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## On Justification, Justice, and Legitimacy

### Justificação, Justiça e Legitimidade

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#### 1. Introduction

I consider three main questions. First, what is the relationship between the concepts of Justification, Justice, and Legitimacy? I approach these concepts from the similar, though divergent, theories as found first in John Rawls, and his theory of Political Liberalism, namely his Justice as Fairness and second in Jürgen Habermas, in his *Between Facts and Norms*, namely his theories of *Communicative Action* and *Discourse Ethics*.

Second, what is the proper level of legitimation and justice? What I mean will become clear below, but in short, which social institutions are best described as doing the legitimation, and to which does it apply?

**ABSTRACT:** I consider three main questions. First, what is the relationship between the concepts of Justification, Justice, and Legitimacy? I approach these concepts from the similar, though divergent, theories as found first in John Rawls, and his theory of Political Liberalism, namely his **Justice as Fairness** and second in Jürgen Habermas, in his **Between Facts and Norms**, namely his theories of **Communicative Action and Discourse Ethics**. Second, what is the proper level of legitimation and justice? Which social institutions are best described as doing the legitimation, and to which does it apply? Third, I offer an argument explaining that legitimacy is not sufficient for a full theory of justice. If justice and legitimacy are divergent concepts, then the latter, as the weaker, singularly fails to deliver a stable social structure. To make this argument, I look at the space between Habermas and Rawls on the subject of Political Liberalism. **Keywords:** Rawls; Habermas; Political Liberalism.

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Third, I offer an argument explaining that legitimacy is not sufficient for a full theory of justice. Again, what I mean will be made more clear, but if justice and legitimacy are divergent concepts, then the latter, as the weaker, singularly fails to deliver a stable social structure. To make this argument, I look at the space between Habermas and Rawls on the subject of Political Liberalism.

I begin, however, by motivating the disagreement between Habermas and Rawls, locating the core of the divergence between their two theories.

## 2. Political Liberalism

According to Rawls, justice consists of those principles that people would arrive at if decided under conditions of fairness and equality. Much more specifically, for Rawls, the basic structure of society, our very social institutions, are just, if and only if the parties in the Original Position, suitably epistemically constrained behind the Veil of Ignorance, decide on the principles of justice that bound them. That definition takes a bit to unpack.

Rawls considers himself to be working in the tradition of the great Social Contract theorists – Locke, Rousseau, Kant – and takes the state of nature as the starting place. He calls this the Original Position, because it's from this point that all of our just conceptions of social structure derive. In the Original Position, people are free, equal, and rational, and agree that in the society they construct, that they will be bound by the conditions that they decide upon there. The Original Position represents a fair agreement, and the desire to begin from a position that treats people as equals.<sup>2</sup>

The parties in the original position are free, equal, rational, and mutually disinterested. That they are free and equal represents the intuitive desire to eliminate bias or opportunity in the form of arbitrariness or partiality. By rational,

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<sup>2</sup> See Rawls, J. (1999 rev. ed.). *A Theory of Justice*. Harvard University Press, Cambridge, MA §3-4.

Rawls means that they seek only to maximize their own interests, and that they are good at calculating the means to do so. And they are neither benevolent, nor malevolent – they are completely disinterested in the welfare of others when making decisions.

We model non-arbitrariness and impartiality in the Original Position by imposing a Veil of Ignorance, an epistemic constraint on the parties therein, which hides from them all but the most necessary of their characteristics: they are deprived knowledge of their social or economic status in the world, their nationality, gender, and even their own comprehensive conception of the good. They have a basic understanding of society (e.g., that it has an economic system), and they understand that they are stewards, or representatives, of people who live in that society who will be bound by social institutions governed by the principles on which they agree.

