The Problem of Political Legitimacy: A Comparative Analysis of the Theories of John Rawls and Seyla Benhabib

by
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Declaration

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Abstract:

The purpose of this thesis is twofold: In the first place, I aim to define the main features of the problem of political legitimacy – understood as the normative justification of a governing regime – together with the criteria which a convincing theory of political legitimacy must fulfil. In the second place, I evaluate two influential theories of political legitimacy in light of these criteria: John Rawls's liberal principle of legitimacy and Seyla Benhabib's theory of deliberative democracy. My conclusion is that the latter provides us with a better standard for evaluating and justifying political rule than the liberal model developed by Rawls. In order to reach this conclusion, I begin by interrogating the concept of political legitimacy generally. I argue for a normative rather than a purely descriptive understanding of political legitimacy, give a brief overview of the historical development of the question of legitimacy and then turn my attention to the current state of the debate about the normative justification of political authority. From the preceding investigation, I extrapolate five criteria that a convincing account of political legitimacy must fulfil. Such an account must: 1) provide a coherent method for *evaluating* – as opposed to merely *describing* citizens' beliefs about – any particular government; 2) address the problem of plurality; 3) provide normative grounds for the authority of a governing regime; 4) account of the relationship between such authority and citizens' duties/obligations; and lastly 5) incorporate the pursuit of stability. With these five criteria in hand, I move on to the evaluation of Rawls's and Benhabib's theories of political legitimacy. Chapter Two is devoted to Rawls's position. After explaining the main tenets of this position, I evaluate his theory in light of the five specified criteria, and conclude that his account of political legitimacy ultimately fails to account for genuine plurality in so far as he seeks to limit political conflict to a very small and tightly defined public sphere. Chapter Three is devoted to Benhabib's theory of deliberative democracy, and follows much the same structure as the previous chapter. I first set out the main tenets of Benhabib's theory, and then evaluate this theory in light of the specified criteria. I conclude that the theory of deliberative democracy provides us with a more convincing theory of political legitimacy than the liberal model espoused by Rawls, for three reasons: 1) contrary to Rawls's attempt to minimize, contain and ultimately remove fundamental disagreement within our political lives, Benhabib takes the deep and dividing disagreements among citizens seriously, and develops a theory of political legitimacy that is able to incorporate these

disagreements within a more expansive public sphere; 2) as a direct result of the previous feature, the theory of deliberative democracy is better able to account for the relationship between political authority and citizens' duties and obligations, and hence 3) resolves the problem of stability in a way that Rawls's liberal model of political legitimacy is unable to do.

Opsomming:

Die tesis het twee doelwitte: Eerstens wil ek die hoofeienskappe van die probleem van politieke legitimiteit – bedoel as 'n normatiewe regverdiging van 'n regerende regime – definieer, asook die kriteria wat 'n oortuigende teorie van politieke legitimiteit moet vervul. Tweedens evalueer ek twee invloedryke teoretici van politieke legitimiteit aan die hand van hierdie kriteria: John Rawls se liberale prinsiep van legitimiteit en Seyla Benhabib se onderhandelde demokrasie. My gevolgtrekking is dat laasgenoemde 'n beter standaard vir die evaluering en regverdiging van politieke regering verskaf as Rawls se liberale model. Om tot hierdie gevolgtrekking te kom, begin ek deur die konsep van politieke legitimiteit in die algemeen te bespreek. Ek stel die argument vir 'n normatiewe eerder as 'n suiwer beskrywende begrip van die konsep, dan verskaf ek 'n kort oorsig van die historiese ontwikkeling van die vraag van politieke legitimiteit en daarna fokus ek op die huidige stand van die debat oor die normatiewe regverdiging van politieke outoriteit. Afgelei uit die voorafgaande ontleding ontwikkel ek vyf kriteria wat 'n oortuigende weergawe van politieke legitimiteit moet vervul. So 'n weergawe moet: 1) 'n koherente metode vir die *evaluering* – teenoor blote beskrywing – van burgers se sienings oor 'n spesifieke staat verskaf; 2) die probleem van pluralisme aanspreek; 3) normatiewe gronde vir die outoriteit van 'n regerende regime verskaf; 4) rekenskap gee van die verhouding tussen so 'n outoriteit en die burgers se pligte/verpligtinge; en laastens 5) die strewe na stabiliteit inkorporeer. Met hierdie vyf kriteria in gedagte, beweeg ek na die evaluering van beide Raws en Benhabib se teorië oor politieke legitimiteit. Hoofstuk Twee handel oor Rawls. Nadat ek die hoofeienskappe van sy posisie verduidelik, evalueer ek sy teorie aan die hand van die vyf kriteria en kom tot die gevolgtrekking dat hy nie daarin slaag om werklike pluralisme ernstig op te neem nie, omdat hy politieke konflik tot 'n baie beperkte en eng-gedefinieerde openbare sfeer beperk. Hoofstuk Drie handel oor Benhabib se teorie van onderhandelde demokrasie en volg dieselfde struktuur as Hoofstuk Twee. Ek begin deur eerstens die hoofeienskappe van die teorie te verduidelik en daarna wend ek my tot die evaluering van die teorie aan die hand van die vyf kriteria. Ek kom tot die gevolgtrekking dat onderhandelde demokrasie 'n meer oortuigende teorie van politieke legitimiteit is as die liberale posisie, om drie redes: 1) teenoor Rawls se poging om fundamentele meningsverskille te minimaliseer en uiteindelik uit ons politieke lewens te verwyder, neem Benhabib fundamentele meningsverskille ernstig op en ontwikkel 'n

teorie van politieke legitimiteit wat die meningsverskille in 'n groter openbare sfeer kan inkorporeer; 2) as 'n direkte gevolg van die vorige punt is onderhandelde demokrasie beter in staat om rekenskap te gee van die verhouding tussen politieke outoriteit en burgers se pligte en verpligtinge en kan daarom 3) die probleem van stabiliteit oplos op 'n wyse wat Rawls se model van politieke legitimiteit nie in staat is om te doen nie.

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Introduction

Why should citizens of a democracy, who regard themselves as equals, do as their government tells them? How is it that a government comprised of equals, governing over equals, may impose its authority and obligations or duties on its citizens? These questions lie at the heart of the problem of political legitimacy. The problem of legitimacy is not a new one: "[S]ince Plato and Aristotle, the idea if not the term legitimacy has always had a primary importance in political reflection" (Cotta (1967), quoted in Stillman (1974: 33)). And it is clear that it still does: Nozick (1974: 4) refers to the question of legitimacy as "the fundamental question" of political philosophy.

According to Buchanan (2002: 689-690), "an entity has political legitimacy if and only if it is morally justified in wielding political power, where to wield political power is to attempt to exercise a monopoly, within a jurisdiction, in the making, application and enforcement of laws". This definition assumes that political power can be, and *should* be, morally justified. I am concerned with the prior question of when and under what conditions political power can so be justified. Any theory of democracy must provide a coherent account of political legitimacy; which is to say, it must offer a persuasive justification for political authority. If it does not, if authority is wielded without persuasive justification, then the authority amounts to little more than the exercise of force, and retains power through bullying.

Thus, in order to answer when and under what conditions political power can be justified, when the exercise of political power is justified and not mere bullying, I look to two influential theories of democratic legitimacy. These theorists are John Rawls and Seyla Benhabib. John Rawls is arguably one of the most influential political philosophers since WWII (Nozick, 1974: 183; Haworth, 2004: 237), and represents the liberal democratic camp. Benhabib works in response to Rawls, building and improving upon Rawls's work. She represents the deliberative democratic camp. In the light of their work, I rephrase my research question as such: what criteria must a convincing account of democratic legitimacy fulfil, and which of the two theorists' theories is, in the light of these criteria, the more convincing. Politics is the problem of action – who may or may not *do* what?, who may or may not *get* what? This includes the problem of power, for example, because

power is only political power when *used* or when the use thereof is used as a threat. It is because politics is so entwined with action that I look to these two specific theories and do not remain in the conceptual and abstract field of conceptual analyses.

Chapter One serves two purposes. Firstly, I therein undertake a conceptual analysis and analytically define the concept of political legitimacy. Secondly I work out the criteria for a convincing account of political legitimacy. The first purpose also indicates my methodology: in Chapter One I do not specifically focus on either Rawls or Benhabib. I do include them when I survey the current state of the debate within the scholarly work on democratic legitimacy, but I do not evaluate them. Rather, I use the chapter to introduce the concept, define it, and then extract the criteria. It is according to the criteria that I will later, in their respective chapters, evaluate Rawls and Benhabib. I do this so as to avoid evaluating one in the terms of the other. This would be problematic for it would necessitate the assumption that the theory in light of which the other is being evaluated is correct or convincing. That is not an assumption I am willing to make. It is only at the end of the third chapter that I throw Rawls and Benhabib against each other, but always mediated through these criteria.

