John Rawls' Law of Peoples: Some of the Important Themes and Issues Raised

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John Rawls' *Law of Peoples*: ¹
Some of the Important Themes and Issues Raised

In *The Law of Peoples* John Rawls fashions an optimistic theory about how a stable and politically just international legal order should be constructed among democracies acting in cooperation with non-democratic but decent societies.

International agreements reached between these two types of nation-state are stable for sound and principled reasons only insofar as each society in those agreements represents the reasonable interests of its various cohesive populations, i.e., the politically constrained interests of the (potentially many) different "peoples" who properly domicile within each society's borders. Rawlsian legitimization of law, domestically and internationally, is predicated on societies representing their peoples' veil-constrained interests. Rawls would thus replace the political calculus which relies solely upon categories like power, dominance, and inferiority with one that depends upon the long-term and non self-absorbed satisfaction of citizens (neither peace by power nor peace by impotence, but peace by bounded mutual acknowledgment). ²

Rawls uses "nation" and "state" as collecting terms which take on a different meaning than that traced back to Thucydides. Where Rawlsian nations/states are justified in their internal rule and in their external activities it is only because they represent the basic interests of their citizens as defined by "the reasonable," ³ and not because they are successful over time in struggling for "power, prestige, and wealth in a condition of global anarchy." ⁴ Legitimate states recognize that there are institutional solutions to systemic problems of dire poverty and extreme hunger, that these calamities are never simply to be dismissed as "the will of God." ⁵ They recognize that a decent society will encourage deep cooperative psychologies in its citizens (supporting the practice of citizens living by "gentle manners" and their acting according to proper self-respect). ⁶ Rawls' construction of licit nationhood sharply distinguishes the idea of a reasonable, fair-minded, pluralistic, and public-spirited nation from the more familiar realist notion of the nation-state in which states are geopolitical entities acting primarily out of rational self-interest for their own power with no substantial constraints other than the balance of power.

Important terms, like "citizen," receive a Rawlsian interpretation, partly based on historical contingency and partly based on his moral ideals. Citizens are those who have come to form, and who have come to recognize the significance of the fact that they have formed, common interests over time as mutually identified and politically associated individuals and groups of individuals. Minimally, democratic citizens have access to the same judicial system, vote in common in national elections, and the like. They are likely to regard the same historical events, say a period of Founding, a Civil war, or a Great Depression, as mutually important and as being of common (domestic) interest among themselves. ⁷

Ideally and morally, citizens recognize mutual domestic obligations towards one another, based on factors like those listed in the above paragraph, plus their avowed recognition that no domestic resident could have a satisfactory life without the willing cooperation of the bulk of the others. Citizens come to rely on the reasonable idea that cooperation which is based on mutual concern and respect creates a form of political stability which morally justifies the state—in at least a thin "political" sense. ⁸
Rawls approvingly cites John Stuart Mill's account of citizenship and common nationality, even incorporating it as a part of his own view. His remarks on Mill are worth quoting since they weaken certain objections to Rawls' theory, namely those accusing Rawls of advocating only a jingoistic nationalism or a limiting form of western colonialism.9 Mill says:

A portion of mankind may be said to constitute a Nationality, if they are united among themselves by common sympathies, which do not exist between them and any others—which make them cooperate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves, or a portion of themselves, exclusively. This feeling of nationality may have been generated by various causes. Sometimes it is the effect of identity or race and descent. Community of language, community of religion, greatly contribute to it. Geographical limits are one of its causes. But the strongest of all is identity of political antecedents; the possession of national history, and consequent community of recollections; collective pride and humiliation, pleasure and regret, connected with the same incidents in the past. None of these circumstances, however, are necessarily sufficient by themselves. 10

Some such grounds for citizens' cooperation are implied by any theory interested in genuinely explaining normative civic commitment, in moving beyond reductionist modus vivendi forms of explanation, and in analyzing the proper instantiation of those grounds in citizen's political psychology.11 Citizens who self-consciously come to recognize proper reciprocity towards others as citizens, particularly other citizens who are least-well-off, and who build towards a cooperative mutuality based on that recognition, engage in what Rawls calls "moral learning." 12 Political moral learning, which builds on a positive sense of political reciprocity, is a potentially plausible basis for stability both within liberal democracies and between reasonable states, at least on the Rawlsian view.13

