

Legitimacy and Diversity

An examination of the problem pluralism presents to the legitimacy of
democratic regimes

By

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Chapter 1: Introduction

The foundations of liberalism lie in respect for the intrinsic value of human freedom. This respect is usually expressed through the defence of the twin values of autonomy and equality. It was during the Enlightenment that liberal values acquired concrete philosophical foundations in the writing of political philosophers such as Locke, Rousseau and John Stuart Mill. Over the past two hundred years, liberalism has become the dominant ideology in the West and, during this time, liberals have always argued that their values are founded on truth and are thus superior to all other political and moral principles.

John Rawls's discussion in *Political Liberalism* moves away from this line of argument.

The political landscape today is very different from that of fifty or one hundred years ago; one central difference being the rise of various cultural groups. In the post-colonial era, people are becoming more vocal and aggressive about asserting their cultural identity and pursuing what they consider to be 'the good life'. This agitation for ethno-cultural recognition has become the leading factor in conflicts around the world.

With the publication of *Political Liberalism*, John Rawls has become the first major political theorist to recognise and to think seriously about the conflicts arising from ethno-cultural and religious differences. He

realises that no theory of justice can be considered sound if it does not take pluralism into account.

The objective of this dissertation is to examine Rawls's recognition of pluralism as the central problem for theories of justice and his arguments for the legitimacy of a neutral liberal regime. Various questions will be raised. Is Rawls's assumption that pluralism is reasonable well-founded? Will a neutral regime, which takes a 'hands-off' approach with regard to the veracity of different doctrines, necessarily gain the favour of those ruled by it? Is a regime necessarily legitimate if its citizens believe it to be so? Or should there be some objective criterion by which one can judge the legitimacy of a regime?

This essay is divided into three sections. Section one will discuss whether pluralism does indeed present a genuine problem for the legitimacy of constitutional democracies. Section two presents John Rawls's argument that the neutral, liberal state offers the best solution to the problem of pluralism. Section three will investigate criticisms by two respected philosophers, Thomas Nagel and Joseph Raz.

Section I: Analysis of the Problem

Governments exercise coercive power over their citizens. What makes this exercise of coercive power over autonomous and rights-bearing individuals morally justifiable? In a modern liberal democracy, it is understood that the citizens are autonomous and that they have the right to conduct their lives according to conscience. It is understood also that the citizens are equal. Therefore, governments have the obligation to enforce law and order so that no citizen will be unfairly impeded in the pursuit of her goals.

A major preoccupation of liberal political theory is to identify the boundary between the public and the private spheres, that is, the boundary between legitimate and illegitimate exercise of governmental power over the citizens. This question, however, is not the focus of this essay. The main concern of this essay is more fundamental: why should democratic regimes be permitted to exercise their power over the citizens in the first place. In other words, this essay is concerned with those arguments that legitimate democratic regimes.

In modern constitutional democracies, the exercise of governmental power is legitimate because it is exercised according to a constitution that represents consensus on the principles according to which coercive state power may be exercised. However, this consensus

of fundamental principles is seldom realised in modern democracies, since by definition they are characterised by the fact of pluralism.

The problem of political legitimacy for liberal democratic theorists is this: how can there be legitimate exercise of coercive power when no consensus exists due to the diversity of different groups holding often incommensurable conceptions of 'the good life'?

This section (Section 1) focuses on clarifying the problem of political legitimacy in the face of diversity and is divided into two chapters.

Chapter 2 investigates whether 'the fact of reasonable pluralism' is indeed real. While we see persistent disagreements around us and are tempted to accept the fact of pluralism, this does not mean that pluralism ought to exist; nor does it mean that the pluralism that exists is reasonable. It is important to note that, with good reason, the vast majority of philosophers in the history of western philosophy have held the view that pluralism is only a transitory situation. Philosophers from Plato to Thomas Aquinas and beyond have argued that disagreements are transient and are due to human error, which reason and careful proofs will set right in due course. Chapter 2 will examine closely the arguments for and against reasonable pluralism.

In Chapter 3, the arguments for democratic legitimacy based on consensus will be presented and critically analysed. The notion of legitimacy and how social scientists and political philosophers understand it also will be distinguished. Briefly, the distinction is that

political philosophers seek moral standards by which to judge the legitimacy of different regimes, while social scientists seek simply to describe the relationship of domination. This distinction is important, as I will argue in Section 3 that Rawls's project in *Political Liberalism* falls short of devising an objectively argued standard of legitimacy.

CHAPTER 2: The Problem of Reasonable Pluralism

Contents:

- A. Introduction
- B. The Problem of Reasonable Disagreement
- C. The Difference Between Justification and Truth
- D. The Fact of Pluralism
- E. Two Conceptions of Political Pluralism

A. Introduction

This chapter seeks to investigate whether 'the fact of reasonable pluralism' is indeed reasonable and whether it is a problem worth the protracted attention of liberal democratic theorists. This investigation will proceed in stages, the first of which examines the question of whether reasonable disagreements are justifiable. In the second stage, key concepts of liberal political theory and their inter-dependent relationships will be accounted for and clarified. The third stage will examine whether 'the fact of reasonable pluralism' is indeed justifiable or merely an oxymoron. Finally, I will argue that the major problem facing liberal democratic political theory today is finding political consensus in the face of pluralism.

B. The Problem of Reasonable Disagreement

Something which has troubled me since I began studying philosophy is the question of why reasonable people disagree. Awed by the powers of logic and its rigorous employment by analytic philosophers, I have often wondered why philosophers cannot produce all-conquering arguments that no reasonable person can refute. While tutoring first-year students I found myself preaching the merits of reason, teaching that because philosophy does not rely on empirical evidence, one must be even more rigorous in one's critical analysis of the logic of the arguments. The unifying, singular power of reason, I found myself saying, will guarantee consensus and ultimately truth.

When challenged by the fact that, over the past two thousand years, no reasoned argument has ever sprouted genuine agreement, that no consensus regarding the 'big questions' is in sight, that both sides of the argument are perfectly reasonable, I assure those under my care that at least one side of the argument must be fallacious (they merely have to further develop their powers of reasoning in order to notice this). I have often wondered whether these assurances regarding the eventual triumph of truth through reason are meant to convince myself or the students.

The fact of the matter is that intelligent, meticulous, good-natured and learned individuals disagree with each other. Amongst academic philosophers, the disagreements seem not to be the result of sloppy reasoning, over-inflated egos or disagreements surrounding facts – errors

caused by sloppiness or ego are picked up and corrected relatively quickly within current academic discourses.

The problem of reasonable disagreement is further complicated when one considers disagreement outside the homogenous security of university corridors. In the world of politics, where people are divided across cultural and ethnic lines, those factors which lead to disagreement increase exponentially. This fact complicates the task of analysing the problem of reasonable disagreement: is it possible that, where parties agree on the premise, opposing but equally sound arguments may exist?

Very often, disagreements between cultures arise from the observation of differing customs. The gesture of greeting someone with a kiss, for example, is understood differently by a Japanese and a French person. In this kind of situation, misunderstandings arising between an uninitiated Japanese woman and an uninformed (but polite) Frenchman can be cleared up relatively quickly once the Frenchman understands that a kiss is a significant gesture of romantic, if not life-long, commitment in Japanese culture, and once the Japanese woman becomes familiar with French customs. This kind of cross-cultural understanding, however, is rare. While differences in customs of etiquette are relatively simple to mediate, variations in world view (often incommensurable) are often irreconcilable. One merely needs to consider

the different conceptions of 'the good life' held by a classical Marxist and a Christian or by a Confucian and a democrat to see this is true.

Cultural differences and their complexities, however, are useful in analysing why reasonable people disagree. Cultural differences demonstrate why opposing attitudes can arise in confrontation with a set of common facts. Returning to the earlier example, let us imagine that a quarrel ensues as the result of the Frenchman's kiss. Both the Japanese and the French individuals, whilst confronting the same fact can, interpreted according to their own customs, display reasonable yet opposite responses.

The disagreement in this case is the result of differing attitudes toward the fact. If one understands that the cause of the disagreement relates not to the truth of the fact itself but to the context in which the fact is interpreted, then one can understand why there are two opposing attitudes. Assuming that they are both reasonable people, once aware of the relevant Japanese customs of courtesy and the meaning of a kiss in that societal context, the Frenchman should acknowledge that it is reasonable for the Japanese woman to react the way she does. The reverse is also true, once the Japanese woman understands the meaning of a kiss in French society – that it is a gesture of harmonious greeting – she should acknowledge the reasonableness of the Frenchman's attitude.

Similarly, while the Marxist may be hostile to the Christian and the Confucian dissatisfied with the democrat, it is possible that the Marxist

can understand why the Christian will hold a different attitude towards the same fact (though he might think it to be in grievous error). There seems not to be a qualitative difference between attitudes shaped by one's world view and those shaped by social custom. The difference lies only in the complexity of the context. Relative to explaining the kissing etiquette of a culture, explaining a world view is far more complex and difficult.

It may be argued that although both world views and social customs affect attitude, a world view is different because it is often restrictive. For example, the Christians' and Marxists' world views hold other world views to be in error. This attitude, however, does not necessarily preclude an understanding of why others hold the attitudes they do. In other words, while the Japanese woman may disapprove of the French custom, she can nonetheless understand why French people are not shy about kissing in public.

C. The Difference Between Justification and Truth

Consider this example. When you enter the kitchen, the cheese left on the table from the night before has tiny bite marks on it. You investigate the surroundings and you see little paw prints leading from the cheese to a hole in the wall. Trying to understand what has happened to the cheese, you come up with three hypotheses.

- (a) There were mice in the kitchen and they bit the cheese.
- (b) Your little brother, although a nice boy, decided to play a joke on you because you played joke on him last week.
- (c) Little green aliens flew down from space and bit the cheese.

The most justified hypothesis, that is, the simplest explanation, (Occam's Razor) is (a), with (b) being somewhat likely and (c) the least likely. However, notice that while (a) is justifiably the most likely, it does not mean (a) is true. All three hypotheses are physically and logically possible and they can all coherently account for the facts of the case. However, while all three are possible, one is better justified in choosing a) over b), b) over c) and by inference, a) over c).

Consider two people arguing about a conceptual issue: 'what is it for colour to be real?'. The disagreement is not over truth of some fact. They are not arguing about the scientifically verifiable nature of light and its refraction; rather, they are arguing about whose account of the reality of colour is the more justified. The argument over colour, a conceptual case, is different from the argument over the bite mark on the cheese, a factual case. With the cheese example, there is a truth independent from the reasoned justifications. One can plainly see that the most justified explanation need not necessarily correspond to the facts. However, the most justified argument is considered the correct view until a better justification is raised.

Moral realists may raise the objection that they *do* believe that there is objective truth in morality, that the assertion 'killing an innocent person is wrong', for example, is either true or false in the factual sense. However, their contention that their view is 'true' is itself subject to the strength of their justification. In other words, because the question of whether killing an innocent person is wrong is a normative and a conceptual one; and because there is no factual way of checking its truth, the answer to the question must always remain interim.

Not all disagreements are reasonable however. Some disagreements are plainly unreasonable. For example, it is not reasonable to argue that one can run one hundred kilometres in twenty minutes. Nor is it reasonable to argue that the earth is flat. Given the laws of logic, if X is taller than Y and Y is taller than Z, it is unreasonable for me to say that Z is taller than X.

On acceptance of the same facts, it can be reasonable to disagree. That is, it is possible for opposing sides to give cogent and sound justifications for the position they hold. The misunderstanding between the Japanese lady and the French gentleman is such a case. It is reasonable both for the Japanese lady to find the Frenchman's actions offensive to her and for the Frenchman to think nothing of it. Understanding the context of social customs, the disagreements are reasonable. A major problem, with which this essay will not deal, is the standard of reasonableness. How does one decide when a world view is

unreasonable? While it is quite easy to say that it is unreasonable, given the evidence we have today, for one to argue that the earth is flat, it is far more difficult to argue that the cultural practice of polygamy is unreasonable.

D. The Fact of Pluralism

Nation states today are made up of culturally diverse peoples. Diversity gives rise to different and often incommensurable perspectives on issues of morality and politics. Recognition of minority cultures gives rise to questions of autonomy, language rights, traditional ritual practices, land claims etc. Since the end of the Cold War, the most common source of violence in the world is ethno-cultural conflicts¹. This fact makes finding peaceful resolutions to disagreements across ethno-cultural lines the most important task for political theorists today.

Western political thought offers surprisingly little guidance for dealing with pluralistic societies. A survey of the canon of western political philosophy reveals that political theorists have always theorised an ideal polis consisting of a homogenous citizenry. The almost total neglect of the multiethnic realities of political society is interesting when one realises that the great political philosophers all lived in multiethnic societies undergoing ethno-cultural conflicts of one form or another. Aristotle, Rousseau and Marx were not members of the ruling class when they taught and wrote down their ideas.

Even within the tradition of liberal political theory, not much emphasis is placed on respecting the antagonistic positions across the ethno-cultural divide. J.S. Mill, the great exponent of liberalism and free speech argued that no perspectives must be denied the opportunity to be heard. This is not because all perspectives are valid in a cultural, subjectivist sense; rather, Truth – eminently reasonable – will eventually triumph in the ‘market place of ideas’².

Philosophers in general have been faithful disciples to the doctrine that reason will ultimately lead one to consensus. Despite the varied opinions on whether truth lies within human capability, there is little dissent that reason is the correct path that guarantees eventual consensus. With consensus – uniformity in belief and evaluation³ – one is reassured that one is getting closer to truth, even if one does not hold that understanding truth lies within human capability. Aquinas, for example, held that consensus on fundamentals was a condition guaranteed by God⁴. Kant argued that it is in the very nature of reason that consensus will eventually be forthcoming. Throughout the western philosophical tradition, consensus has been viewed as something which is assured by the nature of how we as humans understand the world. Rescher points out that:

...consensus was viewed [in the tradition] not just as something to be desired, but as something whose eventual actualisation is

effectively assured by some principle deep-rooted in the nature of things as we humans confront them in the world.⁵

In liberal political theory, finding consensus is key because the legitimate exercise of state power depends on it. For a democratic regime to exercise coercive power, it needs consensus from its citizenry. The details of this legitimisation process, first devised by Locke, will be accounted for in Chapter 3. The focus of the present chapter is to focus on the reasonableness of 'reasonable pluralism'.

E. Two Conceptions of Political Pluralism

There are two conceptions explaining why political disagreements⁶ occur. The *imperfection conception* assumes that disagreements are the result of mistakes on the part of at least one party. The imperfection conception takes the traditionalist, absolute understanding of truth. This conception explains disagreements as the result of the individual's defective reasoning, their lack of time and patience to understand the matter thoroughly, or their minds being clouded by passion.