As is well known, the parties in the original position will arrive at two governing principles of justice:

1. Each individual is to have access to as extensive a set of liberties as is possible, consistent with a similar set of liberties for all (Liberty Principle)
2. Economic and social inequalities are to be arranged as part of a scheme such that they are (a) positions and offices open to all, and (b) to everyone's advantages (and in particular to the advantage of the worst off in society) (Difference Principle)

And the basic structure of a well ordered society, and its institutions, are said to be just if they are consistent with these two principles. In the case of tension between the two principles, the liberty principle is said always to have Lexical Priority, since one should never sacrifice liberty for economic or social improvement.<sup>3</sup>

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<sup>3</sup> See Rawls, J. (1999 rev. ed.). **A Theory of Justice**. Harvard University Press, Cambridge, MA pp. 49-52 & 266. Some liberties, however, for Rawls, may be limited for a greater system of liberty as a whole. An example of limiting liberty for liberty would be allowing conscription for military service in a war whose ends are to defend liberty at home or abroad. Further examples include laws

Once equipped with the two principles, the veil of ignorance is lifted, and the basic structure of society is created. In designing a society (viz., writing a constitution, preparing legislation, judging laws), therefore, the citizens, in conjunction with their own comprehensive doctrines, be they religious, metaphysical, etc, create their society. Rawls is mute on the specific nature of laws, legal makeup, constitutions, etc. Given the specifics of a societies background, history, the comprehensive commitments of its members, the society is free to take on many shapes, so long as they are consistent with, and governed by, the two principles of justice, as discovered by the free and equal parties in the original position.

A problem arises, of course, at this point, and, as Habermas notes, Rawls was insightful enough to discover the problem on his own.<sup>4</sup> Rawls developed his Justice as Fairness theory into a theory of Political Liberalism exactly because of the 'fact of pluralism'. It seems indisputable that by allowing citizens of a society to decide, together, and based on their own comprehensive doctrines, that some incommensurate disputes will arise in the policies that they favor. To overcome this problem, Rawls introduces to use the concept of overlapping consensus, which explains how members of some seemingly incommensurable background

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restricting libel or slander. H.L.A Hart argues that although it's clear that parties in the original position would be sensitive to these conflicts in natural rights and duties, it's more difficult to see how individuals with different interests and divergent choices would resolve these conflicts in choosing the principles to govern a well ordered society. See Hart, H. (1972-1973). Rawls on liberty and its priority. *Chicago Law Review*, 40:534-55.

<sup>4</sup> See Habermas, J. (2006). Religion in the public sphere. *European Journal of Philosophy*, 14(1):1 pg 20. Levinson gives a further defense that at least some religious discourse into the public square of American political life. See Levinson, S. (1992). Religious language and the public square. *Harvard Law Review*, 105(8):2069-81 For an updated discussion of Rawls' view of the role that religious discourse would play in a well ordered society, see Yates, M. (2007). Rawls and Habermas on religion in the public sphere. *Philosophy & Social Criticism*, 33(7):880-891 & Habermas, J. (2010). The 'good life' a 'detestable phrase': The significance of the young Rawls's religious ethics for his political theory. *European Journal of Philosophy*, 18(3):443-54.

traditions may agree on a specific form of political organization.<sup>5</sup> Let us return to justice as fairness.

In a well ordered society, citizens are committed to the principles of justice, as well as to a system whereby each citizen can live together freely as equals. In designing the basic structure of their society, therefore, they undergo a process whereby they consult what Rawls calls their considered judgements, or their moral and political intuitions, and allow those considered judgments to guide their society building endeavor. This process will inevitably involve dialog and critical argument with other members of society, where each will test the considered judgements of the others with counter-examples, etc. In light of those, members will revise their considered judgements, and the process continues in that way, until it ends with a state Rawls calls reflective equilibrium.<sup>6</sup> In that state, the considered judgements of all citizens are in equilibrium, and the basic structure of their society is guided by its particular circumstances, and the principles of justice.<sup>7</sup>

Of course, humans are fallible, and no society could possibly achieve this utopian goal. Nonetheless, there is some great value to be had in the process, and in the system of considered judgements and discourse itself. Furthermore, as new facts and circumstances arise in a society, the considered judgements may change. At that time, the process begins itself again<sup>8</sup> and social institutions are corrected or amended to reflect changes in considered judgements in reflective equilibrium.

As Habermas notes, Rawls did a great service to his theory by noticing very early the role that religion plays in politics and political discourse.<sup>9</sup> The fact is that

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<sup>5</sup> An explanation is provided in section III (below). Also, see Rawls, J. (1987). The idea of an overlapping consensus. *Oxford Journal of Legal Studies*, 7(1):1-25.

