

The 'Political Values' of the 'Public Conception' in the Work of John Rawls

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Aristotle opened his *Politics* with the argument that if there are natural or given human goods recognised by human intelligence, then they are the standards to which politics should aspire. However, if on the contrary, an understanding of the principles of human flourishing is not an object open to intellectual discernment, then the political order must be structured to accommodate itself to subjective and conflicting conceptions of the good. It is the acceptance of the second of these propositions which forms the cornerstone of Rawls' idea of justice in general, and his idea of the good citizen in particular. Whereas classical philosophy and contemporary exponents of natural law theory uphold the superiority of reason over desire and argue that the disciplined exercise of reason may stand as a bar of judgment between competing conceptions of the good, Rawls' theory begins with the presumption that the human faculty of reason cannot be used to make a value judgment about competing goods. In Hobbes' words, '... the Thoughts are to the Desires as Scouts, and Spies, to range abroad, and find the way to the things Desired'.¹ Reason, if it is understood in this instrumental sense, is about the most efficient and practical means to pursue an end. The end itself however is chosen by human desire or appetite. Moreover, for Rawls, objectivity is not the 'adequation of the concept to the thing' (the classical definition), but rather the 'publicly shared point of view of citizens in a well-ordered society' (what might be described as the pragmatic definition). In other words, objectivity for Rawls is about seeing things the way the majority do in a society ordered according to his principles of justice. Overall Rawls stresses the 'political' nature of his theory. It is, he argues, an idea of the ideal citizen and the ideal polity formulated without reference to questions of philosophical psychology or metaphysical doctrines of the nature of the human person. Ontological questions about the essential nature of the human person or of justice itself are not addressed. The purpose of the parties in the 'original position' (Rawls' hypothetical situation from which to formulate basic principles of justice) is not to discover the truth about justice as participants in a Socratic dialogue might do, but rather to discover an optimal construct with which all can feel comfortable — a kind of lowest common denominator view of justice. Rawls states that 'since there is no reasonable religious, philosophical or moral doctrine affirmed by all citizens, the conception of justice affirmed in a well-ordered democratic society must be a conception limited to what I call the 'domain of the political' and its values'.²

This raises the question of what Rawls understands by the term the 'domain of the political' and how he, or anyone else, identifies its values. We know that his 'domain of the political' does not refer to that branch of ethics which relates to social justice issues. This was the classical understanding of the domain of the political, and the understanding common among contemporary natural lawyers who identify with the Aristotelian and/or

¹ T Hobbes, *Leviathan* (London: Pelican Classics, 1951), 139.

² J Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 38.

Thomistic schools of natural law, rather than the Hobbesian inversion of these. However Rawls' conception of politics has been severed from the field of ethics (at least in so far as ethics may be defined classically as the science of morals, rather than pragmatically as the study of values). The 'domain of the political' must therefore refer simply to the domain of public opinion and his 'political values' must be distilled from public opinion without reference to what he calls 'reasonable comprehensive doctrines', or in other words, precepts of moral philosophy.³ His 'values' are therefore what remains once the ether of moral philosophy has been evaporated. The rejection of ontology has meant that the whole architectonic edifice of classical political philosophy has been decapitated leaving only a few bricks of concepts refashioned in Enlightenment moulds. The domain must therefore be limited to the ideas of 'opinion-makers' who accept this severance as a basic starting point. In practical terms this dis-enfranchises, or at least excludes from the domain, all those who wish to argue that there is a natural relationship between politics and ethics, that is, those 'perfectionists' as Rawls calls them, who formulate reasonable comprehensive political doctrines on the basis of their ontological investigations, and who refuse to accept the public/private dichotomy implicit in Rawls' theory which demands of citizens that they refrain from basing their judgments about public matters on what they as a private individual view as the correct principles of moral discernment. Logically what one ends up with in such circumstances are the values of those who subscribe to the idea that politics is somehow a law unto itself.