The second explanation on why people disagree is termed by Mason as the *contestability conception*. He writes;

... political disagreements are intractable because rational constraints on the proper use of political terms allow for a variety

of different applications of them: so long as there is some measure of freedom of expression, disagreement over their proper use will inevitably arise.⁷

According to the contestability conception, when political disagreements arise, the dispute is over which of a number of reasonable interpretations being used is correct or valid. The contestability conception does not have to resort to mistakes in reasoning, lack of attention to detail or misunderstanding of Truth in accounting for disagreement; it merely has to point out that it is impossible to have absolute mutual understanding. Conceptual questions such as 'what is justice?' or 'is colour real?' demonstrate that when one begins to ponder rigorously on the meaning of a concept, few people ever reach consensus. One way of understanding the contestability conception is to understand political disagreement as the product of differences in attitude, not belief⁸.

Neither the imperfection conception nor the contestability conception is completely satisfactory. This is because from academic and daily experience one realises that disagreements can be the result of error and/or different attitudes toward the facts.

In my judgement, the contestability conception is very much dependent on a skeptical position or a relativist position with regard to truth, while the imperfection conception depends very much on an

absolutist position with regard to truth. As such, the two conceptions pose the same set of problems to the absolutist and the relativist. The relativist faces the nihilist position that there is no truth, that everything is permissible. Replacing truth's anchoring and guiding role on how one ought to act, the relativist uses either rational-choice theory or the empiricist power theory. Rational choice and power theories of morality suffer from the criticism that they attempt to reduce autonomous moral agents to impersonal calculations of efficiency. One can reason inductively from the increasingly complex rational-choice models that such a reduction is unlikely, if not impossible, due to the nature of free human agency.

The weakness facing the absolutist is her faith in the mystical existence of Truth. The justification is circular because the absolutist argues that reasonable arguments will ultimately lead to perfectly reasonable conclusions that constitute Truth. In fact, she presumes the conclusion in her premises when she begins from the position that truth and perfect reason are the same. The absolutist also faces a pragmatic problem; contrary to what St. Thomas Aquinas and Kant felt, reason does not seem to strike everyone with the same kind of irresistible, revelation-like force that they experienced.

It is beyond the scope of this paper to deal further with the arguments against empiricist theories of politics. It must be noted that the stance of this essay is a normative one. That is to say, it is my

contention that rational choice and other empiricist attempts to reduce politics to non-moral criteria is futile, if not dangerous. Instead of working toward political solutions that may be beneficial to autonomous individuals, empiricist theories are slaves of efficiency, with the result that individual autonomy may be sacrificed for the sake of systemic efficiency.

If it is inevitable that the free exercise of human reasoning and the nature of human language will lead to the fact of reasonable pluralism, then the question for the liberal political philosophers is this: how is one to build a society founded on the freedom and autonomy of its citizens when they remain fundamentally divided by reasonable religious and moral philosophical doctrines?⁹

Notes:

¹ Kymlicka, *Multicultural Citizenship*, p. 1

² Mill, J.S., *On Liberty*, see chapter 2 "Of the Liberty of Thought and Discussion", pp. 36-89

³ Rescher, *Pluralism*, p. 1

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Mason, *Explaining Political Disagreement*, p. 2

⁷ Mason, *op cit.* P. 3

⁸ Mason, *Ibid.*

⁹ Rawls, *Political Liberalism*, p. 47

Chapter 3: The Legitimacy of Democratic Regimes

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- B. Two Perspectives on Legitimacy
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- D. Normative Understanding of Legitimacy
- E. Consensus
- F. Legitimacy through consensus
- G. The Problem

A. Introduction

This chapter has three objectives. First, it seeks to clarify the two central concepts to democratic theory, namely: legitimacy (normative and descriptive) and consensus. Second, it seeks critically to examine the relationship between legitimacy and consensus. Finally, together with the arguments presented in the first chapter that pluralism is reasonable, it will examine whether the fact of pluralism presents a real and worthwhile problem facing democratic theorists, and if so, why.

B. Two Perspectives on Legitimacy

Why do citizens obey the laws and policies of the government? Ought they to obey the government? Are there reasons for obedience other than

the threat of punishment? Modern governments are bureaucratic machines that enact new policies, laws and regulations. What justifies the force of these policies, laws and regulations? And what justifies governmental sanctions against those who disobey? How is the ability of governments to limit citizens' right to own property, through fines, regulations and taxation, justified? And what legitimises a government's restriction of its citizens' freedom of movement when said citizens are sent to prison? These are just some of the questions posed by political theorists dealing with the legitimacy of government.

There are two ways to pose the question of the legitimacy of the relationship of authority between the state and its citizens. One can either ask (1) why and how the relationship of domination by the government over the citizens is sustained or, (2) whether the relationship is morally justifiable. Both are valid and important questions which interrogate the legitimacy of any state-citizen relationship. The question of how governments sustain their power over the citizens is the one asked primarily by social scientists. Social scientists study the actual relationship between the governor and the governed and document the manner in which the relationship is sustained. Political theorists question whether the relationship is moral, and attempt to discover and set down universalistic *norms* in the context of which the moral rightness of the power relationship can be judged.

The notion of legitimacy is understood differently by political theorists and social scientists. This is because their activities have different purposes and operate according to a different logic¹. Social scientists understand legitimacy in the context of the society they are studying. They realise that whatever criteria legitimise government in one society may be inadequate for legitimising government in another society². What matters to them is not what may be universally true – true regardless of cultural norms – but rather an understanding of what is *believed* by the citizens in the society in question. The position of a social scientist is analogous to that of an anthropologist who studies the religious beliefs of a culture: the anthropologist is not interested in the existence of the deity; rather she is interested in the existence of the belief in the deity. Similarly, the social scientist is not interested in the fact of legitimacy (as claimed by the government); she is interested in the presence or absence of belief in this legitimacy in the minds of the citizens.

Max Weber's definition of legitimacy has been definitive (and has been the focal point of much criticism) in social-scientific studies of the relationship between the state and its citizens. In his words:

It should be self-evident that the sociologist is guided exclusively by the factual existence of such a power of command, in contrast to the lawyer's interest in the theoretical content of a legal norm. As far as sociology is concerned, power of command does not exist unless the

authority which is claimed by somebody is actually heeded to a socially relevant degree.³

The concern of the sociologist is the actual relationship of domination. Her study focuses on describing accurately the factual details of the relationship and giving an analysis based on these facts. Her interests, as Weber points out, do not lie in the theoretical context of the legal (or moral) norm. The concern of the sociologist with regard to legitimacy is descriptive.

In contrast, the concern of the political theorist with regard to legitimacy is normative. For a political theorist, a ruling government is legitimate when its power is justifiable according to a rationally defensible set of normative moral principles. Instead of studying the factual existence of the power relationship between the state and its citizens, a political theorist aims to examine the *justifications* for the existence of the prevailing power relationship. She seeks to judge, according to the most general principles: justice, right and social utility⁴, whether there are indeed sufficient rational justifications for the continuing power of the governor over the governed. In other words, the political theorist focuses on the *moral justification* rather than on the prudential explanations of the citizens' obedience to the rule of government.

While both political theorists and social scientists are interested in political legitimacy, their different reference points and aims inevitably lead

to disagreements. For example, a stable power relationship, according to the sociologist, is legitimate. The same stable power relationship may be judged illegitimate according to the norms and values considered appropriate by a political theorist. While political theorists and social scientists have distinct aims in their respective fields, artificial and rigorous demarcation is neither necessary nor desirable. This is because political theory is (or ought to be) concerned with engaging with the world at large by making value judgements. This task will be poorly served if political theorists do not have a thorough, empirical understanding of the state of a relationship between government and citizens. The criterion for a 'good' society, once discovered by political theorists, ought to be utilised as a standard tool by which to judge and improve existing societies. Normative issues also serve social scientists by challenging and sharpening their methodological practices. This is critical, since overcoming methodological difficulties is nowhere more important than the study of power relations, an area fraught with potential for obfuscation⁵. Thus sociological accounts of legitimacy will not be neglected in my aim of offering a comprehensive account of the bases for legitimacy.

C. Empiricist Understanding of Legitimacy

a. Weber's Sociological Account

Max Weber is one of the founding fathers of twentieth century social science. His contribution is the starting point of almost all subsequent social-scientific contributions to the discourse on legitimacy. Weber argues that the social scientist is not to make moral judgements regarding a given power relation. Power is legitimate, Weber argues, when those involved in the relationship believe it to be so. He writes that legitimacy is equivalent to a *belief in legitimacy* and that legitimate power is power *that is regarded as legitimate*⁶. Weber's preoccupation is to 'describe' rather than to 'account for' domination. He argues that there are both 'inner justifications' and 'external means' whereby the state dominates the citizen. By 'external means' he refers to state apparatuses, such as the police force, used to coerce and enforce obedience of the citizens. By 'inner justifications', he means the internal justification of government for its legitimacy. This point is somewhat ambiguous as he suggests at one point that 'legitimacy may arise from meeting "the expectation of specific external effects, that is, by interest situations"⁷.

Subsequent theorists have expanded on the discourse according to this 'value-neutral', reductionist stance. R. Merelman, for example, calls legitimacy "a quality attributed to a regime by a population". The quality he speaks of is "the *outcome* of the government's capacity to engender legitimacy"⁸. This Weberian stance on legitimacy has been subjected to much criticism. Theorists argue that to reduce legitimacy from an interrogation of the characteristic of states to a study of people's beliefs is in

effect to empty the concept of moral content⁹. R. Graftstein points out that to do so means that “legitimacy no longer represents an evaluation of a regime; indeed it no longer refers directly to the regime itself”¹⁰.

Weber describes three ideal types of legitimacy which characterise the relation between the state and its citizens: traditional, charismatic and legal/rational. Traditional legitimacy refers to the ‘authority of the eternal yesterday’. The relation of domination is legitimate because it is sanctified through ancient customs or mores. The charismatic type of legitimacy explains the relationship by the personal devotion of the citizens to the individual leader. The leader may be the elected warlord or the political party leader, his leadership is legitimate because of heroism or some other quality of individual leadership¹¹. The legal/rational type is legitimate by virtue of a widely-held belief in the validity of the rationally created rules.

b. Criticisms

For the purpose of this essay, Weber’s descriptive account of legitimacy shows two distinct inadequacies. The first lies in Weber’s silence on the legitimacy of democratic regimes, and the second in that his account of legitimacy offers no aid toward making normative judgements; in other words, one cannot use Weber’s theory to evaluate whether one kind of political relationship is more or less legitimate than another.

(1) Silence on legitimacy of democratic regimes

Democracy is understood by liberal democrats to derive its legitimacy from the people. Although democracy does not fit neatly into one of Weber's three ideal types, he does assert at one point that 'it is readily possible that, instead of recognition being treated as a consequence of legitimacy, it is treated as the basis of legitimacy; *democratic legitimacy*'¹². However, Weber does not generally hold democracy per se as a form of legitimacy. He feels that any political regime can be classified under one of the three types of legitimacy. Thus, a democratic regime might be legitimate because it is the tradition of the society, because it is headed by a charismatic authority figure, or because the procedures and rules governing it are considered rational and fair. Generally, Weber considers democracy to fall into the charismatic category. David Beetham argues that Weber falls back on the charismatic type when classifying legitimacy according to his own elitist sympathies¹³. This is because Weber considers popular mandate to be the mere approval of the masses for an outstanding leader. In other words, legitimacy by popular mandate is but a demonstration of popularity of and common support for a charismatic leader. It is for this reason that Weber, biased by his elitist sympathies, does not make allowances for value-rational or democratic legitimacy in defining his three ideal types¹⁴.

(2) Silence on judging normative issues

The concern of this essay is the legitimacy of democratic regimes. More specifically, this essay is concerned with judging whether political liberalism offers positive normative justifications for the legitimacy of constitutional democratic regimes. Weber's descriptive theory that legitimacy is constituted simply by citizens' *belief* in the legitimacy of their government offers no theoretical help in solving the issues of this essay. First, there are neither actual citizens one might poll nor existing states whose stability one may judge in this purely theoretical matter. Second, the central concern of this dissertation is 'why *ought* citizens to obey their government?' not 'why *do* citizens obey their government?'. The answer to the question of why citizens ought to obey their government will necessarily appeal to a kind of rational, objective standard. The answer to why citizens do obey will necessarily appeal to empirical description.

D. Normative Understanding of Legitimacy

a. The source and end of legitimacy

The question with which normative political theory concerns itself can be formulated in two ways: Ought the citizens to accept the authority of the (democratic) state? And, what are the limits of the (democratic) state's authority over its citizens? The first question seeks the source of the state's authority over its citizens; it is concerned with the moral validity of the state's right to expect obedience and cooperation from its citizens. The second question investigates the purpose of the state. It concerns the purpose of governments and thus the limits of their authority. The

purpose or the ends of a government may be moral goodness (Hegel), greatest utility (Bentham) or to guarantee natural rights (Locke). A government is legitimate when it is judged to be effective in fulfilling its purpose; conversely, when the government is not performing its function effectively in pursuit of its ends, it must be judged illegitimate.

Section II will discuss Rawls's political liberalism in detail. It will suffice to point out here that the source of legitimacy in Rawls's political liberal state is consensus on the fundamental values of democracy. The exercise of state power is legitimate insofar as it is exercised according to the principles prescribed in the constitution. Somewhat unconventionally, Rawls's political liberal state has no moral aim. This is because Rawls's state does not prescribe to any moral, philosophical or religious doctrines, which are inevitably contentious and are not conducive to consensus.

Historically, justification for the rightfulness of the source of political authority was based on divine authority. In the sacral world view, the hierarchical state of affairs in human society is both natural and divinely ordained. Questions about the legitimacy of kingly authority were therefore muted¹⁵. With the process of secularisation, however, philosophers of the early modern age began to seek justifications for governmental authority other than the word of God.

Other than Divine Will, there were two alternative sources of legitimacy. Firstly, legitimacy can be derived via tradition. Thus, a regime

is legitimate because it is the rightful heir of the traditional line of authority, a line that extends back to time immemorial. The other possible justification is based on consistency with some infallible truth, for example, Marxism-Leninism.

Theories that based the legitimacy of a government on divinely ordained hierarchy or traditions suffer from obvious fatal criticisms today. With the general shift to a human-centred world view that began during the European Enlightenment, divine authority is employed only by a few Islamic states in the world today.

Besides offering unsatisfactory bases for the source of legitimacy in the modern world, justifications involving God or tradition do not adequately explain the purpose of government and hence the limits of authority. Sacred texts, traditions and their interpreters offer contradictory interpretations of the purpose of government and are hardly clear about the bounds of governmental authority.

b. Social Contract Theories

Contractarian justifications formulated by early modern political philosophers such as Hobbes and Locke give far more compelling justifications than do appeals to God or tradition. In my judgement, there are at least two justifications for this assertion. First, the preference for secular explanations today is inevitable. With the rise of empirical

methods and their appeal to reason rather than authority, appeals for legitimacy to anything other than autonomous reason are unpersuasive. This is because across-the-board respect for divine dogma no longer exists. Second, not only do contractarian theories better suit humanist (as opposed to sacral) world views, the contractarian theories give simpler and more definitive explanations for both the source and the ends of government's legitimacy. Judged according to criteria of simplicity, consistency and efficiency in accounting for political relationships, contractarian theories are superior to theories that appeal to God or tradition.

