The Nuptials Between Justice and Law in the Philosophy of John Rawls: Its Impact in Contemporary Political Philosophy

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> Each person possesses an inviolability founded on justice that even the welfare of a society as a whole cannot override. Therefore, in a just society the rights secured by justice are not subject to political bargaining or to the calculus of social interests.
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> John Rawls, *Theory of Justice*

THE SECOND anniversary of the death of John Rawls—the acclaimed American political philosopher of Harvard—and the main theme of this International Symposium [Justice, Law and Order] suggested the idea of bringing to this audience a short résumé of Rawls' colossal contributions to contemporary political philosophy. John Rawls' teachings are, unfortunately, quite unknown in this part of the world, although the philosophical principles he debated are common, in my view, to the West and the East and not constricted to the Western world. The universality of this debate is confirmed by the centrality of self-government and the focus on individual governance among the core problems of modern societies.

We are, nonetheless, in a better world because of the way John's teachings stimulate us to look to our humanity, to our individuality as creations of God, made in His own image and for God's purpose. Governments seem, sometimes, reluctant to bring

the axiom of John's doctrine into practice because it is framed by the rational and operating tools of modern governance: consent and negotiation.

In this paper I intend to emphasise the major impact that John Rawls' paramount work, *A Theory of Justice as Fairness*, has had on Western and contemporary political philosophy, bringing into the discussion what may be the basic principles of a free, ordered and open society where life could be enjoyable and at the same time responsible. If *Theory of Justice* has an overall and incommensurable merit, it is to allow us to reflect on our conceptions of life and good, and to help us revise systems of government in order to make our lives better.

I count myself amongst those students and followers of Rawls who feel consciously shy about criticising the authoritative contributions of the Harvard philosopher to contemporary political thought, mainly in the way liberals and communitarians often do. I am aware that his writings are commonly seen by the mainstream as biased in favour of American society and immoderate towards other communities where tradition, authority and obedience have a major significance and role to perform. This line of criticism frequently captures a prejudice about Rawls' complex doctrine, and adheres to the flawed idea that there are constituent principles of a society that are singular, inimitable or quasi exclusive.

John Rawls' concept of "Justice as fairness" is, basically, a global conception of how to organise an abstract type of society that, even though contradictory in some aspects, can be adapted to our world and taken as a paradigm, a reference to help us improve the institutions in our own country.

I am fully persuaded that an important part of our everyday problems arises not from our condition as Asians, Europeans, Americans or Africans, but rather from our own human nature, tiny atoms in a gigantic and overwhelming world.

John Rawls' doctrine involves a basic contention that principles of justice essential to the structuring of a constitutional democracy must be viewed as political, in contrast to more comprehensive philosophical or religious doctrines prevailing in any plural society. The right concept of justice is not its being accurate to a previous moral order that has been given to us [or imposed on us], but its being congruent with our self-understanding that the history of justice *as a political entity* embodies an overlapping consensus that has, clearly, a moral and epistemological basis.

The usual attack on Rawls [from his critics] follows the line that what is simply a consensus within a tradition of public discourse doesn't suit the criteria of moral justification. Critics claim that Rawls failed to assert a moral basis for justice as fairness because he refused to make some sort of interlink to a comprehensive theory of good.

Rawls' critics fail, in my view, to perceive the philosopher's argument of a fair and constructive cooperation between free and equal citizens, in the context of a well-ordered society.

The problems that John dealt with in his 1972 book are blazing topics in the fields of ethics and moral philosophy. They are not exactly the themes that positive scholars like John Austin (1790-1859) or H. L. A. Hart (1961) would permit themselves to consider. According to their well-known arguments, law is law because it is *obeyed* or *ought it to be*, and the job of legal science is to free the understanding of law from any moral, religious or mystical assumptions. (1)

What a boring world would be the one where everything could be interpreted in such black and white patterns. But who can exist in any coherent system of rules, norms or ordinary legislation without taking into account the imperatives of justice that transcend them? What, more than the principles of moral justice, lifts up the overall content of every constitution?

We can look at Rawls' response to these particular questions starting with Immanuel Kant's well-known categorical imperative: "act only on that maxim you can at the same time will to be a universal law." In other words, adopt the norm that is consistent with itself but of which the universal adoption is consistent with the individual's own ends and which he steadily could will.

