, the question of conflict between theory and practice not only impacts upon the role of political theory but also the nature of the discipline and questions asked, and discussions had, within it. If the discipline does not engage, it does not

meet its normative duty to be a critical force but also, instrumentally, has less to contribute due to the broad changes in society.

Research Aims: Applied Philosophy

This thesis aims to contribute to this discussion of the role of political theory and political philosophy by providing an example of how philosophical frameworks can be used to address concrete issues. It seeks to make a concrete contribution to the fields of both philosophy and policy, and take steps to overcome the apparent disconnection between the two disciplines. This research, therefore, is a piece of applied philosophy which seeks to create new understandings about policy developments grounded within philosophical conceptual frameworks. Tully describes (2002, p. 534) the potential role that political philosophy can play in this regard: “It is a form of philosophical reflection on practices of governance in the present that are experienced as oppressive in some way and are called into question by those subject to them”. In this instance, I am looking at how the application of John Rawls’ approach to justice can be used to create new ways of thinking about the development and impact of contemporary policy. Despite the claims noted above that it is Rawlsian theory that has contributed towards this disconnect between theory and practice, this research aims to show that by focussing on the central aspect of Rawls’ theory – that individuals are free and equal – we can generate a tool which enables us to create new interpretations of policy.

There are examples of this type of liberal philosophical tradition being applied to issues such as global justice (Williams 2011) as well as more domestic policy problems such as healthcare (Daniels 1985). These applications are used to create deeper understandings of issues such as redistributive obligations between countries. Regarding health, theoretical applications can be used to create understandings around health as a social good and what obligations might follow from this. We can see, then, that there has been some appetite for using philosophical theoretical frameworks in an attempt to help us create new understandings of specific policy areas or issues. However, this is still a relatively innovative approach to using philosophical frameworks particularly within the domestic policy sphere.

More specifically, the application of these types of philosophical frameworks to housing policy has been neglected. However, there is currently a growing field being developed by theorists such as King (2003, 2011) and Watts (2014). Applications of moral and political philosophical frameworks in this field enable us to create new understandings of concrete housing issues such as homelessness and destitution related to concepts such as social freedom rights and empowerment. Drawing on the work of Waldron (1993), King (2003) uses the concept of rights to develop an argument for

housing to be understood as a freedom right. He aims (2003, p. 662) to create “a foundational argument that sees housing as a fundamental entity” through this application. For King, it is the use of the framework of social rights which enables this argument to be created as “what rights-based arguments help us to do is to concentrate on the morality of a situation rather than questions of utility or economy” (2003, pp. 662 – 663). On this argument, then, “scarcity is not a sufficient condition for decision making in housing policy”. We can see, then, that this creation of a new type of understanding can have a direct impact on more concrete engagement with the issue of housing in terms of potential policy responses.

This research contributes to this growing field by adding another formation of a philosophical framework which can be applied to social policy, and housing more specifically. As I will discuss in Chapter 1, there are two ways in which this type of applied project can be both developed and promoted. The first is through philosophers recognising housing as an area of interest to which philosophy can be applied. When looking at the analytic capacity of a specific theoretical approach, philosophers should be more willing to apply this to housing-related issues to understand whether the approach has purchase. We can see this in the work of King (2003, 2011) and Watts (2014). Watts applies a conceptual framework of empowerment to the legal rights to housing of people who are homeless in Scotland and Ireland. In it, she suggests (2014, p. 2) that “legal welfare rights, as implemented in Scotland, can be effective tools for empowering homeless people, and moreover that they have the potential to support rather than undermine self-reliance”. We can see here, not only the creation of a new understanding through the application of a philosophical framework, but the capacity for this application to act as an argument for policy transfer. Second, this can happen through the demand from those working in the development of housing-related policy seeking out the contribution of a philosophical conceptual approach. As I will discuss in Chapter 1 this has happened in other policy areas with theorists such as Wolff (2011). There is still a large way to go in persuading both philosophers and policy-makers that housing is a good site for the application of philosophical conceptual frameworks.

Research Aims: A Rawlsian Account

Additional to the contribution of the research to the field of applied philosophy, the thesis more specifically aims to make a Rawlsian account of justice an appropriate tool to use within an applied context. It therefore addresses criticisms on the abstract nature of the theory, some already highlighted by Martineau and Squires (2012). These criticisms are also fielded by theorists such as Walzer (1981, 1983), and Okin (1989) who argue that Rawls’ metric, understanding of the role of philosophy, and account of individuals are inadequate. This in turn, they argue, undermines the

purchase of his arguments and its subsequent ability to make a useful contribution to either philosophical literature or tangible understandings of issues of justice. In particular, Walzer criticises (1981, p. 135) Rawls for partaking in “the philosophers’ withdrawal” in his approach to justice. Instead, Walzer asserts (1983, p. xiv) that “I mean to stand in the cave, in the city, on the ground. Another way of doing philosophy is to interpret to one’s fellow citizens the world of meanings we share”. For Walzer, Rawls’ approach has no connection to concrete issues and therefore is unable to contribute to discussions around policy. In marked contrast, I argue within this thesis that the Rawlsian account of justice can be seen to contribute “in the cave, in the city, on the ground” (Walzer 1983, p. xiv). In amending and modifying Rawls’ account of the Difference Principle and emphasising its place within the context of an understanding of reasonableness, I argue that the Rawlsian account of justice can provide a tangible test for social justice in social policy.

Rawls’ Difference Principle has been chosen to be the mechanism by which to achieve this, subject to a number of modifications largely around the metric of the test. The intention of the development of this work is to provide a tool by which different understandings of policy can be made through looking at the concept of reasonableness. Success for this aim would therefore be the development of a specific tool which could be used by policymakers to scrutinise policy. This work lays the theoretical framework for this to happen, and acts as a springboard for the development of the tool in more detail in further work. This thesis provides the conceptual framework behind the test, and an indicative application of the test to the Housing (Wales) Act. This project is therefore to be reviewed, and lessons learnt, before the development of the specific tool is developed.

The policy test that I develop, however, is not intended to solely be an example of how Rawls’ framework can apply to housing policy but should act to support the argument that there is a role for philosophers to play within the development and evaluation of policy. Again, this can be seen to be developing with theorists such as Wolff (2011) involved in particular policy development programmes or reviews of the impact of policy. This work, then, can be seen to fit into an already developing field of work – the use of philosophical perspectives within the policy process – as well as making the argument for the expansion of this project.

The theoretical basis of this work is the assertion from John Rawls (1999) that individuals have two moral powers of rationality and reasonableness. Individuals’ capacity to be rational leads to them creating and prioritising a conception of the good for themselves. This involves a value judgement of what is important to individuals, and a motivation for them to act to achieve this. Reasonableness as a moral power understands this priority for a conception of the good in the context of a social scheme of cooperation. As individuals, we recognise that we have a particular conception that we

want to pursue but also that all other individuals in this society have similar motivations to pursue their own conceptions. Individuals, then, have a fundamental interest in being able to create and pursue their conception of the good, within the bounds of a social scheme of cooperation. This division between rational and reasonable is an intuitive one, which can be understood as part of everyday thinking. As individuals living in any form of social scheme we can understand that an action may further our desire to attain or achieve something, but that as members of that scheme the action can be seen as unreasonable due to its impact on others.

This work seeks to expand this analysis so that as well as individual actions, actions taken by institutions can also be both rational and reasonable. The form of action under scrutiny in this research is policy. This thesis examines the extent to which policy can be understood or evaluated in terms of Rawls' conceptions of rational and reasonableness. Policy interventions can appear to be justified on the grounds of rational measures such as the rationing of resources or the implementation of a specific ideological value set – a representative conception of the good. This justification can be undermined, however, through the impact of this policy on individuals within the social scheme. This research will argue that if policy undermines individuals' ability to undertake certain actions then it cannot be justified according to reasonableness. A policy, then, can simultaneously achieve rational justification but fail tests for social justice. In order to assess the extent to which a policy can be identified as being unreasonable, this thesis outlines a test to understand whether they achieve or undermine the concept of social justice. It uses Rawls' concept of the Difference Principle as a framework for this, but modifies aspects to take account of this emphasis on individuals' desire to create and pursue a conception of the good.

Structure

The specific research question for this thesis is, then, whether Rawls' Difference Principle can be made into a test for social justice. In addition to this introduction, the thesis is divided into three overarching parts and ten chapters within those. The first – theoretical foundations – defines the key concepts and processes on which my theoretical framework will sit. The second – building a toolkit – will outline key mechanisms I am using to bend the Rawlsian approach to create a more appropriate account of social justice in social policy. The third part – application – applies the philosophical framework I have developed in the previous two parts to the Housing (Wales) Act. This looks at the development of the legislation, and how this fits with concepts of reasonableness and basic justice. The conclusion chapter reviews this application and provides comments on how it worked in the context of the Housing (Wales) Act and recommendations for the structure of future work to develop the tool further.

Part 1

Chapter 1 of the thesis outlines the methodological approach within which the research sits, as well as the area of research which the thesis will contribute to. It outlines the current relationship between philosophy and policy, engaging with the theorists previously mentioned who take this approach. The chapter provides the argument that there is a specific role for philosophers in the policy process; seeking legitimacy for the interventionist nature of policy. Drawing on the work of Waldron (1993), this chapter outlines the first application of philosophy to policy within the research. It applies Waldron's account of housing as a social freedom to the Housing First model of homelessness support, and thereby generates a different understanding of this type of service provision.

Having contextualised the work within the relationship between policy and philosophy, Chapter 2 outlines the core concept which underpins the thesis – the role of the reasonable in public justification. In this section, the two moral powers included in both Rawls' and Scanlon's accounts of justice are outlined. The chapter outlines how reasonableness can (and should) have a regulatory function and how this can be used to provide an account of legitimacy for policy. Again the development of this argumentation is supported through an application of philosophy to policy. At the end of the section, I outline how the concrete example of the 'Bedroom Tax' can be understood according to an analysis of the policy based on the two moral powers. The policy can be justified rationally based on the need to ration resources, and create equity between citizens based on accessibility of public funding. However, when we look at the impact of the 'Tax' on some individuals we could understand it to be unreasonable. A UN report (2013) into the introduction of the policy outlines that in some cases independent living was undermined for people with disabilities and that there was a retrogressive element to this impact. This analysis, however, was refuted by the UK Government. This example is used to build on the idea that we can create new understandings of policy from Chapter 1, and outline how a particular concept – here the framework of reasonable and rational – can be applied to policy.

Chapter 3 outlines the Rawlsian account of justice. Within this research, elements from different works of Rawls are drawn upon to create my argument for the application of the Difference Principle to policy. The framework of the two moral powers appear in *A Theory of Justice* (1999) and Rawls further develops and emphasises the role of the reasonable within *Political Liberalism* (1996). The role of this chapter is therefore to outline Rawls' theory of justice as fairness and the Difference Principle and explain how this can marry with Rawls' shift of focus in *Political Liberalism*. The chapter argues, therefore, that it is the inclusion of the view point of the worst off in the construction of the

Original Position that enables the Difference Principle to be an appropriate test for basic justice. This is linked to the Rawlsian account of individuals as having fundamental interests. Built into the decision-making procedure regarding the creation of principles of justice is the emphasis on individuals being able to fulfil their fundamental interest in creating and pursuing a conception of the good.

Part 2

Part 2 – building the toolkit – outlines three key mechanisms from Rawls, and concludes by outlining my modified account of the Difference Principle and the test which has been constructed from this. Chapter 4, therefore, outlines the concept of Reflective Equilibrium. It argues that this mechanism can be used to transform the Difference Principle into a device for everyday decision-making about policy. It outlines both Rawls' account, as well as engagement with the concept from Roberts (2007) and Scanlon (2000). Both of these underline this emphasis that Reflect Equilibrium reflects a process of ongoing critical reflection which operates at the level of everyday individual considerations. Drawing on the work of Ron (2006), I argue that we can use the concept of Reflective Equilibrium to provide immanent criticism of structural decision-making. The extension can subsequently make the case for the inclusion of philosophers in the policy-making process as they can contribute to this critical reflection to create legitimacy.

Chapter 5 provides suggestions for alternative metrics to Rawlsian Primary Goods and discusses what the appropriate metric for basic justice should be. I introduce work by Nussbaum (2006) and Daniels (1985) which suggest that there should be a focus on individuals' functionings rather than a focus on a distribution of a variety of goods. I conclude by supporting this position, and stating that in order to measure social justice the capability of individuals to act in certain ways should be taken account of.

Chapter 6 builds on this argument by reinterpreting this in the Rawlsian context of the concept of self-command. This chapter argues that we can understand the focus on capabilities as part of Rawls' discussion of self-command as part of the Primary Goods metric. Linking this to work by Maslow (1943) on a hierarchy of needs, we can understand a metric to be developed around what people are able to do and be, and what needs they are able to meet for themselves. Self-command, linked to the concept of individuals as having fundamental interests to pursue, can become a pared back version of the Primary Goods metric which measures whether individuals are able to create and pursue a conception of the good life. This can then be used as a measure on social policy asking

whether the policy as a form of intervention enables or hinders individuals to create and follow a conception of the good.

Chapter 7, then, both recaps and expands information on the mechanisms I have used to bend Rawls' theory into one which can be used as a policy test. There are three forms of mechanism covered here. First, I emphasise the specific scope in which the test would apply in terms of the policy continuum I introduced in Chapter 2. The test therefore applies only to policy that affects issues of basic justice, and I provide examples of this here. Second, I reaffirm the use of reasonableness within the application of the test. Here I state that the application of the test follows Scanlon's framework of reasonable rejectability; it purely functions as a mechanism to indicate when a policy fails the test, not as a means for outlining what needs to change to meet basic justice requirements. Third, I recap the element of Reflective Equilibrium and how this tool enables the Difference Principle to be used as a regulatory test. Fourth, I recap the revised metric that the test uses – that of effective agency. The chapter concludes with an outline of the test as drafted informed by the theoretical framework. There are two elements to the test therefore; first, whether the policy enables the least advantaged to be effective agents. Second, whether the policy makes the least advantaged worse off in terms of effective agency. I return to the example of the 'Bedroom Tax' to see how the development of the theoretical framework and subsequent policy test enable us to understand this reform.

Part 3

The third part of the thesis focuses on the application of the theoretical framework. In it, I apply the test that I have developed to the Housing (Wales) Act. This case study was chosen for a number of reasons. First, it was an interesting area of policy which has been the subject of some but not lots of philosophical engagement. Second, it is an area that is familiar to me as someone who has worked for a variety of homelessness organisations. Third, it is the first Welsh Housing Act to be made following the devolution of primary law-making powers in 2011. Fourth, at the time of researching I was working as a political researcher and was subsequently able to cover all debates, Committee sessions, and National Assembly output that related to this piece of legislation. This combination of knowledge and experience provided a good rationale for this legislation to be the focus of my case study.

Chapter 8 provides an outline of the key documents within the legislative process. Within it, I outline changes which occurred between the White Paper, the Bill as published, and the Act. A selection of key codes from my theoretical framework is applied to the document which enables an analysis of

the legislative documents according to whether it can be understood as reasonable, and meeting requirements of basic justice. This analysis is supported with interview data from interviews with a range of key decision-makers within the legislative process. The chapter highlights both positive and negative duties included in the legislation which relate to matters of basic justice.

Chapter 9 provides a more focussed analysis of one aspect of Part Two of the legislation, that relating to homelessness law. I identified within Chapter 8 the retention of the use of priority need testing for people who are presenting as homeless within the legislation despite its proposed abolition within the White Paper. Chapter 9 outlines the ongoing role of priority need testing, how this relates to the Act, and the implications of this inclusion in terms of basic justice. I engage with interviews from individuals who have been subject to priority need testing in order to review the impact that this legislative tool can have on individuals. Here I identify as problematic the legal tool for testing priority need, the *Pereira* Test and how this can be seen to undermine basic justice for those who are subject to it.

Chapter 10 goes on to focus on the process by which the *Pereira* Test was included within the Housing (Wales) Act. This inclusion elevated the Test from judicial guidance to statute. I argue that not only does the use of the tool constitute an undermining of basic justice, but that this elevation of status constitutes retrogression in policy-making which impacts on the worst off in society. Furthermore, in parallel to the development of the Welsh legislation, a Supreme Court case on the use of the Test as judicial guidance was ongoing. The Court ruled that it was inappropriate to use the tool in its current format as a piece of judicial guidance. In conclusion, I argue that the inclusion of this legal tool undermines the ability of the Housing (Wales) Act to deliver basic justice.

This research contributes both to the applied philosophy discipline and the housing discipline. It provides an example of how Rawls' Difference Principle can be modified to provide a tangible test for policy. It also shows how the application of philosophical frameworks to specific social policy such as housing policy can be useful in generating new understandings of the formulation and potential impact of that policy and enabling insightful critical judgments. As highlighted, this thesis provides the theoretical underpinnings and test case for the creation of this model. The development of the test as a specific policy tool is to occur through further research projects, with the argument for the involvement of philosophers within the policy process ongoing.

Part 1 – Theoretical Foundations

Chapter 1 – Philosophy & Policy: (un)happy bedfellows?

This chapter is split into two main sections. In the first, I will outline the type of project that I am undertaking. I will provide a brief review of the literature about applied philosophy, as well as an assessment of a number of relevant pieces of applied philosophy research. The second section of the review will focus on the two broadest concepts at play in this research – social justice and social policy – and the relationship between them.

The role of policy

Before looking at whether philosophy can be successfully (and usefully) applied to policy, it is important to first clarify both the role of policy in general terms, as well as the actors who are likely to be involved in the policy-making process. In order for me to make the case that the application of philosophical thought to policy development should happen, there needs to be an account of how that philosophical thought might contribute and how philosophers might become actors within the policy process.

Philosophy can make a specific contribution to the concept of justification in policy-making. Later in the section I will look at how justification of policy might occur currently but, first, I will make the argument that it is the level of intervention linked to the implementation of policy which creates this demand for justification. When looking at what policy is, it is clear that it involves some form of intervention in individuals' lives. Dean (2012) outlines that the creation and introduction of social policy is a recognition of the interdependency upon each other of individuals living in society. He states (2012, p. 6) "the social policies to which societies give birth may be understood as the way in which any particular society recognises and gives expression to the interdependency of its members". This builds on the work of Richard Titmuss (1955) who relates the development of social policy to the dependency of citizens on each other in order to meet needs. Discussing the creation of the welfare state, he outlines the recognition of these 'states of dependencies' as taking the form of collective responsibilities as fundamental to this. These 'states' take two forms; natural and manmade. Natural 'states of dependencies' include childhood, child bearing, and extreme old age. Manmade 'states' include those which are socially or culturally created such as situations of unemployment. These manmade 'states' involve some form of curtailment of earning power, such that an individual cannot meet their own needs. All individuals will experience some form of dependency – either natural or manmade - over their life course. The existence of social policy, therefore, is the recognition both of these dependencies experienced by individuals and of a

collective responsibility for these states. Social policy, therefore, intervenes in individuals' lives at these times to provide either a remedy or mitigation for the type of 'state of dependency' which is being experienced.

Dean (2012, p. 11) goes on to assert that "there are many social policies which impose rules or conditions upon the day-to-day behaviour of all kinds of people". These interdependencies, and in turn the recognition of a collective responsibility by the state for these, lead to the intervention of the state in individuals' lives. The nature of the state through social policy can be seen to take a variety of different forms such as shaping the behaviour of citizens, limiting their actions, and placing obligations on individuals towards each other. We can consider these in turn. Public Health policy is a good example of intervention with the aim of behaviour change. Consider the contemporary drive towards individuals giving up smoking. Images on packaging of the impact of smoking on organs have been introduced as a deterrent, a variety of adverts in different mediums have been disseminated about the dangers of smoking, and smoking cessation programmes and clinics have become widely available through pharmacy services. This broad policy priority can also be seen to provide an example of intervention linked to limits on actions through legislation. The Health Act 2006 introduced by the UK Government banned smoking in public places, smoking has been banned in cars, and the recently defeated Public Health (Wales) Bill looked at extending these no smoking areas to other public spaces such as children's playgrounds and beaches. These pieces of legislation put a limit on the areas where individuals can undertake particular activities - in this instance smoking. Finally, although this is a simplistic discussion, the tax system in the UK can be broadly understood as a recognition of the concept of collective responsibility and therefore a creation of obligation between individuals. Through it, wealth and resources are redistributed in order to address individuals' needs when in states of dependencies. For example, citizens' income tax goes towards funding the NHS not just for the care that they receive but for the collective provision of healthcare. There is, then, a link between the existence of policy and a form of intervention in individuals' lives. It is this link which enables the case to be made for the potential inclusion of philosophy within the policy-making process. I argue that it is the very nature of this inextricable link between policy and intervention that demands the provision of justification for policy. Underpinning this piece of work as a whole then, is the argument that due to the nature of social policy as a form of intervention, a normative element has been built into the process. This normative element places a duty for a requirement of justification onto the policy-making process, which can be provided through a consideration of the concept of reasonableness.

We can further add weight to this claim that justification is required due to the level of intervention social policy entails by looking at the question of what policy is and how it is made. Hall (1993) discusses policy creation as a form of social learning which can conclude with a paradigm shift in approach. He draws on the work of Heclo (1974) outlining (Hall 1993, p. 305-6) that “policy-making is a form of collective puzzlement on society’s behalf”. Although Hall goes on to criticise the narrow focus of this approach, it is an interesting position to consider when looking at the role of policy and questioning whether philosophy can have a part in this process. If policy-making is the process by which the state interprets, and then creates, a response to issues experienced by citizens, then philosophers, in their role of taking a systematic approach to difficult questions, should be involved. I will go on to outline how this could actually happen in practice, but it is important to recognise the potential cross-over in activity between philosophy and policy-making. Within the policy-making process decisions are made regarding the nature of an issue that is to be addressed, how this is understood as a policy problem, and what the solution to this problem should be. Defining terms, and analysing sequential arguments occurs, therefore, within each discipline. This further supports the argument for justification: if policy-makers are acting as the collective decision-makers on behalf of citizens there needs to be a form of accountability for the decisions made in this process.

Hall (1993) goes on to describe the different types of changes that can be made through the policy process. He focuses largely on policy process, but this typology can be expanded slightly in order to understand how different policies might impact on people. His concept of first-order change describes the incremental change in regards to the instruments and settings used within the policy, but with a retention of the fundamental goals and instruments of the particular policy. Second-order change refers to strategic action around a change in institutions used to deliver the policy, but a continuance of the goals for the policy. Both of these states Hall describes as part of ordinary policy-making where no change is made to the fundamental normative framework behind the policy. The final category of change that is outlined is third-order change or paradigm shift. Hall notes that this is likely to be more sociological than scientific, that issues of authority will be central, and that instances of policy experimentation and policy failure are likely to play an important role. We can see here the beginnings of a disaggregation of types of policy change, which could be extended to relate to the impact different forms of policy-making might have on individuals. With the first two orders of change, the change is mechanistic with no change in the goals to which the policy is ascribed. This type of change may have an impact on individuals in terms of the instruments and institutions used to implement the policy. The third type of change; that of a paradigm shift, is likely to have a wholesale impact on individuals who relate to that policy area. We can understand this as an initial account of a continuum of policy: that which affects matters of basic justice, that which

doesn't and that which may or not have an impact. I will expand on this concept of a continuum in Chapter 2. Hall applied his theoretical model to macroeconomic policy-making in Britain between 1970 and 1989, and observed that the change from a Keynesian to a monetarist macroeconomic policy constituted a paradigm shift in that area of policy. Hall further noted that unlike the model he had set out, within this particular paradigm shift it was not the experts and civil servants but the politicians and media who played the pre-eminent role in the process of policy change. Here, we can make a twofold case for a role for justification in policy-making. First, there must be some form of accountability for the decisions made in regard to policy-making, particularly when this constitutes a paradigm shift in approach. It is likely that this type of policy will have a significant impact on individuals. Second, there needs to be a form of accountability in relation to the role of experts within the process. In this case, normative justification is more pertinent as the individuals involved in the process are not always politically accountable.

This latter discussion of Hall's work raises a subsequent question to 'what is social policy?' around 'who is involved?' Here the literature is wide ranging on the role of experts, how organisations and individuals work together, and how these relationships are formed. Again, as background to the making the case for philosophers to have a role in the policy forming process, it is important to review some models around which actors are involved and the role that they play. These models seek to critically explain how policy is made, and provide a framework by which the process can be understood. My approach within this project is to make a series of normative claims around who should be involved in the policy making process, and what considerations actors should make in terms of providing legitimacy for the policy that they make. As noted, there are a range of models which provide an account of the role of particular individual or groups of actors within the policy-making process. This can generally be discussed within the constraints of an analysis of policy-making which supports the dichotomy between 'top down' and 'bottom up' approaches to the process (Cairney, 2013). If the approach taken to policy creation is 'top down' it will be the elites that are involved in the decision-making. This includes political representatives, civil servants, and experts in the particular field. The 'bottom up' form of approaches are led by those who would be involved in the delivery of the policy or who would be impacted by it. We can see that these different approaches to the activity at hand can define the actors that are involved in the process. However, a further wealth of literature discusses how the division between these approaches are not so binary and other factors can influence who is involved in what is understood as the policy-making process. For example, Lipsky (1971) provides the model of street level bureaucracy which emphasises the role of those who implement policy in the translation between intention and delivery of policy goals. Kingdon (1984) highlights the existence of policy entrepreneurs who use

their knowledge of the system to promote their own policy objectives: attaching their own solution to a problem which occurs. The Rhodes Model of policy networks (Rhodes, 1986) outlines in greater detail how and why individuals might work together within the process of creating policy. It lays out five types of networks; policy communities, professional networks, intergovernmental networks, producer networks, and issue networks. Each of these denote different actors being involved in the process, engaging in different ways, and to different ends. For example, an issue network will have a large number of participants with a limited amount of interdependence. A producer network, however, has an emphasis on economic interests, also has limited interdependence, but has a fluctuating membership.

Fischer (2000) discusses the issue of the relationship between the use of experts in policy development and citizen participation in more detail. He builds on concerns from Dewey (1927) that the increasing complexity of modern, technological, society undermines the space for citizens to be involved in deliberation of and decision-making within a democracy. Fischer (2000, p. viii) questions “do most citizens have the knowledge and the intellectual wherewithal to contribute meaningfully to the complex policy decisions facing an advanced industrial society?” He states that this question poses a challenging issue for both democratic theory and democratic politics in action. Citizens have three important goals within a democracy. First, citizen participation and its normative rationale of deliberation give meaning to the concept of democracy itself. All citizens should be involved in some form of deliberation about decisions that impact on their lives. Second, Fischer (2000, p. 2) argues that “citizen participation contributes normatively to the legitimacy of policy development and implementation”. Finally, knowledge gleaned through citizen participation can contribute to professional inquiries into a subject area. These fundamental contributions towards democracy can be seen to be undermined through the reliance on experts as policy decision-makers. There has been a shift, first recognised in Dewey’s work in the 1920s, towards looking to knowledge experts to make political decisions about policy. Fischer (2000, p. 1) characterises this challenge: “are not the knowledge elites more likely to support the values of both social justice and efficiency” in decision-making? The conflict, then, lies between the fundamental role of the citizen within a society functioning as a democracy and the capacity of citizens to adequately contribute to decision-making that regards complex issues.

This shift towards experts and away from citizens has an impact on normative justification. Fischer (2000, p. 7) states:

The increasing complexity of social problems, giving rise to increasing specialisation and the expansion of elite ‘public policy specialists’ puts the Western polyarchies in the position of

being replaced by a 'quasi-guardianship' of autonomous experts, no longer accountable to the ordinary public.

We can see that decisions relating to policy that will have a variety of different impacts on individuals' lives (reflecting on the various types of policy change outlined by Hall) are being made by experts rather than individuals, undermining the direct relationship between citizens and normative justification. Fischer (2000, p. 8) goes on to outline further issues with this reliance on experts: that, in fact it has been seen that experts, also, are unable to engage with these complex problems. Also, that expertise "turns out not to be the neutral objective phenomenon that it has purported to be". Often, expertise has been found to be influenced by ideological motives; undermining the justification of reliance on experts because of their supposed objective knowledge. This conflict between the role of experts and citizens is often based on assumptions about the cognitive ability of citizens. Experts are seen to be more appropriate decisions-makers because of their capacity to engage with complex issues in a robust and rigorous way. Experts need to be able to understand and present solutions to complicated issues, as well as understand how this relates to citizens' views on the issue. Fischer (2000, p. 9) states that experts need to be able present an "understanding [of] how different citizens arrive at their own judgements of such issues". The inclusion of philosophers or use of philosophy within policy-making decisions can be seen to go some way to address this conflict. When looking at the role of expertise, philosophers can provide a way of engaging, with and advising on, normative judgement and the inclusion of multiple groups within decision-making as well as giving an account of the development of judgements. My theoretical framework will go on to outline a way in which citizens using ordinary decision-making procedures can be part of a process which provides normative justification for policy decisions.

The models discussed above all give accounts of how individuals or organisations get involved in the policy-making process, and the role they play depending on how the policy is being developed. I will continue to build my case for why philosophers or philosophical concepts should have a role in the broad policy-making process. I have argued that the very nature of policy consists of a normative element around the interventionist nature of the impact of policy on people. Indeed, Hall (1993, p.292) states "policy-making in virtually all fields takes place within the context of a particular set of ideas that recognise some...as more legitimate than others". To ensure that the interests of the decision-makers match the interests of citizens, it is crucial that a form of scrutiny takes place. I argue that philosophers are well-placed to undertake this critical approach in order to discover justification for policy that is being made.

Policy and justification

It is not, of course, the case that there is no emphasis on justification within the policy-making process currently, or amongst political scientists looking at policies as research material. I merely suggest that there is a further argument to be made around the reason why justification should be provided, and how this can happen through the inclusion of philosophical concepts and frameworks. There are, already, a range of approaches taken to seeking justification for policy decisions. These, however, can be categorised in different ways. First, justification can be analysed in terms of how political decision-makers or representatives provide justification in order to persuade the public of the validity of their decisions. Second, particular mechanisms can be used to provide narrow accounts of justification for policy-making in the form of looking at the impact of the policies in a particular context. I will return to this duality in Chapter Four in my discussion on Reflective Equilibrium. Throughout this work I argue that there is a normative duty for justification to be provided for particular types of policy due to the potential or actual impact that this policy will have on individuals. This is couched within the framework of the political conception of legitimacy which I will outline in Chapter 2.

Atkins provides an analytical framework by which the use of moral arguments by politicians to create justification can be evaluated. She notes that (2010, p. 408) “politicians often appeal to moral principles and arguments in their efforts to sell new policy programmes”. In doing so, however, they are not seeking to claim that an argument fits with a particular moral framework, but are trying to (2010, p. 408) “achieve a consensus in the policy area concerned”, and the use of moral arguments enables them to do this. Atkins states that the formulation of moral arguments used in this way is mediated by three factors. First is the context of ideology. She states that policy proposals are situated on the perimeter of an ideology and link the constituent concepts with the social world. The second concept for Atkins is that of the context of argumentation. This requires looking at the nature of the arguments used by politicians and understanding how they fit with consequentialism, deontology, and virtue theory. She outlines that a variety of different policy areas ‘fit’ with one of these types of argumentation such as arguments for welfare changes largely being consequentialist in approach. The final aspect that is included is that of hegemonic competition. Here arguments are used to frame their content in relation to intuitions of the electorate, or previous outcomes of rivals’ policies. Atkins goes on to apply this framework to New Labour’s approach to their New Deal programme, and shows how this gained hegemonic advantage through their justification strategy which included the delegitimisation of the Conservative Party’s approach to welfare.

This framework provides an example of how conceptual approaches have been used to analyse decisions and create new knowledge. Here they have been used to look at how politicians approach creating justification for their policies, in terms of the strategies they use to justify their decisions. It is an interesting approach to take in order to evaluate how and why policy agendas have shifted, or at least how the acceptance of particular approaches to policy has shifted. In her application of the approach, Atkins shows how New Labour created a new approach to unemployment benefits in certain areas which showed a rejection of the previous Conservative government's approach. In turn, this approach was adopted by the Conservative Party in opposition despite being a rejection of their previous position. The framework shows how the Labour Party used particular argumentation in a particular way to secure hegemonic advantage on this policy agenda.

As noted, particular mechanisms are also used to provide a form of justification for the impact of policies. There are a range of these but, here, I will just discuss Equality Impact Assessments (EIAs) and value for money approaches as these examples represent different approaches to the assessment of policy. The first take a normative focus, using the concept of equality as a metric. EIAs are a tool by which policy can be analysed to understand the impact on individuals who fall into categories with protected characteristics in the 2010 Equality Act (Equality and Human Rights Commission, 2017). Individuals who receive negative treatment due to particular characteristics such as disability, age, or religion have been subject to an illegal act. This is an assessment which can be applied to policy and behaviour of public bodies in order to protect those who are defined as particularly vulnerable. The existence of these embodies a normative claim; the concept of equality is valued and a particular range of individuals should be treated in a particular way. However, this claim focusses on a specific set of individuals and a specific value that is to be upheld. I argue that it is the impact of some pieces of policy on any individual, rather than those with protected characteristics, that creates a requirement for justification.

The second set of mechanisms refer to value for money measurements. This can be seen as a form of justification and accountability based on descriptive or empirical claims. Rather than a normative claim, the motivation behind this type of policy assessment is to assure funders and service users that their funding and services are subject to equitable provision. There are a variety of models within the public sector on measuring this concept which all take slightly different approaches. There are also a variety of conceptual issues to address within this descriptive measurement such as whether the accountability being provided is for funders, service users, or a combination of both. Considerations need to be given to whose values are being measured, and the means by which they are measured. Across the public sector in the UK the approaches to these conceptual questions

differ, thereby creating different models to be applied. The same idea, however, underlies these approaches: that there should be a tangible way of measuring and justifying how public money is used. Again, although also looking at seeking justification for policy decisions, this approach is different to the work I am doing. First, the measurement almost always happens after the fact. The policy or project is implemented, with value for money measurements as part of the evaluation of the impact of the policy. This approach can also be understood as descriptive rather than normative; it is not necessarily that there is a normative element behind creating justification, but that is a requirement of the provision of funding. The measurement of justification therefore focusses on describing what has happened in the implementation of a policy, and how that can be justified financially.

As highlighted, justification is discussed and sought within the policy-making process and literature. However, this largely focusses on a descriptive account of how things are the way they are, rather than how things should be. My test for social policy takes a normative position (broadening the approach to EIAs), arguing that, due to the intervention of the state in individuals' lives through the mechanism of social policy, a form of justification should be provided. In this work, I use housing as an example of policy which can be subject to this form of normative justificatory process. However, the test could be used across social policy in order to give an account of legitimacy and basic justice.

The project of Applied Philosophy

I have outlined so far that there is a normative element to all policy which requires justification with regards to the intervention in individuals' lives. Again, as with the relationship between policy and justification, this is not a new concept. A number of philosophers undertake the broad project of applied philosophy which brings together philosophical theoretical frameworks with particular issues or experiences within society. This can be issue-focussed such as looking at the relationship between conceptions of political obligation and specific prison systems, for example (Holroyd, 2010). However, this can also be methodological such as the engagement of philosophers with policy development more broadly. The basis of this thesis is the argument that social policy is a suitable area in which Rawlsian concepts of justice can be applied. As with the general application of philosophy to policy, Rawlsian theorists have generally looked at the application of justice as fairness to health (Daniels, 1985) or global justice policy contexts (Pogge, 2004) but not to more domestic areas such as housing policy. There are, therefore, two spaces that this project aims to contribute to. First; the minimal engagement of philosophy with public policy. Second; when philosophers do engage with practical issues this is likely to be in the area of health and other distributive goods – rarely housing (King, 2011). I hope for this project to add to the emerging field of the application of

philosophy to public policy, and be persuasive in the argument that housing is an important area for the Rawlsian account of justice to be applied. To begin, I will outline two UK philosophers who undertake or propose this activity of engagement with policy development. Both take different approaches to the project: one applying philosophical concepts to policy issues in a toolkit approach, the other strengthening the development of policy through reference to philosophical frameworks.

The first approach to engaging philosophy with policy can be seen as taking theory to practice. Peter King (2011) addresses a number of the issues outlined above in a paper on the use of a 'toolkit approach' to applying political philosophy to policy (housing policy in particular). He states that the paper emerged as an attempt to answer a number of questions. The first is the question that is often asked of this type of work which is (2011, p. 110) "what has this got to do with real world housing problems?" The second regards why theorists tend to ignore housing as a policy area by which to explore their application of philosophy. Addressing the first question, King outlines (2011, p. 110) that his work in this piece has a "metatheoretical" purpose; he wants to explore how far theorists such as Nozick can be used within a policy context. He emphasises that his work is a response to the ongoing conflict between theory and practice where (2011, p. 109) "the discussion of theory...is a luxury or indulgence that should not be undertaken whilst serious issues...exist". He cites (2011, p. 109) similar concerns from Bo Bengtsson (2001) on this issue: "political philosophies seldom discuss housing, whereas government papers on housing seldom discuss political philosophy". King argues that taking a 'toolkit approach' to the theories of major thinkers would combat this divide, and provide a useful contribution to the policy literature.

Regarding the second question King, again, draws on Bengtsson and highlights (2011, p. 111) that thinkers such as Rawls, Dworkin, and Sen all touch on issues relating to primary goods, resources, and capabilities yet "none of these three writers explicitly discuss housing, not even as an illustration". King goes on to explain why this might be the case, and why other policy areas such as health are preferable for this type of application of theory to practice. First, he highlights that housing is less epistemologically complex than other goods. People understand housing and housing need, and this type of good is more amenable to choice. Determining housing need is therefore (2011, p. 112) "less opaque" than understanding need in other policy areas, and the need for housing is indeed a permanent condition rather than a flexible condition such as health. Second, King outlines that housing is an essentially practical activity and can be seen to require less reflection for decisions to be made as they can be understood in terms of programmatic standards. He states (2011, p. 112) "the nature of the ethical and technical dilemmas in housing is not the same level of complexity and controversy that one finds in healthcare". This can be linked to the type of

intervention required to provide each type of good. For health, the nature of the state's intervention is reactive; healthcare is needed only when something has gone wrong. With housing, however, the need relating to the good is different. Government is, typically, always generically involved in the provision of housing in regard to issues such as standards, the availability of land, and where housing can be built. This is more of a proactive involvement than often seen with issues such as healthcare. Finally, King emphasises that the nature of housing is more culturally determined than other goods such as healthcare, and therefore we could be less able to make universal statements about housing unless in a general sense.

King asserts that by using the application of philosophical concepts to specific housing policy issues we can reverse the questions highlighted above to be able to have a critical tool which asks (2011, p. 113) "what use is (this form of) housing to us?" He goes on to outline a number of potential issues with this form of methodology, namely that there is a variance in the approaches taken by philosophers and policy-makers in terms of decision-making. King highlights that policy-makers are not able to take the *tabula rasa* approach as often found with philosophical frameworks and instead have to work with conditions and situations that are already in place. He notes (2011, p. 118) "the problem therefore is how we match up an abstract, if internally consistent, argument to a changing policy environment". King also notes (2011, p. 118) that the use of these philosophical frameworks will not deliver "hard and fast policy solutions" but an ideal type argument by which specific policy can be measured. It is the nature of this ideal standard which I will be using to formulate my test.

King argues that the 'toolkit approach' proposed by Foucault (1994) can be used to match up the theoretical approaches of political philosophy within the dynamic policy sphere. Foucault suggests that his political work can be understood as a toolkit from which others can draw in order to apply abstract philosophy to particular policy areas. He states (1994, p. 523) "I would like my books to be a kind of tool-box which others can rummage through to find a tool which they can use however they wish in their own area". On this account, there are a number of devices and mechanisms within theories that can be chosen to be applied to policy issues depending on the context and content of the policy. In his own work, King uses Robert Nozick's (1974) theory of private property to analyse the topic of housing and, more specifically, looks at the concept of side constraint as the basis of a phenomenological study of the use of private housing. He states (2011, p. 119) "we might not wish to achieve Nozick's utopia, but like all abstract principles, it forms a model through which to assess the direction of policy".

King asserts, therefore, that theoretical frameworks provided by thinkers such as Nozick can be used to critically analyse contemporary policy, and outlines three ways in which this can happen. First,

these grand concepts can be used to assess existing and past policies against clear normative principles. He gives the example of devices within both Nozick and Rawls' theories of justice as setting specific standards by which to measure or test policy. These devices can offer (2011, p. 118) "some sort of absolute standard or pole by which we can determine both the nature and direction of the policy". King emphasises that Rawls' Difference Principle is one such device, and this is how I intend to use my modified account of the Principle. Second, King outlines that the ideas can also offer the basis by which new policies and commitments can be developed with a (2011, p. 119) "principled underpinning". Again, we can see how theoretical frameworks can set clear normative standards by which policy – either established or emerging – can be scrutinised. Finally (2011, p.119), "we can use grand theory to establish clear distinctions between policies through looking at their normative underpinnings". A comparative approach can be taken to policies, again based on a normative theoretical backdrop. King states (2011, p. 120) that these critical approaches to policy can be taken by extending these devices from within theoretical frameworks beyond the "specific theoretical context" in which they were written, and applying them to new situations. Importantly, he argues (2011, p. 120) that this can be done "in a way that is consistent with...[the] construction of these devices and mechanisms".

Presenting this approach, King emphasises (2011, p. 120) the necessity of applied philosophers to "think clearly of the context for our argument and so which elements of a thinker's position we can use to assist us". By taking a 'toolkit approach' we have a range of theoretical devices and mechanisms available to us to apply to policy, but we need to be sure that these have both utility and relevance. King states:

We should recognise that there is a huge library of works which offer the opportunity to develop our understanding of housing policy and its connection with the normative principles we use to justify our place in the world (2011, p. 121).

Jonathan Wolff has written on his broad experience of being engaged in public policy development as a philosopher, asserting (2011, p. 1) that "political philosophers have a responsibility to take matters of public policy seriously". He has been involved in a range of projects of this nature, from being commissioned by the Liquor, Gambling, and Data Protection Unit to be involved in a review of gambling law, to involvement in the Nuffield Council on Bioethics Working Party looking at the ethics of scientific experiments on animals. He outlines his starting assumption for this type of work as:

Moral and political philosophy...is made for the analysis of public policy, exploring foundational values and consolidating them into theories and prototype policies that could...fit practical needs to improve the moral quality of our public lives (2011, pp. 2-3).

Here we can see how his work fits with King's; both are arguing for the application of philosophy to questions of policy in order to provide a normative test or underpinning for decision-making. Although committed to the use of political philosophy in public policy, Wolf also notes that there are competing objectives and processes within the different spheres. In one discipline, disagreement is encouraged and discussion enabled. In another, the ultimate aim is to provide practical solutions to pressing issues. Again, this can be seen to relate back to King's discussion of the conflict between theory and practice. In philosophy we can indulge in discussion around specific details of what can be seen as abstract concepts in order to achieve internal validity. Within the policy discipline practical solutions are demanded, normally within a reactive context. We can see how the rhetoric around not having the space to engage with theory, when there are pressing matters of public concern to be addressed, can develop.

