



No.93/October 2005

John Rawls's Justice as Fairness: anti-foundationalism,
deliberative democracy, and cosmopolitanism

Fabrizio Trifiró

Institute for International Integration Studies, Trinity
College Dublin.



IIS Discussion Paper No. 93

John Rawls's Justice as Fairness: anti-foundationalism, deliberative democracy, and cosmopolitanism

Fabrizio Trifiró

Disclaimer

Any opinions expressed here are those of the author(s) and not those of the IIS.
All works posted here are owned and copyrighted by the author(s).
Papers may only be downloaded for personal use only.

John Rawls's Justice as Fairness: anti-foundationalism, deliberative democracy, and cosmopolitanism

Dr. Fabrizio Trifiró

Institute for International Integration Studies, Trinity College Dublin

This paper aims at illustrating through a close reading of the works of John Rawls the anti-foundationalist cosmopolitan deliberative democratic approach to liberalism that I have sketched in the IIS Discussion Paper N.47. I shall argue that despite what some of his critics believe Rawls's liberal theory of justice (1) is not concerned with foundational preoccupations (e.g. Michael Sandel); (2) does not ignore concrete processes of collective deliberation over matters of public interests (e.g. Amy Guttmann, Dennis Thomson, Brian Barry); (3) nor does it endorse rigid limits to the scope of democratic deliberation (e.g. Jeremy Waldron, John Gray, Richard Bellamy). Yet I shall claim, following Andrew Kuper, that (4) there is a real risk of infringing individuals' primary moral significance in trying to stretch too much the limits of liberal toleration in order to accommodate political liberalism with multiculturalism in the international sphere.

1. Political liberalism and anti-foundationalism

Michael Sandel, one of the main critics of John Rawls's liberalism, sees it as an instance of that "deontological liberalism", stemming from Kant's transcendental approach, concerned not only with moral and political principles but also with their foundations. That is, he thinks that Rawls endorses deontological liberalism not only in its moral sense, opposed to *consequentialism* as a first-order political and moral position "containing certain categorical duties and prohibitions which take unqualified precedence

over other moral and practical concerns”, but also in its foundational sense, opposed to *teleology* as “a form of justification in which first principles are derived in a way that does not presuppose any final human purpose or end, nor any determinate conception of the human good”.¹

Contrary to this conviction at the basis of Sandel’s criticisms of Rawls’s liberalism, which I shall not deal with here, I shall show how Rawls, during the past thirty years, as he himself continually repeated, was just trying to put together into a coherent and clear system the political and moral assumptions and intuitions that he took as best expressing the liberal respect for people’s freedom and equality, *without* any consideration of their epistemological status, let alone attempting to show their epistemological privilege over the assumptions and intuitions of other moral and political traditions. As he said, his conception of justice is “political, not metaphysical”, and this means, amongst other things, that he took his conception of justice as a first-order moral and political conception without any epistemological privilege attached to it. I shall thus show that Rawls provides a concrete example of a viable anti-foundationalist endorsement of liberalism; a concrete example of an affirmative answer to Sandel’s rhetorical question: “Can liberalism of the first [moral] kind be defended without recourse to the second [foundational]?”²

We can start shedding some light on why Sandel is wrong in regarding Rawls as holding a foundational position by noting that there is no epistemological tension in the difference between deontological and teleological conceptions. What I mean by this is that every deontological position has a value, or a set of values, the satisfaction of which sets a final end to aim towards; and every teleological position has a value, or a set of values, that it considers to be of the most fundamental importance and not subject to compromise. Namely, any point of view stands on some basic values which can be conceived both, in a deontological way, as a matter of ultimate importance not to be questioned, and, in a teleological way, as the ultimate end towards which to direct our practices. There is really no epistemological difference involved here, but only a different way of accounting for the last court of appeal of our justifications, either as a final end or as first principle.

¹ M. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), p.3; referred to hereinafter as *LLJ*.

² *Ibid.*

Thus, both teleological and deontological justifications end in some ultimate value, or set of values, which does not presuppose any other one. If you have foundationalist inclinations you will regard that last set of values as corresponding to how things *really* are in themselves; if you have anti-foundationalist inclinations you will think instead that that set of values, which is the last court of appeal for our justifications, stands only on itself, that it constitutes only the ungrounded territory on which we currently stand. But this epistemological difference does not concern the choice of viewing our ultimate values as final ends or as first principles.

I think the cause of this misreading of the difference underlying the distinction between deontological and teleological theories lies in the potentially misleading formulation of the actual moral and political opposition traditionally involved in that distinction. This is the opposition that Sandel himself acknowledges as being behind the deontology-versus-consequentialism divide, an opposition between first-order moral and political theories holding different views about the fundamental values to which to give primacy, and that is usually formulated in terms of theories that give priority to the right over the good and those that instead put the good before the right.

The priority of the right over the good is indeed the central conviction at the basis of Rawls's – and in fact of any form of – liberalism. I say that this can be a misleading formulation of the central tenet of liberalism because, by setting the right over the good, it may lead, and in fact has led, people to think that liberalism is based on the claim that its conception of justice, of the right way in which to regiment our social interactions and collective decision-making practices, stands on an *epistemologically* different ground from our conceptions of what it means to live a good life. Indeed, it has led people to think that liberalism maintains that the right stands on itself in an epistemologically privileged way, independent of any conception of the good. This reading of the difference between the right and the good may well suit Kant's transcendental conception of morality, but it does not necessarily have to be linked with the liberal thesis of the priority of the right over the good. This thesis, when held with an anti-foundationalist conscience, amounts to nothing else than the statement with which Rawls opened his *Theory of Justice*, namely, that according to liberalism “justice is the first virtue of social

institutions”.³ And whatever a virtue is, it surely is connected with our conception of the good life.

Claiming the priority of justice over other values – the welfare of society as a whole, for example – amounts only to the first-order moral and political claim that “the rights secured by justice are not subject to political bargaining or to the calculus of social interests”,⁴ and not to the epistemological one that the liberal conception of justice, standing detached and aloof from any consideration of the good, must be regarded as the conception that we would endorse once we divested ourselves of our prejudicial views of the good life. To say that the rights secured for people by justice are not to be subject to political bargaining is simply to express a particular moral and political position about the main concerns and values to which a liberal community must give priority in considering how to organize its main structures and institutions, namely, about the restrictions on conceptions of the good whose pursuit must be regarded as acceptable for a society of free and equal persons. As Rawls says,

In justice as fairness the priority of right implies that the principles of (political) justice impose limits to permissible ways of life; and hence the claims citizens make to pursue ends that transgress those limits have no weight (as judged by that political conception).⁵

What we need to know in order to come to an adequate understanding of political liberalism is what conception of the liberal good is conveyed by “justice as fairness”: what exactly are the principles of political justice that we would choose from the standpoint of justice as fairness in order to foster and instantiate that conception? In the course of our answering these questions, and thus explaining the moral and political content of justice as fairness, we will also come to a proper appreciation of its anti-foundational character.

We can start answering those questions by pointing out the main motivating concern behind Rawls’s elaboration of justice as fairness. This is to give adequate expression to the two fundamental values of the liberal tradition: freedom and equality. The basic

³ J. Rawls, *A Theory of Justice*, rev. edn (Oxford: Clarendon, 1999), p.3.; hereinafter *TJ*.

⁴ *Ibid.*, p.4.

⁵ J.Rawls, “The Priority of Right and Ideas of the Good”, in *Collected Papers* (Cambridge, Mass., and London: Harvard University Press, 1999), p.449; hereinafter *Col. Pap.*

concern that these values pose for a liberal society is that of political legitimacy. Rawls's approach to the political question of legitimacy follows the tradition of social contract theories of justice, and maintains that, given both the pluralistic nature of our society and the coercive nature of state power, the governing organisms of the state can exercise their power legitimately only by submitting the choice of the principles regulating the terms of social cooperation and the processes of collective decision-making to the free and considered assent of its citizens regarded as free and equal persons. This is what Rawls calls the "liberal principle of legitimacy".⁶ It amounts to the familiar democratic claim that, in a liberal society, state power is legitimated only when it is exercised with the free consent of, as far as possible, everyone bound by it.

From this central idea Rawls starts drawing the lines of his conception of justice. The central point is that this is a *political* conception. For a conception of justice to be political means three things:

First, that it is a moral conception worked out for a specific subject, namely, the basic structure of a constitutional democratic regime; second, that accepting the political conception does not presuppose any particular comprehensive religious, philosophical or moral doctrine; rather, the political conception presents itself as a reasonable conception for the basic structure alone; and third, that it is formulated not in terms of any comprehensive doctrine but in terms of certain fundamental ideas viewed as latent in the public political culture of a democratic society.⁷

The basic structures of a society are the major political, economical and social institutions that regulate the assignment of fundamental rights and duties to citizens and the distribution of the benefits coming from their social cooperation. The main consideration behind the limitation of the subject of the conception of justice for a democratic society to its fundamental institutions, which links the first with the other two features of the political, is that to lay down regulating principles that extend beyond the limits of the main institutions of political, social and economical life to the whole of life is not consistent with respect for the freedom and equality of the citizens of a pluralist and democratic society. This is because, given the fact of the plurality of incommensurable

⁶ J. Rawls, "The Idea of an Overlapping Consensus", in *Political Liberalism* (New York: Columbia University Press, 1993), p.137; hereinafter *PL*.

⁷ J. Rawls, "The Priority of Right and Ideas of the Good", in *Col. Pap.*, p.450.

conceptions of the good and incompatible ways of life, “as a practical political matter no general moral conception can provide a publicly recognized basis for a conception of justice in a modern democratic state”.⁸ This means that there is no way to legislate on *every* aspect of life without violating the values of freedom and equality, for “a continuing shared understanding on one comprehensive religious, philosophical, or moral doctrine can be maintained only by the oppressive use of state power”.⁹ The idea is that a political conception of justice for a constitutional democracy committed to safeguarding the equality and the freedom of its citizens “should be, so far as possible, independent of controversial philosophical and religious doctrines”, it must be presented as a “freestanding view”. From this it follows that

to formulate such a conception we apply the principle of tolerance to philosophy itself: the public conception of justice is to be political not metaphysical.¹⁰

This point, corresponding to the second feature of the political, is what lies behind the claim that for liberals the right takes priority over the good, and it is made clear, for example, by Rawls’s remark that a political conception of justice “is a module, an essential constituent part, that fits into and can be supported by various *reasonable* comprehensive doctrines that endure in the society regulated by it”.¹¹

The freestanding character of political liberalism is a direct consequence of the liberal principle of legitimacy according to which, given people’s different and conflicting comprehensive doctrines, there is no other way to propose a non-oppressive organization of society than to look for principles of justice that, as far as possible, all citizens could freely and reasonably endorse; principles that, as Rawls puts it, could be “the focus of an overlapping consensus of at least the *reasonable* comprehensive doctrines affirmed by its citizens”.¹² This implies that a liberal society requires from its citizens a commitment to a particular “civil duty”, “the duty to be able to explain to one another ... how the principles and policies they advocate and vote for can be supported by the political values

⁸ J. Rawls, “Justice as Fairness: political not metaphysical”, in *Col. Pap.*, p.390.

⁹ J. Rawls, “Fundamental Ideas”, in *PL*, p.37.

¹⁰ R. Rorty, “Justice as Fairness...”, in *Col. Pap.*, p.388.

¹¹ R. Rorty, “Fundamental Ideas”, in *PL*, p.12; the emphasis is mine.

¹² See “The Idea of an Overlapping Consensus”, in *Col. Pap.*, p.425.

of public reason”,¹³ intended as “the reason of equal citizens who, as a collective body, exercise a final political and coercive power over another in enacting laws and in amending their constitution”.¹⁴

It is this idea of *reasonable* consensus obtained through a collective rational deliberation respectful of everyone’s freedom and equality which lies behind the claim to primacy of the right over the good. This primacy expresses in fact the restraints to be placed on collective decision-making for it to be accepted as reasonable. It expresses the idea that in order to bring about a *reasonable* consensus among people holding and pursuing different conceptions of the good we need to draw as few restrictions to the acceptable ways of life of citizens as is compatible with the equal freedom of everyone to pursue their own way of life; we need, that is, to give priority to the value of having as much respect for every citizen’s choice of the good life as is consistent with their equality, over the conviction that only *one* particular conception of the good life is worth following and should thus be imposed over the others.

