

Questions of Justice

Lecture 8

The Liberal State

1 Rawls's liberal society

- It is Rawls' first principle of justice which makes his society (state) characteristically 'liberal', because once this principle is entrenched in a constitution it places robust legal obstacles to the exercise of political power in ways which threaten the 'basic liberties' of citizens including those which concern personal life, such as freedom of conscience, movement, family life, and, more broadly, personal fulfilment, and the 'political' liberties, such as freedom of speech, association, and, in some form, political participation.
- Although much of this seems so familiar as to be almost 'common sense', it is worth thinking about ways in which it remains contentious; and one straightforward case to think about is 'freedom of conscience' – i.e. the liberty to practice one's own religious or philosophical 'faith', or none. For, on the one hand, Rawls is unequivocal on this point; but, equally, plenty of existing states are not liberal on this issue.

2 Freedom of conscience

- Rawls: ‘The state can favour no particular religion ... The notion of a confessional state is rejected’ (TJ 186)
- Why? What are the arguments for religious toleration?
 - (i) Rawls’ OP argument: behind VI you know it will matter a great deal to you to be able to preserve your own core values. Hence you know that if you turn out to have some particular faith, you will want to be in a society in which this faith is permitted. You might prefer to be in a society in which everyone shares this faith, but you know this is unlikely, so rational self-interest guides you to religious toleration.

This is a potent argument; but notice the presumption: knowledge about the truth of matters of faith is not available behind VI (even though unlimited general knowledge is assumed to be available). So the key presumption is that the truth of religious claims is not a matter of public knowledge.

3 Comments

- This assumption of religious ignorance looks, intuitively, to be part of a powerful rationale for religious toleration anyway. For without knowledge of the truth on some subject-matter, coercive restriction of belief on that subject-matter cannot be justified as a way of avoiding falsehood. What then converts this into an overwhelming argument for religious toleration are two further assumptions: (i) the belief matters a great deal to the believer; (ii) my sincere belief is harmless to those others who have different beliefs.
- In his famous ‘Letter on toleration’ Locke advances a further pragmatic consideration in favour of religious toleration: because religious faith is a matter of the will (i.e. of decision), it cannot be controlled by external force. So religious intolerance is bound to be ineffective.
- The historical record on this point is disputable. But one can connect Locke’s insight that faith is essentially a matter of the will with the key point about, that the question of the truth of religion is never a matter of public knowledge.

4 The 'Communitarian' critics – Sandel, Taylor, MacIntyre, Walzer.

- These critics attack Rawls for misrepresenting his political philosophy. They argue that it is at most appropriate for modern large-scale liberal democracies that lack any substantive sense of political community and historical identity, such as the USA; but that it does not follow that it provides a moral and political theory appropriate to all political societies.
- We can assess this position by considering how it applies to the issue of freedom of conscience. But first it is worth clearing some other issues away

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5 The communitarian critique

- (i) Rawls' conception of the citizen, especially as captured by the OP argument, is said to be too 'thin'. The interchangeable anonymity of this subject behind the veil of ignorance matches the interchangeability of the citizens of a mass society; but this is a defect of modern society, not a proper starting point for political philosophy.
- (ii) The fact that Rawls's state disallows the support for any 'perfectionist' cultural ideals (museums, art forms etc.) manifests the way in which the Rawlsian state does not recognise the ideals through which citizens celebrate their national identity and history.
- (iii) Most fundamentally: the Rawlsian state does not capture the values of a political community whose members want to live together in order to share a life in which they are able to practice their own form of life without interference from others.

6 Rawls' response:

- re (i) he argues that there is misapprehension here – the veil of ignorance etc. is just part of a ‘device of representation’, not a theory of the ‘person’. In truth, Rawlsian persons do have their own ‘plan for life’ and a more or less articulate ‘comprehensive conception of the good’ along with their ‘sense of justice’
- But Rawls argued that when we frame principles appropriate for societies whose members have a variety of plans for life and conceptions of the good, we should not privilege any one plan for life or conception of the good, and the veil of ignorance fiction of the OP argument captures that point.