In *Political Liberalism*, Rawls follows through the logic of his belief in the necessity of the public/private dichotomy by concluding that in discussions of constitutional essentials and matters of basic justice 'we are not to appeal to comprehensive religious and philosophical doctrines — to what individuals or members of associations see as the whole truth'.⁴ Rather, 'as far as possible, the knowledge and ways of reasoning that ground our affirming the principles of justice and their application to constitutional essentials and basic justice are to rest on the plain truths now widely accepted, or available, to citizens generally'.⁵ Precisely what these 'plain truths' are and how they are to be found and defined is not explained. Nor is it clear as to how one distinguishes a 'reasonable comprehensive doctrine' from an 'unreasonable, irrational or mad comprehensive doctrine'. What is clear is that the realm of 'public reason' excludes all comprehensive doctrines, whether reasonable or unreasonable. This exclusion extends all the way to the Supreme Court:

The justices cannot, of course, invoke their own personal morality, nor the ideals and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their own or other people's religious or philosophical views . . . Rather, they must appeal to the political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason. These are values that they believe in good faith, as the duty of civility requires, that all citizens as reasonable and rational might reasonably be expected to endorse.⁶

Linked to this principle is the presumption that the 'political conceptions judges hold and their views of constitutional essentials locate the central range of basic freedoms in more or less the same place'; and a particular idea of democracy in which the Constitution is 'not what the Court says it is', but rather, 'what the people acting constitutionally through the other branches eventually allow the Court to say it is'.⁷ There is also a presumption that being 'reasonable and rational' means using the intellect in an instrumental sense only, it does not mean directing one's intellect to the pursuit of truth. Rawls concedes that his

3 *Id* xxviii.

4 *Id* 224–225.

5 *Id* 225.

6 *Id* 236.

7 *Id* 237.

presumption about the political conceptions of judges and particular interpretation of democracy, and in particular, the role of the judiciary within a democracy, are symbiotic. Thus he says:

Here I assume that the political conception of justice and the ideal of honouring public reason mutually support one another. A well-ordered society publicly and effectively regulated by a recognised political conception fashions a climate within which its citizens acquire a sense of justice inclining them to meet their duty of civility and without generating strong interests to the contrary. On the other hand, the institutions of a well-ordered society are in turn supported once the ideal of public reason is firmly established in its citizens' conduct.⁸

Having thus declared the existence of this symbiotic relationship to be foundational for his theory, Rawls then declares that:

[W]hether these assumptions are correct and can be founded on the moral psychology I sketched in 11.7 are large questions I cannot take up here. It's clear however, that should these assumptions be mistaken, there is a serious problem with justice as fairness as I have presented it. One must hope, as I have throughout, that the political conception and its ideal of public reason are mutually sustaining and in this sense stable.⁹

In the same manner, in *A Theory of Justice*, Rawls defined his conception of the good citizen in *political* (that is for Rawls pragmatic) terms, in order to circumvent philosophical problems, and concluded that: 'however attractive a conception of justice it might be, it is seriously defective if the principles of moral psychology are such that it fails to engender in human beings the requisite desire to act upon it'.¹⁰

Clearly, Rawls' doctrine stands or falls upon these assumptions about the moral psychology of judges and other civic leaders which, when submitted to empirical analysis, may prove to be without solid foundations. For example, Rawls' precept that 'justices cannot invoke their own personal morality, nor the ideas and virtues of morality generally' has not been accepted by all the judges of the American Supreme Court. The controversy surrounding the appointments of Justices O'Connor and Thomas suggests that Rawls is begging the question. He personally would prefer it if judges somehow excluded their ideas of right and wrong from considerations of jurisprudential questions, unless they happen to be in accord with the 'political values' of his 'public conception' whatever they might be. Implied in this precept is the idea that liberal values are ethically neutral, that they are not derived from 'ideas of morality generally'. However if one takes one of the most contentious issues, that of abortion, it is hard to see how the liberal 'pro choice' position can escape being categorised as an 'ethical decision'; that is, a decision about issues of right and wrong. To conceptualise the issue as astringently political is rather difficult. For as long as there are judges and lawyers and civic leaders who continue to see the issue as one which is, in its very nature, ethical, Rawls' doctrine of political liberalism will be without the foundations it needs in order to operate.¹¹

Rawls also seems to presume that it is possible to find 'political values' which are untainted by contact with 'reasonable comprehensive doctrines'. Again, logically, if the public values are not derivative of reasonable comprehensive doctrines, then they must either be created *ex nihilo* or be derivative from unreasonable doctrines. Ideas or concepts which are created *ex nihilo*, such as the social contract and the 'veil of ignorance' are vulnerable to the criticism that instead of interpreting social reality they merely obfuscate it. The social contract has, for example, been described as an 'ambiguous myth — a contraption designed to explain servitude as autonomy voluntarily relinquished in exchange

8 *Id* 252.