It is here, in the reference to “reasonableness”, that we find one of the points where the moral character of Rawls’s liberal conception of justice – its being a conception of the good – is made the more manifest. This is also one of the points in which Rawls most clearly expresses his distance from the foundationalist tradition. The point of insisting on the reasonableness of the comprehensive doctrines supporting the liberal conception of justice is, in fact, to recognize that not any kind of pluralism, not any project of the good life, is consistent with a democratic organization of society; that the possibility of realizing a pluralist, free and equal society depends on its citizens endorsing, along with their own particular different conceptions of the good life and rationality, the same conception of public reason, the same conception of how best to regulate their encounters and cooperation in respecting each other’s freedom and equality. It is to recognize that, in order for different and conflicting comprehensive doctrines to be able to cohabit in a liberal society, they must share a particular moral attitude and virtue, that of reasonableness, intended as “the willingness to propose fair terms of cooperation and to abide by them provided others do”,¹⁵ the civic virtue that involves “a willingness to listen

¹³ J. Rawls, “The Idea of an Public Reason”, in *PL*, p.217.

¹⁴ *Ibid.*, p.214

¹⁵ J. Rawls, “The Power of Citizens and Their Representations”, in *PL*, p.54.

to others and a fair-mindedness in deciding when accommodations to their views should reasonably be made”.¹⁶ It is to recognize, that is, that participation in a liberal society requires the willingness to enter into public deliberation about matters of common concern in respecting each other as free and equal persons.

This recognition has great importance for a proper understanding and evaluation of the liberal project, especially in view of answering the criticisms that insist on its partiality, on its failure to abide by its aim of presenting a freestanding point of view on justice, of creating a state neutral towards its citizens’ conceptions of the good. We can see how a liberal response to this criticism may go by noting that Rawls is aware that the liberal project does not intend to be neutral towards any point of view; aware that this intention would be self-stultifying since, aiming at building a *reasonable* society, liberalism must stand in direct opposition to all the *unreasonable* tendencies that represent a menace for its realization, i.e. the illiberal tendencies to violate the fair terms of social cooperation and the freedom and equality of persons. As he says:

Even though political liberalism seeks common ground and is neutral in aim, it is important to emphasize that it may still affirm the superiority of certain forms of moral character and encourage certain moral virtues ... the virtues of fair social cooperation such as the virtues of civility and tolerance, of reasonableness and the sense of fairness ... The principles of any reasonable political conception must impose restriction on permissible comprehensive views, and the basic institutions those principles require inevitably encourage some ways of life and discourage others, or even exclude them altogether.¹⁷

Rawls is then aware that the priority of right does not mean that we must avoid ideas of good. It only means that “the ideas used must be political ideas: they must be tailored to meet the restrictions imposed by the [liberal] political conception of justice”.¹⁸ Thus, to be reasonable is, for Rawls, to demonstrate one of the virtues required for the working of a free and equal pluralist society, and by insisting on the requirement of reasonableness he intends to stress the moral and political nature of the liberal project.

¹⁶ J. Rawls, “The Idea of Public Reason”, in *PL*, p.217.

¹⁷ J. Rawls, “The Priority of Right...”, in *Col. Pap.*, pp.460, 461.

¹⁸ *Ibid.*, p.467.

By identifying the reasonable with a moral attitude Rawls also wants to create distance between himself and any foundationalist approach to ethics¹⁹ and politics. For Rawls, in fact, to say that reasonableness is a moral virtue coincides with the denial that it is an epistemological idea,²⁰ and this denial means that in justice as fairness “there is no thought of deriving the reasonable from the rational”.²¹ In good pragmatist fashion Rawls distances himself from foundationalism by remarking that “only as a result of philosophy, or a subject in which the rational has a large place would anyone think it necessary to derive the reasonable from the rational”;²² would anyone

think that if the reasonable can be derived from the rational, that is, if some definite principles of justice can be derived from the preferences, or decisions, or arrangements, or agreements of merely rational agents in suitably specified circumstances, then the reasonable is at last on a firm basis. The moral skeptic has been answered.²³

According to Rawls the reasonable and the rational are two complementary moments of our lives. We manifest rationality when we deliberate over alternative courses of action from within the framework of a hierarchical system of values. Rationality is for Rawls the means to an end activity of finding the best way to act and to think about both factual and evaluative matters, in accordance to *our* ultimate system of values. We manifest instead reasonableness in our public behaviour, in our encounters with the others, especially with those holding different systems of values from our own. To be reasonable is to behave in accordance with the liberal principles of justice. Because of this complementarity there is no deriving of the reasonable, of the liberal principles of justice, from the rational. On the contrary, since our rationality works only within a system of values,

¹⁹ I am not distinguishing here between ethics and morality as Habermas does, but using the two terms interchangeably to refer to views and conceptions of individual and collective life projects and the fundamental values underlying them.

²⁰ See “The Power of Citizens...”, in *PL*, p.62: “being reasonable is not an epistemological idea. Rather, it is part of a political ideal of democratic citizenship.”

²¹ *Ibid.*, p.51.

²² *Ibid.*, p.52.

²³ *Ibid.*, p.51.

it seems likely that any plausible derivation must situate rational agents in circumstances in which they are subject to certain appropriate conditions and these conditions will express the reasonable.²⁴

This ethnocentric point will become even clearer once we have turned to consider the standpoint Rawls regards as best expressing the liberal idea of the good and the reasonable and as most appropriate from which to derive the liberal principles of justice, the standpoint of the original position. Although many have read the formulation of the original position as showing Rawls's foundationalist inclinations, I shall show instead how it matches perfectly well with the last passage quoted, with the pragmatist subordination of the rational to the moral. Before turning to the original position, however, we have to shed some light on the third feature of the political, where the connection of Rawls's conception of justice with anti-foundationalism is the closest.

But first I want to make two further observations that connect the second feature of the political to the anti-foundationalist predicament. I want to point out that to conceive of rationality as Rawls does, as embedded in our evaluative system and as incapable of answering the sceptic, is to join the pragmatist anti-foundationalist conception of rationality. In particular, I want to point out that from this ethnocentric conception it follows that, for those who are placed within the liberal *ethnos*, rationality comes to overlap with reasonableness; it comes, as Richard Rorty maintains, "to name a set of moral virtues: tolerance, respect for the opinions of those around one, willingness to listen, reliance on persuasion rather than on force ... the virtues which members of a civilized [read 'liberal'] society must possess if the society is to endure."²⁵

My second remark, related to the first, concerns the significant point of contact between anti-foundationalism and liberalism. It ultimately concerns the fact that the priority of the right over the good can be intended as the priority of liberal values over Truth, the priority of the respect of people's freedom and equality, as expressed in the liberal principle of legitimacy, over Philosophy. Indeed, we can see this point emerging, somewhat counter-intuitively, from Rawls's very dissociation of liberalism from scepticism. Rawls points out that the liberal principle of legitimacy, which requires us to

²⁴ Ibid., p.52.

²⁵ R. Rorty, "Science as Solidarity", in *Objectivity, Relativism, and Truth* (Cambridge, Mass.: Cambridge University Press, 1991), p.37.

extend the application of the principle of toleration from religion to philosophy and to any sort of comprehensive doctrines, is not based on the consideration of the impossibility of the foundational project. In fact, the desideratum of publicity itself requires our political and moral conception not to presuppose any particular position on such controversial matters as those concerning the possibility of reaching Truth. As Rawls says, “it would be fatal to the idea of a political conception to see it as skeptical about, or indifferent to, truth. Such skepticism or indifference would put political philosophy in opposition to numerous comprehensive doctrines, and thus defeat from the outset its aim of achieving an overlapping consensus”.²⁶ Of course, as we have seen, there may come times when our support for the ideals of political liberalism will require from us a direct involvement in controversial issues. These are the times when we have to defend the basis of democratic cooperation of free and equal citizens against the threats coming from people not sharing liberal ideals of reasonableness. This will happen, for example, “whenever someone insists that certain questions are so fundamental that to insure their being rightly settled justifies civil strife”. At this point, as Rawls recognizes, “we may have no alternative but to deny this, or to imply its denial and hence to maintain the kind of thing we had hoped to avoid”.²⁷ Yet this defence of the liberal conditions of freedom and equality does not stand on foundationalist ground; it is just the result of the moral and political commitment of putting reasonableness as our overriding goal, immune from political bargaining. And precisely on this same moral and political ground stands the liberal extension of the principle of toleration to philosophy. The idea is that even if foundationalism were possible, even if we could get at the way things *really* are and *should* be, in the name of the values of freedom and equality we must refrain from imposing that God’s-eye view of things on everyone. The idea is that if we care about freedom and equality more than anything else we will have to ask God, or his representatives, to sit down with all the others at the table of free and open discussion. If we want to keep our encounters free and open, we must avoid a public foundationalist attitude. In *this* moral and political sense Rawls says that the extension of the principle of tolerance to philosophy is not the result of meta-philosophical scepticism.

²⁶ J. Rawls, “The Idea of an Overlapping Consensus”, in *PL*, p.150.

²⁷ *Ibid.*, p.152.

Both considerations can be seen as flowing directly from the liberal principle of justification, which we can now read as characterizing a liberal society in Rorty's pragmatist terms, as "one which is content to call 'true' [read 'legitimated'] whatever the upshot of fair, open and free encounters turns out to be".²⁸ Such a society for Rawls, making the same point,

replaces the search for moral truth interpreted as fixed by a prior and independent order of objects and relations, whether natural or divine, an order apart and distinct from how we conceive of ourselves with the search for reasonable grounds for reaching agreement rooted in our conception of ourselves and in our relation to society.²⁹

That is, a liberal society replaces *foundational rationality* with *conversational reasonableness*. In the light of this conception of liberalism we can then paraphrase the idea of the priority of the right over the good in the terms of Rorty's pragmatist slogan which says: "if we take care of political freedom, 'true' and 'good' will take care of themselves".³⁰ The idea is that, although liberalism is philosophically neutral, if an Archimedean point were to exist it would not be suitable for liberalism, because, as Rawls remarks, given the fact of reasonable pluralism,

philosophy as the search for truth about an independent metaphysical and moral order cannot provide a workable and shared basis for a political conception of justice for a democratic society.³¹

However, if Rawls acknowledges that to endorse the liberal ideals of freedom and equality does not commit one to meta-philosophical scepticism – that "to deny that religious beliefs [as well as any other comprehensive beliefs] can be publicly and fully established by reason is not to say that they are not true"³² – *his own* endorsement of political liberalism, as a member of a liberal community, does actually break with any Archimedean point in a more direct way than the political one just considered. This is

²⁸ R. Rorty, *Contingency, Irony, and Solidarity*, (Cambridge, Mass.: Cambridge University Press, 1989), p.52.

²⁹ J. Rawls, "Kantian Constructivism in Moral Theory", in *Col. Pap.*, p.306.

³⁰ R. Rorty, *Contingency, Irony, and Solidarity*, p.84.

³¹ J. Rawls, "Justice as Fairness: Political not metaphysical", in *Col. Pap.*, p.395.

³² J. Rawls, "The Idea of an Overlapping Consensus", in *PL*, p.153.

shown by his conception of justification in moral and political matters, from which the third feature of political liberalism can be seen to follow.

