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Freedom and equality as necessary constituents of a liberal democratic state

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Chapter 2. A theory of rationality

2.1 The first theory to be discussed on the basis of the previous chapter is that of John Rawls, who qualifies rationality as the crucial feature to serve as the criterion to be granted important rights. What he says qualifies as an example of the first of the two positions identified in section 1.4. As was indicated in the introduction, Rawls's work merits attention here on account of the fact that the question whose interests are to be considered is an important issue for him. For present purposes, it is not necessary to present an overview of Rawls's views on justice. Only the foundation of his theory will be relevant here. Rawls appears to adhere to a basic equality, stating: "[...] since political power is the coercive power of free and equal citizens as a corporate body, this power should be exercised, when constitutional essentials and basic questions of justice are at stake, only in ways that all citizens can reasonably be expected to endorse in light of their common human reason."⁵¹

The notion of 'free and equal citizens' plays a pivotal role throughout Rawls's work. He makes it clear what this means in the following: "I have assumed throughout, and shall continue to assume, that while citizens do not have equal capacities, they do have, at least to the essential minimum degree, the moral, intellectual, and physical capacities that enable them to be fully cooperating members of society over a complete life."⁵²; "To approach [the question of the basic liberties and their priority], let's sum up by saying: fair terms of social cooperation are terms upon which as equal persons we are willing to cooperate in good faith with all members of society over a complete life. To this let us add: to cooperate on a basis of mutual respect."⁵³

In his major work, *A Theory of Justice*, Rawls ascertains that the principles of justice are accepted by "[...] free and rational persons concerned to further their own interests [...]."⁵⁴ Yet this motivation is not decisive, according to Rawls. Altruism is only motivating to a limited degree,⁵⁵ but since one does not know one's own position, individual interests are not decisive: "The veil of ignorance prevents us from shaping our moral view to accord with our own particular attachments and interests."⁵⁶ An egoist is, by contrast, unable to view things from a different perspective than that of his own interests.⁵⁷

⁵¹ J. Rawls, *Political Liberalism*, Lecture IV, pp. 139, 140.

⁵² J. Rawls, *Political Liberalism*, Lecture V, p. 183.

⁵³ J. Rawls, *Political Liberalism*, Lecture VIII, pp. 302, 303.

⁵⁴ J. Rawls, *A Theory of Justice*, § 3 (p. 10); in chapter 3, Rawls phrases this as follows: "[the first principles of justice] are those which rational persons concerned to advance their interests would accept [...]." *A Theory of Justice*, § 20 (p. 102).

⁵⁵ J. Rawls, *A Theory of Justice*, § 43 (p. 248).

⁵⁶ J. Rawls, *A Theory of Justice*, § 78 (p. 453).

⁵⁷ J. Rawls, *A Theory of Justice*, § 86 (p. 497).

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2.2 The problem seems to be that Rawls clings to too narrow a notion of ‘egoism’ here. Under the veil of ignorance these special interests are, indeed, not decisive, but it must be asked *why* one would be motivated to accept the principles of justice in the first place. Someone who opts for the principles of justice from behind the veil of ignorance merely does this because he is ignorant of his position, at least with respect to the second principle (which concerns social and economic equalities).⁵⁸ One may phrase it somewhat irreverently by saying that one acts by purchasing a sort of insurance: should one not find oneself in the most desirable place, the consequences won’t be grave.

The comparison with an insurance is not inappropriate, since the veil is itself part of the model. If one should, in contrast to the model’s premise, have access to relevant information pertaining to one’s position, and this would prove to be a relatively favorable one, the need to agree with the principles of justice would be removed, and it would even be contrary to one’s interests to agree with them, since one would thereby be forced to relinquish some of one’s rights without receiving something in return with enough value to compensate for the loss. This is precisely the situation someone faces when he has paid the premium for his insurance and the event against which he has insured himself has not taken place. He would, with the benefit of hindsight, never have insured himself. He (at the moment he insures himself) and the person behind the veil of ignorance share the same ignorance of their situation. Should one agree with the principles of justice from some sort of insight into what is ‘just’, the veil of ignorance would be a redundant attribute; the fact that it is not proves that such a consideration is not the basis for agreeing with the principles of justice.