9 *Ibid*

10 J Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1972), 455.

11 Rawls makes brief reference to the issue of abortion in a footnote on p 243 of *Political Liberalism*, *supra* note 2.

for protection and security'.¹² Similarly, M A Krapiec from the Lublin school of philosophy uses the expression 'constructs of thought which have no anchorage in life' to describe those concepts which operate well in a theoretical scheme but which bear no relationship, or very little relationship, to anything which *actually exists* in social life. He argues that the dynamism of the pressures of life are more powerful (and one might infer socially significant) than any artificially created constructs:

[I]t can be seen from experience that generally social reforms which are accomplished in the name of philosophical or theological *a priori* doctrines are not in agreement with life, and, in practice, they deprave and pervert [the human person] in the short term, while in the long term these reforms succumb to a modification under the pressure of life which in its dynamism is more powerful than the various constructs of thought which have no anchorage in life.¹³

It is also unclear how Rawls can justify his particular political ideals, such as the ideal of equality, without reference to a reasonable comprehensive doctrine such as liberalism, and if this is conceded — that liberalism is acceptable as a source of doctrines/values for the 'domain of the political' — then how can Rawls justify the use of liberalism (albeit his allegedly philosophically sterile *political* liberalism) while precluding other sources of values? This is rigging the rules so that only liberal values are politically legitimate.

Moreover, expecting citizens to adopt different moral perspectives according to such variables as time, place and social position may not be psychologically healthy. This habit of changing moral caps must be destructive of an integrated personality. This is in part because a basic principle of logic is that something cannot both be and not be at the same time. Those whom Rawls describes as 'perfectionists' are those who wish to argue that if a citizen performs an action which he regards as evil, the moral character of the action does not change according to the 'moral cap' worn by its perpetrator. This is the criticism of the reasoning of the so called 'Nuremburg defence' — the argument used by senior German officers to exonerate themselves from any complicity in the Nazi atrocities. It took the form of a simple proposition that a person could be divided into a private and professional self, one which opposed Hitler, the other which implemented his policies.

A human person should not have two or more 'selves' — one which is private and others which are public. It is precisely for this reason that Roberto Ungar has suggested that it is 'schizophrenia' or the 'bifurcation of the individual self' that brings to life the hidden truth of the moral condition liberal psychology prescribes.¹⁴ A similar argument has been made by Vaclav Havel, the President of the Czech Republic. According to Havel, it is a characteristic of contemporary western society that people behave as though they are playing for a number of different teams at once, each with different uniforms, and as though they do not know to which of the teams they ultimately belong.¹⁵ However, whereas Havel sees this sociological phenomena as a problem for Western society, indeed as a sign of its decadence, Rawls infers that such a psychological condition is a pre-requisite for his model citizen. Rawls takes the individual who has a rather fluid sense of self-identity and tacks on to him a preference for liberal values; that is, those values which by definition deny the existence of any objectively verifiable hierarchy of values. How such a citizen ever formulates a sense of 'civic virtue' is not clear. His presumption (which he acknowledges is merely a presumption) that 'a well — ordered society [that is, a Rawlsian society] fashions a climate within which its citizens acquire a sense of justice inclining them to meet their duty of civility' may be yet another presumption that would not withstand the test of empirical analysis. The dialogue between Socrates and Phaedrus

12 G M Tamas, 'A Disquisition on Civil Society' *Social Research*, v 61, no 2, Summer 1994, 205, 207. G M Tamas is the Director of the Institute of Philosophy of the Hungarian Academy of Sciences.