The inclination for universality—emerging in Rawls' deontological defence of *Justice as Equality* and expressed in *Theory of Justice*—, runs deep with its conception of human beings as autonomous and rational individuals. Individuals are determined by the good of justice as an intrinsic good. In *Political Liberalism*, his second book, John goes a step further saying that, in a well-ordered society, *justice as fairness* is a good for persons, individually, because the exercise of the two moral powers is experienced as a good. He also remarks that this

1. Andrew Heywood, *Key concepts in Politics*, Palgrave, London, 2004, p. 25.

is a consequence of the moral psychology used in *justice as fairness* and that their exercise may be an important good, and will be one for many people, this being clear from the central role of these powers in the political conception of citizens as persons. (2)

The never-ceasing aspiration of every human being to enjoy a real and realisable justice has guided the work of legislators throughout the ages. It has also inspired classical philosophers. Plato (427 BC-347 BC) claimed that "laws are partly formed for the sake of good men, in order to instruct them how they may live on friendly terms with one another, and partly for the sake of those who refused to be instructed, whose spirit cannot be subdued, or softened or hindered from plunging into evil." Aristotle (384 BC-332 BC) observed "law is mind without reason" being "law, order and good law, good order." Cicero (106 BC-43 BC) wrote in *De Legibus*: "the people's good is the highest law." Charles de Montesquieu (1689-1755) foresaw it as the ingredient to equality: "in the state of nature... all men are born equal, but they cannot continue in this equally. Society makes them lose it, and they recover it only by the protection of the law."

According to Rawls' *Theory of Justice*, the primacy of justice in a well-ordered society entails certain restraints on the extent of the conceptions of good and society that make a liberal society pluralistic and tolerant. The job of institutions of representative government and of the constitutional order would be to institutionalise the procedures and principles for a just order without sacrificing the different conceptions of good and society, or even trying to query the first and primary social good: liberty. Contrary to what is sometimes perceived, Rawls doesn't suppress the need for law and legal institutions in a just society. (3) He sees them as an important part of the institutional arrangements that can make society's ideal system of justice realisable.

The problem is that the primacy of justice in any legal system places enormous pressure on the level of response of the legislature and the judiciary. The positivists settle this tension by seeing the coercive element in legal norms as the definitive one and diminishing any moral or ethical requirement; the Kantians seek to reflect, in every situation, the validity (and proficiency) of the moral

2. John Rawls, *Political Liberalism*, Columbia University Press, New York, 1996, p. 203.
3. Andrew Sabl, "Looking forward to Justice: Rawlsian civil disobedience and its non-Rawlsian lessons," *The Journal of Political Philosophy*, Vol. 9, No. 3, 2001, pp. 307-330.

imperative, even against the coercion element of the norm. Rawls stands in-between. This is its freshness and wisdom.

Rawls' conception of justice as fairness and its critics

In *Theory of Justice*, Rawls conceived of his principle of justice as an alternative systematic conception that was superior to utilitarianism, a doctrine that asserted the simple principle of "maximise social welfare" as a decisive criterion to decide what is just, reliable and fair in a pluralistic society.[4] Rawls never felt comfortable with that response and tried to reach higher. He tried for thirty years to construct a general, comprehensive political theory that would defend the contemporary liberal-democratic state, hoping that "justice as fairness will seem reasonable and useful, even if not fully convincing, to a wide range of thoughtful political opinions and thereby expresses an essential part of the common core of the democratic tradition."[5]

He aims not just looking to the principles of justice and the political institutions that are appropriated to day-by-day demands, but also to those that could be achievable. In this sense his doctrine is eclectic, inspired by the usual methods of philosophy as well as by those of economics, and political and legal science.

Rawls' central argument is that justice is only achievable as an outcome of a process of negotiation, through which people aiming to pursue their personal interests convene an agreement about the foundational principles of a well-ordered society. In doing so, Rawls roots his conception in a doctrine that has clear points of contact with John Locke's or Jean-Jacques Rousseau's famous theories of social contract, but with a major difference: the latter use the social contract to justify the legitimacy and entitlement of political authority. Rawls, on his part, uses the idea of a covenant, a pact or a contract to reach the basic principles of social justice.

