

Rawls's Notion of Overlapping Consensus

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Background

The questions I shall examine are whether John Rawls's notion of overlapping consensus is question-begging and does it impose an unjust limit on toleration?

In *A Theory of Justice*, Rawls is concerned with the subject of social justice, in particular the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation (1999, p6).

The conception of justice that Rawls seeks to promote is that of justice as fairness, a conception that is enshrined in two "principles of justice". These are the principles that Rawls believes would be agreed to jointly by people in an "original position" wherein each person is ignorant of such matters as his or her social position, natural assets, psychological propensities and own conception of the good (1999: 10-11 and 52-53). The first of the principles (in order of priority) is relevant to this essay: as restated in Rawls's *Political Liberalism*, it requires that

Each person has an equal claim to a fully adequate scheme of basic rights and liberties, which scheme is compatible with the same scheme for all. (2005, p5).

Plainly, any proposal for social justice in a well ordered society, if it is not to be dismissible as impracticable, must be such as to ensure that the just society will be stable. By Rawls's own admission (2005, xvi), it is assumed in *A Theory of Justice* that such stability will be guaranteed by the endorsement by all the citizens of a comprehensive political doctrine in which, by common consent, the two principles of justice are rooted. The doctrine has a distinctly Kantian flavour, in that the principles of justice are chosen to reflect the citizens' conception of themselves as moral agents who are rational, free and equal. However, the basic rights secured by the above-mentioned first principle of justice must surely include liberty of conscience and freedom of thought, and these in due course would result in pluralism, i.e. the development of a plurality of reasonable comprehensive doctrines being espoused amongst the citizens.

Reasonable comprehensive doctrines and the Critical Question

Briefly stated, by 'reasonable comprehensive doctrine' Rawls means a doctrine that organises 'recognised values so that they ... express an intelligible view of the world', doing so by giving less or more weight to various values and providing ways of balancing conflicting values (2005, p58-9). Such a doctrine, which commonly constitutes a religious, philosophical or moral tradition, will determine what an adherent assesses as the right and the good in human affairs and how he or she justifies such an assessment. Such comprehensive doctrines need not, and often will not, be compatible with one another. To take an example from Samuel Freeman (2003a, p29), an adherent of liberal Thomism will base his or her sense of justice on the desire to follow what he or she sees as God's laws, not on a Kantian desire to express one's moral autonomy. Thus, the assumption of a universal adherence to the same comprehensive doctrine is ruled out by the expected outcome of the principles of justice themselves (2005, xl). Hence, the need arises to establish a revised account of how a well ordered society can remain stable despite the presence within it of irreconcilable comprehensive doctrines. Specifically, an answer is needed to the question (hereinafter the 'Critical Question'):

How is it possible for there to exist over time a just and stable society of free and equal citizens who remain profoundly divided by reasonable religious, philosophical and moral doctrines? (2005, p4).

The above characterisation of reasonable comprehensive doctrines contains nothing that amounts to a requirement of reasonableness: indeed, a comprehensive doctrine might organise values coherently but do so in a manner that is unreasonable (intuitively understood) by

giving scant regard to such values as, say, human dignity and respect for others. Rawls does require of a reasonable comprehensive doctrine that it evolve slowly in response to what its adherents regard as good and sufficient reasons (p59): however, this does not connote an appropriate notion of reasonableness: evolution is not guaranteed to result in rapprochement with other doctrines. Freeman (2003b, p31) asserts that Rawls never defines his conception of reasonableness; however Rawls does offer a characterisation of a reasonable person as one who (a) is willing to propose and abide by what he or she regards as fair terms of cooperation and to consider the terms that others propose, provided that those others are willing to do likewise (2005, p49) and (b) accepts the ‘burdens of judgment’ (by which Rawls means such sources of disagreement as the difficulty of assessing complex evidence or of interpreting imprecise concepts; (2005, p55-7)), and hence expects, as Marilyn Friedman puts it:

people living under free institutions to disagree about fundamental matters of religion, morality or philosophy. (2000, p17)

It appears, then, that a comprehensive doctrine is reasonable if it permits its adherents to act as reasonable persons, as just now characterised, without falling into heresy. Persons or doctrines will be ‘unreasonable’, of course, if they reject one or both of requirements (a) and (b) above.