Before the contractarian school of justifications for the legitimacy of state authority is sketched, it is important that conceptual preliminaries on the corresponding relationship between rights and duties are addressed.

Questions of the nature of political relationships necessarily involve the correlating claims of rights and duties between agents. Questions of the normative legitimacy of a relationship between X and Y investigate whether the correlating claims of X and Y are morally valid and therefore binding.

This relationship is more clearly explained by illustration. Jane promises John that she will wash his car. The agreement gives rise to rights and duties as follows:

1. John has a right to have his car washed by Jane.

2. Jane has a duty (moral obligation) to wash John's car.

The commitment made by Jane gives rise to a morally binding obligation on her part; it also gives John a correlating right to expect Jane to fulfil her obligation. The promise made by Jane to John gives rise to a morally binding relationship between the two¹⁶. The relationship is a normative and moral one in that we can judge a failure on Jane's part to wash John's car to be morally blameworthy.

Analogous to the morally binding relationship between John and Jane, contractarian philosophers argue that a similar bond exists in a political relationship, which also consists of rights and obligations. In the same way that the claims John and Jane have against each other are legitimated by prior agreement, the claims between the state and its citizens are legitimate because there was prior agreement. In other words, contractarian theories contend that the *source* of legitimacy of the moral obligation on the part of citizens to obey their government and the correlating right of the government to exercise its authority over the citizens is derived from consent; the consent that begins with the social contract.

In the same way that the source of legitimacy of government authority is based on consent, the ends of governmental purpose are also defined by consent. The purpose of government is determined by the formulation of the state of nature, according to different political philosophers. For Hobbes, citizens consent to the authority of the government in exchange for physical

security. In the case of Locke, the government is to perform the task of upholding the natural rights of the citizens. The purpose of government therefore determines the extent of its legitimate authority. In other words, if the governmental mandate in the social contract is to provide minimum physical security for the citizens, then redistribution of resources or interference with the strictly private affairs of the citizens will be outside the terms of the social contract and thus illegitimate.

E. Consensus

Consensus is a concept utilised more by social scientists than by political philosophers. Consensus is used as an empirical term to describe the processes or relationships of a society and to explain its cohesion and stability¹⁷. Like consent, which is central to legitimating the authority of a government, consensus of the citizens is central in maintaining the stability of the regime. Democratic systems are characterised by open competition for governmental office, the obligation of the citizens to respect the authority of the elected government and respect for the opposition on the part of the elected government. In other words, democracies are characterised by public disagreements and tensions between ruling and opposition parties. The special problem for democracies generally is that the system requires a great degree of tolerance and self-restraint by all the parties involved. Because democracies are characterised by conflicting

interests, it is natural to expect some normative force that produces this toleration¹⁸.

Traditionally, democratic theorists have asserted that fundamental loyalty to and belief in the principles of democracy is what holds democracies stable. J.S. Mill asserts,

... that however important the interests about which men fall out, the conflict did not affect the fundamental principles of the system of social union that happened to exist; nor threaten large portions of the community which the subversion of that on which they had built their calculations, and with which their hopes and aims had become identified¹⁹

Though not explicit about the 'fundamental principles', it is clear that Mill understood them to include constitutional principles. Mill understood that the force which keeps democracies stable is a powerful and unanimous agreement on the fundamentals of democracy. The fundamental consensus, Mill holds, is so strong that no conflict at the political level will unsettle the democratic system.

F. Legitimacy through consensus

Like other schools of political theorists, democratic theorists are concerned with the legitimacy of a state's authority. Liberal democratic

theorists derive their theories of legitimacy from the premise that individuals are autonomous rights holders. From this premise, it follows that any interference in the rights of the citizen needs to be justified. In democratic theory, the legitimacy of the government is justified or legitimated because the citizens give their consent. In order for a democratic regime to be considered legitimate by all its citizens, it requires their unanimous consent. In other words, consensus is required.

Consensus among the citizens on the fundamental principles of democracy is central to a stable democracy. Democratic theorists have long assumed that common consensus among citizens, characterised by open disagreements and opposing interests, regarding what constitutes democratic principles that keeps the democratic political system from disintegrating into chaos.

Finding consensus that maintains the stability of the government has not been considered a major obstacle in the past. In the past, liberal theorists such as Mill assumed either that there already exists a consensus on democratic values (as is the tradition in Britain) or that such consensus will eventually be reached (with education, as in colonial India). Their faith in reason led classic liberals to believe that their arguments for democracy would eventually triumph in the arena of public deliberation and that consensus would eventually be reached.

This faith in the eventual triumph of reason and complete consensus has since been shattered. Today the only consensus, after centuries of

public deliberation, is that no consensus on fundamental doctrinal issues can reasonably be expected. The fact is that today's societies are multicultural. Cherishing their unique identities and often holding antagonistic and incommensurably conflicting fundamental beliefs, it is no longer possible for democratic theorists to hold that theirs is the most reasonable and, therefore, the superior view. Without consent from non-democrats and without consensus of democratic principles, democratic regimes are in fact illegitimate.

G. The problem

Consensus is the *conditio sine qua non* of legitimate democratic regimes. Reasonable pluralism is a fact that will always persist in modern societies. Pluralism therefore poses a real problem for democratic theorists who seek to argue for the normative legitimacy of the democratic regime.

Notes:

¹ D. Bentham, *The Legitimation of Power*, p. 7

² D. Bentham, *op cit.*, p. 6

³ quoted by R. Barker, *Political Legitimacy and the State*, p. 47

⁴ *Ibid.*

⁵ *Ibid.* p. 7

⁶ *Ibid.* p. 8

⁷ *Ibid.*, p. 48

⁸ D. Bentham, *op cit.*, p. 9

⁹ *Ibid.*

¹⁰ *Ibid.* pp. 9-10

¹¹ *Ibid.*

¹² *Ibid.* p. 52

¹³ Bentham, *Max Weber and the Theory of Modern Politics*, p. 266, quoted by Barker, *Ibid.* p. 53

¹⁴ Bentham, *Max Weber and the Theory of Modern Politics*, quoted by Barker, *Ibid.*, p. 53.

¹⁵ William, C., "Legitimacy and Modernity", *Legitimacy and the State.* (ed.) William C., p. 3

¹⁶ Beran, H., *The Consent Theory of Political Obligation*, p. 5

¹⁷ Partridge. P., *Consent and Consensus*, p. 71

¹⁸ *Ibid.*, P. 97

¹⁹ Leavis, F. R. (Ed.) *Mill on Bentham and Coleridge*, (London 1950), quoted by Partridge, *Ibid.*, pp. 97-98

Section II: John Rawls's Solution

In Section I, the problem reasonable pluralism poses for the normative legitimacy of democratic regimes was examined. It concluded not only that pluralism is a fact, but also that its existence is reasonable. Therefore, it is unreasonable for liberal democratic theorists to dismiss those holding non-democratic views as heretics to be converted to the 'true faith'.

The recognition that non-liberal conceptions of 'the good life' and politics cannot be dismissed as unreasonable and that the non-liberal views' right to exist must be respected means that liberals need to re-examine how they go about arguing for liberal values.

The objective of this section is a systematic presentation Rawls's argument. This section is divided into three chapters (4-6). Chapters 4 and 5 focus on Rawls's *A Theory of Justice* and his *Political Liberalism* respectively. Chapter 6 reconstructs Rawls's argument in *Political Liberalism* that the neutrality of the state with respect to different conceptions of 'the good life' is the best legitimating argument for democratic regimes.

Chapter 4: A Theory of Justice

Contents:

- A. Introduction
- B. The Aim of Political Theory
- C. 'justice as fairness'
- D. The Two Principles
- E. The Feasibility of the Two Principles
- F. Conclusion

A. Introduction

This chapter will offer an exposition of John Rawls's political theory as forwarded in *A Theory of Justice*. It will account for Rawls's theory of 'justice as fairness', since it is upon this foundation that solutions to the problem posed by the fact of pluralism for the legitimacy of democratic regimes will later be built, examined and criticised.

This chapter will follow closely the text of Kukathas and Pettit (*Rawls: A Theory of Justice and its Critics*) in presenting an expository account of Rawls's project as expounded in *A Theory of Justice*. This chapter will be structured as follows: first, an outline of the aims of political theory will be presented; second, the original position will be described; third, Rawls's theory of 'justice as fairness' will be presented; and fourth, Rawls's two principles of 'justice as fairness' will be examined. Finally, Rawls's defence,

that a theory of 'justice as fairness' is feasible and will lead to stability in a well-ordered society, will be examined.

B. The Aim of Political Theory

Rawls's 'guiding aim' in *A Theory of Justice*, as he phrases it, is "to work out a theory of justice that is a viable alternative to these doctrines [utilitarianism and intuitionism] which have long dominated our philosophical tradition"¹. Rawls was dissatisfied with the domination of utilitarianism in its various forms in English-language moral and political philosophy. Moreover, Rawls did not feel that 'workable and systematic' theories existed which could satisfactorily oppose utilitarianism. As a result, people were forced (unsatisfactorily) to choose between either utilitarianism or some form of intuitionism. Intending to remedy this situation, Rawls wrote *A Theory of Justice*. In Rawls's words, it was an attempt to 'generalise and carry to a higher order of abstraction' the traditional doctrine of social contract and to argue for a systematic account of justice superior to utilitarianism².

Traditionally, political theory is considered to have two aspects: the desirable and the feasible³. For political theorists, the desirable refers to values and ends that the government ought to pursue. The feasible, on the other hand, refers to what the government, constrained by limited resources, can in fact accomplish for its citizens. In the first half of the twentieth century, political theorists mainly concerned themselves with the

higher-order questions of the desirable. Instead of judging and discerning what values and principles the government ought to pursue, the political theorists engaged in conceptual analysis of terms such as 'freedom', 'political obligation' and 'democracy' – terms that are used in the study of what the desirable ought to be.

Political scientists and economists, on the other hand, used their newly developed scientific techniques in data collection and statistical analysis to focus on the feasibility problem. As is pointed out by Kukathas and Pettit⁴, Rawls's *A Theory of Justice* broke new grounds in re-amalgamating the two aspects of political theory. *A Theory of Justice* paid attention to both the feasibility and the desirability aspects of political theory. Rawls's contention was not only that the value system for which he argued was morally good and hence desirable; he was equally concerned with whether the values he argued to be desirable were actually acceptable and practicable in society⁵.

On the side of the study of the desirable political principle, Rawls puts forward the concept of 'reflective equilibrium'. He argues that a desirable political principle – a theory of justice – ought to cohere with our reflected and settled intuitions of justice. In other words, a theory of justice should systematically and explicitly express our intuitive sense of justice. When the principles are applied in actual cases, the principles ought to lead to judgements that cohere with people's intuitive sense of rightness⁶. This coherence between a desirable theory of justice and our intuitive sense of

justice can be explained by analogy: in the same way that rules of grammar are a systematic exposition of the intuitive sense of the native speaker's sense of the correct way of speaking, a desirable theory of justice is a systematic exposition of our intuitive sense of what is just⁷.

On the side of the study of the feasible, Rawls focuses on the requirement of whether his theory will lead to stability within a well-ordered society. In carefully considering the feasibility of his theory, Rawls breaks away from the traditional practice of merely considering the desirability of theories.

Both *A Theory of Justice* and *Political Liberalism* pay close attention to the dual considerations of feasibility and desirability. In *Political Liberalism* Rawls is satisfied that 'justice as fairness', as proposed in *A Theory of Justice*, is desirable; however, he is not satisfied that a contemporary democratic society (inevitably characterised by pluralism) can be stable if governed according to the two principles of 'justice as fairness'. The 'serious problem', says Rawls in *Political Liberalism*, is that it is unrealistic to expect a well-ordered society to be stable, as is suggested in section III of *A Theory of Justice*⁸. Because 'justice as fairness' can be regarded as a comprehensive doctrine, and because it is a fact that different, incommensurable, but reasonable, comprehensive doctrines will develop in free democratic societies, it is unreasonable to expect an across-the-board consensus on 'justice as fairness'. This chapter, however, will focus only on

providing an exposition of Rawls's theory of 'justice as fairness' as presented in *A Theory of Justice*.

C. 'justice as fairness'

Rawls's original position is a device to be used for considering the desirable socio-political arrangement. Instead of asking directly what will be the desirable political principle for people to choose, Rawls asks what socio-political arrangements we would choose if we were able to decide for ourselves⁹. The choice of a set of principles of justice which are 'to govern the assignment of rights and duties and to regulate the distribution of social and economic advantages,'¹⁰ Rawls argues will comprise his "justice as fairness".

a. A Contractarian Theory

Rawls's original position can be seen as the same kind of 'state of nature' device used by contractarian political philosophers such as Hobbes and Locke. However, there are fundamental differences between the contractarianism of Rawls and that of Hobbes or Locke. First, the original position is not intended to be a legitimising device. In other words, Rawls does not mean to argue that a prior contract gives rise to duties and obligations between the citizen and the state. Rather, the contractarian device is used as an evaluative and heuristic device¹¹. Instead of making assertions about human nature in the state of nature and thereafter

constructing arguments for the ideal polis, Rawls's original position is framed to bring to the surface our intuitions of justice as well as bring both rationality and fairness to our intuitions. The contractarian side of Rawls's work is distinctive and, in my judgement, largely successful in bring our intuitions to the fore. However, Rawls's contractarianism can also cause confusion for those who are familiar with traditional contractarian arguments.

Locke's contractarianism¹², for example, argues that because each individual is born free, a state can only claim legitimate authority over him when the individual gives consent. The consent by the individual, ether explicit or implicit, forms the basis of a legitimate relationship between the state and the citizen. Rawls does not intend that his contract should have a legitimising role, nor does he see the contract as an actual historic event. Rather, the contract is envisaged as a device to test both the desirability and the feasibility of the arrangement.

b. Original Position

In the original position, we are asked what principles of justice we would choose if we were veiled in ignorance of our own particular interests, interests that affect our ability to thrive in society. These personal interests are: knowledge of our place in society, our class position or status, knowledge of our natural abilities such as our strength and intellect, knowledge of our conceptions of 'the good life' and knowledge about whether

we are conservative or bold with regard to risk¹³. These differences in natural abilities and social backgrounds doubtless contribute to people's successes in life and result in inequalities in society. In denying people knowledge of their particular advantage and disadvantages, Rawls intends to capture our intuitive idea that people ought not to gain or lose in situations for which they are not responsible. In Rawls's words, the distribution of these attributes is 'arbitrary from a moral point of view'¹⁴.