Rawls endeavours in *Theory of Justice* to establish the principles of justice that must govern the *basic structure* of a just society, considering it the way in which the main institutions of a society—political constitution, forms of property, legal system and economy—fit together into a system. But it also assigns rights and duties and determines a probable outcome for individuals.

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4. Rex Martin, "Rawls' New Theory of Justice," *Chicago Kent Law Review*, Vol. 69, 1994, pp. 737-61.
5. Preface for the Revised Edition of *Theory of Justice*, November 1990.

In order to respond to this question in a philosophically convincing way, we should, he says, not only ask what principles are advisable and applicable but should also try to find the principles that we will chose from an impartial point of view, intending to establish arrangements that are practical and desirable. Rawls' answer to his own question is that from an impartial perspective we choose to be governed by *two principles of justice*: the *first*, assuring basic liberal freedoms (freedom of thought, conscience, speech, assembly, universal suffrage, freedom from arbitrary arrest and seizure, the right to hold public office and personal property) usually called the *equal liberty principle*; the *second*, restricting the inequalities that subsist in society, also called the *difference principle*.

In section 46 of *Theory of Justice*,[6] Rawls formally enunciates both principles clearly, and I quote:

> *First Principle*
> 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.
> *Second Principle*
> Social and economic inequalities are to be arranged so that they are both:
>
> [a] of the greatest benefit to the least advantaged, consistent with the just savings principle and
>
> [b] attached to offices and positions open to all under the conditions of fair equality and opportunity.

Rawls presents both principles not at random but in a lexical order, recommending that both principles should be invoked in the appointed order and I quote again:

> *First priority rule*
> The principles of justice are to be ranked in lexical order and therefore the basic liberties can be restricted only for the sake of liberty. There are two cases:
>
> [a] a less extensive liberty must strengthen the total system of liberties shared by all;
>
> [b] a less than equal liberty must be acceptable to those with the lesser liberty.

6. John Rawls, *Theory of Justice* (revised edition), Harvard University Press, Cambridge, Massachusetts, 2000, p. 266.

Second priority rule

The second principle of justice lexically comes before the principle of efficiency and to that of maximizing the sum of advantages; and fair opportunity is prior to the difference principle. There are two cases:

[a] an inequality of opportunity must enhance the opportunities of those with the lesser opportunity;

[b] an excessive rate of saving must on balance mitigate the burden of those bearing this hardship.

This means that the second principle of justice directed against inequalities and discrimination lexically comes before the idea of "maximisation of the sum of advantages". The said sum is chosen by utilitarians as the definitive principle in the search for justice in any liberal society and follows a very simple idea: what satisfies the majority satisfies the criteria of "just" or, in other words, what meets the interest of the majority is the embodiment of Good. It also means that the sub-principle of *just equality of opportunities* has a clear priority over the sub-principle of *major benefit to the least advantaged citizens.*

The general conception of justice designed by Rawls in *Theory of Justice as Fairness*, including these two crucial principles, is so relevant that its primary social good—freedom and opportunity, income and wealth, and the basis of self-respect—should be respected equitably, unless the inequality of all or some of these primary elements of social good would benefit the least advantaged.

The *difference principle* prevents the poor from falling—even into a safety net—as long as it is possible to raise their life prospects higher. The principle of fair equality of opportunities presumes careers open to talent and merit, but also presumes a compensatory education and limits on economic inequalities so that "in all sectors of society there should be roughly equal prospects of culture and achievement for everyone similarly motivated and endowed."

The dual line of criticism against John Rawls' universal vision of social justice—based on a blind, reasonable, elevated appreciation of the conflict of interests—came subsequent to the publishing of his book in 1972. It came both from the right and the left.

Classical liberals (or *libertarians*), such as Robert Nozick, criticised Rawls violently for not counting the freedom to appropriate the fruits of one's own labour as among the basic

liberties, but mostly for diverging from the classic liberal view of assigning distribution to the markets and deserving individuals.[7] Others even said that Rawls has compromised with the socialists[8] and that through the backdoor he was allowing the heavy boot of the state to interfere in the economy, suppress individual liberties and shake freedom of accumulation.