The conception of justification at the basis of Rawls's formulation of the liberal principles of justice is, in fact, anti-foundationalist through and through. It is the holistic and ethnocentric view that since *Theory of Justice* has been associated with the expression "reflective equilibrium". The idea behind this expression is that the justification of a conception of justice is not a matter of "deduction from self-evident premises or conditions on principles", but rather a matter of finding a considered balance, a "reflective equilibrium", between our intuitive convictions and our theoretical principles by way of shaping our position from both sides – a matter, as Rawls puts it, "of the mutual support of many considerations, of everything fitting together into a coherent view".³³ Implicit in this view is that there is no belief and no principle which is *a priori* exempt from revision, that there is no way to anchor some of our beliefs and principles on necessary ground. As Rawls states clearly in a subsequent paper, according to the view of "reflective equilibrium",

what justifies a conception of justice is not its being true to an order antecedent to and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine for us.³⁴

Just as the pragmatists, Rawls maintains that the only materials we can work on in order to formulate a particular conception of justice – indeed, in order to formulate any kind of conceptions – are the intuitive ideas, and more or less considered beliefs, that shape our points of view and that are usually embedded in the tradition of the culture we belong to. There is no way of resorting to an order transcending every practice. According to this holistic and ethnocentric view of justification the aim of political philosophy will not be, then, the foundational one of finding a way to answer the moral sceptic and grounding an ideal just regime *sub specie aeternitatis*, but rather the pragmatist one

to articulate and to make explicit those shared notions and principles thought to be already latent in common sense, or, as is often the case, if common sense is hesitant and

³³ J. Rawls, *TJ*, p.19.

³⁴ J. Rawls, "Kantian Constructivism...", in *Col. Pap.*, pp.306-7.

uncertain, and does not know what to think, to propose to it certain conceptions and principles congenial to its most essential convictions and historical traditions.³⁵

If then the conception of justice to be worked out is for a democratic society, we shall have to “draw solely upon basic intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and the traditions of their interpretation”.³⁶ As Rawls describes his own procedure:

We collect such settled convictions as the beliefs in religious toleration and the rejection of slavery and try to organize the basic ideas and principles implicit in these convictions into a coherent conception of justice. We can regard these convictions as provisional fixed points which any conception of justice must account for if it is to be reasonable for us. We look, then, to our public political culture itself, including its main institutions and the historical traditions of their interpretation. The hope is that these ideas and principles can be formulated clearly enough to be combined into a conception of political justice congenial to our most firmly held convictions.³⁷

We have thus eventually arrived at the third feature of the political nature of Rawls’s “justice as fairness”, which turns out to be a direct consequence of its being a freestanding conception of justice. We have seen that if we want the conception of justice for the basic structure of a society to be democratically endorsed by its citizens, we must avoid as much as possible relying on any particular comprehensive doctrine, on any controversial idea and principle which we cannot expect that other people reasonably agree to. We must rather try to obtain an overlapping consensus relying as much as possible on a conception of public reason shaped by reciprocal respect for the equality and freedom of each point of view participating in the collective process of deliberation. And the best way to seek this public basis of agreement on a conception of justice for a pluralist society, without infringing people’s freedom and equality, Rawls tells us, is “to work from fundamental intuitive ideas implicit in the public culture and to abstract from comprehensive religious, philosophical, and moral doctrine”.³⁸ Indeed, in the light of the

³⁵ Ibid., p.306.

³⁶ J. Rawls, “Justice as Fairness...”, in *Col. Pap.*, p.390.

³⁷ Ibid., p.393.

³⁸ J. Rawls, “Priority of the Right...”, in *Col. Pap.*, p.459.

“reflective equilibrium” conception of justification, this is the *only* possible way, for there is no possible appeal to an order antecedent to and given to us.

2. The epistemological and political significance of the original position: anti-foundationalism (again), deliberative democracy and self-reflexivity

Up to this point I have presented Rawls’s thought without consideration of its development from *A Theory of Justice* to *Political Liberalism*. I followed this approach because it is my conviction that the changes which Rawls has made to his initial formulation of justice as fairness are more concerned with his presentation than with the substance of its content. These changes can be seen as the results of an effort to make the fundamental intuitions behind his conception of justice clearer in the light of the criticisms that have been mistakenly advanced against its initial formulation. These criticisms have been concerned mainly with Rawls’s use of the idea of the original position and it is exactly from these attempts at reformulating the basic intuitions of his conception of justice, without making any further use of that controversial idea, that the main changes in Rawls’s later thought are derived.

I shall consider here two such criticisms, showing why they are mistaken notwithstanding their initial plausibility on a superficial reading of the construction of the original position, and how Rawls has thought to reformulate the basic concepts of justice as fairness in order to obviate them. One criticism is concerned with the epistemological significance of the original position, the other with its political significance for liberalism. In replying to them we shall be able to appreciate better both the anti-foundationalist character of Rawls’s liberalism and its endorsement of the value that must be regarded as central to a healthy liberal society, that of collective self-reflexive discussion over its fundamental rights claims and procedural principles. First a brief sketch of the original position.

3.1. The original position

Rawls resorts to the idea of the social contract, too. However, Rawls is unsatisfied with

the way the classical contractualist theorists envisaged the contractual situation. He thinks they overlooked important moral intuitions that any appropriate formulation of the principles of justice for a liberal society must account for. Thus, by proposing justice as fairness he aims to obviate this defect by recasting the doctrine of the social contract in a way which “generalizes and carries to a higher level of abstraction the familiar theory”.³⁹ While the classical theorists of the social contract imagined real men and real women, endowed with their place in society, their natural assets and their particular interests and conceptions of the good, gathering together to bargain and reach an agreement on the form of government for their community, Rawls wants us to consider carefully what should be the conditions under which free and equal persons ought to enter an agreement on the principles of justice regulating the terms of social cooperation in order for that agreement, and thus those terms, to respect their freedom and equality. The idea at work here is that

the most appropriate conception of justice for the basic structure of a democratic society is one that citizens would adopt in a situation that is fair between them and in which they are represented solely as free and equal persons.⁴⁰

According to Rawls, the classical social contract theories were far from considering fair conditions of encounter between the different contractual parties of society, and thus far from being able to arrive at appropriate principles of justice respecting all citizens’ freedom and equality; this is because, by considering those parties as real human beings with all their values, interests, natural talents and wealth, they were not able to ensure that imbalance between the bargaining powers of citizens – which, as Rawls remarks, “naturally arises within the background institutions of any society from cumulative social, historical, and natural tendencies”⁴¹ – are eliminated; and allowing some people greater bargaining advantages than others means compromising the fairness of social interactions and the freedom of those who are disadvantaged.

Rawls introduces the idea of the original position precisely to capture the egalitarian conviction, which the classical contractualist theories did not adequately account for, that

³⁹ J. Rawls, *TJ*, p.10.

⁴⁰ J. Rawls, “Kantian Constructivism...”, in *Col. Pap.*, p.310.

⁴¹ J. Rawls, “Fundamental Ideas”, in *Political Liberalism*, p.23.

the contractual parties are to be symmetrically situated in order to reach an agreement under fair conditions. That, when thinking about justice, the differences between persons due to natural contingencies (such as their sex, their race, their native talents) and to social chance (such as their wealth and their income), and those deriving from their different interests, values and conceptions of the good life, *should* be regarded as irrelevant, because, as Rawls says, “these aspects are arbitrary from a moral point of view”.⁴² It is this moral point of view that Rawls intends to give expression to through the idea of the original position. He does so by asking us to imagine the persons in the original situation as behind a “veil of ignorance” that deprives them of all that information about themselves that would give them some bargaining advantages or disadvantages.

The original position, then, in order to create contractual conditions appropriate for a society of free and equal persons, places, through the device of the veil of ignorance, all persons on the same footing, so that no one will be able to choose principles which favour her particular interests. The assumption is that “the fairness of the circumstances under which agreement is reached transfers to the principles of justice agreed to”.⁴³ This is what yields the name “justice as fairness”. The idea is to “set up a fair procedure so that any principles agreed to will be just”.⁴⁴

However, if the veil of ignorance ensures fair procedural conditions, it does not yet enable us to see which principles would be chosen from the standpoint of the original position. In order to arrive at these principles we need some assumptions about the motivations of the contractual parties. We need to turn from what the parties must ignore in order to enter the initial position of fairness, to what they are allowed – and, indeed, need – to know in order to be able to make any choice at all.

If the veil of ignorance represents the negative side of the liberal conception of the good, namely the idea that a just society should not base its collective decisions on any particular comprehensive conception of the good that is not unanimously endorsed by all its members, the assumptions about the motivations of the parties to the original position represent the positive side of the liberal good, namely the sphere of content of citizens’

⁴² J. Rawls, *TJ*, p.14.

⁴³ J. Rawls, “Kantian Constructivism...”, in *Col. Pap.*, p.310.

⁴⁴ J. Rawls, *TJ*, p.118.

conceptions of the good life that is considered compatible with an equal freedom of every citizen to pursue her own chosen or preferred way of life. Rawls maintains that, “since these assumptions must not jeopardize the prior place of the concept of right, the theory of good used in arguing for the principles of justice is restricted to the bare essentials”.⁴⁵ This theory of the good restricted to the bare essentials Rawls calls the “thin theory”. With this expression he intends to draw attention to the fact that the difference between the liberal conception of the good, as it is contained in the principle of the priority of the right over the good, and other conceptions of the good is a matter of extension: in fact, a matter of freedom and equality. The more a conception is extended – “comprehensive” – the more it imposes restraints on people’s choices. The liberal ideal is to reduce the restraints on people’s ways of life to the minimum, the minimum not being, though, the absence of any conception of the good. “Again, some view of goodness is used in defining justice as fairness”.⁴⁶ The limits of the minimum are traced by what Rawls calls “primary goods”, those things that are “necessary as social conditions and all-purpose means to enable human beings to realize and exercise their moral powers and to pursue their final ends (assumed to lie within certain limits)”.⁴⁷

The two moral powers are “the capacity to understand, to apply and to act from the principles of justice”, and “the capacity to form, revise, and rationally to pursue a conception of the good”.⁴⁸ The latter corresponds to our sense of freedom and yields the virtue of rationality, of rationally pursuing a plan of life; the former corresponds to our sense of equality and yields the virtue of reasonableness, of respecting our fellow citizens’ autonomy by committing ourselves to the collective search for reasonable agreement and abiding by the agreed principles and rules. By endowing the parties in the original position with the capacity of being rational and reasonable we endow them with the sufficient and necessary motivation to derive the principles of justice for the basic structure of a society of free and equal citizens cooperating under fair conditions. In order to see which principles the parties would choose we now only need to solve a problem of rational choice: we have to find out, in the light of the restrictions on their knowledge and on their motivations, what is the rational choice of principles of justice regulating their

⁴⁵ Ibid., p.348.

⁴⁶ Ibid.

⁴⁷ J. Rawls, “Kantian Constructivism...”, in *Col. Pap.*, p.314.

⁴⁸ Ibid., p.312.

main institutions' assignment of rights and duties and the distribution of the resources coming from social cooperation, the choice that will best guarantee and promote their self-interest.

To sum up the situation of the parties in the original position: they do not know their place in society – their social status, their wealth and income; nor do they know their fortune in the distribution of natural assets – their sex, race, strengths and physical abilities; they are also ignorant of their comprehensive doctrines – their philosophical, religious and moral conceptions – and their psychological setting – their natural propensities and interests. They also do not know the probability of belonging to one or another category, so that any propensity to take some risks to secure higher expectations will be curbed, and they will instead follow a “maximin” approach which will make them rank alternatives by their worst possible outcomes, choosing the one whose worst outcome is superior to the worst outcome of the others. What they know, though, is that they hold some particular conception of the good life to the pursuit of which they will direct their energies and resources (even if they do not know which), and they know that they are capable of abiding by the dictates of reasonableness. Assuming these facts, according to Rawls, we can be confident that everyone in the original position will choose principles of justice that, first of all, would guarantee an equal distribution of certain basic rights and liberties (freedom of thought and of conscience, freedom of movement and occupation, etc.) and of a certain minimum standard of income and wealth to everyone, as necessary conditions freely to form, revise and rationally pursue their own conception of the good life and to ensure equal respect to everyone's point of view and way of life. Secondly, they will choose principles that would ensure an equal distribution of the benefits coming from social cooperation – unless doing otherwise will be to the advantage of everyone, or at least to the more disadvantaged members of society. Thus, the two principles of justice as fairness:

- I. Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
- II. Social and economic inequalities are to be arranged so that they are both:
 - (a) to the greatest benefit of the least advantaged; and

(b) attached to positions and offices open to all under conditions of fair equality of opportunity.⁴⁹

Each principle controls one of the two functions of justice which the governing institutions are in charge of; each gives expression to one of the two basic moral intuitions of justice as fairness, and is represented in the construction of the original position by one of the two sets of restraining conditions conveyed by the veil of ignorance; and each one stands in critical opposition to one of the two principal defects of the main current alternative conceptions of justice.