<sup>6</sup> For an explanation of the revisability thesis in Rawls' theory, see Rawls, J. (1999 rev. ed.). *A Theory of Justice*. Harvard University Press, Cambridge, MA pg. 18.

<sup>7</sup> For the initial outline of Justice as Fairness, see Rawls, J. (1999 rev. ed.). *A Theory of Justice*. Harvard University Press, Cambridge, MA Part I.

<sup>8</sup> Or, rather continues, since it was only in a state is pause.

<sup>9</sup> See Habermas, J. (2006). Religion in the public sphere. *European Journal of Philosophy*, 14(1):1 ibid.

societies are made up of real people, and people have differing, and often incommensurate, conceptions of the good. Though this may cause problems for the theory, pro tanto, in fact this is not an unfortunate consequence of human life.<sup>10</sup> Nonetheless, if all citizens in society are to freely endorse the conception of justice, that conception must be such that it can be supported by individuals who affirm different, even incommensurate, though reasonable, comprehensive doctrines.<sup>11</sup>

How, then, might society decide on a system of basic institutions that satisfy shared liberty and equality, be guided by justice, and also be stable, given that it is populated by free and equal citizens who are nonetheless divided by religious, metaphysical, or moral doctrines? Though there are obvious fundamental and deep disagreements, there are also commonalities: religious toleration is widely accepted, whereas gender and racial exploitation is not. As a starting point, we can arrange these shared convictions into a provisional, coherent theory of justice that any reasonable conception must account for. We can begin by looking at public culture itself as a shared fund of implicitly recognized principles. If such principles can be found, it provides a point from which all citizens, in a publicly recognized forum, can examine their own considered judgements. Society's institutions can in that way be provisionally judged as falling within (or not falling within) those publicly recognized principles, regardless of an individual's comprehensive doctrine, social position, or personal interest, so long as it is a reasonable doctrine.

Suppose finally that the principles governing these institutions can be elaborated to the point that they can be expressed as a political conception of justice, thereby gaining support of an overlapping consensus. That consensus will be made up of all reasonable religious, political, moral, or metaphysical doctrines

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<sup>10</sup> "In framing the political conception so that it can, at the second stage, gain the support of reasonable comprehensive doctrines, we are not so much adjusting that conception to brute forces of the world but to the inevitable outcome of free human reason" Rawls, J. (1993). *Political Liberalism*. Columbia University Press, NY New York pg. 37.

<sup>11</sup> An formal explanation regarding what makes a doctrine, or a pluralism, reasonable is given in Section III, below.

likely to persist across a society, and across generations. A constitutional regime can be devised based on that political conception.<sup>12</sup> Rawls spends much of the remaining text of *Political Liberalism* arguing that justice as fairness can gain such an overlapping consensus. Under *Political Liberalism*, we would say that such a society, inhabited by free and equal citizens motivated in their political decision making by a sense of justice, in which the principles of those citizens are supported by an overlapping consensus, is a well ordered society.

A note on reasonableness: We may say that a person is reasonable if they are willing to propose fair terms of cooperation, and abide by them, given that others will do the same. We may say that a person is unreasonable according to the same scheme – i.e., they are willing to propose fair terms of cooperation, but unwilling to abide by them, even if others are willing to do the same, except e.g., as a public pretense. We've seen how the reasonable diverges from the rational, the latter being defined in terms of self interest, and mutual disinterest. The rational lacks a certain moral sensibility represented by a desire to engage in principles of fair cooperation with others as free and equal citizens. The rational, then, is private, in the exact same way that the reasonable is public.<sup>13</sup>

Assume that reasonable persons only hold reasonable comprehensive doctrines. We may say that a comprehensive doctrine is reasonable if (1) it is an exercise of theoretical reason: its values are such that they are compatible with each other, and with the state of the world, (2) it is an exercise in practical reason: it ranks values by significance, and balances or chooses among them when they are in conflict, and (3) it belongs to, or is part of, a more or less stable tradition of thought and doctrine.

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<sup>12</sup> See Rawls, J. (1993). *Political Liberalism*. Columbia University Press, NY New York pp. 8-15.