Communitarians attacked Rawls' abstract universalism, saying it was unrealistic. Michael Walzer argued in a famous book, *The Spheres of Justice*,[9] that justice could only be local, parochial, and dependent on the shared conceptions of an historical and historically based community. Michael Sandel stressed that Rawls' theory rested upon a mistaken and incoherent conception of people as unencumbered by shared, socially given ("constitutive") ends.[10] In his *Dewey Lectures*,[11] Rawls denied that his doctrine presupposes any distinctive metaphysical condition of a person. As a political rather than a metaphysical doctrine, a *Theory of Justice* aimed to achieve an overlapping consensus among citizens of a pluralistic society which would, definitively, differ in their religious commitments and metaphysical conceptions. Because only a totalitarian or a theocratic state—in which *Theory of Justice* would be clearly unfeasible—will force its subjects to conform to an official, comprehensive doctrine or an official religion.

The line of attack by the communitarians was, nevertheless, more demolishing than that of the core liberalists such as Nozick. Rawls was only partly able to repel the blow. The *dual principle of justice* was designated by different parties with the task to choose the more advantageous principles of justice to be applied to the real world. In this hypothetical situation, which is inspired by the philosophical tradition of contractualists such as Hobbes or Locke, the parties were put behind a *veil of ignorance*. They would not know their identity, their natural talents, their moral views, nor their place in the social order. They would not even know their *interests* in order that they would be able, impartially, behind the veil, to find the principles of justice that are not biased in their own favour. They would only

7. Robert Nozick, *Anarchy, State and Utopia*, Oxford, Blackwell, 1974.
8. Robert Benewick and Philip Green, *The Routledge Dictionary of Twentieth-Century Political Thinkers*, London, Routledge, 2000, p. 209.
9. Michael Walzer, *Spheres of Justice*, Basic Books, New York, 1983.
10. Michael Sandel, *Liberalism and the limits of Justice*, Cambridge, University Press, 1982.
11. Included in *John Rawls: Collected Papers*, S. Freeman ed., Harvard University Press, Cambridge, 1999.

know that certain *primary social goods* are necessary to live a good life. *The aim*—says Rawls—*is to use the notion of pure procedural justice as a basis of theory.* Though presenting his theory as politically motivated and not metaphysically orientated, Rawls conceded its working would have been identical to the one used by Kant to construct his doctrine of the *categorical imperative.* He remembered that, when Kant tells us to test our maxim by considering what would be the case were it a universal law of nature, he must suppose that we do not know our place within this imagined system of nature. (12)

Within the limits of the above restrictions preventing the partners from acting in particular ways to satisfy their own egoistic interests, they were asked which conceptions of justice they would choose to be governed by when returning to the "real world". They could take their options from a list of five moral theories: intuitionism, utilitarianism, perfectionism, egoism, and *justice as fairness.* Considering the different pros and cons, Rawls argues that the partners would choose *justice as fairness* against the others because within the *original position* they would adopt a *maxi-min* strategy. This strategy would enable them to establish a hierarchy for their preferences by the *worst* possible outcome, and adopt the one for which the worst outcome would be preferable to the others' worst outcomes. According to Rawls, the partners in the said *Original Position* would adopt a pessimistic and very conservative approach (like the *maxi-min* strategy) and look for the least-bad solution because they were approached as rational-oriented agents leading the other options to the most intolerable outcomes.

Rawls' argument seems, at this point, rather unconvincing and one main objection would be to ask what guarantees we have that, in the *Original Position,* partners would act as rational agents and not be influenced by the remaining traces of their interests and identities. (13) Some of Rawls' critics also pointed out that maximizing the expected utility would be a preferable and "workable" strategy than the *maxi-min.*

The *Theory of Justice* offers principles derived from a hypothetical social contract to govern an ideal society. Rawls' theory fails somehow

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12. John Rawls, *ibid.*, note 11, section 24 [The Veil of Ignorance]. See about the "false" neutrality of the veil of ignorance, Thomas Nagel, "Rawls On Justice," in N. Daniels *Reading Rawls,* Stanford University Press, Stanford, 1989.
13. Only by an enormous abstraction could one accept as a valid argument that, in this hypothetical situation, the partners were deprived of every trace of their self. Don't we already bring by birth some part of our parental heritage and psychologic alabilities?

to enlighten us on the obligations citizens and government officials have in flesh-and-bone societies. In his most recent writings, Rawls tried to respond, in certain way, to this line of criticism. In *Political Liberalism*, a work of 1993,[14] Rawls abandoned every pretension to universalism and reinterpreted his theory as a reflection of the traditions of the contemporary liberal democratic state. *Justice as Fairness* is presented, however, not as an ideal moral comprehensive theory but as a political conception that could propitiate an *overlapping consensus* in a society marked by moral differentiation and disagreement about a preferable conception of good and happiness. This overlapping consensus could entail a certain degree of stability and social unity in a political society characterised by diversity, plurality and social richness.