7 Voluntary associations and political society

- re (ii) Rawls does think that the political institutions of a well-ordered society should be rather sparing in their official support for perfectionist ideals that are not universally shared, though he does allow that the citizens of his state should value their own distinctive liberal political culture. This point connects with (iii) below –
- re (iii) This is really the crucial point. Rawls conceives of the state as a community which one joins at birth and exits at death; so membership – citizenship – is compulsory. Furthermore, because the state defines and protects fundamental rights and public goods it has coercive powers. Hence the state is not a voluntary association, like a political movement, which will of course have its own particular values and shared goals. It is part of the state's proper role to facilitate voluntary associations of this kind, especially when they are 'social unions'; but because the state is a compulsory coercive association, it is inappropriate, oppressive, for it to be governed by rules that express the ethical or religious perspective of any one voluntary association.

8 Nation-states and political self-determination

- This third point captures an issue that is genuinely difficult:
 - on the one hand, the idea of a ‘nation-state’ which brings together a community of like-minded people as a political unit has obvious attraction;
 - but on the other hand, we have to protect the equal political rights of minority groups whose membership of the state is not voluntary. There is a tension here whose resolution is both practically and theoretically difficult – e.g. how far should there be a right of secession from a political union (cf. the Basques in Spain....).

9 Back to the idea of a 'confessional state'

- How do the communitarian criticism of Rawls's liberal state, and Rawls's reply, engage with the issue of religious toleration? (There are still confessional states today).
- The communitarian will question the liberal's assumption that (as I put it earlier) 'my sincere belief is harmless to those others who have different beliefs'. Instead, he will affirm that there can be value in being a member of a confessional state, a state which entrenches and celebrates one particular faith at the expense of all others.
- The liberal need not, I think, deny the attraction of this kind of unity and solidarity. But he will argue that it is outweighed by the oppressive harm of restricting the religious practices of others who should not be required to emigrate in order to preserve their faith.

10 Democracy and compromise?

- The communitarian might argue that the liberal should concede that toleration of minorities can be overturned by democratic procedures.

The liberal should not, of course, concede this. The Rawlsian liberal does not construe the outcome of the exercise of democratic political liberties as prior to personal liberties. On the contrary for the Rawlsian liberal, the democratic process is constrained by respect for basic personal liberties. So although the liberal is a democrat, s/he is a liberal first and a democrat second.

- But what about a compromise: an ‘established’ faith, combined with toleration of other faiths and indeed those who have none at all? Does this enable one have one’s communitarian cake and eat it by remaining true to liberal values?

11 'Political Obligation'

- A central issue in political theory concerns the moral grounds of the 'requirement' (let's call it, for now) that the members of a political society (aka: citizens of a state) obey the laws and other regulations of their state.
- There are many approaches to this –
 - Some might invoke force (coercion); but this is scarcely a moral ground
 - Others might invoke 'tradition' and existing practices (e.g. 'paternal power'); but why should such traditions merit continued support?
 - Another, quasi-military, model is that of following the instructions of a knowledgeable ruler (commander); but what is this ruler supposed to have knowledge of?

Perhaps it is knowledge of the public interest that is invoked here – if so this leads into a much better answer:

12 Utilitarianism

Namely - Utilitarianism

On this account, the duty to obey the law derives from the moral duty to promote general welfare – where the law, i.e. the state, is a reasonably efficient institution for advancing general welfare.

Plainly, on this approach, where one's state fails this test of promoting general welfare, the duty to obey the law lapses. This is the position of radical utilitarians such as William Godwin and J. S. Mill.

This is an attractive feature of the position; but what's not so clear here is whether there is any further requirement that those governed by the law should somehow 'authorise' those who have power. Utilitarians can hold that democratic institutions and procedures have significant instrumental benefits. But it is not easy for them to argue that they have the kind of non-instrumental significance that seems to be central to liberal politics.

13 Social Contract Theory

- The position which plainly does capture this liberal thought is that which is central to the social contract tradition – that the basis of the state’s authority, and thus of the ‘political obligation’ of the citizens, lies in a ‘social contract’ among a free people which constitutes them as a citizens of a state and confers legislative authority on them collectively, which they then pass over to their representatives in a legislative assembly by means of democratic procedures.
- The trouble with this view is partly that it seems to rest on the myth of ‘natural freedom’; but also that without more conditions it places no moral constraints on the state’s authority. Of course one can then add in such conditions – e.g. via a commitment to preserving fundamental rights within a constitution; but it’s not clear that this will meet the required demand.

14 Rawls's liberal theory

- Where now does Rawls stand on this issue?
 - We can predict that he will find the utilitarian approach unsatisfactory
 - And since his theory of justice invokes the model of a social contract, one would expect his sympathies to lie with the social contract tradition.
- But Rawls's theory of justice is based on a clearly hypothetical contract, and the issue posed here is that of the moral ground of a citizen's duty/obligation to obey the laws of their actual society.
 - So one cannot move directly from Rawls's theory of justice to a contractual account of political obligation.
- In fact Rawls's position turns out to be a complex combination of considerations.