The second model by which philosophy can engage with policy, then, can be explained as from practice to theory. Wolff goes on to highlight three further key areas in which the policy arena debate differs from philosophical argument. First, he asserts that there is little space for 'agreeing to disagree' (as is often the case with philosophy) as practical solutions are needed. The aim of the project is different; in philosophy we are aiming for an internally valid, robust, argument. In policy, we are aiming for a pragmatic and practical solution to a specific and, perhaps, urgent issue which can gain general consensus from decision-makers. Second, within public policy there is an inevitable bias towards the status quo which can be obstructive to developing new normative thinking. As highlighted by King, there is rarely a tabula rasa for policy-makers. The context in which decisions are made are constrained by pre-existing standards and conditions. Third, in developing policy, whether a moral view is correct takes second place to whether it is widely shared or accepted. Again, the emphasis here is on consensus rather than internal validity. In the next chapter, I will go on to address this issue in terms of the existence of 'reasonableness' between individuals and the contribution of this towards a political concept of legitimacy. Wolff states, however, that rather than dismissing philosophical engagement due to these conflicts in aims, academics should explore how to connect philosophical reasoning with public policy and foster this public acceptance. He comments (2011, p. 203) "what matters in public policy debate is not convincing yourself that you have the right position, but carrying others with you".

Explaining his methodological approach to this form of engagement, Wolff notes that the project of connecting philosophy with public policy must engage in ‘bottom-up theorising’. He states that there are two initial approaches to this: first, trying to understand enough about the policy area under examination and the moral difficulties that arise here. Second, to connect these difficulties or dilemmas with patterns of philosophical reflection. As previously noted, this could be achieved through undertaking a ‘toolkit approach’ where there is a careful consideration and application of philosophical devices or mechanisms to specific policy issues. From his experience of this type of theorising, Wolff has identified an alternative methodology by which to undertake this type of analysis. This methodology forms a four part process. The first step is to fully investigate current practice. Second, current regulations and the legislative processes by which the legislation is formed need to be understood. Third, a history of how these processes played out in regard to the specific policy area needs to be constructed. These first three processes can be seen as part of an attempt to understand the pre-existing conditions that are already in place around a policy area. Finally, there needs to be a level of understanding of what people currently agree or disagree about in relation to the policy area. Again, this links back to the potential difference around philosophy and policy in terms of consensus and internal validity. Wolf (2011, p. 192) asserts “philosophers sometimes fall short of taking up the challenge of thinking hard about question of the process, and even more importantly, consequences of implementation”.

We can see from King and Wolff that there are value-based arguments for the application of philosophy to policy. Both highlight similar conflicts between the nature of the disciplines involved, with emphasis being placed on understanding challenges that might already be in place, and developing a consensus on proposed changes or decisions. I also argue that there is a normative imperative for philosophers to engage with public policy in order to provide the level of scrutiny that has been outlined by both Wolff and King. By doing so, we are able to use ‘grand concepts’ to scrutinise political decision-making and to provide normative theoretical frameworks to be used to test current - or support developing - policy.

Jeremy Waldron (1991) provides an example of a ‘top-down’ exposition of a concrete policy issue through a broad conceptual framework. Rather than presenting a methodological account of how philosophy might engage with policy, he simply uses the framework of freedom rights to explore the issue of homelessness. We can see in his work, then, a specific example of how abstract concepts can create new understanding of a housing-related issue. Although King asserts that Waldron uses this policy example to show that the social freedoms conflict, rather than present a new approach to homelessness, it is worth exploring here. Both King and Wolff outlined their methodological

approaches to undertaking applied philosophy, here we will focus on the content of such an application and the potential impact it might have. After outlining the theoretical approach by Waldron, I will relate this to the contemporary policy solution of the Housing First model of addressing the issues of homelessness.

Waldron asserts (1991, p. 296) “homelessness is a matter of the utmost concern in relation to some of the most fundamental and abstract principles of liberal value”. He comments that the recognition of this is lacking amongst theorists, who acknowledge issues such as torture as a key liberal concern but do not often consider issues of housing. Responding to this, he creates a theory of homelessness as an issue of social freedom to show that using an abstract philosophical framework can help understand current housing policy issues, and inform responses to these questions. Waldron asserts (1991, p. 296) “everything that is done has to be done somewhere...no one is free to perform an action unless there is somewhere he is free to perform it”. He then goes on to outline the connection between freedom, action, and the impact of property rights on this.

Noting that there are three types of property rights – private, collective, and common – he asserts that different rights to property have differing impacts on individuals’ abilities to have space in which to act. The ability to act in an area under private ownership is clearly defined to the owners of that space or property. Access to collective property is usually determined by officials acting as representatives of the community, and they define who can act in that space. Common property is a sub-class of collective property, but one which is fairly easy for anyone to access. Waldron highlights (1991, p. 299) that for an individual who is homeless “there is no place governed by a private property rule where he is allowed to be”. He further notes the increasing regulation of public property such as streets and parks where, although access is allowed, some actions are prohibited within those spaces. Waldron asserts that this can be justified through the complementarity of accessing both public and private space – some activities are only to be undertaken within a private space, and these are inappropriate in a public space. This complementarity however breaks down for those who have no access to private space. He comments (1991, p. 301) “what is emerging...is a state of affairs in which...citizens have no place to perform elementary human activities like urinating, washing, sleeping, cooking, eating, and standing around”.

This lack of ability to undertake core human functions creates the basis for Waldron’s theory of homelessness as an issue of freedom. He argues (1991, p. 302) “all actions involve a spatial component”; therefore if an individual does not have a space to undertake a certain action they are not free to do it. Without the space to fulfil basic human functions such as washing and sleeping a homeless individual is (1991, p. 302) “comprehensively unfree” and therefore he concludes (1991, p.

306) “homelessness consists in unfreedom”. He notes (1991, p.320) that the actions that are restricted for a person experiencing homelessness are “basic to the sustenance of a decent or healthy life, in some cases basic to the sustenance of life itself” and often function as the preconditions for other activities. He states that it is degrading and undignified for actions that are (1991, p. 320) “both urgent and quotidian” to be denied and broader social and economic opportunities rely on the fulfilling of these functions. Individuals’ agency is therefore undermined through the condition of homelessness as the most basic freedoms are undermined.

By applying a theory of freedom to the policy matter of homelessness, Waldron has created an approach to homelessness which regards it as a matter of freedom and therefore agency. He comments (1991, p. 324); “perhaps the strongest argument for thinking about homelessness as an issue of freedom is that it forces us to see people in need as agents”. By approaching the issue from a broad philosophical framework, Waldron has revised the understanding of the concept of homelessness which could lead to alternative policy responses. King builds on this theory of housing as a freedom right and argues (2003, p. 661) that “one can build from a common sense perception of necessary human functionings to a conception of the right to housing as an elemental condition for human flourishing”. He states that understanding the issue of housing in the context of freedom rights can have five broad impacts on everyday policy-making. First, it provides a generally applicable argument for housing which is cross-culture and cross-tenure. Second, it places housing alongside other welfare goods. Instead of emphasising the distinct needs of the minority of the population who need urgent housing support, which can lead to entrenched social exclusion, it concentrates on the common, and universal, features of rights. Third, the argument places access to housing as a right alongside property rights – again, not distinguishing between tenures. Fourth, it gives weight to choice-based approaches to housing. Finally, it rejects discussions of resources available and political priorities to recognise the moral imperative within housing as a freedom right. He concludes (2003, p. 671) “this rights-based argument can be used to claim that housing is an elemental right upon which other basic human functions depend”. This understanding of homelessness and housing might have an impact on considerations around intentionality and priority need testing to qualify for a duty for housing, or for such schemes such as the Right to Buy. By understanding the need in a different way, as well as the impact of the lack of provision of housing, policy could be formulated according to different priorities.

Although there is not a specified link, we can look at the relationship between Waldron’s theory of homelessness and the Housing First model of addressing the issue of homelessness. This model

started in New York in 1992, and has developed across the US. It is now gaining traction in the UK. The underlying tenets of the model are as follows:

- Individuals are given immediate housing without any requirement to prove that they can successfully live independently
 - There is the provision of floating support delivered to individuals in their own homes
 - Housing is regarded as a basic human right
 - Respect, warmth, and compassion should be given to each client
 - The organisation providing the housing commits to working with the individual for as long as they need
 - Accommodation is scattered so as to provide integration with the wider community, and this accommodation is normally from the Private Rented Sector
 - There is a separation of housing and services; clients' engagement with one does not affect the provision of the other
 - Consumer choice and self-determination are supported
 - A harm reduction approach is taken in regard to drug and alcohol consumption
- (Bretherton and Pleace, 2015)

Housing First as a solution to homelessness provides us with an insight to the characterisation of homelessness as an issue in the first place and we can see that this broad approach can be seen to fit Waldron's theory of social freedoms. Housing is regarded as a right, which all individuals should have access to. The model provides private space as the first element of its support system. Individuals do not have to prove that they are able to live independently but accommodation is initially provided for them, with support to follow. We can see, therefore, that a characterisation of the problem of homelessness is focussed on the lack of private space for those who are homeless. The Housing First model provides this private space as the first step of the process, with broader (and softer) support services being put in place to enable the individual to successfully live in that accommodation.

The idea of individuals within society being free and equal, and therefore having the right to the capacity for effective agency is crucial within Waldron's theory and is something I will return to when discussing my metric for the test. Despite perhaps not aiming for this, it is important to recognise the importance of Waldron's theory as a contribution to a different understanding of homelessness, wherein the physical space that you are able to access as an individual impacts on your ability to act as an effective agent. Looking at the condition of homelessness as related to social freedoms, and therefore agency, lays the groundwork for the findings from my case study. In this, I will analyse a specific legislative tool which relates to homelessness through a metric of agency. I

hope for this to show a different understanding of the impact of certain legislative duties, and the impact that this can have on individuals.

Chapter 2 – The role of the reasonable in public justification

Introduction

Shaun Young (2008, p. 257) states “the notion of ‘reason(ableness)’ has been a central feature of liberalism since [it] first emerged as a coherent philosophical project”. In this chapter I will be outlining accounts of reasonableness from John Rawls and Thomas Scanlon and discussing how this can be used in my project of creating a test for social justice in contemporary social policy. I will argue that the idea of reasonableness should be extended beyond individual decision-making to be used in a structural context based on an account of political legitimacy. It is this structural aspect, based on reciprocity between individuals in the scheme of social cooperation, which enables boundaries to be set on individual action.

The two moral powers

Both Rawls (1999) and Scanlon (2000) provide accounts of motivation as an alternative to Utilitarianism. Instead of motivation being based on the measure of the greatest pleasure or wellbeing for individuals, they broadly base motivation on the justification of actions as reasonable to others, who are themselves interested in the concept of justification. A fundamental difference therefore between the two types of account is their relationship to the notion of public justification. On a Utilitarian account there is no requirement for justification to be public, but simply justifiable according to consequentialist logic. The liberal accounts characterised by Scanlon and Rawls, however, place the commitment to public justification at the core. Although Scanlon’s project is one of moral constructivism whilst Rawls is looking for a political account of motivation, it is useful to look at both accounts of reasonableness within these contexts. I will outline Scanlon’s account in a subsequent paragraph; here I will address Rawls’ approach to fair terms reasonableness from within *Political Liberalism*.

In *Political Liberalism*, Rawls addresses (1996, p. 47) the question “how is it possible for there to exist over time a just and stable society of free and equal citizens who still remain profoundly divided by reasonable religious, philosophical, and moral doctrines?”. He argues that a political conception of justice can be applied in this context, which will lead to an overlapping consensus of reasonable comprehensive doctrines affirmed by almost all citizens. This political conception needs to be shared by all citizens to be able to create the basis of public reason regarding political questions of both constitutional essentials and basic justice. It is this focus on a shared political conception of justice which leads to the introduction of the concept of ‘reasonable’ as the basis on

which individuals can agree about political issues regardless of whether their comprehensive moral doctrines differ.

Rawls states that there are two moral powers within his conception of the person; the capacity to be reasonable and the capacity to be rational, both of which individuals need to be able to exercise to be considered to be free and equal citizens. The exercise of these two powers is the basis of equal democratic citizenship. Rawls characterises this as a quotidian distinction that individuals understand, and states (1996, p. 48) “in everyday speech we are aware of a difference and common examples readily bring it out”. This is an important aspect to his account from the context of reasonableness operating within a scheme of social cooperation among free, equal, and disinterested individuals. He outlines (1985, p. 233) that to be rational is to be able to hold a conception of the good and to be able to “form, to revise, and rationally to pursue a conception of one’s rational advantage, or good”. This idea is distinct from the second moral power of reasonableness in its focus, and applies to a single, unified, agent such as individual or corporate person. He states that this power entails the agent seeking ends or interests that are their own, and deciding the means by which to pursue these aims. The agents are not being entirely self-interested, however, and do have the capacity for affections and attachments to others within the concept of developing and pursuing their own ends and conceptions of the good.

The capacity of reasonableness is “public in a way that the rational is not” (Rawls 1996, p. 53). To be reasonable is to understand that others also have a motivation to pursue their own conceptions of the good and to act in way which recognises this. For Rawls, this moral power is one that enables individuals to (1996, p. 53) “enter as equals the public world of others”. Here, the focus is on recognising the role of others within a scheme of cooperation through reciprocity; other individuals also have their conceptions of the good that they wish to pursue. As all individuals are free and equal within the scheme, reasonableness ensures reciprocal relationships so that all have the freedom by which to pursue their conceptions of the good. Reasonable individuals, therefore, are aware that limits might have to be put on their own actions due to their membership of a social scheme of cooperation comprised of free and equal individuals. Rawls states (1996, p. 50) “reasonable persons...are not moved by the general good as such but desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms, all can accept”.

Rawls provides further detail on the capacity to be reasonable. He states that there are two aspects to this capacity; first, that individuals have a willingness to propose and honour fair terms of cooperation. Second, that individuals have a willingness to recognise the Burdens of Judgement and to accept their consequences. I will return to the first aspect in greater detail subsequently.

Referring to the second aspect, Rawls states (1996, p. 54) “the idea of reasonable disagreement involves an account of the sources, or causes, of disagreement between reasonable persons so defined”. Reasonable individuals must therefore be aware of the ways by which reasonable individuals might reasonably disagree. The Burdens of Judgement therefore outline a variety of sources of reasonable disagreement, and in turn outline the fact of toleration that exists within a just scheme of social cooperation. Rawls outlines a number of potential sources of this reasonable disagreement:

- i) Complex evidence which is hard to assess
 - ii) Disagreement about the weight of considerations which leads to different judgements emerging from the same considerations
 - iii) All concepts involved in the disagreement are vague and therefore there is a reliance on judgment and interpretation
 - iv) The assessment of evidence is shaped by individuals’ life experiences
 - v) Different normative considerations of a difference force on both sides of an issue
 - vi) Limit of the values that a system of social institutions can admit so there is a selection from the full range of moral and political views that might be realised
- (1996, pp. 85-86)

This construct clearly delineates the rational from the reasonable as the first moral power focuses on agents as individuals, pursuing their own conception of the good. The second, however, requires individuals to recognise themselves as part of a social scheme of cooperation. As noted, Rawls emphasises (1996, p. 62) “the reasonable in contrast with the rational addresses the public world of others”. As well as the willingness to recognize the Burdens of Judgement, individuals must (1996, p. 54) “accept their consequences for the use of public reason in directing the legitimate exercise of political power in a constitutional regime”. This then constitutes the basis of toleration within society and can be seen to go some way towards providing an account of political legitimacy based on reasonableness. Rawls rejects the use of political power to repress views that are not reasonable and asserts that the recognition of the Burdens of Judgement can be used to combat this. He states (1996, pp. 61-62) “citizens as free and equal have an equal share in the corporate political and coercive power of society”. The Burdens of Judgement apply to all individuals within the scheme of social cooperation equally; therefore those who may hold political power in the scheme are equally bound to consider sources of reasonable disagreement. Rawls states (1996, p. 56) “as reasonable we must assess the strength of people’s claims, not only against our claims but...on our common practices or institutions”.

Regarding the relationship between the two moral powers, Rawls outlines that these are two distinct, independent ideas which are complementary rather than derivative. These powers work together to enable individuals to have both the capacity for a conception of the good, and the capacity for a sense of justice. He states (1996, p. 52):

They work in tandem to specify the idea of fair terms of cooperation, taking into account the kind of social cooperation in question, the nature of the parties and their standing with respect to one another.

The term 'reasonable' can be seen from the beginning then, to be fixed to the concept of individuals living together in a scheme of social cooperation. Through exercising these two moral powers (Rawls 1985, p. 52) "in tandem", individuals have to acknowledge that they have interests that they want to pursue, but also recognise the constraint that others' reasonable conceptions of the good place on their actions. Rawls states (1996, p. 50) "reasonable persons...are not moved by the general good as such but desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms all can accept". It is this emphasis on the public that separates reasonableness from rationality.

It is the first aspect of Rawls' account of reasonableness; fair terms reasonableness, which I want to focus on as the basis for argument on political legitimacy. Prior to a willingness to recognise the Burdens of Judgement and to accept their consequences, individuals must have a willingness to propose and honour fair terms of cooperation. Rawls states (1996, p. 49):

Persons are reasonable in one basic aspect when...they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will do likewise.

It is this aspect of Rawls' work that most readily emphasises the social nature of the capacity for reasonableness, and distinguishes it from the moral power of rationality. On this account, for individuals to be reasonable they have to be able to understand their place within a scheme of social cooperation and revise or limit their actions accordingly. They must propose principles and standards which would constitute fair terms for the other members of the scheme to accept, and they must recognise the requirement to willingly abide by other principles and standards that have been proposed as fair terms. Rawls comments (1996, p. 53) "these terms...specify the reasons we are to share and publicly recognise before one another as grounding our social relations". It is this interrelation with others within the scheme of social cooperation, and the role of fair terms

reasonableness within this that enables individuals to (1996, p. 53) “work out the framework for the public social world”.

It is this second moral power, working in tandem with the first, which outlines how individuals can reach agreements as reasonable members of a scheme of social cooperation. This in turn outlines the framework by which individuals within the scheme may operate. Rawls states (1996, p. 54) “in a reasonable society...all have their own rational ends they hope to advance, and all stand ready to propose fair terms that others may reasonably be expected to accept” given their differing ends. It is important to note again that Rawls understands this distinction between reasonable and rational as one which individuals recognise and accept within everyday decision-making. We can see this in our own quotidian understanding of the difference between reasonable and rational in everyday decision-making. For example, we understand that it might be rational for an umpire who is affiliated with a certain cricket team to adjust their judgements in order to favour their team. We also understand that this would be unreasonable, and would undermine the fairness of the game. It would be in my own interest to get a seat on a coach for a long journey, but it would not be reasonable to push all the passengers in front of me in the queue out of the way so I could do so. The account that Rawls provides of a scheme of cooperation comprised of reasonable individuals should not be an abstract theoretical position, but a reflection of how a real society can, and should, operate. Rawls states (1996, p.54) “this reasonable society is neither a society of saints nor a society of the self-centred. It is very much a part of our ordinary human world, not a world we think of much virtue, until we find ourselves without it”.

Scanlon’s account of reasonableness

As previously noted, Scanlon (2000) also looks to provide an alternative account to Utilitarian moral reasoning. Like Rawls, Scanlon emphasises the role of reasonableness in the conception of the person. He highlights that he does not use abstract mechanisms such as the Veil of Ignorance (Rawls’ tool to establish equality in the initial decision-making stage of his social contract theory) as this can distort the clear distinction between contractualist and Utilitarian reasoning. Instead of understanding oneself as potentially being the worst off in society, and making reasonable decisions based on this, Scanlon focuses his moral decision-making process on reasonable individuals being able to accept or reject reasons that are provided for said decision. As well as there being basic compatibility between Rawls and Scanlon’s concept of reasonableness, the format of Scanlon’s test is one that is of interest. His assessment of reasonableness takes the form of ‘reasonable rejectability’ and it is this negative style of approach that I will use in Chapter 7 when presenting my modified account of the Difference Principle.

Scanlon states (2000, p. 594) “what an adequate moral philosophy must do...is to make clearer to us the nature of the reasons that morality does provide, at least, to those who are concerned with it”. He goes on to explain that there must be a deeper understanding of morality and the reasons used within this type of decision-making that elevates it from a (2000, p. 594) “simple special preference”. Instead, the philosophy (2000, p. 595) “must make it understandable why moral reasons are ones people can take seriously”. Moral reasoning on this account then, must regard reasonable decisions for those who are interested in decisions being reasonable. It is not an account or list of actions which are moral in themselves, but an account of how individuals who are interested in finding reasonable agreement can judge whether an action can be understood to be moral. Scanlon states that (2000, p. 598) “morality applies to a being if the notion of justification to a being of that kind makes sense”. This can be seen to mirror Rawls’ account of fair terms reasonableness; that individuals propose fair terms to those who are willing to recognise and abide by them. Scanlon outlines that there are three aspects to his account of a being which is interested in reasonableness; first, that there is a clear sense of how things can get better or worse for that individual. Second, that there is some basis of comparability between this being’s good and our own. Third, the being must constitute a point of view such that we can think what it is to be like that being. Morality on this account then turns on individuals being able to justify their actions to others, based on the reasonableness of both parties.

Scanlon goes on to provide an example of a contractualist account of the nature of moral wrongness to illustrate his position. He states (2000, p. 597):

An act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulations of behaviour that no one could reasonably reject as a basis for informed unforced general agreement.

There are a number of key aspects within this formulation, notably ‘informed agreement’, the emphasis on ‘reasonably’, and the negative way in which this test is applied. The first notion of ‘informed agreement’ is meant to exclude agreement based on superstition or false belief. This is coupled with the proviso that the agreement is also unforced. This element is included not just to rule out coercion but also (2000, p. 597) “to exclude being forced to accept an agreement by being in a weak bargaining position”. Individuals therefore have to be informed about the decision they are making, and be able to make a decision based on this knowledge free from coercion. This is in contrast with Rawls’ concept of the Veil of Ignorance where individuals give ‘uninformed consent’ based on ignorance of their social and material standing. The second element is that of ‘reasonableness’. Scanlon emphasises that this is included to exclude rejections that would be

unreasonable on the basis that both parties have agreed to finding principles that would be the basis of general agreement as described above. A moral philosophy is created in order for individuals who are already interested in providing a moral account to be able to judge whether an action can be deemed reasonable or not based on whether this can be accepted or rejected as reasonable by other individuals. Individuals therefore must be able to understand others' points of view and what could be (un)reasonable for these other parties in order to make a decision about the moral nature of the action or principle. Again, we can see how this relates to Rawls' account of the public nature of reasonableness and how it turns on the interrelationships between individuals in a scheme of social cooperation.

The final key function of Scanlon's account, which sits in comparison to Rawls', is his emphasis on the rejectability of an action based on reasonableness. On this account (2000, p. 598) "it is the reasonableness of rejecting a principle, rather than the reasonableness of accepting it, on which the moral argument turns". To provide further argument for this, Scanlon gives the example of a group of self-sacrificing individuals who are also the 'worst off' in society. He outlines that this group of people could easily accept a principle or decision that could be described as unreasonable, but would not be judged as such on an account that focusses on a positive approach to reasonableness. This case would not occur with the focus on whether actions or principles can be reasonably rejected, rather than accepted. Scanlon asserts (2000, p. 600) "the source of motivation that is directly triggered by the belief that an action is wrong is the desire to be able to justify one's actions to others on grounds that they could not reasonably reject". I will return to the format of this mechanism when fully outlining my test.

The use of reasonableness as a regulatory mechanism

Both Rawls' and Scanlon's accounts can be seen to use the concept of 'reasonable' within a regulatory context. For Rawls, his conception of the person includes the inclusion of 'reasonable' as the complementary moral power to rationality. This power can be seen as regulating the potential actions that individuals take based on their desire to pursue their conceptions of the good. As emphasised above, the capacity to be reasonable is intrinsically linked with the social aspect of individuals within a scheme of cooperation, and can be understood to be the basis of the framework for the social public world. In Scanlon's account, first order desires are regulated by the test of whether the principles or actions that follow from them can be reasonably rejected by others. As noted, this regulative function is also a direct result of individuals acting within a scheme of social cooperation that incorporates other reasonable beings with first order desires.

Margaret Moore makes the case for the concept of reasonableness to have a regulatory function. Highlighting the relationship between the justice as prior to the good in a liberal polity, Moore asserts (1996, p. 169) “at the level of the person, individual actions, individual desires are subject to each individual’s own test of the justice of her actions”. She goes on to state that Rawls’ account therefore creates (1996, p. 169) “a regulatory sense of justice which assesses and controls first-order desires”. In both accounts, the capacity to be reasonable is used as a mechanism of control or limitation over individuals’ pursuit of their conception of the good. In Rawls, this occurs through the introduction of fair terms reasonableness; it is the fact of individuals as members of a social scheme of social cooperation that demands this type of regulation. In Scanlon, this occurs through his concept of reasonable rejectability. Moore goes on to outline two aspects of Scanlon’s formulation which are designed to increase the critical purchase of the concept:

- 1) Rules are justifiable if they can be agreed under circumstances where no one is deceived or coerced.
- 2) The criterion of justifiability is based on the reasonableness of individuals rejecting a principle, rather than the reasonableness of individuals accepting it.

Again, this can be seen to add to the capacity for the concept of reasonableness to be used as a critical, regulatory, tool. Moore states (1996, p. 173) “Scanlon’s formulation, in terms of what can be reasonably rejected, is intended to be a general standard which can be applied to everyone”. Again, we can see how the purchase of a regulatory tool based on reasonableness exists because of the nature of individuals in a scheme of cooperation; the standard applies to everyone, as all individuals within the scheme are free and equal. Moore emphasises this social aspect as she states (1996, p. 169) “the motive behind this regulative test is not the desire to do what is right because it is right, but the desire to act in ways that can be *justified* to others who are also reasonable”.

So far, this account of reason as regulation has focussed on individual actions. Moore states (1996, p. 171) “the idea of being reasonable, at least in ordinary discourse, involves the idea of offering reasons for one’s actions and being prepared to listen to and be persuaded by the reasons of others”. There are two important points to note in this comment. First, as stated, the concept of reasonable we are discussing applies to individuals’ actions. Individuals are motivated to action through first order desires, which are then regulated by the second order desire of reasonableness. They recognise their first order desires, and then question whether they can justify why these should be pursued to other individuals. Importantly, as highlighted, although it is individual actions these actions take place within a social scheme of cooperation. It is this scope that places the need for the regulatory test of reasonableness on individuals. Within this scheme, people recognise that they

have first order desires and subsequently recognise that the other individuals within their scheme of cooperation also have similarly motivating desires that might conflict with their own. This necessitates the regulation of first order desires through the framework of reasonableness. The second point from this comment is that Moore, along with Rawls, emphasises the everyday nature of this type of decision-making. Although discussing desires, motivations, and regulatory functions, that we as individuals are not necessarily acutely aware of when we are within the process of decision-making, it is this process of decision-making through regulation which enables a just scheme of social cooperation. I will build on this in Chapter 4 on Rawls' mechanism of reflective equilibrium.

Moore goes on, however, to critique these constructs of reasonable at an individual level, asserting that more needs to be done to define the term and to move away from assumptions of moral value. She questions the accuracy of the description of how first and second order desires relate to both each other, and other individuals' desires. Moore (1996, p. 174) states:

Indeed what is 'reasonable' here seems to presuppose a shared understanding of the acceptable line of between promoting one's own interests (or not sacrificing them) and considering the interests of others.

Moore argues that the relationship between first order and second order desires within a scheme of social cooperation which Rawls and Scanlon describe is actually a weighing up of the importance of different individual interests. She states (1996, p. 175) "because only some interests count from the impartial standpoint, the crucial issue is which interests are fundamental (and cannot 'reasonably' be set aside) and which are not". In this case, there is no need to appeal to a social contract so that individuals are in a scheme of cooperation. Instead, there could simply be an outline of what individuals hold as objectively value or justifiable interests. There would be no need to rely on a construct of what is reasonable as a regulatory mechanism on desires, as in order to describe what can be justifiable there would simply be a list of acceptable interests available. Moore states (1996, p. 176):

[Scanlon's] assumption that each person constrains her first-order desires according to what satisfies the 'reasonable rejectability' test is functionally equivalent to assuming a common standpoint for all moral subjects, which serves as a basis of agreement.

Moore argues that the construction of 'reasonableness' found within Rawls and Scanlon's work relies heavily on their specific conception of the person. Because of this, what can be deemed reasonable within these accounts can be seen to include an implicit moral framework and as such

(1996, p.175) “the critical purchase of the ‘reasonable rejectability’ criterion is achieved by incorporating moral assumptions...into the conception of what is ‘reasonable’”. Moore argues that due to this inclusion of moral criteria within the concept of what is reasonable, the framework only has critical purchase through (1996, p. 177) “transcendentalising the self”. If this concept of justifiable principles or actions is to be reflective of how individuals actually make decisions then there only needs to be a list of fundamental justifiable interests for individuals in society. This does not need to rely on a social contract construct of individuals in a scheme of cooperation. If Rawls’ and Scanlon’s conceptions of reasonableness are to be used, then they do not give a reflection of how individuals actually are, or how they make decisions. These frameworks rely on an account of ‘transcendentalised’ individuals, with implicit moral values built into the concept of what is reasonable.

I reject this criticism, however. By focussing on Rawls’ political account of fair terms reasonableness I suggest that we can have an account of reasonableness as a regulatory tool whilst avoiding the issue of the ‘transcendentalised’ self. Rawls’ account asks individuals what the limits of reasonable sacrifice are for individuals within scheme of social cooperation operating as political agents. I will go on to show that Rawls’ emphasis on constitutional essentials and matters of basic justice can give us a political framework to understand where these limits are. This does not entail a focus on moral motivation or decision-making by individuals, but a boundary set upon individual action through the fact of the existence of a social scheme of cooperation. The focus on constitutional essentials and matters of basic justice can be seen to create that framework for a public social world, without reliance on an account of moral values.

A political conception of justice

Within *Political Liberalism* Rawls draws a distinction between comprehensive doctrines and a political conception of society. This distinction can be used to reject Moore’s critique of the account of reasonable as regulatory, and build an argument for a policy test based on this concept. Rawls outlines that the fundamental difference between a comprehensive doctrine and a political conception is that of scope. A comprehensive doctrine includes (1996, p. 13) “conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships”. Rawls describes a comprehensive doctrine (of any kind: religious, philosophical, and moral) as part of what can be described as the ‘background culture’ of civil society. This focuses on associational relationships such as church groups, clubs and teams, rather than political ones. Rawls states (1996, p. 137) “the political is distinct from the associational, which is voluntary in ways that the political is not”. A political conception therefore, (1996, p. 13) “tries to

elaborate a reasonable conception of the basic structure alone and involves, so far as possible, no wider commitment to any other doctrine” This conception does not relate to broader moral values outside the scope of individuals as members of a social scheme of cooperation, or the basic structure which supports this. Rawls’ account of the basic structure includes society’s main political, social, and economic institutions, and how these work together to form a public, social, framework for society. The basic structure on the Rawlsian account is therefore the institutional framework that supports and enables individuals to live as members of a social scheme of cooperation, with the political obligations that it brings. It is to this that the regulatory function of reasonableness applies.

It is important to note here how the use of the reasonable as a regulatory mechanism functions within this specific context. I have outlined that in both Rawls and Scanlon’s accounts the concept of the reasonable (or the conception of justice) can be seen as having a mitigating impact on the first order desires of individuals pursuing their conception of the good. When looking at the scope to which this applies, and why a political conception of justice is more appropriate for a scheme of social cooperation than a reasonable comprehensive doctrine, we must consider the impact of the basic structure on individuals. Rawls states (1996, p. 68):

The institutions of the basic structure have deep and long term social effects and in fundamental ways shape citizens’ character and aims, the kinds of persons they are and aspire to be.

The idea here is that institutions or practices within the basic structure have such a fundamental impact on individuals’ lives that they can affect their agency. It is crucial, then, that decisions taken which relate to these fundamental aspects of society are properly regulated. The concept of reasonableness can perform this function as it is both one of two moral powers present in individuals, and provides the framework for the social scheme of cooperation in which individuals live.

A core aspect of this political conception of justice, which was highlighted earlier in the discussion on reasonableness is that justification is public. Rawls outlines his publicity condition of a conception of justice as having three levels. The first level is achieved when society is effectively regulated by public principles of justice. In this situation (1996, p. 66) “citizens accept and know, that others likewise accept those principles, and this knowledge in turn is publicly recognised”. This reflects both Rawls’ and Scanlon’s aspect of reasonableness as being justified to others who also recognise and are committed to reasonableness. This aspect, however, also goes beyond individuals to the scope of the political conception: the basic structure. Rawls states (1996, p. 66) “the institutions of the

basic structure of society are just...and everyone with reason recognises this". It is this aspect of publicity that is of interest within this research project: how it can be tested and recognised that the institutions, or decisions made within the institutions, are reasonable and just?

The second level of the publicity condition is a rough agreement on general beliefs about human nature and the way political and social institutions generally work. Rawls asserts that individuals within a well-ordered society generally agree on these beliefs because (1996, p. 67) "they can be supported (at the first level) by publicly shared methods of inquiry and forms of reasoning". A well-ordered society for Rawls is one that is designed to advance the good of its members, as well as being regulated by a public conception of justice. The final level of publicity is that there is an acceptance of the full justification of the public conception of justice (1996, p. 67) "as it would be presented in its own terms". Rawls states that this full justification should be accepted or at the very least publicly available. He notes (1996, p. 67) that some individuals might not want to carry out philosophical reflection on the justification of the political conception they live by "but if citizens wish to, the full justification is present in the public culture, reflected in its system of law and political institutions". In Chapter 4 I will outline how the mechanism of reflective equilibrium can be used as a way of achieving this level of publicity based on the conception of reasonableness.

As a result of this publicity condition, Rawls outlines that political society is distinct in two ways. First, (1996, p. 67) "it specifies a relationship between persons within the basic structure of society". We can see this in the regulatory nature of the capacity of reasonableness within individuals. Second, Rawls notes (1996, p. 68) that political power is always coercive but that "in a constitutional regime it is the power of the public, that is, the power of free and equal citizens as a collective body". He states that fair terms of social cooperation between free and equal citizens within this scheme of cooperation should meet the requirements of full publicity so that citizens accept, share, and understand the political conception of justice that governs their society. It is this level of publicity which enables the basic structure to have legitimacy. Rawls asserts (1996, p. 68) "for if the basic structure relies on coercive sanctions, however rarely and scrupulously applied, the grounds of its institutions should stand up to public scrutiny".

Returning to the breadth of impact of the basic structure on individuals, including their agency, Rawls states (1996, p. 68):

Publicity ensures, so far as practical measures allow, that citizens are in a position to know and to accept the pervasive influences of the basic structure that shape their conception of themselves, their character, and ends.

As the basic structure has a fundamental impact on individuals' lives, and is governed by the political conception of justice that is based on reasonableness, institutions and decisions coming from the basic structure should also be regulated through the conception of reasonableness. It is this aspect of Rawls account of a political conception of justice that I want to emphasise, alongside his account of the liberal conception of legitimacy.

The liberal principle of legitimacy

Hanberger (2003) argues for the existence of legitimacy capital. He states that democratically elected representatives and bodies make decisions that are legitimate by the very nature of them being democratically elected. On this account, the decisions that are made by elected individuals are automatically legitimate as they have mandate from the electorate to make decisions. I dispute this, and argue that decisions made by these individuals and bodies should be subject to scrutiny and not assumed to be legitimate purely because they have been elected via a democratic process. When elected, individuals do have democratic mandate and therefore some form of legitimacy. I would argue that this legitimacy is provisional, and still relies on the content of the actions they are taking or the impact of the decisions they have made. As already highlighted, this is the motivation behind the creation of a test for social policy; that governmental intervention needs scrutiny in terms of legitimacy. Young argues that the initial motivation behind the development of political liberalism was the rejection of the abuse of power and the concept of reasonableness was introduced as a liberal way of providing a moral and legal standard for judging the legitimacy and acceptability of government behaviour. He notes (2003, p. 256) that this standard has been extended over the decades and now applies to the regulation of power "when is it employed to establish and maintain conditions that unreasonably prevent citizens from either pursuing or achieving self-fulfilment". Both Rawls and Scanlon's accounts of reasonableness focus on the recognition of individuals within a social scheme of cooperation whereby all individuals have first order desires to pursue their conception of the good life, and members of the social scheme must recognise this. These mechanisms can also be used in the structural context, as described by Young.

We can explore this further through Rawls' discussion of the use of power and the liberal legitimacy principle. In this section, Rawls provides an overview of his argument:

- i) Citizens are reasonable and rational
- ii) Citizens are free and equal
- iii) The diversity of reasonable doctrines is a permanent feature of the public culture
- iv) Political power is the power of citizens as a collective body

The question still arises, however, as to when that power of citizens as a collective body can be appropriately exercised. He notes (1996, p. 136):

This power is regularly imposed on citizens as individuals and members of associations, some of whom may not accept the reasons widely said to justify the general structure of political authority...or...may not regard as justified many of the statutes enacted by the legislature to which they are subject.

Due to reasonable pluralism - the existence of irreconcilable but reasonable doctrines - being a fact of public culture, issues will still arise regarding the justification and legitimacy of the use of power within the scope of the political society - the basic structure. Citizens are able to reject the structure of the political authority that is in power, or the specific outputs that the authority has in legislative or policy terms. It is this second aspect that I am particularly interested in. So far we have seen how individuals have the moral power of the capacity for reasonableness, which enables them to have a conception of justice regarding their place as an individual within a scheme of social cooperation. We have seen that this idea of a political conception applies purely to the basic structure of society, and that a particular feature of this political society is that (public) power is coercive. We have arrived at a point where we have stated that due to the coercive nature of this power, there needs to be some standard of reasonableness for the exercise of power to be legitimate. In support of this, Young states (2003, p. 256) "it is necessary that reasonableness be the 'litmus test' for legitimate public policy/behaviour if the governance framework is to be and remain equally respectful of all citizens and their beliefs".

For Rawls, the 'litmus test' of reasonableness, which is applied to the exercise of political power in a scheme of cooperation, refers to the constitutional essentials of that society and basic justice within it. When answering the question of when the exercise of power is appropriate in this type of society Rawls states (1996, pp. 139 – 140):

Since political power is the coercive power of free and equal citizens as a corporate body, this power should be exercised, when constitutional essentials and basic questions of justice are at stake, only in ways that all citizens can reasonably be expected to endorse.

The principle of legitimacy, therefore, asserts that matters of and decisions regarding constitutional essentials and basic justice must be reasonable and can be endorsed as such by citizens. This sets another fairly rigid scope to which the concept of reasonableness applies. I have already outlined the main difference between reasonable comprehensive doctrines and political conceptions as one of scope; a political conception applies only to the basic structure, and not associational relationships

as comprehensive doctrines. When looking at the exercise of power within the basic structure then, Rawls asserts that the principle of legitimacy – that structures and decisions can be understood and endorsed as reasonable – purely applies to constitutional essentials and matters of basic justice. I suggest that the Difference Principle can be used as this ‘litmus test’ for understanding whether these constitutional essentials and matters of basic justice comply with the principle of legitimacy. As well as calling on the regulation of government action in terms of legitimacy and acceptability, Young states (2003, p. 260) “if we are to ensure that all citizens are treated with the respect that they deserve as free and equal beings, then the conditions regulating the use of coercive political power must be acceptable to all those subject to that power”. I argue, therefore, that the Difference Principle can act as a suitable mechanism for this. First, it provides a standard by which government intervention (in this case public policy) can be tested against a conception of justice. Second, the Principle itself is a product of the Original Position and therefore has been subject to reasonable decision-making procedures. It can also be seen then to be acceptable to individuals subject to government intervention if we are basing the scope of the test on the basic structure. The test is intended to be flexible and responsive to policy decisions, not a single event. In this way public justification for policy at development, implementation, and further iterations and impacts of implementation stages can be subject to public justification. As the test regards reasonableness for individuals in a scheme of cooperation, it relies on practical judgements which are the best available at the time of assessment. The example below can be seen to illustrate this, as well as give a more detailed indication of the difference between reasonable and rational.

Applying Reasonableness to Public Policy: The ‘Bedroom Tax’

The application of the Rawlsian concept of reasonableness to the ‘Bedroom Tax’ can be used to illustrate the difference between reasonable and rational decision-making. This example can also indicate how policies that relate to matters of basic justice must be subject to the reasonableness criterion due to the nature of their impact on citizens, and outline policy as a contested domain. This section will not provide an application of my test, but a *prima facie* illustration of how these concepts might work when applied to particular policy issues. The Spare Room Subsidy or ‘Bedroom Tax’ as colloquially known, formed part of the Welfare Reform Act 2012. This legislation aimed to reform the benefit system in the UK, which the Conservative party argued (2010, p. vii) in their 2010 General Election Manifesto had helped create a sense of “helplessness” as (2010, p. 63) “people have too little control over the decisions that affect their daily lives”. Instead, following the 2010 General Election, the new Conservative-led Coalition government wanted to foster active citizenry with a focus on (Cameron, 2009) “empowering and enabling citizens to take control of their lives so

we create the avenues through which responsibility and opportunity can develop". The Welfare Reform Act introduced a range of measures aimed at increasing active citizenry and improving incentives to work. The 'Bedroom Tax' in its first iteration removed £12 a week from individuals' benefits if they were living in a house with one 'spare bedroom', and more if there was more than one spare room (UK Government, 2012). Households were encouraged to relocate to more suitable accommodation in order to avoid this loss in benefits. The rationale behind this was to cut the growing Housing Benefit bill as well as attempt to free up scarce resources by encouraging people to downsize their properties (Phibbs, 2015). Individuals were encouraged to move to more suitable accommodation in terms of room allowance, and were supported in the transition of benefit payment through the use of locally-administered Discretionary Housing Payments.

The rational decision-making behind this policy is clear; the new Conservative-led Coalition government had inherited a benefits bill that was large, and growing, and there was a lack of affordable and social housing to meet people's needs. The 'Bedroom Tax' was created in order to reduce the amount of Housing Benefit being paid out, and free up houses that were being occupied by individuals who did not need the additional space. However, there has been a lot of conflict over the introduction of this new measure including a Supreme Court case, and an intervention by the United Nations (UN). I suggest that this measure can be seen as having more than purely a financial impact, but also impacting on matters of basic justice. I argue that this policy (as an example of policies that affect basic justice) falls foul of the reasonableness criterion despite being rational. Looking at the introduction of the 'Bedroom Tax' as a matter of basic justice can be seen to show that the measure as introduced fails the criterion of reasonableness, and therefore subsequently the principle of political legitimacy.

The UN Special Rapporteur on the Rights of Persons with Disabilities, Rachel Rolnik, visited the UK from August to September 2013 to look at adequate housing as a component of the right to an adequate standard of living, and how this fits with non-discrimination. She visited governments, organisations, and groups, and received testimonies from individuals on a variety of matters relating to her theme. This included looking at the impact of the 'Bedroom Tax', among other recent changes to the welfare system. Highlighting the historic commitment to equality in access to adequate housing in the UK, she noted (2013, pp. 4 – 5) "for generations, women and men have progressively given shape to the notion that a dignified life includes access to decent and fair housing regardless of level of income or other status". In the report, however, the Special Rapporteur highlights that cumulative impact of these welfare changes, and the 'Bedroom Tax' in particular, has led to a retrogressive approach to these rights.