According to the ordinary reading of Rawls' *Political Liberalism*, the intuitive ideas underlying his principles of justice are strictly *political*, which means they are independent of comprehensive philosophical or religious doctrines. The exponents of all reasonable comprehensive doctrines in a democratic society would be able to agree on a political conception of justice, something that would not be possible if everyone were to adhere to its metaphysical grounds as the foundation of a public agreement on justice.[15] The concept of justice as political is not a mere *modus vivendi*. It embodies the overlapping consensus by specifying the fair terms of the required terms of cooperation between citizens that are regarded as free and equal. This is the basis on which Rawls resolves the problem of political stability.

We already know that this consensus encompasses the concept of primary social goods: basic rights and liberties, powers and prerogatives of office, income and wealth, and the basis of self-respect. It also encompasses the "difference principle". Rawls argues that it is not simply a consensus of accepting a certain authority, or simply a compliance with certain institutional arrangements. He makes clear in *Political Liberalism* that it is valid "for all those who affirm the political conception to start from within their own comprehensive view and draw on the religious, philosophical and moral grounds it provides".[16]

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14. John Rawls, *Political Liberalism*, Columbia University Press, New York, 1993.
15. Robert Benewick and Philip Green, *ibid.*, pp. 210-1.
16. John Rawls, *Political Liberalism*, p. 147.

This means that comprehensive doctrines should be excluded from public deliberations on justice although they are, or are presumed to be, central to the private identity of citizens or communities.[17] The final purpose of Rawls is to formulate a doctrine—*political liberalism*—whose nucleus would be its theory of justice, legitimising political institutions that tolerate a diversity of moral and religious conceptions of good, and projects of life in a stable, precise society: the democratic society.

Rawls tells us that the ideas that structure his conception of justice are *latent* in society. These ideas are: the *central organising idea*, the *free citizenship idea* and the *idea of a well-ordered society*. The first departs from the presumption of "society as a fair system of cooperation over time, from one generation to the next". The second is the expression of the political society as a community of citizens, recognised as such. The third is that "a well-ordered society is a society effectively regulated by a conception of justice." Rawls seals the argument by alleging that this political conception has as its subject the basic structure of the society.[18]

Justice and Law

Part II of *Theory of Justice* describes the *basic structure* that "satisfies these principles and, by examining it, the duties and obligations to which they give rise." The citizen enriched with these principles of justice should be able to "judge the justice of legislation and social policies" and "must decide which constitutional arrangements are just for reconciling conflicting opinions of justice". Although one might believe that the political process is "a machine which makes social decisions when the views of representatives and their constituents are fed into it," "a citizen will regard some ways of designing this machine as more *just* than others."[19]

This remark is important and seems to point out that Rawls doesn't foresee a democratic society protected by a conception of *justice as fairness* as just limited to a certain procedural system of

17. This line of argument puts forward powerful challenges to our present-day societies. What about the comprehensive or religious doctrines that attack and undermine that overlapping consensus prevailing in a democratic society? Should they be outlawed if they overstep the limits of tolerance, with harmonious companionship between different ethnic or religious groups emerging from a liberal broad conception of pluralism? Has tolerance to tolerate the intolerants in a pluralistic society?
18. John Rawls, *Political Liberalism*, p. 14.
19. John Rawls, *Theory of Justice*, pp. 171-2.

elaborating laws and representing constituents. He bears in mind something more vital than this: to carry these beliefs to a system of legislation and compliance with the law.