One apparent distinction between traditional realist conceptions of nation-states and the Rawlsian "nation-state" is that Rawls deliberately (and unsurprisingly!) emphasizes states' "moral character, and the reasonably just, or at least "decent," nature of their regimes."14 His characterization becomes more trenchant if we consider the doctrine of moral learning while we sketch his two types of base-state-case: democracies and decent consultation hierarchies.

Consider the familiar Rawlsian idealization for just and democratic states: A just democratic government must be effectively stable and also under its reasonable citizen's reflective control. Citizens are "reasonable" in Rawls' sense if they "are concerned to live with others on fair terms, assuming that the others are so willing; they also understand that to be fair, the terms of cooperation must be ones that other free and equal persons can accept."15

Reflection on the material requirements of justice leads citizens to move past purely formal guarantees of rights to a deeper understanding of mutual obligations towards fellow-citizens.16 This is especially true of citizen-understandings concerning those whose material condition precludes them from being able to reliably command formal rights. Institutionalizing appropriately rich principles of reciprocity, i.e., institutionalizing the fact that people will cooperate on the reasonable and well-entrenched expectation that others will,17 is an appropriate and morally necessary response to the requirements of justice.

One primary goal of this type of mutual cooperation would be the creation of, and widespread citizen support for, social institutions that transparently embed the idea of society as a fair system of cooperation over time. Such support, by citizens with material resources for those citizens who are least well off, is not based on noblesse oblige but, rather, on Rousseau's amour propre, or appropriate self-respect. Widely shared self-respect of this type would presumably be accompanied by the mutual recognition that the institutions of society should be arranged so that every citizen is likely to possess it.18

A democracy politically ordered by citizens operating on this kind of common understanding, whose institutions
effectively secured the same rights for all and embodied systemic concern for the least well off, could be labeled as roughly "well-ordered." If a sufficient number of relatively well-ordered democracies jointly supported principles of international law for apt reasons, we would realize at least a "western" or "democratic" overlapping basis for a Rawlsian law of peoples. Because of Rawls' commitment to pluralism across nations, as well as within them, he does not restrict himself to liberal democracies as guiding members of the overlap, however.

Extending pluralism into the arena of international cooperation, Rawls argues that non-democratic "decent consultation hierarchies" should be regarded as full partners in constructing the law of peoples, at least insofar as they sufficiently represent the reasonable interests of their various "peoples." Liberal states are to exhibit due respect towards decent non-liberal societies by viewing them as authentic sources of the law of peoples. As Rawls notes, "Liberal peoples must try to encourage decent peoples and not frustrate their vitality by coercively insisting that all societies be liberal."19

Democracies and non-liberal but decent consultation hierarchies would form up the core nation-state group supporting a just law of peoples. Rawls includes an imaginary but feasible Muslim society among his just consultation hierarchies.20 "Moral learning" in such a society, as its citizens recognize a consultation-hierarchy-relative sense of proper self respect, likely looks quite different than it would in a liberal society. "Kazanistan,"an imagined non-democratic Islamic Republic, based both on ideal theory and on classical and deeply historic Islamic principles of respect and tolerance for non-Islamic religions, is Rawls' primary example of a decent consultation hierarchy.21

As I imagine it, this decent people is marked by its enlightened treatment of the various non-Islamic religions and other minorities who have been living in its territory for generations, originating from conquests long ago or from immigration which the people permitted...Unlike most Muslim rulers, the rulers of Kazanistan have not sought empire and territory. This is in part a result of its theologians interpreting jihad in a spiritual and moral sense, and not in military terms. The Muslim rulers have long held the view that all members of society naturally want to be loyal members of the country into which they are born; and that, unless they are unfairly treated and discriminated against they will remain so. Following this idea has proved highly successful. Kazanistan's non-Muslim members and its minorities have remained loyal and supported the government in times of danger.22