The original position is also intended by Rawls to be a kind of rational-choice situation, in which everyone attempts to make rational choices based on self-interest. By denying everyone knowledge of their particular advantages and disadvantages, Rawls effectively puts everyone in exactly the same position. Rawls argues that, when choosing from exactly the same position with exactly the same knowledge, all will unanimously choose 'justice as fairness'.

Before Rawls's 'justice as fairness' is presented, it is important that the original position be more closely examined. Following Kukathas and Pettit, four questions concerning the original position will be asked: who chooses? what is chosen? with what knowledge? and with what motivation?

Who chooses?

The people in the original position are not persons in the historical past nor are they a conglomeration of all the people at any time¹⁵. Rather the person, as conceptualised in the original position, is "represented [in]the

way in which it is appropriate to conceive people *when thinking about justice*¹⁶. In other words, the original position is merely an imaginary position; it is the position in which we imagine ourselves to be when we consider what is the just principle. Because everybody is assumed to be equally ignorant, equally rational and similarly situated, it can be expected that everyone will be convinced by the same arguments¹⁷.

What is chosen?

What is chosen in the original position is the basic structure of society. The basic structure, in Rawls's words, means

... the way in which the major social institutions fit together into one system, and how they assign fundamental rights and duties and shape the division of advantages that arise through social cooperation. Thus the political situation, the legally recognised forms of property, and the organisation of the economy, all belong to the basic structure.¹⁸

The choices the individual makes in the original position are not specific choices of policy or ideology; rather she is making a general choice of principle. This principle is general in form, applies universally to everyone and is publicly recognised as the final court of appeal for resolving conflicts between people¹⁹. It is assumed that the principles chosen, when

established, will result in regimes that uphold the rule of law²⁰. The rule of law connotes a social arrangement that the law will apply universally and equally to everyone so that people will know what consequences to expect if they do one thing or another²¹.

Two further given features of the basic structure that people will choose in the original position require attention. The first is that the basic structure is to govern the society of people with a sense of justice. The second is that the society exists under the typical circumstances of justice²².

The premise that people have a sense of justice assumes that people will be inclined to adhere to the principles chosen, that they will not be “pathologically driven towards defection”²³. In order for the principles chosen to lead to a stable society (for them to be feasible), Rawls suggests that it must be assumed that most people in a society have a sense of justice.²⁴

Assuming typical circumstances of justice means accepting that a society is not an Eden in which an unlimited supply of goods satisfies people’s wants; nor are the people saints who put others’ interests before their own. Rather, the society has scarce resources and the people living within it are first and foremost interested in satisfying their own desires.

With what knowledge?

As has already been mentioned, the veil of ignorance conceals information about the particular advantages and disadvantages that an individual possesses. This is because the principle chosen will apply universally and, this being the case, there must be no individual bias contaminating the *motivations* for its choice. However, the individuals are not totally ignorant; if they were, there would be no motivation for choosing anything. The individuals are assumed to possess general facts that will affect the choice of basic structure, particularly facts of psychology and the social sciences.

With what motivation?

Kukathas and Pettit note three points on the motivations of the parties in the original position. The first concerns the ends they pursue; the second concerns the means by which the ends are pursued and in the third Rawls imposes a special condition on their dispositions²⁵.

The ends the parties pursue are not known to the individuals, they only know that they want more rather than less of primary goods. Primary goods are goods that are universally beneficial and useful in the pursuit of any conceptions of the good. The primary goods are defined by Rawls as certain rights and liberties, opportunities, powers, income and wealth²⁶.

Next Rawls assumes that the means adopted by the parties follow the usual guidelines of rationality. In his words,

Thus, in the usual way, a rational person is thought to have a coherent set of preferences between the options open to him.

He ranks these options according to how well they further his purposes; he follows the plan which will satisfy more of his desires rather than less, and which has the greater chance of being successfully executed²⁷.

Thirdly, the special condition Rawls imposes on the individuals is that the parties not be influenced by envy. Rawls justifies this condition on two grounds. First, envy tends to make everyone worse off, it is 'collectively

disadvantageous'. Second, because the parties are presumed to be capable of a sense of justice and this fact is known to everyone, it means that 'the parties can rely on each other to understand and to act in accordance with whatever principles are finally agreed to'²⁸. And because the parties choose the two principles, it is unlikely that there will be strong feelings of envy²⁹.

D. The two principles

From the original position, Rawls asserts that the most rational set of principles, that which the individual will choose to govern the basic structure of society, is his two principles of justice. The first principle guarantees the fundamental liberties while the second ensures that inequalities are accepted only when such inequalities lead to the benefit of the worst-off member of the society. Rawls presents the final formulation of the two principles as follows:

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, and
- (b) attached to offices and positions open to all under conditions of fair equality of opportunity.³⁰

The two principles are lexically ordered. In other words, the first principle must be satisfied before the second principle comes into effect and, within the second principle, (a) takes precedence over (b). Thus, the principle of fair equality of opportunity takes precedence over the difference principle. From the original position, the principle of equal basic liberties is motivated by the desire of the individuals behind the veil of ignorance to protect their freedom to change and to pursue their own conception of 'the good life'. The second principle is motivated by the individual's ignorance of her own position with regard to the distribution of economic and social advantage³¹. Rawls maintains that the two principles constitute the 'maxim strategy'. The difference principle ensures that the worst-off individuals in society will be taken care of as well as possible, while the lexical priority of the basic liberties means that the worst-off individuals will always be protected.

Rawls discusses in detail a second set of reasons on why the two principles will be chosen. First, there will be no consequence that allows the individual to accept less liberty for the greater good of others³². Second, because everyone's good is affirmed and everyone benefits from social

cooperation, they will be inclined to uphold the scheme³³. Third, the two principles of 'justice as fairness' include everybody's good in their scheme of mutual benefit. In publicly expressing 'men's respect for one another' the two principles 'ensure a sense of their own value'³⁴.

E. The Feasibility of the Principles of 'justice as fairness'

After arguing for the desirability of the two principles of 'justice as fairness', Rawls turns his attention to establishing their feasibility. In the third and final section of *A Theory of Justice*, Rawls connects his theory of justice with a doctrine of the good. He argues that 'justice as fairness' is feasible and will lead to a stable society because a just society is a good society – 'justice and goodness are congruent'. Rawls understands the congruence between justice and goodness to mean that to desire to seek good for oneself is to take up the standpoint of justice³⁵.

Three main grounds are provided by Rawls for his claim that 'justice as fairness' is feasible and will lead to stability in well-ordered societies. He argues that 'justice as fairness' is a public principle and will serve to tie people together because when the principles of justice are public and are tied to 'institutional forms'³⁶ people cannot abandon their sense of justice without harming the community. In other words, acting contrary to the principles will mean hurting the people they love – their friends and associates.

The second grounds Rawls gives is that people will want to share in the goodness of society. Because people depend on the cooperation of others for the fulfilment of their own ends, they have an active interest in preserving a good, stable society.

Rawls asserts that it is in our nature as free and rational beings to act justly³⁷. A concept of justice that is contrary to people's nature will not lead to a stable society and is unfeasible. Rawls argues that:

the desire to express our nature as a free and equal rational being can be fulfilled only by acting on the principles of right and justice as having first priority. This is a consequence of the condition of finality: since these principles are regulative, the desire to act upon them is satisfied only to the extent that it is likewise regulative with respect to other desires. It is acting from this precedence that expresses our freedom from contingency and happenstance³⁸.

Taking a Kantian stance, Rawls asserts that the desires to act justly and to express ourselves as free and equal, rational beings are essentially the same desire. In other words, it is consistent with the desire to satisfy our own ends that we act according to our sense of justice.

F. Conclusion

Rawls wrote *Political Liberalism* when he became aware that democracies are characterised by their constitution of different people

holding different comprehensive doctrines. Moreover, it is characterised by reasonable people holding different reasonable comprehensive views about human nature and about how to go about fulfilling human potential. As such, Rawls's Kantian understanding of congruence between justice and goodness cannot claim to hold universally. In other words, because he cannot claim his theory of justice to be congruent with *everyone's* conceptions of the good, he cannot claim that a society based on his basic principles will be stable. As such, 'justice as fairness' fails to be feasible.

As already noted, this chapter on *A Theory of Justice* examines the 'foundations' of 'justice as fairness'. The next chapter offers a detailed summary and interpretation of *Political Liberalism* and its attempt to modify 'justice as fairness' from a seemingly comprehensive doctrine of the good to merely a political conception.

Notes:

¹ Rawls, *A Theory of Justice*, p. 3

² *Ibid.*, p. viii

³ Kukathas, C. & Pettit, P., *Rawls: A Theory of Justice and its Critics*, p. 2

⁴ *Ibid.*, p. 8

⁵ *Ibid.*, pp. 2-6

⁶ *Ibid.* p. 7

⁷ Rawls, *TJ*, pp. 19-21, 46-53, 578-82

⁸ Rawls, *PL*, pp. XV-XVI

⁹ Kukathas & Pettit, *op cit.*, p 18

¹⁰ Rawls, *TJ*, p. 61

¹¹ Kukathas & Pettit, *op cit.*, p. 27

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- ¹² Locke, J., *Two Treatises of Government*, p. 117
- ¹³ Rawls, *TJ*, p. 19
- ¹⁴ Rawls, *TJ*, p. 15
- ¹⁵ Kukathas & Pettit, *op cit.*, p. 21
- ¹⁶ Mulhall & Swift, *Liberals & Communitarians*, p. 11
- ¹⁷ Kukathas & Pettit, *op cit.*, p. 21
- ¹⁸ Rawls, 1978, 'The Basic Structure as Subject', in A. Goldman and J. Kim (eds.) *Values and Morals*, Boston, Reidel, quoted by Kukathas & Pettit, *op cit.*, pp. 21-22
- ¹⁹ Rawls, *TJ*, pp. 130-6
- ²⁰ Rawls, *TJ*, p. 235
- ²¹ Raz, J., 'The Rule of Law and its Virtue', *The Authority of Law*, Oxford, OUP.
pp. 210-29; quoted by Kukathas & Pettit, *op cit.*, p. 22
- ²² Kukathas & Pettit, *op cit.*, p. 23
- ²³ *Ibid.*
- ²⁴ *Ibid.*
- ²⁵ *Ibid.* p. 25
- ²⁶ Rawls, *TJ.*, p. 92
- ²⁷ *Ibid.* p. 143
- ²⁸ Rawls, *TJ.*, p. 145
- ²⁹ Rawls, *TJ.*, pp. 534-41, quoted by Kukathas & Pettit, *op cit.*, p. 26
- ³⁰ Rawls, *TJ.*, p. 302
- ³¹ Mulhall & Swift, *op cit.*, p. 8
- ³² Rawls, *TJ.*, p. 176
- ³³ *Ibid.*, p. 177
- ³⁴ *Ibid.*, p. 179
- ³⁵ *Ibid.*, p. 568
- ³⁶ *Ibid.*, p. 571
- ³⁷ *Ibid.*, p. 572

³⁸ *Ibid.*, p. 574

Chapter 5: Political Liberalism

Contents:

- A. Introduction
- B. The Aim of *Political Liberalism*
- C. Political Foundations
- D. The Concept of the Person
- E. Political Constructivism
- F. Public Justification
- G. Public Reason
- H. The Liberal Political Ideal
- I. Conclusion

A. Introduction

This chapter presents an outline of Rawls's political project as put forward in *Political Liberalism*. It will build on Chapter 4, in which the formulation of 'justice as fairness' as in *A Theory of Justice* was presented, and together these chapters form the basis for Chapter 6 in which a reconstruction of Rawls's argument for a legitimate regime will be presented. Chapter 5 includes an interpretation of *Political Liberalism* that is as close as possible to what Rawls intended – 'providing a more complete justification and understanding of the particular theory put forward in 1971'¹. Primarily because there exist conflicting interpretations of the ideas expounded in *Political Liberalism* and also because *Political Liberalism* is a long and

complicated book, this outline will mainly follow the secondary text by Mulhall and Swift.

B. The Aim of *Political Liberalism*

The 'nature and extent' of the difference between *Political Liberalism* and *A Theory of Justice*, asserts Rawls, needs to be understood as 'arising from trying to resolve a serious problem internal to 'justice as fairness', namely from the fact that the account of stability in part III of *Theory* is not consistent with the view as a whole.² The society as envisaged by Rawls in *A Theory of Justice* is unstable because the adoption of 'justice as fairness' to govern the basic structure of society means that the citizens are implicitly adopting and endorsing it as a comprehensive philosophical doctrine. Since modern democratic societies are characterized by the pluralism of reasonable, comprehensive but incommensurable doctrines³, the imposition of one comprehensive doctrine will lead to instability.

Political Liberalism is written in response to the problem of pluralism. Rawls defines the problem as the internal tension between the liberal necessity of respecting differences on the one hand and the political necessity of finding common ground on the other. The tension between respecting reasonable difference and the necessity for common ground arises out of the two fundamental assumptions of political liberalism. Political liberalism, as elucidated by Rawls, makes two assumptions. First, for political purposes the plurality of incommensurable yet reasonable comprehensive doctrines is assumed to be the normal result of the free exercise of human reason in constitutional democratic regimes⁴. Second, political liberalism assumes that

a reasonable comprehensive doctrine does not reject the essentials of democracy⁵. These two assumptions place Rawls in the liberal tradition of defending the secular state that guarantees its citizens the right to live their lives as they believe to be good and worthwhile. Consistent with the liberal tradition, Rawls inherits the problem of defining 'reasonableness' in drawing the line between 'reasonable' and 'unreasonable' comprehensive doctrines⁶.

In the "Introduction" to *Political Liberalism*, Rawls explains that the fact of plurality of comprehensive doctrines is inconsistent with the promise of stability in part III of *A Theory of Justice*; and that *Political Liberalism* is written to correct this defect. The problem for political liberalism, as is set out by Rawls, is: "How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?"⁷.

C. Political Foundations

1. Three features of a political conception of justice

Granting that 'justice as fairness' as presented in *A Theory of Justice* can be interpreted as a comprehensive doctrine, Rawls is eager to establish that this need not be the case. In *Political Liberalism*, Rawls argues that 'justice as fairness' ought to be understood as a political conception. However, leaving the question of *why* 'justice as fairness' ought to be understood as political for the moment, it is important firstly to understand *how* a conception of justice can be political. Rawls presents three distinguishing features of a political conception of justice:

(1) That it is framed to apply solely to the basic structure of society, its main political, social, and economic institutions as a unified scheme of social cooperation; (2) that it is presented independently of any wider comprehensive religious or philosophical doctrine; (3) and that it is elaborated in terms of fundamental ideas viewed as implicit in the public political culture of a democratic society.⁸

First, 'justice as fairness' is intended by Rawls to apply to the basic structure of society. By 'basic structure' Rawls understands the essential political, social and economic institutions of society – institutions such as universities, schools, churches and hospitals are excluded. As such, 'justice as fairness' is silent on the matter of how goods are to be distributed. However, while schools and churches do not belong to the basic structure, they are bound by the constraints that arise from the principles of justice⁹. This means that while churches can excommunicate heretics, they cannot burn them, as the churches are bound by the liberty of conscience. The first distinguishing aspect of the political conception, then, is its *scope* or *subject*¹⁰. 'justice as fairness', to reiterate, applies specifically to the political sphere, to the basic structures of society – the major social, political and economic institutions.