The first principle controls the aspect of justice concerned with the assignment of fundamental rights and duties to citizens and gives expression to the moral conviction, behind the claim of the priority of the right over the good, that every person should be left free to pursue her own conception of the good as long as it does not interfere with the realization of the others' plans of life, which is represented in the original position by the assumption of the parties' ignorance of their own conceptions of the good. The conceptions of justice it opposes are the perfectionist ones, as exemplified by classical utilitarianism.

According to Rawls, classical utilitarianism, as with any perfectionist doctrine, fails to recognize the priority of the right over the good. In particular it fails to abide by Kant's precept always to treat human beings as ends in themselves and never as means. It fails to give an adequate account of the commonsense conviction that "each person possesses an inviolability founded on justice that even the welfare state as a whole cannot override". Justice as fairness instead recognizes that

justice denies that the loss of freedom for some is made right by the greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship are taken as settled: the rights secured by justice are not subject to political bargaining or to the calculus of social interests.⁵⁰

For this reason the first principle has to be given precedence over the second.

⁴⁹ Ibid., p.266.

⁵⁰ Ibid., pp.3-4.

In particular, Rawls believes that utilitarianism is led to ignore the primacy of the basic rights of citizens because, by incorrectly thinking that “as it is rational for one man to maximize the fulfilment of his system of desires, it is right for a society to maximize the net balance of satisfaction taken over all of its members”, it is led “to adopt for society as a whole the principle of rational choice for one man”,⁵¹ thus failing to recognize the essential aspect of human existence underlying the primacy of justice, “the plurality and distinctiveness of individuals”.

The second principle of justice, which Rawls calls “the principle of difference”, controls instead the aspect of justice concerned with the “appropriate distribution of the benefits and burdens of social cooperation”, and gives expression to the other liberal moral intuition represented by the other constraint of the veil of ignorance, namely, that we should try to neutralize the inequalities in the initial distribution of natural and social assets when deliberating about justice. The conceptions of justice it opposes are those that, although usually belonging to the social contract family which Rawls praises, allow for factors due to natural contingencies and to social chance to influence the choice of principles for the correct distribution of social and economic benefits. Rawls’s targets here are two particular systems of justice. One is based on the principle of “natural liberty”, the other on the principle of “liberal equality”.

The system of natural liberty, as it has been endorsed by intellectuals in the liberal tradition stemming from Hobbes, Locke, Bentham and Smith, like libertarian liberals such as Hayek and Nozick, regards as just any distribution resulting from a social organization based on free market economy and observing a formal (legal) equality of opportunity. For Rawls, “intuitively, the most obvious injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by these factors so arbitrary from a moral point of view”.⁵² In fact, the distributive shares sanctioned by the principle of natural liberty tend to be a mere reproduction of the initial distribution of natural talents and social fortune, and thus they will be just only in so far as the initial distribution was just; which, as a matter of fact, is never the case.

The system of liberal equality tries to remedy to these injustices by aiming at a “fair meritocracy”. The idea is to make the principle of equality of opportunity less formal by

⁵¹ Ibid., pp.23-4.

⁵² Ibid., p.63.

correcting the social inequalities between persons, so that those similarly talented may enjoy real equal opportunities. To Rawls the principle of liberal equality “intuitively still appears defective”, too close to the libertarian predicament, because, “even if it works to perfection in eliminating the influence of social contingencies, it still permits the distribution of wealth and income to be determined by the natural distribution of abilities and talents”, and “there is no more reason to permit the distribution of income and wealth to be settled by the distribution of natural assets than by historical and social fortune”.⁵³ Both factors are equally arbitrary from a moral point of view.

In order to obtain an adequate grasp of this point of view, justice as fairness postulates that the parties in the original situation do not know their social position and their fortune in the natural lottery, so that the principles of justice to which they will give their allegiance will give expression to the intuitive idea of democratic equality as it is expressed by the principle of difference, “that the social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate”.⁵⁴ Only in this way will the governing institutions be able adequately to respect citizens’ freedom and equality and thus be considered legitimated, for no one could be reasonably asked to assent to terms of social cooperation that would disadvantage her more than other viable and reasonable alternatives.

3.2. The original position and anti-foundationalism

The epistemological criticism of Rawls’s construction of the original position points to the fact that the ignorance requirements of the original conditions have been appositely tailored in order to be able to derive the principles that Rawls was looking for from the outset. This criticism plays on the consideration that a circular justification is not a justification at all, and expresses the conviction that Rawls presented the idea of the original position as a heuristic procedure that could provide a rational foundation for his two principles of justice. Alas, the original position is not a device of justification at all, and Rawls does not intend to provide a foundational argument for his proposed principles of justice, as opposed to an ethnocentric one.

⁵³ Ibid., p.64.

⁵⁴ Ibid., p.65.

Rawls is well aware that the conditions of the original position have been tailored *ad hoc* in order to obtain the two principles of justice as fairness. In *A Theory of Justice*, he admits that “there are many possible interpretations of the initial situation” and that “justice as fairness is but one of these”;⁵⁵ and he explicitly says that he wants “to define the original position so that we get the desired solution”.⁵⁶ But this circularity does not bother him, because, as he has made repeatedly clear, the original position is not to be taken as a device of justification, but “is to be seen as a device of representation”.⁵⁷ It must be seen as a device by means of which he can represent his liberal moral point of view and specify the considerations that he believes must be taken into account, and those that must not, for deciding the principles of justice for a society of free and equal citizens. As he says, “as a device of representation the idea of the original position serves as a means of public reflection and self-clarification. It helps us work out what we now think, once we are able to take a clear and uncluttered view of what justice requires when society is conceived as a scheme of cooperation between free and equal persons.”⁵⁸ That is, it helps us

[to model] what we regard – *here and now* – as fair conditions under which the representatives of free and equal citizens are to specify the terms of social cooperation in the case of the basic structure of society; and since it also models what, for this case, we regard as acceptable restrictions on reasons available to the parties for favouring one political conception of justice over another, the conception of justice the parties would adopt identifies the conception of justice that we regard – *here and now* – as fair and supported by the best reasons.⁵⁹

Rawls is not trying, then, to use the original position as a foundational device for liberal ethics and politics. He “[is] not trying to find a conception of justice suitable for all societies, regardless of their particular social or historical circumstances”. Rather, coherently with the holistic and ethnocentric conception of justification and the related conception of the aim of political philosophy that we have presented above, he is just trying “to settle a fundamental disagreement over the just form of basic institutions *within*

⁵⁵ J. Rawls, *TJ*, p.105.

⁵⁶ *Ibid.*, p.122.

⁵⁷ J. Rawls, “Justice as Fairness...”, in *Col. Pap.*, p.400.

⁵⁸ *Ibid.*, p.402.

⁵⁹ *Ibid.* The emphasis is mine.

a democratic society under modern conditions”,⁶⁰ by showing not that his conception of justice is “true to an order antecedent to and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine for us”.⁶¹ “The real task”, he says,

is to discover and formulate the deeper bases of agreement which one hopes are embedded in common sense, or even to originate and fashion starting points for common understanding by expressing in a new form the convictions found in the historical tradition by connecting them with a wide range of people’s considerations: those which stand up to critical reflection.⁶²

And this task, he again makes clear, in a way reminiscent of the pragmatist conception of objectivity, “is not primarily an epistemological problem”:

The search for reasonable grounds for reaching agreement rooted in our conception of ourselves and in our relation to society replaces the search for moral truth interpreted as fixed by prior and independent order of object and relations.⁶³

The original position serves as a means for accomplishing this task: “[it] serves as a mediating idea by which our considered convictions of all levels of generality are brought to bear on one another so as to achieve greater mutual agreement and self-understanding”.⁶⁴ And, of course, “we have to concede that as established beliefs [and thus considered convictions] change, it is possible that the principles of justice which it seems rational to choose may likewise change”.⁶⁵ There is no attempt, *pace* Sandel, at escaping tradition to reach the Archimedean point, no attempt at “distinguishing a standard of appraisal from the thing being assessed”⁶⁶ in order to ground the cherished liberal practices *sub specie aeternitatis*.

⁶⁰ J. Rawls, “Kantian Constructivism...”, in *Col. Pap.*, pp.305-6. The emphasis is mine.

⁶¹ *Ibid.*, pp.306-7.

⁶² *Ibid.*, p.306.

⁶³ *Ibid.*

⁶⁴ J. Rawls, “Justice as Fairness...”, in *Col. Pap.*, p.402.

⁶⁵ *Ibid.*; *TJ*, p.480.

⁶⁶ M. Sandel, *LLJ*, p.16.

Even if Rawls uses the expression “Archimedean point”⁶⁷ to describe the standpoint of the original position, even if he says that “to see our place in society from the perspective of this position is to see it *sub specie aeternitatis*”, we do not have to forget that he specifies that

the perspective of eternity is not a perspective from a certain place beyond the world, nor the point of view of a transcendental being; rather it is a *certain form of thought and feeling* that rational persons can adopt within the world. Purity of heart, if one could attain it, would be to see clearly and to act with grace and self-command from this point of view.⁶⁸

These are the concluding sentences of *A Theory of Justice*, and they confirm the central point I have been making in this paper, that is, that Rawls’s conception of justice, and thus the device of the original position, elaborates just one moral conception amongst other different and conflicting moral conceptions. Indeed, as Rawls remarks, commenting on the proposal to include explicit moral motivations in the description of the parties to the initial situation, “it is a mistake to object that the notion of the original agreement would no longer be ethically neutral. For, this notion already includes moral features and must do so, for example, the formal conditions on principles and the veil of ignorance”.⁶⁹ In particular, those concluding sentences make clear that the objectivity justice as fairness is after, the only objectivity with which, according to anti-foundationalism, liberalism should be content, is objectivity intended as *fairness*, the objectivity we may obtain if we try to place ourselves in the original position; that is, if we try to adopt that certain form of thought and feeling, that certain moral sensibility, which does not regard the facts that we occupy a particular social position, that we hold a particular comprehensive doctrine and a particular conception of the good, and that we are endowed with particular natural characteristics and abilities, as constituting morally and politically appropriate reasons to be taken in consideration when deliberating on matters of justice – e.g., on the appropriate assignment of rights, duties and distributive shares. This is a moral

⁶⁷ J. Rawls, *TJ*, pp.230-32: “How can this doctrine determine an Archimedean point from which the basic structure can be appraised?”; and p.511: “embedded in the principles of justice there is an ideal of the person that provides an Archimedean point for judging the basic structure of society”.

⁶⁸ *Ibid.*, p.514; emphasis mine.

⁶⁹ *Ibid.*, p.512.

objectivity, not an epistemological one, and saying this is the same as saying that the original position has not been envisaged as a justificatory device but as a normative one. The belief that Rawls, by proposing the idea of the original position, was trying to provide a definitive argument for a certain conception of justice has been thought to be supported not only by his reference – arguably inopportune but in any case innocuous once contextualized – to the Archimedean point, but also by the apparent rationalist aspect of the idea of the original position. This aspect is taken to be manifested in the fact that the choice of principles of justice by the parties to the original position is presented as an instance of a solution to a problem of rational decision; and to be further confirmed by Rawls’s assertion that “the theory of justice is a part, perhaps the most important part, of the theory of rational choice”, following the seemingly even more compromising claim that “the merit of a contract terminology is that it conveys the idea that the principles of justice may be conceived as principles that would be chosen by rational persons, and that in this way conceptions of justice may be explained and justified”.⁷⁰

However, even if we admit that this is a somewhat lax way of speaking for an anti-foundationalist, we should not forget that Rawls is talking from the standpoint of a conception of justification according to which “to justify a conception of justice to someone is to give him a proof of its principles from premises that we both accept, [these principles having in turn consequences that match our considered judgements]”; that is, a conception of justification according to which “proofs become justification [only] once the starting points are mutually recognized”.⁷¹ This means that Rawls is well aware that the rational choice of the parties to the original position will sound rational, and thus an argument for the chosen principles of justice, only to those who share the same liberal form of thought and feeling as the parties of his device of representation. As he says,

the essential agreement in judgments of justice arises not from recognition of a prior and independent moral order, but from everyone’s affirmation of the same authoritative social perspective.⁷²

In other words, Rawls is aware that, since in the real world we face the choice of

⁷⁰ Ibid., pp.14-15.