Rawls stipulates that the Muslim rulers of Kazanistan have taken the legitimate interests of its various peoples into account, i.e., that the rulers consult their varying "peoples," and that those various legitimate domiciled groups are represented institutionally. These peoples' fundamental interests are known, respected, and the like. Thus, fair terms of cooperation between Muslim and non-Muslim groups are worked out and practiced as the political norm. The "moral learning" that citizens of Kazanistan act from regarding their legitimate Muslim leaders and their fellow-citizens is not the same as that built up with a properly composed elected democratic leadership and with fellow democratic citizens from within a well-ordered liberal democracy.

Presumably, a model tiered in terms of customary role-obligations within one's social and birth communities, representing the reasonable interests of the various communities, would produce legitimate but "non-individualist-looking" political identities and obligations that appear to be different from those found in the liberal democratic model. One might initially think more of F.H. Bradley's My Station and Its Duties than of John Stuart Mills' On Liberty. To be more au courant, from the perspective of well-understood first-order role obligations, one might then think of the sort of role obligations towards loving parents that one incurs on an argument like that expressed in Michael Hardimon's Role Obligations,23 where we contractually choose to take on some role obligations but are also sometimes born into them/grow into them (as when we are raised by a loving family).

It is worthy of note, to those who believe that a consultative and reasonably pluralistic hierarchical Muslim society is a pure fiction, that Rawls' Kazanistan bears significant similarity to the political acceptance of plural
religions within most Muslim societies established during the first several centuries of Islamic conquest after Mohammed's death. Typically, various Christian, Jewish and Zoroastrian communities were allowed to conduct local affairs under their own customary laws concerning marriage and the adjudication of civil disputes.24

It should be quickly added, to avoid romanticizing this militarized past, that there are strong contrasts between the realist assumptions that Muslim conquerors acted upon and the Rawlsian view of peace by satisfaction. Expansionist political sovereignty for Muslims via military conquest was a primary goal of early Muslim states, and the state was viewed as an arbiter of self-centered theocratic power (much as in the Christian states of Europe.) Most European and Muslim political history appears to fall far short of seeking peace by satisfaction as a primary goal.

Rawls adds that Christendom has its own profound history of anti-pluralism in the form of anti-Semitism, ranging from the inquisition through the holocaust and on to this day.25 One could observe that in the fifteenth and sixteenth centuries Jews were clearly better off in Muslim countries than in most European ones.26 Productive theorizing about religious pluralism has become the mainstream Catholic theme only recently, through the work of Pope John XXIII in the Second Vatican Council thirty some years ago, and the work of John Courtney Murray, "a twentieth-century American, deeply in love with American political ideas."27 We thus have some empirical evidence that religion-guided views which were long hostile to reasonable pluralism can eventually come to officially embrace it.

Domestically and internationally, Rawls recommends a now familiar form of political and legal respect for dissimilar comprehensive theories of the good. Precocious versions of such respect are now characteristically found within large-scale liberal democracies,28 both within the same democratic polity and between distinct liberal democracies. In Rawls' ideal world, similar respect is also found within Kazanistan, and between Kazanistan and other decent or liberal societies.

Rawlsian pluralism, a central theme from at least the early 1980s on, finds its place in The Law of Peoples in Rawls' insistence that all states (in his legitimizing sense) will respect the freedom and independence of other groups and individuals, observe treaties, abstain from intervention, honor human rights, engage in war in only very limited circumstances, and the like.29

As a thinker embedded in the western liberal tradition, meta-politically and in terms of justifying his reasoning, Rawls draws these conclusions from a second original position in which we consider ourselves representatives of states/peoples whose power, territory and wealth are unknown to us. If we were to entertain the idea of being representatives within Rawls' second original position, our role would be to structure the institutions of the state so that they represent peoples' legitimate interests, to find an agreement about the just limits to state power, and to begin to sketch out how legitimate states are to set up law amongst themselves.