The Critical Question in greater detail

In a reformulation of the Critical Question, Rawls states that the problem addressed in *Political Liberalism*

is to work out a political conception of political justice for a (liberal) constitutional democratic regime that a plurality of reasonable comprehensive doctrines ... may endorse for the right reasons. (2005, xxxix)

One path to stability is thus ruled out immediately, namely the basing of a conception of justice on a single comprehensive doctrine. Adherents of the disqualified reasonable doctrines could hardly endorse this at all, let alone for the ‘right reasons’, and the resultant society could hardly count as a liberal democracy. It would be no more than a pious hope that adherents of one comprehensive doctrine could peacefully persuade everyone else to convert to it: indeed, Rawls believes that such a conception of justice would require enforcement by ‘the oppressive use of state power’ (2005, p37).

The requirement that endorsement be for the ‘right reasons’ rules out arrangements between adherents of different comprehensive doctrines as a matter of convenient compromise, a matter (as Rawls terms it) of ‘mere modus vivendi’. In such an arrangement, each party subscribes to the agreement on the basis of self-interest: the bargain struck between the parties is seen by each as the best it can achieve given the prevailing circumstances. However, the resulting equilibrium is only meta-stable: a change in circumstances, in particular a change in the balance of power between the parties, is likely to upset the bargain since it will no longer reflect what the parties see as their respective self-interests. As Rawls puts it, in the case of a modus Vivendi

social unity is only apparent, as its stability is contingent on circumstances remaining such as not to upset the fortunate convergence of interests. (2005, p147).

It would seem from the foregoing that a stable conception of justice in a pluralistic liberal society cannot be fabricated from the comprehensive doctrines themselves. Instead (and here I am guided by Dreben, 2000, p333-4), Rawls proposes that a different starting point be adopted, namely the idea of a constitutional liberal regime – one in which

citizens [are] ... free and equal persons and ... society [is] ... a fair system of cooperation” (1997, p453),

and that a conception of justice (1) be forged from the values implicit in such an idea. Such a conception must (2) ‘specify the basic rights, liberties, and opportunities’ afforded to the citizens (1997, p490), and the principles it embodies must ‘apply to basic political and social institutions’, such principles moreover being (3) capable of presentation ‘independently from

comprehensive doctrines of any kind' (1997, p453). A qualifying conception of justice may accordingly be characterised as (1) liberal, (2) political, and (3) free-standing. Formulating a qualifying political conception of justice for adoption by a society is not, however, sufficient to provide a solution to the Critical Question: the adherents of the various comprehensive doctrines also have to acquiesce in the conception. Indeed, for stability mere acquiescence is not enough, for it may signal no more than a *modus vivendi*. What is wanted is that citizens actually approve of the political conception. Claudia Mills suggests that enthusiastic support for a society's institutions promotes the stability of those institutions and may promote loyalty and community feeling (2000, p193).

The idea of overlapping consensus

The question now arises as to the basis of such approval of the adopted conception of justice, and it is to the notion of 'overlapping consensus' that Rawls turns in order to answer it. Briefly put, if a liberal constitutional society is to remain stable despite harbouring a plurality of reasonable comprehensive doctrines, it must be possible for each citizen to find grounds *within the reasonable comprehensive doctrine to which he or she adheres* for endorsing the conception of justice in play in that society. Simplifying Rawls's illustration (2005, p145), let us consider a model case of a society containing two comprehensive doctrines: one is religious, the other is a moral doctrine. There would be an overlapping consensus if the same political conception of justice could be justified in terms of the principles embodied in each of the doctrines. For instance, as Freeman elaborates (2000b, p36), the liberal political principle of treating citizens as free and equal might be endorsable by the religious doctrine on the ground that the principle reflects God's will, and by the moral doctrine, if Kantian in flavour, on the ground that the principle respects a person's autonomy, or, if utilitarian, on the ground that the principle is conducive to an increase in aggregate utility. Thus, the comprehensive doctrines permit consensus amongst their adherents on a common conception of justice essentially characterised only by political values without compromising the beliefs that make up those doctrines: yet, despite overlapping to the extent that consensus is possible, the doctrines remain incompatible overall.

Does Rawls beg the question in favour of liberalism?