When looking at the 'Bedroom Tax' specifically, Rolnik highlighted that the Impact Assessment provided by the Department of Work and Pensions noted that there was a mismatch between household size and the availability of suitable accommodation for those affected by the 'Tax'. As the properties for individuals to downsize to were largely not available, if individuals chose to remain in their existing homes they were left with fewer benefits than previously. Testimonies reported individuals having to choose between heating their homes or eating adequately with individuals left feeling in (2013, p. 13) "tremendous despair". For those who were able to avoid the loss of benefits and move properties, Rolnik stated (2013, p. 12) "many felt targeted and forced to give up their neighbourhoods, their carers, and their safety nets". Rather than the simple pragmatic transaction of moving to a house that is more suitably sized, individuals were having to leave areas where they had family and broader support networks which in turn impacted on their wellbeing in a number of ways. We can see what might be portrayed as rational decision-making that led to the introduction of this measure has had a far bigger impact on individuals in terms of basic justice than predicted by decision-makers. On the one hand, individuals were staying in the house and area that they called home, and were having to choose between affording basic essentials such as food and heating. Or they were moving away from support networks, jobs, or carers to be able to afford these basic essentials. Furthermore, in the light of further data on the impact of the measure, the savings that had been predicted are likely to be much less than stated as additional support costs had not been considered.

In the conclusion of her study, Rolnik stated (2013, p. 16):

Some population groups are particularly affected by the cumulative impact of the various policies and reforms mentioned above. Numerous testimonies corroborated the view that people 'felt squeezed from all sides' in their housing and human rights situation.

She highlighted a range of groups for whom the cumulative changes to the UK welfare system introduced by the then Coalition Government were having and were likely to continue to have a high impact. These groups can be seen to be some of the most vulnerable in society and include low-income individuals and households, individuals who are homeless, and disabled people. The 'Bedroom Tax' affected the first and last of these groups substantially. Research from the National Housing Federation on the impact of the 'Tax' after 4 weeks of implementation in Merseyside showed that more than 14,000 households fell into arrears with their rent after the introduction of the measure. Of these, it was the first time that 6,000 had ever gone into arrears (2013, p. 16).

Regarding the cumulative welfare changes, the UN report states (2013, p. 16) “the plight of persons with disabilities deeply touched the Special Rapporteur”. Specifically, there were particular issues around the lack of responsiveness of the ‘Bedroom Tax’ to the needs of disabled people. Many individuals were told that a room where they stored medical equipment or a separate bedroom for a partner or carer were counted as ‘spare rooms’ and therefore subject to the ‘Tax’. This meant that individuals were often being asked to choose between leaving specially adapted homes (or homes where there was a space for a carer to provide overnight care), or being significantly financially worse off. Rolnik stated (2013, p. 16) “at the root of many testimonies lies the threat to a hard-won right to live independently”. She noted that these testimonies also often referred to anxiety, stress, and suicidal thoughts as a result of these changes. Rolnik highlighted that previous concerns about the cumulative changes to housing benefit and the impact on disabled people had been raised by the House of Lords and House of Commons Joint Committee on Human Rights. They stated (2013, p. 17) “the range of reforms proposed...risk interacting in a particularly harmful way for disabled people...as a result, there seems to be a significant risk of retrogression of independent living”. It clear, therefore, that the policy had a particular impact on some of the most vulnerable in society due to the very nature of their vulnerability.

The emphasis on retrogression is also important in the context of using this application of the Difference Principle as a test on social policy. In her recommendations, Rolnik emphasised this issue of retrogression noting that states are bound to provide at least an equal, or better level of an enjoyment of a right such as adequate housing. She noted some of the policies in the UK that had enabled the enjoyment of adequate housing (2013, p. 20) “are being eroded and the structural shape of the housing sector has changed to the detriment of the most vulnerable”. As we will go to see, the Difference Principle states that inequality is acceptable within a scheme of social cooperation if it makes the worst off better off. We can see the two key elements of the Principle initially at play here; the most vulnerable, and interventions making individuals worse off. As outlined by Rolnik, the ‘Bedroom Tax’ has a particular impact on some of the most vulnerable, or worst off, groups in society; disabled people, and low-income households. The ‘Tax’ has also been criticised for being retrogressive and withdrawing some of the freedoms individuals have gained around independent living. When we are looking at the Principle as a test for social policy, according to the liberal principle of legitimacy, we can see that this policy does make the worst off groups worse off. As a recommendation within the report Rolnik calls for the immediate suspension of the policy, and for there to be a full evaluation of its negative impact on the right to adequate housing and the general wellbeing of vulnerable individuals.

The response from the UK Government to the publication of the report was robust. The Housing Minister at the time, Kris Hopkins called (Gentleman and Butler, 2014) for the report's findings to be rejected stating "this partisan report is completely discredited, and it is disappointing that the United Nations has allowed itself to be associated with a misleading Marxist diatribe". This position was supported by a spokesperson for the Department of Work and Pensions who asserted (Gentleman and Butler, 2014) "this report is based on anecdotal evidence and the conclusion was clearly written before any research was actually completed". We can see here, then, the contested nature of not only policy development but the impact of policy once implemented. Not only is there a lack of clarity between the rational and reasonable elements of the creation of this policy, but the evidence on the impact of the worst off in society because of this policy is also contested.

The example of the 'Bedroom Tax' has outlined the terrain in which my test is to function and I suggest has highlighted two key areas of contestation. First, it has shown that there are some instances in which seemingly rational policy decisions actually impact on matters of basic justice. In regards to this policy, disproportionate burdens appear to have been placed onto a relatively small group of individuals, which in turn impacted on their ability to live independently or pursue their conception of the good. In these instances, I argue that they become subject to the test of public justifiability based on reasonableness. Second, it has shown the contested nature of the impact of the policy on the least advantaged in society. This lack of clarity demonstrates that a policy test that assesses the impact of intervention on the lives of the worst off in terms of basic justice would have some role to play in current debates around policy.

On this account, therefore, there is a continuum of policy where policy that sits in different places on the scale has a different relationship to the concept of basic justice. First, there are policies that have a clear impact on matters of basic justice and constitutional essentials, for example homelessness policy. There is an obvious interaction here between the policy and the capacity for individuals to be effective agents. Second, there are policies that may have an impact on basic justice, or may not. Some other areas of housing policy can be seen to fit into this; standards in the Private Rented Sector or policy relating to the quality of social housing. In these cases, whether the policy relates to basic justice depends on its impact. Finally, other policies might not affect the issue of basic justice at all, such as the protection of historic buildings. It is only the first set of policies that do impact on matters of basic justice that are subject to the test. Therefore, the first two categories outlined on the continuum would be tested; the first because they clearly relate to basic justice and the second so as to understand whether there is any impact on basic justice, and therefore if they are

subsequently subject to the test. The third set are not subject to the test as their impact relates aspects other than effective agency.

In the next chapter, I will further outline my argument for the Difference Principle to be used as this test. Prior to that, I want to emphasise the scope in which a test should apply. I have argued that the 'Bedroom Tax' policy is actually a matter of basic justice, rather than ordinary policy-making, which falls within another place on the continuum. Therefore, there are two distinct types of policy on this account; those subject to the test of reasonableness and those that are not. According to Rawls' account of political legitimacy, those subject to the test are policies that impact on matters of basic justice or constitutional essentials. Outputs of government that do not focus on these are not subject to the test in the same way. This relates back to Rawls' emphasis on the impact that institutions of the basic structure can have on individuals in terms of agency. Policies created within the basic structure have the potential to support, undermine, or change individuals' life chances. This needs to be recognised through the scrutiny of government according to the liberal principle of legitimacy. We can draw a distinction therefore between basic justice policy-making, and everyday policy-making. The first type can be seen to encapsulate policies such as the 'Bedroom Tax' as discussed above. The second can be seen to be a more banal form of policy-making, which does not impact on matters of basic justice. This could include the provision of bike lanes on certain roads, the rate of National Insurance contributions, or some forms of agricultural subsidy. As policies, these have a very different type of impact on individuals' lives compared to policies such as the one discussed above. Rawls' account of the reasonable can be seen to both delineate these two types of policy, and outline the argument for the principle of justifiability to apply to basic justice policy-making. In the next chapter I will outline Rawls' concept of justice as fairness and the Difference Principle in particular. I will argue that it is this mechanism that should be used as this justifiability test for basic justice policy, and will suggest a revision to the mechanism based on an account of agency.

Chapter 3 – A Rawlsian account of justice

In this section I will outline that, by applying the concept of reasonableness which Rawls develops in his account of political liberalism, the Difference Principle (from *A Theory of Justice*) can become a determinate tool by which to test policy according to Rawls' theory of justice. I will acknowledge the shift between *A Theory of Justice* (first edition 1971, second edition 1999) and *Political Liberalism* (1996) but argue that by applying Scanlon's account of reasonable rejectability we can understand the Difference Principle to be the standard that policy needs to meet to be just. The section will be structured accordingly; outlining Rawls account of justice as fairness, his revised approach to justice from *Political Liberalism* and finally how the two can be brought together to create a test for social justice in policy based on the liberal principle of legitimacy.

Critique of Utilitarianism

Rawls' approach to justice in *A Theory of Justice* is underpinned by his rejection of the Utilitarian account of justice. It is useful to look at this in order to both outline and situate the characteristics and mechanisms of Rawls' theory within a wider context. In outlining and critiquing Utilitarianism, Rawls focusses on the classical approach as formulated by theorists such as Sidgwick, Bentham and Mill. Of Utilitarianism, Rawls states (1999, p. 20):

The main idea is that society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it.

Utilitarianism provides a teleological account of justice, where the good is defined as prior to the right and the right is defined as that which maximises the good. The satisfaction of rational desire acts as the good on this account, so arrangements of justice are those which maximise the satisfaction of individuals' desires in society. Social cooperation therefore is organised in a manner which supports gross satisfaction and Rawls states (1999, p. 23) "the appropriate terms of social cooperation are settled by whatever in the circumstances will achieve the greatest sum of satisfaction of the rational desire of individuals". Distributive justice on the Utilitarian account, therefore, is that which (Rawls 1999, p. 23) "yields the maximum fulfilment" of desires. Hence, there are no demands on a form of equality of distribution if this is not the manner by which the most desires can be satisfied. Rawls (1999, p. 23) outlines that, according to Sidgwick, "more equal distribution is to be preferred" and it would be possible for a form of compensation system for gains and losses to operate on this account. However, Rawls states (1999, p. 23) "it simply happens that

under most conditions, at least in a reasonably advanced state of civilisation, the greatest sum of advantages is not attained in this way”.

In order to create an account of Utilitarian justice within a society the mechanism of the impartial spectator may be used. This device adopts the view of one perfectly rational individual and extrapolates from this view the conditions that would need to be in place in order for satisfaction fulfilment to be maximised. Again we can see the difference between the two accounts. Both Rawls and Scanlon highlight individuals as having two forms of moral powers; the reasonable and the rational. As previously highlighted by Moore, the reasonable can (and should) have a regulatory function on the rational. On a Utilitarian account, however, the rational aspect of individuals has ultimate value. The creation of a just Utilitarian society is therefore (1999, p. 24) “the consequence of extending to society the principle of choice for one man, and...conflating all persons into one through the imaginative acts of the impartial spectator”. Although both the Rawlsian and Utilitarian accounts use a form of representative device based on ideal theory to explore individual decision-making, we can see the role of the ‘reasonable’ in allowing the Rawlsian account to have some form of public justification based on obligations between individuals within a social scheme of cooperation.

Rawls is critical of the Utilitarian approach and states (1999, p. 24) that, in terms of questions of justice, on this account “the correct decision is essentially a question of efficient administration”. He goes on to outline three major, and interlinked, differences between a classical Utilitarian account and his theory of justice. First, Rawls criticises the relationship within Utilitarianism between the right and the good. The priority for a Utilitarian theory rests with the good, and the right is that which upholds or maximises the good. Rawls states (1999, p. 25) that this account “maintains that common sense precepts of justice and notions of natural right have but a subordinate validity as secondary rule”. For Rawls, this relationship between the right and the good is subverted. In his theory of justice, Rawls asserts the priority of the right which acts as a framework of rights and liberties within which individuals may undertake the pursuit of their version of the good. He states (1999, p. 25) “while the contract doctrine accepts our convictions about the priority of justice as on the whole sound, Utilitarianism seeks to account for them as a socially useful illusion”. This relates to the previous discussion of the role of the concept of the reasonable within a Rawlsian approach. A singular emphasis on the rational focuses on individuals’ pursuit of the conception of the good; there is no regulation through the reasonable which enables a conception of the right to be developed.

As already highlighted the Utilitarian position involves the conflation of all individual views to one perfectly rational view in the form of the impartial spectator. This forms the basis of Rawls' second criticism and he contrasts this with his own account within the contract tradition (1999, p. 25):

Whereas the utilitarian extends to society the principle of choice for one man, justice as fairness, being a contract view, assumes that the principles of social choice, and so the principles of justice, are themselves the object of an original agreement.

Although it is perfectly possible that Utilitarianism might be chosen as the societal arrangement that would deliver justice on Rawls' account, he asserts that the procedure used to formulate the Utilitarian account is problematic due to this conflation of views. He states (1999, p. 26) "to do this is not to take seriously the plurality and distinctiveness of individuals". On his account, purely extending the perfectly rational view of one individual to all individuals gives an inadequate account of individuals and the nature of social cooperation. Instead, Rawls uses the device of the Original Position to provide the limits within which decisions about the principles of justice can be made. Within his own work, Rawls criticises the nature of the conflation of system of values to a single comprehensive political doctrine. This is evident in his shift in focus from *A Theory of Justice* to *Political Liberalism*. For Rawls, his account of stability as presented in his initial work is understood to be unrealistic in his later work because individuals' views are unlikely to merge to support a singular account of justice. A subsequent section of this chapter will address this in more detail.

Finally, Rawls gives a further procedural criticism regarding the teleological nature of Utilitarianism. This has already been alluded to in the discussion of the relationship between the right and the good within both theories. In contrast to the consequentialist nature of Utilitarianism, Rawls' theory of justice is deontological in that the right is not interpreted as that which maximises the good. Rawls states (1999, p. 27) that, on the account of justice as fairness, individuals "implicitly agree...to conform their conceptions of their good to what the principles of justice require, or at least not to press claims which directly violate them". Justice imposes restrictions on what individuals can regard as, or at least make manifest, their conception of the good, therefore emphasising the previously made point that, on Rawls' account, the right has priority over the good. Rationality is individuals' motivation to pursue their conception of the good, whereas reasonableness sets the boundaries of this pursuit due to individuals' inclusion within a social scheme of cooperation. Rawls concludes (1999, p. 29) by asserting that "implicit in the contrasts between classical Utilitarianism and justice as fairness is a difference in the underlying conceptions of society". Rawls' form of social cooperation is apparent in his concept of the well-ordered society, where individuals exist in relation to each other in terms of obligations and stability based on the concept of reasonableness.

Conversely, a Utilitarian position proposes an account of social cooperation where individuals exist as separate entities aiming to best maximise their rational preferences in an “efficient administration” (Rawls 1999, p. 24).

Justice as fairness

In *A Theory of Justice*, Rawls outlines his procedural account of justice for a well-ordered society from within the social contract tradition as a response to the Utilitarian account. He describes the traditional aim of the contract theory as (1974, p. 142) “to provide an account of justice that is both superior to Utilitarianism and a more adequate basis for a democratic society”.

In simple terms Rawls attempts to create a procedural account by which representatives within his social contract mechanism can create a substantive theory of justice for their societies. There are, however, several interlocking aspects of this theory which I will discuss in turn. In the previous discussion of the relationship between Utilitarianism and justice as fairness I have outlined a number of characteristics of Rawls’ theory; the right as prior to the good, the role of a contract within creating the theory, and the deontological nature of the theory. I will go on now to outline specific mechanisms which have certain functions within justice as fairness. Two of these key mechanisms have already been outlined in the discussion on reasonableness; the social scheme of cooperation and the basic structure. Both form key underpinnings of his theory of justice. To recap: for Rawls, there is a special relationship between individuals in a scheme of cooperation. These individuals relate to one another as citizens with ties of political obligation based on the moral power of reasonableness, not as individuals within interrelationships. A procedural theory of justice applies just to these ties of political obligation, and matters arising from this, not any further interactions between individuals. This, in turn, underpins his account of the basic structure: the arena wherein the theory of justice as fairness can apply. Rawls states (1999, p. 6):

The primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.

As outlined in the chapter on reasonableness, Rawls describes the basic structure as the arena in which the principles of justice can be used as a corrective instrument against natural inequalities. This structure includes areas such as the protection of the liberty of conscience and competitive markets, and comprises therefore all aspects of society which enable basic needs to be met. Rawls asserts (1999, pp. 6-7) “taken together as one scheme, the major institutions define men’s rights and

duties and influence their life prospects, what they can expect to be and how well they can hope to do”.

We can see how these two basic concepts work together to underpin justice as fairness: Rawls claims (1999, p. 7) that people are born into different social positions and the basic structure should be regulated, through the principles of social justice, to mitigate against the contingent factors that lead to “especially deep inequalities” within the social scheme. These principles of justice apply, therefore, to the basic structure in order to enable justice within a well-ordered society. To be well-ordered, individuals within the social scheme of cooperation must accept the conception of justice, and know that others do too, and the basic social institutions must in turn satisfy these principles. According to Rawls in *A Theory of Justice*, therefore, this concept of a well-ordered society allows for an element of stability to be inherent from within the creation of a theory of justice.

Building on these two key concepts, there are two preliminary aspects of the construction of this account of justice; a form of social contract (the Original Position) and intuitive ideas about justice. Together, these form the initial situation by which representatives of the social scheme of cooperation would choose principles of justice to regulate their scheme. As already highlighted therefore, justice as fairness is a contractarian approach to justice as it focusses on reasonable agreement of individuals within a hypothetical decision-making procedure. To begin, Rawls outlines an intuitive idea about justice (1999, p. 3): “justice is the first virtue of social institutions, as truth is of systems of thought...Laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust”. On this account, Rawls assumes that all representatives have this initial intuition about justice; that their scheme of cooperation should be underpinned by just institutions.

The hypothetical Original Position adopts this initial intuition about justice and social cooperation. As previously noted, this can be seen to be notably different to the mechanism of the Impartial Spectator from a Utilitarian account. In this Position representatives are present from the different positions in society. These people are subject to the ‘veil of ignorance’ where they are unaware of the particularities of their positions such as talents, economic and social position, and how these relate to society. Rawls asserts that this lack of information enables the representatives to make objective decisions about how their society should be ordered as they could be equally the best or worst off in that community. The decisions taken, then, should be free from subjective interests as no-one is aware of their standing, wealth, or background. Rawls states (1999, p. 16) “it seems reasonable and generally acceptable that no one should be advantaged or disadvantaged by natural fortune or social circumstances in the choice of principles”. If individuals had knowledge about their

own particularities, principles could be rationally accepted which reflect their knowledge of circumstances and impact on individuals, but which are irrelevant from the standpoint of justice. Rawls gives the example of arrangements regarding tax in the scheme of cooperation: if an individual knew they were wealthy they could rationally support measures which would limit the amount of tax paid by wealthy individuals, to the detriment of society receiving services that would be paid for through this tax collection. If the individual knew they had fewer financial resources instead, they could rationally support the opposite measures ensuring that tax collection from wealthy individuals is set at a high level in order to ensure redistribution to those with fewer resources. The difference in decision-making by this individual based on self-interest is that which Rawls wants to avoid in his creation of an objective initial situation for decision-making. In order to ensure that objective decisions are reasonable, based on ideas of justice, rather than self-interest, the exclusion of knowledge of individual particularities is crucial to this initial situation. This fits with Rawls' emphasis on the right as prior to the good.

We can see, here, both the similarities and differences with the Utilitarian conception of the Impartial Spectator. In both approaches hypothetical, abstract, mechanisms are used to provide justification for the restrictions created within a theory of justice. In the Utilitarian approach, the interests of one individual is extrapolated across the whole social scheme. In the Rawlsian approach no interests of individuals within the initial situation are made known, therefore decisions are made based on intuitive ideas about justice. It is important to consider on the Rawlsian account that all representatives within the hypothetical structure of the Original Position effectively have a veto on decisions made within the Position. It is this inclusion of a range of views (but no particularities), rather than an extrapolated individual's view, that leads to the Rawlsian initial situation being one of equality. On this account, considerations are taken of all representative parties in society, rather than a single, conflated, representative position which is the case on the Utilitarian account. Rawls states (1999, p. 17):

It seems reasonable to suppose that the parties in the Original Position are equal. That is, all have the same rights in the procedure for choosing principles; each can make proposals, submit reasons for their acceptance, and so on.

The Original Position is the procedure by which a theory of justice can be chosen. On this account, therefore, Rawls is using ideal theory to create a procedure by which a theory of justice can be agreed. This procedure produces two principles of social justice which act as restrictions to ensure that justice is met by the further arrangements created through the social compact. He asserts that he provides purely the procedure by which justice can be attained but that a range of sets of

substantive principles of justice could be agreed upon by different groups of representatives. This reflects his commitment to the priority of the right over the priority of the good.

As outlined, in order to reach these substantive principles, the procedural principles of social justice must be formulated. These Rawls describes (1999, p. 4) as “a set of principles...for choosing among the various social arrangements which determine this division of advantages and for underwriting an agreement on the proper distributive shares”. These principles “define the appropriate distribution of the benefits and burdens of cooperation” (Rawls 1999, p. 4) for a well-ordered society to be created based on a conception of justice. As well as a rejection of a Utilitarian account of justice, Rawls’ theory of justice is a response to the existence of natural inequalities. Rawls states that these are not inherently just or unjust but that how society engages with the fact of these inequalities is subject to principles of justice. Rawls emphasises the importance of equality of opportunity in order for justice to be met, and asserts that affirmative action must be taken in order to rectify the natural inequality of opportunity. The principles of justice therefore, are used to mitigate against the impact of these inequalities as these differences are not based on desert or merit.

Rawls outlines (1999, p.266) the two principles of social justice as such:

First principle: Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all

Second principle: Social and economic inequalities are to be arranged so that they are both:

- a) To the greatest benefit of the least advantaged, consistent with the just savings principle
- b) Attached to offices and positions open to all under conditions of fair equality of opportunity

These two principles of social justice are considered to be acceptable within the initial situation of the Original Position and are principles that will enable a conception of justice to be established within a well-ordered society. Subsequently, they address the problem raised in the previous paragraph of the arbitrary nature of natural inequalities. Rawls states (1999, p. 13):

The two principles mentioned seem to be a fair basis on which those better endowed or more fortunate in their social position, neither of which we can be said to deserve, could expect the willing cooperation of others when some workable scheme is a necessary condition of the welfare of all.

The first principle outlines the liberties that citizens in a well-ordered, just society could expect it to uphold. These include; political liberty, freedom of speech, freedom of the person and right to hold personal property, amongst others. Rawls asserts that the representatives in the original position would agree to this principle as these liberties would be agreed upon from a position of ignorance of social position. These liberties are therefore those which all individuals, regardless of social and economic status, could want to experience within a just society. This first principle is lexically prior to the second as liberties must obtain before distribution and equality of opportunity can be addressed. These two principles can then be used to assess the specific sets of substantive principles that arise from the compact between representatives.

Rawls outlines (1999, p. 82) the starting points of the representatives in the Original Position: “each person holds two relevant positions: that of equal citizenship and that defined by his place in the distribution of income and wealth”. The second principle therefore ensures that once certain liberties have been upheld, natural inequalities can be addressed through redistribution and subsequently equality of opportunity can obtain. In the context of the Original Position, Rawls asserts, individuals would apply the maximin criteria. As is obvious from the title of this project (1974, p. 145): the “natural focal point between strict equality and the principle of average utility”. This criterion would ensure that individuals, whatever their standing may be beyond the ‘veil of ignorance’, will have agreed to maximise the minimum goods possible subject to the second principle. Returning to the example Rawls gave regarding decision-making on tax within the Original Position, with the Veil of Ignorance in place representatives are likely to choose the level of tax which provides the most services or resources possible to the worst off in society.

The Difference Principle

As obvious from the title of this project, this work focusses on the ‘Difference Principle’. This is the first section of the second principle which states that social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged. Following from the primacy of the first principle guaranteeing equal rights and liberties, this part of the second principle aims to justify the existence of inequalities in the context of a theory of justice which responds to the fact of natural inequality. Rawls states (1999, p. 72) that “the difference principle is a very special criterion: it applies primarily to the basic structure of society via representative individuals whose expectations are to be estimated by an index of primary goods”. The Principle applies, therefore, to institutions within the basic structure and ensures that the distribution within and across these institutions redresses the imbalance caused by natural inequalities. The Principle therefore allows

for inequalities to exist among individuals, but provides a restriction that these inequalities need to be such that the least advantaged are most advantaged because of them.

Rawls uses primary goods as the metric for his account of justice and describes (1999, p. 54) these as “things that every rational man is presumed to want”. These are goods which are broadly necessary, whatever the rational life plan of individuals and Rawls goes on to outline two types of these resources. Social primary goods include rights, liberties, opportunities, income and wealth, and self-respect. Natural primary goods include health and vigour, intelligence and imagination. He notes the difference in relationship between these sets of goods and the basic structure. The former set of goods is one which the basic structure has a level of control over, whereas the latter is not. Although the structure can be seen to have a level of influence over natural goods, the relationship is causally different than that with social goods. Rawls states (1999, p. 55) “imagine, then, a hypothetical arrangement in which all the social primary goods are equally distributed: everyone has similar rights and duties, and income and wealth are evenly shared”. He sets (1999, p. 55) this as the “benchmark” for judging improvements or changes to the social and economic arrangements.

Rawls’ account of justice as fairness holds that institutions can be regarded in two ways: as an abstract object or as a “realization in the thought and conduct of certain persons at a certain time and place” (Rawls 1999, p. 48). The Difference Principle is intended to ensure that each institution in the well-ordered society meets the principles of social justice so that equality of opportunity is available. It is in this way that the principle could be used as a test of contemporary policy and institutions. A particular standard for justice has been set: that any inequality makes the least well off better off, and certain policy formations can be tested against this standard. Rawls states (1999, p. 81) “men share in primary goods on the principle that some can have more if they are acquired in ways which improve the situation of those who have less”.

Rawls highlights four procedural aspects linked to the difference principle as a means to give further detail about the concept. First, he likens the principle to the Pareto Efficiency Principle which states that a system is efficient if it cannot be changed so that some persons are better off without others being worse off. Although Rawls asserts that justice is prior to efficiency, he states (1999, p.69) “justice is defined so that it is consistent with efficiency, at least when the two principles are perfectly fulfilled”. Second, in defining the least advantaged representative Rawls outlines three main kinds of contingencies:

- a) Family and class origins
- b) Natural endowments

c) Fortune and luck in the course of life

He uses these to define the least well off representatives from particular groups. The views of these representatives are then included in decision-making procedures to ensure that levels of inequality also enabled their needs to be met. Rawls gives the example of the 'unskilled workers' as a group and defines the least well off members of groups as those whose income is less than average of those in the lowest social position. Returning to the example of setting levels of tax contributions, we can see that these individuals would have a specific view to contribute within this decision-making process. This needs to be represented to ensure that decisions made can be accepted as reasonable by those who can be understood as some of the 'worst off' in society. Third, Rawls explains that the difference principle should raise the expectations of primary goods equally amongst the representatives. This ensures, then, that there is an aspect of reciprocity and mutual benefit from inequality. Rawls states (1999, p. 87):

The difference principle represents, in effect, an agreement to regard the distribution of natural talents as in some respects a common asset and to share in the greater social and economic benefits made possible by the complementarities of this distribution.

Finally, he outlines that people can increase their wealth and resources through free association as long as the difference principle is met so that a certain standard of equality of opportunity is guaranteed. The principle is therefore based on reciprocity and redress in order to ensure equality of opportunity is achieved. Rawls states (1999, p. 86) "the principle holds that in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favourable social positions". We can see here how the Difference Principle can be seen as product of Rawls' focus on the reasonable as one of the two moral powers. Individuals have an obligation to recognise reciprocal relationships between members of the social scheme of cooperation to ensure that the worst off are made better off within conditions of inequality.

Rawls therefore gives a deontological account of justice from within the social contract tradition. The metric used in the theory is primary goods, with the subject being the basic structure and a well-ordered society. Within this society individuals are interested in pursuing their conception of the good, but the contract device of the Veil of Ignorance allows them to commit to the maximin criteria for redistribution. His Difference Principle therefore shows a commitment to equality within distributive justice, although to what extent the theory provides egalitarian obligations is questionable. A further caveat of the Difference Principle is that it is to meet the publicity criterion:

“citizens generally should be able to understand it and have some confidence that it is realised” (Rawls 1974, p. 144). As previously noted this, combined with the concept of the well-ordered society, allows for this theory of justice to create stability within society.

Rawls’ Difference Principle can be used beyond abstract theory and hypothetical choice scenarios to look at policy in the real world. Within *A Theory of Justice* Rawls discusses this usage within his account of the four stage sequence of how the theory of justice as fairness is made and subsequently could be used. Rawls states (1999, p. 171) that this sequence “clarifies how the principles for institutions are to be applied” through creating a framework for their application. This stage is based on the framework of the US constitution and forms “an elaboration of the Original Position” (Rawls 1999, p. 172). Key to this sequence, then, is the role of the Veil of Ignorance. The first stage of the sequence is the creation of the principles of justice within the Original Position which has already been outlined. The second stage is the constitutional stage. Here representatives are tasked with designing a system for the constitutional powers of government and the basic rights of citizens. This has to fit within the limits set by the principles of justice as formulated in the Original Position. In this stage, the Veil of Ignorance is partially lifted, and individuals have knowledge of the national circumstances of their society, the resources available and economic advancement of society, as well as the political culture.

The next stage is legislative. Here, the justice of laws and policies are to be assessed according to both the limits of the principles of justice and the limits set through the choice of a constitutional framework. Rawls highlights that whether policies and legislation, particularly regarding economic and social issues, are just is often subject to reasonable differences of opinion. Rawls states (1999, p. 174) “often the best that we can say of a law or policy is that it is at least not clearly unjust”. Focussing on legislation that relates to social and economic matters, Rawls notes that the particular principle of justice that would relate to this is the Difference Principle. However, Rawls comments (1999, p. 174) “the application of the Difference Principle in a precise way normally requires more information than we can expect to have”. He notes that the application of the first principle is simpler to understand, as it is clear when there is a breach of equal liberties and rights and this fits into the second stage regarding the constitution. He says (1999, p. 174) that this clarity is “comparatively rare with social and economic policies regulated by the Difference Principle”. My test, I suggest, enables the application of the content of the Difference Principle without the reliance on information which Rawls outlines. It takes the abstract concept contained within the Principle and facilitates a way of applying this to tangible policy. The final stage in Rawls’ four part sequence is the application of rules constructed in the previous three stages to particular cases of legislation and

policy by judges and administrators. In this stage, all information is available to representatives as this is required to make appropriate judgements on the justice of particular cases.

Rawls states (1999, p. 176) that this “four-stage sequence is a device for applying the principles of justice” and is also part of the process of justice as fairness. There is already then, a process by which the ideas and decisions of the Original Position are to be applied to specific legislation and policy. We can see three different types of judgements at play in this sequence. First, individuals have to judge legislation and social policies. This, as already noted, is done in the context that the citizen “knows that his opinion will not always coincide with those of others, since men’s judgements and beliefs are likely to differ especially when their interests are engaged” (Rawls 1999, p. 171). We can see that the type of reasoning that led to the specific design of the initial situation of justice as fairness as being characterised by the Original Position and the Veil of Ignorance. Because of this, individuals have to engage with a further type of judgement: deciding which constitutional arrangements are just in order to reconcile these conflicting opinions about justice. Rawls describes (1999, pp. 171-172) the political process as a machine “which makes social decisions when the views of representatives and their constituents are fed into it”. This we can see as part of the democratic process, political representatives feed their views and the views of their constituents into decision-making through the legislative and policy scrutiny processes. Citizens in general can be seen to input their views around constitutional arrangements through taking part in elections. The final, and linked, type of judgement that individuals make regards where the limits of political duty and obligation lie. If the first two kinds of judgements have not resulted in appropriate decision-making based on justice considerations, individuals need to decide whether they are obliged to comply with political rules and obligations.

In light of these three types of judgements Rawls states (1999, p. 172) “a complete conception of justice is not only able to assess laws and policies but it can also rank procedures for selecting which political opinion is to be enacted into law”. However, as already noted in Rawls’ comments on the use of the Difference Principle the application of the principle (in particular) is often indeterminate. Although using this procedure to test legislation, with the restrictions of the principles of justice and the decisions made in the constitutional stage, it can still be unclear which economic or social arrangements should be chosen. Rawls states (1999, p. 176):

Thus on many questions of social and economic policy we must fall back upon a notion of quasi-procedural justice: laws and policies are just provided that they lie within the allowed range and the legislature, in ways authorised by a just constitution, has in fact enacted them.

When we consider the arguments made in Chapter 2 regarding the liberal principle of legitimacy and the rejection of legitimacy capital, I suggest that this use of the Difference Principle is not sufficient on its own. I argue that by using the focus on reasonableness from within his later work (*Political Liberalism*), Rawls' Difference Principle can be used as a tangible way of testing policy in the context of social justice.

Bringing together *A Theory of Justice* and *Political Liberalism*

As previously highlighted, Rawls shifts a number of his views around justice between *A Theory of Justice* and *Political Liberalism*. As my work combines the concept of reasonableness from the latter work, with the application of the Difference Principle from the former work as a test for policy, there needs to be an exposition of how the Rawlsian approach to justice shifts across the two pieces of work.

Rawls criticises his initial account of justice as fairness as drawing no distinction between comprehensive doctrines and political conceptions of justice. *Political Liberalism* is based on this distinction; that individuals will have commitments to particular comprehensive doctrines but these will differ across society. The most individuals can be expected to agree upon, through their moral power of reasonableness, is a political conception of justice. Both of these have been defined elsewhere in the thesis. Reflecting on his account of the stability of justice as fairness in *A Theory of Justice*, Rawls highlights that for there to be agreement and stability around this account of justice, individuals would need to agree to a substantial philosophical comprehensive doctrine. The aim of *Political Liberalism* is to answer the question of how individuals can both subscribe to a variety of different comprehensive doctrines but also live in a social scheme of cooperation based on a reasonableness conception of justice. Rawls states (1996, p. xvi):

An essential feature of a well-ordered society associated with justice as fairness is that all citizens endorse this conception on the basis of what I now call a comprehensive philosophical doctrine. They accept, as rooted in this doctrine, its two principles of justice.

Rawls outlines in *Political Liberalism* that this is, in fact, unrealistic as modern, democratic, societies are characterised by the fact of reasonable pluralism. He states that it is unreasonable for all individuals to be expected to unilaterally support one comprehensive philosophical doctrine and therefore revises his view to consider “the idea of a well-ordered society of justice as fairness as unrealistic” (Rawls 1996, p. xvii).

Within *Political Liberalism*, therefore, Rawls outlines the role of stability within society as supporting a political conception of justice rather than a comprehensive philosophical doctrine. *Political*

Liberalism therefore “transforms the doctrine of justice as fairness...into a political conception of justice” (Rawls 1996, p.x1i). Rawls argues that this transformation from a focus on comprehensive doctrines to a focus on political conceptions is necessary, as the reliance on agreement on a single comprehensive doctrine in the former work to create stability is actually undone by the principles of justice to which the theory subscribes. Rawls states that the two principles require a constitutional democratic regime, and this would not allow for the enforcement of all individuals to an agreement on a singular comprehensive doctrine. Instead, this regime would enable the fact of reasonable pluralism which acts as the starting point for *Political Liberalism*.

Rawls states that this transformation requires reformulating the component ideas of justice as fairness as a comprehensive doctrine into political conceptions. He notes that this does not change the content of the account of justice substantially, and that the principles stay the same but the framework to which they are applied is different. The largest shift here regards the Rawlsian account of the person. Instead of the focus on the person as a moral agent as seen in Rawls’ earlier work, his later work engages with individuals purely as citizens. Rawls states that the fundamental political relation of citizenship has two special features. The first is that it is a relation of citizens as members within the basic structure. This is understood as a closed community, where individuals are members from their birth until their death. Secondly, (and as previously outlined) this relation is one of free and equal citizens who exercise ultimate political power as a collective body. We can see how this particular conception of citizenship can be seen to relate to the liberal principle of legitimacy: individuals as members of a political community are able to exercise political power as free and equal citizens. Rawls expands on this, outlining that the criterion of reciprocity is at play in this conception of individuals as citizens. He states (1996, p. x1iv) “our exercise of political power is proper only when we sincerely believe that the reasons that we offer for our political action may reasonably be accepted by other citizens as a justification for those actions”. As outlined in Chapter 2, the exercise of political power is therefore subject to scrutiny, in terms of whether the claims or outcomes from this exercise can be seen to be reasonable and to be likely to be accepted by reasonable individuals. Rawls states (1996, p. x1iv) “the criterion applies on two levels: one is to the constitutional structure itself, and the other is to particular statutes and laws”. I will return to this in more detail in the next section on the use of the difference principle in this context.

This shift from justice as fairness as being based on a comprehensive doctrine to being a political conception of justice has an impact on the nature of the theory of justice. The emphasis on a political conception rather than a comprehensive doctrine leads to Rawls providing the framework of justice as fairness as one liberal political conception among many, rather than the only account of

justice that would be agreed upon in the Original Position. In *Political Liberalism* therefore, Rawls is outlining a family of liberal political conceptions based on a number of particular characterisations. The first of these characterisations is that the political conceptions need to comply with a specification of certain rights, liberties, and opportunities. Second, the conceptions reflect a special priority for these freedoms. Finally, the conceptions need to include measures assuring all citizens, whatever their social position, adequate all-purpose means. We can see here how this maps onto the principles found within justice as fairness. The first two characterisations fit with the first principle which guarantees the protection of liberties, and how this has lexical priority over the second principle. The third characterisation reflects the commitments of the second principle of justice, demonstrating commitments to equality and redistribution. This includes the Difference Principle, and we can see this reflected in the mention of individuals within any social position being able to enjoy all-purpose means. This can be seen, however, as being less rigorous than the second principle within justice as fairness, as there is no commitment to the least advantaged being most advantaged through economic and social inequality. Rawls outlines that there can be replacements to the Difference Principle within alternative liberal political conceptions of justice such as a principle which improves social well-being subject to a constraint guaranteeing a universal level of adequate all-purpose means (Rawls 1996, p. x1vii).

On the revised account then, Rawls acknowledges that there is a family of conceptions which could meet his characterisations of a liberal political conception of justice. However, he does state that he believes justice as fairness to be the most reasonable conception as it best meets the characterisations of an appropriate conception. Here we can see the full outcome of the shift from comprehensive doctrine to political conception in terms of justice as fairness; the account of justice as fairness is not being proposed as the singular appropriate framework for justice, but an example (albeit the best example for Rawls) of one of many liberal political conceptions of justice. Rawls states (1996, p. x1v) “while I view it as the most reasonable...I shouldn’t deny that other conceptions also satisfy the definition of a liberal conception”. The next challenge in this thesis then, is to reconcile the argument for the Difference Principle being used as the singular test for social justice in social policy, not as an example of a possible way of characterising social justice, with the emphasis on the use of the concept of reasonableness from *Political Liberalism* which exists within the context of reasonable pluralism.

Justifying the use of the Difference Principle

So far, I have outlined two main arguments in my work, the amalgamation of which can be problematic for Rawlsian scholars. This is largely linked to these arguments being chosen from

different parts of the Rawlsian canon, when Rawls himself had revised his views on his account of justice. The first argument is based within *Political Liberalism* and calls for the use of the concept of reasonableness as a regulatory tool in line with the liberal principle of legitimacy. The second argument is that the Difference Principle as created and characterised within *A Theory of Justice* should be the mechanism by which this occurs. As highlighted in the previous section, there is a problematic relationship between using the concept of reasonableness based in reasonable pluralism, and the normative claim that the Difference Principle is the tool by which social policy should be tested for legitimacy. As outlined, Rawls' position when developing his concept of reasonableness is that a family of liberal political conceptions of justice could be formulated that would meet his criteria for a just society. Shifting from his account of justice as fairness as the way that justice can be achieved in liberal schemes of social cooperation, Rawls argues on this account that justice as fairness can only be judged to be the best conception due to its attainment of the characteristics of a liberal political conception of justice. In *Political Liberalism*, Rawls is no longer claiming that justice as fairness is the singular way to achieve a just society, but that the model is a 'best fit' for the idea of a liberal political conception of justice and could be superseded by others.

The question arises then, of how my use of the concept of reasonableness as a regulatory tool can be reconciled with my argument that the Difference Principle should be used as the mechanism by which to deliver the liberal principle of legitimacy. If we are looking at justice within the context of reasonable pluralism which Rawls outlines in *Political Liberalism*, then the limits of my claim about the Difference Principle should be that the Principle offers one way in which we could talk about the liberal principle of legitimacy. This fits with Rawls' shift from an account of justice as fairness as a comprehensive philosophical doctrine in *A Theory of Justice* to a focus on a family of liberal political conceptions of justice from within his later work. I want to argue, however, that the Difference Principle as formulated within his earlier work is the tool which should be used to critically assess social policy within a Rawlsian framework. By using this tool, we can generate insights into policy analysis that might not have been available through the use of other tools. We have seen from Rawls' discussion of the characteristics of a liberal political conception of justice that both principles from within justice as fairness are represented within the conditions of an appropriate conception. I have also noted that although equality and redistribution are outlined within this framework, the Difference Principle as formulated within *A Theory of Justice* is not. I argue, however, that the Difference Principle can be seen as the most reasonable account of delivering the liberal legitimacy principle and ensuring that social policy delivers social justice on a Rawlsian account.

The starting point for my argument is the construct of the Original Position. As already outlined, this provides an initial situation of equality where individuals are unaware of their economic or social standing within society and must make decisions on justice from this position of ignorance. There are two core aspects of this construct that need to be emphasised for my argument. First, when we think about how this plays out in terms of decision-making, we see that part of the process is for all individuals to consider the impact of the decision they are making on themselves if they were the worst off in society. Although these individuals also need to consider themselves as the most advantaged in society in order to decide based on the maximin criteria, it is this inclusion of the consideration of individuals as the worst off in society which supports my argument for the use of the Difference Principle. On this account then, the views of individuals who could be the worst off in society effectively have a veto on decisions made within the Original Position. If individuals within this initial situation feel that the proposal on justice that is being discussed could not be reasonably accepted by the worst off in society, then it can be rejected and an alternative sought. Moreover, according to the Difference Principle and inclusion of the maximin principle this should be rejected. When we consider this in the context of the concept of fair terms reasonableness we can see the argument becomes strengthened.

In both *A Theory of Justice* and *Political Liberalism* Rawls discusses the justification behind individuals in the Original Position choosing the two principles of justice as formulated. These discussions focus on the understanding of individuals as having rational autonomy and the relationship of this to their fundamental interests. In *Political Liberalism* this is emphasised as part of the discussion of the political conception of the person: individuals are free and equal, with a set of fundamental interests which motivate them. The second point to emphasise regarding the construct of the Original Position, therefore, is that the principles chosen within the Original Position are those which “enable the citizens...to become full persons” (Rawls 1996, p. 77) through the pursuit of these three fundamental interests.

The first two fundamental interests relate to the two moral powers which have already been outlined in Chapter 2. Rawls (1996, p. 74) states “since citizens are regarded as having the two moral powers, we ascribe to them two corresponding higher-order interests in developing and exercising these powers”. The first interest, therefore, relates to the moral power to develop and exercise the capacity for a sense of justice. Individuals have an interest in being able to pursue their conception of the right within a social scheme of cooperation. The second corresponding interest relates to the moral power of rationality. Individuals have a fundamental interest in developing and exercising their capacity for creating and following a conception of the good. Rawls emphasises that within this

capacity, is the ability for individuals to revise their conception. Rawls states (1996, p. 30) “given their moral power to form, revise, and rationally pursue a conception of the good, their public identity as free persons is not affected by changes over time in their determinate conception of it”. Although the ability to follow a conception of the good life is a fundamental interest for individuals in the Original Position, Rawls emphasises that this does not constitute the whole of their identity and therefore identity is not affected when conceptions change. As noted, in *Political Liberalism* he emphasises this link between identity and conceptions in relation to the individual as political. He asserts that persons have both political and non-political aims and commitments, and these two aspects of moral identity need to be reconciled.