So Rawls again uses an "original position" as his preferred device of representation and, should readers disagree with the analysis, they would be invited to generate equally desirable conclusions from their preferred analyses. Wide reflective equilibrium, balancing morally desirable results, an explicit and careful statement of the critic's own preferred analysis, and uncontroversial science and common sense, would provide the only scales upon which to weigh alternative proposals from the perspective of those who would take "the philosophical driver's seat."30

As the following article by Professor Fiala argues, there is some question as to whether Rawls himself holds an objectionably metaphysically restrictive philosophy of history; one that would block agreement from those who hold a Kantian philosophy of history, for instance.

Liberal democracies make a relatively decent base case in accounting for international justice. One historical reason is that liberal democracies tend not to war with one another, or "Doyle's Law," as Rawls calls this claim in his Oxford Amnesty lecture:31 "The crucial fact for the problem of war is that constitutional democratic societies do not go to war with one another."32
A second, internal-structural reason why liberal democracies make a good base-state case, is that Rawls has long argued that liberal democracies have a basic structure which is at least compatible with justice as fairness. Such democracies comprehend some of the values crucial to justice as fairness, e.g., political ideas like "free and equal citizen," fundamental recognition of the moral power of individuals to pursue the good and to support justice, and the like.

A third personal/psychological justification is that there actually exists a thin political sense of the citizen-self as a possessor of basic rights. This sense, deeply embedded in long-standing democratic political cultures, is a building-block that liberal views like Rawls' depend upon in order to be seen as feasible. The individual citizen's sense of "being a rightful possessor of political powers" is a facet of her political psychology as she marries and divorces, seeks an education and career of her own choosing, exchanges goods, worships freely, speaks freely, and so forth. These are fundamental reasons why it is plausible to assert of democratic citizens that they can come to possess Rousseau's amour propre. Such citizens are capable of supporting peace by contentment or satisfaction, rather than seeing domination of others as the only honest basis of social stability.33

Recommending this "partnership," between representative democracies and representative non-democratic consultation hierarchies, as a sufficient theoretical basis for forging a just international order raises several questions in the context of a world that may be too complex to be moved to justice by arguing in Rawlsian terms. We will divide questions about Rawls' view into two sets: one which we think consists of answerable difficulties, and one which we believe to be more intractable, even as we take an optimistic attitude, along Rawlsian lines, about achieving global justice.

The first set advances four currently pressing issues, issues to which Rawls could plausibly reply: Among pressing and central concerns about international justice which are in play at the present moment are: (1) concern about the relative concentration of desperate circumstances in the southern hemisphere, (2) pragmatic policy parameters [whether we can afford moral constraints to come in only as an afterthought if at all], (3) relative-political questions [Should there be a relationship between foreign state-building and a preference for the creation of democracies?], and, (4) questions of unhappy immediacy after September eleventh.

"Rawlsian" responses to these four areas of concern tell us quite a bit about his theory and about morally available courses of action from a point-of-view which is sympathetic to Rawls' project.

The first answerable difficulty concerns the relative and large disparity in wealth between the northern and southern hemispheres. Do we have Singer-type obligations to peoples who inhabit poor nations analogous to our obligations to the least well off in a liberal democracy?

On one hand, Rawls' view does not automatically entail any justice-based redistribution of wealth from the people of rich nations to those of poor nations. On the other, he recognizes that very low levels of well-being can make the achievement of a stable and politically just state impossible, even given culturally modest expectations for well-being. Rawls would recognize the need to redistribute resources to poor nations to the extent that such redistribution is a necessary condition for such societies to be law-abiding members within the law of peoples.

There is, however, no direct international analogue to the domestic difference principle, which requires economic shifts to fellow citizens which benefit the least well off among them before those who are better off can gain additional social advantage. Within the ideal relatively just liberal state, where citizens have a strong sense of reciprocity founded on a common history of cooperation, there should be a core communal determination to enable the full participation of the least well-off.

Citizens of such a liberal state will simply not have the same deep sense of democratically embedded reciprocity towards the citizens of other nations. The Law of Peoples is not so much concerned with whether "the well-being of the globally worst off person can be improved"34 as it is with whether within each society (and by its lights) minimal internal Humean conditions are met which allow for members of that society to secure stable
political justice over generations.