Friedman asserts that what she describes as "Rawls's legitimization pool for political liberalism" is characterised in just such a manner as to exclude those people whose adherence to certain comprehensive doctrines 'would lead them to reject political liberalism' (2000, p28). Friedman quotes a comment by Samuel Scheffler (1994, p20) to the effect that Rawls presupposes a society already permeated with liberal values but provides no reason for converting an illiberal society to liberalism. Rawls stands accused of question-begging unless he can produce a 'conception of reasonableness that ... is not defined in terms of the politically liberal values he seeks to defend' (Friedman, 2000, p28).

It is tempting to reply by recalling that the liberal state envisaged in *A Theory of Justice* embodies the principles of justice developed under the conditions of the original position. Since a person in that position is denied knowledge of his or her conception of the good, it follows that the principles of justice as fairness are developed independently of any comprehensive doctrine that defines its own particular conception of the good. Those who *subsequently* espouse a doctrine that is unreasonable are those who in effect have recanted from the principles of justice. Rawls's notion of reasonableness may well be designed to catch those, and only those, who can continue to subscribe to those principles, but it is invoked essentially as a response to the pluralism that develops in the liberal state. Since that notion of reasonableness plays no part in the *establishment* (as opposed to a later defence) of a liberal state based on the principles of justice, no question is begged. Unfortunately, replies along these lines have been undermined by Rawls himself, for he has stated (1997, p489) that the doctrine of justice as fairness was presented as a comprehensive doctrine to which all assent, and that this is not possible in a pluralistic society. However, one must not throw out

the baby with the bathwater: I am still inclined to regard the first principle of justice as a good encapsulation of core liberal values.

I suggest that Friedman's objection is nonetheless misconceived. It is important to bear in mind that, as seems clear from the Critical Question, Rawls is trying to ascertain the circumstances – if any - under which a constitutional liberal and democratic society can (for the 'right reasons') be maintained *as such* despite the growth of incompatible comprehensive doctrines that a liberal climate will encourage. Rawls finds that there *are* such circumstances, namely the existence of overlapping consensus among reasonable comprehensive doctrines. In response to Scheffler's comment, the important point is that Rawls's project *starts* from the notion of the liberal state: the question of converting an illiberal state simply does not arise. Note too that the Critical Question addresses a seeming internal incoherence in the notion of the liberal state (briefly, it encourages incompatibilities). In the context of the liberal state, it is the liberal notion of reasonableness that is in play: investigating an alternative "neutral" notion would be irrelevant to the Critical Question.

The limits of toleration

Friedman (2000) observes that, because policies in the liberal society that Rawls envisages are legitimated by the consent only of adherents of *reasonable* comprehensive doctrines, anyone whose comprehensive doctrine is deemed unreasonable will be excluded from that 'legitimation pool'. For Rawls, unreasonable doctrines are not to be accommodated: they incur "the practical task of containing them – like war or disease - so that they do not overturn political justice" (2005, p64, n.19). Friedman worries that such containment requires suppressing the adherents of an unreasonable doctrine so that they may neither express nor enact it (2000: p22-3). Rawls had in fact already stated that the liberty of the intolerant should be curtailed 'only when the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger' (1999, p193). Clark Wolf suggests that the Rawlsian liberal state therefore places a lighter burden on those who would dissent from its principles than the burden that might be expected to be imposed by a fundamentally illiberal state on dissenters from *its* principles (2000, p122).

Nonetheless, some curtailment of freedom is envisaged and hence the foregoing does not rebut Friedman's assertion that Rawls's political liberalism fails to entail "respect for the political autonomy of *all* its citizens" and has "no greater politically independent, *consent-based* claim to anyone's allegiance than many of its political rivals" (2000: 31, original italics). Notwithstanding Friedman's view that those who would reject basic liberal values "are an unsavory [*sic*] lot indeed" – for example those who seek to impose their religious dogmas on others, or those who seek to exploit social cooperation to further their own ends at others' expense – she finds "no principled but politically neutral reasons" for excluding them from the legitimation pool (2000: 29). Recast in Rawls's terminology, the charge is that seeking to justify social arrangements only by reference to an overlapping consensus of "the reasonable" is itself unjustifiable.