The second aspect that distinguishes the political conception of justice is its *status*¹¹. 'justice as fairness' can be 'presented independently of any wider comprehensive religious or philosophical doctrine'. By this Rawls means that the ideas embedded in 'justice as fairness', such as the original position and the two principles of justice deriving from it do not rely upon any

comprehensive doctrines. In other words, the claims of 'justice as fairness' do not depend on and are independent from any comprehensive moral, religious or philosophical doctrines. In effect, 'justice as fairness' is intended to be understood and applied by any individual, irrespective of the moral, philosophical or religious allegiances of the individual.

The third distinguishing aspect in which the conception of justice is political concerns its *method or source*¹². 'justice as fairness' is 'elaborated in terms of fundamental ideas viewed as implicit in the public political culture of a democratic society'. Rawls understands his theory of justice not as dependent on or as the elaboration of a particular comprehensive doctrine; rather it is the systematic articulation of the intuitive ideas that are embedded in a democratic society's public political tradition. In the same way that the philosophical method of conceptual analysis brings to the surface the intuitive ideas and then gives them a systematic coherence, so Rawls understands his political conception of justice. He understands the political conception of justice as the 'working up' into a coherent pattern the intuitive ideas that are embedded in the liberal democratic society's (American) institutions and public traditions¹³.

The society envisaged by Rawls, that embodies 'justice as fairness' as an intuitive idea, is a society that is characterized by a fair system of cooperation between free and equal citizens. The connection between society as a fair system of cooperation between free and equal citizens and Rawls's political conception of justice can be expressed in two stages¹⁴.

In the first stage, the original position embodies the "various substantive normative claims that lie at the heart of 'justice as fairness'"¹⁵. As such, it can

be regarded as intending to represent society as a fair scheme of cooperation between free and equal citizens. The original position models what can be regarded as 'fair conditions under which the representatives of free and equal citizens are to specify the terms of social cooperation in the case of the basic structure of society'¹⁶.

In the second stage, the understanding that society is a fair system of cooperation between free and equal citizens is taken to mean that 'justice as fairness' ought only apply to the basic structure. Implicit in this understanding is that a liberal democratic culture does not presuppose the validity of any one of the comprehensive doctrines¹⁷.

2. *Why political?*

The problem of stability, already touched upon earlier, provides the initial motivation for Rawls to seek a political conception of justice. However, this motivation is not exhaustive. In *Political Liberalism* Rawls repeatedly insists that his argument proceeds in two stages, with the question of stability as secondary:

'justice as fairness' is best presented in two stages. In the first stage it is worked out as a freestanding political (but of course moral) conception for the basic structure. Only with this done and its content – its principles of justice and ideas – provisionally on hand do we take up, in the second stage, the problem whether 'justice as fairness' is sufficiently stable.¹⁸

Rawls considers the first stage, in which the theory is 'worked out as a freestanding political (but of course moral) conception' to be of primary importance. In the first stage, 'justice as fairness' articulates two kinds of political values, 'those of political justice and of public reason'¹⁹. In the second stage, when the society has achieved consensus by endorsing a common doctrine of justice, Rawls calls this society 'well-ordered':

To say that a society is well-ordered conveys three things: first..., it is a society in which everyone accepts, and knows that everyone else accepts, the very same principles of justice; and second .., its basic structure – that is, its main political and social institutions and how they fit together as one system of cooperation – is publicly known, ... and third, its citizens have a normally effective sense of justice, and so they generally comply with society's basic institutions, which they regard as just.²⁰

As can be seen from his conception of the well-ordered society, Rawls's aim in his theory is to reach public understanding, acceptance and consensus on a single principle of justice which underlies the basic structure of society. While the ultimate aim is to reach the stability of the well-ordered society, this goal can only be achieved once the principle of justice can be publicly justified. However, before public justification and public reason can be elucidated, it is important first to examine Rawls's conception of the person and the public and private roles she plays.

D. The Concept of the Person

Rawls does not deny that his conception of the person is a particular conception. Looking at the individual from the perspective of justice, it is clear that Rawls regards the person as distinct from her natural endowments. This is because, in Rawls's view, when the question concerns justice, the individual should not be advantaged or disadvantaged by circumstances and endowments for which she is not responsible²¹. So what are the scope, source, status and validity of Rawls's conception of the person?

a. Scope

Rawls's conception of the person is a political conception: the person is a citizen. In this conception, because the public political culture is one of constitutional democracies, it is therefore implicit that this conception of the citizen stands free of any particular comprehensive moral, religious or philosophical doctrine²². Thus, the scope of Rawls's conception of the person applies only insofar as she is a member of the public 'participating in political and social relationships as specified by the basic structure'²³.

b. Source and Status

It is tempting to understand the source of the political conception of the person as the public political culture. This, however, according to Mulhall and Swift, will be to misunderstand Rawls. This misunderstanding will be due to the fact that Rawls attaches great importance to the moral value of public justifiability. Rawls endorses his conception of the person as how one *ought* to conceive of the person as the citizen; his view is that public justifiability of his

theory depends on the conception of the citizen as free and equal.

Ultimately, the source and status of Rawls's conception of the person is not sociological but moral²⁴.

c. Validity

Communitarian critics argue that Rawls's conception of the citizen is invalid because a citizen who is detached from her personal endowments cannot and will not pursue and develop her identity as part of her community²⁵. In other words, the communitarians argue that Rawls has neglected the fact that a citizen needs holistic development in community; detached from her unique attributes, she cannot develop her identity as a specific role-player within a community. In order to develop her identity holistically, the person needs to identify herself as playing a worthwhile role in her community – as an elder in the church, as a mother in the family or as a professor in a university, for example.

This communitarian contention, Mulhall and Swift argue, is misleading, because Rawls's claim is that the detachment is restricted only to the domain of politics. As such, it does not imply that a citizen can generally step back from her value-commitments. Rather, Rawls points out that it is inappropriate, when the matter concerns constitutional essentials, for the individual to play her role as an elder in the church, a mother in the family or a professor in a university.

E. Political Constructivism

Concerned with political justice, Rawls relies on a method of political theorising that he calls 'political constructivism'. He understands political constructivism to mean a certain procedure of construction in which 'certain basic, purely political conceptions of the person and of society are utilized to generate a conception of a just constitutional regime that might then be used to guide our political endeavours'²⁶. Rawls adopts political constructivism because he cannot rely on any moral or religious authority due to the fact of reasonable pluralism. A constructivist view that specifies the 'fair terms of cooperation', if correctly formulated, should lead to the acceptance by the citizens along with their own particular conceptions of the good²⁷. In short, Rawls's political constructivism, restricted to political matters, avoids controversial metaphysical doctrines; it does not make any deontological claims about the moral nature of human beings. Adopting purely political concepts about the person as citizen and the society, Rawls's method of political theorising is designed to be publicly justifiable.

F. Public Justification

Rawls seeks a political conception of justice displaying the three distinguishing features listed above because he seeks a conception that can be publicly justified to all members of the public who endorse different incommensurable comprehensive doctrines. Given the fact of pluralism, a conception of justice that is based on the fundamental claim of a particular comprehensive doctrine will give rise to conflict, and will not lead to consensus as other citizens can and do hold different reasonable doctrines. Furthermore,

'justice as fairness' is the implicit expression of the shared fundamental ideas in the public political culture of a mature constitutional liberal democracy. Rawls states:

'justice as fairness' aims at uncovering a public basis of justification on questions of political justice given the fact of reasonable pluralism. Since justification is addressed to others, it proceeds from what is, or can be, held in common; and so we begin from shared fundamental ideas implicit in the public political culture in the hope of developing from them a political conception that can gain free and reasoned agreement in judgment . . .²⁸

Rawls believes his 'justice as fairness' will be acceptable to all because he regards society as a 'fair scheme of cooperation between free and equal citizens, a conception that is modelled by the original position'²⁹. Because society is a fair scheme of cooperation, and because its members are reasonable, Rawls considers it possible, despite the fact of pluralism, for members of society to reach consensus on 'justice as fairness'.

The device of the original position and the veil of ignorance is utilized in bringing to the fore the implicit intuitions of this 'public conception' of justice. By concealing from the individuals their particular preferences, Rawls is 'distilling' from the various preferences and intuitive senses of justice the 'shared fundamental idea' – the public sense of justice. Because it is with regard to the public sense of justice that Rawls seeks consensus, and because the citizens are free to pursue in their private lives whatever comprehensive

doctrines they choose, Rawls can only search for reasons that will be persuasive in the public sphere. In order that a theory of justice can be publicly justified, Rawls utilizes what he calls 'public reason'.

G. Public Reason

Public reason is public in three senses. It is the reason of the person in her public role – as a citizen. Its subject is the public good and public justice. Its nature and content are public – they are 'transparently based on publicly available ideas and principles'³⁰. Public reason is different from the reason used in deliberations that take place between members of private associations. Private reason used in such associations is different in that private associations have various concerns, constraints and considerations that are determined by the purpose of the particular association. Public reason, in contrast, has special constraints because citizens participating in it have very different goals and aims; because of this, constraints need to be applied. The constraints of public reason apply to holders of public office. They apply to the legislator, the executive and especially the judiciary – to the Supreme Court in particular. In a constitutional democracy incorporating judicial review, decisions on constitutional matters must reflect the justices' understanding of the constitution and its application to the relevant statutes and precedents³¹.

H. The Liberal Political Ideal

In order for the problem of reasonable pluralism to be solved, Rawls leans heavily on a political position that is neutral as regards different conceptions

of the good. In order that his theory of justice can be deemed acceptable to everyone, it is not sufficient that it be based on a particular elegant and internally consistent moral theory. Rather, 'justice as fairness' must be publicly justifiable. It follows therefore that political debates about theories of justice exclude controversial metaphysical claims. The need for public justification and endorsement, asserts Rawls, is implicit in the 'liberal political ideal'. Rawls argues that:

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 in the light of their common human reason³².

The conception of political power in a liberal democracy is that it is the 'coercive power of free and equal citizens as a corporate body'. This is a normative claim. In other words, the liberal democrats consider it morally wrong that some citizens should be coerced by political power that they cannot be expected to reasonably endorse. It is the argument of political liberalism that seeing a society as a fair scheme of cooperation between free and equal citizens and the deliberative process as appealing only to public reason are consistent with the liberal political ideal.

I. Conclusion

The liberal answer to the question of the legitimacy of the democratic regime is dependent upon its understanding of the relationship between the state and the citizen. For the political liberal, the source of the coercive power of the state is ultimately derived from the citizens themselves. As such, the exercise of this power against the citizens is legitimate only when it is reasonable to expect that those citizens subject to it can reasonably endorse it.

Since reasonable pluralism is a fact, it is not reasonable to expect the citizens to endorse constitutional essentials that are based on one particular conception of the good. As such, it is important that appeal be made to public reason, to values and ideas that are shared by all and are implicit in the public political culture.

Notes:

- ¹ Mulhall & Swift, *Liberals and Communitarians* 2nd ed., p. 171
- ² Raw
- ² Rawls, J., *Political Liberalism*, pp. XV-XVI
- ³ *Ibid.*, p. XVI
- ⁴ *Ibid.*
- ⁵ *Ibid.*
- ⁶ Frost, R., "Political Liberalism", *Constellations* (April, 1994), 1:164
- ⁷ Rawls, *TJ.*, p. XVIII
- ⁸ Rawls, J., *PL.*, p. 223; numbers inserted by the author.
- ⁹ Mulhall & Swift, *op cit.*, p. 172
- ¹⁰ *Ibid.*
- ¹¹ *Ibid.*
- ¹² *Ibid.* p. 173
- ¹³ *Ibid.*
- ¹⁴ *Ibid.*, p. 174
- ¹⁵ *Ibid.*
- ¹⁶ Rawls, *PL.*, pp. 25-26
- ¹⁷ Mulhall & Swift, *op cit.*, p. 174
- ¹⁸ Rawls, *PL.*, pp. 140-1
- ¹⁹ *Ibid.*, p. 64
- ²⁰ *Ibid.*, p. 35
- ²¹ Mulhall & Swift, *op cit.*, p. 192
- ²² *Ibid.*
- ²³ Rawls, *PL.*, p. 300
- ²⁴ Mulhall & Swift, *op cit.*, p. 194
- ²⁵ *Ibid.*
- ²⁶ *Ibid.* p. 180

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- ²⁷ Rawls, *PL.*, p. 97
- ²⁸ Rawls, *PL.*, pp. 100-1
- ²⁹ Mulhall & Swift, *op cit.*, p. 178
- ³⁰ *Ibid.*, p. 179
- ³¹ *Ibid.*
- ³² Rawls, *PL.*, pp. 139-140

Section III: Discourse with Critics

In this section I will present critical discourses on Rawls's argument that neutrality offers the most promising argument for the legitimisation of modern democratic regimes.

Critics face numerous difficulties when confronted with Rawls's political theory. The first is the sheer bulk of Rawls's intricately interconnected arguments, the design of which is intended to provide rational justification for a single idea – that 'justice as fairness' is the best framework of justice a society can adopt. Compounded with this problem is Rawls's shift in position. Since the publication of his canonical *A Theory of Justice*, Rawls has actively engaged with his critics in developing, refining and sometimes revising the position first proposed in *A Theory of Justice*.

The second problem, related to the comprehensiveness of the Rawlsian project, is finding an appropriate perspective from which to criticize Rawls's theory. The comprehensiveness of Rawls's argument for 'justice as fairness' means that critics from different disciplines and ideological persuasions are all able to present criticisms from their perspectives.

It is in connection with the two problems outlined above that I choose to follow the well-beaten path marked out by analytical liberal

political theorists, using two of the most eminent liberal political philosophers in the English speaking world – Thomas Nagel and Joseph Raz – as my task-masters. Both philosophers can be said to engage in the same critical discourse, that is, they are both concerned with the legitimacy of modern liberal democratic regimes.

In Chapter 7, Nagel's criticism that the original position as conceived in *A Theory of Justice* is biased towards individualistic conceptions of the good will be presented. In Chapter 8 is discussed Raz's perfectionist critique that Rawls fails in *Political Liberalism* to present an objective, normative standard by which moral judgements can be made.

Chapter 6: Legitimacy of the Neutral State

Contents:

- A. Introduction
- B. The Dilemma of Liberal Toleration
- C. Liberal Goods and Liberal Institutions
- D. Conception of the Good
- E. Political Liberalism and Toleration
- F. Consensus and 'justice as fairness'

A. Introduction

This chapter will present a reconstruction of Rawls's argument for the legitimacy of the liberal state. It will draw from the above Chapters 4 and 5 on *A Theory of Justice* and *Political Liberalism* respectively. This reconstruction will present Rawls's political liberalism as an argument for legitimacy based on the state's neutrality between different conceptions of the good.