⁷¹ J. Rawls, *TJ*, p.50.

⁷² J. Rawls, “Kantian Constructivism...”, in *Col. Pap.*, p.356.

principles of justice with full knowledge of our natural talents, our conceptual and moral setting, and our social position, it will not be *irrational* per se – as opposed to *immoral* – for someone to choose principles which would be to her advantage, even if they will make some other citizens worse off. He is aware that for real people to choose the liberal principles he proposes, to accept to enter into the conditions of the original position, they must already share the same moral convictions represented by the veil of ignorance, that is. that people should be left as free to pursue their own conceptions of the good as is consistent with an equal freedom for everyone, and they should be treated as equal without natural and social fortune influencing the distribution of the benefits of social cooperation. Rawls is aware that his two principles of justice will be accepted only by reasonable people, people who have agreed to abide by the dictates of freedom and equality, and thus by the collectively endorsed terms of social cooperation.

But, as we know, Rawls has no thought of deriving the reasonable from the rational. He believes that “any plausible derivation must situate rational agents in circumstances in which they are subject to certain appropriate conditions and these conditions will express the reasonable”.⁷³ And this is exactly what he does: ethnocentrically conceiving of reasonable conditions as the conditions of a pluralist and democratic society committed to the respect of everyone’s freedom and equality,⁷⁴ and trying to give adequate expression to them by looking for “a description of the initial situation that yields principles which match our considered judgments duly pruned and adjusted”, incessantly going back and forth in the holistic swing of the reflective equilibrium, “sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments and conforming them to the principles”.⁷⁵ This is the only possible way of proceeding, since “there is no set of conditions or first principles that can be plausibly claimed to be necessary or definitive of morality and thereby especially suited to carry the burden of justification”.⁷⁶ This burden can be carried only by the ethnocentric, conversational and holistic procedure aiming at “the mutual support of many considerations, of everything fitting together into a coherent view”.

⁷³ J. Rawls, *TJ*, p.52.

⁷⁴ See “Kantian Constructivism...”, p.340: “rather than to think of the principles of justice as true, it is better to say that they are the principles most reasonable for us, given our conception of persons as free and equal, and full cooperating members of a democratic society”.

⁷⁵ J. Rawls, *TJ*, p.18.

⁷⁶ *Ibid.*, p.506.

Looking back at his initial formulation of the derivation of the principles of justice from the construction of the original position Rawls admits that it would have been better not to have said that the theory of justice is a part of the theory of rational decision. “What should have been said”, he now clarifies,

is that the account of the parties, and of their reasoning, uses the theory of rational decision, though only in an intuitive way. This theory is itself part of a political conception of justice, one that tries to give an account of reasonable principles of justice. There is no thought of deriving those principles from the concept of rationality as the sole normative concept.

Yet he still believes that “the text of *Theory* as a whole supports this interpretation”.⁷⁷ I have been trying to show that this is indeed the case.

In his later works, however, Rawls prefers to drop any talk of theory of rational decision and to rely less heavily on the construction of the original position. Indeed, he seems to have realized that as a device of representation it lent itself to too many misreadings and that it would be better to replace it with a more direct and concrete way of expressing the moral and political intuitions which he tried to systematize by its means. The normative concept of “public reason”, which I have already introduced as “the reason of equal citizens who, as a collective body, exercise a final political and coercive power over another in enacting laws and in amending their constitution”,⁷⁸ fulfils this substitutive function.

Built into the concept of “public reason” is the same moral stance we found at the basis of that *certain form of thought and feeling* that the original position was intended to convey. *Purity of heart*, in the same sense of fairness, we could now say, “would be to see clearly and to act with grace and self-command in accordance with the dictates of public reason”. In fact, the idea of public reason, just as with the epistemic and motivational constraints on the parties in the original position, expresses the condition of reasonableness necessary for reaching a fair agreement on the principles of justice between free and equal persons. It expresses the ideal of democratic citizenship, “the ideal of democratic citizens trying to conduct their political affairs on terms supported by

⁷⁷ J. Rawls, “The Power of Citizens...”, in *Col. Pap.*, p.53 footnote 7.

⁷⁸ *Ibid.*, p.214.

public values that we might reasonably expect others to endorse”.⁷⁹ Indeed, the core of public reason is the principle of reciprocity, according to which

Our exercise of power is proper only when we sincerely believe that the reasons we offer for our political action may reasonably be accepted by other citizens as a justification of those actions.⁸⁰

The idea of public reason thus answers the problem of political legitimacy for a liberal society in exactly the same egalitarian spirit of the construction of the original position. Political decisions are collectively binding, i.e. legitimated, when they are justifiable to all citizens bound by them, regarded as free and equal persons. Both the idea of the original position and that of public reason yield the same liberal principle of political legitimacy.

There is therefore no substantial difference between the central idea of Rawls’s original formulation of justice as fairness and that central to his later formulation. The change reflects Rawls’s willingness to obviate any misunderstanding about the epistemological intent behind the elaboration of his conception of justice. This does not aim at giving a rational foundation to liberal ethics and politics; it just wants to express a particular stance in the debate within liberalism over the best way to realize in our pluralist society the respect for everyone’s freedom and equality. Public reason, with its explicit moral and political injunctions incorporated into it, makes the ethnocentric endorsement of this moral and political stance more perspicuous and less artificial than the idea of the original position.

3.3. The original position and democratic deliberation

However, by elaborating the concept of public reason Rawls not only wanted to state more clearly his distance from foundational philosophy, he also wanted to answer the other kind of criticism which I wish to consider, that concerned with the political significance of the original position. This criticism focuses on the form that political deliberation on the principles of justice takes when viewed through the device of the

⁷⁹ J. Rawls, “The Idea of Public Reason”, in *Col. Pap.*, p.253.

⁸⁰ J. Rawls, *Col. Pap.*, p.xlvi.

original position. Indeed, so the criticism goes, in justice as fairness properly speaking there is no political deliberation at all, if by this term we intend what we normally intend – at least ideally – for it in the everyday practice of politics, namely, the collective give-and-take of moral arguments on matters of controversial political and moral issues. For example, A. Gutmann and D. Thompson observe that, even if Rawls “argues cogently for the values of citizenship and participation in politics”,

When [he] considers how to make the principles of justice more specific, he does not propose that citizens or their representatives discuss moral disagreement about these principles in public forums. Although his theory of constitutional democracy leaves room for such discussion, it emphasizes instead a solitary process of reflection, a kind of private deliberation. He suggests that each of us alone perform an intricate thought experiment in which a veil of ignorance obscures our own personal interests, including our own conception of the good life, and compels us to judge on a more impersonal basis.⁸¹

The same point has been made by Brian Barry who argues, following Hart’s statement, that within Rawls’s system we are concerned with what “no rational person bargaining with others on a footing of equality could agree to”, that

Rawls’s original position does not have any room for bargaining with others – on a footing of equality or any other footing. There can be no bargaining among people who, even though they actually have conflicting ends, do not know what those ends are. The whole idea of bargaining thus becomes inapplicable and the choice of principles reduces to a choice by anyone in the original position picked at random ... We might as well talk of computers having the same program and fed the same input reaching an agreement.⁸²

Barry’s conclusion is that Rawls is in this way “open to precisely the charges that he levels against ‘impartial spectator’ theories of ethics: he ‘does not take seriously the plurality or distinctiveness of individuals’ nor does he ‘recognize as the basis of justice that to which men would consent’”. For it is perfectly open to someone to say ‘I accept that if I were making the kind of decision stipulated in the original position I would have

⁸¹ A. Gutmann and D. Thompson, *Democracy and Disagreement* (Cambridge, Mass. and London: Harvard University Press, 1996), p.37.

⁸² B. Barry, *Justice as Impartiality* (Oxford: Clarendon Press, 1995), p.58.

chosen x ; but that has no relevance to what I can reasonably be asked to agree here and now”.⁸³ Therefore his theory of justice “fails to accommodate [his] fundamental egalitarian idea that principles of justice have to be acceptable above all to those who stand to do least well under them”.⁸⁴

Similarly, Gutmann and Thompson conclude that, by placing all the weight of the derivation of his principles of justice on the solitary deliberation of the original position, Rawls compromises his initial egalitarian intentions, because “citizens cannot maintain a stable commitment to principles of justice ... without extensive deliberation in public forums about the meaning of constitutional principles and their implications for specific decisions of government”.⁸⁵ For it is only “by making democracy more deliberative [that] citizens stand a better chance of resolving some of their moral disagreements, and living with those that will inevitably persist, on terms that *all* can accept”.⁸⁶

Although it is undeniably true that within the original position no actual process of collective deliberation takes place, I believe that these criticisms miss the point behind Rawls’s construction of the initial situation. Like the previously considered charge of circularity, these criticisms “from deliberation” fail to appreciate that the original position is only a device of representation. In particular, these criticisms forget that the original position never pretended to be a description of how political deliberation is, or should be, effectively conducted. In fact, Rawls never fails to remind us that “the original position is a purely hypothetical situation. Nothing resembling it needs ever to take place”;⁸⁷ that the contract between people placed behind the veil of ignorance “must be regarded as both hypothetical and nonhistorical” since “we do not suppose that the agreement has ever [been], or indeed ever could actually be entered into”.⁸⁸

The construction of the original position serves only as a figurative way to convey the moral commitment which Rawls believes citizenship in a pluralist, free and egalitarian society demands. It is a thought experiment by means of which Rawls wants to communicate to us the moral and political injunction that we should regard our natural

⁸³ Ibid., p.59.

⁸⁴ Ibid., p.61.

⁸⁵ A. Gutmann and D. Thompson, *Democracy and Disagreement*, p.38.

⁸⁶ Ibid., p.51; my emphasis.

⁸⁷ J. Rawls, *TJ*, p.104.

⁸⁸ J. Rawls, *Justice as Fairness: A Restatement* (Cambridge, Mass.: Harvard University Press, 2001), pp.16-17.

and social assets, our interests and our conceptions of the good, as morally and politically inadequate considerations when deciding on matters of justice and of common concern. It is “an expository device which sums up the meaning of [the constraints that we are prepared to regard as limits on fair terms of social cooperation] and helps us to extract their consequences”.⁸⁹ And, as Barry himself notes, “there is nothing wrong with the idea that we can throw light on what is fair by asking questions about what we might think in hypothetical situations”.⁹⁰

It seems, then, that Barry shares to some degree the same “incapacity to appreciate the force of hypotheticals” that he himself imputes to Rawls’s critics. Like Henry Phelps Brown, whom Barry rightly mocks for writing that “it is hard to see why an engagement that appears rational, and binding, to a person of one kind, allowed very limited information should continue to be acceptable or to be binding upon that person when he and all others like him have been greatly changed and are altogether better informed”,⁹¹ thus not seeing that for Rawls “the only point of the original position” was to make demands on real people, he himself seems to be “apparently incapable of recognizing that Rawls, [through the hypothetical device of the original position] invites people to put themselves in others’ shoes in order to concentrate their minds on what they should think is fair while wearing their own shoes”.⁹²

It is therefore incorrect to argue, as Barry, Gutmann and Thompson do, from the solitary nature of political deliberation within the framework of the original position the absence from Rawls’s conception of justice of any commitment towards spaces of collective deliberation over matters of common interest, and thus his blindness towards a necessary condition for political legitimacy in a society free and equal persons. This is not to deny that *A Theory of Justice* fails adequately to stress the importance of – and indeed gives little attention to – the concrete collective deliberative practices of public decision making in a pluralist society. In fact, Rawls introduces the concept of public reason precisely in order to give to his conception of justice a worldlier and more practice-oriented moral and political outlook, and to give within justice as fairness a more central space to moments of collective deliberation. Yet, we cannot ignore that already built into

⁸⁹ J. Rawls, *TJ* p.19.

⁹⁰ B. Barry, *Justice as Impartiality*, p.55.