13 M A Krapiec, *I Man — An Outline of Philosophical Anthropology* (Toronto: Mariel Press, 1983), 270.

14 R Unger, *Knowledge and Politics* (London: Macmillan, 1975), 58.

15 V Havel, *Open Letters: Selected Prose 1965–1990* (London: Faber & Faber, 1991), 95.

provides a good illustration of the principle that public values which are not rooted in something more substantial and more rational than mere opinion or rhetoric will quickly give way to the ideas of tyrants and idiots:

Socrates. Suppose I tried to persuade you to acquire a horse to use in a battle against the enemy, and suppose that neither of us knew what a horse was, but I knew this much about you, that Phaedrus believes a horse to be that tame animal which possesses the largest ears.

Phaedrus. A ridiculous thing to suppose, Socrates.

Socrates. Wait a moment: suppose I continued to urge upon you in all seriousness, with a studied encomium of a donkey, that it was what I called it, a horse: that it was highly important for you to possess the creature, both at home and in the field: that it was just the animal to ride into battle, and that it was handy, into the bargain, for carrying your equipment and so forth.

Phaedrus. To go to that length would be utterly ridiculous.

Socrates. Well, isn't it better to be a ridiculous friend than a clever enemy?

Phaedrus. I suppose it is.

Socrates. Then when a master of oratory, who is ignorant of good and evil, employs his power of persuasion on a community as ignorant as himself, not by extolling a miserable donkey as being really a horse, but by extolling evil as being really good: and when by studying the beliefs of the masses he persuades them to do evil instead of good, what kind of crop do you think his oratory is likely to reap from the seed thus sown?¹⁶

To this reflection may be added the observation of Voegelin in his work *From Enlightenment to Revolution* that 'once the 'spiritual substance' [the commonly shared notions of the good] are destroyed, the structure of political sentiments within society is in a precarious balance that can be destroyed by any untoward event, as for instance an economic crisis'.¹⁷ Prior to these crises where social behaviour is governed by conventions rather than convictions, politicians who should be the guardians of liberties, increasingly rely upon the mechanism of passions and interests of a social group as their source of power. Viewed from such a perspective, Rawls' 'political values of the public conception' become the solvent of democratic political culture. Once self-respect is decoupled from notions of goodness and politics it is no longer primarily about social justice, individuals of moral substance turn away from involvement in politics and the realm of the political is left to those who view politics as an end in itself and who are motivated by a desire for power. As Ian Crowther has observed:

A deracinated individualism of the kind which admits no objective measure and no orientation larger than the self will typically find relief from solitariness either in a frenzied pursuit of material gratifications or in the warmth of totalitarian ideology.¹⁸

The only concession Rawls seems prepared to make to those who subscribe to 'perfectionist' conceptions of justice, that is, conceptions of justice based on 'reasonable comprehensive doctrines' is that 'privately they may regard it as unthinkable to view themselves without certain religious and philosophical connections'.¹⁹ In *A Theory of Justice*, Rawls dismissed the argument that obligations to God must take precedence over obligations to follow his own principles on the ground that 'such a view is unnecessary

16 R Hackforth (trans), *Plato's Phaedrus* (Cambridge: Cambridge University Press, 1952), 119–120.

17 E Voegelin, *From Enlightenment to Revolution* (Durham NC: Duke University Press, 1975), 97.

18 I Crowther, 'Reinstitutionalising Society', June 1988, *Salisbury Review* 12.

19 J Rawls, *supra* note 10, 554.

to argue against' and advised those who find his principles contrary to their view of the good, that 'their nature is their own misfortune'.²⁰ Rawls even described the positions of Aquinas and Loyola as 'irrational' and 'mad'.²¹

The very difficult question of in what circumstances it is right to reject a civil law which one believes to be unjust is briefly addressed by Rawls in section 56 of *A Theory of Justice* where he concludes that:

A theory of justice must work out from its own point of view how to treat those who dissent from it. The aim of a well ordered society, or one in a state of near justice, is to preserve and strengthen the institutions of justice. If a religion is denied its full expression, it is presumably because it is in violation of the equal liberties of others. In general, the degree of tolerance accorded opposing moral conceptions depends upon the extent to which they can be allowed an equal place within a just system of liberty.²²