There may be a fairly high correlation between destitute (burdened) societies and state sponsors of terror and war (outlaw societies). Prudence and duty might be invoked in such cases. Since correcting the behavior of outlaw states can be very expensive in terms of the costs of war, prudence would dictate some attention to the problem of burdened societies which are apt to become outlaw states. Duty might also require wealthy nations to work along with burdened states to allow the latter to achieve the material and political conditions necessary to create a decent consultative or a just democratic society. This is likely to involve as much or more attention to political change or to institutional reform as it does to simple redistribution of money or physical resources. 35

Societies that are just in ideal theory axiomatically have sufficient resources to stabilize themselves in terms of the requirements of justice for their members, and thus meet the condition of members' having their needs met sufficiently for them to be reasonably expected to behave justly towards other citizens, as well as towards the rest of the world. But this is emphatically not the same as saying that politically just societies must be wealthy societies, or that all societies should have the same levels of wealth.

There exist impoverished societies in which life is generally nasty, brutish and short, or "burdened societies" as Rawls calls them. Some may not have governments worthy of the name, and may exist primarily as kleptocracies. Some might have well-intentioned governments, but "may lack the political and cultural traditions, the human capital and know-how, and, often, the material and technological resources needed to be well-ordered." 36 Some may be decent.

The duty of assistance to such societies requires a strategy of carefully understanding and targeting appropriate specific shortfalls, and not a reductive all-purpose end-state egalitarian/economic redistribution. One could easily imagine a scale of material well-being for societies which begins with burdened states, and which is developed in empirical detail to include those conditions which stabilize them in the form of decent consultation hierarchies or democratic states. One could also easily imagine Rawls allowing the empirical details to be worked out as involving micro-structural issues which lie beyond the scope of his political philosophy.

The second answerable difficulty concerns whether international law (or foreign policy) should be thought of in moral terms only as an afterthought, if at all?

A tough-minded version of realism might be thought to argue that morals play no basic guiding role in the formulation of foreign policy.

This sort of argument has a long and "distinguished" history: Henry Kissinger's invocation of realpolitik during the Vietnam conflict, Clausewitz's 19th century doctrine of war, and Thucydides' views as already briefly discussed (from the 5th century B.C.E.) are often seen as paradigmatic realist accounts. The anti-realist moralist is apt to be seen as a hopeless idealist. Particularly, advocating moral constraints on behavior during war may be seen as unsophisticated, and even dangerous.

Rawls resists these aspects of realism, and views the denial of the relevance of moral considerations as sophistical--as less than carefully thought out.

First, Rawls points out that "it would be unfair to Clausewitz not to add that for him the state's interests can include regulative moral aims of whatever kind." 37

Second, Rawls could easily add that no one of any intellectual stature justifies the Serb's raping of Bosnian women as an acceptable instrument of war. An earlier version of The Law of Peoples was published as part of an Amnesty International volume along with Catherine MacKinnon's "Crimes of War, Crimes of Peace," in which she argues for trying rape as a war crime. In The Law of Peoples Rawls absolutely rejects the unqualified inference from General Sherman's "war is hell" to the conclusion that normative/moral considerations do not apply in times of war. 38 He cites Sherman's own doctrine distinguishing property and persons during Sherman's march through Georgia as some evidence that Sherman's own view was more sophisticated than is
sometimes acknowledged. Though all this does not establish a full positive account concerning moral constraints on behavior during war, it is evidence of the recognition of a level of behavior below which one will not allow the conduct of war to fall, at least not without recognizing the appropriateness of sanction against those who violate the rules.