15 Obligations and Natural Duties

An initial point is the need to distinguish 'obligations' from 'natural duties':

For Rawls the characteristic features of obligations are (TJ 97):

- (i) 'they arise as a result of voluntary acts' – such as promises, agreements and accepting benefits;
- (ii) their content is specified by the rules of a practice or institution
- (iii) those to whom we owe obligations are typically partners in the practice.

None of these points apply to 'natural' duties (TJ 98):

- (i) 'they apply to us without regard to our voluntary acts'
- (ii) 'they have no necessary connection with institutions or social practices'
- (iii) they hold between people irrespective of their institutional relationships.

Footnote: not all duties are 'natural' – most arise in the context of practical relationships – e.g. in a family, workplace etc.

16 Fairness

Acc. to Rawls (TJ 96) the normative substance of obligations derives from the 'principle' of fairness,

that 'a person is required to do his/her part as defined by the rules of an institution' when (i) the institution is just, and (ii) one has voluntarily accepted the benefits of the institution: 'We are not to gain from the cooperative labors of others without doing our fair share' (TJ 96)

Plainly: this is not a utilitarian thesis; instead it is a basic 'deontological' intuition. And I take it that this principle enters into the 'fairness' of the 'pure procedural justice' which underpins his account of justice 'as fairness'.

Is the principle correct? Nozick's challenge?

17 Fairness and political obligation?

- So: we can ask whether the requirement that one obey the law, or at any rate, the laws of a just society, is grounded in accordance with the principle of fairness on obligations which one incurs when one voluntarily accepts the benefits of membership of one's political society.
- Rawls holds that this is not in general the case: because political societies are coercive institutions which we enter by birth, membership is not voluntary. (TJ 296)
- Hence although the content of just laws is determined by reference to a hypothetical fair contract, the duty to obey actual laws, however just, is not an obligation incurred in accordance with the principle of fairness since no actual contract or agreement to these laws is presupposed by membership of one's society.
- Has Rawls backed himself into a dead end here (from which the only escape looks to be the dreaded utilitarian route)? Rawls thinks not – that there is another way out:

18 Natural Duties

- Rawls's way out is to appeal to the existence of a 'natural duty of justice' to ground the duty to obey (just) laws.
- Natural duties generally:
These are fundamental non-institutional moral duties which apply to people irrespective of their membership of institutions etc. Acc. to Rawls, we have many natural duties, including positive duties of assistance and negative duties not to harm others (TJ 298).
- Since he admits that there are no clear priorities among them, it follows that at an individual level he is committed to an intuitionist thesis. There are also going to be conflicts both between duties of this kind and, further, including obligations arising from voluntary agreements etc. which individuals have to resolve on an ad hoc basis (there is no higher order principle which ranks duties ahead of obligations, or v-v).

19 The 'natural' duty of justice

What is then unexpected about Rawls's position is that at this point he introduces a 'natural duty of justice'. This sounds trivial at first: a duty to do one's duty.

But once one connects justice with social institutions, and has an account of it which does not rest upon natural duties, then it is OK to think of there being a normative connection between the position of an individual member of a political society and the justice of that society. And it is this connection which Rawls describes as 'the natural duty of justice' which is that 'we are to comply with and to do our share in just institutions when they exist and apply to us', and also 'we are to assist in the establishment of just institutions when they do not exist' (TJ 295-6).

However, there is something strained here: natural duties were initially described as duties that hold between people irrespective of their institutional relationships. By contrast, the natural duty of justice applies to persons and 'just institutions'!

20 Comments on this

- (i) Since the duty is a 'natural' duty of justice, it is not clear that it applies especially to the relation between a citizen and his/her own society. 'Natural' duties are precisely those which apply irrespective of one's society. So it looks as though this is really an all-purpose duty to promote justice, not a duty to abide by the laws of one's own society.
- (ii) It is hard to see that there is any immediate connection between this duty and participation in democratic procedures – except insofar as justice includes protection for political liberties.

So I don't think that Rawls's appeal to a natural duty of justice does what is needed if one is looking for a liberal account of political obligation. It would be better to look instead at democratic theory as a way of capturing a liberal demand for participation, combined with a utilitarian commitment to promoting the public interest.