<sup>13</sup> See Bongiovanni, G. and Valentini, C. (2009). Reciprocity, balancing and proportionality rawls and habermas on moral and political reasonableness. In Laporta, F. J., Peczenik, A., Schauer, F., Aarnio, A., Bayles, M. D., Johnson, C. D., Mabe, A., Bongiovanni, G., Sartor, G., and Valentini, C., editors, *Reasonableness and Law*, volume 86 of *Law and Philosophy Library*, pages 79-107. Springer Netherlands.

Finally, we can distinguish between the fact of pluralism as such, and the fact of reasonable pluralism. It seems that there will always be people with unreasonable views. However, reasonable pluralism also seems possible, and is achieved when all people and their comprehensive doctrines in society are reasonable. However, for Rawls, which sort of pluralism exists makes no difference for the decision of which principles of justice will be selected. Remember that the process occurs in two stages, and overlapping consensus is not introduced until the second stage. If the pluralism in the second stage is reasonable, we have no problem. But even if the pluralism in the second stage is not reasonable, we may assume that the parties in the original position, as stewards of citizens in society, will find their task all the more urgent, since society might contain interests that would stifle or prohibit basic liberties. In either case, the same principles would be chosen.<sup>14</sup>

### 3. Communicative Action and Discourse Ethics

As my main focus with Habermas is to look closely at his critique of Political Liberalism, I only briefly outline his own positive position as he offers it as a substitute or correction for justice as fairness. The full theory can be found in his *Between Facts and Norms*.<sup>15</sup>

In his *Remarks on John Rawls's Political Liberalism* (1995), Habermas gives what may be well summarized as three objections that are relevant to the present project. First, he claims that, contrary to Rawls' plan, it's not the case that every part of the Original Position succeeds in its design to achieve impartiality of judgement. Second, Political Liberalism needs a sharper division between questions of justice, and questions of acceptance (or stability). And finally, if the

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<sup>14</sup> Rawls, J. (1993). *Political Liberalism*. Columbia University Press, NY New York pp. 63-64.

<sup>15</sup> See Habermas, J. and Rehg, W. (1996). *Between facts and norms*. Mit Press Cambridge, MA. See also Habermas, J. (1995). *Reconciliation through the public use of reason: Remarks on John Rawls's political liberalism*. *The Journal of Philosophy*, 92(3):109-131 §3.

first two criticisms are correct, Rawls has constructed a constitutional state that gives civil rights priority over legitimation of the basic structure. If that's right, Rawls has failed to bring liberties of the ancients into harmony with modernity.

### **Impartiality of Judgement**

The Veil of Ignorance in the Original Position is designed to ensure impartiality and non-arbitrariness in the decision procedure of the parties there as they deliberate about the principles of justice that govern the basic structure. Rawls reserves the concept of full autonomy to the resident of a well ordered society. In the construction of the original position, he splits the concept of full political autonomy into two parts, the first as represented by the characteristics of the parties (as rational and mutually disinterested) and second by the characteristics of the position itself (i.e., the veil of ignorance). These latter constraints allow the parties in the original position to have the characteristics that they have, and those characteristics cause them to reflect on principles that are good for themselves, and thus for everyone. Given these characteristics, Habermas poses three questions:

1. Can rational egoists really comprehend the highest order interests of citizens motivated by a sense of justice and a comprehensive conception of the good, in a well ordered society?
2. Do primary goods really track basic rights (or civil liberties)?
3. Does the veil of ignorance really ensure impartiality?

#### **1**

In thinking about the first problem, remember the citizens of a well ordered society are free, equal, moral persons who possess and are motivated by a sense of justice, and their own individual conception of the good. Parties in the original position lack autonomy, and are constrained by their design. So, Habermas questions how they're somehow supposed to understand, and take seriously,

characteristics that they lack in design, such as a respect of the interests of others on the basis of just principles, rather than self-interest, and the belief in the legitimacy of social institutions based on public reason, etc. Can the meaning of considerations of justice and legitimation be unaffected by the choice of egoists? If parties in the original position are supposed to represent the interests of citizens in a well ordered society, they will require moral and epistemic capacities that are, by design, closed to them.