Rawls does argue that egoism is not decisive on account of the fact that there is a difference between the situation behind the veil of ignorance, where the parties are characterized as mutually disinterested, and ordinary life: “In practical affairs an individual does have a knowledge of his situation and he can, if he wishes, exploit contingencies to his advantage. Should his sense of justice move him to act on the principles of right that would be adopted in the original position, his desires and aims are surely not egoistic. He voluntarily takes on the limitations expressed by this interpretation of the moral point of view.”⁵⁹ In this case, however, it would be unclear *why* the individual would opt for the ‘right’ principles (just as someone who is sure that some event will not take place, or won’t affect him, won’t pay an insurance premium to be insured against such an event).

2.3 One may try to evade the problems by stressing that the principles only apply to ‘moral’ persons, a strategy that Rawls adopts. He states that “[...] it is precisely the moral persons who are entitled to equal justice. Moral persons are distinguished by two features: first they are capable of having (and are assumed to have) a conception of their good (as expressed by

⁵⁸ J. Rawls, *A Theory of Justice*, § 46 (p. 266).

⁵⁹ J. Rawls, *A Theory of Justice*, § 25 (p. 128).

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a rational plan of life); and second they are capable of having (and are assumed to acquire) a sense of justice, a normally effective desire to apply and to act upon the principles of justice, at least to a minimum degree.”⁶⁰

It is not surprising, in this line of thought, that the behavior towards animals⁶¹ is no object of the principles of justice.⁶² Such a perspective might be defended by pointing out that animals are *de facto* unable to be parties to any agreement⁶³ (forgoing here rudimentary ways of living together in which an implicit ‘agreement’ may be said to exist, e.g., between a dog and its owner). This may be a legitimate reason not to exclude rationality from the items about which one lacks knowledge behind the veil of ignorance. After all, if rationality itself were one of those items, the entire thought experiment would not even get off the ground, so to speak, since rational agents are required for such an experiment in the first place.

One must, however, be careful not to confuse this given with the claim that rationality would itself provide a ground to grant certain rights. Such a stance may be taken, but must then be argued independently. Furthermore, the thought experiment easily leads to the unwarranted privation of rights from animals compared to people who are unable, just as animals are, to agree with the principles of justice, namely cognitively impaired people.⁶⁴ The question is justified whether there is room in Rawls’s model to defend that in the case of ‘perfect procedural justice’, there would be “[...] an independent criterion for what is a fair division, a criterion defined separately from and prior to the procedure which is to be followed.”⁶⁵

There is a clear limitation to the veil of ignorance: “The parties arrive at their choice together as free and equal rational persons knowing only that those circumstances obtain which give rise to the need for principles of justice.”⁶⁶ So there really is no complete ignorance: one already knows that one will share a society with others that are free and equal to oneself. If that same limitation is subsequently used once the veil is lifted, and differences between human beings and animals are allowed, the circularity is obvious: one has introduced a standard to distinguish between these beings behind the veil and applies the

⁶⁰ J. Rawls, *A Theory of Justice*, § 77 (p. 442).

⁶¹ I will use ‘animal’ in the sense of non-human animal, unless specified otherwise.

⁶² J. Rawls, *A Theory of Justice*, § 3 (p. 15), § 77 (p. 441). Cf., though in a different context, J. Fichte, *Das System der Sittenlehre nach den Prinzipien der Wissenschaftslehre*, § 22 (p. 246): “Wie es in Beziehung auf die vernunftlose Natur keine Rechte gibt, eben so wenig giebt es in Beziehung auf sie Pflichten.” (“Just as there are no rights regarding nature, being devoid of reason, there are no duties with regard to it.”)

⁶³ Cf. Th. Hobbes, *Leviathan*, Ch. 14 (p. 97): “To make Covenants with brut Beasts, is impossible; because not understanding our speech, they understand not, nor accept of any translation of Right; nor can translate any Right to another: and without mutuall acceptance, there is no Covenant.”

⁶⁴ Cf. P. Singer, *Practical Ethics*, pp. 18, 19. Rawls does not discuss the position of such people in detail (and does not include them in his assumption (cf. note 52, *supra*)), and even deals with *physical* impairments only in passing (J. Rawls, *Political Liberalism*, Lecture V, p. 184).