More specifically, in Chapter One I start by explaining the first major divide within the work on political legitimacy – that of a descriptive versus a normative conception. I argue against an exclusively descriptive theory, and for a predominantly normative theory. I argue against a purely descriptive theory – which reports on described behaviour or reported beliefs – because such a conception turns not on the content of the concept legitimacy, but on beliefs *about* the concept. The chief criticism here is that citizens may, for whatever reason, believe a government to be legitimate when it is decidedly not. As such a conception depends only on reported beliefs, such a government would then have to be classed as legitimate. Nazi Germany, despite what the citizens believed, cannot be termed legitimate. Normative accounts, on the other hand, *are* able to speak about the nature of the government, the quality of governance, and is concerned with what ought to be (or ought not to be). This allows for a judgement to be made, regarding the current state of affairs in relation to how the current state of affairs *could* be. I do not argue for a purely normative account because a legitimate government must, as part of its legitimacy, enjoy the support of a large percentage of its citizens (as without such support the stability of a

government is under serious threat). In this way the descriptive reporting of beliefs about the government is important – if taken in conjunction with a normative account.

I next turn to the philosophical origins and development of the normative conception of political legitimacy. This provides some background and explains why the question is such an old and important one. I lean heavily on the social contract theorists (Hobbes, Locke, Rousseau and Kant), as they introduce many of the central concepts in the legitimacy debate. One of these is the idea of consent – that those who consent to the contract thereby consent to bow down to the government authority and thus render it legitimate as long as the government upholds its end of the contract. With this background, I am then able to turn to the current debate about political legitimacy; a debate which I frame between John Simmons and David Estlund, as they represent the reasonable limits of the debate. This section is structured according to the various differences regarding three central concepts: what is political authority?, what is the relation (if at all) between political obligation and duty?, and what does the right to rule entail?.

Having mapped the current work on legitimacy, and tracked the main divisions in the field, I am finally in a position to extract the criteria for a convincing account of political legitimacy. Such an account must 1) provide a means of evaluating a government; 2) conceive of legitimacy as pertaining to plurality, and respect plurality; 3) provide normative grounds for the authority of a governing regime; 4) account for the relationship between such authority and citizens' duties/obligations; and 5) pursue stability.

At the end of the first chapter, once it has been shown that legitimacy is an important and pressing question, the various manners in which legitimacy has been and is understood, and what criteria are necessary for a convincing account of legitimacy, I am able to move on to the evaluative chapters of Rawls and Benhabib. Both of these chapters follow the same structure, bar one difference at the end of Benhabib, the final chapter. (I end with the more convincing account.) Both of these chapters start with a description and explanation of the relevant theorist's position, then move on to criticisms of the position, and finally evaluate each in terms of the criteria from the first chapter. The difference in structure between the two is an addition at the end of Benhabib's, where I finally compare Benhabib and Rawls, side by side.

Rawls is a political liberal. For him politics is a coordination problem, the burdens and benefits of coordination must be justly divided (Wenar, 2012: 5). Another way to phrase this problem is to ask: How can a plural society work together and achieve a just distribution of benefits and burdens related to coordination? The answer to this question is also Rawls's conception of legitimacy. He presents a conception where citizens must consent to government authority, and that to which they consent must be just – an "appropriate consensus" (Rossi, 2014: 3). In order to get around the problem of plurality, and the fact that plurality brings with it many different conceptions of the life worth living, or of the just life, Rawls imposes limits on the political sphere. Firstly, he fixes the political sphere to the public sphere (not the private: social) and introduces a language in which one may talk politics. Public reason must be used when discussing constitutional essentials or matters of base justice. Public reason is not dependent on a single comprehensive doctrine (a fundamental worldview like a religion), but is comprised of reasons that others, from within different comprehensive doctrines, could, in principle, recognise *as reasons* that are valid reasons (if not the best or even the most applicable). In this regard, Rawls tries to maintain neutrality amongst the various reasonable comprehensive doctrines. The culture which public reason brings with it is instituted and furthered in societal institutions, and in this manner Rawls maintains that citizens will ultimately be reconciled to their government, they will see their own values from within their comprehensive doctrines embodied in their institutions.

I introduce three criticisms of Rawls. Chantal Mouffe argues that Rawls is unsuccessful in his attempt to remain neutral in a political sense. Rawls presents his argument for remaining neutral regarding any of the reasonable comprehensive doctrines as a moral choice, but Mouffe argues it is a strategic political choice. John Horton argues that public reason is incomplete. Specifically, there is a difficulty when using public reason to ascertain when public reason fails to resolve an issue. David Reidy provides examples of these, and also argues that should public reason be expanded to be able to deal with these examples, then non-political reasons must be allowed entry, and with them enter comprehensive doctrines.

Benhabib also understands legitimacy as entailing consent. However, she differs from Rawls insofar as she does not stipulate consent to a just decision, but consent to a procedure. If the procedure of deliberation is followed then the outcome of the procedure is legitimate. Benhabib borrows from Habermas to bolster her account of deliberation. Where she differs markedly from Rawls is her departure from an exclusively political language in which deliberations occur. She also enlarges the political sphere well beyond the public sphere as Rawls has it – she includes the private sphere equally. This difference is borne out of the different ways in which they reply to the inevitable political conflict of pluralism. Rawls hopes to avoid it, ultimately ending up with a well-ordered society, while Benhabib wishes to embrace it and use it to the benefit of the citizens. For her, deliberating with others who are different is an edifying activity. She envisions politics as a game, wherein the rules are up for contestation, as are their interpretations, and even the position of the referee (Benhabib, 1996: 79-80). She envisions the political extending its tendrils into every facet of citizens' lives, where there is constant deliberation, and where decisions are always up for re-evaluation through further deliberation.

The criticisms I explore in relation to Benhabib come, firstly, from Parkinson. Benhabib considers a deliberated decision legitimate if, amongst other criteria, all those affected by the decision partook of the deliberation. This is not possible in very large and plural societies. While Benhabib does allow for representation, Parkinson is able to show that this would, in some instances, negate the edifying nature of deliberation. Lastly, Mouffe voices a criticism through Wittgenstein. For Wittgenstein, to speak the same language means to share the same form of life. Plurality precludes the sharing of the same form of life. Mouffe argues that this means that deliberation is neither neutral nor rational. In fact, Mouffe argues that no procedure is neutral and rational.

After all the above I finally compare the two, and argue that Benhabib provides the more convincing account. Rawls attempts to achieve a well-ordered society through avoiding political conflict. Through narrow and fixed conceptions of the political sphere and public reason and the application of public reason, he has achieved this. But this does not mean that the conflict disappears. In all likelihood the conflict will emerge in the private sphere, where Rawls's conflict avoidance mechanisms are not applicable. This weakens Rawls's relation to the second criterion: that plurality must be respected and legitimacy conceived

in terms of plurality. The fundamental pluralities are such that Rawls cannot deal with them, and must simply move them aside. In turn, this weakens Rawls's reply to the third criterion: the justification of political authority. If the very fundamental political values cannot be dealt with in the political sphere then it is less likely that citizens will see their concerns embodied in their institutions, and become reconciled to them. Both of these two points weaken Rawls relation to the fifth criterion: that of stability, for obvious reasons.

Benhabib, on the other hand, is able to deal with fundamental plurality by embracing it head on. She expands the political sphere into the private sphere to such an extent that the boundary is opaque, if not altogether removed. There is no avoiding issues in her conception. And, should the deliberative process be correctly followed, these differences will edify citizens. In the heart of deliberation is not just speaking but listening, and thus changing one's view in one way or another. For these reasons Benhabib fares much better than Rawls regarding these three criteria. The remaining two criteria are very convincingly fulfilled by both theorists, and are very close to one another. Insofar as the remaining two criteria do indicate a difference between the two, the difference takes place within one of the other three. That is, the criteria that a convincing account of legitimacy must provide a means of evaluating the government (first criterion) and must account for the relationship between legitimate political authority and citizens' duties/obligations (fourth criterion) are accounted for in the work of both Rawls and Benhabib in the same manner. For the first criterion, in both theories the evaluative mechanism is one whereby the citizens evaluate the government in terms of how well or adequately the government implements the decisions reached by the citizens. That the two positions here overlap so closely means that the differences are relegated to *how* these decisions are reached. The specific problem with reaching decisions is plurality, thus this difference manifests itself in the second criterion. Concerning the relationship between authority and citizens' duties/obligations towards this authority, again both positions overlap very closely. Both follow a general consent theory – citizens consent to the decisions made (thus the use of authority by the government) by partaking of these decisions. Again, this relegates the problem to the *means* of decision making, which is the work done by the third criterion.

I therefore present the following argument in support of my conclusion that Benhabib provides the more convincing account of normative political legitimacy. Clearly, much

hangs on the manner in which the problem of plurality is addressed. Taking plurality seriously is an absolutely necessary condition, as our modern worlds are very much characterised by a deep plurality. The manner in which plurality is dealt with speaks directly to how decisions are made by citizens regarding governments' exercise of authority. Further, as both these theorists justify authority through consent, the problem of plurality arises again. How is such a profound plurality to come to an agreement regarding government authority and its limits and aims? Rawls, I argue, in his attempt to avoid conflict introduces rigid definitions of public reason and of the political sphere. While this is able to avoid conflicts within these particular spheres, he does not deal with conflict directly. He merely relegates it into the private sphere. This is unsatisfactory, because the aim must be to *address* conflict, not to shift it out of the political sphere and into another. Benhabib *does* address this conflict. Unlike Rawls, she includes the private sphere into the political sphere, and can thus provide political mechanisms for dealing with conflict wherever it may arise within a society. That this is the case means that stability is threatened under Rawls's model to a much more severe degree than in Benhabib's. I argue that Benhabib is able to confront conflict – a more realistic option than avoidance – and mitigate it. This then bolsters the benefits of her deliberative model, where all are included and thus offer their consent. It is, ultimately, the deep differences in comprehensive doctrines or world views that propagate most of the political conflict the world over. This conflict is a fact of our world and cannot merely be avoided, left to simmer elsewhere, and emerge in a sphere where Rawls cannot provide mechanisms for dealing with it.