On this point Rawls shows how the legal system is developing and putting into practice the agreed covenant: firstly, after adopting the principles of justice in the *Original Position*, the partners move to a constitutional convention where they have to decide upon the justice of political forms; secondly they design a system of constitutional powers for government; and thirdly they settle the basic rights of citizens. It is over this point that the veil of ignorance is partially lifted and they acquire the relevant general facts about their society and choose "the most effective just constitution, the constitution that satisfies the principles of justice and is best calculated to lead to just and effective legislation." [20]

Now, says Rawls, we come to the legislative stage, to take the next step in sequence, and that is and I quote:

> Justice of laws and policies is to be assessed from this perspective. Proposed bills are judged from the position of a representative legislator who, as always, does not know the particulars himself. Statutes must satisfy not only the principles of justice but also whatever limits are laid down by the constitution. By moving back and forth between the stages of constitutional convention and the legislature, the best constitution is found. [21]

Rawls considers it to be the main two constitutive elements of the basic structure. He considers the first not only as the enshrining of the fundamental liberties of the person and political liberties, but also the securing of a common status of equal citizenship while realising political justice; and the second as the framing of the political institutions.

In this construction, Rawls foresees some *division of labour* regarding an entitlement to the conception of justice within the constitutional and legislative process. He chooses the second part as the place that contains "the distinctions and hierarchies of political, economic and social forms, which are necessary for efficient and mutually beneficial social cooperation."

The last stage of this ongoing process of bringing justice as fairness to the real world would be the application of rules to

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20. *Ibid.*, pp. 172-3.
21. John Rawls, *ibid.*, p. 174.

particular cases by judges and administrators, and the following of rules by citizens. Rawls considers that the partners now have access to all facts and that all the upcoming problems (of embodying justice) are now laid down in the field of compliance theory in the context of the original position. We come here, within a society oriented towards consensual principles of justice, to consider the cardinal problem of subordination of citizens to positive law. The norms and statutes are just (or socially considered as such) because they are approved following a legitimate and constitutional procedure that is obeyed by the members of the community.

Rawls deals with the problem[22] in section 38 of *Theory of Justice*: "The Rule of Law". He says, first, that the conception of formal justice, the regular and impartial administration of public rules, becomes the rule of law applied to the legal system, being the regular and impartial administration of justice called "justice as regularity".[23]

The rule of law—he argues—is closely related to liberty. Departing from the notion of *legal system* and its connection with "justice as regularity", a legal system is "a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation." And then he adds, and I quote:

> When these rules are just, they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled. If the bases of these claims are unsure, so are the boundaries of men's liberties [...]. What distinguishes a legal system is its comprehensive scope and its regulative powers with respect to other associations. The constitutional powers that it defines generally have the exclusive legal right to at least the more extreme forms of coercion. [...] Given that the legal order *is a system of public rules addressed to rational persons*, we can account for the precepts of justice associated with the rule of law. These precepts are those that would be followed by any system of rules that perfectly embodied the idea of a legal system. This is not, of course, to say that existing laws necessarily satisfy these precepts in every case. Rather,

22. Less than satisfactory, I must add.
23. *Ibid.*, p. 207.

> these maxims follow from an ideal notion in which laws are expected to approximate, at the least for the most part.

So, for Rawls, a legal system is to be considered *just* if it embodies legitimate requirements of justice applied by skilful legislators in order to perform the perfect balance between expectations and realities. Laws envisage rational addressees who are able to understand the bargaining and reasoning beyond their drafting and accept them as expression of the power of regulation belonging to the state.

Rawls has already treated this point in section 34 ("Toleration and the common interest"): "granting all this, it now seems evident that in limiting liberty by reference to the common interest in public order and security, the government acts on a principle that would be chosen in the original position." And he adds: "the government's right to maintain public order and security is an enabling right, a right which government must have if it is to carry out its duty of impartially supporting the conditions necessary for everyone's pursuit of his interests and living up to his obligations as he understands them." [24]

The logic buried in this *rationale* seems to suggest that, if the laws approved in a well-ordered society are ostensibly unjust or contradictory to the general overlapping consensus (by, for instance, breaching the principle of freedom), citizens are entitled to resist them and to being exempted from their obligations of citizenship. [25] Its response to this problem is mixed and obscure and I quote:

> The point of thinking of a legal order as a system of public rules is that it enables us to derive the precepts associated with the principle of legality [...] One legal order is more justly administered than another if it more perfectly fulfils the precepts of the rule of law. It will provide a more secure basis for liberty and a more effective means of organising cooperative schemes. Yet, because these precepts guarantee only the impartial and regular administration of rules, whatever these are, they are compatible with injustice. [26]

Rawls deduces that "the principle of legality has a firm foundation in the agreement of rational persons to establish for themselves the

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24. *Ibid.*, p. 187.
25. See Andrew Sabb paper, supra.
26. *Theory of Justice*, p. 208.

greatest equality of liberty" and concludes that to be confident in the possession and exercise of these freedoms, *the citizens of a well-ordered society will normally want the rule of law to be maintained.* [27] Rawls considers that we can reach the same conclusion in conformity of behaviour because *it is reasonable to assume* that in a well-ordered society the coercive powers of government are to some degree necessary for the stability of social cooperation.

Although we share a common sense of justice and we want to accommodate to previous arrangements, we "may nevertheless lack full confidence in one another" and this may cause the scheme to break down. That climate gives only one way out: "the role of an authorised public interpretation of rules supported by collective sanctions is precisely to overcome this instability. By enforcing a public system of penalties, government removes the grounds for thinking that others are not complying with the rules." And he concludes: "for this reason alone, a coercive sovereign is presumably always necessary, even though in a well-ordered society sanctions are not severe and may never need to be imposed."

In this passage Rawls clearly assesses the need for a coercive system of sanctions within the legal system basing it on the principle of liberty itself. He puts aside the justification for the restriction of liberty arising from the greater good of some to be balanced against the lesser good of others as inconsistent with the priority of this principle. He also doesn't admit that a lesser liberty could be accepted as against the lesser good of others. So we must always be strict on the principle of liberty:

> Rather, the appeal has been the common good in the form of the basic equal liberties of the representative citizen [...] In applying the principle of legality we must keep in mind the totality of rights and duties that defines the liberties and adjust its claims accordingly. Sometimes we may be forced to allow certain breaches of its precepts if we are to mitigate the loss of freedom from social evils that cannot be removed, and aim for the least injustice that conditions allow. [28]

Rawls' prioritisation of the principle of liberty over any conception of public good pursued by a legitimate government in a legitimate democracy fades, in some way, against the abstractness

27. *Ibid.*, p. 211.
28. *Ibid.*, p. 213.

and generality of the norm, and places the compulsion of the legal system in a kind of a standstill.

Rawls doesn't accept the necessity of obeying the law to assure the cohesion of the legal system, nor the rule of law in the paradigm of a well-ordered society, dictated by his principles of justice. Although in ideal conditions we can start from the principle that we owe complete obedience to the law, in non-ideal conditions we should only assume a partial compliance, he argues.

The theory of *partial obedience* should, according to Rawls, deal with these questions: limiting its opposition to invoking the principles revealed by the ideal theory, and affirming obedience rather than treating, substantially, the problem of injustice. [29]

Taking as an example of this consciousness of an innate sense of justice, Rawls points to the case of *civil disobedience*. Rawls states that, although the natural duty of justice imposes on us *compliance with the law*, in a society imperfectly run, the continuous violation of the principle of liberty and exhaustion of the means to have its rights protected and its violations repaired could justify civil disobedience and, in certain severe conditions of repression, rebellion. [30]

It happens because the sovereign can make errors and society can be interpreted as a scheme of cooperation among equals; those injured by injustice need not submit. [31] Rawls foresees, with originality, civil disobedience as "one of the stabilising devices of a constitutional system, although, by definition, an illegal one". Resisting injustice within the limits of fidelity to the law serves to inhibit departures from justice and to correct them when they occur, he adds. A general disposition to engage in justified civil disobedience introduces stability into a well-ordered society, or one that is nearly just, he concludes. [32]

It would be plausible to question in what kind of society we may consider such tremendous pressure on the regulatory system of compliance and execution. Putting the emphasis on the *innate sense of justice* [rather than the duty to obey], Rawls takes us into a kind of a psychological trap. In allowing the principle of liberty to take

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29. See Samuel Freeman, "Congruence and the good of Justice," in Samuel Freeman ed., *The Cambridge Companion to Rawls*, Cambridge, Cambridge University Press, 2003, pp. 280-1.
30. *Theory of Justice*, p. 336.
31. See on this point Chandran Kukathis and Philip Pettit, *A Theory of Justice and its Critics*, Stanford University Press, 1990, pp. 60-70.
32. *Theory of Justice*, p. 336.

an enlarged primacy over any minimal or consensual conception of public good [enacted by the state], John Rawls deprives public institutions of the ability to act as social equilibrators, leaving it to each individual's conscience.