Third: The Law of Peoples contains numerous references to acts of war which have been appropriately criticized on moral grounds, particularly where civilians have been targeted (the firebombing of Dresden, the atomic bombings of Hiroshima and Nagasaki). These are cases where civilians were targeted on the grounds that soldier's lives would be saved and the war shortened, but the case was not based on showing that the conditions of the Supreme Emergency Exemption were met. The latter is the only case in which targeting civilians is justified on a Rawlsian view. More generally, in cases of immoral military uses of power, Rawls argues that we can often properly make harsh judgments about winning military strategies even in defense of democracy against extremism. Such questions of moral judgment are not axiomatically settled in favor of victors who successfully advocated maximal uses of force. Ex post moral criticisms may be legitimate, and might guide future action in ways that make it the world a more just place-particularly in signaling a transparent resolve to work towards permanent and lasting peace.

The third answerable difficulty concerns the necessity of creating democracies. Wouldn't it be better to view the ultimate goal of achieving an international order as the creation of democracies rather than accepting non-democratic consultation hierarchies as full partners? This concern has been at the heart of Rawls' perhaps most distinguished critic's remarks. Thomas Pogge, in "Rawls on International Justice," argues that in moving towards the legitimization of the interests of "peoples," Rawls loses the moral leverage of normative individualism, thereby forfeiting the analytical advantages of insisting upon individual freedom and equality. Were Rawls to stump for the ubiquitous creation of liberal democracies with their commitment to normative individualism he could remedy this flaw.

Rawls' commitment to political pluralism is a trump here: Kazanstan and other decent non-democratic consultation hierarchies are sufficiently just, in his view, to be legitimate nation-state members of the international society of peoples. It is of some obvious interest that Rawls picks a Muslim state as his model of a decent consultation hierarchy.

Eleven of the forty-seven Muslim nations in the world are democracies, and if one thinks that the possibility of decent forms of reciprocity exist in non-democratic societies (what would logically rule it out?) then one is likely to think that the prospects for a just international order require recognition of alternative forms of decent society. With at least 1.2 billion Muslims in the world, the Muslim state seems a good place to begin, particularly as Islam is the world's fastest growing religion. There may well be more Muslim states that come to be consultation hierarchies than western-style democracies. For Rawls the commitment to pluralism implies theoretical acceptance of potentially just non-liberal states, just as it has always required our (almost entirely theoretical) acceptance of just Rawlsian liberal ones.

The fourth answerable difficulty is that the unthinkable has happened, and we have been attacked by outlaws on September 11th. How should we think about just war here-and-now?

Rawls' doctrine of just war, both in the imperfect compliance situation and in ideal theory, justifies war in cases of self-defense as well as in cases where a society egregiously violates the basic rights of its citizens. In very radical circumstances, say were England to be the last surviving democracy and her existence imperiled by Nazi attack, the Supreme Emergency Exemption could be invoked. That exemption could make civilians the legitimate target of military activity as a last-ditch-defense of democracy against fascism. In the following article, professor Fiala argues that a Kantian would have grave difficulty with this aspect of Rawls' view.

Such a survival situation, where the extinction of a well-embedded and decent way of life is at stake, seems rare indeed. But situations of self-defense or where a society egregiously violates citizen's rights occur with some frequency. Many societies, including some of the non-democratic Muslim societies mentioned earlier, may instantiate deeply unjust conditions (routine use of torture, no shared sense of the rule of law for the common
good). Military intervention in their affairs might be justified on Rawlsian grounds. Though this topic is of great interest, we here restrict ourselves to the issue of self-defense after an attack like that of 9-11.

Engaging in a justified war of self-defense would be only the beginning of a Rawlsian response to an attack. He makes practical distinctions, and he appeals to a principled way of framing just-war policy in order to maximize the possibility of achieving a just and lasting peace. Among the practical distinctions is that when at war with an outlaw state we must differentiate between its leaders, its civilians, and its soldiers. Leaders are to be held responsible. Soldiers are to be given an opportunity to surrender, as they may not be willing combatants. Civilians are to be protected. "Collateral damage" to civilians would be unjustified on a Rawlsian view in every circumstance except one in which the Supreme Exemption is invoked properly. On our reading, taking care to reduce harm to civilians to an absolute minimum is a condition sine qua non of a causes' being just during a time of war.