Chapter One: The Concept of Political Legitimacy

Introduction

One of the most pressing concerns regarding scholarship in the field of political legitimacy is the very meaning of legitimacy. This term appears in a wide variety of contexts. There is a clothing shop in my town called *Legit Clothing*. Here, presumably, the term indicates that the name brands are, in fact, genuine or real. In the more popular vernacular one could say that the tea one is drinking is "very legit". Here the meaning is that the tea is very good. The first example is an epistemic claim (it is true that these name-brand items of clothing were in fact manufactured by said name brand); in the second a judgement is expressed. Further, the results of a democratic vote could be deemed illegitimate, meaning that the rules were not followed correctly. In this sense the term is used as a procedural verification. I will here clarify the domain in which I use the term, and refine its definition in this domain.

In order to clarify terms, I begin by distinguishing between descriptive and normative accounts of political legitimacy, and conclude that a normative account is preferable to a purely descriptive account. Having established why and how a normative account is preferable to a purely descriptive account, I then turn, in Section 2, to the historical origins of the normative conception of political legitimacy in the work of the classic social contract theorists, followed by an account of the current state of the philosophical debate about political legitimacy (Estlund and Simmons and their relation to the traditional voluntarist account of legitimacy). In the third and final section of the chapter I deal with three concepts central to the problem of legitimacy – authority, obligation and duty – and then present five criteria for a convincing account of legitimacy, which detail the main problems that a convincing theory of legitimacy must address.

The overall aims of the present chapter are (a) to analytically define the concept of political legitimacy and (b) to work out the criteria for a convincing account of democratic legitimacy. This will enable me, in the two subsequent chapters, to evaluate the influential theories of legitimacy proposed by John Rawls and Seyla Benhabib respectively.

1. Descriptive versus Normative Theories of Legitimacy

In this thesis I am concerned with normative accounts of legitimacy as distinct from purely descriptive accounts. In order to clarify the scope of my inquiry, I therefore begin by explaining the differences between descriptive and normative accounts of legitimacy, which also serves to demonstrate why a normative account is preferable.

Descriptive accounts of political legitimacy are concerned with what is, with what exists. They are empirical, in that they describe observed behaviour or reported beliefs, and usually rely on case studies or experimentation. A descriptivist approach is able to provide a means of testing a hypothesis against objective and quantifiable data. Weatherford (1992), for example, identifies no fewer than 20 attitudes to be measured amongst citizens in relation to legitimacy. These range from government responsiveness to personal trust to civic pride. This approach does not investigate the concept of political legitimacy itself, but rather describes how the concept functions in a specific arena.

A descriptivist account can focus on one criterion for legitimacy or on many. Max Weber's account is an example of the former, focusing on belief, while Charles Taylor is an example of the latter, focusing on "positive beliefs, attitudes, perceptions, or other 'favourable orientations' towards their society or regime" (Simmons, 1999: 749). What these two theories have in common is that they both locate the legitimacy or illegitimacy of a government in the attitudes of citizens[1]. If citizens believe their government is legitimate, or behave as if it is, then according to this approach it is a legitimate government. The deciding factor of whether or not x is legitimate does not turn on any prior definition of legitimacy, but rather on beliefs *about* legitimacy.

Normative theories of political legitimacy, on the other hand, are concerned with what ought to be (or ought not to be), rather than merely with what is. Such approaches do not merely take citizens' attitudes as proof of the legitimacy of the political authority. They are qualitative rather than purely descriptive, in that they judge whether a specific state of affairs ought to be as it is, compared to possible alternative states of affairs. Therefore, in contrast to descriptive accounts, which are either true or false, normative accounts are well argued or not, they are convincing or appropriate or not. Normative accounts of legitimacy

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1   As such, Taylor (1985: 275) refers to descriptive theories as attitudinal accounts of legitimacy.

usually present a normative ideal, evaluate existing governments – or existing theories of governance – in light of this ideal, and motivate why governments should attempt to approach this ideal. In contrast to the descriptivist, who asks: "Do citizens believe that government *x* is legitimate?" the normative approach asks: "*Should* citizens consider government *x* legitimate?", or "What would make government *x* more legitimate?"

In what follows, I will defend a normative account of political legitimacy. To do this, I will show what it is that a descriptive account can explain, and compare this with what a normative account is able to achieve. I conclude that a normative account necessarily includes a moral evaluation, while a descriptive account has only explanation, and show that a normative account's enlarged power is favourable. While I will make clear that a *purely* normative account is unsatisfactory, I will nevertheless argue that a primarily normative account is favourable.

As a representative instance of a typically descriptive account of legitimacy, imagine a researcher is tasked with ascertaining whether a particular government, *G*, is legitimate. Our researcher asks a representative sample of the citizenry whether *G* is legitimate, and the data shows that 75% of those asked answered that yes, *G* is legitimate. Assume a democratically inclined researcher. The researcher concludes that the majority of citizens regard *G* as legitimate and therefore it is legitimate. What explanatory power does the above theory of legitimacy hold? The above can explain only what attitude citizens have regarding the legitimacy of *G*. Internal to a descriptivist theory, this is not a problem, for it defines legitimacy in terms of the attitudes held by the citizens; what was asked was answered. But there is also an important implication of this explanation of political legitimacy. *G* might reasonably assume that it is doing a good job of governing and would therefore expect its commands to be obeyed.

Now, imagine the same researcher is posed the same task, yet from a normative perspective. The researcher will not rely on a poll. Instead, the researcher will investigate how *G* attempts to motivate the citizenry to specific actions; our researcher will investigate which reasons *G* provides for obedience and through which mechanisms obedience is sought. For example, *G* may provide reasons of consent (75% of the citizenry voted for us, and therefore consent to obeying us) and use coercion as a mechanism (obey

or suffer the consequences of the justice system). Our researcher is able to evaluate these reasons and mechanisms in themselves (ask whether an election result equates consent and whether consent yields a moral obligation), is able to evaluate these reasons and mechanisms in terms of the citizenry (do the citizens themselves, and not just theory, consider these reasons to be good reasons) *and* is able to evaluate government performance.

Thus, descriptive theories of legitimacy can explain what beliefs citizens hold regarding *G* and can speak about *G* only in terms of these beliefs: all that can be said about *G* is that 75% of citizens believe it to be legitimate, and the two implications mentioned above. On the other hand, normative theories of legitimacy can evaluate *G*'s reasons for demanding obedience, *G*'s governance, and the justifications of citizens' beliefs. Normative theories of legitimacy do not only explain – as does descriptive theories – but *also* evaluate. Moreover, the evaluation is done in terms of a moral standard. While an information deficit does not in and of itself always necessarily demote a theory, in the case of political legitimacy it does. This is the case due to the implications of these two theories (not to be confused with the implications of the data within the two scenarios above).

One of the most worrying implications of a purely descriptivist theory concerns the threat of tyranny. If beliefs about legitimacy are considered facts about reality, then even if a false fact is believed to be true, it can legitimise a government. If a government commits morally reprehensible acts, though is able to hide this from its citizenry, then based on this false belief it has acquired legitimacy. The converse also holds: if citizens fail to uphold a state merely due to their own shortcomings, and not because the state lacks moral authority (for example when people refuse to pay taxes because they simply do not feel like it), then the descriptive account simply has to accept that the state has lost its legitimacy (Simmons, 1999: 750). What is more, even in the absence of tyranny, a descriptivist account of legitimacy might condone political stagnation. A poll might yield the results that a government is legitimate. It need only continue exactly as it has thus far in order to remain legitimate. There is no motivator, as far as citizens' beliefs (and thus most likely the powerful weapon of their vote) indicate, for the government to do more.

Thus, to summarise, descriptive theories of political legitimacy suffer from a number of weaknesses: the threat of government tyranny and its converse, the threat of citizen tyranny; and stagnation. The arguments for a normative account of legitimacy can largely be deduced from the criticisms of a purely descriptive account. Nevertheless, as will become clear, a normative theory of legitimacy does not have to be purely normative; it can contain descriptive elements as well.

The first point in favour of a normative account of legitimacy is that such an account is able to speak of the government itself, rather than about beliefs *about* the government. Recall the democratically inclined researcher above. Gathering information regarding beliefs held about the government is what could lead to tyranny or stagnation. When acting as a normative theorist, however, she is able to evaluate the government against a standard – an ethical one – which alleviates these threats. Further, such an account is able to evaluate a government in terms of its moral authority. A descriptive account really only refers to the de facto authority of a government, as opposed to its *moral* authority. A normative account has the capacity to address and evaluate the quality of the government. This is preferable to a purely descriptive account because it provides a means for identifying and resisting tyrannical governments.

We must also ask: Why do we care about legitimacy at all?, What is the point of asking after the conditions for legitimate political authority? The answer is that we have no reason to take any given state of affairs as morally justified merely because it happens to exist. For any given political arrangement we can always still ask: but *ought* it to exist? Whether the majority of free citizens and slaves believe that whites were legitimately a master race entitled to relegating all other races to a life of servitude cannot be the deciding factor in deciding whether a political system based on slavery is morally justified. Without the evaluative function of the normative conception of legitimacy, we lack the means for questioning the political status quo.