The final fundamental interest is that of the adopting principles within the Original Position which enable individuals to pursue a determinate conception of the good. As representative parties, individuals in the Original Position are not aware of the specifics of the content of their conception of the good but they have a “third higher-order interest to guide them” (Rawls 1996, p.74). Rawls (1996, p. 77) states:

The aim of the parties is to agree on principles of justice that enable the citizens they represent to become full persons, that is, adequately to develop and exercise fully their moral powers and to pursue determinate conceptions of the good they come to form.

Although unaware of the particulars of their social positions and the content of their conceptions of the good, parties in the Original Position are motivated by the three fundamental interests to choose an arrangement of institutions, governed by the two principles of justice, which enable individuals to exercise their two moral powers and pursue a determinate conception of the good life. Rawls (1996, p. 77) states “the principles of justice must lead to a scheme of basic institutions – a social world – congenial to this end”.

Rawls (1996, p. 75) goes on to outline that these fundamental interests are “purely formal” in their structure. In order for parties to make a rational decision on the principles that will enable them to pursue their conception of the good, Rawls introduces the concept of primary goods. He states “the parties evaluate the available principles by eliminating how well they secure the primary goods essential to realise the higher-order interests of the person for whom each acts as a trustee” (Rawls 1996, p. 75). By looking at the primary goods needed for individuals to be able to exercise their two moral powers, parties can then understand which principles would be most appropriate to enable individuals to be able to do this. Rawls (1996, p. 76) asserts “at the basis of the parties’ reliance on primary goods is their recognition that these goods are essential all-purpose means to realise the

higher-order interests connected with citizens' moral powers and their determinate conceptions of the good".

We can see here, then, the link between individuals' ability to exercise their two moral powers as the first two fundamental interests and the subsequent ability to pursue a determinate conception of the good in relation to the "social world" (Rawls 1996, p. 77). The link between primary goods and institutions is emphasised: in order to make a rational decision on how society should be arranged and regulated according to particular principles of justice, parties need to be aware of the level of primary goods needed for individuals to be able to pursue their conception of the good. There is, therefore, a clear link in the outlining of Rawls' account of fundamental interests between the conception, revision, and pursuit of a conception of the good, and the impact of basic institutions and primary goods on this. In deciding on principles within the Original Position; "the parties are trying to guarantee the political and social conditions for citizens to pursue their good and to exercise the moral powers that characterise them as free and equal" (Rawls 1996, p. 77).

Previously, I have argued that policy should be tested in line with the liberal principle of legitimacy when it impacts on issues of basic justice and constitutional essentials. This should be done to ensure that fair terms reasonableness can be achieved; that individuals' decision-making is reasonably accepted by other members of the social scheme of cooperation. To achieve fair terms reasonableness therefore, there needs to be consideration of the individuals who are likely to be impacted most heavily by these matters of basic justice and constitutional essentials. The group that is likely to be affected by matters of basic justice is the worst off in society. If we understand basic justice to be matters of fundamental freedoms and ensuring the attainment of all-purpose means, we can see that it is the group of individuals least advantaged within society that are mainly likely to be affected by these issues. Within the argument for looking at fair terms reasonableness as part of the liberal principle of legitimacy we can see that decisions have to be made that will be reasonably accepted by all reasonable members of the social scheme of cooperation. When we look at the formulation of the Difference Principle we can see the clear emphasis on ensuring that the least advantaged receive the most advantage from positions of inequality. According to Rawls' revised approach to justice, we can have a variety of mechanisms which meet the criteria of a political conception of justice. However, ensuring that the worst off become better off because of inequality is not a necessary condition within this approach.

I argue therefore, that the most reasonable test for fair terms reasonableness as a form of legitimacy comes from the Difference Principle. This Principle effectively gives the worst off in society a veto on decision-making through the Original Position; if the individuals in this position do not see that the

decision can be reasonably accepted by the worst off under fair terms then it can be rejected. When looking at the legitimacy of decisions made regarding basic justice and constitutional essentials according to fair terms reasonableness we need to understand the position of the worst off within this decision-making process – the Difference Principle enables us to do this. Returning to the characteristics of a political conception of justice which Rawls outlines in *Political Liberalism* the third condition is that measures should be in place to ensure that all citizens, whatever their social position, have all-purpose means. There is no demand in this condition, however, that the specific interests of the worst off in society are taken into account during the decision-making process. I argue, therefore, that if we are looking for a test for fair terms reasonableness as an extension of the liberal principle of legitimacy the Difference Principle is the mechanism we should use. The use of this mechanism ensures that any inequality is measured against the interests of the worst off, and individuals in these representative groups will not become more worse off through the existence of this inequality. When looking at decision-making procedures, therefore, we can see that this effectively constitutes a veto by the worst off in society on policies that can be implemented within the basic structure.

Further, we can understand the assessment of basic justice to include the capacity for individuals to fulfil their three fundamental interests. I have outlined the relationship between individuals being able to pursue their fundamental interests and the arrangements of the “social world” (Rawls 1996, p. 77). Parties in the Original Position are motivated to choose principles and subsequent arrangements in the basic structure which enable them to pursue their interests. If individuals are unable to follow these fundamental interests, they are also unable to exercise their two moral powers of rationality and reasonableness. There are two core aspects of the construction of the Original Position in terms of decision-making therefore: that those who are the worst off in society have an effective veto on decisions which are made, and that the parties will choose principles which enable them to fulfil their three fundamental interests.

Part 2 – Building a ‘toolkit’

Chapter 4 - Reflective Equilibrium: making ends meet

The concept of reflective equilibrium can be used in this context to understand how the idea of reasonableness in decision-making can be applied to policy in everyday terms. This chapter will outline how the structure of reflective equilibrium enables the tool of the Difference Principle to be taken beyond the initial decision-making process of the Original Position and the conception of justice that follows, to a regulatory mechanism that can be used as a means for members of the scheme of social cooperation to scrutinise institutions within the basic structure.

Reflective equilibrium is a means to achieve justification for decisions regarding justice. Roberts (2007) and Scanlon (2002) both give an account of it being used on an individual level to provide justification for our own views, and Amit Ron (2006) expands this to an institutional level where agreement between individuals within a pluralist society regarding their social institutions is reached. Rawls (1996) states that the process of Reflective Equilibrium involves achieving balance between our considered convictions and basic principles from public culture in order to create a political conception of justice. This process enables a balance and agreement to be reached between individual convictions, and how these fit in to a wider conception of values as part of the social scheme of cooperation. Reflective Equilibrium can be seen therefore as a means by which individuals exercise their moral power of reasonableness, and is based on reciprocity within the social scheme of cooperation. Rawls states (1996, p. 385n) at its fullest extent “this equilibrium is fully intersubjective: that is, each citizen has taken into account the reasoning and arguments of every other citizen”.

In this chapter then, I will outline Rawls’ account of Reflective Equilibrium before moving on to an overview of constructivist accounts from Scanlon and Roberts. This section will outline the function of Reflective Equilibrium in enabling individuals to achieve balance between their convictions and broader principles of justice, and how this can work in the context of reasonable pluralism. On this account, Rawls draws a distinction between four types of Reflective Equilibrium: narrow, wide, general, and full. I intend to use this distinction to create an extension of Rawls’ use of the concept of Reflective Equilibrium to deliver justification based on the liberal principle of legitimacy. Using the work by Ron (2006), I will indicate that the framework of Reflective Equilibrium can also be used as the basis for individuals within the social scheme seeking to find justification for the values and the outputs of the institutions of the basic structure. Here I will argue that the structure of narrow and wide Reflective Equilibrium can have ‘external’ application in line with the Difference Principle to scrutinise the actions of institutions in regards to basic justice. On my argument then, the focus of

the actors within the process of Reflective Equilibrium has shifted from individuals finding an equilibrium within themselves, and in turn within other individuals in the scheme of social cooperation, to members of the scheme of cooperation aiming to acknowledge Reflective Equilibrium within the values and outputs of institutions of the basic structure.

Rawls' account

A central debate within Rawls' approach to a conception of justice is how different values within society can be balanced so that there can be a social scheme of cooperation which accepts and respects a single set of principles of justice. He questions (1996, p. 8) "how might political philosophy find a shared basis for settling such a fundamental question as that of the most appropriate family of institutions to secure democratic liberty and equality?". Individuals within society have a variety of firmly held personal convictions which are likely to differ from others within the scheme. In order to secure liberty and equality however, a set of arrangements or a political conception for regulating society must be agreed upon by individuals with these differing convictions. Rawls (1996, p. 8) describes these convictions as "provisional fixed points" for a political conception to be built upon. A shared political conception "must accord with our considered convictions, at all levels of generality" (Rawls 1996, p. 8). Rawls asserts that individuals within a social scheme must search, therefore, for an equilibrium between these convictions to create a political conception of justice.

Contextualising a discussion of the mechanism of Reflective Equilibrium within *Political Liberalism*, Rawls outlines the importance of distinguishing three different points of view within his creation of a theory of justice. The first two of these Rawls describes in conjunction as belonging to the conception of justice as fairness and, therefore, being specified within the bounds of the fundamental ideas of this framework. The first is that of the parties in the Original Position. Rawls (1996, p. 28) states that these are "merely the artificial creatures inhabiting our device of representation". These views are created by those who establish the device of representation in order to work out justice as fairness, and therefore the nature of these parties depends on these creators. Rawls warns (1996, p. 28) that "justice as fairness is badly misunderstood if the deliberations of the parties, and the motives we attribute to them, are mistaken for an account of moral psychology, either of actual persons or of citizens in a well-ordered society". These points of view are merely used as mechanisms within the Original Position which functions as an initial decision-making device. The second point of view, that of citizens in a well-ordered society, is equally still a part of the construct of justice as fairness. However, this view could also be regarded as achievable within a social world.

The third view “is that from which justice as fairness, and indeed any other political conceptions, is to be assessed” (Rawls 1996, p. 28). This is the point of view of “you and me” (Rawls 1996, p. 28). This view belongs to individuals who are both elaborating and assessing justice as fairness as a political conception of justice. The point of view on this account has been taken outside of the construct of justice as fairness to function as an assessment of the conception as a whole. Rawls states (1996, p. 28):

Here the test is that of reflective equilibrium: how well the view as a whole articulates our more firm considered convictions of political justice at all levels of generality after due examination once all adjustments and revision that seem compelling have been made.

Although I will be outlining Reflective Equilibrium in both monological and dialogical terms in two separate ways - internal and external - it is important to recognise the point that Reflective Equilibrium is always achieved by ‘you and me’ and that Rawls intends this to be used in a way to scrutinise conceptions of justice.

As previously highlighted, there are a number of levels of achieving Reflective Equilibrium. These four categories can be understood by a further division; the first two categories of narrow and wide Reflective Equilibrium are monological. Here Reflective Equilibrium is achieved by individuals reaching a balance between their internal value sets. The second two categories of full and general are dialogical; Reflective Equilibrium is achieved by individuals with reference to other individuals within the scheme of social cooperation. I will go on to outline how this distinction can be used in an ‘external’ context, but will first outline these interpretations of Reflective Equilibrium from within Rawls’ account.

Rawls characterises (1999, p. 43) narrow Reflective Equilibrium as “the smoothing out of certain irregularities”. On this account individuals’ considered convictions are defined as those descriptions or statements which “more or less match one’s existing judgements except for minor discrepancies” (Rawls 1999, p. 43). The proposed principles from the Original Position are tested against this set of convictions. This process can be characterised as a narrow form of Reflective Equilibrium – justification occurs through a ‘matching’ and adjusting process between similar principles or judgements. This form of Reflective Equilibrium, therefore, occurs when individuals take note of only their own convictions and how these fit with the proposed principles of justice.

The second interpretation Rawls describes as a radical shift. This process includes considering “all possible descriptions to which one might plausibly conform one’s judgements together with all relevant philosophical arguments for them” (Rawls 1999, p. 4). This is a much more demanding

process, described as 'wide' Reflective Equilibrium. In this process, a third layer of consideration is added to the existing levels of considered convictions and proposed principles. On this account the equilibrium achieved between these two initial stages is measured against more general background theories in order to evaluate which would be the best set of principles to be reached through Reflective Equilibrium. On this account, then, individuals have considered a variety of types of information or values; their considered convictions; the proposed principles; alternative conceptions of justice, and leading conceptions of political justice found within their philosophical tradition. Wide Reflective Equilibrium is achieved therefore when an individual's general convictions, first principles, and particular judgements, are all in line. Rawls notes that a well-ordered society is achieved when all individuals have achieved wide Reflective Equilibrium.

The dialogical form of Reflective Equilibrium builds on these initial accounts. General Reflective Equilibrium is achieved when "citizens recognise that they affirm the same public conception of political justice" (Rawls 1996, p. 384). Here, individuals who have already achieved wide Reflective Equilibrium now recognise that their fellow citizens' judgements are also in wide Reflective Equilibrium. Full Reflective Equilibrium therefore occurs when both general and wide Reflective Equilibrium has been achieved. Rawls states (1996, p. 385):

In such a society, not only is there a public point of view from which all citizens can adjudicate their claims of political justice, but also this point of view is mutually recognized as affirmed by them all in reflective equilibrium.

It is this recognition of the status of others' judgements and how this stands in relation to levels of Reflective Equilibrium which makes this approach dialogical; individuals are taking account of their attainment of Reflective Equilibrium in relation to other citizens within the social scheme of cooperation. We can see, then, how this fits with the concept of reasonableness. Rawls highlights (1996, p. 28) that a conception of justice that has achieved full Reflective Equilibrium is "the conception that, so far as we can now ascertain, is the one most reasonable for us". Proposed principles from the Original Position have been checked against individuals' considered convictions at various levels of generality. They have also been checked against the status of others' judgements within the social scheme of cooperation. Rawls also notes (1996, p. 381) that on this intersubjective account of Reflective Equilibrium, there must also be an account of "how well [the] principles can be applied to democratic institutions and what their results would be". For a political conception of justice to be understood as reasonable, therefore, both general and wide Reflective Equilibrium would need to be achieved.

Scanlon and Roberts

By looking at constructivist accounts of Reflective Equilibrium we can see how the mechanism can be further understood in terms of two key characteristics. The first is justification: by looking at different accounts of Reflective Equilibrium we can see the force of the concept in terms of providing justification for judgements and conceptions of justice both in monological and dialogical terms. As noted, this dialogical account is linked to the notion of reasonableness - individuals are situating their judgements within the context of the judgements of other members of the social scheme of cooperation. A reasonable political conception of justice is therefore one which has achieved both wide and general equilibrium. By emphasising this notion within the concept of Reflective Equilibrium, I am laying the groundwork for my extension of the concept. The second is the idea of everyday decision-making. As previously noted on my chapter on the concept of reasonableness as regulatory, a key part of this is the idea of reasonableness as a quotidian part of decision-making. Building on the different points of view as highlighted by Rawls, the constructivist accounts of Reflective Equilibrium emphasise the everyday nature of this process.

Scanlon (2002) gives an initial account of reflective equilibrium as justification within Rawls' theory, which is subsequently built on by Roberts. Scanlon (2002) outlines the three stages of Reflective Equilibrium. First, considered judgements about justice need to be fully identified. These must be informed judgements, where the individual thinks carefully and clearly. The second stage is to formulate principles which might account for these considerations. Finally, Reflective Equilibrium is used at the third stage to respond to possible divergence between the first two stages. On this account, as with others, it is clear that the starting point for Reflective Equilibrium is individuals' considered judgements or convictions. The starting point is, therefore, also our everyday moral reasoning. As already highlighted, within this process the Original Position is a mechanism for developing proposed principles of justice, which then must be tested against our own moral reasoning to achieve Reflective Equilibrium. It acts as a tool to ensure that positions of partiality are not included in deliberations about justice, but that proposed impartial principles are achieved. As previously highlighted, this includes providing the worst off in society with an effective veto regarding the creation of principles for a political conception of justice.

Scanlon asserts that the process of Reflective Equilibrium can be seen to be open to two different interpretations. The first is deliberative, that the method of Reflective Equilibrium involves working out what to believe about justice. Here, Reflective Equilibrium is a process of justification for everyday moral reasoning on an individual level. His second interpretation is descriptive, and is a method by which to characterise the conception of justice held by someone else. He notes (2002, p.

143) that this does not provide a justification for principles but “portraits” of individuals’ conceptions of justice. We can understand this within the shift from monological to dialogical accounts of Reflective Equilibrium as already explained.

For Scanlon, the deliberative interpretation of Reflective Equilibrium is primary and refers to Rawls’ claim that moral philosophy is Socratic: through this process of reflection between principles and convictions justification is created. He states (2002, p. 149) “it is their status as judgements that makes them open to revision as the ‘Socratic’ process of seeking Reflective Equilibrium proceeds”. On this account therefore, the process of Reflective Equilibrium is deliberative and necessary in both making and justifying individual moral decisions. It is not purely a process used to create whole conceptions of justice on an individual level, but reflects, and is part of, everyday moral decision-making. Scanlon states (2002, p. 149) “it seems to me that this method, properly understood, is in fact the best way of making up one’s mind about moral matters and about many other subjects”.

Scanlon does, however, note two criticisms of this process. First is the charge of conservatism which proposes that Reflective Equilibrium is too closely tied to prior beliefs of decision-makers to be able to provide justification. On this critique, no objective principles are created through the reflective process as it lacks independence from previously held beliefs to allow it to have any critical force. Scanlon responds to this, stating that as the considered judgements of the parties in the process are open to constant revision, they can be revised according to new information or convictions that are created so that all available evidence is included in the decision. As Rawls (1996) also asserts, there is no necessary stability within the process, but this can be seen as a strength in terms of justification. For example wide Reflective Equilibrium has justificatory force “given the wide-ranging reflection and possibly many changes of view that have preceded it” (Rawls 1996, p.384). Scanlon comments that judgements within the process present at every level of generality and, on a wide Reflective Equilibrium account, all plausible conceptions of moral matters are to be considered. This provides a pluralist, rather than conservative, approach to decision-making. Subsequently, the second criticism Scanlon addresses is that of relativism. Within the process of achieving Reflective Equilibrium two different sets of principles could be justified through the same process. In response, Scanlon notes that the boundaries for equilibrium provided by the structure of the Original Position are themselves justified through Reflective Equilibrium. This, in turn, enables the starting points for all sets of principles to be justified. He states that as well as the justification of shared conceptions of justice being social, the role of the conception is shared. He asserts (2002, p. 154) “the function of the conception of justice is to serve as a publicly shared standard for resolving claims against the basic institutions of a society”.

Roberts (2007) gives a further exposition of the role of justification in Rawls' theory of justice, and how he achieves this through Reflective Equilibrium. His account builds on the work of Scanlon (2002) and also suggests that Reflective Equilibrium is a process which reflects and supports ordinary individual decision-making, with the Original Position as a starting mechanism. Again, Roberts emphasises the role of the Original Position in creating a context of impartiality, with all partial positions excluded through the Veil of Ignorance. Roberts provides a constructivist account of Rawls' approach to justification, noting that the aim of justice as fairness is to provide an alternative account of justice to those provided by intuitionism and utilitarianism in the context of a plural society. Roberts states (2007, p. 9) "justice as fairness is to provide determinate principles with definite priorities established that can in turn provide the necessary guidance despite intuitional and political pluralism".

Roberts notes that there are two fundamental parts to justice as fairness; first, the interpretation of the initial situation of equality which is found in the Original Position and the choice that faces decision-makers in this construct. Second, the set of principles which would be agreed upon within this construct. Roberts emphasises, however, that the procedure of Reflective Equilibrium adds a third integral part to the creation of a conception of justice. This additional process creates the conditions for justification for the principles, alongside the initial conditions within the Original Position. From this we can see that justification for the principles of justice which are constructed in the Original Position only occurs when they are in Reflective Equilibrium with our own considered convictions. Roberts states (2007, pp. 20-21) "the final acknowledgement of the two principles as the principles of justice waits on a demonstration that they are in reflective equilibrium with those considered convictions about justice".

Roberts describes (2007, p. 24) Rawls' account of Reflective Equilibrium as being a "two way adjustment process" by which principles and judgements about justice are calibrated by individuals. On this account, both the set of principles and convictions, and the impartial Original Position which mediates between them, are open for revision. He emphasises the common sense nature of the thinking within both the process and starting point of the Original Position, making individuals the source of this process. He highlights Rawls' claims about the Original Position being an expository device, not the sole source of justification, and notes that this mechanism has a "heuristic role" (Roberts 2007, p. 26) in identifying the consequences of our considerations of justice. This emphasises the specific role of the Original Position as previously outlined by Scanlon: it enables proposed principles of justice to be reached within an initial situation of equality. Roberts emphasises (2007, p. 26) that "the deductive argument from the description of the Original Position

is not itself a primary source of justification” but that the “justificatory weight is taken by the process of reflective equilibrium”. Justification is achieved when the proposed principles and considered convictions are in Reflective Equilibrium.

This constructivist account of Reflective Equilibrium can address critiques regarding the abstract nature of a Rawlsian approach to justice. Throughout this exposition, I have highlighted Roberts’ claims that Reflective Equilibrium is an integral part of the conception of justice which provides both justification for the principles and an ongoing method for revising or deciding about moral questions. Central to this account is Roberts’ statement (2007, p. 21) that “the idea of a search for reflective equilibrium as part of a notion of justification involves modelling what are often very ordinary ways of thinking and reasoning” which, most simply, is “an account of the processes of everyday critical reflection used in moral deliberation and argument”. It is this everyday method of decision-making which is found in the process of Reflective Equilibrium which provides the justification for the construction of a conception of justice, as well as more general moral decision-making. Roberts states (2007, p. 22):

Rooted in our convictions about justice, Rawls’ starting points are embedded in our everyday methods of thinking rather than based on the identification of metaphysical foundations. This is the basis of a response to influential and important criticisms that Rawls’ liberalism is, like many foundational positions, abstract and otherworldly.

It is these notions of the Original Position as heuristic and therefore Reflective Equilibrium as an account of everyday thinking about moral decisions that I argue allows the mechanism to add to the argument of reasonableness as regulatory. The process of Reflective Equilibrium is one which can be used to critically assess a variety of levels of moral decision making according wide or narrow accounts. In the next section I will argue that this can be expanded to critically assess institutions. All considerations, however, concern a political conception of justice and thus the role of individuals within a social scheme of cooperation. Therefore accounts of reasonableness and reciprocity are built into the process of Reflective Equilibrium.

Rawls, therefore, provides a systematisation of ordinary individual convictions about justice, rather than an abstract and complicated construct of hypothetical decision-making which is often assumed. The basis for both the starting point of Reflective Equilibrium and the process of Reflective Equilibrium, which provide justifications for decisions, begins with individuals, and the agreements we reach. These conceptions are also always open to revision, again emphasising the situated nature of individuals and how our thoughts around justice can respond to this. Replying specifically to

Michael Walzer's (1983) methodological concerns about how philosophy is conducted, Roberts asserts (2007, p. 22):

The approach embodied in the search for reflective equilibrium between these convictions and our general principles about justice makes plain Rawls' intention to proceed with his feet firmly planted 'in the city' and 'on the ground' by constructing a conception of justice that 'best approximates our considered convictions of justice.

Through Scanlon's account, I have outlined that the process of Reflective Equilibrium includes the Original Position as an initial situation of equality which proposes principles of justice. These are then tested against the everyday moral reasoning of our considered convictions, and revised accordingly. As previously highlighted, the restrictions of the Original Position are in line with considered convictions, and the principles created through the Original Position are then tested on these convictions.

For both Scanlon and Roberts the role of Reflective Equilibrium in the creation and justification of decisions about justice is primary. As emphasised, this is not an abstract philosophical construct but a concrete reflection of, and support to, individuals in justification of decision-making. Roberts states (2007, p. 29) that "reflective equilibrium, the process of ongoing critical reflection, is simply the process of continually reassuring ourselves that our best current understandings are as objective and appropriate as we thought".

Extending the concept of Reflective Equilibrium

In this section I will make my argument for the extension of the concept of Reflective Equilibrium. I have already outlined the two broad forms of Reflective Equilibrium that can be achieved; monologic and dialogic. On the monologic approach individuals are attaining Reflective Equilibrium for their own judgements as individuals. On the dialogic account individuals have achieved Reflective Equilibrium for their own judgements, and are now looking at how these can be positioned in relation to the status of judgements and Reflective Equilibrium for other members of the social scheme of cooperation. This can be linked to the concept of both reasonableness and everyday decision-making and it is in this context that I will argue for the application of these models of Reflective Equilibrium to institutions. To begin, I will outline the work of Amit Ron (2006) who uses the concept of Reflective Equilibrium as immanent criticism of societies and institutions. I will then go on to argue that by shifting the actors involved in the frameworks of narrow and wide Reflective Equilibrium we can take a further step towards using the Difference Principle as a test for social justice in social policy based on reasonableness.

As outlined in Chapter 2, Rawls states that reasonableness consists of both assessing people's claims on each other, and (importantly) on common practices and institutions. I have used the constructivist approach by Scanlon and Roberts to show that Reflective Equilibrium enables justification for moral reasoning which is concrete on an individual level. I now aim to extend this into an institutional account through the work of Amit Ron. This broadened account includes institutional outputs such as policy and legislation, as well as the organisations themselves, and it is this form of output that I focus on in this research. I will continue to argue that Reflective Equilibrium is the mechanism which can make the regulatory notion of reasonableness and, therefore the liberal principle of legitimacy, have purchase. Through this approach, we can assess whether policies and institutions can be seen to fit fair terms reasonableness.

Ron argues (2006, p. 173) that Rawls' work can be seen as a piece of critical theory in which he pursues a "deliberative turn". He states that in his later work Rawls "situates his theory of justice as an argument made in the context of an ongoing public deliberation and not as the philosopher's grand scheme for reorganising society". This is reflected in this piece of work, wherein I use the account of reasonableness largely from Rawls' later work to make determinate the difference principle which is predominantly from his earlier work. Ron states (2006, p. 174) that justice as fairness can be seen as deliberative in the following ways:

- 1) As an argument in an ongoing social discourse; and
- 2) Taking the convictions of the participants in this discourse as the point of the departure for the argument

His account therefore mirrors the constructivist account in that the Original Position is the point of departure for creating justice as fairness, and this is constructed and justified through reference to the everyday moral reasoning of individuals living within a scheme of cooperation. As Scanlon (2002) values the deliberative nature of Reflective Equilibrium as a form of individual justification, Ron expands this concept of deliberation to justice as fairness on an external, institutional, level. He highlights that it is the role of individuals' everyday moral reasoning - included in Reflective Equilibrium - which in turn justifies justice as fairness that enables the theory to have justificatory weight.

When this everyday moral reasoning is expanded from an individual to an institutional level, we can see the purchase that the device of the Difference Principle might have as a test for social justice in contemporary social policy. Ron asserts that justice as fairness can be used as immanent criticism of

societies. This theoretical framework can test institutions and both the values they state they are committed to, and the values they actually deliver on. He asserts (2006, p. 175):

Justice as fairness can be understood as an immanent criticism aimed at synthesizing the moral values *claimed by* existing social institutions into a coherent model of a well-ordered society in order to demand that these institutions *stand up* to the values that they promise.

The role of Reflective Equilibrium as immanent criticism on this account therefore is twofold. It can first test whether institutions are delivering on the values of public justification that they claim to be. It can, secondly, test these institutions against conceptions of justice more broadly. Ron acknowledges that it is the inclusion of individuals' everyday moral reasoning that enables justice as fairness to be justified. He also claims that the process of Reflective Equilibrium can be used to undertake immanent criticism of institutions through a Rawlsian framework.

Ron, therefore, argues that both the content and the method of justice as fairness can be used to evaluate contemporary social institutions. Rawls' set of principles can be used as a test for these bodies, with Reflective Equilibrium being used to carry out the assessment. Institutions are evaluated according to our own considered convictions of justice: are these institutions fulfilling the just role we as a society want them to? But also in terms of the moral convictions which they claim to deliver on; are these institutions delivering on the moral terms that they claim to be delivering on? Ron claims (2006, p. 177) "the delineation of the institutional structure of society is part of the process of arriving at reflective equilibrium". On this account, the principles of justice, therefore implicitly contain a certain ideal of social institutions, it is therefore fair to test them against justice as fairness, as well as the ideals the institutions themselves use as justificatory mechanisms. Ron states (2006, p. 181):

An existing institutional framework claims legitimacy based on certain values of principles which it promises to deliver – freedom, equality, justice, and so forth. Reflective Equilibrium can be seen as the process by which we critically examine our institutions against their own claims for justification.

In order to undertake this process of immanent criticism, Ron asserts that there are four stages of evaluation at which to look at: current institutions, the values embedded in them, the principles of justice, and the principles embedded in these institutions. This process, therefore, moves away from Rawls' initial practice of ideal theory and addresses the critique of abstract philosophy as being disconnected from reality. Instead, "deliberation is understood as a process in which citizens question the norms and institutions that govern their life" (Ron 2006, p. 181). The process first looks

at institutions, and the values embedded within them. It develops a theoretical framework based on these principles, and proposes an alternative arrangement within the institutions so that these are reflected. Ron asserts (2006, p. 182) “putting this idealized mirror against existing institutions is needed as a first stage in order to identify, study, and transform these power dynamics”. Justice as fairness interpreted in this way allows for the starting point of political theory to be the reality of contemporary social situations, understood through a theoretical philosophical framework. We can see here how this account fits into my argument for the involvement of philosophers within the policy process. By applying a model which searches for public justification to a policy, philosophers are able to generate new knowledge or a new understanding about the policy. Evaluating whether values agreed upon by Reflective Equilibrium are immanent in these institutions can then lead to proposed changes to ensure that these values are reflected. Ron states (2006, p. 185):

Rawls’ theory can be understood as setting a forceful agenda for an immanent criticism of contemporary institutions. Understood in such a way, ‘justice as fairness’ provides a set of idealizing ‘mirrors’ that are needed to view power dynamics in society, not as a model for an ideal society.

Ron’s account gives us an indication of how the mechanism of Reflective Equilibrium can be used to understand justice as fairness as having a regulatory function based on reasonableness and everyday decision-making. We can use Reflective Equilibrium as immanent criticism to assess institutions both based on the values agreed upon within reflective equilibrium, and through the process of Reflective Equilibrium itself.

I assert that by looking at the designations of narrow and wide Reflective Equilibrium we can give further clarity to this idea. I argue that the Difference Principle provides the most reasonable mechanism by which to scrutinise policies related to basic justice and this is based within the framework of the liberal principle of legitimacy: the nature of the intervention of social policy in individuals’ lives requires justification, and this should occur within the context of the concept of reasonableness. Here, we can see the test for social policy has a two-fold nature; first, policies could be tested according to the values by which they are justified by the institution itself. Secondly, the policy can be tested with reference to broader conceptions of justice. This can be seen to mirror the distinction of narrow and wide Reflective Equilibrium. For the first part of the test we are asking whether this policy relating to basic justice is internally consistent; does it meet the values that institution is using to justify this type of intervention? Here the question is whether the justification that the institution is providing for the policy is matched by the outcome of the policy itself. For example, the justification for the introduction of the Welfare Reform Act 2012 was partly centred

around the Conservative-led Coalition Government's desire to ensure that individuals were autonomous and have control and responsibility for their lives (Cameron, 2012). When looking at the outcome of this project we can see that many individuals were given less control over their lives following the implementation of this piece of legislation (Power et. al, 2014). The justificatory mechanism of arguing that the changes will create autonomy and agency for individuals is therefore undermined by the impact of the policy when implemented. We can see how this reflects the justificatory mechanism of narrow Reflective Equilibrium which asks whether individuals' considered convictions and the proposed principles of justice are internally consistent.

Returning to the concept of wide Reflective Equilibrium, this asks whether the individuals' considered convictions and the relationship this has to proposed principles, fit within broader considerations of justice. On the second configuration of the test, therefore, we can extend the assessment of the policy to broader conceptions of justice. If the policy matches questions regarding narrow Reflective Equilibrium, and is internally consistent, we can see whether the impact of the policy fits with our wider commitments to values regarding justice. For example, when looking at justifications for policies such as the Right to Buy which can be seen to immediately lead to greater autonomy and control for individuals who shift from tenants to homeowners, we can look at the relationship between the longer-term impact on social housing of this policy and particular conceptions of justice. This can be seen as an extension of Ron's concept of a using Reflective Equilibrium to assess institutions. As well as assessing them for internal equilibrium, as Ron suggests, my test analyses how policy outputs sit within wider discussions of basic justice.

On this extended account therefore, the actors involved in the process of reaching Reflective Equilibrium (both narrow and wide) have changed. In the Rawlsian and constructivist accounts, Reflective Equilibrium is to be achieved either in a monologic or dialogic sense by or between individuals as members of the social scheme of cooperation. In my account, the actors involved are individual or a collective of members of the social scheme of cooperation and the institutions which constitute the basic structure. By using Reflective Equilibrium in this way, I can show how policies related to matters of basic justice can be scrutinised by citizens within the scheme of social cooperation. There are two ways in which this testing can happen - on a narrow or wide account. This can be seen to be related to the final two stages of Rawls' four stage process of lifting the Veil of Ignorance. Rawls states that the justice of laws and policies should be assessed from perspective of the agreed upon political conception of justice. By shifting the arena in which the framework of narrow and wide Reflective Equilibrium applies, we can provide a more tangible account of how this

might happen. On my revised account, both the internal justificatory values and the how these values relate to the external environment can be assessed.

Chapter 5 – Primary Goods: An appropriate metric?

A focus on a metric is important in order to be able to provide interpersonal comparisons based on distribution. When analysing whether a policy meets demands of basic justice, we first need to be able to understand whether the policy is one of basic justice. Second, if it is, we need to understand the impact that this policy will have on individuals. It is crucial, then, that the metric that we use within our assessment of policy is correct. If arguing for the legitimacy of policy based on what it enables the worst off individuals to do and be, we need to be able to measure this. This section will therefore look at accounts which assert that the primary goods metric used by Rawls is not the appropriate measurement of justice. I will assess the alternatives provided, before outlining my own modified metric. Within this theoretical framework I focus on basic justice for the worst off in society; my metric needs to be able to provide an account of this within policy terms.

There is a wealth of engagement with Rawls' concept of primary goods which Daniels (1990) characterises as a discussion of what the target of our egalitarian concerns should be. He outlines that there are three different responses to this question. First, some theorists emphasise the importance of ensuring equality of opportunity for welfare. This can be seen in the work of Arneson (1990) and Cohen (2000). Second, theorists have argued that the important factor to measure is not welfare satisfaction, but whether individuals receive the resources they need to pursue their ends. This line of argument is proposed by Dworkin (1981) and Rawls (1999). The final answer focuses on the relationship between individuals and resources in the form of capabilities; what individuals are able to be and do. Within my work, I argue that Rawls' concept of the primary goods metric does not have to be wholly rejected for my focus on effective agency to work. I will propose, however, that a simplification of primary goods with an emphasis on capabilities is a more appropriate measurement of social justice in social policy. This chapter will lay the ground work for this argument.

Criticisms of Primary Goods

Within *A Theory of Justice* Rawls defines (1999, p. 79) primary goods as “things which it is supposed a rational man wants, whatever else he wants”. He states that, regardless of what an individual's rational plans are for life, there are some goods which they can be expected to prefer more of rather than less. He asserts (1999, p. 79) “with more of these goods men can generally be assured of greater success in carrying out their intentions and in advancing their ends, whatever these ends may be”. This account is modified slightly in *Political Liberalism* where Rawls gives an account of primary goods as those which democratic (rather than rational) people are expected to want. As we have already seen, these primary goods enable parties in the Original Position to decide on which

principles would best support them in creating a determinate conception of the good. As I have outlined, Rawls distinguishes between natural and social primary goods. Both of these categories are those which rational individuals are expected to want, but obligations relating to the provision of these different goods vary. Natural primary goods are those which, although influenced by the basic structure, are not altogether under its control. These include goods such as health and vigour, intelligence, and imagination. Primary social goods are those which the basic structure does have direct control over, and therefore the obligation to measure and deliver these goods falls on this combination of institutions. These include the broad categories of rights, liberties and opportunities, and income and wealth. As his argument develops throughout *A Theory of Justice*, Rawls goes on to include self-respect as a final broad category of social primary goods. He highlights that these categories, clearly connected to the basic structure as rights, liberties, and opportunities, are (1999, p. 79) “defined by the rules of major institutions”, and these institutions also regulate the distribution of income and wealth. These social primary goods, then, enable individuals to follow their rational life plan and conception of the good. Rawls states (1999, p.80) “we are to suppose...that each individual has a rational plan of life drawn up subject to the conditions that confront him”. Individuals are happy, then, when they are able to pursue this rational plan and achieve their conception of the good.

The basic structure facilitates the distribution of social primary goods to enable this to happen in line with the two principles of justice. There must be, then, a fair distribution of primary goods between individuals but one that relates to individuals’ conception of the good. This distribution occurs within the boundaries of individuals as part of a social scheme of cooperation. Rawls states (1975, p. 553) “there is an understanding among members of a well-ordered society that as citizens they will press claims only for certain kinds of things and in ways allowed for by the principles of justice”. He emphasises that the configuration of primary goods is a generalization of the notion of needs, which is distinct from desires and aspirations. This context of a social scheme of cooperation is important here, as conceptions of the good have to be seen to be acceptable under this scheme for there to be a requirement on the basic structure for primary goods to be redistributed. Rawls states (1975, p. 554):

The institutions and distributions of a well-ordered society set up a just background scheme and a fair principle of contribution for shifting the primary goods of income and wealth so that individuals may form and pursue whatever (admissible) plans they wish in ways that serve their mutual benefit (as measured by primary goods).

There are a number of criticisms of Rawls' account of primary goods, which Daniels (1985) has characterised as a discussion of what the target of egalitarian concerns should be. One focus of these criticisms is the inflexibility of social primary goods to respond to variation between individuals. Variation on this criticism can take two different forms; the first being that individuals are committed to a variety of different rational life plans and conceptions of the good that reflect different value sets. The Rawlsian configuration of social primary goods can be seen as inflexible to this. The second variation is the ability of individuals to convert these sets of social primary goods into the pursuit of their rational life plans or conceptions of the good. The first criticism has been termed the Nagel-Schwartz objection after the initial critical theorists (Arneson, 1990). This outlines that primary goods are differentially useful for the successful pursuit of individuals' life plans. The objection states that the current construction of the set of social primary goods favours those whose rational life plans are individualistic, over those whose goals are communal. Arneson writes (1990, p. 441):

Primary goods, even though necessary to any rational life plan, may nonetheless not enable individuals with idiosyncratic, as opposed to widely shared, expensive rather than cheap, or communal rather than individualistic, personal values to have a reasonable expectation of fulfilling them.

The issue here arises of how individuals are enabled by the redistribution of social primary goods to pursue their rational life plans. Should it be the case that those with expensive preferences get a greater amount of primary goods than those with less expensive preferences? Are individuals able to pursue communal goals rather than ones based on individual liberties or resources? Arneson characterises this conflict in three ways: first, he outlines that some individuals' aims require more goods in order for them to be more satisfied than others. He highlights the difference between an astronomer and a poet in the goods they need to pursue their conceptions of the good; a poet needs just paper and pen, the astronomer needs a range of expensive, technical equipment. If both the poet and the astronomer receive an equal share of primary goods, then they could be unequal in their opportunity for satisfaction. Second, Arneson outlines that more complex coordination is required for some individuals to satisfy their final aims. One individual might want to be left in solitude, another's conception of the good might rest of being part of a successful team. Again, satisfaction of this conception of a good life is based on a different configuration of resources. Finally, Arneson suggests that an individual's conception of the good might be linked to passing on values to different generations. If your final aim is to do all you can to combat the impact of climate

change, educating future generations about a particular value set is part of this. Arneson states that this could lead to concerns over fair socialization practices or fair preference formation asserting (1990, p. 432):

It could be held that organizing a society so that it conforms to a primary goods standard would unfairly prevent adherents of some conceptions of the good from sustaining their cause over the long run.

It can be argued, therefore, that the Rawlsian account of primary goods favours some conceptions of the good over others.

Outlining Rawls' response to this issue, Arneson notes that Rawls rejects this critique as a valid objection as the basic preference of individuals should not be seen as afflictions that the redistribution of primary goods has to address but as within individuals' voluntary control. Returning to the context of individuals being in relationship with each other as citizens within a scheme of social cooperation, Rawls emphasises the role of responsibility in relation to the creation of a conception of the good. He states (1975, p. 553) that implicit in the conception of primary goods is the position that "since we view persons as capable of mastering and adjusting their wants and desires, they are held responsible for doing so (assuming that the principles of justice are fulfilled.)" Society, in the form of the basic structure, enables and regulates the distribution of certain liberties and opportunities as well as the provision of primary goods. Individuals who are part of this society then have the responsibility to form and revise their final aims and preferences accordingly. On Rawls' account, then, individuals are able to choose and revise their preferences in keeping with the distribution of primary social goods. Due to this, the issue of the inflexibility of Rawls' account of social primary goods doesn't arise as if individuals are unable to pursue their conception of the good with the set of primary goods distributed according to the principles of justice then this conception can be revised.

The second issue of flexibility relates to the ability of individuals to convert the primary social goods they receive into the means by which to pursue their conception of the good. This is the focus of the Capabilities theorists' objections. Both Nussbaum (2006) and Sen (1979) criticise Rawls' theory for excluding certain groups within his scope of justice which, they state, undermines his ability to deliver justice on this model. For Sen, this problem is manifested through Rawls' use of primary goods as the metric of justice. Both Rawls and Sen criticise utilitarianism for providing an inadequate theory of justice. Sen states (1979, p. 333) that Utilitarianism is a special type of welfarism which "is the view that the goodness of a state of affairs can be judged entirely by the goodness of the utilities

in that state” and adds that Rawls’ difference principle also fits into this category. Sen therefore rejects Rawls’ emphasis on using primary goods as the metric for justice and states (1979, p. 343) “the primary goods approach seems to take little note of the diversity of human beings”. On this account, Rawls’ approach is inadequate in terms of ensuring that all people’s needs are met in a way that delivers justice. Sen comments (1979, pp. 343-344):

If people were basically very similar, then an index of primary goods might be quite a good way of judging advantage. But, in fact, people seem to have very different needs varying with health, longevity, climatic conditions, work conditions, temperament and even body size.

Sen asserts (1979, p. 344) that these differences cannot be ignored by a theory of justice as it leads to a ‘fetishism’ of primary goods and a “partially blind morality”. He links this critique of the metric of justice as fairness to wider debates about formal and substantive justice, and states (1979, p. 350) “a theory of justice based on fairness must be deeply and directly concerned with the actual freedoms enjoyed by different persons...to lead different lives that they can have reason to value”. Sen asserts that Rawls’ theory fails to do this due to its use of a metric of primary goods. On Sen’s account by ignoring the differences between people and therefore their varying ability to convert primary goods into actual life chances, Rawls does not provide a theory of justice which delivers substantive freedom.