⁹¹ H. P. Brown, *Egalitarianism and the Generation of Inequality* (Oxford: Clarendon Press, 1988), p.444.

⁹² B. Barry, *Justice as Impartiality*, p.56.

the device of the original position was the moral and political injunction central to the later development of theories of deliberative democracy such as those advanced by Gutmann and Thompson and by Barry themselves. This is the injunction that Rawls, in *Political Liberalism*, placed at the basis of the idea of public reason in the form of the principle of reciprocity: namely, the injunction that citizens,

as reasonable and rational, and knowing that they affirm a diversity of reasonable religious and philosophical doctrines, should be ready to explain the basis of their actions to one another in terms each could reasonably expect that others might endorse as consistent with their freedom and equality.⁹³

As Gutmann and Thomson explain, “this disposition to seek mutually justifiable reasons expresses the core of the process of deliberation”. And just as for Rawls, for them too the main motivation behind this disposition is the quest for political legitimacy. “Deliberative democracy”, they say, “asks citizens and officials to justify public policy by giving reasons that can be accepted by those who are bound by it”.⁹⁴

Joshua Cohen, another key figure in the development of deliberative conceptions of democracy, expresses the key tenet of his position in similar terms to those used by Rawls. “The conception of [political] justification that provides the core of the ideal of deliberative democracy”, he writes, “can be captured by an ideal procedure of political deliberation”.

In such a procedure participants regard one another as equals; they aim to defend and criticize institutions and programs in terms of considerations that others have reason to accept, given the fact of reasonable pluralism and the assumption that those others are reasonable; and they are prepared to cooperate in accordance with the results of such discussion, treating the results as authoritative.⁹⁵

In *A Theory of Justice* this disposition of reciprocity was contained in the idea that in a well-ordered liberal society, a society regulated by a public liberal conception of justice,

⁹³ J. Rawls, “The Idea of Public Reason”, in *PL*, p.218.

⁹⁴ A. Gutmann and D. Thompson, *Democracy and Disagreement*, p.52.

⁹⁵ J. Cohen, “Procedure and Substance in Deliberative Democracy”, in S. Benhabib, ed., *Democracy and Difference* (Princeton, N.J.: Princeton University Press, 1996), p.100.

the members are, and view themselves as, free and equal moral persons ... they each have, and view themselves as having, fundamental aims and interests in the name of which they think it legitimate to make claims on one another; and they each have, and view themselves as having, a right to equal respect and consideration in determining the principles by which the basic structures of their society is to be governed.

Indeed, the original position, as Rawls clarifies immediately afterwards, “is specified to embody the appropriate reciprocity and equality between persons so conceived”.⁹⁶ Indeed, the injunction of reciprocity is contained in the fundamental idea behind the construction of the contractual circumstances of the original position. This is the very same idea that Barry places at the basis of his conception of “justice as impartiality”, i.e. “that just rules are those that can be freely endorsed by people on a footing of equality”.⁹⁷ I hence believe that we can confidently conclude that both the role of reciprocity as the guiding principle of public discussion and the role of fair and free public discussion as the guiding principle of political justification have always been central elements of Rawls’s justice as fairness. Although we can certainly agree with Barry that the idea of the original position does not do any essential work in the construction of justice as fairness – as Rawls himself has acknowledged, after all, by replacing “public reason” for “the original position” as his central idea; and that what Rawls is really asking is after all, in a way similar to Thomas Scanlon’s contractualist construction,⁹⁸ “whether or not a principle could reasonably be rejected by someone aware of its impact on him”.⁹⁹

3.4. *The original position and self-reflexive deliberation*

By showing the anti-foundationalist and deliberative character of Rawls’s justice as fairness I thus think we can confidently attribute to it the commitment to the value that I have argued in IIS discussion paper No.47 to be fundamental for a fuller respect of people’s freedom and equality, i.e. that of leaving the established interpretation and

⁹⁶ J. Rawls, *TJ* p.475.

⁹⁷ B. Barry, *Justice as Impartiality*, p.52.

⁹⁸ See T. M. Scanlon, “Contractualism and Utilitarianism”, in A. Sen and B. Williams, eds, *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982).

⁹⁹ B. Barry, *Justice as Impartiality*, p.67.

application of the requirements of justice open to public discussion and revision. Jeremy Waldron, though, has questioned this point, maintaining that Rawls fails to draw, from his burdens-of-judgment argument for a reasonable plurality of comprehensive conceptions of the good, the conclusion that “for the same reason, in a well-ordered society, reasonable people might be expected to disagree fundamentally about the basic terms and principles of their association”,¹⁰⁰ thereby failing “to deal with justice-pluralism and disagreement about rights”.¹⁰¹

Waldron’s argument is based on what I believe to be an incorrect reading of Rawls’s injunction to follow the demands of public reason when dealing with matters of justice. He takes it as presupposing that an agreement on the fundamentals of justice must be already realized in our societies when we engage in public discussions, whereas I believe it must be taken as a moral injunction to strive towards reaching such an agreement. The centrality played in Rawls’s conception of public reason by the normative principle of reciprocity for me clearly shows that Rawls takes public reason as a normative ideal, as a moral *telos* which persons holding different and conflicting conception of the good and of the right should strive for in order to bring our societies nearer to the liberal ideal of a well-ordered society of free and equal persons. This can be clearly evinced, for instance, by Rawls’s assertion that

the limits of public reason are not, clearly, the limits of law or statute but the limits we honor when we honor an ideal: the ideal of democratic citizens trying to conduct their political affairs on terms supported by public values that we might reasonable expect others to endorse.¹⁰²

However, even leaving aside the correct interpretation of Rawls’s conception of public reason, I do not see how, in the light of the many passages in which Rawls acknowledges the plurality of reasonable conceptions of justice and of fundamental rights, it can be plausibly believed that Rawls overlooks the fact that “pluralism of comprehensive religious, philosophical, and moral doctrines is not the only pluralism with which we have to deal in a modern democratic society”.¹⁰³ For example, when we dealt with the

¹⁰⁰ J. Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999), p.152.

¹⁰¹ *Ibid.*, p.158.

¹⁰² J. Rawls, “The Idea of Public Reason”, in *PL*, p.253.

¹⁰³ J. Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999), p.158.

charge that the conditions of the original position have been tailored *ad hoc* in view of the two principles of justice, we saw that Rawls, already in *A Theory of Justice*, had no problem in admitting that “there are many possible interpretations of the initial situation” and that “justice as fairness is but one of these”. We also saw that, in the same book, coherent with his ethnocentric and holistic conception of justification as consisting of a reflective equilibrium between our theorizations and our established beliefs, he maintained that “we have to concede that as established beliefs change, it is possible that the principles of justice which it seems rational to choose may likewise change”.

In *Political Liberalism*, the work on which Waldron bases his argument, Rawls is even more explicit on the plurality of reasonable conceptions of justice. He states, for instance: “The view I have called justice as fairness is but one example of a liberal political conception; its specific content is not definitive of such a view”.¹⁰⁴ Furthermore, and more significantly, he clarifies his conception of public reason by claiming that

It is crucial that public reason is not specified by any one political conception of justice, certainly not by justice as fairness alone. Rather, its content – the principles, ideals, and standards that may be applied to – are those of a family of reasonable political conceptions of justice and this family changes over time. These political conceptions are not of course compatible and they may be revised as a result of their debates with one another. Social changes over generations also give rise to new groups with different political problems ... The content of public reason is not fixed any more than it is defined by any one reasonable political conception.¹⁰⁵

This passage, in which we can find stated both the anti-foundationalist and deliberative character of justice as fairness, makes particularly clear that Rawls wholly acknowledges the fact raised by such criticisms as advanced by Waldron, but also Gray and Bellamy¹⁰⁶ for example, namely that specifications of basic rights, liberties, and opportunities, assignments of a special priority to these rights, liberties, and opportunities, and decisions of measures assuring all citizens adequate well-purpose means to make effective use of

¹⁰⁴ J. Rawls, ‘The Idea of Public Reason’ in *PL* p.226.

¹⁰⁵ J. Rawls, *PL*, p.liii.

¹⁰⁶ See for instance J. Gray’s *Two Faces of Liberalism* (Cambridge: Polity Press, 2000), and R. Bellamy’s *Liberalism and Modern Society* (Cambridge: Polity Press, 1992).

their basic liberties and opportunities “can be seen in different ways, so there are many liberalisms”.¹⁰⁷

As we have already observed, Rawls’s intention was to take a particular stance within the debate internal to liberalism. His has been an attempt to systematize certain intuitions about the set of rights, liberties, and principles regulating their relative priority, that can best realize in pluralist societies the respect for people’s freedom and equality, and thus legitimize governing institutions, without ever forgetting that his represents only a particular interpretation of freedom, equality and political legitimacy among other different but equally reasonable interpretations. I think we can confidently say that Rawls’s justice as fairness does not aim, as Gray believes, at being “insulated from conflict of value;¹⁰⁸ at giving “a prescription for an universal regime”¹⁰⁹ based “on a rational consensus on the best way of life”.¹¹⁰ It does not aim at “the construction of the just society *sub specie aeternitatis*”,¹¹¹ as Bellamy believes. There is no attempt, *pace* Sandel, at “distinguishing a standard of appraisal from the thing being assessed”¹¹² in order to ground his favoured principles of justice on the Archimedean point of view. Of the two horns of the dilemma that the justification of principles of justice presents us with, the Humean one which wants us to derive the principles “from the values or conceptions of the good current in society”, and the Kantian one which makes us look for “a standard external to the values and interests prevailing in societies”,¹¹³ Rawls is happy, *pace* Sandel, to grasp the former ethnocentric one.

Returning to Sandel’s criticism of Rawls with which I started my reflections, I want to observe how the dilemma of justification on which Sandel bases his charges is just a particular instance of the fundamental dilemma of epistemology: either abandoning ourselves to an infinite regress of justifying reasons or accepting instead the unavoidable circularity of justification. This is not the place to formulate a viable anti-foundationalist epistemology defending it from the charges of corrosive relativism. I have sketched how to do it in my previous discussion paper No.47. I just limit myself here to observing that

¹⁰⁷ J. Rawls, “The Idea of Public Reason”, in *PL*, p.223.

¹⁰⁸ J. Gray, *Two Faces of Liberalism*, p.81.

¹⁰⁹ *Ibid.*, p.2.

¹¹⁰ *Ibid.*, p.1.

¹¹¹ R. Bellamy, *Liberalism and Modern Society*, p.261.

¹¹² M.Sandel, *LLJ*, p.16.

¹¹³ *Ibid.*, p.17.

the fear of circularity is a typical expression of the foundational conviction that if you do not have a neutral ground upon which to place your cherished values and beliefs then you do not have any valid reason at all to endorse them. Sandel shows that he shares this fear and this conviction when, in presenting us with the dilemma arising from the justification of principles of justice, he takes for granted that Rawls is, in some way, trying to escape from it. In fact the conviction behind this assumption is that to grasp the first, circular, option would condemn our values and beliefs to arbitrariness as much as if we would grasp the second, infinitely receding option.¹¹⁴

However, as I have shown, Rawls in formulating his conception of justice is not trying to reach that Archimedean point which would permit us to break the dilemma of epistemology, since, like anti-foundationalist philosophers such as Richard Rorty and Hilary Putnam, he does not think that that dilemma is a genuine one. He does not think that the contingency of the bases on which our justifications stand is something we should worry about; that to accept the contingency of our positions forces us to embrace the corrosive conclusions of relativism. Rather, he endorses and defends the values and practices of the liberal tradition, accepting at the same time their metaphysical neutrality and immanency. In particular, with the description of the original position he does not try to give them a metaphysical back-up, but only to contribute to their clearer formulation. I am therefore inclined to think that behind Sandel's belief in the foundationalist spirit of Rawls's deontological liberalism there lies the foundationalist assumption that if you are not able to give such an absolute backup to your values and beliefs than you cannot claim their priority; from which follows the conviction that, if Rawls is willing to claim the priority of justice as fairness over other conceptions of the good and of the right, he must be trying to secure that priority on absolute foundations.

¹¹⁴ Ibid. "Where the first would be arbitrary because contingent, the second would be arbitrary because groundless ... These then are the perplexing and difficult demands of the Archimedean point [which allegedly Rawls tries to look for] – to find a standpoint neither compromised by its implication in the world nor dissociated and so disqualified by detachment".