Lastly, and closely related to the previous point, unlike the possible stagnating effects of the descriptivist approach, a normative approach interested in alternate possible states of affairs is capable of positing a moral ideal (which will differ amongst the various theories of normative legitimacy). Given that it is an ideal, it is unlikely that the normative

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standard of legitimacy would be fully realised in practice. However, precisely by positing such an ideal, normative theories of legitimacy act as motivator for change.

Having said this, I do not mean to imply that any normative account of legitimacy is necessarily devoid of empirical content; it is worth pointing out that a normative account of legitimacy might very well include reported beliefs from time to time, and is therefore not necessarily opposed to all forms of descriptivism. It surely cannot be the case that a government would be morally justified to exercise political power over a populace that does not acknowledge the government's moral right to do so. Moreover, in such a case the issue of stability becomes a problem. A government that is unable to rule due to non-cooperation by its citizens, despite the fact that the government is theoretically legitimate, simply cannot govern. On the other hand – on the positive side – if a government justifies its normatively conceived legitimacy theoretically, and a poll of citizens' beliefs concur with this normative justification, then the poll serves to confirm the government's legitimacy. At the very minimum, it confers upon the government not just theoretical legitimacy, but also effective, practical legitimacy.

We may therefore conclude that normative and descriptive accounts of legitimacy are mutually intertwined. Nevertheless, as the preceding discussion has shown, a primarily normative account necessarily has primacy over a primarily descriptive account. Before I address the main features that such a normative account must have in order for it to count as such, I first want to take up the historical origins of the normative conception of legitimacy in the work of the classical social contract theorists.

2. Philosophical Origins and Development of the Normative Conception of Political Legitimacy

In this section I look to the first influential theorists who dealt with the problem of legitimacy. These are, in chronological order, Hobbes, Locke, Rousseau and Kant, all of whom can be placed within the broadest conception of the classical social contract tradition. I will first explain what the classical social contract tradition entails in the broadest sense and then introduce three distinctions within the broader tradition; contractarianism, argues Boucher and Kelly (2004: 1-34), has three streams within it, differentiated through the specific ends served by each. They are: moral, civil and

constitutional type of contracts. As the former two streams tend to raise the more interesting philosophical questions, they enjoy my attention[2]. The questions raised, and also the specific aims of these two streams deals directly with legitimacy. The question raised and the specific aims are to justify the authority over citizens that a government has. This is, with variations, answered through consent. The contract is a means of consenting to authority while remaining free and equal, as citizens. Thus, I here discuss the classical social contract theorists in order to explain not just how the problem of legitimacy was initially conceived, but, more importantly, how it was subsequently further developed within philosophical thought.

All four of these theorists present a state of nature, the social world as it was (or is, according to Rousseau[3]) before the establishment of formal and legitimate political authority. For Hobbes (1981: 186), the state of nature is famously "nasty, brutish and short" where "every man is Enemy to every man," and the only security any person has is "what their own strength, and their own invention shall furnish them". For Locke the state of nature has its "inconveniences," while for Kant our moral duty disallows punishment and thus renders the inhabitants of the state of nature impotent with regards to justice. Rousseau is here the odd one out, pointing, unlike the other three, to a future contract. For Rousseau the pre-contract world is one where political power is not yet legitimated, and is characterised as a world where "[m]an is born free, and he is everywhere in chains" (1968: 2). For all four, thus, there is a great need or duty to escape the state of nature. This escape is through the social contract. Individuals agree to the contract, for various reasons (Hobbes: self-preservation, self-interest; Locke: will, consent; Rousseau: freedom; Kant: moral duty), and thus have a moral requirement to uphold the contract. That is, they morally bind themselves to do as the political authority tells them.

As Haworth (2004: 77-80) writes, for this broad basic structure of the social contract, there is first a world presented, a world lacking that which you want to explain, and you then find reasons individuals would have for introducing the lacking element, in this case the legitimate state. Note the hypothetical tense of 'would' in the preceding sentence.

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2   Constitutional contractarianism, as understood by Boucher and Kelly (2004: 10), relates to the middle ages; "it is essentially a juristic conception with its sources in the Roman Law jurists, the covenants of the Old Testament [of the Christian Bible], commercial law and … feudal contracts". As such I simply omit it from the current discussion, as irrelevant.

3   With regards to Rousseau, I use the present tense, but intend it to refer to *his* present (1712-1778).

Classic social contract theory deals with hypothetical contracts, these theorists did not write accurate histories; they sought possible justifications for the emergence of legitimate states. After Kant, the last of the classical social theorists, however, this tradition largely fell out of favour. It would be revived by Rawls, whose position is closer to Kant's than to any of the others, though as will be discussed in Chapter Two Rawls deviates from the classical structure of social contract theory. Currently, social contract theory plays a significant role in the work of a number of moral and political philosophers (D'Agostino, 2011: 1).

The idea of a social contract is a very flexible tool. The above broad and basic structure *is* broad, and basic. The flexibility of the social contract lies in the variable nature of what the contract states, or aims to achieve. The aim may be "to create society, civil society, a sovereign, procedural rules of justice or morality itself"; moreover the contract can be historical, hypothetical or ideal, "its expression explicit or tacit"; those entering into contract can be individuals contracting with other individuals, with a government or with a god, or whole host of other political entities (Boucher and Kelly, 2004: 2). Furthermore, what motivates agreement to the contract itself ranges widely, as indicated parenthetically above. As my current aims are to investigate the initial conception and later development of the problem of legitimacy, I will emphasise the differences amongst types of contractarianism in terms of the aim of the contract.

Moral contractarianism grounds "moral principles in the creative self-interest of individuals who adopt constraints to their behaviour in order to maximise benefits" (*ibid.*: 3). In other words, such contractarianists argue that everyone will be in a relatively better position after the contract than before. This then founds a morality. Hobbes could be said to belong to this stream. However, these streams are not mutually exclusive, and thus Hobbes sits more comfortably amongst moral contractarians than civil contractarians, though there is no reason why he cannot, in part, represent either. Hobbes denies the possibility of morality by agreement, and therefore he must introduce a sovereign who imposes morality (*ibid.*: 2)[4].

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4   Forsyth (1994: 39) agrees: "It is Hobbes's relentless secularism … his refusal to start from absolute moral presuppositions, that set him apart from the others [Locke and Rousseau]" (Forsyth, 1994: 39)

Civil contractarianism, on the other hand, aims "either to legitimise coercive political authority, or to evaluate coercive constraints independently of the legitimation of the authority from which they derive" (*ibid.*: 4). In contrast to moral contractarianism, civil contractarianism does not seek to *create* a morality. Locke belongs to this stream. For him, in the state of nature, before the contract, God's laws direct morality. The contract consolidates, extends and transforms this godly moral order by imposing constraints – institutionalising them and protecting already existing rights and duties. Unfortunately, these godly laws are imperfect duties; they are difficult and ambiguous to discharge in the state of nature, and thus the need for the contract. Again, unlike Hobbes who introduces a sovereign, Locke (and Rousseau) "merely determine where sovereignty lies" (*ibid.*: 4). Likewise for Locke: while the act of consenting to the contract is "the occasion on which our moral obligations become political," it also serves as an affirmation of the legitimacy of the political power. Subjects do not, then, obey the political power (or: have the duty to obey while the power has the right to be obeyed) *because* they consent to the contract, but because the contract furthers and facilitates their natural godly duties (*ibid.*: 5).

While for Rousseau the contract is the tool whereby moral rejuvenation and transformation occurs (in his future), for Kant it is "a requirement of reason, a standard by which the practice of sovereigns can be evaluated" (*ibid.*: 6). For Kant morality is already evident in the state of nature. At the forefront, is that precept that all humans are autonomous persons in possession of dignity and ends in themselves. Reason dictates that individuals agree to the contract, provided it safeguards this moral imperative. Kant does not use the contract to explain the origin of political authority (*ibid.*: 9).

The most general problem that all four of the above philosophers tried to answer through the use of a social contract – the work asked of the contract – is to ground the legitimacy of political rule (and power) in authority and not mere force. More specifically, Hobbes's question take the following form: How can we all escape the nasty, brutish and short life in the state of nature? Rule by force is the norm in the state of nature. Hobbes answered that a legitimate authority is and can only be a total authority. Hobbes's Leviathan imposes a morality and before the sovereign does so, just and unjust, good and bad do not exist. The only way to ensure peaceful coexistence and to legitimise political power is through the contract which creates and enforces both the political and moral order. Locke and

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Rousseau, in this regard, demand less of the contract. Locke asks how the rights and liberties of individuals under the natural law, in the state of nature, can be preserved and furthered (Waldron, 119: 52). Rousseau asks an even stronger question, of the same form: What kind of contract can preserve each individual as the sovereign they are in the state of nature, a sovereignty which society without the contract has tarnished? Rousseau asks of a contract to *return* us to our freedom as lived in the state of nature, before society. Locke answers that all individuals transfer their power and liberty to a sovereign, voluntarily (which, he maintains, would be the most rational thing to do) who must safeguard their freedoms (*ibid.*: 54); Rousseau wants to literally include every citizen in the ruling process thus retaining freedom even when subject to the laws of a society. Lastly, Kant asks how, from the position of the state of nature, can justice and right be exercised. Thus for him too there is *already* a morality in existence. Due to this pre-existing morality, individuals have a duty to escape the position of injustice (Williams, 1994: 137). For Kant, we have a rationally discernible duty to promote justice. For this both a state and an authority is required – only to be found through a contract.