The question of the desirability of neutrality can be asked in two ways: one theoretical, one practical. Neutrality may be desirable because of the conceptual coherence it offers to the liberal political theorist; alternatively (though the two are not mutually exclusive) neutrality may be desirable because it contributes to the stability of society¹. This chapter will focus on the theoretical desirability of neutrality. It will

focus on the conceptual difficulties facing the construction of a coherent neutral liberal position rather than the practical obstacles of maintaining a well-ordered society.

B. The Dilemma of Liberal Toleration

The dilemma facing liberals committed to toleration is that their argument for respecting differences is susceptible to the same fatal criticism suffered by the naïve relativists and the moral skeptics. The claim of the naïve relativist is that there are no objectively true moral values. As a result, no single doctrine can claim a privileged epistemic position. Because no single doctrine is 'more correct' than others, no single doctrine can claim the authority to pass paternalistic judgments about the truth of other doctrines. The conclusion of the naïve relativist is that the views of adherents to all different philosophical, moral and religious doctrines are 'true for them' and must be respected. This view, however, suffers from the flaw of internal inconsistency. What the naïve relativist fails to see is that her view on neutrality is itself a value, and that by taking a stand for neutrality, she in fact imposes her values paternalistically on all other doctrines. In other words, she is taking the privileged epistemic position and claiming that relativism is true – and that by implication all non-relative views are false. The view of the moral skeptic suffers from the same criticism. As is famously pointed out by Aristotle in *The Metaphysics* the skepticism of the skeptic is self-

contradictory as the skeptic, by definition, must confess that he cannot be certain of his skepticism.

The liberal commitment to toleration of different values faces the same criticism as those facing the naïve relativist and the moral skeptic. The dilemma facing the liberal is this: her commitment to toleration means that the liberal is in fact imposing the *value of toleration* on those whose doctrines may prescribe intolerance (as is the case with monotheistic religions). The value of toleration, when applied, may well have a directly opposite effect.

The liberals are generally aware of the pitfalls described above. In their commitment to toleration or 'neutrality' with regard to different moral values, they have developed various defences. Broadly speaking, the liberals adopt two distinctly different strategies when arguing for neutrality. The first is to argue that the liberal values characterised by toleration and individual rights are *goods* and ought to be the aim of the liberal state. The second strategy, of which Rawls is the most prominent proponent, argues that the liberal state is neutral among different conceptions of the good. Galston describes this strategy as follows:

...[the state] presides benignly over [different ways of life], intervening only to adjudicate conflict, to prevent any particular way of life from tyrannising over others, and to ensure that all adhere to the principles that constitutes society's basic structure.²

Instead of defending the liberal value of neutrality as a good, the second strategy in fact defends the view that the liberal state can exist without any substantive theory of the good. The justification for the liberal state is that it offers the most conducive environment for different non-liberal – even anti-liberal – conceptions of the good to thrive. It can be observed that in the first strategy, the liberals see their values and virtues as one of many competing conceptions. The liberals go about defending their primary good in the same way that the Christians defend the teachings of Christ or that Confucians defend the ‘tao’ and the ‘te’. The second strategy does not defend liberal virtue as a good *per se*. Rather, the strategy of the ‘political’ liberal is to reserve judgement on conceptions of the good and to focus purely on finding a ‘political’ consensus. In other words, the political liberal does not enter into the fray of moral debates; rather she focuses only on political issues – issues that are relevant to the basic structure of society. The second strategy, that the state remains neutral with respect to different conceptions of the good, has its strongest proponent in Rawls who takes a stance for epistemic abstinence. For Rawls, the solution to the problem of legitimacy in the face of pluralism is for the government to stay out of the fray of doctrinal debates.

C. Liberal Goods and Liberal Institutions

The traditions of liberalism arose from the Enlightenment. Brian Barry asserts that 'liberalism is *par excellence* the doctrine of the Enlightenment'³. He identifies three central goods of liberalism:

- a. The belief that inequalities are a social artefact and therefore have to be justified on the basis of the fundamental equality of all human beings.
- b. The belief that every doctrine should be open to critical scrutiny and no view should be held unless it has in fact withstood critical scrutiny.
- c. The belief that no religious dogma can reasonably be held with certainty.⁴

While it would be a logical necessity for those who hold these liberal goods to support liberal institutions, the defence of liberal goods and the defence of liberal institutions are usually undertaken independently. Rawls's focus in *Political Liberalism* is not on arguments for liberal goods such as freedom and toleration, but rather on arguments for liberal institutions. Given that those who adhere to liberal values will logically support liberal institutions, Rawls's arguments for 'justice as fairness' as the governing principle are intended to persuade non-liberals. Rawls is arguing for the legitimacy of liberal institutions to govern a society whose citizenry holds a plurality of conceptions of the good. Quite clearly,

Rawls is not arguing for the validity of liberal goods, nor is he seeking to legitimise liberal institutions on the metaphysical truth of the liberal goods. Rawls's task in *Political Liberalism* is to argue for the legitimacy of liberal institutions independent of conceptions of the good, liberal or non-liberal. It is in this sense that Rawls presents arguments for liberal institutions. Arguing that liberal institutions will not concern themselves with the truth or falsity of any one comprehensive doctrine – that liberal institutions will remain 'neutral'; Rawls in fact seeks consensus on this neutral state. Before the reconstruction of Rawls's arguments for liberal institutions is presented, it is important first to examine in some detail the subject on which Rawls wishes to remain neutral.

D. Conception of the Good

Conception of the good is understood generally to consist 'more or less' of the goals and ends a person wants to accomplish. These ends and goals are desirable not for their instrumental value; rather they are desirable for their intrinsic value, that is, they are desired for their own sake. Rawls understands the conception of the good to include a 'more or less determinate scheme of final ends' as well as 'attachments to other persons and loyalties to various groups and associations'⁵. Rawls's definition and other specifications of the nature of a conception of the good are contested both between the liberals themselves and between liberals and communitarians⁶. If the conception of the good is specified

as what is 'good for' the individual, the liberal is accused of accepting an egoistic individualism. However, if the 'good' includes what is good impersonally and it is possible that no one can experience it, then the liberals will not consider it to be a good at all⁷. Due to the contested nature of the conception of the good, Richardson identifies four significant dimensions from which the notion might be more accurately understood: the metaphysical depth, critical structure, scope and detail of a conception of the good⁸.

a. The metaphysical depth

The metaphysical depth of a conception of the good relates to the extent to which it depends on general metaphysical conclusions of the doctrine. The depth describes how intimately the conception of the good is related to the conception of the individual, the individual's identity through time, human nature, man's purpose in the world etc.⁹.

b. The critical structure

The critical structure of a conception of the good refers to the hierarchical ordering or the procedure for ordering the various values internal to the conception of the good. The critical structure is the basis on which internal criticisms are made possible, it 'allows for the criticism of some of an individual's desires, commitments or ends on the basis of others of them'¹⁰.

c. Scope

The scope of a conception of the good is concerned with 'the range of subject matters to which it applies'¹¹. The 'range of subject matter' may include the well-being of the individual herself, the well-being of others or some impersonal value relating to the state of affairs. For the liberals, there is a clear demarcation between the private and the public, for the communitarians on the other hand, there is a more holistic conception of the good. In other words, the liberals have a narrower while the communitarians have a wider scope with regard to their respective conception of the good.

d. Degree of detail

Interpretations of the notion of a conception of the good are possible even in the most objectivist theory of the good. The different goods in the theory require interpretation and specification when applied. The variation between different conceptions of the good depends on whether the task of interpretation and specification is left up to individual preferences or to public discussions and adjudication¹².

E. Political Liberalism and Toleration

Faced with a diversity of conceptions of the good, the traditional liberal attitude is one of toleration. For Rawls's political liberalism, the

justification for this tolerance lies not in the positive value of diversity, nor in the dangers of entrusting a few with the power to suppress different views; it is the considerations of fairness¹³.

Two factors feature prominently with regard to the conception of the good in Rawls's argument for neutrality in *Political Liberalism*. First there is the fact of pluralism. Second, Rawls points out that our (liberal democratic) society shares a rich 'common culture' consisting of principles all accept as valid¹⁴. While there is a diversity of conceptions of the good, there is a shared public culture discoverable via public reason whose validity is beyond dispute, despite the fact of pluralism. The task for Rawls, then, is to construct a conception of justice that is already shared by the citizens of the liberal democracy even though they may hold different moral, religious or philosophical viewpoints.

It is from the observation that there already exists a common political culture that Rawls seeks to find an overlapping consensus. The overlapping consensus Rawls seeks is 'political'; that is, his task is confined only to finding a theory of justice that will govern the liberal institutions. It is not Rawls's task to find consensus on the single true good for human lives.

In his political liberalism, Rawls seeks to bring to the surface the basic intuitive ideas he believes are embedded in the makeup of liberal constitutional democratic regimes¹⁵. This basic intuitive idea, he argues, can be expressed as 'justice as fairness'.

F. Consensus and 'Justice as Fairness'

To bring to the surface the common intuitions held by citizens of constitutional democracies about fairness and distributive justice, Rawls asks us to imagine that we exist behind a veil of ignorance where knowledge of our own particular circumstances is screened from us. Deprived of knowledge of our particular circumstances, we are very much the same. We have biological needs, an ordered set of wants and a conception of the good. Also, we have basic knowledge of economics and the general workings of society. We know that society is the source of various resources, resources that will be useful in our pursuit of our set of needs and wants. These resources, or primary goods as Rawls calls them, include rights, liberties, opportunities, powers, income and wealth. Though we do not know our particular circumstances, nor what conception of the good we want to pursue, we do know that more rather than less of the primary goods will be useful in pursuing our conceptions of 'the good life'.

Given the above circumstances and given that we are rational, Rawls posits that we will choose according to the demands of distributive justice. We will choose to have the most extensive system of equal basic liberties. Inequalities with regard to society's resources will only be acceptable when the worst-off in society benefits from them¹⁶. Note that the person's particular conception of the good life does not affect his share of

society's resources. In other words, opinion as to whether the conception of the good is worthy or not does not constitute a reason for allocating more or fewer resources to a person; this is the principle of neutrality, 'the principle that public policy should not be based on an evaluation of people's conception of the good'¹⁷. Going on to assert the 'priority of the right over the good', Rawls concludes that the principle of neutrality should be the organising principle of all liberal societies.

G. Neutrality as Legitimacy

Rawls's argument is directed at the democratic society characterised by pluralism. While the citizens of this society hold different conceptions of the good life, they are reasonable and realise that a share of the societal resources will be useful in their pursuit of a meaningful life. Motivated to remain in society by the pursuit of their own conception of 'the good life', adherents of the different doctrines are given an opportunity to decide by what basic principles the governmental institutions will be governed. If there is unanimous consensus on the basic principles, then no-one can produce moral complaints regarding the coercive force used by the state to enforce the law. With consensus, the state will be legitimate.

'Justice as fairness' is offered by Rawls as the basic principle most likely to gather consensus. Rawls argues that his conception of justice uncovers the shared fundamental ideas implicit in the liberal democratic

tradition – the device of the original position merely brings to the surface the existing common intuitive definition of fairness which characterises a mature constitutional liberal democracy.

Fairness in the political sense means that no one will be disadvantaged by her particular beliefs with regard to philosophy, morality or religion.

Liberal institutions governed by ‘justice as fairness’, Rawls asserts, are institutions that do not discriminate between different conceptions of the good. The liberal state, made up of liberal institutions that are neutral with regard to different conceptions of the good, has the best chance for consensus and, therefore, for democratic legitimacy.

Notes:

¹ Richardson, H., “The Problem of Liberalism and the Good” in Douglass, R. *et al* (eds.), *Liberalism and the Good*, p. 2

² Galston, W., *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State*, p. 80

³ Barry, B., “How not to Defend Liberal Institutions”, in Douglass, R., *et al* (eds.), *op cit.*, p. 45

⁴ *Ibid.*

⁵ Rawls, *PL.*, p. 19

⁶ Richardson, H., *op cit.*, p. 11

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.* p. 12

¹⁰ *Ibid.* pp. 12-13

¹¹ *Ibid.*, p. 13

¹² *Ibid.*

¹³ Rawls, 'Justice as fairness: Political not Metaphysical' in Freeman, S., (ed.), *John Rawls: Collected Papers*, pp. 388-414

¹⁴ Rawls, 'Kantian Constructivism in Moral Theory', *Journal of Philosophy*, 77 (1980), p. 517

¹⁵ *Ibid.*

¹⁶ see Chapter 4 for a detailed discussion of Rawls's original position.

¹⁷ Barry, B., *Ibid.* p. 50

Chapter 7 Nagel's Critique on Neutrality

Contents:

- A. Introduction
- B. Foundations of Liberalism
- C. Conceptual Analysis of Neutrality
- D. Is the Original Position Neutral?
- E. Rawls's Reply to the Charge of Bias Towards Individualistic
Conceptions
- F. Conclusion

A. Introduction

This chapter will focus on the argument that the original position as conceived in *A Theory of Justice* is not neutral towards all conceptions of 'the good life'. Nagel's argument that Rawls's original position is biased towards an individualist conception of 'the good life' initiated a discourse on the possibility of neutrality itself. This discourse was positive in that it led to better clarification of the liberal understanding of governmental neutrality. Furthermore, it led to Rawls's reformulation of his primary goods and, in my opinion, contributed to Rawls's post-*A Theory of Justice* positional shift. This chapter is structured as follows: first the foundation and aim of the liberal position on neutrality will be clarified and elucidated. Second, Nagel's criticism on the neutrality of the original

position as conceived in *A Theory of Justice* will be presented, and this will be followed by Rawls's response.

B. Foundations of Liberalism

In liberalism there exist two forms of restrictions of governmental power, both inspired by the same intuition¹. The first is the view that governments should not concern themselves with the truth or falsity of conceptions of the good held by their citizens, 'that neither the validity, cogency or truth of any conception of the good, nor the falsity, invalidity or stupidity of any other may be a reason for any governmental action'². The second restriction, related to the first, is that governments must act in such a way that they neither improve nor hinder the chances of citizens' success in pursuing their respective conceptions of the good life.

Both of these restrictions are classic conceptions of liberalism and they can be found demonstrated throughout the history of liberal theory. These restrictions are premised on the belief that people are autonomous moral agents and that as such they are in the best position to decide the best course of option for themselves. There is thus no moral justification for paternalistic prescriptions from political authority. Aside from the argument for individual moral autonomy, there is a further pragmatic argument for the neutrality of liberal governments. This argument states that because of the overwhelming power governments wield over citizens, and because of the inherent uncertainty with regard

to the truth of any conceptions of the good, it is prudent not to allow governments to prescribe any one conception of the good to the detriment of other, possibly more valuable conceptions.