3. The Law of Peoples: a multicultural path to cosmopolitanism?

Rawls in *The Law of Peoples*¹¹⁵ turns to apply his liberal conception of justice “to the principles and norms of international law and practice”¹¹⁶, trying to “work out the ideals and principles of the *foreign policy* of a reasonably just *liberal* people”¹¹⁷ taking into account the historical fact of the diversity of cultures and traditions of thought among the different peoples of the world. Rawls’s preoccupation is “to specify how far liberal peoples are to tolerate nonliberal peoples”,¹¹⁸ starting from the consideration that

If all societies were required to be liberal, then the idea of political liberalism would fail to express due toleration for other acceptable ways (if such there are, as I assume) of ordering society. We recognize that a liberal society is to respect its citizens’ comprehensive doctrines – religious, philosophical, and moral – provided that these doctrines are pursued in ways compatible with a reasonable political conception of justice and its public reason. Similarly, we say that, provided a nonliberal society’s basic institutions meet certain specified conditions of political right and justice and lead its people to honor reasonable and just law for the Society of Peoples, a liberal people is to tolerate and accept that society.¹¹⁹

Rawls calls these non-liberal societies complying with basic requirement of liberal justice and with international laws, “in the absence of a better term”, “decent peoples”.

Just as with the normative idea of reasonableness he does not believe there could be a precise definition of decency from which we could deduce a clear-cut set of criteria. Furthermore, just as he believes in there being different kinds of liberal peoples interpreting the notion of reasonableness in different ways, he believes that there may be different kinds of decent peoples. Thus he regards the kind of decent people that he takes into consideration as one among many possible ones. The one kind which, in his usual pragmatist fashion, conforms to the way he thinks “decency” is used within a liberal

¹¹⁵ J.Rawls: *The Law of Peoples (LP)*, (Cambridge, Mass., London, England: Harvard University Press, 1999)

¹¹⁶ Ibid., p.3

¹¹⁷ Ibid., p.10

¹¹⁸ J.Rawls: *LP*, p.59

¹¹⁹ Ibid.

democratic culture.¹²⁰ What then are the basic criteria of justice a people should meet in order to be considered decent?

Without going into the details of his definition of ‘decency’ Rawls believes that decent peoples are those non-aggressive societies that honour the laws of peace and respect the political and social order of other societies, that secure human rights for all their members and in which their system of law and their public servants follow a common good idea of justice that takes into account the fundamental interests of everyone in society.¹²¹ Decent peoples are also characterized by associationist social structures and by what Rawls calls a “decent consultation hierarchy”. That is, as he puts it, “the members of these societies are viewed in public life as members of different groups, and each group is represented in the legal system by a body in a decent consultation hierarchy.”¹²² This hierarchy he regards as satisfying six guidelines:

First, all groups must be consulted. Second, each member of a people must belong to a group. Third, each group must be represented by a body that contains at least some of the group’s own members who know and share the fundamental interests of the group. The first three conditions ensure that the fundamental interests of all groups are consulted and taken into account. Fourth, the body that makes the final decision must weigh the views and claims of each of the bodies consulted, and, if called upon, judges and other officials must explain and justify the rulers’ decision. In the spirit of the procedure, consultation with each body may influence the outcome. Fifth, the decision should be made according to a conception of the special priorities [of the people] ... Sixth and last – but highly important – these special priorities must fit into an overall scheme of cooperation, and the fair terms according to which the group’s cooperation is to be conducted should be explicitly specified.¹²³

Besides liberal and decent peoples Rawls see the world inhabited by ‘outlaw states’, ‘burdened societies’, and ‘benevolent absolutism’. “While a benevolent absolutism does respect to a certain extent human rights, it is not a well ordered society, since it does not

¹²⁰ Ibid., p.67 “We give it meaning by how we use it”

¹²¹ Ibid., p.64-7

¹²² Ibid., p.64

¹²³ Ibid., p.77

give its members a meaningful role in making political decisions”¹²⁴. That is, it lacks a decent consultation hierarchy. Burdened societies are those societies that because of unfavourable historical, social and economic circumstances are not able to achieve a well-ordered regime, whether liberal or decent. Outlaw states are instead those regimes that do not respect the human rights of their members and are aggressive towards other peoples.¹²⁵

According to Rawls the society of peoples guided by liberal laws can and should comprise only liberal and decent peoples, that is, those peoples that in their relations towards each other and towards their members are guided by considerations of reasonableness and thus respect the reciprocity principle. Indeed, the motivation behind Rawls’s choice of peoples rather than states as the relevant political and moral subjects of international relations is exactly that of “distinguishing [his] thinking from that about political states as traditionally conceived, with their powers of sovereignty included in the (positive) international law for the three centuries after the Thirty Years’ War”, namely “the right to go to war in pursuit of state policies with the ends of politics given by a state’s rational prudential interests ... and a certain autonomy in dealing with its own people”.¹²⁶ The main normative idea behind his formulation of principles of liberal justice at the global level is precisely “to reformulate the powers of sovereignty in light of a reasonable Law of Peoples and deny to states the traditional rights to war and to unrestricted internal autonomy.”¹²⁷ He thus focuses on peoples, conceived as persons sharing the same reasonably just institutional, cultural and political-moral environment,¹²⁸ as the subjects to place in the original position to be acted out at the global level.

To conclude my sketchy presentation of Rawls’s conception of the Law of Peoples let us look at the principles of international justice that he believes liberal and decent peoples will come to agree on when the veil of ignorance drops down. These, which he takes

¹²⁴ Ibid., p.92

¹²⁵ Ibid., p.90

¹²⁶ Ibid., p.25-6

¹²⁷ Ibid., p.26-7

¹²⁸ Ibid., p.23-4.

“from the history and usages of international law and practices”, are the following eight “familiar and traditional principles”:¹²⁹

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples;
2. Peoples are to observe treaties and undertakings;
3. Peoples are equal and are parties to the agreements that bind them;
4. Peoples are to observe a duty of non-intervention;
5. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense;
6. Peoples are to honor human rights;
7. Peoples are to observe certain specified restrictions in the conduct of war;
8. Peoples have a duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime.¹³⁰

Andrew Kuper in his *Democracy Beyond Borders*¹³¹ has advanced a powerful argument against Rawls’s application of his political conception of justice to the international sphere. He believes that when he passes to the global level Rawls betrays the liberal attribution of primary moral significance to individuals. The key mistake for Kuper is Rawls’s choice to take peoples, rather than individuals, as the politically relevant subjects to place in the global original position. According to Kuper, Rawls’s commitment to constrain states’ sovereignty by considerations of reasonableness and decency is not enough to protect individuals’ “democratic rights and obligations”.¹³² Kuper, that is, thinks that decent peoples are not decent enough, and that when Rawls comes to extend toleration from within liberal communities to decent peoples “he seeks toleration *of the wrong kind*. Only an original position that includes all the persons of the world as free and equal persons can express toleration in the right way”,¹³³ namely, in the *liberal* way. Kuper’s argument is that the tolerance manifested by decent peoples towards the traditions, views and practices of their members is not compatible with liberal tolerance.

¹²⁹ Ibid.. p.41

¹³⁰ Ibid., p.37

¹³¹ A.Kuper: *Democracy Beyond Borders. Justice and Representation in Global Institutions (DBB)*, (Oxford: Oxford University Press, 2004)

¹³² Ibid., p.4

¹³³ Ibid., p.19

“Liberal tolerance expresses *ethical* neutrality, by remaining impartial between particular moral conceptions of the good; for this very reason, liberalism must reject any *political* neutrality, that is, neutrality in respect of justification of coercion”.¹³⁴ Kuper refers to Rawls’s own conception of toleration in *Political Liberalism* according to which a state should be neutral towards comprehensive views of the world.

It is the essence of a politically liberal regulatory framework that it expresses toleration by *not* incorporating any comprehensive doctrine in the principles of justice; to fail to do so is not to extend but rather to eliminate liberal tolerance. In *LP*, on the other hand, he is mistaken. Decent peoples are not ethically neutral, nor is a Law of Peoples which recognizes their comprehensive doctrine ethically neutral; thus at neither stage is there any basis for saying that what is being expressed counts as liberal toleration.¹³⁵

Kuper’s preoccupation is that Rawls by trying to take cultural pluralism seriously, stretching liberal toleration to decent non-liberal people, “does so by *not* taking seriously the reasonable pluralism of individual persons.”¹³⁶ His reasonable Law of Peoples would thus unreasonably have serious anti-liberal consequences, for “dissenting individuals with liberal views would surely, it seems, dispute the idea that accommodation of reasonable pluralism requires that their individual moral claims be taken less seriously”.¹³⁷ In particular, the problem with decent societies is that their decent consultation hierarchy “does not allow free speech”, as “one could not really know what [dissenting individuals] would think, since their views could well be sealed off from view by the decent consultation hierarchy”.¹³⁸ Sure, decent peoples, as Rawls has characterized them, “ensure that fundamental interests of all groups are consulted and taken into account”, as well as guaranteeing space for dissent, public accountability for its civil servants, and transparency of public procedures and decision-making. Yet, Kuper argues, “citizens must argue within the conceptual terms of the regime, and only through representative of the groups; this closes off large domains and numerous types of discussion”, the most

¹³⁴ Ibid., p.20

¹³⁵ Ibid., p.20-1

¹³⁶ Ibid., p.21

¹³⁷ Ibid., p.22

¹³⁸ Ibid.

serious being that “it prevents proper critical discussion of how the rules of discussion might be altered”.¹³⁹

Here we reach the core of the disagreement, and the key issue to be dealt with in order to assess Rawls’s *The Law of Peoples* with regard to the liberal commitment to the priority of individual autonomy as expressed in *A Theory of Justice* and *Political Liberalism*. Are decent peoples decent enough? Are they to be tolerated by liberals? Indeed these are the very questions that motivate *The Law of Peoples*, and we know that Rawls’s moral intuitions tell us that we should answer them in the affirmative. Yet, is he right? Is he not relaxing to much the liberal criteria of toleration? Kuper believes so. In order to assess the normative import of Rawls’s conception of international justice I believe we should try to grasp the source of the disagreement. Is Kuper getting Rawls’s description of decent peoples wrong or right?

If he is mistaken about the extent to which Rawls’s decent societies curb the social and political rights of their members, and in particular of those who dissent from the ruling conception of the good, then their normative disagreement would disappear and Rawls’s intention would be that to accommodate within liberalism the importance attached by individuals to their culture and community: to accommodate, that is, cosmopolitanism with multiculturalism in the full respect of everyone’s individual autonomy. If Kuper, though, gets Rawls’s conception of decency right, then their disagreement would be a question of a clash of different moral and political intuitions about how to be liberal, and would raise the further crucial question: What is the motivational basis of Rawls’s toleration between liberal and decent peoples, normative or pragmatic? In other words, is Rawls really surrendering individuals’ rights to the normative priority accorded to a culture, thereby abandoning a cosmopolitan *ethos*, or is he only raising a pragmatic point concerning the concrete reality which liberal people have to face?

I believe that Kuper gets Rawls both wrong and right, and that behind Rawls’s extension of justice as fairness to the international arena there lie both pragmatic considerations external to the normative core of liberalism and normative considerations internal to the concept of liberal toleration. The reason behind this ambivalence and ambiguity, I believe, is Rawls’s anti-foundationalist awareness, as expressed in his conviction that there is not a single correct form of liberalism, a single correct interpretation of liberal

¹³⁹ Ibid.

reasonableness, toleration, freedom and equality and practices implementing these values and principles. “Liberal societies”, he reminds us,

may differ widely in many ways: for example some are far more egalitarian than others. Yet these differences are tolerated in the society of liberal peoples. Might not the institutions of some kinds of hierarchical societies also be similarly tolerable? I believe this to be so.¹⁴⁰

Here it is made manifest how at the centre of Rawls’s preoccupation with liberal international toleration is his anti-foundationalist awareness that it is not possible to define *a priori* the normative and institutional limits of a liberal society, ‘to deduce the reasonable from the rational’, and as a consequence, that also is not possible to establish clear-cut limits between liberal and non-liberal peoples. Surely, there are behaviours that are unquestionably unacceptable such as those of outlaw regimes “that think a sufficient reason to engage in war is that war advances, or might advance, the regime’s rational (not reasonable) interests”¹⁴¹ and that do not respect those universal human rights whose “political (moral) force extends to all societies” and that “are binding on all peoples and societies, including outlaw states”.¹⁴² And Rawls is unshakable in his condemnation of these states. “An outlaw state that violates these rights is to be condemned and in grave cases may be subjected to forceful sanctions and even intervention”, and “this refusal to tolerate those states is a consequence of liberalism and decency”.