Now, given the obvious character of these objections, Habermas notes, Rawls could easily amend the theory to account for them – and in fact he did just that. For example, although they're mutually disinterested, taking no account of the needs of others, Rawls does equip the parties in the original position with a “purely formal” sense of justice – they understand that in society, the citizens whom they represent will be bound by the principles they choose. Put another way, they themselves, when reaching the real world, will be bound by the principles they agree on, though for the present they must choose under more constrained decision rules.<sup>16</sup>

While Rawls is free to amend his theory in any way he likes, one wonders if by blurring the division of labor, i.e., by allowing agents a perspective from which to step outside of their role as disinterested choosers, does the design lose its main strength by stepping outside the original constructs of the original model? By stepping outside of this role, expecting self-interested agents to arrive at morally sound principles undermines the strength of the original project.

On its own, the problem does not seem too strong. But, as Habermas notes, one of the (presumably intended) consequences of the Original Position is the

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<sup>16</sup> “Taking everything relevant into account, including the general facts of moral psychology, the parties will adhere to the principles eventually chosen. They are rational in that they will not enter into agreements they know they cannot keep, or can do so only with great difficulty. Along with other considerations, they count the strains of commitment.” Rawls, J. (1999 rev. ed.). *A Theory of Justice*. Harvard University Press, Cambridge, MA pg. 126.

introduction of primary goods (among them are included civil rights), which is important for the development of the theory. But are primary goods the appropriate currency to track basic rights or civil liberties? <sup>17</sup>

## 2

For egoists as rational choosers, any interests (in this case, normative ones) can be represented only by self-interest, or goods. (Goods are what is good for you). Thus, Rawls introduces primary goods as means for citizens to realize their life plans.<sup>18</sup> Though they know that some of these goods will represent certain rights in society, parties in the original position can only describe rights as one kind of good. And so they frame the principles of justice as a question about the distribution of various goods. This conception of justice (an ethics of goods) is more utilitarian than deontological – and so a paradigm of distribution is problematic for Rawls, who prefers to work in the Kantian tradition. Rights can be enjoyed only by being used – there is no value in having them if one cannot exercise them. Rawls cannot equate rights with primary goods without simultaneously giving up their deontological nature. The character of the original position would otherwise force Rawls to treat basic liberties as basic rights, and so instead he equates them with goods – thereby equating norms and values.<sup>19</sup>

But if that's right, Habermas continues, Rawls is guilty of blurring the distinction between norms, which are deontological in nature, and values, which are teleological in nature. But they're far from the same. Norms: inform decisions regarding what I ought to do; impose obligations on me; have binary validity – i.e.,

<sup>17</sup> On the danger and difficulty of drawing out the implications for legal analysis from Rawls' ideal theory, see Rutherglen, G. (2006). Private law and public reason. *Virginia Law Review*, 92(7):1503–1515. Stable URL: <http://www.jstor.org/stable/4144961>.

<sup>18</sup> See Rawls, J. (1999 rev. ed.). *A Theory of Justice*. Harvard University Press, Cambridge, MA \$15.

<sup>19</sup> Kordana & Tabachnick argue that Rawls' ideal theory in its final stages is best understood as outcome driven, or consequentialist. As a maximizing theory of distributive justice, this undermines any application of Political Liberalism as a form of corrective justice as an independent moral principle. See Kevin Kordana, D. T. (2006). On belling the cat: Rawls and corrective justice. *Virginia Law Review*, 92(7):1279–1310.

either valid or not; represent an absolute duty; and must not contradict other norms. Values, on the other hand: inform decisions urging a more desirable conduct; express preferences over goods; rank goods as more attractive; reflects an evaluative ordering; and compete for priority with other goods.

Due to the fact that he's handicapped the deontological component of the original position, Rawls compensates by giving priority to the first (liberty) principle, over the second, which governs primary goods. But working as a rational egoist, advancing one's own interests, it's difficult to see how the parties in the original position could justify this priority.

Again, Rawls can amend the theory to compensate for this, and he does. He ensures that primary goods include a qualification securing them a relation to basic liberties, such that primary goods include only those that are expedient for the life plans and development of the moral faculties of citizens in a well ordered society. Furthermore, Rawls builds a guarantee of "fair value" into the liberty principle to pick out the primary goods that are constitutive of the institutional framework of a well ordered society, separating them from other goods.