Rawls's position on legitimacy through neutrality is that it does not promote any one conception of the good, that it does not concern itself with the objective truth of any conception of the good. This position is unique among both liberal and illiberal theorists. The vast majority of political theorists are 'perfectionist' insofar as they hold vital the promotion of some ideal or ideology to be the primary function of the state. Even amongst traditional liberals the main task is to argue for the objective truth and superiority of liberal values over other political ideals. For Rawls, the constitutional democratic state he envisages rejects the idea that the state has the moral right to impose *any* conception of the good on its citizens. Rawls points out in *A Theory of Justice* that

'justice as fairness' . . . [does not] try to evaluate the relative merits of different conceptions of the good . . . There is no necessity to compare the worth of the conceptions of different persons once it is supposed they are compatible with the principle of justice. Everyone is assured an equal liberty to pursue whatever plan of life he pleases as long as it does not violate what justice demands.³

As pointed out in Chapter 3, the *conditio sine qua non* of a legitimate democratic regime is to find consensus among its citizens. Rawls's intention in conceiving the original position was to use it as a device by which to secure unanimous consensus (after reflection) between reasonable people on the two principles of 'justice as fairness'.

There are two problems with using the original position as a device in securing consensus. First, Rawls realised that democratic societies are necessarily characterised by reasonable pluralism. As such, it is not feasible to expect everyone to endorse 'justice as fairness' as a comprehensive doctrine. Second, those primary goods that Rawls intended to be universally useful in any pursuit of 'the good life' were shown not to be so.

In response to the fact of pluralism that exists in modern democratic societies, Rawls developed the idea of overlapping consensus. Rawls argues that within a liberal democratic culture, a rich political culture is already shared. The task therefore is to find that consensus on democratic values shared by people holding different doctrines. In response to the second problem, the focus of this chapter, Rawls was forced to revise his definition of primary goods. Before this particular discourse is presented, the notion of neutrality must first be clarified.

C. Conceptual Analysis of Neutrality

The primary sense of neutrality is to 'do one's best to help or hinder the various parties concerned in an equal degree'⁴. For a government to be neutral, it must act so that its activities will not benefit or hinder any particular individual or group of individuals.

However, to act so that no party will be harmed or aided by a government's policy is *prima facie* impossible, since whatever policies a government implements it is bound to benefit some groups and disadvantage others. For example, if a police service is established, values such as loyalty, discipline and obedience will very likely be prized for reasons of effectiveness. If this is the case, then values such as creativity and individuality will be disadvantaged by the existence of this police force. Should a government grant mining companies rights to prospect and to mine, there necessarily will be implications for the environment. If the value of economic growth is prized, again there are costs to the environment. In short, any action a government pursues will be pursued with the intention of accomplishing some good and will necessarily have positive or negative consequences for different doctrinal values. In the sense just described, total neutrality is impossible.

Neutrality in the strict consequentialist sense described above is not usually defended by neutral theorists, including Rawls. Rawls and other neutral theorists argue that neutrality is a property of the justification of governmental action. In other words, there needs to be neutrality in the

justification of laws, policies or institutions, and not of their effects⁵. In Charles Larmore's formulation:

[the liberal state's] neutrality is not meant to be one of outcome, but rather one of procedure. That is, political neutrality consists in a constraint on what factors can be invoked to justify a political decision.⁶

The duty of the neutral state is to justify the laws it passes, the policies it prescribes and the institutions it sets up in such a way that will neither hinder nor aid any one group of its citizens. In other words, neutrality of the state applies exclusively to the *reasons* for which governments may act⁷.

D. Is the Original Position Neutral?

Fundamental to Rawls's argument for fairness and neutrality in the original position is that it should not depend on any particular conception of the good. Rawls's intention in using the veil of ignorance is to shield against any bias entering the decision for a principle of justice. As was pointed out in Chapter 4, the individuals behind the veil of ignorance are not completely ignorant. They have general knowledge of society and the workings of the economy and they are also motivated by the fact that they want more rather than fewer primary goods. Rawls

defines primary goods as those which are universally beneficial and useful in the pursuit of any conception of the good. In order for the outcome of the original position to bind legitimately and universally it is essential that no conception of the good be favoured, as this will lead to that conception being preferred over others. In other words, complete neutrality in the original position between conceptions of the good is paramount to the legitimacy of 'justice as fairness'.

a. The value of primary goods

Thomas Nagel argues that the set-up of the original position is not neutral because primary goods as conceived in *A Theory of Justice* are not equally valuable for the implementation of different conceptions of the good⁸. This criticism can be better illustrated by example: in ancient Mesopotamia, obedience to one's hierarchical superior was considered the prime virtue⁹ (this is also true of the Confucian conception, amongst others); 'the good life' was one in which individuals obeyed those in authority and performed their allotted role in the hierarchy of society. Liberty, the first of primary goods, is of relatively less utility (if not outright dis-utility) for the ancient Mesopotamian than for the modern American as the Mesopotamian conception of 'the good life' is achievable only in a strictly structured hierarchical society.

The bundle of primary goods will also be relatively less useful for an individual who holds a Marxist world view. For the Marxist, the

achievement of broader rights and liberties and greater income and wealth are directly detrimental to the pursuit of 'the good life', since the desire for these things contributes to the exploitation of the proletariat and leads to alienation. These Mesopotamian and Marxist examples illustrate that primary goods as defined by Rawls are not necessarily universally useful in the pursuit of all conceptions of the good life.

Robert Wolff takes up a similar line of criticism. While it is acceptable, asserts Wolff, that we might assume rational persons will prefer more rather than fewer primary goods, it is impossible, due to subjectivity of value, to derive a neutral indexing procedure¹⁰. Wolff points out that it is impossible for there to be neutrality of the value of bundles of primary goods. He asks us to consider two hypothetical "representative men". The one seeks a life of consumerism and the other prefers a more conservative, frugal lifestyle. The consumer is prepared to work long and hard so that he might be able to consume an ever-changing variety of goods. The non-consumer, on the other hand, may prefer to work less and to consume from a more limited array of goods. Plainly, the same bundle of primary goods is not of equal utility in the pursuit of the two different life-plans because opportunities and power, wealth and income, like all other commodities, do not have objective, intrinsic value. Their values are dependent on diminishing marginal returns and contingent on the subjective needs of the individual.

Nagel's point on the subjectivity of value is supported by Raz. Raz points out that the value of primary goods lies in the function of supply and demand. Therefore, the value of the primary goods is at least partly determined by the usefulness of the goods in the society and by the manner in which conceptions of the good are pursued¹¹. Plainly, the Rawlsian conception of primary goods is less useful to non-individualistic conceptions which will depend more on the cooperation of others.

E. Rawls's Reply to the Charge of Bias Towards Individualistic Conceptions

a. Rawls response in "Fairness to Goodness"

In a 1975 paper titled 'Fairness to Goodness'¹² Rawls responded directly to criticisms and objections raised against his conception of primary goods. In this paper Rawls clarified some points concerning the interpretation of the original position. He also replied to Nagel and others who argued that the original position does not meet the requirement of fairness, that the nature of the original position is not neutral and is biased toward individualist conceptions of the good. By way of clarification, Rawls asserts that the original position is not meant to be morally neutral, but rather that it is:

. . . intended to be fair between individuals conceived as moral persons with a right to equal respect and consideration in the design of their common institutions.¹³

Rawls points out that notions in the original position cannot be and are not morally neutral and objective towards all conceptions of the good. The most that can be hoped for is procedural fairness, that no single individual is to be advantaged or disadvantaged during deliberations. However, while the original position is not completely objective and, as a result, not absolutely and ideally fair, Rawls argues that his construction is as fair as possible. He also points out that he is attempting to find the fairest possible solution to an ethical and not a logical problem. Rawls argues this by analogy, that in the same way that many have thought there may be no principles of accommodation between religions, there may well be no principle of accommodation between moralities. If no principle of accommodation or common denominator exists between moralities, then no 'ideal fairness' exists, logically or politically. In other words, if it is the case that no ideal fairness exists, then to charge that the original position is not fair will be a nonsensical claim.

In response to the claim that the original position is constructed specifically with a bias toward individualism, Rawls asserts that 'the original position does not presuppose the doctrine of abstract

individualism'¹⁴. He defines abstract individualism as 'the doctrine that the fundamental aims and interests of individuals are determined independently from particular social forms'¹⁵. Since the individuals in question are presumed to have both commonsense and social-scientific knowledge of society, and since Rawls presumes that individuals will enter a well-ordered society, individuals behind the veil of ignorance do understand that their rational life plan will take place in society. Equipped with knowledge of social institutions and how individuals relate to them, Rawls argues that the individuals will not be more inclined to pursue 'abstract individualism'.

To the criticism that some conceptions of the good, such as the Mesopotamian's and the Marxist's, will not be able to thrive as well as individualist ones, Rawls replies that he does not see neutrality as pertaining to consequences, but rather to procedures. In a well-ordered society that is stable in terms of the conception of justice, there are bound to be certain types of conceptions that will not be able to thrive. The first type requires the repression or degradation of certain groups on racial, ethnic or perfectionist grounds. The second type can only survive if they control the machinery of the state. Rawls questions the viability of conceptions such as Marxist, Mesopotamian or religious conceptions, which may not survive well or gain adherents within institutions of equal freedom and mutual toleration¹⁶. In other words, Rawls has little sympathy for doctrines that require state or/and ideological apparatuses

to sustain themselves. In line with Mill's choice criterion, Rawls argues that good and worthwhile conceptions will continue to thrive, while erroneous conceptions will die out if allowed to do so. It is enough, Rawls asserts, that:

the basic structure of a well-ordered society be as fair a background of institutions as one can devise against which to apply Mill's criterion, given the conditions of human life (the circumstances of justice).¹⁷

b. Rawls's modification of the formulation of primary goods

In his 1982 article "Social Unity and Primary Goods" Rawls specifically addresses the moral and practical problem of interpersonal comparisons in 'justice as fairness'. In this article Rawls states the problem of interpersonal comparisons in justice to be this: given the different incommensurable conceptions of the good, how is public understanding possible? Primary goods as 'a *partial* similarity of citizens' conceptions of the good is sufficient for political and social justice'¹⁸. Later, in the 'Preface' to the French edition of *A Theory of Justice*¹⁹, Rawls notes that a 'serious weakness' of the original English edition was its account of primary goods. Rawls identifies the weakness as the ambiguity of whether primary goods' value depends solely on the 'natural facts of human psychology' or on the 'moral conception of the person

that embodies a certain idea'. Recognising that the value of primary goods is dependent on what a person perceives as valuable in her pursuit of 'the good life', Rawls settles the ambiguity in favour of the latter. He re-characterises primary goods as 'what persons need in their status as free and equal citizens, and as normal and fully cooperating members of society over a complete life'²⁰.

It is important to note that there is a shift, albeit slow and cautious, towards a more pragmatic neutralism in Rawls's work from *A Theory of Justice* to *Political Liberalism*. In *A Theory of Justice*, 'justice as fairness' is understood to be a comprehensive moral doctrine to which every reasonable person can and will agree once they have reflected on it thoroughly. 'Justice as fairness' as formulated in *A Theory of Justice* can be understood to have two thrusts of argument. On the one hand, the original position can be understood as a rational choice situation, the outcome of the rational choice bounded universally. On the other, the set-up of the original position serves as a device for us to reach reflective equilibrium in terms of our intuitive moral sentiments. Rawls's argument in *A Theory of Justice* was intended to offer a comprehensive justification for the two principles of 'justice as fairness'. Whilst Rawls still holds the deontological view that citizens are free and equal, he has been forced to make a less comprehensive claim for his theory of justice. He recognises that it is unlikely that unanimity will result from deliberations in the theoretical original position, and so he develops a

more robust and pragmatic theory that is specifically applicable to modern democratic constitutional regimes.

F. Conclusion

This chapter has presented the argument that the original position, the main device originally used by Rawls in arguing for the two principles of justice, is not neutral towards different conceptions of the good. The argument was largely successful in that it had the effect of forcing Rawls to clarify that the original position was 'procedurally' as fair as possible. By this Rawls means that in the realms of morality, religion and philosophy, objectivity is logically impossible. This being the case, it is nonsensical to argue that primary goods are not completely neutral. By neutrality of the primary goods, Rawls meant that the primary goods are: (1), procedurally neutral in that the justifications for them are not meant to discriminate for or against anyone, and (2), primary goods are neutral insofar as people are considered to be free and equal and as circumstances of justice apply.

Notes:

¹ Raz, J., *The Morality of Freedom*, p. 108

² *Ibid.*

³ Rawls, *A Theory of Justice*, p. 94

⁴ Montefiore, A. ed., *Neutrality and Impartiality*, p. 5, quoted in Raz, *op cit.*, p. 113

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- ⁵ Sher, G., *Beyond Neutrality: Perfectionism and Politics*, p. 23
- ⁶ Larmore, C., *Patterns of Moral Complexity*, p. 44
- ⁷ Sher, G., *op cit.*, p. 4
- ⁸ Nagel, T., 'Rawls on Justice', in Daniels, N. (ed.), *Reading Rawls: Critical Studies on Rawls' A Theory of Justice*, pp. 1-16
- ⁹ Henri Frankfort et al., *Before Philosophy: A Study of the Primitive Myth, Beliefs and Speculations of Egypt and Mesopotamia*, p. 217
- ¹⁰ Wolff, R., *Understanding Rawls: A Reconstruction and Critique of A Theory of Justice*, pp. 133-137
- ¹¹ Raz, J., *op cit.*, p. 119
- ¹² Rawls, 'Fairness to Goodness', in Freeman, S. (ed.), *John Rawls: Collected Papers*, pp.267-285
- ¹³ Rawls, *Ibid.*, p. 270
- ¹⁴ *Ibid.* p. 277
- ¹⁵ *Ibid.*
- ¹⁶ *Ibid.* p. 280
- ¹⁷ *Ibid.*
- ¹⁸ Rawls, *Social Unity and Primary Goods*, in Freeman, S. (ed.), *op cit.*, p. 361
- ¹⁹ Rawls, *Preface for the French Edition of A Theory of Justice*, in Freeman, S. (ed.), *op cit.*, p. 515-420
- ²⁰ *Ibid.*, p. 417

Chapter 8: Raz's Critique on Neutrality

Contents:

- A. Introduction
- B. Raz's Argument for a Perfectionist Liberal State
- C. Raz's Interpretation of Rawls's Political Liberalism
- D. Raz's Perfectionist Critique
- E. Conclusion

A. Introduction

This chapter presents Raz's criticism of Rawls's argument for liberalism. Raz understands Rawls's argument for liberalism to be based on the purported neutrality of the liberal regime. In his book *Ethics in the Public Domain*, Raz offered a thorough analysis of Rawls's post-*A Theory of Justice* position. This chapter will be structured as follows: Raz's own defence of liberalism and the value of autonomy as presented in *The Morality of Freedom* will be briefly outlined. Second, his interpretation of Rawls's post-*A Theory of Justice* arguments for liberalism will be presented and finally his criticism of Rawls's neutrality stance will be presented.