If the political conception of political liberalism is sound, and if the steps we have taken in developing the Law of Peoples are also sound, then liberal and decent peoples have the right, under the Law of Peoples, not to tolerate outlaw states. Liberal and decent peoples have extremely good reasons for their attitude. Outlaw states are aggressive and dangerous; all peoples are safer and more secure if such states change, or are forced to change, their ways. Otherwise, they deeply affect the international climate of power and violence.¹⁴³

¹⁴⁰ J.Rawls: *LP*, p.84

¹⁴¹ *Ibid.*, p.90

¹⁴² *Ibid.*, p.80-1

¹⁴³ *Ibid.* 81

Yet in the grey area that divides liberal and non-liberal peoples how can anyone possibly be so certain to recommend a liberal foreign policy of political and economical sanctions or forcible interventions, aimed at “gradually shap[ing] all not yet liberal societies in a liberal direction, until eventually (in the ideal case) all societies are liberal”¹⁴⁴? “This foreign policy simply assumes that only a liberal democratic people can be acceptable”.¹⁴⁵ This is the question behind Rawls’s reflections on international justice: “how do we know, before trying to work out a reasonable Law of Peoples, that nonliberal societies are always, other things being equal, the proper object of political sanctions?”¹⁴⁶ Following the conviction that “denying respect to other peoples and their members requires strong reasons to be justified”,¹⁴⁷ Rawls then is only asking himself whether we should withhold respect to decent peoples, given that, even though Kuper is right that their “ideas of justice allow basic inequalities among their members (for example, some members may not be granted equal liberty of conscience)”¹⁴⁸, still

Liberal peoples cannot say that decent peoples deny human rights ...; nor can liberal peoples say that decent peoples deny their members the right to be consulted or a substantial political role in making decision ... Finally, decent peoples allow a right of dissent, and government and judicial officials are required to give a respectful reply ... Dissenters may not be dismissed as simply incompetent or lacking in understanding. In this and other ways, the common good conception of justice held by decent peoples may gradually change over time, prodded by dissents of members of these peoples.¹⁴⁹

Indeed, these decent peoples as described by Rawls seem far more decent than most of the societies that describe themselves as liberal democracies. However, this is Rawls’s fundamental point: even if decent peoples are not complying with liberal *ideal* principles and practices, are they so bad as to be *sanctioned*? Kuper is correct in stressing that the inequalities with regard to freedom of speech and conscience “are serious restrictions on liberty which would horrify a liberal at home, and it is not apparent that they should not be less horrifying when perpetrated against people that are not part of one’s liberal

¹⁴⁴ Ibid., p.82

¹⁴⁵ Ibid., p.82-3

¹⁴⁶ Ibid., p.60

¹⁴⁷ Ibid.

¹⁴⁸ Ibid., p.70

¹⁴⁹ Ibid., p.61

society”. He is correct, of course, if he speaks of ideal liberal societies and peoples. And, always staying on ideal ground – this has always been our ground of reflection after all –, Kuper is also right when he continues the passage just quoted by observing that the seriousness of these infringements to freedom and equality “would certainly be apparent to parties in a single global original position who, when the veil lifts, might find themselves in a non-liberal society”.¹⁵⁰ Yet again, are these infringements so serious as to *sanction* these peaceful societies that respect basic economic, social and political rights, as opposed to *constructively relating with* them? Rawls never affirms that considerations of reciprocal respect, as he introduces them in the international original position, forbid rational dialogue and debate between liberal and decent peoples, just as they do not forbid rational confrontation between different liberal societies. Also he never denies the moral and political superiority of the liberal commitment to the normative primacy of individual autonomy. Rawls’s answer to our last question can thus be found in the following passage:

Liberal peoples must try to encourage decent peoples and not frustrate their vitality by coercively insisting that all societies be liberal. Moreover, if a liberal constitutional democracy is, in fact, superior to other forms of society, as I believe it to be, a liberal people should have confidence in their convictions and suppose that a decent society, when offered due respect by liberal peoples, may be more likely, over time, to recognize the advantages of liberal institutions and take steps toward becoming more liberal on its own¹⁵¹

Kuper does take into account these pragmatic considerations. He admits, in fact, that for Rawls “liberals are still able to criticise non-liberal regimes, since acceptance of decent peoples in international law by no means implies endorsement of their principles by liberals more generally nor does it require that non-liberal regimes are viewed as beyond reproach”.¹⁵² Yet, on the one hand, he believes that Rawls practical recommendations on how to deal with decent people are too weak. Liberals should not only engage in critical confrontation with non-liberal peoples, they should also limit decent peoples’

¹⁵⁰ A.Kuper: *DBB*, p.22

¹⁵¹ J.Rawls: *LP*, p.62

¹⁵² A.Kuper: *DBB*, p.34

engagement in a common global legal structure by requiring reforms in the liberal direction, as it is increasingly being invoked by the theory and practice of international law. This global legal structure inspired by cosmopolitan values would in its turn increase the efficacy of the soft efforts of reforming, from outside and within, decent people towards a fully liberal democratic organisation of society.¹⁵³ On the other hand, Kuper believes that giving priority to pragmatic considerations in international relations over above normative co-coherence with the dictates of liberalism ends up watering down the ‘realistic utopian’ aspiration of a liberal conception of international justice, in this way – reminding us of Kant’s observation – risking to “eternalise the violation of right”.¹⁵⁴

Here, the issue thus shifts again to that of the normative appraisal of the political moral decency of Rawlsian decent peoples, and to what extent we are giving up individual liberties by extending respect to them in the way advocated by Rawls. Kuper remains of the same conviction that, as Bruce Ackerman puts it, “Rawls proposes a dangerous political compromise” in choosing peoples rather than individual as the relevant moral subjects to place in the global original position, because, “none of Rawls’ ‘well ordered’ hierarchies will be free of natives who are themselves inspired by liberal ideas of liberty and equality”.¹⁵⁵ His concern is further compounded by Amartya Sen’s research on the relationships between democracy and development showing that communities that do not guarantee full democratic rights risk ending up infringing also the fundamental human rights to life and well-being of their members.¹⁵⁶

So, in conclusion, is Rawls’s choice of peoples as the moral and political subjects of an international conception of justice legitimate from a genuine liberal standpoint? I tend to share Kuper’s worries, while understanding and appreciating both Rawls’s main normative intent behind his Law of Peoples and the epistemological approach that accompanies it. I believe that, given the fact of pluralism and the impossibility of deducing liberal principles and practices from *a priori* considerations of rationality, and thus the impossibility of drawing a clear-cut line between liberal and decent non-liberal people, it is both a wise pragmatic principle and part of the liberal commitment to

¹⁵³ Ibid. p. 42-4

¹⁵⁴ I.Kant: ‘Perpetual Peace’, in H. Reiss, trans. And ed., *Kant’s Political Writings* (Cambridge: Cambridge University Press, 1991), quoted in A.Kuper: *DBB*, p. 38.

¹⁵⁵ B.Ackerman: ‘Political Liberalism’ in *Journal of Philosophy*, Vol.91, N.7 (1994), p.382-3

¹⁵⁶ A.Sen: *Development as Freedom* (Oxford: Oxford University Press, 1999)

freedom and equality to maintain a relaxed – we could even say anti-foundationalist – approach to toleration; reminding ourselves at the same time that relaxed toleration does not in the slightest entail withdrawal from rational criticism. At this point there is space for disagreement about the correct non-intrusive ways to interact with decent peoples with a view to encouraging them to move towards liberal democratic principles. Kuper believes there is more room for manoeuvre than Rawls seem to believe, and he may be correct. However, the disagreement on the normative *ethos* of liberalism here intertwines with that over concrete policy recommendations of action, which is a terrain on which Rawls is not walking, and we do not want to walk here. The point remains, though, that the relaxed attitude towards toleration recommended by Rawls is crucial in order to release the tensions between the universalistic aspirations of human rights and democratic principles and cultural particularism, and thus for accommodating cosmopolitanism with multiculturalism.

Yet Kuper's worries, which are also reflected in his more substantive and pro-active policy recommendations, are legitimate, because, as he rightly reminds us, history has shown us that when priority is given to communities vis-à-vis individuals, and when our normative aspirations give too much way to pragmatic considerations, serious violations of human rights take place, and our driving ideals, losing their utopian element, lose their capacity to drive us towards concrete reforms of our present predicament. Rawls, I believe, would agree with these concerns of Kuper's. None the less it is never too much to remind us, as Kuper does, that our appreciation of, and our respect for, the valuable and significant role that cultures, traditions and shared histories play in individuals' life-projects and self-realisation, should not blind us to the fact that the shared institutions, culture and conceptions of good of a people are not undisputed and undisputable facts of nature, but can and should be criticized when they are felt and judged to be violating individuals' autonomy. I have no doubt that Rawls would agree with this cautionary remark, given both his unshakable commitment to the priority of the right over the good, and his anti-foundationalist awareness. For this same reason I agree with Kuper that it would be better to take individuals as the primary moral and political subjects of global

justice, and let the role of culture in the realization of their life project be decided by them in the original position.¹⁵⁷

Conclusions

In this paper I have argued that Rawls's reflections on justice, from his *A Theory of Justice* to *The Law of Peoples*, passing through *Political Liberalism*, elaborate what I call an anti-foundationalist deliberative democratic conception of liberal justice concerned to accommodate its universalistic aspirations with multiculturalism.

I have argued in particular that 'justice as fairness' cannot be considered the expression of a deontological theory attempting to ground the principles of liberal justice on absolute grounds, trying to deduce them from an *a priori* conception of rationality. Justice as fairness stands, in fact, on a firm ethnocentric epistemological awareness, as it is exemplified by his 'reflective equilibrium' conception of justification. Indeed, justice as fairness expresses a particular conception of the good among many others, only a more liberal one that aims at enabling different comprehensive view of the world to live together on terms of reciprocal respect. This moral point of view is conveyed by the normative device of representation that Rawls calls 'the original position'. Its epistemological significance is not a foundational one, as it represents only an attempt to formulate in a clear and coherent way the moral intuitions that Rawls regards as contained in the moral and political tradition to which he belongs.

I have argued that this ethnocentric normative awareness has been further stressed by his later conception of public reason, which he introduces to replace the construction of the original position as the driving normative core of his conception of liberal justice. The notion of public reason, I also argued, allows Rawls to meet the objections of those theorists of democracy who failed to appreciate the discursive dimension of his conception of political legitimacy in *A Theory of Justice*. The notion of public reason enables him to depart from the abstraction of the original position and come down to the

¹⁵⁷ A. Kuper: *DBB*, p.24. "In political liberalism, we do not close off the possibility that parties representing free and equal persons in a global original position would decide in favour of thin states [i.e. states whose government is constrained by reasonable peoples]...rather we say that thin states...must be justified."

worldly, deliberative, reality of the principle of reciprocity that has always been at the centre of justice as fairness. I have further argued that the combination of Rawls's commitment to public deliberation and his anti-foundationalist awareness leads him to appreciate how the liberal project should be centred on a commitment to self-reflexively keep open to debate and revision the outcomes of its deliberations as well as its fundamental assumptions.

Finally I have illustrated how Rawls's contribution to the theory of international relations and global justice should be considered an attempt to draw a difficult and risky path through the muddy and contested 'no man's land' running between individual and collective rights, cosmopolitanism and multiculturalism, without falling into the opposed but similar traps of blind and hypocritical universalism and relativism.



Institute for International Integration Studies

The Sutherland Centre, Trinity College Dublin, Dublin 2, Ireland