Alternative metrics

Returning, then, to Daniels’ question of what the target of our egalitarian concerns should be, I will now briefly outline Arneson’s response to the criticism of primary social goods being inflexible, before outlining the response from the Capabilities Approach in more detail. Arneson (1990) argues for a commitment to egalitarianism to result in the equal opportunity for welfare amongst individuals. He states (1990, p. 429) “a principle of distributive justice in a liberal theory ought to use individual opportunities for preference satisfaction rather than primary goods as the basis of interpersonal comparisons”. Responding to the criticism that the nature of social primary goods might create a disjuncture between redistribution and individuals actually being able to pursue their rational life plans, he states that there needs to be a firm connection between what is being redistributed and how that affects the individual. On this account, those concerns around individuals with expensive or idiosyncratic tastes would be addressed. Within an equality of opportunity for welfare, Arneson defines welfare purely as preference satisfaction and focuses on the measurement of the opportunities individuals have to achieve this. This type of satisfaction consists of the

availability of an “array of options that is equivalent to every other persons’ in terms of the prospects for preference satisfaction it offers” (Arneson 1988, p. 87). The key focus in this approach, therefore, is individual choice. Distributive justice is focussed on giving individuals the means by which to satisfy the preferences that they have chosen. Arneson emphasises that a lack of index (such as that provided by primary goods) enables this position to be stronger in terms of responding to variations between individuals’ values and rational life plans. The equality of opportunity approach enables a subjectivist standard of distributive justice to be set, which provides a valuation of resources based on an individual’s self-evaluation of their preferences. Arneson states that this focus on distributive subjectivism enables his account to respond adequately to issues around the balance of obligations and values between individual and state. He notes that as his approach is based on self-evaluation, there is no one conception of the good which is recognised more highly than others (as can be a criticism of the Rawlsian model). On Arneson’s account, therefore, the focus for redistribution is the equal availability to individuals of the opportunity to satisfy their preferences. There is no index of goods which should or could be redistributed in order to enable individuals to pursue their conceptions of the good, but a commitment to ensuring that all individuals are equally able to pursue these conceptions. We can categorise this approach as a satisfaction-based approach to distributive justice.

The second critique around conversion of primary goods into actual opportunities is responded to through the Capabilities Approach. As noted, I intend to use this approach within my argument around metrics for distributive justice in the following chapter so will provide a fuller account of this response than Arneson’s. This criticism focusses on the relationship between the individual and resources in terms of redistribution, and asks what individuals are able to do with the redistribution that has taken place. I have already highlighted a critique from Sen (1979) around primary goods being inadequate to provide an account of this relationship. In outlining a response to this issue from the Capabilities Approach I will focus on the work of Martha Nussbaum (2006). Nussbaum provides three main criticisms of Rawls’ justice as fairness as a whole. Although only the final critique directly addresses the issue of the metric of primary goods, the other two criticisms contribute to this discussion in regards to the construction of the metric for the principles of justice and the conception of the individuals involved within redistribution. This approach can be categorised as capacity-based distributive justice.

Nussbaum establishes herself as working within a Rawlsian framework and recognises the motivation of a determinate conception of social justice as the aim of both her own and Rawls’ theories. She states (2006, p. 177) “the philosophical motivation is profoundly similar, since in both

cases the principles are attempts to capture and render politically concrete the idea of a life in accordance with human dignity". However, she distinguishes between the principles of justice as fairness and the initial situation which Rawls begins with, accepting the former and rejecting the latter. Nussbaum therefore accepts the outcomes of justice as fairness, but not the procedure by which it is created, and she suggests a revision to the metric to allow Rawls' approach to focus on capabilities. Throughout her work she emphasises that she sees her approach as an extension or complement to Rawls' theory but asserts (2006, p. 70) that the "capability approach provides sounder guidance for law and public policy".

Nussbaum robustly establishes her account as one that is to be determinate and applied to societies. She states (2006, p. 70) her aim as:

To provide the philosophical underpinning for an account of core human entitlements that should be respected and implemented by the government of all nations, as a bare minimum of what respect for human dignity requires.

There are three areas in which Nussbaum believes Rawls to fail on this regard. His use of social contract theory, his account of individuals as already outlined, and his chosen metric. On this account, this initial situation, or circumstances of justice, undermine Rawls' ability to provide a determinate account of justice as they provide an inadequate account of the world. She outlines four main points in this regard. First she criticises the primary goods metric, instead asserting a threshold account of capabilities. Second, she rejects the use of the Kantian conception of the person, linking this to the acceptability of primary goods within the theory. Third, she notes that parties in the social contract situation are roughly equal in power and ability which is unrealistic. Finally, she criticises the emphasis on mutual advantage as a goal pursued through cooperation. None of these aspects of Rawls' theory gives an adequate account of the variety of individuals within society according to Nussbaum. If these are the components of the initial choice situation for Rawls, then the outcome of this decision-making process in Rawls' procedural account will also be unrealistic.

Nussbaum states that those who are not part of the decision-making process do not get their interests represented and therefore the outcomes of the process, the principles of justice in this case, do not cater for their needs. She refers to those who have a disability as individuals who might not be included in the initial situation, and therefore not be part of the decision-making process for the principles of justice. She states (2006, p. 33):

Issues that seem extremely important for social justice – issues about the allocation of care, the labour involved in caring, and the social costs of promoting the fuller inclusion of disabled citizens – fail to come into focus or are explicitly deferred for later consideration.

Nussbaum contrasts the ability for an able-bodied individual, and an individual with a physical disability to be able to use their primary goods resources to highlight this issue. She states that on the justice as fairness account both will be allocated the same resources but that the individual with a disability might not be able to use them how they wish. She notes the importance of accessibility of public space and asserts that even though both individuals receive the same resources on Rawls' account, without a suitable adaptation of public space the individual with the disability still has limited choice in what they can do.

Nussbaum outlines her own conception of the person and societal relations to counteract Rawls' claims, and gives four areas where the capability conception differs to Rawls'. First, she states that justice and inclusiveness are ends of intrinsic value from the outset of the theory. This is unlike Rawls' social contract situation where there are high demands on the capacity of individuals. Second, individuals are tied by altruistic ties as well as mutual advantage. This allows for the recognition of a diverse range of values within societal relations. Third, a person is a political and social animal which shares many ends with others. Finally, the good of others within the society is part of an individual's own good. Although reciprocity is a key feature of Rawls' theory, Nussbaum clearly emphasises the role of individuals as social, as well as political, animals. She states (2006, p. 158) "living with and toward others, with both benevolence and justice, is part of the shared public conception of the person that all affirm for political purposes". Rawls' initial situation, which assumes individual capacity, undermines his ability to make a robust claim to impact on society as his procedure excludes groups of individuals and some demands of social justice. We can see how this response to the Rawlsian account of justice fits with other criticisms around the inflexibility of the primary goods metric to respond to individuals' differential values.

Staying with the approach which favours an index-based metric, Nussbaum creates (2006, pp. 76-78) a list of capabilities that must be met to ensure respect for human dignity:

1. Life
2. Bodily Health
3. Bodily Integrity
4. Senses, Imagination and Thought
5. Emotions

- 6. Practical Reason
- 7. Affiliation
- 8. Other Species
- 9. Play
- 10. Control over One's Environment

She sees this as a minimum account of social justice and describes (2006, p. 75) the list of capabilities as giving “shape and content to the abstract idea of dignity”. However, the list is also described as “minimum core social entitlements” (Nussbaum 2006, p. 75) and not a complete account of social justice as there are inequalities above the threshold. Nussbaum outlines the procedure of her account as starting with outcomes - in this case a life worthy of human dignity - and then seeking political procedures which will achieve this. She states (2006, p. 82) “justice is the outcome, and the procedure is a good one to the extent that it promotes this outcome” In the example of individuals using public space therefore, Nussbaum would measure both individuals' ability to go where they wish with their resources and, unless the public space was adapted so that the individual with a disability could use it, this would not be meeting the minimum social entitlements. On Rawls' account, using resources as the indicator for primary goods, the social justice requirements would have been met.

Nussbaum criticises Sen for calling on the metric of capability to replace primary goods to take account of this asymmetry in use of resources. She asserts that this does not go far enough as a resource-focussed account. Nussbaum rejects measuring justice through any single quantifiable standard and states that her list allows for a broader measurement of capabilities. This, she asserts, would give a full account of capabilities for individuals in society and therefore make social justice manifest. She states (2006, p. 176) “Rawls has simply left out lots of things that are highly pertinent to any real construal of well-being and relative social position, things for which wealth and income are not good proxies”. Nussbaum suggests that her account of capabilities through a list of core social entitlements is therefore a more determinate account of social justice. It is based on a realistic understanding of individuals and their relationships in society, and allows for an inclusive approach to social justice.

Through these two examples we can see two ways of focussing on distributive justice; either based on preferences, or based on capabilities. Both start from the position that there is not an adequate account of distribution given through Rawls' account of primary goods. Both alternative metrics aim to correct failings of the primary goods account but by focussing on different areas of motivation.

Arneson's account attempts to mitigate failures within the primary goods account by shifting the emphasis onto individuals' ability to satisfy their preferences. The capability theorists, on the other hand, focus on what individuals are able to achieve through redistribution focussing on the relationship between goods and capacity to act. I argue that Arneson's shift towards a focus on hard goods and preference-satisfaction is misguided, and does not adequately address the issues apparent in Rawls' primary goods account. The focus on preference-satisfaction does not give an account of functionings and individuals' capacity to act. The Capabilities Approach provides an account based on capacity; asking what individuals are able to do and be through forms of redistribution. On this framework, justice is measured in terms of capacity and this is a more appropriate form of understanding a metric for basic justice than Arneson's account of preference satisfaction. I will build on this account of capacity within my revised metric.

Revising Primary Goods

Daniels (1985) states that there are two simplifying assumptions used by Rawls in his account of primary goods. First, that income and wealth can be used as approximations of the index and second, that the theory is idealised for individuals who are fully functioning. Here he builds on Nussbaum's criticism that Rawls does not account for non-compliant agents. In terms of constructing a just theory of healthcare this is problematic as "*in effect, there is no distributive theory for healthcare because no-one is sick!*" (Daniels 1985, p. 43). However in rectifying this, and including individuals who are not fully-functioning, Daniels asserts that Rawls' scale becomes too truncated. Again building on the Capability Approach, Daniels states (1985, p. 43) "people with equal indices will not be equally well-off once we allow them to differ in healthcare needs". A crucial issue has arisen therefore in using Rawls' theory to address the issues of healthcare. If the primary goods metric is used as intended then healthcare is not an issue for the distributive theory as individuals with disease or disability are not recognised. If the scale is broadened, however, to include individuals with impairments then the metric used does not guarantee equal outcomes. Daniels also notes that merely adding healthcare to the list of primary goods could also lead to the type of interpersonal comparisons which Rawls rejected in his critique of Utilitarianism.

Daniels makes the claim that healthcare should be understood as a special social good, which should be included within the primary goods metric. He defines the type of healthcare that he is engaging with as at the macro, or social, level, of decision-making. He states (1985, p. 2) "the macro level concerns the scope and design of *basic healthcare institutions*, the central institutions and social practices which form a healthcare system". He notes that this includes support and personal care services and outlines the five types of decisions that might be made on this level. First, questions of

what kinds of healthcare services will exist within a society can be answered. Second, questions around who will get these services and on what basis. Third, who will deliver them and fourth, how the burdens of financing these services will be distributed. Finally, how the distribution of power and control of these services will be distributed. Daniels is therefore taking a broad, and structural, approach to healthcare with an emphasis on the institutions (in the broadest sense) involved in delivering these services. It is this approach which allows him to claim that healthcare can, and should, be subject to a theory of justice. He states (1985, p. 2) “because these macro decisions critically affect the level of distribution of our wellbeing, they involve issues of social justice”.

Daniels states that a ‘right to health-care’ approach is not an adequate starting point for an inquiry into just healthcare and that it must be situated within a broader, systematic theory of distributive justice. However, for healthcare to be included in this broader theory, the type of social good it is needs to be defined. This, according to Daniels, should include its functions, effects and why it is different in moral importance to other goods. Daniels asks (1985, p. 11) “is healthcare special?”. To answer this he asserts two main purposes of a theory of healthcare needs; that it shows how healthcare is special, and that it provides a basis for distinguishing between more and less important types of goods that healthcare provides. He begins therefore at a starting point of needs. Daniels notes (1985, p. 19) that “a broad category of health services function to improve quality of life, not to extend or save it”. Therefore the range of needs that is met by these services is broad and can include the aim to “restore or compensate for diminished capacities and functions”, as well as improving quality of life in other ways (Daniels 1985, p. 19). Here Daniels is beginning his argument for normal species functioning. By emphasising capacity and functioning as key needs, he is moving away from Rawls' concept of primary goods as the metric for justice. So far, Daniels has established healthcare within the Rawlsian institutional framework, defining it as a broad good which should be subject to the principles of justice. In his definition of healthcare needs, and categorisation of healthcare as a special social good, Daniels relies on ideas of capabilities to establish the concept of normal species functioning.

In order to create a theory of healthcare needs, two key points need to be addressed: that there is something particularly special about healthcare, and that some kinds of healthcare are more important than others. Daniels asserts that this can be done through a categorisation of the relevant needs within the theory. He notes these to be objectively ascribable, in that one need not be aware of their own need, and objectively important; that there is a special weight placed on these needs in a variety of moral contexts. He asserts that these two classifications allow him to use a truncated measure of wellbeing in terms of preferences. In order to further clarify this, he uses David

Braybrooke's (1968) account of 'course of life needs' and 'adventitious needs'. The former is a range of needs which all individuals will experience throughout their life course. The latter gives an account of those needs which are based on individuals' particular, or contingent projects. He supports Braybrooke's claims that a deficiency in 'course of life needs' "endangers the normal functioning of the subject of need considered as a member of a natural species" (Braybrooke 1968, p. 90). This emphasis on basic needs can also be seen to align with Waldron's theory of homelessness as an issue of social freedom.

In characterising needs in this way, Daniels has met his first aim of a theory of healthcare needs: to show that they are ascribable. In order to show that they are important, he analyses their impact on the equal opportunity of individuals. He states (1985, p. 27) "impairments of normal species functioning reduce the range of opportunity open to the individual in which he may construct his 'plan of life' or 'conception of the good'". Daniels goes on to outline this theoretical position in terms of healthcare. He accepts the biomedical model of health that takes health as the absence of disease, and disease as "deviations from the natural functional organisation of a typical member of the species" (1985, p. 31). In including healthcare under the metric of normal species functioning, Daniels is making the concept part of the truncated scale of needs and thus subject to the principles of justice. He states (1985, p. 31) "my intention is to show which principles of justice are relevant to distributing healthcare services where we can take as fixed, primarily by nature, a generally uncontroversial baseline of species-normal functional organisations".

Daniels provides (1985, p. 32) a list of healthcare needs to be met:

1. Adequate nutrition, shelter
2. Sanitary, safe, unpolluted living and working conditions
3. Exercise, rest, and some other features of lifestyle
4. Preventive, curative and rehabilitative personal medical services
5. Non-medical personal and social support services

He intends this to highlight the functional relationship between varieties of diverse goods in healthcare.

In order to make this account of needs subject to a distributive theory of justice, Daniels now analyses it in relation to opportunity. He states (1985, p. 34) that disease and disability restrict an individual's opportunities "relative to that portion of the normal range his skills and talents would have made available to him were he healthy". Those aspects of disease, therefore, that undermine normal species functioning can be seen to undermine opportunity in terms of pursuing a conception

of the good. This can be termed the 'normal opportunity range' for individuals, and disease (mitigated by healthcare services) can be assessed on this scale. He notes two points about this scale in terms of subjectivity: first, that the impact of diseases on opportunities is socially relative and second, that individuals have their effective opportunities limited when a disease impacts on a skill that they regularly used. The impact of disease is, therefore, not objectively valued but valued depending on how it impacts on an individual's normal species functioning. Daniels will now use Rawls' theory of justice to show that this theory of healthcare needs generates obligations in terms of redistribution.

As previously mentioned, Daniels' account aims to include healthcare within Rawls' theory of justice through the principle of equality of opportunity. Daniels has already argued that healthcare services are in place to mitigate disease as it impacts on the normal opportunity range of individuals. Here he takes this further to argue that certain obligations arise from Rawls' principles of justice in regard to healthcare. Daniels notes that both his theory and Rawls' use truncated scales to measure justice. Rawls' takes account of primary social goods, while Daniels' regards certain basic needs in the form of normal species functioning. In the theory of just healthcare, Daniels aims to fit the two scales together to place healthcare within the Rawlsian theory.

Daniels uses Kenneth Arrow's (1973) work to show two potential problems which arise from incorporating healthcare into Rawls' metric. First, the difference principle would be so robust as to drain resources from all other public services due to the demand to satisfy those with extreme health needs. Second, it would, result in trade-offs between interpersonal comparisons of utility. Daniels suggests, therefore, that healthcare institutions, defined within his macro account, be included in the basic structure of society. As healthcare needs are vital in achieving equality of opportunity, healthcare services are equally vital in enabling this and are, thus, subject to the principle of equality of opportunity. Daniels sees this as an extension of the scope of Rawls' theory for social justice, based on his principle of equal opportunity. Daniels states (1985, p. 45) "healthcare institutions will help provide the framework of liberties and opportunities within which individuals can use their fair income shares to pursue their own conceptions of the good".

Daniels, therefore, uses his claim that healthcare is a special social good which supports normal species functioning and, therefore, the normal opportunity range, to argue that it should be included in the basic structure and be subject to the principle of equality of opportunity. He states (Daniels 1985, p. 47):

Subsuming healthcare institutions under the opportunity principle can be viewed as a way of keeping the system as close as possible to the original idealisation under which Rawls' theory was constructed, namely that we are concerned with normal fully functioning persons with a complete lifespan.

Daniels outlines the four different types of institutions which would be included on this account. First, those that provide preventive measures and minimise the departure from normal species functioning. Second, those that correct departure from this type of functioning by providing medical and rehabilitative services. Third, more extended services which include looking after the chronically ill, disabled, and frail elderly. Finally, services for those who cannot be brought closer to idealisation of normal species functioning. Here, Daniels notes, principles beyond justice such as beneficence are brought into play. He states (1985, p. 48) "each [type of institution] corrects in a particular fashion for a type of departure from the Rawlsian idealisation that all people are functionally normal". In order for equality of opportunity for exist, all of these types of institutions and services must be available for individuals to access.

Before providing a summary of his theory of just healthcare, Daniels notes limits to his account. He recognises that he does not provide a general theory of justice, and that the account he does provide is conditional on "the justice of the principle of fair equality of opportunity, suitably broadened and given appropriate priority, which I cannot offer" (Daniels 1985, p. 55). He further recognises the emphasis placed on the social obligation to maintain and restore health, with a lack of recognition for the role of individual responsibility in doing so. In concluding, he summarises that his account has broadened Rawls' principle to include normal species functioning and not just access to jobs and careers. He states that his account justifies (1985, p. 57) "the claim that healthcare institutions should have the limited – but important – task of protecting people against a serious impediment to opportunity, their failing to enjoy normal species functioning".

Both Daniels and Nussbaum state that their accounts work within the Rawlsian framework, but through expanding or revising his framework of primary goods. Nussbaum criticises assumptions within the construction of justice as fairness around what people are able to be and do. Daniels also builds into his theory the idea of functionings and what basic capacities individuals need to have to be part of a just society. I argue that, when answering Daniels' question of what the target of our egalitarian concern should be, the focus should be on what individuals are able to do and be. This can be constructed in terms of capabilities or functionings, but I argue that there is a requirement for individuals to be able do certain things in order for social justice to exist. I will expand on this in more rigorous detail in Chapter 6, but here it is interesting to briefly relate this to Waldron's concept

of homelessness as a social freedom. Waldron's argument also revolves around the idea of functionings, and he measures freedom by the capacity for individuals to meet basic needs. As stated, his argument asserts that as individuals who are homeless do not have access to private space to undertake basic human functionings such as washing, urinating, or sleeping, they are not free. We can see, then, this idea of capability to act, or capacity to undertake certain functionings can be used to understand particular policy issues which have an impact on individuals. By applying this theoretical framework we can create a new type of understanding of the problem, and therefore potentially new solutions to how it might be addressed.

Chapter 6 – Self-Command and Basic Justice

The previous chapter discussed in greater detail Rawls' account of primary goods as those which every individual is rationally presumed to want. On this model, justice is measured through the redistribution of particular goods to particular individuals which, in turn, enables them to pursue their conceptions of the good. Arneson (1990) criticised this, arguing that the focus should not be on redistribution, but the opportunities that individuals have to satisfy their preferences. Distributive justice here, then, is not focussed on a range of goods that can be seen as central to an individuals' welfare but ensuring that any goods are redistributed in order to enable individuals to purely satisfy their preferences. The critique from the Capability Approach (1979, 2006) also focussed on the lack of flexibility of primary goods, but focusses on individuals' capacity rather than preferences. On this account, it is argued that the framework of primary goods does not adequately reflect individuals' abilities and needs. Again, in the alternative metric suggested, the focus is on the relationship between the individual and what they are able to do because of distribution. This focus is not characterised by preference satisfaction, however, but the idea of the capabilities that individuals have to act. The Capabilities Approach states that justice can be measured according to what individuals are able to do and be.

It is this focus on individuals' capabilities, not preferences, which I want to use within my revised metric of the Difference Principle. Following on from the exposition of both Nussbaum (2006) and Daniels (1985), I argue that this consideration of the functionings of individuals is important within an account of justice. The criticisms of the primary goods metric for ignoring the relationship between redistribution and what individuals are able to do, I suggest, are sound. There needs to be a focus on individuals' ability to act in order to give a full account of the impact of redistribution within the aim of creating social justice. As Nussbaum (2006) highlights, individuals can be given the same level of goods through a just process of distribution but what individuals are able to do with these resources is likely to differ. The question of justice here then should be what individuals are able to be and do as a result of this distribution, rather than whether the process of equally redistributing a set of goods has been followed. As I have already outlined, Nussbaum considers herself as part of the Rawlsian tradition. Daniels too, gives an account of how the focus on functionings or capabilities can fit within a Rawlsian approach to justice. Daniels argues that there should be a recognition of healthcare as a particular type of good which should be included within the primary goods distribution process. I also argue that the focus on what individuals are able to do and be can be incorporated within a Rawlsian framework. I suggest that this can be done through a review of

Rawls' comments on self-respect as the most important primary good and the focus on self-command that this brings.

Self-respect as a primary good

Rawls states (1999, p. 386) "perhaps the most important primary good is that of self-respect". For Rawls, this concept of self-respect has two key aspects. First, the concept includes a person's sense of their own value: "his secure conviction that his conception of his good, his plan of life is worth carrying out" (Rawls 1999, p. 386). Individuals must be confident that they as persons, as well as their conception of the good and aims for life, have value. The second aspect is that individuals also have the confidence in their abilities to fulfil their intentions, as far as it is in their power to do so. This, therefore, builds on the first aspect; not only do individuals have to have confidence in themselves and their life plan, but they need to be confident that they will be able to achieve this life plan. If individuals have confidence in these two areas then they have self-respect. Rawls outlines that, without the presence of self-respect, desire and activity will become meaningless, and individuals will fall prey to cynicism and apathy. He states (1999, p. 386) "the parties in the original position would wish to avoid at almost any cost the social conditions that undermine self-respect". We can see here how this account of self-respect builds on individuals' three fundamental interests in pursuing justice, creating a conception of the good, and enabling this conception to be determinate.

In aligning this discussion of self-respect with his conception of a rational conception of the good, a fuller characterisation of the first aspect of self-respect can be provided. Rawls states that there are two circumstances which need to be in place for this confidence in individuals and their conceptions of the good to be created. Initially, individuals need to have a rational plan of life in place; they all need to be able to fulfil the second fundamental interest of having created a conception of the good. In particular, this should be one which satisfies what Rawls calls the Aristotelian Principle. This asserts that individuals enjoy the exercise of their capabilities, and that this enjoyment increases as the use of individuals' value capabilities increases. Secondly, individuals need to have their "person and deeds recognised and confirmed by others who are likewise esteemed and their association enjoyed" (Rawls 1999, p. 387). There is a focus, then, on the associational aspect of self-respect; that the confidence that we have as individuals needs to be matched by confidence or appreciation from others to create individual self-respect. Rawls states (1999, p. 387) "the conditions for persons respecting themselves and one another would seem to require that their common plans be both rational and complementary". In order to have self-respect, then, individuals have to fit together

into a scheme of activity within which all are respected, and all associations and activities are enjoyed.

Rawls goes on to talk in greater detail about the nuances of this associational focus of self-respect. He outlines the different types of associations that could be constructed, as well as how the Aristotelian Principle and self-respect could function on this account. I argue that it is not the focus on associations, here, that is important, but the aspect of the further characterisation of self-respect, outlining the importance of individuals being able to construct a rational plan of life. Although this appears to be subsumed within his further discussion of self-respect, how this relates to others, and how this supports the Aristotelian Principle, I want to use this as the crucial point for my revision of the metric for the Difference Principle. As already outlined, this research creates an account for how the Difference Principle could be used as a justificatory test for social justice in social policy. This is couched within the concept of reasonableness and a commitment to the liberal principle of legitimacy. I argue that the Difference Principle can be applied to policies which regard matters of basic justice to test whether social justice can be delivered through these mechanisms. The metric for this test then needs to be able to test how individuals' lives are impacted by policy interventions that relate to basic justice; whether they are able to fulfil their three fundamental interests.

As the subject of the Difference Principle test is policy related to matters of basic justice, then it is crucial that some account is given of what individuals are able to do and be in response to this policy intervention. If policy is to be legitimate according to the liberal principle, there needs to be some justification for the level of intervention stemming from the policy. As already argued, there is an explicit link between social policy and social justice; policy should be subject to tests for justice. By looking at what individuals are able to do and be we can give a good account of justice. The second step of this position is to look at what this type of focus means in practice. This is where the specific aspect of Rawls' argument on self-respect as a primary good, which I have highlighted, can be used. I argue that the metric for the revised Difference Principle should be whether individuals have the ability to create and revise a conception of the good. Throughout the previous discussions on metrics and how justice in distribution should be measured, the focus was on preference satisfaction, following a conception of the good life, and having the capabilities to do what you want with goods that have been redistributed. I assert that a fundamental stage of this argument is missing from the general discussion of redistribution. It is important to look at Daniel's characterisation of the argument as to what the fundamental target of our egalitarian concerns should be in terms of preference satisfaction and goods being distributed, in order to enable

individuals to achieve their conception of the good. However, this discussion is based on the assumption that individuals have naturally been able to create a list of preferences or a conception of the good. I argue that in regard to matters of basic justice a key question is not whether individuals are able to satisfy their preferences or fulfil their conception of the good, but the prior question of whether individuals are able to construct and control a conception of good in the first place. The test, therefore, asks whether individuals are able to follow their second fundamental interest.

Here, Rawls' discussion of self-respect, and particularly self-command, can be useful. In his engagement with the concept of shame, Rawls outlines self-command as an 'excellence' from which other 'excellences' can flow. These 'excellences' are ways in which virtues can be sought "and their absence may render us liable to shame" (Rawls 1999, p. 391). Self-command, then, is a crucial aspect of individuals' ability to follow their conception of the good life and to achieve a virtuous life. We can link this to his emphasis on the importance of having a rational plan of life in order to foster self-respect. Both having the ability to have control over your life (self-command) and to use this to create aspirations and motivations (a rational plan of life or conception of the good) are crucial to Rawls' account of primary goods. There needs to be a primary step, therefore, in our discussion of how metrics around justice and distribution should function. Instead of questioning whether there is a triangulation of individuals' preferences or conceptions of the good, distributed goods, and abilities of individuals to link these two aspects, there firstly needs to be a discussion of whether individuals have had the opportunity to create a preference list or conception of the good. The question, then, doesn't focus on whether individuals are able to satisfy their choices because of redistribution, but whether they are in a position to have choices around preferences and aspirations in the first place.

This shift can be taken whilst working within the Rawlsian framework. Built into my position is a focus on individuals' capabilities which has come from the work of Nussbaum but we have also seen with Daniel's discussion of Braybrooke's (1968) framework of functionings and course of life needs that this focus can be incorporated within a Rawlsian framework. Unlike Daniels, however, I am not adding extra types of goods to the list of primary goods. Instead, I am arguing that an initial paring back of primary goods is done to address the primary question of whether individuals have, or have had, the opportunity to create a set of aspirations or preferences. This is based on Rawls' discussion of self-respect as the most important primary good, and the small mechanism within this discussion where he states that individuals must first have a rational life plan to attain self-respect. By looking at this in the context of self-command, we can argue that there needs to be a primary review of

whether individuals have the capability of self-command before discussions around the relationship between distribution of goods and enabling conceptions of the good occur.

Self-command and social freedom

To further understand my argument that an additional initial stage needs to be looked at as a metric, we can return to Waldron's (1991) theory of homelessness as social freedom. In his article, Waldron states (1991, p. 306) that "homelessness consists in unfreedom". He reaches this conclusion by looking at the things that individuals can do, dependent on the space that they are able to access. He argues that activities are categorised by the spaces in which individuals are able to perform these, outlining a range of activities which are not allowed to be undertaken in public spaces – only private spaces. These include fundamental human activities such as washing, urinating, and sleeping.

We can consider this analysis in the context of Rawls' discussion of self-command related to self-respect as a primary good. The test here is not whether individuals are free, but whether they are able to achieve self-command and subsequently create a conception of the good, or set of preferences and aspirations which constitute a rational life plan. Waldron has discussed that individuals who are homeless have no access to private space. The only space which they are generally freely able to access is public space, however there are limitations on the activities which can take place in these spaces. When we think about the impact of this access to space on the ability to create a rational life plan, I suggest that this lack of space for meeting basic human functionings undermines the ability to create a conception of the good. I argue that if individuals' situations are such that they are not free to undertake fundamental human functionings, then they are also not free or able to create a rational life plan.

There are two aspects to this argument, linked to Rawls' account of self-respect as a primary good. First, if individuals are struggling to meet basic human needs in terms of shelter, warmth, and security, they do not have the luxury of reflection on aspirations. Returning to Braybrooke's (1968) account of course of life needs, it could be argued that individuals who are unable to meet these needs are unable to develop adventitious needs based on chosen projects. I assert that when individuals are using their energy to try and meet fundamental needs then they are unable to reflect on their aspirations and preferences and create a rational plan for life. Second, even if the first aspect is not true and individuals are able to create a rational life plan, Rawls calls for this to be a realistic plan that individuals can be confident in achieving. Again, the state of homelessness is often a struggle for survival – individuals are working towards meeting basic human needs, not necessarily working to achieve a broader aspirational life plan.

This critique of homelessness and self-command is not intended as a moral judgement or criticism of individuals who find themselves homeless. Instead, it is meant to aid understanding about the relationship between self-command and basic justice. I would argue (and do argue later on in this text) that homelessness is a matter of basic justice, and that the state of homelessness undermines individuals' ability to have control over what they be and do. I assert that being homeless often undermines self-command, and it this type of matter of basic justice that needs to be analysed. This is also not to say that all individuals who are homeless are not able to achieve self-command. Some individuals may choose to be homeless as part of their rational life plan. For these individuals, their ability to achieve self-command is not undermined by being homeless but is a result of it.

A further way of understanding this position is through a consideration of Maslow's (1943) hierarchy of needs. Maslow outlines a theory of human motivation where a series of needs take a hierarchical form; with each set of needs being largely dependent on the satisfaction of others. He states (1943, p. 370) "human needs arrange themselves in hierarchies of prepotency". This condition means not only does the satisfaction of a set of needs depend on the satisfaction of 'lower' needs, but that the appearance of needs relies on the prior satisfaction of others. Maslow does not intend this to be a rigid definition of needs, but a suggested framework for future research on how human motivation can be understood.

The first set of needs in Maslow's hierarchy is that of physiological needs. He does not present a list of fundamental needs of this kind, but notes that the needs arise as a response to a lack of a physical element of some kind, such as food or warmth. These types of needs would be the most urgent for individuals to meet if they were lacking a number of different needs. Maslow states (1943, p. 373) "a person who is lacking food, safety, love, and esteem, would probably hunger for food more strongly than for anything else". The first point from Maslow, here, is that if there are physiological needs that have not been met for an individual, then it is these that the individual will be most motivated to meet. As previously noted, however, Maslow's analysis also states that within the hierarchy the existences of some needs are reliant on the satisfaction of prior, more fundamental, needs. In the above example, not only would hunger be the most urgent need to meet, but it is likely to impede the development of subsequent 'higher order' needs. Maslow asserts (1943, p. 373) "if all the needs are unsatisfied, and the organism is then dominated by the physiological needs, all other needs may become simply non-existent or be pushed into the background". Again, he returns to the example of hunger. He describes the individual who is hungry as having a consciousness that is pre-empted by hunger. For this individual, the organisation of all capacities is determined by the purpose of satisfying hunger and all capacities are being used to satisfy this one aim: "the receptors and

effectors, the intelligence, memory, habits, all may now be defined simply as hunger-gratifying tools" (1943, p. 373). In the presence of a physiological need, therefore, capacities have been transformed into tools with the one function of meeting that fundamental need.

Maslow also states that the way that the individual engages with the future is also fundamentally changed if there is a physiological need that is not met. He comments (1943, p. 374) that the result of the need not being met is that "the whole philosophy of the future tends also to change". There are therefore two ways in which individuals' capacities have changed. First, when physiological needs are not met capacities become simple tools with which to meet that need. Second, simple capacities are no longer used in order to consider or plan the future, leading to the development of other capacities within the hierarchy. Maslow asserts (1943, p. 374) "freedom, love, community feeling, respect, philosophy, may all be waved aside as fripperies which are useless since they fail to fill the stomach". We can see, then, how this fits with Waldron's (1991) theory of homelessness as a social freedom. Waldron argues that the lack of space within which basic human functions can be undertaken undermines an individual's freedom. Maslow's hierarchy also outlines the urgency of fundamental human functionings, or physiological needs being met. Without these being met, individuals are unable to achieve higher levels of functioning such as engaging with freedom, community and love. They are also unable to adequately plan for the future.

In the final aspect of Maslow's theory which I want to draw upon, we can see how the Rawlsian account of self-command can fit into the analysis. As with Rawls, Maslow highlights the importance of individuals being able to pursue their conception of the good. Maslow emphasises the role that gratification plays as a motivator in human behaviour. This can be seen to fit with Rawls' discussion of the Aristotelian Principle. On both accounts, it is important for individuals to have their needs satisfied in order to develop the engagement with further, more meaningful needs. He states (1943, p. 375) that gratification "releases the organism from the domination of a relatively more physiological need, permitting thereby the emergence of other more social goods". This focus on gratification leads Maslow to develop an argument around self-esteem and self-actualization which I argue can be seen to fit into the Rawlsian account of self-command. Maslow says (1943, p. 382) "what a man *can* be, he *must* be" and emphasises the role of fulfilment of needs within an account of self-actualization. On this account, individuals must have the freedom to actualize the person that they have the capacity to be and "to become everything that one is capable of becoming" (Maslow 1943, p. 382). The emergence of these needs of fulfilment and actualization, however, are reliant on the prior satisfaction of more fundamental needs such as the category of physiological needs. We can relate this discussion of self-actualization to the idea of the creation of a conception of a good

life within Rawlsian theory, and the pursuit of fundamental interests. For Rawls, individuals should be able to be in a position to create a conception of a good life, which it is important for them to work towards and fulfil. For Maslow, this is discussed in terms of capacities and self-actualization for potential within individuals.

This discussion of self-actualization and a hierarchy of needs fits into my critique of the primary goods metric. Within Maslow's hierarchy, fundamental needs must be met for individuals to be able to develop needs around more 'higher order' capacities and to be able to engage with the idea of future needs or capacities. This can be reflected in my discussion around the creation of a conception of the good. I argue that there are instances when individuals have such needs that they are unable to create a conception of the good. It is this metric that I argue for in the context of a test for basic social justice. Maslow argues that if individuals have physiological needs that are unmet, then the rest of the individuals' capacities will be focussed on meeting this need – not creating a philosophy or vision of the future. I suggest that the Difference Principle can be used to test issues of basic justice in terms of policy through giving an account of whether individuals are able to satisfy their fundamental interests, and follow a conception of the good life.

The revised metric

My revised metric for use alongside my configuration of the Difference Principle is thus: the test of social justice in social policy should measure whether the worst off in society are able to create, amend, and follow a rational life plan. This step is to be inserted before discussions on the redistribution of primary goods, and is to fit into a Rawlsian framework. I argue that in order for social justice to be achieved, individuals need to be able to have self-command and the ability to create a conception of the good - they need to be able to pursue their three fundamental interests. For ease of reference, I will refer to this as individuals having effective agency. The critique of homelessness allows us to take the first step towards understanding how this might work in policy terms. If my revised Difference Principle was being used as a test on the issue of homelessness, we could say that a policy which results individuals being homeless failed to meet standards of basic justice as some individuals were unable to achieve self-command. Remember, it is not that there is an absolutely necessary connection between lack of control and homelessness – some individuals may have included this as part of their rational life plan. However, we can argue that if there are individuals who are homeless who do not want to be homeless then their ability to choose what they want to be and do is undermined through their state of homelessness.

My argument around this revised metric does not suggest that the primary goods account should be rejected, or that the Capabilities Approach or any other alternative metric be adopted. What it states is that for my version of the Difference Principle to be a test for social justice in social policy, a different approach should be taken. It also does not state that the primary goods metric cannot function on my account of the Difference Principle. The range of primary goods can be looked at from the position of social justice in the context of the liberal principle of legitimacy. However, what is fundamental to the use of the test is that the first metric used is whether worst off individuals are able to create, revise, and follow a conception of the good or rational life plan; whether these individuals are able to be effective agents. When we are discussing whether individuals are able to do what they want to do, it is important to distinguish between those who are lacking satisfaction in the actions they are able to take and those who lack capacity to act. This can be highlighted through the consideration of the difference between those who are busy and those who are struggling. Both groups can be seen to be experiencing the same problem – lack of time due to having too much to do. However, there is a fundamental difference in terms of self-command. Individuals who are busy have created a conception of the good life for themselves and are pursuing it to some extent, they are able to revise their conception or approach to their conception to better satisfy their choices, if they wish. Individuals who are struggling are not able to revise their use of time and resources. For example, they could only be able to get a zero hours contract and have to work all the hours offered to them at a certain time because they are unsure whether the hours will be available the following week and have rent to pay. The difference here lies within the individuals' ability to achieve self-command.

We have seen how this addition can be justified through the Rawlsian emphasis on self-respect as a primary good, and we have seen how this revised metric can give insight into an issue of basic justice such as homelessness. The next stage of the argument then is to outline how this will work in the context of my test. The following chapter will consolidate my theoretical arguments throughout the initial framework and will outline, in greater detail, how the test will work holistically. Here, I will just give some indication of how the revised metric might work in practice. When looking at a piece of legislation or policy, then, the question will be whether that intervention makes individuals who are the worst off in society more or less able to achieve self-command: control over what they want to do or be. The aim of the test is to find out whether a policy intervention that relates to basic justice can be justified according to the liberal principle of legitimacy. It questions whether the policy intervention can be accepted as reasonable by individuals who are affected by this intervention. I argue then, that the metric itself can be seen as subject to the regulatory test of reasonableness. It would be unreasonable to argue that individuals who are members of a social scheme of

cooperation should be expected to live without control over what they want to be and do. I assert that it is reasonable to require all members of this scheme to be able to construct, revise, and follow a conception of the good.

Returning to my analysis of the 'Bedroom Tax', I firstly argued that this could be seen as a matter of basic justice. I then outlined how the policy intervention could be seen to fail the reasonableness criterion as individuals who could be understood as some of the worst off in society were seen to be worse off in a variety of ways due to this intervention. The review of the policy by the UN (2013) showed that some particular groups were likely to be more impacted by the 'Tax' than others and that individuals' ability to live independently was being undermined. When looking at this in the context of my revised metric, we can understand the policy to be undermining individuals' ability to construct and follow a conception of the good life and to define what they want to be and do. The impact of the 'Tax' included individuals having to move away from family and communities where they had established a conception of the good for themselves and were pursuing a rational life plan. In some cases also, individuals were having to move away from specially adapted houses which had been designed to directly enable individuals to decide on and pursue aspirations and preferences.

We can see, then, how this revised metric fits into the focus on reasonableness as regulatory within the revision of the use of the Difference Principle. The metric itself can be understood to be subject to the test for reasonableness; it would be unreasonable for individuals to be expected to lack self-command as members of a social scheme of cooperation. We can then use this metric to further understand the impact of particular policy interventions which impact on matters of basic justice. The test would ask whether the intervention enabled or undermined worst off individuals' ability to achieve self-command and decide for themselves what they want to do and be. I have argued that it is unreasonable to expect individuals to lack self-command. It would also be unreasonable for individuals to experience less self-command as a result of a policy intervention. Therefore, if the test finds that individuals who are the worst off in society are less able to make choices around conceptions of a good life or preferences due to a policy intervention then that intervention has failed the test and is unreasonable.

Crucial to this account, is the link between my revised metric, fundamental interests, and the two moral powers. I have outlined that self-respect as a primary good and the related concept of self-command can be understood to be linked to Rawls' accounts of individuals as having three fundamental interests. Interests two and three in this account relate to the creation of and making determinate a conception of the good. The idea of self-command then can be seen to encapsulate these two fundamental interests. When looking at the source of these interests, the second

fundamental interest regarding the creation of a conception of the good stems from the second moral power of individuals: rationality. By following a metric which assesses whether individuals have self-command and are able to follow two of their three fundamental interests, we are also assessing the capacity of individuals to exercise their moral powers. If individuals do not have self-command and are unable to create and pursue a conception of the good, then they are unable to exercise their moral power of rationality. The test as created, then, assesses whether individuals have the capacity to exercise rationality or not due to the impact of policy. If a policy either does not enable, or undermines, the worst offs' ability to create a conception of the good then it is not allowing them to exercise their second moral power and fails the standard of basic justice.

It is important to remember that this test applies to policy which addresses matters of basic justice within the policy continuum. Due to the structure of the Difference Principle, the focus is on the worst off individuals within society. It is important to remember that the test does not ask whether individuals have or can satisfy their preferences, but is based on capacity; whether they are able to construct a conception of the good for themselves. It does not ask what individuals are able to do with the goods that are redistributed to them or whether there is sufficient redistribution based on preferences, but whether these individuals have the ability and opportunity to create a picture of aspirations, preferences, or the good. It also asks whether this ability has been diminished through a particular policy intervention. As stated, if individuals who are the worst off in society are less able to create a conception of the good or rational life plan due to a policy intervention then the intervention has failed the test for basic justice.

Chapter 7 – The Theoretical Framework: A consolidation

This chapter will consolidate the philosophical mechanisms I have emphasised or modified within my theoretical framework. I will re-cap the core elements of my account of using the Difference Principle as a test for social justice, and will outline the elements of the test that have been established thus far. The final section of the chapter will state the test as formulated within the framework, before I apply this to the case of the Housing (Wales) Act.

Mechanisms from theoretical framework

i) The scope of application

The core context of the development of my test is the scope within which it functions. Within the thesis so far, I have outlined that it is the political obligations that arise between individuals living within a social scheme of cooperation which enable the focus on reasonableness as regulatory. The subject of this regulation is, then, the basic structure itself and its outputs; the institutions which support the social scheme. In this work, I am looking at social policy as the main output of the basic structure and have previously outlined the interventionist nature of social policy as creating a need for justification of the impact of policy.