⁶⁵ J. Rawls, *A Theory of Justice*, § 14 (p. 74).

⁶⁶ J. Rawls, *A Theory of Justice*, § 39 (p. 222).

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same standard after it has been lifted.⁶⁷ The issue is perhaps most patently clear in the following: “That moral personality suffices to make one a subject of claims is the essential thing.”⁶⁸ When Rawls says: “The minimum capacity for the sense of justice insures that everyone has equal rights.”,⁶⁹ the reference to ‘everyone’ is restricted in such a way that the ‘equality’ means that those who are able to agree with the principles of justice are at the same time those who are entitled to the rights based on them.

Rawls initially clings to a ‘neutral’ definition of ‘rationality’, according to which a rational person ranks his options depending on how well they further his purposes and seeks an optimal satisfaction.⁷⁰ Such an outlook would be compatible with purposes and the concomitant plans to achieve them that would, presumably, not be considered ‘moral’,⁷¹ such as someone’s plan to murder his spouse to collect life insurance. Further on, however, Rawls seems to smuggle in a ‘moral’ notion in stating the following: “[...] to establish [the principles of right] it is necessary to rely on some notion of goodness, for we need assumptions about the parties’ motives in the original position.”⁷² Elsewhere, Rawls makes it clear that he considers the parties’ conduct as constrained by the requirements of pure practical reason, seeking a correspondence with Kant’s theory,⁷³ revising his earlier position that the theory of justice should be considered a part of the theory of rational choice, this theory rather being “[...] itself part of a political conception of justice, one that tries to give an account of reasonable principles of justice.”⁷⁴ (The relevance of the ‘moral’ aspect of reason will be fleshed out in chapter 5, when Kant’s views will be considered.)

Rawls’s remark that assumptions about the parties’ motives in the original position are needed seems to me to be correct, but to conclude from that to the necessity of a notion of ‘goodness’, however ‘thin’ Rawls, admittedly, acknowledges this to be,⁷⁵ is a *non sequitur*,

⁶⁷ Lloyd Thomas reaches a similar conclusion when he remarks that: “[...] there is a problem about how it is possible to avoid drawing back the veil, as one hardly can remain ignorant of one’s capacities for rational deliberation in the original position.” “Equality Within the Limits of Reason Alone”, pp. 549, 550.

⁶⁸ J. Rawls, *A Theory of Justice*, § 77 (p. 443). In order to paint a representative picture of Rawls’s position, it must be added that he leaves it open whether moral personality is, besides a sufficient condition for being entitled to equal justice, a necessary condition (*A Theory of Justice*, § 77 (pp. 441, 442)).

⁶⁹ J. Rawls, *A Theory of Justice*, § 77 (p. 446).

⁷⁰ J. Rawls, *A Theory of Justice*, § 25 (p. 124).

⁷¹ I say ‘presumably’, since I suspend judgment about such matters altogether here.

⁷² J. Rawls, *A Theory of Justice*, § 60 (p. 348). It is also clear from the following: “[...] moral personality is characterized by two capacities: one for a conception of the good, the other for a sense of justice. When realized, the first is expressed by a rational plan of life, the second by a regulative desire to act upon certain principles of right.” (*A Theory of Justice*, § 85 (p. 491)).

⁷³ J. Rawls, *Justice as Fairness. A Restatement*, § 23 (p. 81). The parallel with Kant’s work is, incidentally, already clear in *A Theory of Justice* (e.g., § 40 (p. 221-227)).

⁷⁴ J. Rawls, *Justice as Fairness. A Restatement*, § 23 (p. 82). In addition, the account of ‘rationality’ in *Political Liberalism* is relatively complex; means-ends reasoning and self-interest do not exclusively constitute it (Lecture II, pp. 50, 51).

⁷⁵ J. Rawls, *A Theory of Justice*, § 60 (p. 348).