Before I turn to the current debate about political legitimacy, and look much closer at these concepts such as authority and duty and right, I conclude this section by rephrasing the above social contract theorists' questions and answers as a continuous trend, starting from near-total authority and ending – with Kant, the most optimistic of the four – with a mere moral facilitator. Hobbes introduces the all powerful Leviathan, who imposes morality and political authority and to whom all have transferred their individual power. It is akin to a complete relinquishing. Locke weakens his sovereign's power, demanding of it only to protect and enhance those moral rights already existent in the state of nature. He does not ask the question from the beginning, as it were; he does not see the need to establish a morality *de nuovo*. Maintaining the state of nature moral status quo, and improving upon it, is enough for a legitimate sovereign. Rousseau is even more aware of the freedom to be found in the state of nature (before society) and wishes to find it and preserve it within. His question is how to reconcile freedom with being governed. For Rousseau, the sovereign takes on a moral personality. Kant's question is how can justice be exercised while respecting the dignity of all persons. For Kant, however, this question is so fundamental that it can be answered in *a priori* terms. Much like the experiencing of space

and time are necessary for human life, a precondition, in the same manner Kant holds that his social contract is necessary for human social life (Williams, 2014: 140).

3. The Current Debate about Political Legitimacy

Having now provided an account of one historical emergence of the question of legitimacy in theory, I now jump to our current era and will here map the current state of the debate. I will do so primarily at the hand of two thinkers: John Simmons and David Estlund. I do not argue that these two represent the most dominant trajectories in the debate. Rather, I use the work of these two thinkers for strategic reasons. The strategy is two-fold: firstly these thinkers present theories that demarcate the reasonable limits of the debate; secondly, Simmons's position – philosophical anarchism – is born out of a critique; (extending to its limit) the so-called traditional account of political legitimacy.

Simmons argues for philosophical anarchism. He does not believe that there are currently existing legitimate states and therefore holds that "there are no good reasons for believing that citizens have political obligations or governments *de jure* political authority" (Simmons, 1987: 269-270)[5]. Estlund, on the other hand, argues that some current states are legitimate. These legitimate states not only have grounds for possessing a moral authority, but further, individuals have a moral duty to consent to the state. Should we not consent to the authority of a legitimate state, we are wrong and our non-consent is nullified. The traditional position sits between these two. It argues that there are some legitimate states that do possess moral authority, and that this authority is generated through voluntary consent. We retain the freedom to not consent to a legitimate state and to have our non-consent count as non-consent.

The traditional account is born out of the work of Locke, who emphasised consent strongly. This consent is either tacit or explicit – I either consent through perlocutionary means, expressly declaring my consent, or I consent through making use of government provided goods or benefits. Consent is voluntary and once I consent, I bind myself to the

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5   There exists a radical version of philosophical anarchism and R. P. Wolff is such a proponent. Such a position, however, has not found as much support as Simmons's (and J. Raz and M. B. E. Smith's). Simmons argues that there are no legitimate states on empirical grounds, while Wolff (1969) argues that there cannot be legitimate states on *a priori* grounds. Further, in Simmons's (2001: 107) words, he is a "weak anarchist", contrasted with a "strong anarchist" like Wolff who argues "that a state's illegitimacy further entails a moral obligation or duty to oppose and, so far as it is within our power, eliminate the state".

moral authority of the government, and am thus obliged to obey it. On the traditional account, a legitimate government has the right to rule. As Copp (1999: 10) puts the point, "the right to rule is a right against relevant persons that they obey the law". Obligations correspond to claim-rights: one owes an obligation *to* someone "and it corresponds in a precise way to a right possessed by that agent" (*ibid.*: 11)[6].

The reason why weak philosophical anarchists do not understand any existing state to be legitimate is quite simple. I quote Simmons (2001: 103-4) at length:

> Anarchist commitments to this thesis are usually motivated by prior commitments to voluntarism (to the great moral importance of autonomy or free choice or self-determination, etc.), with existing states then characterized as fundamentally nonvoluntary or coercive; to egalitarianism (to equal rights or equal opportunities or equal access to basic goods, etc.), with existing states then characterized as fundamentally hierarchical, sexist, classist, or otherwise inegalitarian; to the values of community (to the great moral importance of shared ends or feelings of solidarity or sympathy, etc.), with existing states then characterized as alienating or divisive; or to some combination of these positions.

Should a voluntarist find herself in a state not categorised as fundamentally nonvoluntary or coercive, then she may well have a moral duty to obey the laws of the authority. However, from Simmons's view the fact that such a state can or will exist is unlikely. In any event, it does not currently exist. This does not mean that Simmons calls for the abolishing of or opposition to states. Rather, he advocates a "balance-of-reasons approach" (*ibid.*: 109): sometimes there may be good reasons for acting as the state demands – yet these reasons do not *compel* you to act in this manner. Simmons may drive on the same side of the road as prescribed by law, but not because he has a *prima facie* moral duty to

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6   In daily language, we may state that we have an obligation to obey the state. A state is an institution, it is the institutional structures of government, government comprised of people. Thus, the general use of the term can be translated into this more technical language as follows: one has an obligation to obey the government, and because a democratic government is comprised of representatives of the people, one owes the *demos* one's obligation; the *demos* have the right to your obligation. As Buchanan (2002: 691) points out, "owing anything to an institutional structure, as opposed to those persons who occupy roles in it is problematic," because institutional structures cannot be thought to enjoy rights. Nonetheless, as this distinction is not implemented by all legitimacy theorists, I use these terms interchangeably, and unless explicitly stated otherwise, mean by them 'government'.

obey the state's laws. His actions may coincide with the law's prescriptions, yet for non-political reasons, such as pragmatic value or simply personal safety.

The traditional view has, according to Simmons, a central problem. It centres on the understanding of the term obligation. The idea is that obligation is too specific a term to convey the thought that subjects of a legitimate state have a moral duty to obey the law (Copp, 1999: 10). Obligations correspond to claim-rights; an obligation is a moral requirement, as is a duty. A duty, however, is not owed to any particular individual or collective[7], and does thus not correspond to a right or rights. However, if (as the traditional view states) it would be sufficient for the legitimacy of a state for citizens to have an obligation to obey the law, then it will be equally sufficient if citizens have a duty to obey the law without owing their obedience to anyone.

Simmons relies upon a second division, that of special rights and fundamental rights – the two types of claim-rights that exist. The former, special rights, are acquired "as a result of others' voluntarily assuming or otherwise acquiring the corresponding obligations," while fundamental rights are possessed in virtue of being an instance of a relevant kind (Copp, 1999: 10). The traditional account holds that a legitimate state's right to the obedience of its subjects is a special right, acquired when citizens consent to obey the laws of the government.

Simmons concludes that the first manner in which a government acquires its special right – from an agent's voluntary commitment or consent – is unable to do the work required of it. Few citizens have made the express commitment to obey the government's laws. The second option available – voluntary acceptance of benefits – concerns a reciprocity for goods or services received, such as national defence, commons, etc. is equally problematic. Firstly, in a practical sense, it is difficult to imagine how I would revoke this consent, how I can *avoid* making use of these goods. In this sense, it is not voluntary. Secondly, it is not a clear given that, by making use of public goods, one must reciprocate by obeying the law (*ibid.*: 13). One simple reason suffices to make the point: the goods received may be worth less to an individual than the cost of the taxes she is required to

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7   The argument could be made that one has a duty to oneself, though even if such an argument were successful, it would have no bearing on Simmons's argument.

pay for these goods. For these reasons, Simmons concludes that it is very implausible that any government has a special right to enjoy the obedience of its subjects. Therefore it is equally implausible that there are legitimate states, according to the traditional view.

If Simmons wanted to avoid this no-legitimacy conclusion, he could try to show that a government has a fundamental right to its citizens' obedience. As the statement stands, all existing states are thus legitimate – a view which Simmons (though not him alone) also finds very implausible[8]. There must thus be a distinguishing feature, identifying legitimate from non-legitimate states. Even further, it must be shown that this property, whatever it may be, grounds a claim-right against its subjects for their obedience. It therefore seems doubtful, bearing the objections to the traditional view in mind, that there is such a property and that it can ground all it is required to ground. Simmons thus takes the traditional view to its limits, and must conclude in favour of political anarchism.

While Simmons grounds authority through voluntary consent (though as we have seen there is no duty to consent to obey the authority), Estlund defends a position where those governed by a legitimate authority *do* have a moral duty to consent to obey it. Rights and obligations are thus final reasons. Instances where individuals do not consent to obey, can under certain conditions be nullified. This thus places Estlund in opposition to voluntarism, because for him "authority can simply befall us, whether we have consented to it or not" (Estlund, 2008: 117). This is termed normative consent and will form the basis of this discussion of Estlund. Further, Estlund argues, ultimately, to justify the authority of democracies (and titles the text in which he presents these arguments *Democratic Authority)[9]*. Estlund is an epistemic proceduralist and has according to Trejo-Mathys (n.d: 1) "recently articulated the most sophisticated form of epistemic proceduralism available in Anglophone legal and political philosophy".