I have made the case for justification to be sought for social policy which impacts on matters of basic justice. I have argued that the Difference Principle provides the justificatory mechanism by which this can be done, by applying the principle of legitimacy to social policy through a focus on reasonableness. Finally, I have outlined that the metric by which this should be measured is the ability for individuals to formulate and follow a conception of the good by satisfying their fundamental interests – which I am calling here effective agency. The following chapter will outline the key mechanisms which underlie these arguments, and the formulation of the Difference Principle which results from them. Building on my ‘Bedroom Tax’ example, I will now outline a number of pieces of Welsh legislation to provide further illustrative examples of the scope of my test.

The Food Hygiene Rating (Wales) Act was introduced in 2013 and set duties on all businesses selling food to be subject to a hygiene inspection and rating. This rating is to be displayed publicly as part of a ‘scores on the doors’ approach. The justification for this policy was to drive up standards of food hygiene within businesses, and for consumers (National Assembly for Wales, 2013). I argue that this piece of legislation can be seen as an example of policy-making that is not subject to my test. Neither basic justice nor constitutional essentials are impacted upon through this intervention. When we are looking at effective agency – the ability of individuals to create and follow a conception of a good life

– as the metric for basic justice, we can see that this legislation does not impact on this capacity. The Historic Environment (Wales) Act is another example of this type of policy. As described by CADW (2016) the legislation had three main aims:

- To give more effective protection to listed buildings and scheduled monuments;
- To improve the sustainable management of the historic environment; and
- To introduce greater transparency and accountability into decisions taken on the historic environment. (CADW, no date)

Again we can see that this legislation is unlikely to impact on individuals' basic justice or constitutional essentials. Instead it is focussed on management and sustainability of resources which do not affect individuals' abilities to make decisions about their lives.

The Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015 can be seen, however, to be a piece of legislation that relates to basic justice. The aims of this Act include improving awareness of gender-based violence, and taking a joined-up approach to services across Wales for those affected by the issue (National Assembly for Wales, 2016). We can see here that this legislation is focussed on a matter of basic justice: violence against women. The application of my modified test would, therefore, ask whether the piece of legislation has enabled the worst off in society to become better off in terms of effective agency. We could argue here that the Act has the intention of doing this as it aims to stop gender-based violence and provide better services for those who experience it. It also introduces a needs-based approach to developing strategies which will ensure that the needs of those who experience this issue are recognised and responded to, as well as creating a greater level of accountability for decision-making. When looking at the issue of domestic violence, we can understand that those who are victims of this might not necessarily have the capacity to create and follow a conception of a good life. When looking at this in the context of Maslow's (1943) hierarchy of needs, the fundamental motivation for victims of violence would be safety. Not having this need met would impede the engagement with future motivations and the development and fulfilment of higher order needs. All of the intended impacts from this piece of legislation can, therefore, be seen to be aimed at increasing the effective agency of individuals who are subject to gender-based violence.

The Regulation and Inspection of Social Care (Wales) Act 2016 is another piece of legislation which can be understood to fit into the basic justice category of where my test applies. This Act was in part created as a response to a failure in care for older people in care institutions. The legislation aims to improve the quality of care provided, through a re-focus on the impact of this on individuals rather

than minimum standards. It also aims to put individuals at the heart of the regulatory regime and to increase accountability for decision-making within the sector. The intended impact of this legislation therefore is to improve the quality of services provided to elderly people in care (who could fit into the 'worst off' category), and to include them in the regulatory process (National Assembly for Wales, 2015). These individuals, who are often vulnerable, would therefore have more protection within the system, and more involvement in identifying what needs should be met. When applying my test to this piece of legislation, we can see that it would meet the condition of increasing effective agency for the worst off in society. Again, this can be seen to relate to Maslow's (1943) hierarchy and the pre-potent nature of engaging with and meeting needs. If adequate care is not being provided to vulnerable individuals, then they might be in the situation where their physiological needs or needs around safety might not be met, thus undermining their ability to develop or meet higher needs.

As highlighted in my previous example of the 'Bedroom Tax' policy, it is not necessarily the case that policies that relate to basic justice always meet basic justice needs. This is why the test is needed. Policy which regards basic justice and constitutional essentials should, at the very minimum, increase effective agency for the worst off in society. In some examples (as in the 'Bedroom Tax') we can see a policy that clearly relates to basic justice potentially undermining rather than strengthening effective agency. This was the basis of the Special Rapporteur's analysis of the implementation of the 'Bedroom Tax'. It is important to note here the particular role of retrogression within the formulation of the Difference Principle. It states that the least advantaged must receive the greatest benefit from arrangements relating to social and economic inequality. On this account, then, the 'worst off' cannot be made worse off due to these arrangements but must be made better off. In regards to the 'Bedroom Tax', the Special Rapporteur argued (2013) that the rights that individuals had gained around independent living were being withdrawn and this was not acceptable.

There are two main aspects to focus on within this discussion of the scope of the test. First, is the limited scope of the application of the test to matters of basic justice and constitutional essentials. The review of legislation that would be subject to the test has highlighted the difference between policy that does not, and that which does, relate to matters of basic justice. In some instances it will not be clear which category the legislation or policy fits in to; in this instance the test is to be applied. The main point here is that there is generally a good indication of policy that is likely to be subject to the test and that which is not. This scope is supported by the focus on individuals within a scheme of social cooperation and the basic structure which supports this. The second aspect

mentioned in the developed discussion of the 'Bedroom Tax' example is the concept of retrogression. I will return to this when outlining how the test will function in the final section of this chapter.

ii) Use of reasonableness

The application of the test for basic justice has a clearly defined scope. This is also supported by the procedural nature of Rawls' development and use of the Difference Principle. The Rawlsian framework which I am working within provides a procedural approach to justice, and I wanted to use this clearly defined approach in the application of my modified Difference Principle. The test is therefore used within the negative account given by contractualist theorists, Scanlon (2000) in particular. Having outlined Scanlon's approach to reasonableness in a previous section, I will now focus on his concept of rejectability to outline how my modified test will be used.

As previously highlighted, justifiability is the central concept to Scanlon's (2000) theory of 'what we owe to each other'. Although used in a variety of approaches, Scanlon uses it in two particular ways: first as the normative basis to the morality of right and wrong; second as the most general characterisation of this basis. The motivation within his theory of morality is therefore finding principles that can be agreed upon by others. Scanlon outlines that other individuals feature twice in his schema; first in terms of those to whom justification is owed, and second those who might, or might not, be able to reasonably reject certain principles. I have already explored his approach to reasonableness based on justification to others, so I will focus on the second aspect here.

Moral justification on this account is sought through the approval of others within the scheme who could accept or reject an action. Rightness is that which cannot be reasonably rejected by others, wrongness that which could be rejected. Scanlon's test, therefore, is that of reasonable rejectability. Principles and actions are either permitted or wrong based on whether they can be reasonably rejected by others within the social scheme. Deciding on whether principles are morally acceptable "requires a substantive judgement on our part about whether certain objections to possible moral principles would be reasonable" (Scanlon 2000, p. 194). This substantive judgement does not accept self-interest as a reasonable case to reject a moral principle, but rests on the understanding of individuals as being of equal moral concern. Rather, it looks to the burdens placed on individuals when proposed principles are, or are not, applied. Scanlon (2000, p. 194) describes this judgement as serving as "the basis of mutual recognition and accommodation". In defining what we owe to each other, Scanlon uses the concept of individuals as agents with equal moral concern as a justificatory tool in identifying moral principles. If there is no reasonable rejection of a principle, then

it is morally acceptable. Principles can be reasonably rejected when individuals are burdened to an extent whereby their agency is undermined.

Scanlon's test therefore looks like this:

Would it be wrong to do X in circumstances C?

1. Objections to permission – how would people be burdened if people were allowed to do X?
2. Objections to prohibition – how would people be burdened if people were not allowed to do X?
3. Comparison of I) and II)

A principle is decided upon through a comparison of the impact of burden or harm if the principle was either allowed, or not allowed, to proceed. If individuals are unnecessarily burdened by the introduction of the principle this gives ground for reasonable rejection. If they would be unnecessarily burdened by the prohibition of the principle, this also gives ground to reasonable rejection. It is these two sets of objections that need to be compared for a decision to be made on the justifiability of the principle. He states (2000, p. 201) “we can see the need for limits on certain patterns of action (patterns of justification) by seeing the ways in which we are at risk if people are left free to decide to act in these ways”. Scanlon notes however, that it is impossible to understand the impact of certain principles on particular individuals and, therefore, asserts the need to consider principles from the view of standpoints. He states (2000, p. 204):

Since we cannot know, when we are making this assessment, which particular individuals will be affected by it in which ways...our assessment cannot be based on the particular aims, preferences, and other characteristics of specific individuals.

There are two standpoints that need to be recognised with each evaluation of a principle. First, the standpoint of the main beneficiaries who will have strong generic reasons to insist on the principle. Second, those who will be constrained by it or who are beneficiaries of an alternative principle. These individuals will have reasons to reject the principle in favour of an alternative or less demanding principle. The theory states that these standpoints are taken into account when deciding on principles, therefore demanding that others have regard to these positions when they themselves act. As with Rawls' account of reasonableness, the whole of this process is based on the recognition of free and equal individuals within a scheme of cooperation.

With regard to the negative aspect of the test, Scanlon's account clearly does not provide a threshold or range of provisions to be delivered to attain moral principles. There is no checklist of what needs to be in place for a principle to be right, or a list of activities that immediately make a principle wrong. It is rather, a procedure for testing a principle to see whether it meets that standard of rightness: that others cannot reasonably reject it. Following the conclusion of this test, there is no further procedure that must be carried out in order to ensure that principles 'become right' other than they need to be revised and re-tested. As Scanlon outlines, this means that the test says nothing more than for something to be right means only that it is not wrong. There is no further definition of a principle that is right. It also incorporates the element of universality. This is a test which can be used on all proposed moral principles and regards the claims of rejectability from each individual as equal.

This negative test structure is one I use within my own theoretical framework. I have argued that Rawls' Difference Principle is pertinent precisely because of the parameters which it works within. I want to emulate these parameters and procedural use of the theory in its application, as well as scope and metric. I have furthermore argued that using the metric of effective agency sets out necessary, but not sufficient conditions for an ordinary human life. My revised principle will test whether these are being delivered through the mechanism of the state which is to enable this - social policy. The structure, or application, of my test therefore asks a series of questions:

- a) Are worst off individuals living as effective agents?
- b) Is it reasonable to ask these individuals to not live as effective agents?
- c) Does this social policy enable people, the worst off, to have the capacity to be effective agents?

The second question in this section is one which follows Scanlon's approach. I use his concept of reasonable rejectability to question whether it is acceptable for individuals to not live as effective agents. Using this approach, the question then becomes: Can anyone reasonably reject individuals living within society who are not effective agents? I have argued that this, indeed, can be reasonably rejected. Scanlon's formulation of the test rests on the concept of mutual recognition. Individuals are free and equal, and must be able to justify their actions and principles to other members in society. I argue that the claim that others within an equal scheme should not be enabled to live as effective agents is unreasonable. I assert that this argument rests on the use of reasonableness as a regulatory tool; individuals must recognise their reciprocal relationships with others in the scheme of cooperation and limit their actions to ensure that others may pursue their conception of the

good. This is linked to the concept of the worst off in society having an effective veto within the Original Position. Arrangements would not be agreed upon within the Original Position that would make it acceptable for the worst off to not live as effective agents. To understand whether a policy is just or not, therefore, individuals must acknowledge the standpoint of those who will be most affected by it in order to analyse whether it can be reasonably rejected within a scheme of social cooperation. This relates to my argument that the Difference Principle is the single tool which can be used for this test as it contains within it an effective veto of the worst off in society.

The two assumptions at work behind my final test are therefore that effective agency does not exist equitably within society, and that for effective agency not to exist is unacceptable as it can be reasonably rejected. The test then applies to social policy which addresses issues of basic justice. It questions whether the policy supports or undermines basic justice in terms of effective agency. Again, following Scanlon, this is where the test stops. The ultimate negative outcome of the test is that the social policy does not enable effective agency: policy-makers must then revise the policy to ensure that it meets its intended aim. At no point does the test state what the policy-makers must do to enable the policy to meet the requirements, it purely tests when policy does or does not meet these demands. This type of negative approach is already used within policy analysis, for example the EIAs test whether a policy undermines the equality of individuals within a range of protected characteristics. The tool does not outline how specific policies should deliver equality, but provides 'checks and balances' for the impact of policy on specific individuals within society.

iii) Reflective Equilibrium

The first mechanism discussed within the development of a toolkit approach to my test was Reflective Equilibrium. This discussion outlined how the Difference Principle, as part of the Rawlsian framework of justice as fairness, could be applied in an immanent way. There are two key focusses in the use of this mechanism: first, that the application of justice as fairness can be understood as an everyday form of decision-making that individuals can partake in. The construction of Reflective Equilibrium enables this emphasis as Rawls outlines the view points by which Reflective Equilibrium is undertaken; from and between individuals. This is further supported by looking at constructivist accounts of the use of the mechanism. The tool of Reflective Equilibrium displays Rawls' intent for justice as fairness to be used to scrutinise and inform decision-making through a process of reflective consideration undertaken by 'you and me'.

The second aspect is a modification of Rawls' stated use of the concept. Ron (2006) asserts that the tool of Reflective Equilibrium can be seen to create a means for immanent criticism of society

through standards of justice. I have built on this and asserted that there can be a shift from monological to dialogic and subsequently internal to external uses of the mechanism of Reflective Equilibrium. On a dialogic, external, account therefore citizens are looking at whether outputs of the basic structure in terms of policy meet reasonable views about the nature of basic justice and effective agency. The engagement with the mechanism of Reflective Equilibrium, therefore, enables us to see how the Difference Principle might be applied to outputs of the basic structure by citizens for the purpose of justification.

iv) Revised metric

As previously outlined, I have modified the metric of basic justice from primary goods to a focus on the ability of individuals to do and be things. This can be justified through Rawls' commitment to self-command as a primary good, and does not undermine the primary goods metric but pares it back. The focus in my revised metric is therefore whether individuals are able to formulate and follow a conception of the good. This I have described as effective agency for ease.

The Difference Principle states that social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged. I have argued that the existence of social policy responds to both social and economic inequalities as a form of mitigation. I have also outlined that when discussing the 'greatest benefit' within the context of the Difference Principle, it is preferable to revise the metric to one of effective agency rather than primary goods. What we are testing on my modified account, therefore, is policy (as a response to inequalities), and how this interacts with effective agency for individuals who are the least advantaged. This critical approach is based on the framework of the liberal principle of legitimacy so that matters of basic justice and constitutional essentials. This revision leads us to reformulate the difference principle as:

Does this policy make the worst off better off in terms of effective agency?

I have argued that the role of social policy, in mitigating natural inequalities, provides a site of social justice and policy which relates to basic justice and can, therefore, be seen to be subject to this principle. This principle can therefore be used to test social policy which addresses basic justice and/or constitutional essentials to see whether it does fulfil its aim of social justice through improving the effective agency of the worst off.

Within the theoretical framework as it stands we have five core elements to inform the test:

- a) The scope of the test – policy that impacts on issues of basic justice and constitutional essentials

- b) The negative test formation based on Scanlon's concept of 'reasonable rejectability'
- c) The element of retrogression included within the Difference Principle
- d) The concept of Reflective Equilibrium as an example of everyday regulatory decision-making
- e) A revised metric for basic justice – effective agency for the least advantaged

These aspects have been discussed and highlighted throughout the exposition of my theoretical framework for my test. Although not all the elements of the framework, these are core concepts for my modification of the Difference Principle as a means to apply the liberal principle of legitimacy within the context of reasonableness.

The modified test

I have already outlined the first set of questions which create the assumptions on which the formulation of my test is based. These assumptions state that it is unreasonable for individuals within a social scheme of cooperation to not be effective agents. The test is based on this premise then: that it is reasonable for individuals living in a social scheme of cooperation to be effective agents, and any proposal which would cause individuals not to live as effective agents could be reasonably rejected. The first element of the test is therefore:

- 1) Does this policy enable the least advantaged individuals to be effective agents?

This first question tests whether the liberal principle of legitimacy can be met; that the interventionist nature of policy can be justified through the positive (or lack of negative) impact that it has on the lives of those who could be considered the worst off in society. Focussing on the negative test format as included from Scanlon's work, if a policy fails the first question the test does not outline what needs to be done in order to make the policy better. The question purely asks whether the policy delivers or enables the simple standard of basic justice – effective agency.

The second question within the test relates to the formulation of the difference principle, and its focus on retrogression. It asks:

- 2) Does the policy make the least advantaged individuals in society worse off in terms of effective agency?

This emulates the focus in the Difference Principle on the worst off being made better off despite the existence of inequalities in primary goods. There are therefore two standards that my test engages in; first, whether effective agency is at all enabled by the policy. Second, whether the policy has any retrogressive impact where individuals are made worse off in terms of effective agency because of this intervention.

We can return once again to the case of the 'Bedroom Tax' to see how the two parts of this test can function. When applying the first question of the test, we can see that according to Rolnik's (2013) analysis the 'Tax' does not enable individuals to have effective agency. There is no positive measure around ensuring that individuals are able to consider and act on what they want to do and be in the form of a conception of a good life. The testimonials shared with Rolnik outlined how individuals were experiencing a variety of negative impacts from the change. These included physical (or physiological) impacts, such as having to choose whether to have adequate heating or eat adequately if they were being taxed for the extra room(s). Social impacts included moving away from family and support networks if individuals did downsize to avoid the cut in benefit. There were also psychological impacts such as suffering from anxiety and depression related to these physical and social impacts (2013). If we consider these in the context of Maslow's (1943) hierarchy we can see that individuals were not able to meet fundamental sets of needs, which according to Maslow impacts on their ability to engage with and plan for the future. We can see that the impact of this benefit change could undermine individuals' capacity for effective agency rather than enable it.

Another core feature of Rolnik's (2013) analysis was the retrogressive impact of the 'Tax'. We can see here how this fits into the second question within the test. Rolnik highlighted that as well as the impact outlined already, individuals were also having their ability to live independently affected by the benefit change. As a result of the changes, some individuals were having to leave specially adapted accommodation to move to not-adapted accommodation or rooms were being classified as 'spare' when they were used to store medical equipment or provide accommodation for carers. The impact of this was to remove some elements of independent living for individuals. In this instance then, individuals were not better off in terms of effective agency because of the intervention of the policy, but worse off.

This test can, then, provide a series of analyses of the impact of a particular policy. First, we can use it to understand whether the policy affects matters of basic justice. As already mentioned, there will be some policies where it is clear whether the policy is one of basic justice but with others it will not be clear. Applying the test, and seeing what the relationship between the policy and effective agency is, will provide this information before the test can be properly applied. Second, if a policy is understood to relate to matters of basic justice the test can provide an account of how the policy and effective agency fit together. It asks whether the policy enables effective agency, based on the assumption that it would be unreasonable for individuals within a scheme of social cooperation to not be effective agents. Finally, the test questions whether there are retrogressive elements to the

impact of the policy on effective agency. If the policy does enable effective agency, the test assesses whether individuals are able to decide and act on what they want to do and be as they were before.

With this structure in place, I will now apply the test to the Housing (Wales) Act. I will ask whether the policy enables the least advantaged individuals in society to have the capacity to be effective agents and, if so, whether it has increased or decreased this capacity due to the intervention. Through the application of the test I want to see whether this can function as a useful policy tool, and whether new insight into the legislation, and the impact of it, arise through its application. I will return to the format of the test after the case study to discuss whether the aim of creating a test for social justice in contemporary social policy based on the Difference Principle has been successful.

Part 3 – Application of framework

Having established the theoretical framework and accompanying policy test, I will now apply this to the Housing (Wales) Act 2014. The methodological approach to this case study is outlined in Appendix 1. The aim of this application is to see whether new insight around the potential impact of legislation can be provided through the use of my philosophical framework and philosophical frameworks more generally, and how this affects our understanding of policy and legislation.

There are two core reasons for choosing this piece of legislation to first apply my test to. First, this is the first Housing Act passed by the National Assembly for Wales following the transfer of primary legislative powers in 2011. Devolution occurred in Wales following a referendum on powers in 1997. The National Assembly for Wales was established in 1999 with a conferred powers model of devolution. (National Assembly, no date). This was re-named the Welsh Assembly Government in 2001. Initially the government only had secondary law-making powers, and could use these when authorised by the UK Government. The Government of Wales Act 2006 went on to formally separate the government from the legislature, following the creation of the National Assembly for Wales and the Welsh Government as distinct bodies in practice from 2002. It also granted the National Assembly powers to make laws for Wales in specifically defined areas. This was done through the use of Legislative Competence Orders approved by both the National Assembly and the UK Parliament, or through framework powers conferred on the Assembly through legislation made at Westminster. In 2011, a further referendum was held on whether the National Assembly should be granted further, primary, legislative powers. The Welsh electorate voted yes by 63.49% on a turnout of 35.2%. These powers came into effect at the subsequent National Assembly election in May 2011. This meant that the National Assembly could make legislation independently in areas where powers had been transferred from the UK Government (National Assembly, no date).

The Housing (Wales) Act was one of a number of key pieces of legislation made in the first five years of the devolution of primary legislative powers, alongside legislation relating to sustainable development and social services. Rhetoric surrounding Welsh devolution has long focussed on the 'clear red water' between England and Wales; with Welsh Labour having a clear normative approach to politics and policy which is distinctive from the UK Labour Party (Osmond, 2010). This phrase originated in a speech by First Minister, Rhodri Morgan, in the run up to the second Assembly term in 2002 where he outlined the values supported by a Welsh Labour Government (BBC, 2002). Looking at the Housing (Wales) Act as a test case for a theoretical framework for social justice seems appropriate in the context of the claims made by the Welsh Labour Party around their commitment to equality and participation (Osmond, 2010).

The second reason for choosing this legislation as a test case is the context of housing as a site of basic justice. As we have seen from Waldron's (1991) account, we can understand the most extreme form of housing deprivation as a state of unfreedom. Individuals' ability to act, plan, and undertake basic human functions are inextricably linked with the spaces that they have access to in order to do these things. Although Waldron's theory addresses only the extreme state of a privation of housing, we can understand all elements of housing to have an impact on individuals' lives, whether this relates to the quality of housing that is available, the security that different types of tenure of housing provide, or the redistribution of housing as a social good. As noted in Chapter 1, housing is an area that is frequently under-investigated by applied philosophers. The context of housing therefore provides a good policy area where I can apply my test of social justice, and give an indication of how philosophers can engage more with housing as a policy area.

When looking at a full piece of legislation, within the context of its political development, it is important to note that the document contains within it a variety of different policies. The Housing (Wales) Act is a far-reaching piece of legislation which addresses policy areas as broad as from Gypsy and Traveller accommodation needs to the registration of private landlords. Contained within the legislation is a variety of policy areas all of which will interact with my test for basic justice in a different way. This can be seen to be linked to my description of a continuum of policy; some which are definitely subject to a test for basic justice, some that might be, and some that are not. Within this case study, I will provide an analysis of the core policy areas and how they interact with my test. I will then focus on what I understand to be a core matter of basic justice within the legislation; the *Pereira* Test.

I wish to build the analysis of the legislation through my theoretical framework in an incremental way; first testing how my theoretical framework can be understood to relate to the legislation, before applying the test in detail to a particular element. The first section of the case study will therefore provide a content analysis of the legislative documents involved in the development of the Act. I will review how proposals changed across the creation of the legislation, and how this relates to key conceptual themes within my framework. The case study will draw out elements of the Act which can be understood to be positive on a basic justice account, as well as those which could be seen to be negative. The latter half of the study will focus on a key element from within the legislation which I suggest fails my test for basic justice.

Chapter 8 – Case study: legislative process

To start to build my case regarding the relationship between the legislation and my theoretical framework, I have identified four codes that work to demonstrate conceptual themes within the policy documents. This is intended to begin to outline how my theoretical framework could be applied to the legislation through the identification of overlapping elements; social justice, the most vulnerable in society, the state as enabler, and effective agency. These concepts have been identified throughout the theoretical framework as core to my account of basic justice:

- Social justice is the focus of the Difference Principle as a policy test
- The most vulnerable in society are the subject of the Difference Principle
- The principle of the state as an enabler underpins the concept of policy as a delivery mechanism for social justice
- The social bases of effective agency is the metric which is used to measure whether policy delivers basic justice

By using these codes to assess the documents within the legislative process, we can see how the framework of the Difference Principle can be used to analyse the legislation and provide a new understanding of both how the Act might impact on individuals, and how it relates to basic justice.

The White Paper

The White Paper to the Housing (Wales) Act, *Homes for Wales* (2012), is the first document to be looked at within this case study. As Welsh Government Official A identified “the process [of policy development] wasn’t just the White Paper then the Bill, it actually started earlier in 2011 we published a Minister Challenges paper which was an open consultation”. *Homes for Wales* (2012) was therefore informed by the sector through a variety of consultations. The interviewee stated “it wasn’t a typical situation where we issue proposals; it was the Welsh Government saying ‘well what needs to be done?’” *Homes for Wales* (2012) outlined both specific legislative proposals as well as non-legislative policy change to the housing sector in Wales. The Welsh Government Official stated “the White Paper is a hybrid, an ambitious programme of change, every element was put in to improve...lives”. This approach based on consensus was supported by the interview data from the members of the Welsh Local Government Association (WLGA). They stated that “there’s been a period of very significant dialogue and exchange of ideas behind the development of the key proposals in the White Paper”. They described the approach to the White Paper as a “feeling of co-authorship or co-ownership of the main issues that are in the White Paper”.

As a White Paper, there is an aspirational element to the proposals within *Homes for Wales* (2012) which cumulates into a strong social justice agenda throughout. The Official describes “social justice was a very strong element in all sorts of sections”. The *Ministerial Foreword* opens the document by describing (Welsh Government 2012, p.2) the agenda of the paper as “one which is distinctively Welsh, based on our long-term commitments to social justice, tackling poverty, and sustainable development”. In outlining the approach taken within the document, the White Paper references a commitment to a variety of broad philosophical concepts with the then Minister (Huw Lewis AM) asserting (Welsh Government 2012, p.2) “our approach reflects our values of fairness, social justice, equality, and sustainable development”. This is supported from interview data from Dr Peter Mackie, the academic whose research informed the development of the White Paper. He outlined “the White Paper is strongly tied to [the] conception, and ambitions... of social justice”. He went on to assert that the proposals were informed by the very definition of social justice. He stated: “I very quickly scribbled down what I would define social justice as; it’s fair and equal treatment. That’s social justice. Our model didn’t achieve, was never going to achieve, total social justice because part of our remit was ‘there is no more money’”. Apparent, here, are the first links between my framework and the piece of legislation. There is a strong commitment to social justice throughout, with those involved in the drafting of the paper outlining how the concept informed its development.

Moving on to more tangible assertions within the document, the *Vision* states (Welsh Government, p.5) “our ultimate goal is a future where everyone has a home they can afford and where homelessness does not exist”. It goes on to outline (Welsh Government 2012, p. 5) that “people will receive more and better help to live independently, with additional support for our most vulnerable people” under the new piece of legislation. There is, then, an initial commitment to the codes that have been identified through the theoretical framework. There is a stated commitment to social justice. The focus of the legislation is to support the most vulnerable or least advantaged in society. The White Paper recognises the role of the state in enabling individuals to live independently, and this focuses on the measurement of the capacity for effective agency. The White Paper goes on to outline the five areas of legislative and policy change which aim to support this approach: increasing the supply of homes, improving quality of existing homes, a better Private Rented Sector, better services and support, and preventing homelessness. As I will detail later on, some of these areas can be seen to be linked to my metric of effective agency; that individuals should be able to create and follow a conception of a good life.

A number of specific proposals are outlined within the White Paper:

- The creation of a registration and licensing scheme for private landlords and letting agencies which will increase tenants' rights in the Private Rented Sector
- A commitment to improving existing homes to enable the Welsh Housing Quality Standard to be achieved consistently
- Further detail on the Welsh Government's Empty Homes scheme which provides finance for redeveloping empty properties
- A proposal relating to increasing the level of council tax on empty properties
- Commitments related to Local Authorities undertaking needs assessments for Gypsy and Traveller communities, and subsequently meeting these needs
- A proposed 'Housing Solutions' approach to homelessness
- The end of family homelessness by 2019

(Welsh Government, 2012)

We can see, here, that the nature of these proposals is both broad and aspirational. There are a variety of different policy proposals within the legislation as a whole that relate to the conceptual codes in a different way. Returning to the idea of a policy continuum, we can identify that some areas of the legislation have a clear link to my test of basic justice. The 'Housing Solutions' approach to homelessness (Welsh Government 2012, p. 75), and ending family homelessness by 2019 (Welsh Government 2012, p. 78) can be seen to directly relate to those who are least advantaged in society and therefore relate to basic justice. Some areas of policy have less of a connection with basic justice, such as the proposals around council tax (Welsh Government 2012, p. 28). It is unclear whether other proposals relate to basic justice. The licensing and registration of private landlords (Welsh Government 2012, p. 47) could be seen as a matter outwith the bounds of my test, however, when it is considered that individuals who are homeless could have their statutory duty met through being housed in the private sector then the proposal can be seen to relate to the least advantaged in society. We can begin to build a picture then, of how the theoretical framework can be applied to the legislation to create new insight of how it might function, and how this relates to the concept of legitimacy.

The stated commitment to social justice has already been discussed. Moving on to the application of the other codes to the document, we can see the concept of effective agency referenced heavily within the White Paper. This largely relates to providing housing and support to enable individuals to reach their potential. The *Introduction* (2012, p. 9) outlines the Welsh Government's position in this regard: "we want people to realise their potential and will encourage them to help themselves". This is strengthened with comments within the '*Our Vision and Role*' section of the document which

asserts (2012, p. 14) "a home is fundamental to people's ability to thrive, to make the most of their abilities and to be part of a community". There is a clear understanding here, of individuals as effective agents with material goods and support being delivered from the state, to enable them to achieve the social bases of effective agency. By interpreting this through my theoretical framework we can understand the vision behind the legislation to be to enable individuals to create and follow conceptions of a good life.

This is linked to the code of 'state as enabler' which is also referenced frequently within the White Paper. With this code, I focus on specific references to 'enabling' as well as broader statements around the role of the state. For example, there is a focus on the state stepping in to assist individuals when market forces cannot do so. The *Introduction* (2012, p.9) states "we will do all we can to help people whose needs cannot be met by market forces. This is the heart of our approach". Again, regarding the increase of the supply of homes outlined in the document, it affirms (2012, p. 18) "we remain fully committed to helping those whose needs cannot be met by the housing market, with help that reflects people's differing circumstances". The document therefore proposes that the state play a whole system stewardship approach to the housing sector:

Our 'system stewardship' role applies to the whole housing sector. We cannot influence all aspects but a whole system approach helps us, and others, to identify where interventions are best made and where limited funds should be spent to best effect (Welsh Government 2012, p. 19).

The White Paper therefore outlines an approach which regards individuals as effective agents being enabled by resources and support delivered by the state. The role of the state is to support individuals to achieve the social bases of effective agency and in turn realise their full potential. We can see through the codes how this links to my theoretical framework on the liberal principle of legitimacy and delivering basic justice. We could argue that, in this case, intervention in the form of social policy can be understood to be justified when it meets the criteria of social justice. Within the document, the Welsh Government realise that there are needs of individuals that cannot be met by market forces and that a stewardship approach to the housing sector as a whole needs to be taken so that individuals can be the best they can be, whilst living in thriving communities.

As well as claiming to outline a "distinctively Welsh approach" (Welsh Government 2012, p. 2), the White Paper asserts a number of times (2012, p. 5) that the approach taken focusses on the core values of "fairness, social justice, equality, and sustainable development". Referring specifically to the housing stewardship role, it further asserts (2012, p. 12) that "our principles of fairness, equality,

and social justice are close to our heart and are fundamental to giving people and communities the opportunity to grow and flourish". This approach is further strengthened by references to helping the worst off in society, and engaging within individuals and communities in order to effect change. The first code is highlighted a variety of times in terms of reforming policy regarding the Private Rented Sector, domestic violence, and Gypsy and Travellers' needs in order to support some of the most vulnerable in society. This links to the format of the Difference Principle and my test; that it is the 'worst off' in society that should experience improvements from policy. One of the main proposals within the White Paper is to "do more to prevent homelessness, and improve housing services to help people, particularly those who are vulnerable, to lead healthy, independent, lives" (Welsh Government 2012, p. 4). This emphasis on supporting those who are vulnerable is highlighted as a driving force behind Private Rented Sector reform as well as improvements to the Housing, Health and Safety Rating System and homelessness duties.

There is, therefore, a strong general commitment to social justice as defined within my theoretical framework within the White Paper. The document can be seen to acknowledge individuals as needing the social bases of effective agency, and the role of the state in enabling them to achieve this. This approach is even clearer in terms of the proposals set out around homelessness. The 'Housing Solutions Approach' (Welsh Government 2012, p. 75) extends the amount of time that individuals can present to Local Authorities as threatened with homelessness from 28 to 56 days. It also guarantees accommodation to individuals with no safe place to stay on presenting as homeless. The approach uses a two-step process whereby intentionality, local connection, and priority need tests are not used in the initial interaction with the person experiencing homelessness as was the case with the English legislation. The Local Authority would have a duty to try and find a 'housing solution' for the individual's homelessness, with an assessment for the statutory homelessness application to be undertaken after six months. It is only at this stage that the tests for local connection, and priority need are to be used – with the intentionality test to be used at Local Authority's discretion.

Intentionality testing requires that individuals prove they have not made themselves 'intentionally homeless'. This encompasses a range of actions from individuals damaging their property in some way, to individuals allowing their children's other parent to visit when no other individuals are allowed in the property. This is problematic as the test allows for a vast amount of discretion from Local Authorities. The local connection test asks individuals to prove that they have connections with the local area, such as family, employment, or education over a number of years. The final test – that of priority need – demands that individuals show that they are vulnerable enough to require help.

This could be in terms of age, whether the individual has any dependents, or on mental or physical health grounds. This assessment is the focus of Chapter 9.

In this current chapter, I argue that removing these tests at the initial stage of interaction with Local Authorities shows a commitment to individuals as having the social bases for effective agency. The new approach is not asking citizens to prove their moral worth in order to access housing support from the state, but acknowledging that housing should be seen as a necessity for all individuals. As the White Paper states (2012, p. 71):

The current legislation involves a series of tests and hurdles, leading through a ‘rights-based’ safety net. Whilst this provides some protection for the most vulnerable, it has led to a process-driven environment with substantial resources devoted to inquiry, interpretation, and challenge.

The ‘Housing Solutions Approach’ recognises that individuals cannot be effective agents without somewhere safe to stay, and the first step for Local Authorities to enable sustainable support for these individuals is to provide them with temporary accommodation. The approach therefore reflects the detrimental impact that being homeless can have on individuals as effective agents, and provides initial support to enable the state to work with individuals to assist them in addressing their housing (and broader) issues.

In discussing the relationship between the White Paper and the idea of effective agency, the document represents a commitment to social justice on the account given within my theoretical framework. Although this level of conceptual commitment can be expected from such an aspirational document as a White Paper, I suggest that this commitment is also reflected in the proposed legislative and policy changes contained within the Paper. This is particularly pertinent in regards to the approach taken to homelessness.

Housing (Wales) Bill

The codes can also be applied, albeit in a slightly different way, to the Housing (Wales) Bill as published in order to assess the development of the legislation and its relationship to basic justice. As Welsh Government Official A stated “the words ‘social justice’ probably don’t appear in the legislation” but we can assess this stage of the process through looking at the proposals in the legislation itself as well as the content of the Explanatory Memorandum. The Bill contains the following broad proposals that can be seen to impact on, or deliver, social justice:

- The proposed registration of landlords and letting agents which will allow for standards to be raised within the rental market, as well as protecting the rights of tenants
- A proposed statutory duty on Local Authorities to provide new sites for Gypsies and Travellers in response to needs which have been identified through engagement with communities
- A reform of homelessness legislation with extended duties and a focus on prevention

There is clearly a reflection here of the broad conceptual commitments as seen in the White Paper. Individuals' rights are being strengthened through duties being placed on organisations such as Local Authorities and private landlords. As expected, the frequency of occasions of codes being identified in the document is less than in the White Paper. There were a number of references to effective agency, which largely related to homelessness provisions. References to the worst off in society are made a similar amount of times. These are spread across proposals regarding the registration of landlords, particularly in regard to the fit and proper person test being used as a licensing requirement. These also occur with reference to homelessness provisions, and assessing and meeting the needs of Gypsy and Traveller groups. These broad proposals show that the Bill aims to fulfil a range of the commitments that are outlined in the White Paper, such as delivering on concepts such as fairness and social justice.

The Explanatory Memorandum (Welsh Government, 2013b) supports this commitment to normative concepts. It states (2013b p.7) "a suitable home is key to good health and wellbeing. It represents the best possible start in life for children, and the foundation for strong, safe, and fair communities". This reflects the commitment to effective agency, relating the access to suitable housing to the ability for individuals to make plans around what they wanted to do or be. The Memorandum goes on to state (2013b p.7) that appropriate housing is "fundamental to the Welsh Government's goals of reducing poverty and the inequalities within some of our communities". When asked about the difference between the White Paper and Bill in terms of social justice Welsh Government Official A stated "I don't see a huge amount of difference in social justice between the White Paper and the Bill".

The homelessness aspect of the Bill, however, retracts from the progressive approach outlined in the White Paper. Instead of the 'Housing Solutions Approach', the tests for priority need and local connection are reintroduced at the first stage of presenting as homeless to a Local Authority following the completion of the prevention duty. This means that individuals will have to prove that they meet the criteria of being priority need, such as having ill health or dependents in order to

access housing. They will also have to prove that they have some form of local connection to the authority to which they are applying for help (Welsh Government 2013, pp.29 – 30). Issues around the practice of priority need testing will be discussed in more detail in Chapter 9. The Bill also proposes that Local Authorities will have discretion to decide whether to test for intentionality or not (Welsh Government 2013, p. 30). This entails an assessment of whether individuals have made themselves homeless through actions such as creating rent arrears or being involved in anti-social behaviour. Within the Bill, there is still a commitment to tackling family homelessness but this is now dependent on the family not making themselves intentionally homeless in the previous five years (Welsh Government 2013, p. 30). In terms of how this has changed from the White Paper, we can see the rejection of universal provision for accommodation for all individuals with ‘nowhere safe to stay’ and the subsequent reintroduction of tests for priority need, intentionality, and local connection. Welsh Government Official A commented on this change:

The overall aim is actually to prevent homelessness in the first place but the danger, if you have that universal accommodation, is that it can sometimes lessen the prevention effort. The resources really was a big driver, and it still is because we have to look at costs.

The Bill also retracts the automatic priority need for housing given to prisoners on their release back into the community. Following England, the Bill removes the provision for prisoners to receive accommodation from Local Authorities at the end of their sentence. Within the proposals in the Bill, ex-prisoners will get longer support in order to find accommodation when at the end of their sentence but will be subject to the same assessment criteria as other individuals when approaching a Local Authority for assistance. This was described by Welsh Government Official A as the “biggest difference” between the White Paper and the Bill.

The shift then between the White Paper and the approach to homelessness outlined in the Bill can be seen to lose the recognition given to the link between somewhere safe to stay and the ability for individuals to have the social bases of effective agency. Unlike the White Paper, housing applicants are not being regarded as individuals whose material conditions affect their bases of effective agency. Instead, it can be seen that the process demands that individuals prove their worthiness of receiving help from Local Authorities before being assisted with housing. Two suggestions for why this is the case came from the interview data. First, is the contested argument of cost, with respondents acknowledging that the Welsh Government was facing a context of cuts in terms of both revenue and the impact of welfare reform. WLGA representatives supported this asserting that “because of constraints on resources of all kinds, we weren’t able to offer support services as broadly as we would wish to see”. This was rejected by Dr Mackie who stated “if there was a real

feel for social justice we'd find the money... and the truth is the money's there. It's just that government work in departments which the money is saved later down the line".

The second response relates to the concept of responsibility. The WLGA stated:

Even if we could afford it... there is that issue about people having to take responsibility for themselves as well so it's not all about what we can do for you... it just felt that it would be too easy for people to move from one accommodation to another but without taking that responsibility.

This was supported by Welsh Government Official A who stated that the approach in the White Paper "could have stopped people having responsibility for themselves because the way [it was proposed] might not have been conducive to, might have been too much of a safety net or backstop and taken something away from the prevention angle, which is really important". As well as the financial cost of the proposals in the White Paper, respondents were concerned about normative implications of a Housing Solutions approach regarding the role of individuals' responsibility in their housing situations. We can see in these positions that two distinct types of argumentation are being used here. The first refers to the appropriate use of limited resources. This could be understood as an argument from efficiency; resources are limited, therefore they need to be used in the way that helps the most people. The second is a normative argument which focuses on fairness. The argument asserts that individuals should take a certain level of responsibility for their housing situation, and this could be undermined through the over provision of resources.

Housing (Wales) Act

From the first publication of the Bill, three stages of scrutiny were undertaken by the National Assembly. In the first stage, the Communities, Equality, and Local Government Committee took evidence from stakeholders on the Bill as published. The Committee then formed a number of recommendations for the Bill which were published in their Stage 1 Report (2014); it is up to the discretion of the Minister in charge of the Bill on whether these are accepted. In Stage 2 scrutiny, members of the Committee and the Welsh Government can put forward amendments to the Bill to be voted on by the Committee and the Minister. In the final stage of scrutiny, the Bill is taken to the whole Assembly for all AMs to table amendments to the Bill to be voted on. Due to the distribution of seats in the Assembly (where Labour held half of them, from 2011 to 2016), in practice, only Opposition amendments that have the support of the Minister are voted into the Bill. There are therefore a number of opportunities for the Bill to be changed before being voted into law. The structure of proposals, however, remained largely similar between the Bill and the Act. Some details

of the proposals around homelessness changed which I will focus on in more detail shortly. The other amendments of interest between the Bill and the Act are proposals around legislation of the Private Rented Sector have been strengthened through a proposed Code of Practice (2015) which included more protection for tenants from eviction. Further, the level of council tax for Local Authorities to charge for long-term empty properties was increased to 100% extra.

As previously mentioned, details around the homelessness proposals have changed in slight ways that could have a large impact on individuals experiencing homelessness. Following a recommendation from the Committee in their Stage 1 report (2014, p. 7) the Bill was amended to include a test for vulnerability. This will be the focus of the second stage of my case study. The duty to provide information was amended to be dependent on a local connection. Arrangements around the assessment of intentionality was changed so that the default position is not to assess, with the Minister publishing categories of where this can be applied, with a duty placed on Local Authorities to publish their decision on the matter. Throughout the scrutiny process there were debates and considerations around how vulnerability is to be defined in terms of individuals who are placed in the category of priority need. For example, there was a discussion within Stage 1 scrutiny of the Bill on whether the phrase ‘mental health’ should be included in the priority need categories. Following questioning from Leighton Andrews AM (Labour), the Minister, Carl Sargeant, confirmed that both “physical and mental health” (National Assembly, 2014c) will be included on the face of the Bill. He noted, however, “I have agonised over this process with my team in terms of what it may or may not mean, my interpretation of that, and how we can give the confidence that what we mean was that there would be better services for vulnerable individuals” (2014c). Discussion within the rest of the process largely focussed on the revocation of the priority need category for prisoners, but also those experiencing homelessness in general. The inclusion of a particular test for priority need and vulnerability is the biggest change between the Bill and the Act in terms of affecting effective agency. Again, I will focus on this in more detail in the second section of the study.