Our second set of questions has no easy answer in Rawls, so far as we can see: (1) What is the prospect of democracies representing only the reasonable interests of their peoples as arrived at through the proper intersubjective reasoning? (2) What is the prospect for their being decent non-democratic consultation hierarchies sufficiently and adequately known to be so? (3) If there were, as Rawls imagines, a working cluster of just liberal democracies and decent consultation hierarchies, how much can we say about their multilateral and collaborative efforts from our realist-guided vantage point? (4) Is Rawls' view coherent? (Do accounts based on "peoples" typically move in a quite different direction? As a political liberal can Rawls recommend killing civilians under any circumstances?)

Some of these questions are for another time. But one disappointing question, raised in professor Fiala's article, is whether Rawls' view simply resembles a component of a rival comprehensive doctrine to those who do not share liberal values. In particular, the existence of the Rawlsian "Supreme Emergency Exemption,"an exemption which allows the killing of innocent civilians in exceptional circumstances, may make it appear that Rawls' conclusions about attack allow for the killing of civilians whenever followers of an established way of life properly deem their circumstances to be exceptional. Perhaps, professor Fiala suggests, the Supreme Emergency Exemption is too strong for political liberalism to support, particularly since neither a Christian nor a Kantian philosophy of history can be comfortably adduced to provide a basis in a liberal democratic "overlapping consensus" for its deliberate targeting of civilians.

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Notes

1. Thanks to Professor Bindu Madhok for many helpful suggestions. Thanks to Laura Jordan for her careful reading and assistance. Errors of fact or interpretation are mine alone. Thanks to Professor Andrew Grossman who championed the leave which gave rise to this project.


3. ibid., p. 29. For Rawls the "reasonable" is not specifiable in terms of necessary and sufficient conditions (p. 87). In a reasonable (just) social order, class distinctions (indexed by income and wealth) are reasonable insofar as they are recognizably functionally necessary for a market system of exchange to exist. Differences between comprehensive (typically religious) doctrines are accommodated on a basis of overlapping consensus among them concerning the political essentials, i.e., voting, freedom of expression, freedom of worship, right to trial or the like. Differences of race and gender do not debilitating or even strike with much (if any) force in a reasonable society. These conditions and others like them being met, all citizens in the society that meets them exist in a social environment in which proper self-respect and proper moral satisfaction with society are both likely and warranted.

4. Ibid. p. 28.
5. Ibid. p. 46.

6. In Montesquieu's sense of gentle manners (moers douces) and Rousseau's sense of self-respect (amour-propre). Ibid., p. 46, pp. 34-5, 47 for Montesquieu and Rousseau respectively.

7. Though, one takes it, the interpretation of such an event will not always be uniform, particularly in a large pluralistic democracy. The American South, for instance, may continue to construe the Civil War as having been principally about states' rights. Northerners may typically construe it as having been primarily about slavery. And these divisions may sway the community of professional historians first one way, and then the other.

8. I have deliberately chosen Ronald Dworkin's terminology to characterize "reciprocity." There is some evidence that Rawls would endorse this move. There are two caveats here: I do not mean to imply that Rawls is advocating a comprehensive view or that he takes Justice as Fairness to be a rights-based view. See Political Liberalism (New York, Columbia University Press, 1993), p. 135, Collected Papers (Cambridge, Harvard, 1999), "Justice as Fairness: Political and Not Metaphysical," p. 400, footnote 19.

9. Op. cit., John Rawls, The Law of Peoples, p. 25 footnote 20: "Here I think of a nation as distinct from the idea of government or state, and I refer to it as a pattern of cultural values of the kind described by Mill in note 17 above." The objection thus considered is that Rawls' views on the justified actions of states is another version of jingoism/nationalism. Rather than "Liberalism for liberals, and cannibalism for the cannibals" Rawls' motto appears to be "Representative reasonableness for all peoples," or some such.


11. Bruce Ackerman's We, The People: Foundations (Cambridge, Harvard, 1991), expresses an historically embedded form of constitutionalism in which the Founding, Civil war and New Deal are interpreted as periods of higher lawmakering, and periods of American law other than these are treated as "normal politics." Only in periods of higher lawmakering is the Constitution being made, and it's the job of the court to preserve the most consistent interpretation of higher law during normal politics. The view is very much analogous to Kuhn's The Structure of Scientific Revolutions. Ackerman's view is the source of my picking these three periods as examples.