Epistemic proceduralism is a position that holds that there are normative political truths, and that there are certain individuals who have superior knowledge of these[10]. Specifically,

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8   There is a second-order problem with holding that all states are simply legitimate by virtue of their fundamental right to the obedience of its subjects and the definition of legitimacy as provided by the traditional view: if all states simply are legitimate, then legitimacy becomes a property of a state, one of the stipulations of its definition. To attempt to declare a state illegitimate then, is to have to argue that the state is not, in fact, a state. This position therefore relegates the problem to legitimacy to the level of statehood.
9   As will become clear below, Estlund is forced to make an argument for democracy.
10   This is where Estlund has a large challenge in arguing for democracy. If some individuals have a fuller knowledge

a government's legitimacy is anchored in normatively appropriate truths, such as justice or the common good, and in so far as the procedures of the governments' institutions track this normative truth, they are not just legitimate, but have full political authority. This makes Estlund a metaphysical thinker, who also shares this with Locke. For Locke, "the natural law (or at least its legal force) was rooted in the will of a divine lawgiver" (*ibid.*: 5).

Normative consent, as Estlund has it, "contributes to the justification of the authority of the democratic collective over those who disagree with certain democratically approved laws" (Peter, 2014: 9). In short, the rules of the game (democracy) must be consented to on normative grounds as it is the best available option, all things considered [11]. When the rules of the game are consented to, that which comes to be through procedures, while adhering to the rules of the game, is legitimate. And in such a scenario, coercion may be used to enforce this political authority. For Estlund, as government has authority " when it has the moral power to issue a command or prohibition to another agent (or set of agents) and the issuing of the command or prohibition creates a moral requirement (of some weight or other) for that agent (or set of agents)" (*ibid.*: 11). It is for this reason that I state that for Estlund, rights and obligations are final reasons: that an individual is issued with a command is reason enough to obey the command. Legitimacy is what permits the exercise of authority; an agent has legitimacy "if it has moral permission to coercively enforce (certain) commands" (*ibid.*) . In his own words, "there might be moral requirements to consent to authority in certain cases. In those cases, what happens if we don't consent? Can we escape the authority in that way?" (Estlund, 2005: 351). For Estlund, clearly not.

The inverse of this thought is not a new nor controversial idea. Stated, it is the conviction shared by almost all consent theorists, that under certain conditions, consent is nullified. Examples include consent obtained under duress or coercion. Estlund introduces a symmetry to this point: that non-consent can also be nullified. In a word: when you should have (morally) consented, but did not, your non-consent is null.

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of normative political truths, why do they not rule in an epistocracy, like Plato's philosopher kings (though Estlund does not explicitly place this knowledge in the minds of philosophers exclusively, as Plato does).

11 Estlund (2008: 42) expresses this as the Qualified Epistemic Claim: "Democracy … [is] the best epistemic strategy from amongst those that are defensible in terms that are generally acceptable. If there are epistemically better methods they are too controversial…to ground legitimately imposed law".

The largest difference between these two positions is that philosophical anarchism does not rely upon legitimacy to do the work of ensuring compliance with government laws. Yet the work gets done, just in other ways (including, in fact, non-moral ways: obeying the state out of self-interest is not obviously a moral reason for obedience). The position for normative consent does rely upon legitimacy; it is nonconsent to a legitimate authority that can be nullified. Both of these two positions, thus, rely upon or react against traditional consent theory. And they are not unique in doing so.

Having above sketched the two limits to the field of debate about political legitimacy, I can now proceed to map some of the more dominant theorists into the field. I start with Rawls (to whom I dedicate an entire chapter), as he can be seen as reigniting an interest in political legitimacy after the end of WWII. The other thinker to whom I dedicate a chapter – Benhabib – is a critic of Rawls and provides her own theory of legitimacy in order to overcome what she deems serious shortcomings in Rawls' theory. In brief, Rawls holds that there can be legitimate states, though he does not, as does Simmons, require full or total legitimacy. Rawls works in degrees of legitimacy, and a high degree of legitimacy is enough for him. Rawls also grounds legitimate political authority in voluntary consent, though not in the manner of the traditional theory. And Lastly, Rawls understands a legitimate state as having a moral right to the obedience of its citizens. In Rawls's understanding, citizens become reconciled to their institutions, seeing their own goals furthered through the institutions, and thus *want* to obey the government. Equally briefly, Benhabib continues the work of Rawls, somewhat radicalising it: she retains his proceduralism, not to reconcile citizens with their institutions, but rather to continuously open discussion about institutions, and even discussion about discussion about the institutions. In short, Rawls looks for the well-ordered society while Benhabib wants the content of a well-ordered society constantly re-evaluated and deliberated. For her, this constant ability and procedure of re-evaluation encourages legitimacy while Rawls himself works out the rules of the game and argues that whatever happens *within* the rules is legitimate.

While Rawls occupies a dominant position within the debate, he is certainly not the only player. As I have presented Estlund and Simmons above, it is clear that most of the dominant positions differ from one another in their conceptions of authority: whether

authority generates a duty (without a corresponding right), or an obligation (with a corresponding right); and on the relation between authority and legitimacy: does legitimacy confer authority on a state, necessarily, not at all, or partly. Raz (1986), for example, unlike Simmons who argues that political authority may be morally justified, without being legitimate, yet only legitimate authority generates obligations (and without truly legitimate authority, there is thus for Simmons only duties), argues that legitimate authority does bring with it the right to rule. That there is a right shows that there is a corresponding obligation. Dworkin (1986), on the other hand – as summarised by Fabienne (2014: 2) – presents an account where legitimacy does yield political authority, but political authority does not generate obligations of obedience. Others, such as Edmundson and Buchanan have endorsed this position, and further argued that additional normative conditions must be satisfied for obligation to yield.

The above merely states the relations between the central concepts in the legitimacy debate (political authority, obligation, duty and right to rule), but does not present the arguments for these relations. That is what I turn to next, focusing specifically on authority and duty, and obligation. I do this in order to build up to the final task of this chapter, to stipulate which criteria a convincing theory of normative legitimacy must address.

4. Criteria for a Convincing Normative Theory of Legitimacy

As the analysis in the previous section has shown, what counts as a 'convincing' theory of legitimacy is itself a disputed point. It depends on prior assumptions. Hence, instead of trying my hand at yet another, fully-fledged theory of legitimacy, I will rather point out the problems that *any* theory of legitimacy must be able to deal with and discuss them each. My aim is therefore not to present a final *definition* of legitimacy, but to set out what the work is that a philosophical account of legitimacy must do, what it should enable us to achieve. Of central importance here is that a theory of legitimacy must be able to explain *authority* and *obligation* (or, as we have seen above, if obligation is replaced with duty, this substitution must be accounted for). I will discuss each of these concepts in turn in order to show what it is that a theory of legitimacy must be able to explain in each case.

4.1 Authority

Simmons's claim above raises the obvious point that any government (disregarding its legitimacy or illegitimacy) must be able to rule. A government may rule through mere force alone, through providing convincing reasons for specific action (reasons which may generate an obligation or a duty, or not) or a combination of both (good reasons and the threat of sanctions or coercion to encourage a certain behaviour). The authority of a government is related to the extent to which it is, in fact, able to make and implement laws that are then followed. In this regard, Raz (1988: 29-31) makes a helpful distinction between *authoritativeness* and *authority*.[12] The former can be termed *de facto* authority, or authority without a moral justification, and can thus exist independently of legitimacy [13]. The biggest and strongest child on the school field may wield this type of authoritativeness – one follows his commands simply because he has issued them. Authoritativeness, thus, is of no concern to us here, as it is devoid of a normative component. Ruling simply and only because you have the bigger stick cannot of itself contribute to legitimising your rule. The only reason such a bully is able to provide to those whom he bullies for obeying his commands is the threat of violence. This is not a *moral* justification for his authority. Nor does this give him the right to rule – because you *do* rule (even ruling effectively), does not mean you *should* rule. Simply being the ruler does not legitimise your rule[14].

Authority, on the other hand, has two subdivisions. These are theoretical and practical authority, and "most theorists of [political] authority view it as a species of practical authority rather than theoretical authority" (Christiano, 2013: 1). A theoretical authority in a specific intellectual field is an expert in that field who can offer the layman advice, and the "judgements of theoretical authorities give people reasons for belief while the judgements of political authorities are normally thought to give people reasons for action" (*ibid.*).[15] A theoretical authority does thus not impose duties or obligations – advice can be taken or not. The playground bully also offers reasons for action (the threat of violence)

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12 See also Christiano (2013:2) and Buchanan (2002: 691-692).

13 Not to be confused with Simmons's position. Recall, for Simmons, political authority may be morally justified *without* being legitimate – *not de facto* authority, which is devoid of moral justifications.

14 *De facto* indicates just this: in fact, as in the actual state of affairs, one may yield authority. It is a descriptive statement, and cannot contribute to moral justifications, or the normative question *should* one rule. This can be seen as an iteration of the descriptive/normative conceptions of legitimacy above. While this view is widespread, Christiano (2013: 2) points out that it is not universal: "Hobbes insists that any entity capable of performing the function of de facto authority is necessarily justified and deserves the obedience of the de facto subjects. But most have argued that there is an important distinction between de facto authority and legitimate authority".

15 See also also Raz (1988: 29).

but is to be classified as authoritativeness and not political authority for the simple reason that the bully's only claim to any kind of authority lies only in the fact that the bully is a bully.