In terms of the codes, the Act measures in a similar way to the Bill but with an increase in references to effective agency. This concept can be seen to be referred to more times in the Act, all within the section of homelessness. One of the changes in this regard between the Bill and the Act is the inclusion of a new subsection within this which outlines groups of individuals which might experience particular need. The references to the worst off in society have, however, decreased between the Bill and the Act. Again, this relates to proposals around homelessness and the inclusion of the fit and proper person test in the registration of licensing of private sector landlords. Engagement is also referred to in the Act, in relation to engaging with Gypsy and Traveller groups in

undertaking a needs assessment and working with stakeholders in setting standards for social housing.

From the content analysis of all three documents, it is clear that the main difference in general proposals occurred between the White Paper and the Bill as first published. The difference between the homelessness provisions in these two documents shows a clear retreat from a commitment to social justice as helping the worst off in society. The homelessness proposals in the Act are largely similar to those published in the Bill, with the exception of the change in terms of a test for priority need which was introduced in the final stages of scrutiny. As outlined, I will analyse this in further detail in Chapter 10. In the next section of this chapter I will assess proposals contained in the Act in relation to my test of basic justice. Those duties which facilitate the capacity for effective agency for the worst off will be described as positive duties, those that appear to fail the test will be described as negative duties.

Analysis: Positive duties

The two part structure of the test will ask, firstly, whether the proposed legislation enables individuals to have the capacity to be effective agents. If this is the case, the second part of the test asks whether individuals are in a better or worse position in regards to effective agency due to the application of the legislation. This section will largely focus on the primary question in the test, with a discussion of retrogression in the following chapter on the *Pereira* Test. There are a number of proposals within the Act, therefore, that can be seen to deliver this account of social justice; that individuals are enabled to create and follow a conception of the good because of the introduction of the legislation.

Duty 1: Private Rented Sector

The first element is the introduction of a licensing and registration scheme for landlords and letting agents (*Housing (Wales) Act 2014* part 1). This was proposed in both the White Paper and the Bill, and the proposal did not fundamentally change through the scrutiny process. The intention behind this proposal was to create improved standards in the Private Rented Sector and ensure that landlords and tenants were aware of their respective rights and responsibilities (Welsh Government 2013b, p.13). This aspect of the legislation requires that any landlord who has a rental property in Wales based on an assured, assured shorthold, or regulated tenancy must be registered. In addition to this, if a landlord sets up tenancies and manages their properties then they must also have a license. If these activities are undertaken for them via an agency, then this agency must have a

license. As part of this registration and licensing process, landlords must also complete a training course on the role, rights, and responsibilities of being a landlord (Welsh Government 2013b, p.13).

This proposal can be understood as a piece of policy which could be seen to relate to basic justice due to the use of this type of accommodation to house those who are homeless. When we look at the types of individuals using this tenure of housing, we can identify a variety of individuals who could be described as the least advantaged in society. The WLGA recognised that “there are those in the sector who we know are vulnerable because they can’t access social housing”. They noted that these individuals are more and more likely to get housing in the Private Rented Sector so it was important that this “be made more secure for people, as well as improving the quality”. They highlighted that this demonstrated “that social justice thing kind of ran through a lot of those proposals in the White Paper and as far as practicable have been taken forward into the Housing Act”.

Analysing this particular duty according to my framework of effective agency, we can see that this change can enable tenants to have more self-command in terms of a clearer process of accountability for landlords within the Private Rented Sector. Indeed, this was outlined in the aspirational discussion of the proposals within the White Paper with a focus on this new system enabling some of the most vulnerable to have more choice and control over their living arrangements (Welsh Government 2012, p. 48). Welsh Government Official A stated that this section of the legislation was intended with the aim of “balancing the power” between landlords and tenants. This respondent highlighted how this fitted with the then forthcoming Renting Homes (Wales) Act in terms of ensuring that tenants were able to hold their landlords and letting agents to account. The respondent emphasised how the legislation focussed on institutions; putting more duties on organisations in order to ensure that individuals were able to make better decisions about their lives. They asserted “organisations, no matter what decision an individual can make... can have a detrimental effect”. The legislation addresses this as it focuses on organisations making “better decisions because organisations have to operate within the functions of the Bill”. The respondent stated that this section of the legislation focussed on “enabling renters to make better decisions”. Support for this duty was also given by Respondent 5 who stated that “so much bad stuff is happening in the Private Rented Sector it would be massively, massively positive to introduce accreditation and licensing”.

We can see how this clearly fits with the philosophical framework around self-command and effective agency; the piece of legislation was intended to improve the opportunities individuals had for making decisions about their living arrangements, and to be able to make better quality decisions

due to the context of regulation. Highlighting how this legislative approach was diverging from England, Welsh Government Official A stated “this is where devolution kicks in... we are going the equality way, the social justice way, whereas England is not”.

Duty 2: Gypsy and Traveller needs assessments

A second area where the commitment to effective agency can be seen in the Act is in the new duties around the provision of accommodation for Gypsy and Traveller communities (*Housing (Wales) Act 2014* Part 3). The legislation creates a new statutory duty on Local Authorities to provide new Gypsy and Traveller sites where need has been identified. The broad aim of this new duty is to ensure that more sites are provided as a response to identified needs, and that this will lead to an improved standard of accommodation, improved community cohesion, and better access to services. The duties on Local Authorities in this section of the legislation entail that a needs assessment relating to accommodation must be done in each area every five years, and this must include consultation with appropriate stakeholders. Following the assessment, Local Authorities must meet any needs for mobile home sites that have been identified.

When discussing the duties within the legislation in interviews, the aspect relating to Gypsy and Travellers was highlighted as a good example of a provision relating to social justice. The former Welsh Government researcher identified this duty as one which would enable the ‘worst off’ in society to better have their needs met. Mark Isherwood AM (Conservative) welcomed these proposals as well, stating that he was “broadly supportive of these” as demonstrating a commitment to social justice. He particularly emphasised the importance of the inclusion of a duty to engage with communities themselves within the legislation so that the “assessment of need is genuinely engaged with the local Gypsy and Traveller communities”. Respondent 9 also welcomed this duty as “really positive... the duty to provide accommodation... that’s fantastic”. Within the context of my theoretical framework, this could be understood as individuals being enabled to create a conception of a good life for themselves. We can see, then, how this maps on to discussions around self-command; a provision has been included within the legislation which provides for particular groups to have their accommodation needs assessed when there was no previous duty to do so. It also ensures that these groups are consulted with, and action taken following on from the assessment. In terms of individuals being able to create a conception of a good life, we can see that there being provision around needs assessment and some duty to meet this can lead to individuals being able to decide what they want to do and be more than they could do previously.

Duty 3: Homelessness

The final area to look at is the approach to homelessness taken within the legislation (*Housing (Wales) Act 2014* Part 2). Although I have already highlighted issues around changes in approach between the White Paper and Bill, there are still many areas of this section of the Act which show a positive commitment to social justice. The first main change within the legislation is the focus on prevention. All individuals who are threatened with homelessness in Wales now have a right to access information, advice, and assistance from a local authority within 56 days of being made homeless. The legislation therefore places a duty on Local Authorities to take all reasonable steps to prevent homelessness for individuals. The introduction of this prevention duty is a major change from previous legislation, and means that all individuals who are threatened with homeless have a right to some form of assistance from a Local Authority. Although tests around intentionality, local connection, and priority need have been retained to some extent, these are not applied until the prevention duty time period is complete. There are therefore two main changes within this duty; that all individuals have the right to access to support, and that the time period for this support has been extended from 28 to 56 days. The focus on prevention also extends to strategic planning around meeting needs regarding homelessness. Under the Act, Local Authorities must also publish a homelessness prevention strategy which has regard to those who ‘may’ become homeless. This is an extension of previous legislation in which strategies referred to individuals who had become homeless and this homelessness was likely to recur. The intention behind this section of the legislation is therefore to extend duties owed to individuals who may become homeless. Aims also include a more consistent application of homelessness legislation, and a greater emphasis on preventing homelessness in the first instance through strategic planning.

This focus on preventing individuals becoming homeless as well as enabling them to access information and advice when they are threatened with homelessness can be seen to be strongly linked to my previous arguments around self-command. When we look at Waldron’s analysis of what individuals are able to be and do when they are homeless, we can see a direct link between the prevention of homelessness and a commitment to individuals having self-command. I argue that the duties included in the legislation demonstrate recognition of individuals’ choices being impeded through them being homeless. The outlined aims for this section of the legislation include “fewer households experiencing the trauma of homelessness” (Welsh Government 2013b, p. 17) and “more informed choice for all households who are homeless or threatened with homelessness” (Welsh Government 2013b, p. 17). Again, we can see the new duties as recognition of the impact of homelessness on individuals’ lives. These increased duties were welcomed by the majority of

respondents. Welsh Government Official A stated that the overall aim of the legislation was to prevent homelessness in the first place, and commented that they saw no real change between the White Paper and the Bill. The WLGA stated that the duties show “a shift in social justice, it felt as if we all signed up to the idea that it was improving social justice for those who are homeless”.

As well these new duties around prevention within the legislation, there is a duty for Local Authorities to involve individuals who are presenting as threatened with homelessness within their assessment and support process (*Housing (Wales) Act 2014*, Pt 2, s.62). This was highlighted by Welsh Government Officials who stated: “One of the fundamental parts in terms of practice, and delivery of the Act, is the approach taken by Local Authorities in meeting the requirement of taking reasonable steps... and the customer is very much seen as part of the overall problem-solving process”. This ties in with the metric of effective agency very clearly. As well as having increased rights around prevention for homelessness, individuals now also have a right to be involved in the process for finding a solution to their housing situation.

We can see through a brief look at these three sets of duties from within the legislation, that the Act can be seen to enhance the effective agency of some of the worst off in society. Through these duties, renters are given more power and control over the way in which their accommodation is provided and maintained. Gypsy and Traveller communities have a right to a needs assessment for accommodation, a right to be involved in this process, and are owed some action toward meeting this need when it is identified. There is now a total commitment to the prevention of homelessness, and individuals who are threatened with homelessness have a right to access support and information, and to contribute to their support process. The homelessness section of the legislation was described as “all-encompassing” by Welsh Government officials. In this way, these sections of the legislation both fall into the category of basic justice-related policy and meet the test of social justice; individuals are more able to create a conception of the good life because of the impact of the legislation.

Analysis: negative proposals

There are, however, also some areas which either are contested around whether they meet my definition of social justice or which I argue do not enable individuals to have effective agency. In this section, I will focus on particular aspects of the homelessness section of the legislation that changed between the White Paper and the Bill which includes the removal of the priority need order for prisoners.

Duty 1: Homelessness

As highlighted, there was a big shift in the proposals around homelessness between the White Paper and the Bill as originally published. These largely didn't change again through the stages of scrutiny. The 'Housing Solutions Approach' which was proposed in the White Paper enabled universal provision of accommodation for all individuals with nowhere safe to stay, without the use of intentionality, priority need, or local connection tests. As outlined in the previous section, the legislation as passed includes a prevention duty when individuals are threatened with homelessness but if this duty is not successful, individuals become subject to the range of tests when the 56 days is complete (*Housing (Wales) Act 2014* Pt. 2 S. 62). This change was criticised by a number of respondents. Peter Black AM (Liberal Democrat) stated that "the promises of the White Paper, particularly on homelessness, have not been fulfilled within this Bill". The changes were also criticised by Mark Isherwood AM (Conservative) who called for a co-production approach to homelessness "giving people and communities real voice, choice, and control". He emphasised the importance of engaging directly with people who are homeless "allowing them to explain the causes of the problem" and then be able to work towards how the Welsh Government can "help them tackle their complex demons in order to meet their own dreams for a better life".

Looking at this from the context of my theoretical framework, we can understand this as a commitment to individuals' being able to create a conception of a good life for themselves. These responses suggest that AMs in opposition to the Welsh Government were unhappy with the level of commitment to meeting the needs of those who are homeless, and the shift away from the 'Housing Solutions Approach' within the White Paper. Respondent 9 supported this sentiment stating "the things that would have made a real difference to the people have gone from the Bill and I'm thinking now, where there is a safety net there, I'm thinking that isn't as strong as it should have been". Further concerns were raised around the moral implications of the retention of the priority need and intentionality tests. Jocelyn Davies AM (Plaid Cymru) stated that the Bill was "full of compromises" and said "I'm concerned there are moral judgements now creeping in". She said this was a result of keeping the tests for homelessness assistance. Respondent 9 asserted that the inclusion of these tests within the Bill leads to views about "the deserving and the undeserving, that attitude that 'they deserve another chance but they don't'". This respondent also criticised the lack of service-user approach taken within the legislation. This view was mirrored by respondent 5 who stated that the Bill was "really setting people into deserving and undeserving". This was again echoed by Dr Mackie who stated "under the new system... I've got to judge whether they're in priority need, in order to

decide whether you get temporary accommodation. Automatically, also then, we've got a more deserving group and a less deserving group".

Feedback from respondents on this issue also focussed on the necessity of compromise and the recognition that resources were limited. Although most criticised some of the changes between the White Paper, the Bill as published, and the Act as passed, most were also aware of the financial drivers behind these changes. The former Welsh Government researcher stated that the Bill was a response to the "double whammy" of cuts in revenue for the Welsh Government and the impact of welfare reform. They stated that the legislation had to find a balance between aspiration and the "messy reality" of financial settlements. This respondent emphasised the importance of looking at the legislation as a whole system approach to tackling issues of housing. Discussing the retreat from a commitment to universal provision, the respondents from the WLGA again highlighted that this type of provision could indeed undermine the commitment of individuals "having to take responsibility for themselves" and argued that the shift from White Paper to Bill did not display a lack of commitment from the Minister around social justice but a "practical response to obstacles that appeared rather than any fundamental shift in philosophy around the whole thing". Welsh Government Officials also highlighted the issues of cost and behaviour change. They stated that a position of "common understanding" had to be found between the Welsh Government's aims and the cost of the new legislation on the organisations delivering the new duties. Regarding the retention of the test for intentionality in some form, they highlighted the issue of it having "an impact on people's behaviours" There was concern from Local Government that some individuals would no longer take responsibility for their actions.

Welsh Government Official A also recognised the role of resources in the shift between the White Paper and Bill. They emphasised, however, that there was no retrogressive element to the proposed legislation from the legislation that was already in place. They stated "nobody is worse off than they are now, when people are in priority need in some cases there will be a duty from Local Authorities". This respondent noted that although there had been a shift between the White Paper's proposals and the duties included in the final legislation, the legislation was still a radically improved approach to homelessness compared to previous legislation.

Duty 2: Removal of the Priority Need (Wales) Order for Prisoners

The removal of automatic priority need categorisation for prisoners was a change included within the Bill that had not been referred to within the White Paper. This change meant that individuals who were leaving prison would no longer be automatically deemed as within a priority need

category, but their needs separate to their leaving prison would need to be assessed. This was a contentious inclusion within the legislation, with stakeholders arguing both that the change would increase and decrease social justice. Welsh Government Official A argued that the renewed system would lead to an increase in social justice as:

The other big issue and it is a social justice issue of course... is that they [prisoners] leapfrog over other people and the decision to live in a social housing property is taken from them. So it undermines some else's agency and social justice.

They stated that the legislation would include a "far, far, better process of delivering support to a national standard" in terms of enabling prisoners to access accommodation in a more informed way. On the new system, prisoners would receive support for up to three months prior to release so that accommodation should be in place when they did leave. This can be seen to be another commitment to the prevention agenda. According to this account, there would be a more equitable approach given to all individuals who are threatened with homelessness as all would get prevention support and prisoners would not automatically meet the priority need criteria.

Peter Black AM (Liberal Democrat), however, stated that there were "big issues" around homelessness legislation and social justice, particularly in regard to this removal of priority need for prisoners. The proposed system within the Bill at the time of interviewing was that prisoners who were being held outside of Wales would move back to Wales six months prior to their release date in order to receive support with accommodation. Mr Black highlighted that there is not currently a female prison in Wales and therefore there would be inequitable provision based on gender grounds. He stated "it's a better system for men but not for women and I think that does raise a number of questions". Respondent 9 raised concerns that the decision regarding the removal of this Order was made in haste and was "done quickly and deliberately to free up housing". They outlined that there is likely to be a negative impact on prisoners with mental health problems and those from the BME community which are overrepresented within the prison population, as well as women who do not have access to a prison in Wales.

This debate is interesting in the context of the use of reasonableness; both sides of the argument appear to make the case that their position is the most reasonable. It is this type of debate around policy where discussions of my theoretical framework can work to bring new understanding. The content of the policy – the housing situation of some of the least advantaged in society – can clearly be seen to be a matter for basic justice. Both sides of the argument around the removal of the Order discuss this in terms of reasonableness. On the one hand, removing the Order levels the playing field

for all of those in priority to have access to particular resources. On the other, individuals who were guaranteed particular rights are no longer automatically able to access these. It is here that the role of retrogression is particularly useful. When looking at this shift in legislation, we can see that there is a lesser obligation to individuals who can be considered some of the worst off in society. In this way, the policy makes the least advantaged worst off and therefore fails the test for basic justice.

Conclusion

In terms of looking at this set of proposals from the context of self-command and effective agency, we can see that some provisions might undermine individuals' decisions around what they are able to do and be. The retention of the tests around local connection, priority need, and intentionality have been criticised on this model as undermining effective agency. We can see how looking at these duties in terms of effective agency can give us a new insight into the impact and the issues which result from the legislation. The next chapter will focus on what I argue is the biggest negative impact of the legislation in terms of effective agency; the inclusion of the *Pereira* Test for vulnerability on the face of the Act.

Chapter 9 – Priority Need and Effective Agency

In this chapter I will review the specific process for testing priority need included in the legislation. I argue that the *Pereira* Test – the legal tool which has been included in order to measure vulnerability – is a blunt instrument which undermines agency. There are three areas in which this legal instrument fails my test for basic justice. First, the way that the test is structured embeds the existence of people who are homeless as acceptable within society. As noted, involuntary homelessness can be seen to undermine individuals' ability to create conceptions of the good life. Policy based on this type of priority need testing effectively accepts that there will be individuals in society for whom creating a conception of the good is not possible because of their housing conditions. Second, the implementation and use of priority need testing can often unconsciously undermine basic justice. Third, the inclusion of the *Pereira* Test creates a retrogressive element to the Housing (Wales) Act in terms of basic justice. The first two arguments will be presented in this chapter, the argument regarding retrogression will be made in Chapter 10.

Priority Need and Effective Agency

As has already been outlined, the Housing (Wales) Act retained the inclusion of a series of tests for eligibility for statutory duties around homelessness assistance after 56 days of advice and support (*Housing (Wales) Act 2014*, Pt. 2). This includes the priority need test which ranks the needs of individuals in order to establish whether there is a statutory duty to assist (*Housing (Wales) Act 2014*, Part 2 Section 70). I argue that priority need testing as currently formulated leads to the acknowledgement that there will be individuals in society who will be homeless. The format of the testing does not function as a triage service, where the test determines who will receive resources first or last. Rather, it tests whether a Local Authority has a duty to provide a certain type of assistance at all. If individuals are deemed to be owed a duty, they are able to apply for accommodation. However, if they do not meet the tests outlined then there will be no obligation for any Local Authority to assist them. Due to this use or formulation of priority need testing, the recognition and acceptance that some people will be homeless and therefore not qualify for assistance, has been built into a homelessness policy.

Within the Housing (Wales) Act, priority need is created if individuals fit into one of the following categories:

- (a) a pregnant woman or a person with whom she resides or might reasonably be expected to reside;
- (b) a person with whom a dependent child resides or might reasonably be expected to reside;

(c) a person—

- (i) who is vulnerable as a result of some special reason (for example: old age, physical or mental illness or physical or mental disability), or
- (ii) with whom a person who falls within sub-paragraph (i) resides or might reasonably be expected to reside;

(d) a person—

- (i) who is homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster, or
- (ii) with whom a person who falls within sub-paragraph (i) resides or might reasonably be expected to reside;

(e) a person—

- (i) who is homeless as a result of being subject to domestic abuse, or
- (ii) with whom a person who falls within sub-paragraph (i) resides (other than the abuser) or might reasonably be expected to reside;

(f) a person—

- (i) who is aged 16 or 17 when the person applies to a local housing authority for accommodation or help in obtaining or retaining accommodation, or
- (ii) with whom a person who falls within sub-paragraph (i) resides or might reasonably be expected to reside;

(g) a person—

- (i) who has attained the age of 18, when the person applies to a local housing authority for accommodation or help in obtaining or retaining accommodation, but not the age of 21, who is at particular risk of sexual or financial exploitation, or
- (ii) with whom a person who falls within sub-paragraph (i) resides (other than an exploiter or potential exploiter) or might reasonably be expected to reside;

(h) a person—

(i) who has attained the age of 18, when the person applies to a local housing authority for accommodation or help in obtaining or retaining accommodation, but not the age of 21, who was looked after, accommodated, or fostered at any time while under the age of 18, or

(ii) with whom a person who falls within sub-paragraph (i) resides or might reasonably be expected to reside;

(i) a person—

(i) who has served in the regular armed forces of the Crown who has been homeless since leaving those forces, or

(ii) with whom a person who falls within sub-paragraph (i) resides or might reasonably be expected to reside;

(j) a person who has a local connection with the area of the local housing authority and who is vulnerable as a result of one of the following reasons—

(i) having served a custodial sentence within the meaning of section 76 of the Powers of Criminal Courts (Sentencing) Act 2000,

(ii) having been remanded in or committed to custody by an order of a court, or

(iii) having been remanded to youth detention accommodation under section 91(4) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, or a person with whom such a person resides or might reasonably be expected to reside.

(*Housing (Wales) Act 2014*, pt. 2 s. 70).

Individuals who are presenting as homeless therefore qualify as priority need if the Local Authority satisfies itself that they have a variety of characteristics, or have been through a number of experiences, which are deemed to make them vulnerable. If this is achieved, in conjunction with demonstrating that individuals are not homeless through fault of their own and have a local connection to the area, then they qualify for statutory assistance.

The *Pereira* Test plays a specific function within this process, and is used to help define C) (i) of the Schedule 70 which refers to individuals being vulnerable for some special reason. If individuals do not qualify as priority need through the other outlined categories, then the Test can be used to see if they are vulnerable for some special reason. This tool is constructed as follows:

When homeless, less able to fend for himself than an ordinary homeless person so that injury or detriment to him will result when a less vulnerable man would be able to cope without harmful effects (*R v Camden LBC, ex parte Pereira*)

It asks, therefore, whether the individual is vulnerable in comparison with other individuals who are already homeless.

The Test was developed through a series of cases regarding the correct interpretation of 'vulnerable' persons under s.189(1)(c) Housing Act 1996 with an initial homeless comparator developed in *R v Waveney DC Ex p. Bowers [1982] EWCA Civ 238* and later being refined to the 'ordinary homeless person' in *R v Camden LBC, ex parte Pereira*. The latter case confirmed that Local Authorities should interpret 'vulnerability' for the purposes of a priority need assessment in line with an 'ordinary homeless person' comparator, defined as street homeless, rather than 'sofa surfing'. The criterion is therefore whether individuals are 'more vulnerable' than the 'ordinary homeless person'. This judicial formulation requires an exercise in comparison. Until the decision in *Hotak*, the *Pereira* formulation stood as the correct interpretation of s.189(1)(c) Housing Act 1996, and was used as an interpretative guide for this section of the legislation – and the associated housing duty – by Local Authorities in England and Wales.

The Pereira Test as Problematic: Normative Concerns

As outlined, the inclusion of the *Pereira* Test fails my test for social justice. First, the impact of the retention of priority need testing in general undermines individuals' ability to have effective agency. By the exclusion of some individuals from priority need categories, and the subsequent use of the *Pereira* Test, some individuals are left to be homeless and can therefore be unable to create a conception of the good life. We can see this from looking at the impact of the Test on the least advantaged in society.

In order to explore the potential consequences of the use of this type of mechanism, I conducted semi-structured interviews with six 'guests' at a drop-in centre for the homeless or vulnerably housed in Wiltshire. In this research, I wanted to see whether experiences of going through the priority need testing process was similar to other research (such as Bretherton et. al (2013) to be discussed later), and also ask specifically about how this impacted on individuals' agency. The concept of effective agency was therefore discussed with the individuals before the interviews began, so that the questions could relate to the relationship between process and impact. I will outline two responses which refer to priority need testing more broadly, before outlining a case relating to the *Pereira* Test in particular.

The first respondent's narrative outlined the 'dehumanising' impact of general priority need testing. This individual had applied for housing when they were 17 or 18 and had not been found as priority due to their lack of physical health problems. The Local Authority argued that as the individual was occasionally able to stay with his family then he was not classed as homeless under the legislation and therefore did not require housing from the Authority. Following this, the respondent stayed with their family for some evenings during the week, when it was possible, and 'sofa surfed' at friends' houses when they were unable to stay in their family home. When asked how this impacted on their life, the individual stated that they were unhappy with the decision but felt that there was nothing they could do. They said that they were unable to make decisions about their life whilst their accommodation was not settled and they often fell out with their family leading to a large amount of instability. They expressed frustration at the lack of a safe place where they can "get away from people" and how this undermined their ability to successfully access wider facilities, such as education and jobs.

When applying my theoretical framework to this information, we can understand this as the lack of capacity to create a conception of the good life. The respondent emphasised that employment and education were effectively 'on hold' whilst their housing situation was unstable and therefore they could not make any plans for their future. The Test can therefore be seen to be too blunt to be able to assess how vulnerable an individual really is in terms of effective agency. In this case, the Local Authority recognised that the individual had a relationship with their family and therefore assumed that they would provide accommodation and the individual was therefore not homeless for the purposes of the legislation. The Authority did not, however, look into the quality of the relationship between individuals which led to the individual being in the volatile position of 'sofa surfing'. Through being assessed according to a specific set of rigid criteria, the individual's agency was undermined. When asked how improvements to the system can be made, the respondent asserted that the system needs to look more at the individual's needs – such as the relationship with their family – rather than just judging the external factors of their situation.

Respondent 2 had been living in a tent in some woodland for 10 years. He had bad asthma and was not physically coping with his housing situation. He said he realised that "another winter in the woods would have killed me" and applied for housing with his partner with the Local Authority. He was not found as high priority and instead accessed housing privately "with a dodgy landlord". He argued that he should have been considered as priority due to his age and physical health problems. The individual was eventually housed by the Local Authority but only through the intervention of a solicitor. The landlord illegally evicted the couple, who were still not considered priority need. The

solicitor who pursued the case against the eviction also advocated for the couple at the council that they were classed as high priority and allocated a flat.

The advocate therefore enabled the couple to be regarded as vulnerable enough for accommodation, which they had not been when assessed without representation. The respondent was keen to emphasise that they did not blame the individuals at the Authority which made the decision “as their hands are tied” but stated that more houses need to be built to be able to provide sufficient accommodation. However, the respondent also said that, in an ideal world, the assessment would be based more on applicants as individuals and commented that there’s “thousands and thousands of us” that do not qualify for support. Again, we can see the impact of this process on an individual’s effective agency. Without representation the respondent would not have been classified as being in priority need and could still be living in a tent in the woods. Returning to Waldron’s account of homelessness, and Maslow’s account of needs, we can understand this as problematic in terms of individuals being able to undertake basic human functioning. Without access to private space, individuals can be understood to have their capacity to undertake certain actions limited and be unable to make plans for the future, or create a conception of the good life which they are able to follow.

The final case I use here is from the research but is not based on a specific interview. It relates specifically to the application of the *Pereira* Test. I had arranged to interview the individual in question, but he passed away before I was able to. The Director of the drop-in centre, Lisa Lewis, has documented his story on the organisation’s blog.

K was rough sleeping and had been diagnosed with hepatitis C. Treatment for the condition is only possible with medication that must be stored in a fridge. As a rough sleeper, K did not have access to a fridge and he applied to the council to be housed in order to start his course of treatment. The Local Authority did not find K to be in priority need of housing, asserting that his medical condition did not impede his daily activities and render him less able to fend for himself than an ordinary homeless person. As he was not classed as priority, there was no statutory duty to provide housing, and therefore he could not receive treatment for his medical condition. This was described by Ms Lewis as the ‘Catch 22 fridge situation’; the council stated that he did not have priority because he had not started his course of treatment. He could not start the treatment until he was able to access a fridge. K also suffered from addiction and mental health problems, but again this was not classified as ‘vulnerable enough’ to qualify for housing. Describing the impact of the Local Authority’s judgement on K, Lisa Lewis stated:

The bottom line is that K was extremely vulnerable. He had ongoing long term mental health issues which led to him being very fragile... He also had very serious physical health issues that needed treatment. Basically, K was on a crash course to developing serious long term medical conditions that could very easily be fatal (Lewis, 2015).

K died before being able to appeal the decision about his vulnerability.

This case shows the impact that the use of the *Pereira* Test can have on individuals if used in the most stringent way, alongside the dangers of allowing decisions to be made primarily at the discretion of individual housing officers and other administrators. In terms of it being a 'blunt instrument' therefore, the Test can be used to deny support to those who have high levels of physical and mental vulnerability due to the inclusion of the 'ordinary homeless person' comparator. This comparator separates the 'ordinary homeless person' from the 'ordinary person' which can have problematic implications on both a normative and procedural level. Lisa Lewis concludes "whilst people sat around making decisions about his levels of vulnerability, they delayed him getting into a safe place, and forgot that he was a human being who was totally reliant on a stranger to have a bit of compassion" (Lewis, 2015).

By establishing the 'ordinary' precedent, behaviours that are 'normal' for individuals who are homeless are disregarded within assessments of vulnerability. This issue can be understood through the following example; in a court case regarding a homeless woman being sexually assaulted, the assailant's lawyer argued that the attack, "may not have had as much of an effect on her as a homeless person, as a result of what she has seen and experienced, as it might have someone else" (The Gazette and Herald, 2010). It seems that the lawyer was arguing that the sexual assault was negligible because it was against a homeless person rather than a 'normal' person. Sexual assault was something that an 'ordinary homeless person' could expect to experience because of their housing situation.

This is clearly unacceptable when considering agency in the context of a scheme of social cooperation between free and equal individuals. When looking at the capacity for individuals to be effective agents, it is unacceptable to assert that individuals who are homeless can expect to have experiences such as sexual assault, with the subsequent impact that this has on their agency. This construct of an 'ordinary homeless person' can be seen to set individuals who are experiencing homelessness apart from 'ordinary people' in terms of expected behaviours and experiences. This construct therefore fails to ensure Rawls' emphasis on self-respect as the most important primary good, and the revised metric of effective agency within my policy test. I argue, therefore, that the

establishment of the 'ordinary homeless' comparator leads to normative implications for individuals' capacity to establish a conception of the good life for themselves. Waldron (1991) has shown that homelessness undermines agency in terms of social freedoms and the ability to undertake basic human actions. Measuring vulnerability against the 'ordinary homeless person' who is street homeless assumes that homelessness is an acceptable state of agency. Implicit in the use of the *Pereira* Test, therefore, is the acceptance of the ability of homeless individuals not to function as effective agents. I argue that this undermines Rawls' commitment to individuals as free and equal. This definition of vulnerability incorporates the standpoint whereby individuals are not able to define and follow a conception of a good life for themselves. By using the *Pereira* Test, the reality of a lack of agency is embedded in the law relating to homelessness.

The Pereira Test as Problematic: Procedural Concerns

Looking at the role of decision-making using the *Pereira* Test, Meers (2012) asserts that there are four main issues related to implementation which can be identified with the use of this construct. I argue that these, in turn, lead to the use of the Test undermining basic justice. First, the Test can be seen to both allow and encourage gatekeeping. This practice consists of Local Authorities restricting access to support and/or resources through a robust interpretation of priority need testing, often in order to combat limits of resources within the local area. Halliday notes (2004, p. 87) that the interpretation of homelessness law by non-professionalised Housing Officers can often be seen as operating in an environment "where law and alternative normative influences co-exist". These other normative influences can include financial management and performance audit, with individuals passing assessments of needs based on availability of resources. Rather than judging individuals on their level of vulnerability and ability to cope with homelessness, Housing Officers can be seen to decide whether an individual qualifies for support based on whether housing is available or how the Officers themselves will be judged on their decision. Whether an individual can get support for homelessness is then no longer based on judgements of need, but on instrumental Local Authority processes or resources which differ across the UK. This is linked to the second issue: that the 'ordinary homeless comparator' is working with a sub-population who are already street homeless, who are therefore already in need. In terms of effective agency, the Test is measuring individuals against those who are already lacking agency as they do not have the social freedoms to undertake basic human actions. If you are not 'more vulnerable' than individuals who do not have access to a safe place to stay or somewhere to wash or urinate then you are not 'vulnerable enough' to qualify for support.

The third problem with the Test is that decision-making is based on the discretion of Local Authority staff. This means that it can be interpreted in a robust way so as to discount vulnerable individuals as being owed a duty for housing, or in a generous way which can support those in need, or anything in between. As Meers describes “there is a great deal of litigation on its interpretation, and the law as it currently stands grants a large amount of discretion to Local Authorities in its application” (2012). The impact of this inconsistency is apparent in the work by Bretherton, et al. (2013) on the use of medical evidence within the assessment of vulnerability process. Their research shows a range of areas where discretion leads to “subjective and personal decision-making” (2013, p. 70). Building on the work of Halliday (2004) they also show that decisions around vulnerability can be seen as “socially constructed” (Bretherton et. al 2013, p. 70) and note (Bretherton et. al 2013, p. 79) in their research that “information on which decisions were based was not collected in a standardised manner and could be subject to input from a range of different persons”. Through their focus groups, case file analysis and interviews, they identified a range of influences on the process of decision-making. Housing Officers based decisions on factors such as the first impressions of applicants in terms of their physical and mental health, whether they displayed appropriate behaviour, and their ‘gut-feeling’ about the individuals. When gathering evidence of medical issues for assessments there appeared to be a complex relationship between Local Authority staff and medical professionals. Officers were distrustful of evidence from applicants’ GPs as they could be regarded as ‘on the side’ of the applicants. They were more trusting of evidence from in-house experts provided by a private firm. This is highlighted in the practice noted in the report where if applicants’ GPs gave an assessment that an individual was vulnerable this was further investigated, but if a GP gave an assessment that an individual was not vulnerable then this was used as evidence. The research also showed Officers as seeing medication dosage as “a very important proxy” (Bretherton et al. 2013, p. 84) of vulnerability; using the internet to enhance their knowledge due to lack of medical training.

Meers states (2012) “the current position of the homelessness legislation is reminiscent of the old Poor Laws, and this is made worse by the discretion given to Local Authorities when deciding vulnerability”. The final problem therefore, is the moral assessment of the use of the Test which can be seen as a culmination of the previous issues. The establishment of the ‘ordinary homeless comparator’ leads to questions of who the ordinary person is, and this should be the measure of vulnerability. The reliance of the Test on discretion leads to ‘socially constructed’ decisions based on subjective factors such as gut-feeling or the amount of resources available within the locality, with such normative practises as assuming applicants’ GPs are ‘on their side’. Rather than acting as a neutral policy tool therefore, it is being used to judge – in the moral sense – individuals’

vulnerability. As Meers asserts (2012), the *Pereira* Test, and the broader range of tests that individuals must go through to be assessed as qualifying for homelessness support, can be seen as a reflection of the historic divide between deserving and undeserving poor. Individuals must prove themselves worthy or deserving of state support to address their situation of homelessness by showing that they are 'vulnerable enough', and responsible enough, to be owed a duty. Again, this can be seen to undermine agency as individuals are not being judged purely on whether they have the social bases of effective agency, but whether their behaviour constitutes being deserving of state support. This position is supported by my interview data where respondents outlined concerns around the shift from proposals in the White Paper to the Bill leading to a moralisation of the issue of who qualify for homelessness support. The implementation of priority need testing and the use of the *Pereira* Test can be seen, then, to further add to concerns around basic justice.

The Impact of Priority Need Testing

Returning to the relationship between priority need testing and my policy test, these two sets of issues (normative and procedural) are demonstrated within research on lived experiences of individuals presenting at Local Authorities as homeless and subsequently going through the priority need testing process. The impact of both procedural issues around discretionary decision-making and the normative impact on individuals' agency can be seen in Crisis' report 'Turned Away – the treatment of single homeless people by Local Authority homelessness services in England' (2014). In this research, the organisation undertook 'mystery shopping' of homelessness services around a variety of different types of Authorities. The eight actors with experiences of homelessness took on four different characters facing homelessness: a rough sleeper who had become unemployed, a young person thrown out of the family home, a victim of domestic violence, and a very vulnerable individual with learning difficulties. They attempted to register as homelessness and in priority need in 16 different Local Authorities which had been contacted and informed prior to the research being undertaken. The research aimed to assess both the outcome of the assessment, and the process by which the decision was made.

In 37 out of 87 visits, Local Authorities provided accommodation for that night, either in emergency provision or by negotiating a return to the household that the individual had left. In the remaining 50 visits, little or no support was given despite the fact that the individual had nowhere safe to stay that evening. Following the research, the report asserts (2014, p. iii):

Too many homeless people get little or no help because they are not deemed to be in 'priority need'... In many cases even those with learning difficulties or victims of domestic violence are being turned away without help.

The research can be seen to demonstrate the procedural implications of priority need testing. It shows that the arrangement of specific parts of the process such as lack of privacy, quality of interactions with staff, and office environment impacted on actors' experiences in a way that undermined agency. In terms of agency, the research highlights that the effectiveness of initial contact in this process is an important factor in determining the quality of information received, and that "it is imperative that people seeking help feel they are in a safe environment and are not looked down upon or treated with suspicion" (Bretherton et al. 2014, p. 11).

Two broad sets of impacts therefore emerge; access to services and aspects of assessment. Regarding the process of accessing homelessness services, the research found a tendency for Authorities to use the legislation to 'gatekeep' access to accommodation as well as focussing on proving that an individual was definitely not 'priority need' through a check box interview. This supports the work of Meers (2012) and Halliday (2004) on the use of the *Pereira* Test. For example, one shopper (rough sleeper, male) stated (Crisis 2014, p. 13): "I was told straight away that I was not a priority because I was single with no children and no medical problems or vulnerabilities". Although the priority need process is in place, individuals are still expected to receive an assessment about their housing situation rather than instant dismissal. There was a significant difference between the interactions in London Local Authorities and those outside of London. In 29 visits to London Authorities, gatekeeping prevented shoppers from receiving adequate assessments. Individuals were either told that they could not see a Housing Advisor because they were not priority need, or that they needed substantial identification before they could see an Advisor. The report notes that the details of these visits were not recorded because no meeting with an Advisor was held, therefore affecting the statistics regarding homelessness acceptances. When proper assessments were undertaken, these were found to be "superficial" (Crisis 2014, p. 15) and in 29 visits the "focus of the conversation had been on trying to demonstrate that they did not have a priority need" (Crisis 2014, p. 15). In this regard, Local Authorities were actively preventing those who were vulnerable from accessing services through the use of the 'ordinary homeless person' comparator as a test for vulnerability. This included an individual fleeing from domestic violence, a young person thrown out of the family home, and an individual with learning difficulties.

As well as the issue with aspects of the assessment process, a number of specific elements of the application process also undermined individuals' experience of agency. Shoppers noted that there

was a lack of privacy within almost all Local Authorities so that individuals had to share personal information at a reception desk in full view and hearing range of a number of other individuals. This was “very unsettling” and “compounded feelings of anxiety and shame” (Crisis 2014, p. 17). Regarding interactions with staff, these were generally “OK; but some shoppers felt ‘let down’ by the manner in which they were approached by staff.” Some stated that Advisors had “zero sympathy” (Crisis 2014, p. 18), whereas others experienced interruptions from other staff members who were “very disrespectful and treated me like I was invisible” (Crisis 2014, p. 18). The shopper in this instance found this to be very distressing, and interpreted this as the staff member not feeling like the individual was worth engaging with as a human being. This issue of dehumanising treatment was also apparent in assessments where there were no introductions between staff and applicant, but the staff member went on to ask for individuals to share very personal information. One shopper (male, victim of domestic violence) reflected “they did not ask my name. Just asked factual questions and due to lack of ID refused to help me” (Crisis 2014, p. 28). These procedural aspects of the priority need process can be seen to undermine agency. Small arrangements within the process such as expecting confidential information to be shared in public areas, or a lack of introduction from the staff member, can be seen to ‘dehumanise’ applicants with a lack of regard for the free and equal status of individuals.

In conclusion, the research found that in the majority of cases, individuals received inadequate support which largely constituted written information or help looking at Private Rented Sector availability. There was considerable inconsistency in this, and if the individuals had not been mystery shoppers they would have been left in very vulnerable situations. In some cases, even the character who was an individual with learning difficulties who had been forced out of their accommodation was not found in priority need. The visits showed that there was a lack of privacy in all Local Authorities and specific arrangements around staff interaction and access undermined individuals’ experience of agency – with shoppers often finding the experience ‘dehumanising’. Finally, the research showed that the specific tests within the law were being used as gatekeeping mechanisms for Local Authorities to limit access to their resources. The report states (Crisis 2014, p. 37):

The law is being used by some Authorities as a way of gatekeeping, with staff trying to prove that people are *not* in priority need and *not* eligible for the main homelessness duty rather than focussing on assisting them to resolve their housing need.

The research shows therefore that the use of priority need testing and the *Pereira* Test leads to both inconsistency in decision-making, and specific aspects of the process undermining individuals’ agency.

Conclusion

I argue that the use of the *Pereira* Test as a measure of vulnerability fails my test for social justice. Within my theoretical framework of the difference principle, the *Pereira* Test's criticisms can be seen to fit into two related broad categories; normative and procedural. Linked to the normative impact of the Test in terms of agency, the second category includes issues around the application of the Test such as the foundation of discretion and how this impacts of the application of the Test across different geographical areas. Due to the 'socially constructed' form of decision-making (Halliday 2004), individuals can be assessed differently across the UK with subjective factors being included in this process. The availability of housing stock and the disposition of Housing Officers could be instrumental in deciding whether an individual is vulnerable enough to receive support. This undermines the commitment to free and equal individuals in a scheme of social cooperation. This is embedded within the first set of concerns regarding normative implications of the Test. By judging individuals against an 'ordinary homeless person' the bases of effective agency are undermined. The bar against which vulnerability is defined is so high, that I suggest effective agency cannot be achieved. Furthermore, by using this mechanism, the state is acknowledging that it is acceptable for some individuals in society not to be effective agents. Referring back to Waldron's (1991) work on homelessness being a matter of social freedom: "One question we face as a society – a broad question of justice and social policy – is whether we are willing to tolerate an economic system in which large numbers of people are homeless" (1991, p. 304). He asserts that individuals' ability to function as agents is undermined through homelessness, as basic actions are banned through a lack of access to spaces in which to act. Waldron states (1991, p. 306) "homelessness *consists* in unfreedom" as persons' actions and dignity is curtailed. Homelessness can be seen therefore as undermining agency, and the low standard set by the *Pereira* Test includes an inherent acceptance of some individuals in society not being able to function as effective agents.

Chapter 10: Priority need and Wales

The inclusion of the tool in the Housing (Wales) Act

The *Pereira* Test for vulnerability was put on the face of the Housing (Wales) Act, elevating it from a tool for local decision-making and judicial guidance to a statutory provision. I have already argued that use of the *Pereira* Test, in general, is problematic as an effective agency account of social justice, due to both normative and procedural issues with the use and impact of the tool. I suggest that the inclusion of the *Pereira* Test in legislation, rather than as judicial guidance, has further implications for social justice as it diminishes the scope for individual redress.