It seems clear that, in complex and multifunctional societies, such as we have nowadays, it would not be advisable to let each citizen be his or her own judge of legal compliance.

This is the reason why I name, above, Rawls' concept of the trade-off between justice and law as a kind of courtship, a wooing. Within John Rawls' world we seem to be in the presence of a couple, dating, with different ideas of wedlock and looking for a compromise. The female, the most romantic, is looking for the realisation of the most intimate dreams of happiness, intimacy, and, simply put, love. The male is looking for a workable compromise for a life together, and a wealthy and prosperous family. Both the one and the other look for the perfect quintessence of marriage but they suspect it is unachievable. So, when they grasp their compromise, they guess wrongly that they would be able to convince the other.

JOHN RAWLS was the most distinguished moral and political philosopher of our age. Initially isolated in the Anglo-American world of philosophy, preoccupied with problems of logic and language, Rawls played a major role in reviving an interest in the everlasting questions of the political philosophy debate. What makes society just? How is social justice related to each person's pursuit of a good and fair life? The influence of his ideas in our time are paramount and made these questions central to philosophy, and the arguments about justice, respect, liberty and dignity central to the political debate.

In the international sphere, a substantive moral theory of human rights has made its way into international law and into the practice of nations, embodying minimal levels of dignity and justice in standards, principles and norms that governments are invited to transfer to their constitutions and ordinary legislation. This repertoire of rights and government limitations is rooted in Rawls' conception of *justice as fairness.* [33] At a national level, the procedural

33. Baogang He, "New moral foundations of Chinese democratic institutional design," in Suisheng Zhao ed., *China and Democracy: Reconsidering the Prospects for a Democratic China*, New York, Routledge, 2000, p. 94.

justice envisioned by Rawls has an important role helping us to arrive at an outcome that is likely to be fair, whatever it is, provided that the procedure has been properly followed. [34] It would be a daily effort. However, the legitimacy of governments and rulers does not arise from when they are elected or reconfirmed, but in the way they are able to govern by consent rather than by force or demagogy.

Rawls' political conception of ethics apprehends the fundamental problems leading up to a moral foundation for sound politics and better political arrangements for society. The problems are common to the West and to the East. They are, in my view, central to the generational debate in China and to the trends China faces in the years ahead. China would not be able to live in a nutshell dissociated from the world. China is an intimate part of the changes the world is going through at the beginning of the twenty-first century. There is, after all, as some Chinese scholars argue, a parallel moral ground in the Mencius concept of the right to rebel against a tyrannical ruler which is mostly identical to Locke's right to rebel. [35] But the debate needs to be taken out of its nutshell. [36] Human dignity is not negotiable in any context. It is the basic cement of our humanity, our nature as human beings. In this sense it is universal, wide-ranging, all-inclusive.

A public morality based on individual rights is the only moral background design acceptable for reliable institutions in any wealthy and balanced society. So, even if we move away from Rawls, especially from the most unsatisfactory aspects of his doctrine, we should make a compromise with its thought because it is illuminating, moderate and balanced. Surely this is a sign of his works' depth and enduring significance?

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34. *Ibid.*, p. 99.
35. *Ibid.*, p. 103.
36. See Dr. Zhao Dunhua, "Rawls in China," communication presented at the Roundtable of Asian-Australian Ethics (1996) in www.hku.hk/philodep/ch/rights.htm; BaoGang He, "Confucianism versus Liberalism over minority rights: a critical response to Will Kymlicka," in www.china-review.com/zpym/execute.asp; Gu Su, "New Liberalism in Contemporary China and Western Values," Nanjing University, in www.luiss.it ; Stephen C. Angle, "Human Rights and Political Participation," *Beijing International Conference on Democracy* (April 2004), in http://sangle.web.wesleyan.edu.