Practical authority, on the other hand, gives reasons for action. Stated differently, theoretical authority is "authority-on" and practical authority is "authority-over" (Beran, 1983: 487)[16]. The dominant view, also the traditional view as explained at the hand of Simmons above, sees political authority as a species of practical authority, and understands practical authority as generating duties of obedience through consent. Consent is just one manner in which this is done (others will be discussed below), but an abstraction can be made from this. Unlike authoritativeness, a practical authority requires a justification. Thus, practical authority is an authority that prescribes action, and must justify this ability. In this sense, practical authority has an inevitable normative component.

To understand why political authority is considered as a kind of practical authority, I must briefly look to politics and its problems. One of the problems of politics is the problem of action[17]: without any concern for action (which may well be informed by beliefs) the problem of negotiating competing interests – in short, politics – disappears. Competing interests compete through action: who may or may not *do* what.

Neither theoretical authority nor mere authoritativeness can resolve the problem of competing interests. This point is aptly illustrated by the free-rider problem (see Christiano, 2013: 14). There may be compelling reasons for every citizen to pay tax in order to secure public goods such as roads and healthcare, but there are even more compelling reasons for a solitary individual not to pay taxes, provided everyone else does. In this example, the free rider still believes that paying tax is a morally good thing to do –

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16 Edmundson, as explained above, as an epistemic proceduralist, must counter the threat of appearing to endorse an epistocracy precisely because he understands political authority as a species of authority-on: he holds there are factual answers to the questions of politics. Why do the authorities-on (political theory), asks the challenge, not immediately become the authorities-over (political subjects)?

17 Politics is also the problem of law, administration, power, justice and the like. Action, however, is an essential constitutive part of politics. For present purposes, these other problems of politics can be read as a problem of action. Power, for example, is only power (in any meaningful sense) when it is *used*, or when someone threatens to use their power. A little black book full of compromising information regarding public figures, for example, confers no power on the holder of the book unless it is known that she has the book (the threat of the book being used), or if she actually uses the book.

that is, he/she accepts the theoretical authority of the state to determine the tax rate – yet this theoretical authority does not translate into practical authority, reasons for prescribed action. The authoritative bully can threaten you with violence if you do not pay your tax, yet you might hold that the violence is preferable to parting with your cash. The bully cannot *force* you to pay, he can merely increase the threat – and a threat is no argument. Or he can steal your share of tax money from you. Similarly, the theoretical authority can lead you to believe that paying tax is morally correct, though you are still able to decide not to pay (for whatever reasons you may have), and the theoretical authority can also not force you to pay.

Political authority is a kind of practical authority because of its necessity for making prescriptions; political authority is practical authority institutionalised systematically and hierarchically, and which prescribes actions within a specific sphere – the political sphere. How this political sphere is understood varies, but the idea that political authority is practical authority delimited to a certain (usually called public) sphere is inherent in all the variations.

A political authority presents *reasons* for desired action. The reasons offered by a political authority serve as motivators for those subject to the authority to obey. The hope is that these reasons are sufficiently effective, and on the whole will generate obedience. This allows for politics, for the solving of collective action problems involving the citizenry as a whole, in the name of furthering some good(s) (justice, freedom, etc., depending on the theory). The ultimate hope is that the reasons provided will secure compliance from the citizenry for each and every command issued, in a blanket fashion. The logic of this hope is as follows. Citizens will recognise the moral worth of the aims of the government and the need for a political authority to achieve these aims, and that these reasons will be of such a nature that they generate a duty or obligation for the citizens to obey the commands of the authority. As a claim-right, this obligation generates a right that the government has to rule, and if citizens do not respect this right the government may issue sanctions or use coercion, morally.

Nonetheless, consent is just one way in which compliance can be achieved. To move to a higher level of abstraction, all political authorities must solve or manage collective action

problems that are unavoidable, which is done through normatively ensuring compliance. There are at least three ways in which a political authority tries to ensure a specific desired action. Specifically, these have to do with obedience, with what kind of duties (if any) citizens may be placed under by the authority, and how a political authority attempts to ensure that these duties are fulfilled. This forms the focus of the next section.

4.2 Duty and Obligation

The importance of the question of obedience in the political domain cannot be overstated[18]. In its most basic form, this question amounts to the following: If all individuals are politically equal, why and how do some individuals have the right to issue commands over others, commands that others have a duty or obligation to obey? Even in an ideal conception of democracy, where the people govern themselves, there remain power imbalances, where some obey the commands of others. An example of this real power imbalance is the figure of the judge. A judge must rely on precedent and function within the limits of the law, but often an unprecedented case emerges. In South Africa where the jury model is not followed, the judge's interpretation of the law as applied to a novel case sets the precedent for future similar cases.

The choice of a judge is this example points to a generally accepted point within the theory of political obligation[19], and that is that political obligation is the moral duty to obey the law[20]. More specifically, obeying the law amounts to obeying those who issue the law or those who enforce the law. I earlier introduced Simmons's distinction between obligations and duties (namely that an obligation is correlated with a right, a duty not; an obligation is owed to someone, and that someone has a right to be obeyed). Recall Buchanan (2002: 691), "owing anything to an institutional structure, as opposed to those persons who occupy roles in it is problematic" (see footnote 6 above). Whatever the nature of the duty to obey laws, this duty is owed to the government, and not the state. The state is the institutional organization that empowers individuals to wield political power. These individuals and their political power is the government. It is problematic to owe a duty to

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18   "'Why should anyone obey anyone else?' may be 'the most fundamental of all political questions,'" writes Berlin (1962: 7 quoted in Pocklington, 1975: 495).
19   "On [this] point there is almost complete agreement among political philosophers" (Dagger, 2010: 1).
20   Dagger (2010: 2) points out that according to Plato, the reasons why Socrates did not acquiesce to his companions' plan to escape his sentence, was "that to defy the judgment against him would be to break his 'agreements and commitments' and to 'mistreat' his friends, his country, and the laws of Athens". Socrates believed he had, amongst other duties, a duty to obey the law.

obey to the state as an institution for the following reason: "To say that X has a right to be obeyed by P implies that if P does not comply with X's rules P wrongs X" (Buchanan 2002: 691). It makes little sense to think that an institutional structure can be wronged; it is typically a moral agent who can be wronged, and an institutional structure cannot be a moral agent. This doesn't have to mean that we have an obligation towards the actual individuals who happen to occupy specific governmental roles. Rather, as in a modern liberal democracy, the duty to obey the law of equal respect for all is a duty of obligation owed to one's fellow citizens, not the government (though this does not exclude the duty to obey being extended to those individuals occupying formal positions – government is comprised of equal citizens, after all; this is the problem of obedience as I phrased it at the onset of this section). Why we may have a moral duty to obey our fellow citizens will be treated below.

I must clarify, however, that my concern here is not so much with a conceptual analysis of political duty or obligation *qua* concept, but with the justification for a government's right to impose such a duty or obligation, and citizens honouring or accepting this duty. Before turning to the question of justification, however, I will first address and refute the claim that "having obligations" simply *is* what it means to be a citizen, and that it is entirely superfluous to try and justify what amounts to a necessary property of citizenship. McPherson (1967: 64) writes in this regard:

> belonging to any society […] involves rights and obligations. Understanding what it is to be social would be impossible unless we understood what it is to have rights and obligations—and vice versa [...] That social man has obligations is an analytic, not a synthetic, proposition [...] 'Why should I obey the government?' is an absurd question. We have not understood what it means to be a member of political society if we suppose that political obligation is something that we might not have had and that therefore needs to be justified.

In other words, rights and obligations exist by virtue of the definition of 'political society,' much like a bachelor must be an unmarried man. Obligation is therefore part of the conceptualization of political authority: a political authority has the right to rule that simply contains the duty of citizens to obey. Christiano (2013: 3) argues that, from the

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perspective of the citizen, the right to rule and the duty to obey are not so different at all. To use an analogy: if one is playing a game of rugby with a referee and one does not comply with the directives of the referee, one is also interfering with the referee's responsibility to carry out his duties.

This position is, however, unsatisfactory. To simply collapse a duty to obey (and the right to rule) into political authority is unsatisfactory for various reasons, but the most poignant is the question raised by morally offensive institutions or orders. Does a citizen have a duty to obey these also? Conversely (and this is Gilbert's (2006: 8) example), if a citizen is duty bound through law to stop at a stop sign, yet to do so would result in crashing into a rogue driver, is one obliged to stop regardless? It seems entirely plausible to answer that no, simply by virtue of being a citizen, and therefore automatically (by definition) having a duty to obey the commands of the state, does not oblige us to obey morally offensive commands. A distinction is required, distinguishing between morally offensive commands and commands that are not. Such a distinction will separate justified duties of obligation from non-justified ones. Introducing such a distinction counters the original claim that no justification is required. I conclude that justification *is* required, that McPherson's argument is not successful[21], and show how this is attempted in the remainder of this section.