However, as already noted, the 'containment' envisaged by Rawls applies to unreasonable doctrines only when they threaten to endanger the liberal order (2005, p64, n19; 1999, p193). A person may therefore observe the requirements of his or her comprehensive doctrine, express his or her views and may associate with those of like persuasion, to the extent that the liberties of others remain unaffected. Thus, for example, the atheist may not seek to outlaw another's worship, whether private or communal, and the religious fundamentalist may not seek to impose sanctions on the atheist for alleged apostasy. This seems to be entirely consistent with core principles of a liberal state, namely personal autonomy and equality in the distribution of rights and liberties. These principles surely preclude the imposition of one's comprehensive doctrine on others against their wishes, for such imposition would diminish their autonomy and constitute an arrogation of rights that outweigh the rights of those others. If containment of illiberal doctrines can thus be achieved without transgressing

such principles, then (pace Friedman) the liberal credentials of the Rawlsian state remain intact.

Friedman assumes a very lofty remit for liberalism, for she attributes to Jeremy Waldron, with seeming approval (2000, p19), the view that liberalism requires

that all aspects of the social world should either be made acceptable or capable of being made acceptable to *every last individual*. (Waldron 1993, p36-37. Friedman's emphasis)

In failing to accommodate those who are stigmatised as unreasonable, Rawls's political liberalism falls short of satisfying that requirement. However, it is not at all clear that such an elevated requirement can ever be fulfilled. At least, the onus is upon those who insist upon such a standard for a liberal state, if that standard is not to be a mere pipe-dream, to demonstrate that, and how, it is attainable. Stephen Macedo observes that it would be 'utterly debilitating' to seek public policies that are neutral as between the many comprehensive doctrines that exist (1995, p484). Furthermore, although a political doctrine that holds equal liberty and freedom of expression to be goods, yet which denies those goods to certain people, is admittedly in tension, a doctrine that gives people a right completely to undermine it is hardly a candidate for stability. Something has to give, and curtailing liberty and freedom of expression only to the extent of preventing those goods from being used to deny them to others seems an eminently sensible way for a society to endure in a state wherein the degree of liberty approaches a *practicable* maximum. The modest (but necessary) curtailment of liberty will inevitably involve restrictions on those who would supplant the liberal social order. However, this should hardly be a cause for regret if one is engaged in the project of preserving a liberal state as I contend Rawls is. As Macedo puts it, the tough-minded political liberal must be prepared to 'remind fundamentalists and others that they must pay a price for living in a free pluralistic society' (1995, p496).

Bibliography

- Dauenhauer, B, 2000 'A Good Word for a Modus Vivendi', in Davion & Wolf, 2000a
- Davion, V & Clark, W, 2000a *The Idea of A Political Liberalism: Essays on Rawls*, Rowman & Littlefield.
- Davion, V & Clark, W, 2000b 'From Comprehensive Justice to Political Liberalism', in Davion and Wolf, 2000a
- Dreben, B, 2000 'On Rawls and Political Liberalism', in Freeman, 2003a
- Freeman, S, 2003a *The Cambridge Companion To Rawls*, Cambridge University Press.
- Freeman, S, 2000b 'John Rawls – An Overview', in Freeman, 2003a.
- Freeman, S, 2000c 'Congruence and the Good of Justice', in Freeman, 2003a.
- Friedman, M, 2000 'John Rawls and the Political Coercion of Unreasonable People', in Davion and Wolf, 2000a.
- Hershovitz, S, 2000 'A Mere Modus Vivendi?', in Davion and Wolf, 2000a.
- Macedo, S, 1995 'Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?', *Ethics*, Vol. 105, No. 3.
- Mills, C, 2000 'Not a Mere Modus Vivendi: The Bases for Allegiance to the Just State', in Davion and Wolf, 2000a.
- Rawls, J, 1999 *A Theory of Justice*, Revised edition, Oxford University Press.
- Rawls, J, 1997 'The Idea of Public Reason Revisited', *University of Chicago Law Review*, 64 (Summer 1997), reprinted in Rawls 2005, pp. 440-490.
- Rawls, J, 2005 *Political Liberalism*, Expanded paperback edition, Columbia University Press.
- Scanlon, T, 2003 'Rawls on Justification', in Freeman, 2003a.
- Scheffler, S, 1994 'The Appeal of Political Liberalism', *Ethics* 105, No. 1.
- Sterba, J, 2000 'Rawls and Religion', in Davion and Wolf, 2000a.

- Waldron, J, 1993 *Liberal Rights: Collected Papers 1981-1991*, Cambridge University Press. Excerpt as quoted in Friedman, 2000.
- Wolf, C, 2000 'Fundamental Rights, Reasonable Pluralism', in Davion and Wolf, 2000a.