The difficulty with such a conclusion is that it relies on both circular reasoning and a rather narrow view of what constitutes religious belief and practice. It also presumes that the main source of conflict is the 'violation of liberties of others' which can be resolved by the application of liberal principles of tolerance. However, conflicts between one's personal conscience and one's social or public position usually arise in circumstances where the individual believes that certain civic laws are unjust and that the State enshrining or formulating and defending those laws is unjust. So the basic justness of the State's position cannot be presumed, but is in fact the point at issue. For a perfectionist, especially one in the Natural Law tradition, justice is something real which exists in itself — there is more to it than simply being the outcome of procedural fairness. Secondly, if religious principles were only private matters, like whether or not to eat pork, or to abstain from meat on Ash Wednesday, then principles of toleration could be applied so that individual citizens are not persecuted for the practice of their religion, as they have been at times throughout history. The application of a principle of tolerance to such circumstances certainly allows individuals to pursue their own forms of worship and religious practice free from State interference and persecution. This is the easy case scenario. However the difficult cases arise when some principle which is derived from a religious framework (such as the Judeo-Christian pro-life principle) impinges on the social aspects of human life and thus encounters the sphere of authority of the State. Rawls wants a theory which will make the State a kind of umpire which regulates the public sphere in such a way that no conception of the good is allowed to prevail over any other conception. In practice however this is not possible as the Communitarians, particularly Sandel, have noted. There are certain occasions when the State will be in a zero-sum position where it will have to make a choice between different conceptions of the good and even competing liberties. In other words, there are political situations which cannot be resolved by applying a theorem of political calculus designed to reward all parties with the greatest possible personal liberty. No such theorem exists because not all issues can be reduced to questions of liberty. In such zero-sum situations whatever policy the State adopts amounts to the promotion of one conception of the good over another. If, for example, the State has a choice between the right to life of the unborn or the right of a woman to choose whether or not to have an abortion, all ethical systems which are based on utilitarian considerations or questions of procedural fairness fail. The State has to make a choice between two antithetical conceptions of the good. To adopt a 'right to choose' position is, in effect, to decide against the right to life. It is in these circumstances then that 'perfectionists' are

20 *Id* 576.

21 *Id* 554.

22 *Id* 370.

likely to find themselves questioning the State's claim to be just, or at least, the justness of a particular law. For such citizens Rawls suggests that:

[N]one of this [the conflict between competing conceptions of justice] need affect the conception of the person connected with society's public conception of justice and its ideal of social co-operation. Within different contexts we can assume diverse points of view toward our person without contradiction so long as these points of view are together when circumstances require.²³

The issue of 'What circumstances do *not* require that human persons have integrated personalities?' is never addressed. When Rawls is talking in the context of his own system he argues that 'our ends must be revised whenever they conflict with the principles of justice'.²⁴ His own principles of justice therefore are an end to which other precepts are subordinated, but other conceptions of the highest good do not receive the same treatment. The 'fairness' or 'practicality' of such a position is not self-evident.

Rawls seems to anticipate criticism of his severance of the values of 'reasonable comprehensive doctrines' from his list of acceptable political values by reference to the lives of great individuals who are publicly regarded as having changed society for the better precisely because they refused to accept the public/private dichotomy and acted publicly on the basis of privately held 'reasonable comprehensive doctrines'.

In the context of the values espoused by Martin Luther King, Rawls concedes that 'religious doctrines clearly underlie King's views and are important in his appeals'.²⁵ However, he then states that the example of King in no way threatens the validity of his theory since King's values were 'expressed in general terms' and they 'fully support constitutional values and accord with public reason'.²⁶ The logic of such a position is that it may be acceptable to promote perfectionist or reasonable comprehensive doctrines if they are expressed *generally* rather than *specifically*. Such a conclusion may be absurd but it is the logical corollary of Rawls' justification for including King as an exemplar of his theory. It is also far from self-evident that King's publicly espoused values were in accord with the political values of the public conception when the civil rights movement began. At that time there was no public consensus about the correct political values to be applied to civil rights issues. If Robert Kennedy had not been the Attorney-General at the time of the Alabama riots, if rather, the Attorney-General had been more strongly influenced by the political values of figures such as J Edgar Hoover, perhaps King's values would not have been so acceptable in the echelons of power? Moreover Rawls' adoption of King as a model consistent with his theory does not seem to be consistent with King's own statements on these issues. For example, of the moral relativism which frequently accompanies subjective conceptions of the good, King said:

It is midnight within the moral order . . . Moral principles have lost their distinctiveness. For modern man, absolute right and absolute wrong is a matter of what the majority is doing. Right and wrong are relative to likes and dislikes and the custom's of a particular community. We have unconsciously applied Einstein's theory of relativity, which properly described the physical universe, to the moral and ethical realm.²⁷

Even more pertinent was King's argument that the 'Church must be reminded that it is not the master or servant of the state, but rather the conscience of the state'.²⁸ It is hard to see how the Church could possibly fulfil this office which King assigns to it, if public

23 J Rawls, 'Kantian Constructivism in Moral Theory' *Journal of Philosophy*, vol LXXVII, Sept 1980, 515, 544-545.

24 *Id* 544.

25 J Rawls, *supra* note 2, 250.

26 *Ibid*.

27 J M Washington (ed), *A Testament of Hope: the Essential Writings and Speeches of Martin Luther King* (San Francisco: Harper and Row, 1986), 498.

28 *Id* 501.

values may not be derived from 'reasonable comprehensive doctrines'. Moreover, in his 'Letter from Birmingham Jail' King defined a just law as one which 'squares with the moral law or the law of God' and an unjust law as one which 'is out of harmony with the moral law'.²⁹ The idea that all men are created equal may have been enshrined in the American Constitution, but it took a Baptist Minister relying on the Genesis conception of the human person as a being made in the image and likeness of God to bring that particular constitutional provision to life. Similarly, if one examines electoral maps of Germany in the 1930s one quickly becomes aware that regions with high Catholic populations did not vote for Hitler. The fact is so stark that even little Catholic villages within predominately non-Catholic *Länder* stand out in the shadings as having not voted for Hitler.³⁰ Obviously the public values of the non-Nazi voters had something to do with a particular 'reasonable comprehensive doctrine' or perhaps 'unreasonable comprehensive doctrine', given that we know that Rawls thinks that both the Thomistic and Ignatian expressions of Catholicism are 'irrational' and 'mad'.

Rawls' desire to develop a pragmatic conception of justice against the more rigorous philosophical demands of classical and neo-classical schools of Natural Law is reminiscent of Machiavelli's criticism of classical political philosophy. Machiavelli argued that the Ancients aimed their bows too high; by attempting to achieve an objective knowledge of the real essences of the best political order(s) they were setting themselves an almost superhuman task. Machiavelli claimed it was far easier to simply move the target. Rawls follows him in the pursuit of a 'political' conception of justice and states that he 'hopes' that such a conception will be supported by an 'overlapping consensus' — a consensus that includes all the opposing philosophical and religious doctrines likely to persist. Leaving aside the question of whether this is in itself desirable as an intellectual enterprise, it would seem that it may fail by its own standard of practicality since the continued existence of 'perfectionists' prevents the emergence of any such consensus. Rawls wants to conscript perfectionists to his market-place 'morality' which is predicated on political values which he either creates *ex nihilo* or somehow discovers hermetically sealed from philosophy, including the philosophy of liberalism, in the conversations and works of public opinion-makers — and if they resist conscription to deny them some of the privileges of citizenship. If this were to happen, the perfectionists in society would face a choice between abstaining from any involvement in public life, a form of internal exile, or persecution. For such an enterprise, one may conclude with an epithet taken from James Russell Lowell as used by Martin Luther King in a sermon at the Ebenezer Baptist Church in Atlanta:

Truth forever on the scaffold, Wrong forever on the throne, —
Yet that scaffold sways the future, and, behind, the dim unknown
Standeth God within the shadow, keeping watch above his own.³¹

29 M L King, 'Letter from a Birmingham Jail' in *Why We Can't Wait* (New York: The New American Library, 1963), 76, 82. See also the discussion on this point in C Rice, *50 Questions on the Natural Law: What it is and why we need it* (San Francisco: Ignatius Press, 1993), 25.

30 See the electoral maps in E Von Kuehnelt-Leddihn, *Liberty or Equality: The Challenge of our Time* (London: Hollis and Carter, 1952), 224–225.

31 J M Washington *supra* note 27, 507.