Setting up the system this way, though assumes a deontological distinction between rights and goods which makes it impossible to classify rights as goods, which Rawls needs. Since equal liberties require equal opportunities to exercise those rights, then only rights, not goods, can be qualified in this manner. A legitimate problem exists between rights, and the chances to exercise those rights. No such problem exists between the possession and enjoyment of goods - it's redundant to talk about the "fair value of equally distributed goods" since, on the face of it, and equal distribution of goods is fair, and vice versa. While we can make a distinction between legal and factual equality, no such distinction exists for goods.

Finally, does the necessity to correct for this by amendment really justify the inclusion of primary goods in the first place? Is it a good idea to equate rights with

primary goods in the original position? If the qualification to fix the problem of primary goods at this phase was necessary, Habermas concludes, we may wonder whether the phase that necessitated primary goods at all – the creation of the veil and the original position – was prudent.

### 3

It seems, then, that parties in the original position are not good trustees of their clients' highest order interest in society. So why constrain them at all? If Habermas is correct, the benefits of the veil of ignorance in terms of impartiality are undermined by the very same deprivation of information. The veil of ignorance is self-defeating.

The solution, he suggests, is to keep the procedural conception of practical reason strictly procedural, eliminating the unnecessary substantive connotations implied by Rawls.

The intuition underlying the Categorical Imperative is that all affected should be able to will a maxim as a general rule. But when this is applied by rational egoists deciding from an individual perspective, they are limited in what each understands that all could will. The rationality constraints on the parties in the original position leave them inadequately prepared to apply the categorical imperative.

What is needed instead is a theoretical decision procedure, whereby the understanding of each individual is not rational egoism, but rather reflects a transcendental consciousness, i.e., a universal, pluralistic, view of the world. In such a case, the parties deciding the principles of justice would be adequately suited to apply the full intuitive force of what is equally good for all. There seem two ways to go about it. Rawls proposes rational actors, suitably epistemically constrained, thereby undermining their ability to reason to the general good. Discourse ethics, on the other hand, provides a decision procedure in which the moral point of view is discovered by intersubjective argument toward an

idealizing expansion of everyone's interpretation and perspective. Discourse ethics discovers a stepwise emergence of the general interest resulting in a legitimate pluralistic theory of cooperative action, through dialog and argumentation.<sup>20</sup>

Since the actors in the original position are constrained from the very beginning, Rawls must show that (1) the theory extends to all particular viewpoints, and (2) it should go no further, by only extending to such normative matters as that cannot be accepted as candidates for the common good by free and equal moral persons. But as we've seen, the parties in the original position will have trouble satisfying (2). They must create principles of justice that are consistent with all the world's normative content that supports the self understanding of citizens in a well ordered society. But the epistemic constraints must be built ahead of time to accommodate them. So impartiality in judgment of a well ordered society must be built in at the beginning.

The best response, of course, is to lighten the burden on the parties in the original position, and the best way to do that is through an implementation of discourse ethics as a theoretical decision procedure. This can be done without relying on the burdens of the substantive characteristics of the original position as is found in Rawls' conception.

As a final thought, Habermas asks, regarding political liberalism, whether overlapping consensus is a part of the legitimation of the theory of justice, or is it used as a subsequent check? And in the same area, in what sense is the doctrine of overlapping consensus "reasonable" rather than true?<sup>21</sup>

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<sup>20</sup> Jackendoff provides further discussion of the universality of morality, and its implication on the law. See Jackendoff, R. (2009). Is morality universal, and should the law care? : The natural logic of morals and of laws. *Brooklyn Law Review*, 75.

<sup>21</sup> See Habermas, J. (1995). Reconciliation through the public use of reason: Remarks on John Rawls's political liberalism. *The Journal of Philosophy*, 92(3):109-131 pp. 116-18.

### Overlapping Consensus

This first question asks whether overlapping consensus adds to the justification of the political conception that's already taken to be justified as reasonable. Or is it rather an external check on justification? That is, are they part of the justification, or are they part of a subsequent condition of stability?

This is a problem for Rawls because justice as fairness itself (including the characteristics of the parties, and the original position) contributes to the institution of social cooperation, which is expressed by overlapping consensus. But this assumes the intrinsic value of a justified theory - overlapping consensus is just instrumental for that end. If that's right, then an overlapping consensus is only of interest in securing what Habermas calls acceptance (that is, subsequent social stability), and not of acceptability (or valid justification of the political theory).