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unless one would grant ‘goodness’ to be deprived of its meaning,⁷⁶ or at least identify it with a non-‘moral’ quality (such as desirableness), thus rendering the issue moot. Rawls does speak here of ‘the principles of right’, but this does not get him off the hook, since ‘the right’ is itself taken to be of a ‘moral’ nature (although Rawls does not, as he himself states, simply adopt the traditional concept of ‘right’⁷⁷): “The intuitive idea is this: the concept of something’s being right is the same as, or better, may be replaced by, the concept of its being in accordance with the principles that in the original position would be acknowledged to apply to things of its kind.”⁷⁸ That means that a *petitio principii* is committed, since it is concluded that there must be a notion of ‘goodness’ on the basis of the ‘moral’ ‘principles of right’.

2.4 The choice Rawls does not but should make is between (1) acknowledging that rationality does not imply a ‘moral’ viewpoint and (2) arguing why it does (if the latter option is available at all, of course). He provides the example of an experienced climber who gives advice to another with regard to the equipment he should use and the route he should follow; “He wants to know what we think is rational for him to do.”⁷⁹ This has nothing to do with morality from the point of view of the prospective climber: he simply wants to act in the safest way possible. From the perspective of the experienced climber, one may say that ‘morality’ *is* involved: “Climbers [...] have a duty of mutual aid to help one another, and hence they have a duty to offer their considered opinion in urgent circumstances.”⁸⁰ However, it is not clear what the basis of such an (alleged) duty would be (it would not be a *legal* duty, in any event, as such an explanation would unnerve the premise of the account, since the climber merely acts as he should, in such a case, because he wishes to avoid punishment).

As the quote above (note 78, *supra*) shows, Rawls explicitly refers to an ‘intuitive idea’, but this is not sufficient. Such an appeal to intuition is not compelling, and is perhaps a sign that the argument cannot be pursued to a satisfactory degree.⁸¹ Perhaps such an appeal will – in the end – be inevitable; even a solid field of research such as mathematics must resort to this (most expressly when it comes to the acceptance of its axioms) lest it be

⁷⁶ Whether it has a meaning at all is not an issue here, as this would result in a meta-ethical analysis that would mean too great a detour to justify, given the confines of this inquiry.

⁷⁷ J. Rawls, *A Theory of Justice*, § 18 (p. 95).

⁷⁸ J. Rawls, *A Theory of Justice*, § 18 (p. 95).

⁷⁹ J. Rawls, *A Theory of Justice*, § 62 (p. 356).

⁸⁰ J. Rawls, *A Theory of Justice*, § 62 (p. 357).

⁸¹ MacIntyre puts it, somewhat more poignantly, as follows: “[...] the introduction of the word ‘intuition’ by a moral philosopher is always a signal that something has gone badly wrong with an argument.” *After Virtue*, p. 69. A radical stance in this regard is taken by Cappelen, who argues that philosophers don’t even genuinely rely on intuitions (*Philosophy without Intuitions*, e.g., pp. 3, 18, 115).

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confronted with an infinite regress. That does not mean, though, that it should be left in place if alternatives are available that provide a more compelling account.

2.5 An alternative would be to take ‘rationality’ to have a limited scope (and the one with which Rawls initially seems to concur), as a faculty which is focused on the non-‘moral’⁸² goal of obtaining the most desirable outcome in the long term.⁸³ (The phrase ‘in the long term’ must be added here to accommodate the aspect of rationality; without it, the behavior of an animal such as a cat, which presumably acts on instinct,⁸⁴ would be included.) Hobbes’s account may, perhaps, be said to be somewhat crude in some respects, but as a starting point it has its merits, being limited to premises that can be verified and not resorting to vague notions that cannot find approval from those who are willing and able to analyze matters critically and consistently.

Hobbes’s definition is the following: “[...] REASON, [when wee reckon it amongst the Faculties of the mind], is nothing but *Reckoning* (that is, Adding and Subtracting) of the Consequences of generall names agreed upon, for the *marking* and *signifying* of our thoughts [...]”⁸⁵; “[...] deliberation is nothing else but a weighing, as it were in scales, the conveniences, and inconveniences of the fact that we are attempting; where, that which is more weighty, doth necessarily according to its inclination prevaile with us.”⁸⁶ Incidentally, Hobbes does not seem to distinguish between ‘reasonable’ and ‘rational’ (as Rawls does⁸⁷), as is clear from the following quote, in which he uses them interchangeably: “The Definition of the *Will*, given commonly by the Schooles, that it is a *Rationall Appetite*, is not good. For if it were, then could there be no Voluntary Act against Reason.”⁸⁸ An analysis of the consequences of such an outlook, which leads, I think, to the conclusion that no ‘moral’ standards can be found, must be forgone here.⁸⁹ In any event, I will not distinguish between ‘rational’ and ‘reasonable’ in this inquiry, if only because such a distinction is not necessary here.