B. Raz's Argument for a Perfectionist Liberal State

Raz begins his argument by asserting that liberal values are not necessarily neutral. Instead of arguing that a liberal state is most conducive to the flourishing of different conceptions of the good, Raz argues for the value of autonomy. Autonomy, Raz argues, is the value that is most effective for achieving human well-being and thus ought to be the ultimate goal of political institutions and policies. Autonomy is also compatible with value pluralism. Given that there are different, equally valuable autonomous choices, Raz is happy to be tolerant of value pluralism.

Well-being is understood by Raz to be linked to the level of success attained in pursuing comprehensive goals¹. Given that well-being is dependent on this success, two questions are critical: first, how do persons come to formulate and pursue these goals and second, what is the case for the pursuit of these goals to constitute success?

The answer to the first question is that people come to formulate and pursue their goals because they are presented with 'existing social forms, i.e. forms of behaviour which are in fact widely practiced in [their] society'². These social forms constitute some of the most important structures of our pursuits (friendships, intimate relationships, careers, personal projects etc.). Raz argues in a later essay that 'by and large, one's cultural membership determines the horizon of one's opportunities of what one may become, or (if one is older) what one might have been.'³.

In other words, the social structures one encounters determine one's sense of the range of possible goals and pursuits available to one.

Raz is eager to point out that well-being does not preclude a person from pursuing comprehensive goals that are original. Nor is well-being automatic when one pursues conventionally approved goals. For Raz, only the successful pursuit of objectively valuable goals constitutes well-being.

In modern liberal states, autonomy is pervasive. To succeed in modern liberal states, individuals need to be able to exercise autonomy effectively. This is because liberal societies 'call for the ability to cope with changing technological, economic, and social conditions, for an ability to adjust, to acquire new skills, to move from one subculture to another, to come to terms with new scientific and moral views'⁴.

Since autonomy is 'a fact of life' in liberal states and a person's well-being is determined by how successfully she is able to pursue goals determined by the social context, the promotion of autonomy in the liberal state ought to be the primary aim of liberal regimes. Raz points out that the recognition of the contextual value of autonomy in a liberal state also commits one to value pluralism⁵. If several significantly different options worthy of choice exist (e.g. careers in public service, medicine and academia), and if these choices include incompatible comprehensive goals, then value pluralism is true.

C. Raz's Interpretation of Rawls's Political Liberalism

Faced with the fact of pluralism, Rawls resorted to the classic liberal response of toleration. Raz points out three features of Rawls's tolerant attitude. First, Rawls's response is basically tolerant: he allows for the existence of conflicting and incommensurable conceptions of the good life. Second, the justification for the tolerant attitude is not based on the positive value of diversity or on the pragmatic argument regarding the dangers of giving government too much power, but on the consideration of fairness. Third, the consideration of fairness leads Rawls to advocate an 'epistemic withdrawal from the fray'⁶. Raz points out the novelty of Rawls's position:

... for never before has it been suggested that governments should be unconcerned with the truth of the very views (the doctrine of justice) which inform their policies and actions, and never before has it been argued that certain truths should not be taken into account because, though true, they are of an epistemic class unsuited for public life.⁷

Raz distinguishes four themes of Rawls's conception of political theory under the slogan 'Justice as Fairness: Political not Metaphysical': (1) The theory has *limited applicability*; (2) it has *shallow foundations*; (3) it is *autonomous*; (4) it is based on *epistemic abstinence*⁸.

a. Limited applicability

'Justice as fairness' is not a comprehensive theory of justice; it applies only to the basic structure of society. Moreover, in *Political Liberalism* it is modified to apply only to the basic structure of a modern constitutional democracy. The new limitation on the theory serves not only to clarify that it is not a metaphysical, comprehensive theory but, perhaps more importantly, that it removes any trace of utopianism and emphasises the pragmatic intention of the theory. The strict limitation to modern constitutional democracies means that the theory is applicable to the shared common culture that exists in modern pluralistic, constitutional democracies. For Rawls, the two criteria of modern democratic societies are the fact of pluralism and the fact that these societies share a common culture rich enough that consensus on some principle is possible. The new limitation placed on the applicability of 'justice as fairness' re-focuses the aim of political philosophy, as Rawls puts it: 'the aim of political philosophy depends on the society it addresses'⁹. The aim of Rawls's *Political Liberalism* thus is to theorise and argue for the principles of justice on which citizens of pluralistic democratic societies can find consensus. The pursuit of this aim brings one to the second theme identified by Raz.

b. Shallow foundations

The theory of justice for the modern democratic society has shallow foundations. The justification for this theory begins with the fact that certain common beliefs are held by all. Further, the theory does not question the metaphysical foundations for the beliefs of the common culture. For Rawls, a theory of justice draws on the common political and intuitive ideas that are embedded in the tradition of a constitutional democratic regime. The shallowness of the foundation is the result of the two other features of 'justice as fairness': the autonomy and epistemic abstinence of the theory.

c. Autonomy

By 'autonomy' Rawls means that his theory is capable of standing alone. The theory itself is neither justified by nor dependent for its truth upon any comprehensive moral theory. 'Justice as fairness' does not depend on any moral truths, it begins from the common culture and that is as far as it goes¹⁰.

d. Epistemic abstinence

Responding to the fact of pluralism, Rawls embraces shallow foundations and autonomy in his theory because he seeks consensus in the public political culture; whether the consensus is based on truth does not matter. The epistemic abstinence of Rawls's political liberalism

lies in the fact that he refrains from claiming the principles that the citizens consent to be true¹¹. Since truth depends on deep and possibly non-autonomous comprehensive doctrines, to assert the truth of the principle would be contrary to the principle of tolerance. Because the Rawlsian project is to find consensus and therefore legitimacy for the government and not to find metaphysical truths, epistemic abstinence is the only strategy Rawls can adopt.

D. Raz's perfectionist critique

The aim of political liberalism is to find public consensus in the face of pluralism. The task of Rawls's political philosophy is not to find true, valuable ideas. Rather, it is to find consensus. The consensus acts as a means for the political goal – to ensure the stability of the well-ordered society from one generation to the next¹². In other words, Rawls's theory is concerned with the 'bread and butter' of practical democratic politics and not with objective truths or universalistic values. *Political Liberalism* is concerned with finding acceptable conditions, exploring common grounds and coming to solutions to which all parties can agree. Raz notes that Rawls's project in his political liberalism is very much to engage in practical constitutional politics – with one difference: that he does not try to secure the agreement by claiming the principle underlying the proposal to be true¹³.

However, Raz admits that to claim that Rawls's project is merely a consequentialist search for consensus would be to misinterpret him. Two elements in his theory preclude the interpretation that Rawls's project is an unprincipled search for consensus. First, his aim is to find consensus between opposing philosophical, moral and religious doctrines that are likely to persist through time in a more or less just constitutional democratic society¹⁴. Second, Rawls explains why his overlapping consensus is not a mere *modus vivendi*¹⁵. Mere *modus vivendi* means that the compromise is based on self or group interest; the agreement is based on self-interest and there is no real 'meeting of the minds' on any principle. Consensus in the Rawlsian sense can only be achieved when the different moral, philosophical and religious doctrines can coherently justify the agreed-to principle according to their own conceptions of the good. In other words, the different doctrines do not agree to the common principle because it is advantageous to their survival, rather they agree to it because the principle is consistent with their own comprehensive doctrines.

Rawls's theory is both philosophical and practical – philosophical in the sense that it is a complex moral doctrine of justice, and practical because its task is to find consensus which will promote stability in the well-ordered society¹⁶.

Raz questions the goal of Rawls's political philosophy. He asks why the establishment of stability through consensus, above other

things, should be a goal of political philosophy. Raz points out that on the one hand Rawls presumably considers the practical goal of stability through consensus to be valuable and worthwhile, while on the other hand he is not concerned with truths. The assumption that social unity and stability based on consensus are valuable and worthwhile goals for political philosophy forms the foundation of Rawls's theory of justice; without this assumption Rawls's theory cannot be regarded as a theory of justice – only as a theory of social stability¹⁷. Raz points out that Rawls's political liberalism is more a sociological and empiricist search for stability rather than a normative quest for a just society. Raz argues that a regime cannot be considered 'just' simply because there is consensus amongst its members. It can only be considered just when measured according to some normative standard, meaning that the theory need to be either a true, a reasonable or a valid theory of justice. Instead of arguing for the truth of his theory, Rawls has merely offered a scheme for a stable and empirically legitimate government.

E. Conclusion

In Chapter 3 of this dissertation, I distinguished the difference between empiricist and normative understandings of legitimacy. Briefly, social scientists are concerned with what they can observe empirically. A regime is considered legitimate when one can verify that the citizens believe it to be so and when one can verify stability in the power

relationship between the regime and the subject. Political theorists, on the other hand, are concerned with normative legitimacy. They are concerned with whether the relationship between the regime and the subjects is just. Because political theorists are concerned with making moral judgements, their task is to find a norm by which the morality of a political relationship can be judged.

According to the distinction between normative and empirical legitimacy, Rawls's search for stability through overlapping consensus can be considered to be empirical. If a society with a liberal tradition is considered legitimate when the citizens believe that they have no grievances and that the society is stable, then this must be an empiricist understanding of legitimacy.

While it is important that political theory be connected and be relevant to politics in the world, it ceases to serve its intended purpose when it no longer plays the role of a critic. Is a constitutional democracy legitimate when the citizens are satisfied that it is so? Or is it legitimate when it is just? The answer depends on whether one is concerned with a normative or an empirical definition of justice.

Rawls's writing since *A Theory of Justice* has mellowed increasingly. The modifications Rawls makes to his theory of justice are, in my judgement, primarily driven by his concern for acceptability. While Rawls intended *Political Liberalism* to be a further elaboration of his theory of justice, it has in fact restricted its persuasive force. If the

primary concern of a theory of justice is to find stability in society, then it ceases by definition to be concerned with the normative.

Notes:

¹ McCabe, D., 'Joseph Raz and the Contextual Argument for Liberal Perfectionism', *Ethics* 111 (April 2001), p. 496

² Raz, *Morality of Freedom*, p. 308

³ Raz, 'Multiculturalism', in *Ethics in the Public Domain*, quoted by McCabe, *op cit.*, p. 497

⁴ Raz, *Morality of Freedom*, p. 369-370

⁵ McCabe, D., *op cit.*, p. 499

⁶ Raz, *Ethics in the Public Domain*, p. 46

⁷ *Ibid.*

⁸ *Ibid.* p. 47

⁹ Rawls, *The Idea of an Overlapping Consensus*, in Freeman, S. (ed.), *op cit.*, p. 421

¹⁰ Raz, *Ethics in the Public Domain*, p. 49

¹¹ *Ibid.*, p. 50

¹² Rawls, *The Idea of an Overlapping Consensus*, in Freeman, S. (ed.), *Ibid.*

¹³ Raz, *op cit.*, p. 52

¹⁴ Rawls, 'Justice as Fairness: Political not Metaphysical', pp. 225-6 and pp. 246-7, noted in Raz, *Ibid.*

¹⁵ Rawls, *PL*, p. 147

¹⁶ Raz, *op cit.*, p. 54

¹⁷ *Ibid.*

Chapter 9: Conclusion

This essay set out to examine Rawls's argument for the normative legitimacy of liberal democratic regimes faced with the fact of pluralism. In Chapter 2, it was argued that pluralism is reasonable and that Rawls's contention that the fact of pluralism will persist is correct. As a result, pluralism poses a genuine problem for democratic theories that require consensus from the different groups. In Chapter 3, the concept was clarified and it was pointed out that two different kinds of political legitimacy exist. Empirical legitimacy is concerned with what is empirically verifiable, and from this perspective a regime is legitimate when the citizens believe it to be so and they act consistently with this belief. Normative legitimacy is not concerned with the beliefs and actions of the citizens, and is judged according to a normative standard. This standard would be derived reasonably and is independent from the empirical situation.

In Section II (Chapters 4 – 6), John Rawls's argument for the normative legitimacy of a neutral state was elucidated. Chapter 4 presented a summary of Rawls's argument for his theory of 'justice as fairness' in *A Theory of Justice*. Building on this, Chapter 5 presented an outline of *Political Liberalism*, in which Rawls made modifications to 'justice as fairness' in an attempt to depict a stable society. In Chapter 6, Rawls's argument that the neutral state offers the best argument for a

legitimate democratic regime was reconstructed. Here was presented Rawls's argument that a state that does not concern itself with contestable truths held by the different groups is most likely to gain their consensus.

In Section III (Chapters 7 – 8), criticisms of Rawls by two prominent authors were noted. Chapter 7 deals with Thomas Nagel, who points out that primary goods, described by Rawls as motivation for the individuals behind the veil of ignorance, tend to favour those who hold individualistic conceptions of the good life. Because no commodity has objective value and value depends on the subjective circumstances of the individual, giving different people the same bundle of goods does not equate to giving them goods of equal value. Inevitably, the same bundle of goods will prove more useful in the pursuit of some conceptions of the good than in the pursuit of others. Complete consequential equality is therefore impossible. In response to this, Rawls clarified his position and argued that procedural equality is sufficient for a just system.

In Chapter 8, Joseph Raz's criticism, that Rawls's preoccupation with stability and consensus is detrimental to the task of finding a normative standard by which a democratic regime may be judged, was elucidated. In my judgement this criticism is valid. However, I suspect that Rawls would reply that to make this criticism is to misunderstand him. Rawls's project in *Political Liberalism* is to legitimate a

constitutional democratic regime in confrontation of the fact of reasonable pluralism.

In arguing for the legitimacy of a liberal society in which equality and autonomy will be respected by all, Rawls took an approach emphasising toleration and compromise. It is in emphasising the importance of toleration that Rawls took an anti-perfectionist stance. By remaining consistent with regard to the assertion that no one in a pluralistic society can claim to have privileged access to the truth, Rawls makes a strong case for the acceptability of a neutral state.

The case Rawls makes, however, is for the acceptability and thus for the *empiricist* legitimacy of the state. Rawls's emphasis on acceptability by the citizens and on the stability of the regime is, to my mind, an argument for empiricist legitimacy because he is primarily concerned with persuading the citizens to *believe* the regime to be acceptable and therefore legitimate. By emphasizing stability and focusing on persuading the citizens, Rawls has strayed from the original task of making a strong, objective argument for his 'justice as fairness'.

While it is my judgement that the later Rawls has strayed too far from the task of providing a strong normative framework by which the legitimacy of the regime can be judged, I also understand that Rawls is engaged in a balancing act. On the one hand, one needs to consider the theoretical consistency of one's theory, on the other hand, one needs to consider the practical adaptability of one's theory.

For those who agree with Rawls, his neutral state is indeed a very attractive option for adjudicating between different conceptions of the good that exist in modern democratic societies. For those who disagree with him, his pragmatism and his eagerness for toleration and compromise restricts to an unacceptable degree the criticism of different comprehensive conceptions of the good.

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