12. "Moral learning" is extolled as a basis for stability "for the right reasons" in Rawls' The Law of Peoples, page 44.

13. A perhaps surprising result, at least for fans of strict modus vivendi explanations, is that "individualistic" democracies may sometimes produce more aptness towards genuine trust and reciprocity than societies which are anthropologically viewed as subordinating the interests of the individual to the group. For a study that finds more promise concerning reciprocity in the American "individualistic" case than in the Japanese "group-oriented" case see the article by Nahoko Hayashi et al titled "Reciprocity, Trust and the Sense of Control" in Rationality and Society, (1999, Sage), pp. 27-46.


16. If Rawls' own voluminous writings on the topic are not sufficiently persuasive, surely Amartya Sen's work (especially books like Inequality Reexamined) would be convincing to readers who are anywhere in the ballpark concerning the material dimensions of justice.

17. Rawls insists, for instance, that even in a world in which governments are subservient to market
considerations involving multinational corporations and vast wealth that a constitutional government should not be run in a manner where it is "directed by the interests of large concentrations of private economic and corporate power veiled from public knowledge and almost entirely free from accountability." Rawls, Op. cit. The Law of Peoples, p. 24.

18. The level of "moral learning" implied here takes us quite beyond any status quo that America has recently experienced. Perhaps the New Deal period would come closest to an appropriate recognition of material reciprocity in our national policy. The Civil Rights movement might seem to be a candidate, but its legacy seems to be more a recognition of certain formal rights (some of them perversely interpreted to ignore the long history of status-quo discrimination as in Shaw v. Reno) than in adequate reconsideration of the political/material bases of meaningful freedom and equality. As in the New deal period, where the majority white population was severely impacted, the question is not whether citizens' liberties are formally specified in the same way under law. They are. The question is whether, as measured by the index of primary goods, citizens can make effective use of those liberties. See John Rawls, Justice as Fairness: A Briefer Restatement, (Cambridge, Harvard, 2001), pp 148-50.


20. Among "democratic" Muslim societies, Mali perhaps comes closest to realizing a political democratic structure akin to Western democracies. (See the New York Times report on the Freedom House rankings of Muslim nations, December 23, 2001). It is not clear to me which societies have a form of decent consultation hierarchy built into their political culture in a manner conducive to meeting Rawlsian conditions.


22. Rawls, Ibid., pp. 76-77.


26. Thanks to Greg Saltzman for this observation, made in our coterie on Karen Armstrong's book The Battle for God.


28. "Liberal democracy" is Rawls' shorthand notation for just democratic constitutional society. As such, it is also clear that this is an idealization too, since such a society is well-ordered by the two principles of justice. This rules out, among other things, the society's not being directed "by the interests of large concentrations of private economic an corporate power veiled from public knowledge and almost entirely free from accountability." (Op. cit., The Law of Peoples, p. 24.)

29. Ibid. p. 37.

30. See Norman Daniels' "Reflective Equilibrium and Justice as Political" (p. 143) for the argument that the philosophical "driver's seat" was never genuinely available as a common democratic justification of the politicized version of justice as fairness.


33. In Lockard and Murphy's *Basic Cases in Constitutional Law*, for instance, the list of such powers which we usually simply assume includes: The right to be free from bodily restraint, to marry, to have or not have children, to educate one's children, to "acquire useful knowledge," to vote, to associate with others for peaceful purposes, to travel within the U.S., to retain U.S. citizenship, to receive equal protection of law, to use federal courts and to enjoy a presumption of innocence. Duane Lockard and Walter E. Murphy, *Basic Cases in Constitutional Law*, (Washington D.C., Congressional Quarterly Press, 1987), pp. 167-8.


39. In footnote 27, page 103, Rawls asserts "In justice to Sherman, it must be said that on his march through Georgia in the fall of 1864 his troops only destroyed property. They did not attack civilians."


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