⁸² Which is something else than ‘immoral’. It simply means that ‘morality’ is not an issue here.

⁸³ This is merely a working definition; as Posner rightly observes, the word ‘rational’ lacks a clear definition (“The Law and Economics Movement”, p. 1).

⁸⁴ If one considers the behavior of the relatively developed animals, the notion of ‘rationality’ becomes even harder to define than is the case when one limits oneself to human beings. There may, in addition, be a fine line between instinct and rationality. Needless to say, these are issues that cannot be worked out here.

⁸⁵ Th. Hobbes, *Leviathan*, Ch. 5 (p. 32). He also puts it, even more poignantly, as follows: “In summe, in what matter soever there is place for *addition* and *subtraction*, there also is place for *Reason*; and where these have no place, there *Reason* has nothing at all to do.” *Leviathan*, Ch. 5 (p. 32).

⁸⁶ Th. Hobbes, *De Cive* (the English version), Ch. 13, § 16 (p. 166).

⁸⁷ J. Rawls, *Political Liberalism*, Lecture II, pp. 50, 51; Lecture VIII, p. 305; *Justice as Fairness. A Restatement*, § 2 (p. 6), § 23 (p. 81).

⁸⁸ Th. Hobbes, *Leviathan*, Ch. 6 (p. 44).

⁸⁹ Hobbes’s own position is inquired in J. Doomen, “A Systematic Interpretation of Hobbes’s Practical Philosophy”, pp. 470-476.

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By defining ‘rationality’ (and thereby ‘reasonableness’) as I have done, I have not, of course, precluded the possibility of clinging to a (different) conception of ‘reason’, which would enable one to distinguish between reason in the sense in which I have used it (i.e., as a mere instrument to reach a desired end) and reason as a ‘moral’ faculty. (If such a strategy *were* permitted, nearly every philosophical issue would immediately be solved, but not, presumably, in a satisfactory way.) All that matters here is that if reason is indeed to be considered a (mere) instrument, there would seem to be no ground to treat those that are endowed with it in any special way vis-à-vis those (including animals) that are deprived of it. Whether the other sort of reason (i.e., the ‘moral’ faculty) may provide such a basis will be inquired in chapter 5.

2.6 I mainly criticized Rawls in the foregoing. That is not to say that I consider his account to be without merit. This lies primarily, however, in a domain I have not explored since it is not part of the research question, namely, the distribution of economic inequality, which is not a matter of formal equality, which is my focus here. Related to this, the fact that Rawls presents a lexical order for the principles of justice, according to which (political) liberties are not to be restricted for anything else than (other) (political) liberties⁹⁰ (so not for equalizing welfare, for example), does not conflict with my account, since my account is concerned with formal equality, the object of which is (*inter alia*) political liberty. As I have inquired into the basic equality that lies at the root of distribution issues, no conflict arises here, since, absent the inquiry, no such conflict *can* arise. It does mean that there is an overlap between formal and material equality insofar as political liberties are considered to be the result of a policy to realize the equal opportunity to be politically active (resulting in political liberty), but that is still far from what is usually taken to be the core of economic equality.

2.7 Summary and relation to chapter 3

In Rawls’s theory, there is a focus on rationality as the pivotal feature to consider beings equals and to treat them equally. The main problem is that the import of this feature is not fleshed out; in particular, it remains unclear whether rationality is a ‘moral’ characteristic. A similar approach is found in Kant’s account of – practical – reason; Kant *does* make the explicit choice that is lacking with Rawls. Before turning to this alternative, however, Dworkin’s and Kateb’s positions will receive attention, in order to deal with the two elemental alternatives – *viz.*, the lack of any particular feature as a (purportedly) decisive one and rationality as the essential feature – in the proper order.

⁹⁰ J. Rawls, *A Theory of Justice*, § 8 (pp. 37, 38), § 46 (p. 266).