But, of course, Rawls doesn't want to make this distinction at all, since his theory is supposed to be political, not metaphysical. That is, Rawls' theory is not a comprehensive theory, derived from any particular metaphysical or religious doctrine, that is meant to be true, but rather a freestanding conception of justice that can serve as a basis of political agreement between free and equal citizens of society. It is not meant to be true, only reasonable.

Rawls is of course welcome, again, to make these strategies part of the theory. But if so, he also needs to draw a sharper distinction, since citizens must accept the conception of justice before reaching reflective equilibrium. In that case, overlapping consensus can't merely be instrumental. But a functional role is also ruled out, since he doesn't want to commit the theory to any prior epistemic claims.

And if that's the case, Habermas concludes, it's difficult to see why Rawls prefers to call the consensus "reasonable", rather than "true".<sup>22</sup>

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<sup>22</sup> See Habermas, J. (1995). Reconciliation through the public use of reason: Remarks on John Rawls's political liberalism. *The Journal of Philosophy*, 92(3):109-131 pp. 119-22.

### Reasonable

This leaves us with Habermas' last question. Does 'reasonable' express acceptability (i.e., the validity of political judgements), or does it simply express tolerance in a pluralistic society? Though we can refer back to Rawls' definition of reasonable (in section II, above).<sup>23</sup> Note, however, that this conception of the person presupposes the concept of practical reason. Practical reason is explained on two dimensions, first on its normative validity, and second on public reasoning. It is the second aspect that is more interesting here. Publicity is the perspective from which citizens mutually convince one another of what is just or not, by presenting the best argument. The objectivity, if any, then, of political convictions, comes from their being founded by reasonable persons who eventually endorse them. If so, then the public use of reason is the final judge of normative statements. And if that's right, then 'reasonable' is just equated with the validity of normative statements. But that is strictly not how Rawls uses the term - he instead claims that a worldview need not be true, even when it's reasonable.

Now, if a theory were derivable from a particular metaphysical doctrine, then it could be "true". From a pluralist view, each perspective starts with equal weight, and through reflexive dialog, one worldview emerges as preferable, through argumentation, and ultimately better reasons. In this case, it could never be known if the principles are derived from the "correct" worldview. And remember that we say that a political conception of justice is reasonable if it can tolerate those worldviews that are not unreasonable. But, asks Habermas, is that concept of a reasonable conception of justice consistent with Rawls' insistence on placing the priority of the right over the good?

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<sup>23</sup> That is, we may say that a person is reasonable if they are willing to propose fair terms of cooperation, and abide by them, given that others will do the same.

We identify the right with justifiability, regarding what is in the interest of all. We identify the good with some non-impartial worldview, regarding what is good for me, or my group.

But, says Habermas, worldviews can't make valid conceptions of justice, since even though worldviews captured in 'the good' are comprehensive, and they're concerned with answers to basic moral questions, and guide individual life plans, they are measured by the authenticity of the lives they guide, more so than by the truth of the statements they endorse.<sup>24</sup> Comprehensive doctrines offer interpretations of the world as a whole, and so do not consist of an ordered set of facts, all of which can be "true" or "false".

There seems to be no prima facie reason to exclude comprehensive worldviews, since they don't admit of true or false facts on their own. So why does Rawls insist on excluding them? Why does he think that a comprehensive worldview must admit of "truth"?<sup>25</sup>

#### **4. Justification, Justice, and Legitimacy in Rawls**

Habermas makes frequent use of the concept of legitimacy, often to the exclusion of the concept of justice. Perhaps he thinks that they are the same? A bit of reflection shows that they are not.

A political institution can be legitimate, but simultaneously fail to be just. One fairly clear example is provided by Rawls: a legitimate king or queen may rule justly, or not. The legitimacy of their rule says something about their pedigree, or how they came to power, in accordance with established rules or procedures, etc. Many political leaders in recent history arrive at their power legitimately, though use it unjustly. Furthermore, laws passed by majority are legitimate under a certain

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<sup>24</sup> Habermas here cites the unpublished manuscript of Forst, "Justice as Fairness: Ethical, Political, or Moral" (1992).