Wales is the only country in the UK that has made this transfer of status. This inclusion fails part two of my test regarding the retrogressive nature of policy. Although individuals are more able to access support when threatened with homelessness, individuals who do not qualify as priority need when the Test is applied will still not qualify, but it will be compulsory for the *Pereira* Test to be applied. Due to the transition of the function of the tool, individuals will have no opportunity to effective redress regarding this decision, as they did have when it was judicial guidance. This is compounded by the result of a Supreme Court case in England on the test as a legal tool which ruled that it should not be used in the format has been outlined, and which is included in Welsh legislation. I argue, therefore, that regardless of the positive provisions around effective agency found in other sections of the 2014 Act, the inclusion of the *Pereira* Test on the face of the Act undermines the legislation's overall ability to enable basic justice.

Section 71 of the 2014 Act states:

(1) A person is vulnerable as a result of a reason mentioned in paragraph (c) or (j) of section 70(1) if, having regard to all the circumstances of the person's case, —

(a) the person would be less able to fend for himself or herself (as a result of that reason) if the person were to become street homeless than would an ordinary homeless person who becomes street homeless, and

(b) this would lead to the person suffering more harm than would be suffered by the ordinary homeless person; this subsection applies regardless of whether or not the person whose case is being considered is, or is likely to become, street homeless.

(2) In subsection (1), "street homeless" in relation to a person, means that the person has no accommodation available for the person's occupation in the United Kingdom or elsewhere.

Changing the test to a statutory formulation removes any scope for the legal nuances which arose throughout numerous challenges to the case law. Instead, the test is imposed on everyday homelessness duty decision-making by the statute itself. It is this transfer of function that raises concerns about the retrogressive impact of the legislation.

The Welsh Government did not initially intend to put the *Pereira* Test on the face of the 2014 Act. This changed following Stage 1 scrutiny of the Bill, when the Communities, Equality, and Local Government Committee recommended its inclusion as a means to clarify the definition of vulnerability (National Assembly, 2014d). The then Minister for Housing, Carl Sargeant AM, agreed to include the *Pereira* Test but noted that this was “not without risk” (National Assembly 2014c). He ultimately concluded (National Assembly 2014c), however, that he was, “comfortable with the current position of the *Pereira* Test and vulnerability”. The argument for including the *Pereira* Test in the Bill was that it would help achieve consistency in decision-making by creating a national approach to vulnerability. The Committee noted “some concerns that the application of the test of vulnerability may not be applied consistently without stronger definition” (National Assembly 2014d, p.55) and argued that including the *Pereira* Test would help address these concerns. This is apparently misguided, given research evidence about the already inconsistent use of priority need testing which includes the *Pereira* Test. It seems, then, paradoxical to include the *Pereira* Test as a means to cure variability in approach and develop a national process of decision-making. When asked about the decision of the Welsh Government to include the Test on the face of the legislation, Welsh Government Officials were keen to emphasise that it was the Committee that called for its inclusion. They stated “the Committee requested a definition of vulnerability for the purposes of priority need within the Act”.

Throughout the stages of legislative scrutiny both Peter Black AM (Liberal Democrat) and Jocelyn Davies AM (Plaid Cymru) tabled amendments to the inclusion of the Test. These acknowledge both the normative and procedural issues apparent through the use of this tool. When interviewed, Jocelyn Davies AM (Plaid Cymru) criticised the comparator with the ‘ordinary homeless person’ noting that the case law shows it to not include individuals with severe conditions such as depression or AIDS. Her initial amendments regarded testing vulnerability against the average person who was not homeless but this was rejected by the Welsh Government. Her second set of amendments were slightly adjusted to measure against the person who can cope with homelessness “rather than this imaginary homeless person”. Discussing the normative implications of the Test, and how her amendments would address this, Davies stated “how could it possibly be acceptable for the common sense person, he wouldn’t think that. He wouldn’t think that people wouldn’t be

vulnerable because they have AIDS or severe depression, or something like that". Here Ms Davies can be seen to refer to the reasonable rejectability of the use of the Test. Her argument is that the Test uses a different definition of vulnerable than would receive public justification. She emphasised that some of the conditions that individuals have which are not defined as vulnerable with the Test, would be classed as creating vulnerability within 'everyday thinking'. This links with my claims that the use of the 'ordinary homeless comparator' as embedding a lack of agency could be reasonably rejected. Ms Davies stated that putting the *Pereira* Test on the front of the Bill was a mistake which would not lead to consistent decision-making.

Davies' substantive amendments on individuals able to cope with homelessness were discussed in the Stage 3 debate on the Bill (National Assembly, 2014a and 2014b). Outlining the amendments, the AM welcomed clarity on the issue of vulnerability, but stated (National Assembly, 2014b):

The test that has been chosen, I think, is a misguided choice. The Test defines vulnerability as someone who would be less likely to fend for themselves and suffer more harm than the ordinary homeless person. This Test is outdated and often harmful.

She noted (National Assembly, 2014b) that the Test had caused "confusion and distress" for individuals and that "in decision after decision, those who by any reasonable common sense criteria would be considered vulnerable have been found not to be in priority need of housing". She highlighted the number of court cases generated by the Test during the 16 years that it has been used and asserted that it is "astonishing" that the Welsh Government wanted to enshrine a test so controversial in law. She proposed that the test to be used to identify vulnerability should use a comparator of "the homeless person who is able to cope with becoming street homeless" which would "make the test fairer and ensure that those who are unable to cope with street homelessness are judged to be in priority need for housing".

In these amendments, the AM proposed that the test for vulnerability to be revised so that those who would be able to function as effective agents and be homeless would not be classed as vulnerable. Again, the focus here is on agency. In closing, Davies stated (National Assembly, 2014b) "this Bill must focus on social justice principles and not make it impossibly hard for those unfortunate enough to find themselves seeking to enter this statutory system". Although the amendments were a concession to the inclusion of the process of priority need testing, we can see how Ms Davies' amendments focus on the impact of the process and *Pereira* Test in particular in terms of what individuals are able to do and be.

These sets of amendments were supported by Peter Black AM (Liberal Democrat). He also criticised the ‘ordinary homeless comparator’ stating (National Assembly, 2014b):

That could be quite a problem, particularly when you think that over 80% of homeless people will have a mental health or substance misuse issue. By any normal definition, therefore, they would be considered to be homeless. However, when you start comparing within that cohort, the test of vulnerability becomes quite harsh.

As previously highlighted, individuals can be classed as not vulnerable if they engage in behaviour that can be seen as ‘typical’ to a homeless person, such as substance misuse or suffering serious illnesses. Cases have been seen where Local Authorities have used data on the high prevalence of mental health issues, for example, to argue that because an individual is homeless they are to be expected to suffer mental health problems.

Replying to these amendments, the Minister (Carl Sargeant) rejected the amendment to test individuals against those who are able to cope with becoming homeless. He stated (National Assembly, 2014b) “the needs of vulnerable persons are being met and considered through this Bill, and we will include former prisoners who are vulnerable, for the very special reason that we have the *Pereira* case presented on the face of the Bill”. He recognised the issues with the Test, however, and referred the AM to the Code of Guidance which was being developed, asserting that some of Davies’ concerns will be addressed through this. Interestingly, the Minister also noted that he had intended to table his own amendment to remove the ‘ordinary homeless person’ comparator asserting (National Assembly, 2014b) “we have considered further how section 71 works, and I had intended to table my own amendment to remove the definition of ‘ordinary homeless person’—unfortunately, for a different reason, I believe, to the Member’s reason for seeking to amend the Bill”. The Minister was unavailable to be interviewed for this case study and it was unclear what the motivation behind, or the content of, the amendments might have been.

The 2015 Code of Guidance was subsequently developed, and the section that refers to the use of the *Pereira* Test states:

In order to establish the basis of this test the Local Housing Authority must first understand the likely harm or detriment an ordinary homeless person would face if they were to become street homeless and their ability to fend for themselves. This should be based on the ordinary person who in the experience of the Local Authority is found to be homeless within the meaning of s55. This would be the starting point for any comparison.

The Guidance amends the definition of an ‘ordinary homeless person’ from an individual who is street homeless, to one that is without residence which could include sofa surfing. Although a positive move, two issues still remain here. First, that the ‘ordinary homeless person’ comparator is still being used which, as noted, raises normative and procedural issues. Second, the face of the Act still uses the definition of ‘street homeless’. This could lead to confusion in implementation of the legislation, further compounding the issues of inconsistencies with using the *Pereira* Test.

When criticised on the decision to include the *Pereira* Test on the face of the legislation, Carl Sargeant AM and Welsh Government officials pointed to accompanying sets of Guidance as mitigating potentially negative impacts. Officials stated “the Welsh Government’s position... did not, and never has, considered that all the homeless persons as being what you could describe as a rough sleeper with complex needs” and asserted that the 2016 Code of Guidance outlines that the measurement of a persons’ vulnerability for the purposes of section 70 should be compared with the definition of an ordinary person, which is in the current code. Since the 2014 Act was introduced, there have already been two relevant Codes of Guidance (Code of Guidance to Local Authorities on the Allocation of Accommodation and Homelessness 2015 and 2016). These effectively provide the Welsh Government’s response to the recent Supreme Court Judgment, *Johnson v Solihull Metropolitan Borough Council*, concerning the *Pereira* Test, which will be discussed below.

The Supreme Court case

The controversial use of the Test in England has been further compounded by a judgement by the UK Supreme Court on the use of the Test as an interpretive guide to the Housing Act 1996. As the case concerned the English legislation, its application to the Housing (Wales) Act is not straightforward; however, as demonstrating clear authority on the same formulation, the decision should have some impact on the use of the Test within the Housing (Wales) Act.

The Court assessed three cases together where the applicant had appealed about the use of the Test in their application for housing. It ruled that the Test should not be used as judicial guidance for a variety of reasons, including it not providing an adequate definition of vulnerability. Giles Peaker (2015) outlines the three issues that were raised across the different appeals:

- i) The issue of the comparator, if any, in the assessment of vulnerability (the “*Pereira* Test” issue). This arose from *Johnson v Solihull* in the Court of Appeal.
- ii) The issue of whether and how far third party support should be considered when assessing vulnerability. This arose from *Hotak v Southwark* in the Court of Appeal.

iii) Whether the Public Sector Equality Duty in the Equality Act 2010 has an effect on determination of priority need by a disabled applicant (or one with another protected characteristic). This was a point of appeal from *Kanu v Southwark*.

Peaker argues (Peaker, 2015) that following the judgment; required changes in the use of the *Pereira* Test are, “very significant and potentially far reaching”. He notes (Peaker 2015) that the *Pereira* Test has now been changed to the simple question; “is the applicant more vulnerable than an ordinary person if made homeless?” Street homelessness is no longer an appropriate comparative measure. Noting the Supreme Court’s recognition that everybody who is homeless suffers some harm, Meers outlines (2015) the impact of this change:

The question in interpreting s.189(1)(c) therefore, is whether the applicant would be when homeless significantly more at risk of harm than an ordinary person in need of accommodation.

This is a core change in the definition of the Test for vulnerability and it enables a lower bar to be set when assessing individual cases. This can be seen as going some way to addressing the normative issues with the *Pereira* Test. Subsequent rulings have been laid down with regard to this issue, and these refer to the processes by which Local Authorities make vulnerability decisions. The notion ‘ordinary homeless person’ was clarified to mean a person who is ‘robust and healthy’. Returning to my example case of ‘K’ from the drop-in centre, as he was not robust and healthy, he would have qualified as in ‘priority need’ following this clarification of the *Pereira* Test.

The Supreme Court also decided that Local Authorities cannot now make decisions with reference to the resources available in their local area. This can go some way towards addressing issues of gatekeeping. Finally, the Supreme Court ruled that decisions on vulnerability should not be based on statistics, such as the prevalence of mental health and physical health issues, for individuals who are homeless. This particular ruling can be seen to address concerns from AMs regarding the use of the test through the scrutiny of the Housing (Wales) Act.

The impact of this ruling on Wales is currently unclear. The case was decided under the Housing Act 1996 rather than the 2014 (Wales) Act, therefore it does not apply automatically. The Minister for Housing in place when the ruling occurred (Lesley Griffiths AM), committed to revisiting the *Pereira* Test, including assessing how adopting the change in comparator would affect the Welsh legislation. In an oral statement she outlined “what I’ve asked officials to do now is to have a look at the likely impact on Wales of these very complex judgments, and they are very complex. We need to, obviously, consider the application of vulnerability in the implementation of our legislation, and I

think absolutely I have to look to see if further amendments are needed, and I'm very happy to give you that assurance" (Welsh Government 2015). It is suggested, therefore, that the Judgment in *Johnson v Solihull Metropolitan Borough Council* does not automatically apply, and that revising relevant Guidance is sufficient to address the issues that arose for decision in Supreme Court.

The revised Code of Guidance 2016 emphasises that the Local Authority must undertake a thorough assessment when looking at issues of vulnerability, and that this must take account of whether, "the individual is less able to fend for themselves if they were to become street homeless, than an ordinary homeless person who becomes street homeless" (Welsh Government 2016, p.263). This individual also needs to be at risk of suffering more harm where an 'ordinary homeless person' would be able to cope if they became street homeless. In line with the Supreme Court ruling, the Guidance states that when Local Authorities are assessing vulnerability, they "should not equate that person [the ordinary homeless person who becomes street homeless] to a chronic rough sleeper with the associated social, mental, and physical health problems that they can display" (Welsh Government 2016, p.264). Furthermore, and again referencing *Johnson v Solihull*, it is noted that; "the assessment of an applicant's ability to cope is a composite one taking into account all of the circumstances including the level of support available to the application if he or she were to become street homeless" (Welsh Government 2016, p. 264).

The Guidance clarifies that the definition of an 'ordinary homeless person' should not be that of a 'chronic rough sleeper' but of an individual who is homeless and becomes a rough sleeper. Although amending the Guidance is a positive move, a number of issues still remain. First, the 'ordinary homeless person' comparator is still being used, raising the normative and instrumental issues already discussed. Second, the 2014 Act still uses the definition, 'street homeless'. This could lead to confusion in implementing the legislation, further compounding the already inconsistent use of the *Pereira* Test. Following *Johnson v Solihull Metropolitan Borough Council*, I asked Meers for comment on the impact of this in Wales. He stated:

The Supreme Court has been clear that the correct comparator for the purposes of assessing vulnerability under priority need is not an ordinary street homeless person, but rather an ordinary person in need of accommodation. Though the distinction may appear subtle, it has far reaching consequences in how this comparator can be constructed, and may pose a particular problem for the Housing (Wales) Act, where the 'street homeless' aspect of the old 'Pereira test' has been codified in s.71.

The question arises whether the Code of Guidance is sufficiently clear to reflect this distinction, despite the comparator of 'street homeless' being within the legislation. Indeed, the Guidance tells Local Authorities to judge individuals on whether they would be less able to fend for themselves if they were to become street homeless, so the use of the term still stands in both the legislation and accompanying Guidance. I suggest that the lack of clarity around the use of an 'ordinary homeless person' comparator could lead to further inconsistencies in decision-making on vulnerability.

Third, the Guidance can be amended at the discretion of a Minister without scrutiny from the Assembly, and a revised Code of Guidance has already been issued. Finally, the composite nature of the assessment as outlined in the 2016 Guidance highlights that all available support for individuals who become street homeless should be taken into account. I am concerned that this could be used to deny the existence of a statutory duty to provide housing, if support such as hostels and homelessness services were in place in the area where the assessment was being made. The Guidance does not clarify this issue. When questioning Welsh Government Officials about the inclusion of the Test in the legislation, they recognised issues with timings regarding the creation of the Welsh legislation and the Supreme Court case. They emphasised, however, the impact of the increased prevention duties on the number of individuals who get to the second stage of the legislation and are subject to the *Pereira* Test. They stated:

The statistics for quarter 3 of 2015/16 indicate there were low numbers of people who had a decision that they were not in priority need and subsequently not owed the s.75 duty (Duty to secure). The legislation has been designed to ensure everyone will receive help under the prevention and relief duties. Following an unsuccessful relief duty, the case is reviewed for the s.75 duty.

They outlined that they were working closely with stakeholder groups on monitoring the implementation of the legislation and the current view was that there was no fundamental change.

Conclusion

In my view, it is still problematic for the Welsh Government to remain in the position where the *Pereira* Test is on the face of the 2014 Act, but is adjusted to meet the Supreme Court ruling by Guidance. This is especially true if the Welsh Government is using concepts of consistency and clarity to justify continued use and statutory enactment of the *Pereira* Test. This position does not address the procedural issues concerning use of the *Pereira* Test that I have outlined; including gatekeeping and decision-making on the basis of local housing officers' discretion. Basic justice can be seen to

remain undermined by a lack of consistent decision-making, and reliance on Guidance to ensure that the Judgment in *Johnson v Solihull Metropolitan Borough Council* is properly acknowledged.

Two interlinked normative issues remain in light of retaining the ‘homeless person comparator’ in statute law. First, there are issues around the acceptance of homeless individuals in society and a necessary condition for the state to enable the social bases of effective agency. I have argued that individuals who are homeless might not be in the position to function as effective agents, whether they are street homeless or ‘sofa surfing’. Returning to Waldron’s (1991) arguments on freedom rights, if individuals do not have a private space to undertake basic functions their freedom is undermined, as is their agency. Therefore, the existence of individuals who are homeless not through choice can be seen to fail my necessary test for achieving the social bases of effective agency through the implementation of social policy. Second, the notion of ‘ordinary homeless people’ as different from ‘ordinary people’ is problematic in terms of equal agency. This artificial separation creates procedural problems around how people who are homeless are understood and treated within society, in turn undermining their agency.

Finally, the inclusion of the *Pereira* Test on the face of the legislation can be seen as a retrogressive move particularly in the context of the Supreme Court case on the use of the Test within the Housing Act 1996. By shifting the function of the Test, the least advantaged can be seen to be worst off. I have established that the use of the *Pereira* Test within priority need testing undermines basic justice. The application of this as statute, rather than judicial guidance, acts to make the worst off in society even worse off in their application for assistance with homelessness.

Conclusion

Summary statement of the argument of the thesis

As stated in the Introduction, this thesis aimed to contribute to the debate around the practical application of political theory and political philosophy. It sought to address issues around Stears' (2005, p. 326) critique of a "dismal disconnection" between theory and practice, and create a Rawlsian account of social justice in social policy. The development of the theoretical framework of the research aimed to demonstrate that Rawls' Difference Principle could be used as a mechanism by which to engage with contemporary policy. This mechanism would then be able to test whether social policy delivered social justice based on an account of reasonableness.

The research reflected this developmental approach, with Part 1 of the thesis laying the groundwork and theoretical structures on which to build the development of the policy test in Part 2. First, the argument is made that a place should be made for philosophical frameworks and concepts within the policy-making process. The role of philosophers within the policy-making process can take two forms, either by philosophers further understanding how policy can be a good arena to apply philosophical concepts; or, by those involved in the creation of policy being motivated to include philosophical frameworks within their decision-making process.

The second theoretical structure is the statement that there needs to be some justification and scrutiny of policy due to its function as a type of intervention in individuals' lives. The concept of legitimacy capital is rejected in favour of the liberal principle of legitimacy. This can be achieved through the use of the Rawlsian concept of reasonableness as a regulatory function. On this account justification is achieved through an assessment of how the policy affects the Rawlsian concepts of constitutional essentials and matters of basic justice.

The final theoretical structure outlined within Part 1 is the argument that the Difference Principle should be the tool with which this form of justification can be achieved. This is because of the inclusion of a veto for the worst off in society through the creation of the principle within the Original Position. Here the focus on individuals as having three fundamental interests is introduced, laying the groundwork for the revision of the metric of the Difference Principle to take account of the ability of individuals to pursue a conception of the good. This section brings together a combination of concepts from within different parts of the Rawlsian canon – *A Theory of Justice* and *Political Liberalism* – and outlines how they can be considered together as a means to make the argument for the inclusion of philosophy in considerations of policy.

Part 2 outlines the ways in which the Rawlsian accounts as outlined in the previous section are to be modified in order to make the Difference Principle a test which can be applied to social policy. There are a series of modifications considered here; the use of Reflective Equilibrium, the metric of Primary Goods, and the operational characteristics of the test. The test as outlined at the end of this section is such:

- a) Does this policy enable the least advantaged individuals to be effective agents?
- b) Does the policy make the least advantaged individuals in society worse off in terms of effective agency?

The metric used for this test pares back the standard Rawlsian account of Primary Goods and emphasises his argument for self-respect as the most important Primary Good. Building on the discussion from Part 1, the policy test measures whether basic justice can be achieved through the policy by individuals being able to function as effective agents – being able to create and pursue a conception of the good for themselves. The test also emphasises the role of retrogression: if the worst off in society are able to act as effective agents, are they less able to do this because of the impact of the policy? This is positioned within Maslow's (1943) account of a hierarchy of needs which enables a clearer account to be given of this idea of effective agency, in a way that is easy to understand within the framework of 'everyday thinking'. The final, operational, aspect to be outlined about the test is that it works according to Scanlon's (2000) account of 'reasonable rejectability'. The test is used in a negative context, pointing out where social policy fails to deliver basic justice, but goes no further.

The first two Parts of the thesis outline how a test for social justice should be developed in order to be applied to policy. It also introduces, however, initial applications of philosophy to policy throughout. I argue that the use of philosophical frameworks to tangible policy issues can create new interpretations of the issue, and subsequently new policy responses. In Part 1 examples of the application of Waldron's (1993) concept of housing as a matter of social freedom is applied to the Housing First approach to homelessness. Throughout, the argument is made that this approach to the application of philosophy to policy uses quotidian concepts such as distinguishing between reasonableness and rationality. The example of the 'Bedroom Tax' is introduced to demonstrate this, as well as support the discussion around policy as a contested area and the presentation of a continuum of policy which relates to basic justice. Throughout Parts 1 and 2, therefore, there is both the development of a way of applying philosophy to policy but also a demonstration of how this can be used to help understand the process itself.

Part 3 constitutes the full application of the test developed in Parts 1 and 2 in the form of a case study on the Housing (Wales) Act. This piece of legislation was chosen as a case study due to the content of the legislation, the proximity of the researcher to the development of the legislation, and the fact that the Act was the first piece of full housing legislation made by the Welsh Government. As the piece of legislation addressed the issue of homelessness, it could be understood to fit the section of the policy continuum which addresses basic justice. The aim of the case study was to see whether any insight could be gleaned through the application of the developed test to the legislation, and how this would work. The application highlighted a particular issue within the legislation around the use of priority need testing for those who are homeless, and more specifically concerns around the inclusion of the *Pereira* Test as a part of this process. The case study demonstrated first, that there was value in applying the philosophical test that had been developed as it drew out normative issues and presented them as problematic in a way that had not been necessarily been considered. Second, the application was supported through engagement with key stakeholders in the development of the legislation or the impact of affiliated legislation. Individuals were able to engage in discussions about the legislation from within the philosophical framework, using concepts that had been developed within this. We can see then, that this use of normative language is not alien in the policy sphere as practitioners and politicians were able to hold discussions about these types of elements of the policy-making process. This demonstrates that although normative theory is abstract, it is not disconnected from the everyday concerns of policy-makers.

Research Aims and Implications: Applied Philosophy

The first research aim was to contribute to the application of philosophical frameworks to contemporary policy issues and argue for the positive role that philosophers can play in the development of policy. The research has shown how the application of this test for social justice can create new understandings of contemporary policy. By applying the test to the Housing (Wales) Act, areas where the change in legislation has improved or undermined individuals' capacity for effective agency have been identified. The application of the test enabled the identification of the *Pereira* Test as problematic on normative, procedural, and retrogressive grounds in terms of its impact on individuals' capacity to be effective agents. As King states (2003, p.671) of the discussion of homelessness in terms of freedom rights "this argument undercuts questions of resources and priorities, and goes straight to a moral imperative". It is important, therefore, to include these normative discussions within debates around policy. Housing policy, in particular, often frames debates in terms of efficiencies and resources, but not often the normative element of what the

impact of housing policy on people may be. Particularly when we are considering policy debates and discussions around homelessness, this normative element is crucial. However, it is not purely housing policy which this test applies to. The test can be used on all forms of social policy that can be identified as impacting on basic justice as a way of identifying normative concerns.

We can see from the example of Waldron's (1993) work that using philosophical concepts can create different understandings of tangible policy issues. This is one of the developments which is aimed for in this research – using the philosophical distinction between reasonableness and rationality to generate normative understandings of potential and actual policy impact. In this context, the focus is on housing but it need not be. These understandings, in turn, inform how governments and services respond to the issue. King goes on to outline the importance of these different understandings in terms of campaigning for change. Again discussing the conceptualisation of housing as a freedom right he states (2003, p. 671):

It is therefore a much more powerful argument than those used by campaigners over the last 30 years. Instead of making claims for resources, which, inevitably, have counter-claims attached, the argument is based on something basic and elemental to human life.

Not only, then, does the application of philosophical frameworks help generate new understandings of issues. It can also be useful also in creating stronger arguments for calling for change. In this thesis we have seen that one argument or criticism against the inclusion of the *Pereira* Test in the Housing (Wales) Act is that the Supreme Court was reviewing the legislative tool throughout the creation of the Act, and then ruled against it in its current format once it had been included within the Act. This is an argument against the test from within the legal framework, and addresses issues of consistency in approach between legislative frameworks. However, we have also seen that a more convincing argument is that there are normative concerns around the use of the Test. This research has shown that the use of the *Pereira* Test can be seen to fundamentally undermine individuals' ability to choose what they want to do and be.

Research Aims and Implications: A Rawlsian Approach

As well as contributing to the literature on the role of philosophy in policy, a further aim of the research was to understand whether a Rawlsian framework in particular could be developed. Through the modifications of elements of Rawls' theory, I think this has been achieved. Although there has been some adaptation of some of the particulars of Rawls' account, I argue that the framework as developed belongs within the Rawlsian tradition. Rather than drastically change mechanisms within the theory, I have taken an approach which either brings together different

elements of his canon or emphasises certain aspects over others. The focus throughout, however, is the central aspect of his account – that individuals are free and equal. The main modification to the use of the Difference Principle was the shift to a focus on effective agency. This was done with reference to Nussbaum (2006) and Daniels (1985) both of which consider themselves within the Rawlsian tradition. The modification centred, therefore, on highlighting Rawls' argument for self-respect as the most important Primary Good and discussing this in terms of a focus on functionings. The use of Maslow (1943) here, enabled a stronger connection to be drawn between understanding what needs individuals have, whether these are being met, and how this links to higher level needs such as being able to create a conception of the good life for themselves. The other elements of modification were matters of emphasis or reconciliation. For example, looking at the concept of reasonableness and how this fits with basic justice and the formulation of the Difference Principle as containing a veto for the worst off. Although a new account of how and where the Difference Principle should function, this account has been wholly built from mechanisms within *A Theory of Justice and Political Liberalism*.

My account also strengthens refutations of the charge that Rawls has partaken in the “philosopher’s withdrawal” (Walzer 1983, p. xiv) from real politics. We can see from the modification of the use of the Difference Principle, and its application to the Housing (Wales) Act, that the Rawlsian account of justice does have something important to say about tangible issues such as homelessness. Through the framework we can give an alternative account to what it might mean to be homeless, as well as an analysis of the impact of particular legal and policy tools that have been created to address the issue. New understandings can be created, then, around homelessness as a policy issue and the subsequent policy and legislative responses to this. As King (2003) highlighted, giving normative accounts of what policy responses should be can often be more useful than using a resource- or efficiency-based argument. A Rawlsian account of homelessness and critique of the *Pereira* Test in particular have already been used, then, to make political arguments and highlight problems with this piece of legislation. More importantly than this though, is the ability of the framework to highlight normative issues within social policies. A failure to consider these issues further means that the fundamental interests of individuals to be able to pursue a conception of the good are being ignored. Providing a normative account, additional to a resource-based argument, enables us to analyse the relationship between policy and the central aspects of what it is to be a citizen in a scheme of social cooperation.

Limitations and Further work

As can be expected there are limitations with this piece of work, and this links with the need for further work. The framework has been used for me as a researcher to analyse a piece of legislation and write a thesis on it. It has also been used to communicate with key individuals within the policy-making process. It is far off, however, from becoming a policy tool. A single case study has been undertaken which has demonstrated the use of the framework in creating new understandings of housing policy. This needs to be supported through exploring the application of the test in other policy areas in order to understand whether it works beyond the initial application site of housing policy.

There are two specific elements to developing this further work, therefore. The first is to apply the test to other pieces of legislation to see whether the delineation of the policy continuum within the legislation is appropriate. A wide variety of different types of legislation should be engaged with here to understand whether the characterisation of basic justice and policy within the research is correct, as well as whether the framework can have use when applied to different types of policy. Second, work needs to be done on developing this as a specific policy tool. This would involve further consideration around who would be using the tool, how it would be implemented, and how the results would be used. This would be supported by engagement with the policy sector. As highlighted in Chapter 1 there are a variety of types of measurement for the impact of policy and legislation such as Equality Impact Assessments and value for money tools. As outlined, I think this framework has worth as a policy assessment tool as it is not linked to a specific set of protected characteristics nor is it a measurement of efficiency. However, there would need to be engagement with those who would use the tool around how it can be developed to be both useful and functional.

Contribution to knowledge

This research makes the case for philosophers and philosophical frameworks to be used within the policy-making process, and provides a means by which to do this. By modifying a Rawlsian concept – the Difference Principle – this test can be used to provide a normative account of the impact of social policy on the fundamental interests of individuals. It gives an account of how policy can impact on issues of basic justice through enabling or undermining individuals' ability to create and pursue a conception of the good. Although it modifies some aspects of the Rawlsian account of justice, it does this through focussing on the core of the account – individuals as free and equal. It uses Rawls' account of people as having two moral powers and the subsequent fundamental interests in pursuing a conception of the good, and outlines a way in which this can be taken account of in

policy-making processes. The case study highlights the impact that this can have when applied to policy, and provides an example of the identification of a specific policy mechanism which can be understood to undermine individuals' fundamental interests. Rather than a simple acceptance that efficiency and value for money is the standard against which social policy should be evaluated, the research makes the argument for, and provides an example of, creating normative accounts of the impact of social policy on the lives of individuals.

Appendices

Appendix 1: Methodological Approach

In this appendix I will outline the methods used to undertake the case study in line with my methodological approach. In order to investigate whether my modified Difference Principle can function as a policy tool, I have undertaken a case study using the tool on the Housing (Wales) Act.

Rationale for research design

Yin (2003) has provided a series of pieces of work looking at the case study method as a distinct method in and of itself, rather than as a part of a broader approach to mixed methods. He states that case studies should be used “when the focus is on a contemporary phenomenon within some real-life context” (2003, p. 1). In this regard, the case study method is ideal for an investigation into whether the Housing (Wales) Act delivers social justice as it “allows investigators to retain the holistic and meaningful characteristics of real-life events” (Yin 2003, p. 2). This method is beneficial for two reasons. First, as I am applying philosophy to public policy the method enables a broad account to be given of how the legislation developed, how decisions were made, and the potential impact of these decisions. Second, I have used the case study to undertake research with those who were involved in the legislative process. By using this method, I was able to investigate the proposals and potential implications of the Act, how these decisions were reached, and the impact these might have following implementation through the theoretical framework of my modified test. This research strategy meets the three conditions that Yin describes for a case study; the type of research question, the extent of control an investigator has over actual behavioural events, and the degree of focus on contemporary rather than historical events. The research question in this instance is: does the Housing (Wales) Act deliver social justice? This can be assessed through my two part test.

The Housing (Wales) Act was analysed in ‘real time’ whilst it was being developed in the National Assembly. As Yin (2003) notes, case studies can be seen to include many of the same techniques as analysing history. However, there needs to be a direct observation of events which is supported through interviews with actors involved. As Schramm (1975, p. 12) highlights “the essence of a case study...is that it tries to illuminate a decision or set of decisions: why they were taken, how they were implemented, and with what result”. My interviews have a twofold role: first, interviews with policy makers and politicians demonstrate the role of reflective equilibrium in decision-making. Second, interviews with those who have been affected by similar policy create a standpoint by which the impact of the legislation can be judged. My case study therefore engages with the legislative process at three stages; the white paper, the Bill as published, and the Act as passed. By undertaking

direct observations of the legislative process supported by interviews with stakeholders in the Act, I am able to track decisions around legislative proposals and analyse how these proposals fit with social justice. This supports Wolff's (2011) four-part structure of applying philosophy to public policy through understanding the context of the policy arena, as well as the political context around the decision-making itself.

Richards discusses the role of elite interviewing and asserts (1996, p. 200) that "its function is to provide the political scientist with an insight into the mindset of the actor/s who have played a role in shaping the society in which we live and an interviewees' subjective analysis of a particular episode or situation". He goes on to outline positive contributions that this method can bring to research. First, elites can help in interpreting documents particularly if they are responsible for the creation of these. Second, elites can help interpret personalities within the process that is being investigated. Third, they can help provide information which was not recorded publicly. Finally, interviewing elites can lead to other interviewees being suggested through a 'snowballing' method. Within my interview process the first, third, and final characteristics were apparent. I interviewed individuals who were involved in the creation of key documents, and interviewees signposted me to other individuals involved in the process to approach for interviews.

Richards (1996) also outlines potential negative aspects of elite interviewing, which I aimed to mitigate. The first is that the data gleaned from this type of interviews can be unrepresentative. Second, interviews can take place a long time after the events which are being researched and individuals' memory of these events can be problematic. Finally, individuals can provide subjective or misleading information. The construction of my case study aimed to mitigate these potential impacts. First, it was carried out 'real time' as the piece of legislation was being developed. This can address any issues around the memory of participants. Second, representatives from all political parties as well as policy-makers and individuals from the third sector were interviewed. Finally, the information they provided was triangulated with documentation from the legislative process which was in the public domain such as National Assembly Committee sessions.

As well as providing a suitable approach for the type of content I wanted to evaluate, the case study method also supports my methodological approach. Yin (2003, p. 13) writes "you would use the case study method because you deliberately wanted to cover the contextual conditions – believing that they might be highly pertinent to your phenomenon study". This aspect of the method therefore contributed towards the stakeholders in the legislation that I wished to interview. I identified three groups which could outline, or experience, difference contextual conditions: political representatives, policy-makers, and people who had been affected by similar legislation. I undertook

interviews with individuals in each group throughout the study to create a robust account of the contextual conditions of the legislation. As I will outline, the primary focus within the case study was the proposals around homelessness in the Act. I therefore undertook interviews with those who had been, or who were, experiencing homelessness in order to understand the contextual conditions of those whom the homelessness legislation would affect.

Collecting Data

Having outlined the reasons why I have used the case study method, I will now describe the specifics of my case study on the Housing (Wales) Act. Yin (2003) asserts that there are five components to a case study research design. I will present these here, alongside the details of my own case.

Generic Case Study	Housing (Wales) Act Case Study
A study's questions	How far does the Housing (Wales) Act deliver commitments to social justice?
Its propositions, if any	Legislation and social policy should deliver social justice This is necessary for the intervention of policy to be justified
Its unit(s) of analysis	Unit of analysis: Housing (Wales) Act Sub-units of analysis: Specific legislative proposals within the Act
The logic linking the data to the propositions	The modified difference principle: <i>Social justice is delivered when social policy (in the broadest sense) enables the least advantaged individuals to have effective agency</i>
The criteria for interpreting the findings	Does the legislation match/meet the principle, and to what extent?

My case fits the design of a single-case, holistic, study. I am looking at a single piece of legislation; the proposals within it, the decision-making that led to this, and the potential impact this might

have. Yin (2003, p. 41) states “one rationale for selecting a single case rather than a multi-case design is that the single case represents the *critical test of a significant theory*”. In this way, a single-case study enables me to critically test my modified difference principle in order to understand whether it is able to be used as a policy tool.

Although the broad unit of analysis is the holistic Housing Act, when undertaking the first analysis of the case through documentation I identified the specific legislative proposals within the Act as sub-units of analysis. The interviews drew on these sub-units with different individuals giving a different analysis of the proposals in regard to social justice. This led to a focus on a specific sub-unit: the inclusion of the *Pereira* Test for vulnerability within the legislation. The presentation of the case will therefore be structured around the sub-units of general homelessness proposals, with a deeper analysis on the *Pereira* Test. Interviewees highlighted other sub-units as key matters of social justice; which are outlined through interview data. This, again, is a strength of the case study as Yin notes (2003, p. 59) “the specific information that may become relevant to a case study is not readily predictable”. My assumptions were that homelessness was the most significant matter of social justice within the legislation; interviewees saw other legislative proposals as key to enabling effective agency. Through the case, I hope to demonstrate that the Housing (Wales) Act does not pass my test for social justice in social policy as the inclusion of the *Pereira* Test does not deliver the bases of effective agency and can therefore be ‘reasonably rejected’.

As the main unit of analysis was legislation, the first source of evidence was documentation. This provided a factual overview of the content within the legislation, and the initial process by which it was created. Within both this source, and the supporting source of interviews the process of triangulation was used. For example with documentation, I used a range of political and administrative documents for initial analysis primarily focussing on the white paper, Bill as published, and Act as passed. Analysis of these documents, as well as claims made by interviewees were checked against further documentation including transcripts from National Assembly Plenary and Committee meetings, and supporting legislative documents such as written statements and secondary legislation. Yin (2003, p. 89) asserts that within case studies interviews assume the format of “guided conversations rather than structured queries” which are “fluid rather than structured”. Within my interviews these followed a broad set of questions which asked individuals specific questions regarding how the legislation had changed between the white paper and the Bill, and how this impacted on social justice. I also asked normative questions about policy recommendations and how they thought the legislation as a whole delivered on social justice. The interviews therefore were semi-structured and allowed for respondents to discuss their experience of the legislative

process, or their interpretation of the potential impact of the legislation. The interviews show that decision-makers were committed to social justice, but needed to reconcile differing demands of justice in terms of use of resources and delivering effective agency.

Yin (2003, p. 90) states that these types of interviews need to operate on two levels at the same time; “satisfying the needs of your line of inquiry while simultaneously putting forth ‘friendly’ and ‘non-threatening’ questions in your open-ended interviews”. This aspect of case study interviews was crucial with the nature of respondents I was engaging with in order to access the standpoint of those who could be affected by the legislation. The individuals within the third set of interviewees – those who had been affected by similar legislation – were experiencing homelessness, often causing chaotic lifestyles. In order to engage appropriately, I had to ensure that the individuals were comfortable with me asking them a range of questions about often personal aspects of their lives. In order to understand the legislation, I had to analyse the standpoint of those who will be affected by the specific proposals – in this case, those who are experiencing or facing homelessness. Yin asserts (2003, p. 92):

Interviews are an essential source of case study evidence because most case studies are about human affairs. These human affairs should be reported and interpreted through the eyes of specific interviewees and well-informed respondents can provide important insights into a situation.

Analysing Data

Aberbach and Rockman (2002) suggest that the use of open-ended questions within elite interviews – as I have used as part of the study – suit a variety of types of data. First, they are suitable for the collection of individuals around complex or abstract issues but which require a degree of prior knowledge. Within my interviews, respondents were discussing a piece of legislation that they were currently engaged with but considering this through more abstract philosophical concepts. Second, the authors state (2002, p.674) that these types of questions allow for a maximisation of response validity as “open-ended questions provide a greater opportunity for respondents to organise their answers within their own frameworks”. Finally, they assert that elites are receptive to being involved in this sort of data collection as they prefer to articulate their views and be explanatory. There are, however, issues with coding this type of data. Aberbach and Rockman (2002) assert that there are three basic types of codes for open-ended questions within interviews: manifest coding, latent coding, and global coding. Within this case study I use latent codes where “the characteristics of the response coded were not explicitly called for by the questions themselves” (2002, p.675). I

identified the codes according to the development of my theoretical framework. These were: social justice, the most vulnerable in society, the role of the state as an enabler, and effective agency. These codes had two functions; first, to analyse the key legislative documents according to my philosophical framework. Second, to identify themes within interview data. The use of these enabled me to apply the Difference Principle and generate a normative analysis of the legislation with regards to basic justice and effective agency.

Interviews with those facing a tangible impact of similar legislation were triangulated with responses from political representatives, and policy makers in order to achieve a comprehensive insight into how the legislation was formed, and what its impact might be. This delivered both a standpoint of those who had been affected by the legislation, and an overview of the process of decision-making that led to the creation of the Act. This was then tested against my modified Difference Principle to see whether the white paper, Bill as published, and Act as passed could deliver on social justice. In terms of effective agency, my analytical strategy was therefore twofold; a theoretical analysis of whether the parts of the legislative process met criteria of social justice, and an explanatory evaluation of how and why this may or may not be the case. My initial analysis of documentation showed a great variance between the legislative proposals in the white paper, and those contained in the Act as passed. An explanation was therefore needed of why these proposals had been removed, and the impact this might have on the ability of the legislation to deliver social justice. Another strength, therefore, of the case study method is its iterative nature. This enabled me to track developments of the sub-units of the analysis ‘real time’ and focus on specific areas of social justice whilst the legislation was being developed. I could then respond to aspects raised through interviews, such as the prevalence of the *Pereira* Test, and focus analysis on this area. Yin describes (2003, p.122) a case study process as “refining a set of ideas”. This emphasis on refinement has allowed me to adapt my analysis of the legislation to contemporary developments which is apparent in the structure of my case.

There are a number of aspects of, or issues within, my case that are important to note. First, both Yin (2003) and Wolff (2011) outline the importance of understanding policy context when undertaking a case study. Yin writes (2002, p. 61) “each case study investigator must understand the theoretical or policy issues because analytic judgements have to be made throughout the data collection phase”. As previously noted, Wolff (2011) outlines a four stage process for undertaking a philosophical analysis of policy. This includes investigating current practice, understanding the legislative processes around this and how this arose, and finally understanding what stakeholders currently disagree about. I suggest that this is a strength of my case study. Throughout the study I

have worked as a political researcher providing monitoring of developments in Welsh politics. I have been able therefore to easily access all public documents about the legislation, as well as watch all scrutiny sessions as the legislation was passing through the Assembly. This has allowed me to meet Wolff's criteria. Furthermore, having worked within the homelessness field, I also have an understanding of the tangible 'real-world' impacts of legislation as well as the political processes that have created them. Regarding issues with the case study process, Yin outlines the potential issue of bias within a single-case study. In order to address this, I have tested my initial findings on colleagues through a series of papers given at conferences. Following this, I was able to contact further individuals to be involved in interviews to give a broader account of the development of the legislation. This case study enables a normative understanding of the piece of legislation to be developed, and therefore supports the argument within the thesis that there is a place for philosophical frameworks within the policy-making process.

Appendix 2: Interview respondent information

Interview number	In text reference	Respondent information
1	Welsh Government Official A	Welsh Government Official
2	WLGA	Representatives from the Welsh Local Government Association responsible for housing and social justice
3	Dr Peter MacKie	Dr Peter Mackie, Cardiff University
4	Mark Isherwood AM	Mark Isherwood AM, Conservative, Spokesperson for Housing
5	Respondent 5	Head of Policy, third sector homelessness organisation
6	Welsh Government Officials	Welsh Government Officials responsible for oversight of the legislation
7	Peter Black AM	Peter Black AM, Liberal Democrat, Housing Spokesperson
8	Jocelyn Davies AM	Jocelyn Davies AM, Plaid Cymru, Housing Spokesperson
9	Respondent 9	Director of third sector housing organisation
10	Former Welsh Government researcher	Former Welsh Government researcher who worked on development of legislation

Appendix 3: Bibliography

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