<sup>25</sup> See Habermas, J. (1995). Reconciliation through the public use of reason: Remarks on John Rawls's political liberalism. *The Journal of Philosophy*, 92(3):109-131 pp. 123-26.

constitutional convention, but many may judge them (correctly, at times) to be unjust. Does political liberalism aim at legitimacy, or justice?

What if, for example, we aim to lay out political institution such that they are legitimate, rather than just, and also to derive laws from them that are also merely legitimate?

Legitimacy is a weaker concept than justice: it limits what can be done by the sovereign more weakly. First, like justice for Rawls, it is institutional, essentially connecting it with justice. Legal decisions are legitimate not because of their content, but because they are enacted by legitimate procedures. Of course that procedure must be just, or at least as just as possible – it is impossible that a procedure be legitimate, and not just, or at least not gravely unjust. Finally, legitimacy without justice is not stable: over time, the injustice of the outcomes of a legitimate procedure will undermine its own legitimacy. Purely legitimate procedure distinguishes itself from justice, even if, in the mean time, legitimate procedures result in legitimate outcomes.

Even so, Rawls agrees that legitimacy has a special role to play in democratic intuitions. For example, in those cases in which unanimity is unlikely or impossible, responsibility for the justification of a law can be delegated to the authority of a smaller body, such as a committee, corporation, or procedures for amending the constitution.

What, then, can be said of such procedural legitimacy with regard to stability? In a well ordered society, in which citizens are motivated by a sense of justice, in conformity with an overlapping consensus, procedural legitimacy may be sufficient to ensure justice after all. But Political Liberalism, with citizens in the world, and with real interests, limitations, and comprehensive doctrines, is concerned with practical applications of principles of justice. Even in a reasonably well ordered society, citizens would always enact laws that are legitimate, though not always just. In such a case, the legitimacy of the institutions would also begin

to break down. This, again, is because the legitimacy of the procedure (constitutional, etc.) depends for its stability on justice. Therefore, we depend for the stability of even a well ordered society on our substantive considered judgements about justice.

A further practical problem: even in a reasonably well ordered society, the modern conception of legitimacy would never allow the full communicative ideal of public discourse to occur. The way that actual public bodies conduct business departs too far from the ideal. There are constraints of time, there are constraints on legislators capacity to evaluate, or even be exposed to, all available information and evidence, etc. Actual legislative action could never ensure that a public conception guided solely by legitimacy not exceed the range that it is afforded.<sup>26</sup>

Regarding Habermas' use of legitimation as an ideal outcome for the public discourse of communicative action falls short of the conception of justice as a public good. Actual constraints of stability, publicity, and reasonable pluralism show that a legitimate state in the absence of a public conception of justice is not sufficient.

### Justificação, Justiça e Legitimidade

#### RESUMO

Considero três questões principais. Em primeiro lugar, a relação ente os conceitos de Justificação, Justiça e Legitimidade. Eu abordo estes conceitos a partir de teorias similares, embora divergentes, como encontradas primeiramente em John Rawls e sua teoria do liberalismo político, nomeadamente em **Justice as Fairness** e depois em Jürgen Habermas, em **Between Facts and Norms**, nomeadamente suas teorias acerca da **Communicative Action and Discourse Ethics**. Em segundo lugar, qual é o nível adequado da relação entre legitimidade e justiça? Quais instituições sociais são as melhores para descrever a legitimidade e para o que isso se aplica? Em terceiro lugar, enfim, eu apresento uma argumentação demonstrando que a legitimidade não é suficiente para uma teoria completa da justiça. Sendo justiça e legitimidade conceitos divergentes, então este último, enquanto o termo mais fraco, falha em

<sup>26</sup> See Rawls, J. (1993). *Political Liberalism*. Columbia University Press, NY New York §2 and Rawls, J. (1995). Reply to Habermas. *Journal of Philosophy*, 92(3):132 §5.

proporcionar uma estrutura social estável. Para construir esta argumentação, eu foco no distanciamento entre Habermas e Rawls acerca da temática do Liberalismo Político.

**Palavras-Chaves:** Rawls; Habermas; Liberalismo Político.

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