Having dealt with McPherson's claim, let me now address the issue of the moral justification of the right to rule, which is the converse of the obligation to obey on the part of citizens. Justification is intimately bound up with reasons and reason-giving. A political authority must be able to issue *moral reasons* for obedience (if it wishes to remain a political authority, and not simply authoritative). Threats may appear to be such a reason, but this is unsatisfactory – and not only because it is not clear that avoiding coercion is a moral duty: "'You ought to obey the law because you will suffer if you do not' may be a powerful reason for obedience, but it is not a reason that speaks to [a] concern with the moral function or object served by law" (Green 1986: 13). Beetham (1991: 28-29) explains why threat / coercion cannot be a sufficient reason to do what a government

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21 McPherson presents an argument stating citizens have a duty to obey the political authority simply in virtue of being citizens, by definition. This is one level. On a second level, clearly some political authorities are not to be obeyed, such as the Nazis, for example. If there are some political authorities that citizens are not, by default, obliged to obey, then McPherson is unsuccessful. I believe I have shown that he is.

demands. Firstly, by way of analogy, a teacher attempting to teach students who do not share a belief in the value of education will have to spend much time on maintaining order, time that is not spent teaching. Likewise for an alleged political authority: if it relies on force alone to secure compliance then the time and resources spent on that which the authority wants to achieve is necessarily diminished. The authority spends much of its resources simply securing its position as authority. Secondly, such an authority leads a precarious life. As it relies upon a single motivator for action (force – which in turn relies on self-interest), if this single motivator fails or diminishes (usually this occurs due to lack of resources), then authority is eroded or even lost. Such an authority is unstable.

While self-interest and threat of force may share some similarities – i.e. obeying traffic laws because it is in my immediate self-interest to do so, or obeying because it is in my interest to avoid punishment – there are also important differences between these two positions that help clarify the justificatory role (and its position) of duties to obey. Direct self-interest concerns the content of a specific order – e.g. "Keep left" or "Do not exceed 120km/h". Obeying the commands of the authority because, if you do not, you will suffer the consequences, is a more general position. It concerns *all* commands issued. If a political authority is to be successful in governing, then each of its individual commands cannot be weighed in terms of self-interest by each citizen, and then obeyed or not depending on this evaluation. A political authority must thus aim to justify obedience through content independent reasons (to use Raz's (1988) terminology) that do not turn on force or punishment; the reasons should be of such a type that obedience does not turn on the content of each individual command. A pure proceduralist, for example, will argue for the justification of a specific procedure for generating commands or laws, and then hold that whatever the procedure yields, if correctly followed and adequately justified, is accompanied by a duty to obey the commands. Peter (2008) holds such a position, with regard to democracy. According to his thought, if the decisions reached by a democratic government are the result of a deliberative decision-making process (one which satisfies certain conditions of fairness); they are legitimate and therefore contain the duty to be

obeyed, regardless of the quality of such outcomes.[22] More specifically, the nature and quality of the procedure justifies duties of obedience to laws.

If self-interest and succumbing to a threat (which is but a special case of self-interest) are not adequate moral reasons for obeying a political authority, what would count as such reasons? These reasons, reasons that justify an authority's authority, and justify subjects' duty or obligation to obey, can also be understood as sources of legitimacy, or, thus, legitimising reasons for an obedience obligation or the right to rule. I will briefly examine a number of candidates – divine command, consent, social contract, gratitude, fair play and membership or association – not so as to select one which is best, but in order to abstract from these candidates the criteria that any reasons justifying political authority must address in order to do the justificatory work required of them.[23]

The divine command justification for political authority is perhaps the oldest theory of legitimacy, and is for the most part self-explanatory. The idea is that a divinity, using its omnipotent power, has placed specific authorities in their positions to do its will, and thus to disobey these authorities is to commit the most grievous moral wrong. Paul's Epistle to the Romans encapsulates this best: "For there is no authority except from God, and those that exist have been instituted by God. Therefore he who resists the authorities resists what God has appointed, and those who resist will incur judgment" (quoted in Dagger, 2010: 3).

Aside from the usual challenges posed to any position anchoring itself in a divinity, there is a second and more pressingly political problem with this position. This challenge is successful, and the divine command theory of the justification of political authority has almost entirely fallen out of favour within liberal thought generally. This challenge is the following: a divine command theory only justifies political authority for those practising the specific religion used to justify the authority. It offers no reasons for other faiths, nor atheists. Plurality is a fact about modern democracies. To some extent the problem of politics – the problem of managing collective action problems – is the problem of politics *due to* the plural nature of national populations. What must be said, however, is that were

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22 Due to, firstly, the condition that the process be a form of democracy, and secondly that certain conditions of fairness are met, it is hoped that the outcomes will never be morally reprehensible. Should McPherson attempt to introduce such qualifications, then, as shown above, he introduces not just a justification, but a justification *for certain kinds* of permissible exercises of authority, and his original position is defeated.

23 The list of types of reasons that may be advanced in defence of political obligation comes from Dagger (2010).

the citizenry of a state to be uniformly devout, this would be a spectacularly successful justification for political authority. It is a paradoxical thankfulness that we are not all uniformly devout.

The next four positions can be placed under a single, larger, umbrella term. The social contract, the consent, the gratitude and the fairness justifications for political authority are all of a transactional type. In these theories, political authority is justified through a transaction-like logic of give and take. Moreover, as I have already discussed both the social contract and the consent justification, I will here only briefly revisit them.

The social contract justification for political authority is a subtype of the more general consent position and is best typified by Hobbes, Locke, Rousseau and Kant. While they have different theories of the social contract, there remain commonalities. All of these are metaphorical: they postulate a hypothetical 'state of nature' without formal politics, where individuals come together and enter into an agreement to instate a political authority, and therefore agree to obey this authority. They agree through the contract (in this manner transactional): if you – the authority – do this, we – the subjects – will obey. For Hobbes, we agree to the contract for reasons of self-interest (self-preservation), while for Kant we have a moral duty to submit to an authority in so far as that authority rules according to the principles of right. The transactional nature of Kant's position is not as evident as Hobbes', yet it remains, for his position takes the form of a hypothetical: if (and only if) the authority rules according to the principles of right then I have a duty to obey. Stated otherwise, if the authority exercises its authority correctly, I have a duty to consent to obey its laws. It is unnecessary to provide account of both Locke and Rousseau also. Suffice to say they follow the transactional logic of a contract.

The various classical social contract theorists have each been subject to criticism, yet this criticism has not proved finally successful enough to banish these theories. Rather, the theories have been augmented or altered in response to the criticism, and not discarded as the divine command view has been. Rawls, for example, presents a kind of social contract position (though a further abstracted one), and also draws significantly on Kant. Social contract theory thus continues to live on through Rawls, but not Rawls alone. Consent theorists have continued the tradition, in a manner.

Consent theorists[24] follow the same justification of political authority, though without the hypothetical state of nature. The point remains the same: citizens have a moral duty to obey political authority because they consented to do so (for whichever reasons the specific theories offer). The nature of consent is the biggest point of contention here. As Peter (2010: 4) paraphrases Raz (1995: 356), there are three ways in which the relation between consent and justified political authority can be understood. I quote Peter in full.

> (i) consent of those governed is a necessary condition for the legitimacy of political authority; (ii) consent is not directly a condition for legitimacy, but the conditions for the legitimacy of authority are such that only political authority that enjoys the consent of those governed can meet them; (iii) the conditions of legitimate political authority are such that those governed by that authority are under an obligation to consent.

Simmons, of course, falls within the first stream, and due to the problems within consent theory he is able to conclude that no existing state is legitimate. Rawls falls within the second category. As will become clear in the chapter dedicated to his thought, Rawls does not rely on *actual* consent to justify political authority, but on hypothetical, or possible, consent. Lastly, Estlund represents the last stream. For him, if a justified political authority is not consented to, then the act of non-consent is null (of course he clearly specifies what a justified political authority is: for him it is epistemic proceduralism). That three such important names in the world of legitimacy theory are related to consent theory, is a testament to the influence of the classical social contract theorists, and also of the justificatory power of consent.

The gratitude justification for political authority was first suggested by Walker (1998). The claim here is that "[t]he person who benefits from *X* has an obligation of gratitude not to act contrary to *X*'s interests, every citizen has received benefits from the state [and] noncompliance with the law is contrary to the state's interests. Therefore every citizen has an obligation of gratitude to comply with the law" (Walker 1988: 205). However, this view hasn't gained traction, for a number of reasons. Firstly, gratitude is usually presented not as a primary justification for the duty to obey, but as one amongst many reasons (recall

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24 Such as Beran (1987), Plamenatz (1968) and Steinberger (2004).

Socrates's four reasons, in footnote 20 above). Secondly, gratitude is not typically understood as including obligations in return. One may be expected to thank the giver of gifts, but whether one owes the giver a duty is not a foregone conclusion. In fact, this particular example illustrates a further point of critique. A government does not give gifts. A government collects taxes and provides services with this tax money. In this light, it is more of an exchange – one benefits from government services, but one also pays for them in some form (in taxes, or by giving up certain freedoms, etc.). It is difficult to think that one could have a duty to be grateful for receiving what one has paid for. Nonetheless, even though justification through gratitude has not gained traction, it is an expression of a justification theory that relies on a deep-seated human feeling, one reasonably assumed to be shared by all rational beings. Like Kant's duty to obey principles of right, whether theoretically sound or not, it presents a justification that seems to make intuitive sense, and is a justification used often in popular discourse.

Closely related to the last challenge against the position of justification from gratitude, is the position of fair play. The thought is that "everyone who participates in a reasonably just, mutually beneficial cooperative practice … has an obligation to bear a fair share of the burdens of the practice" (Dagger, 2010: 15). One owes the obligation to the others involved in the activity. There are many objections to this position, but Smith's (1973: 954) will suffice. "[T]he obligation of fair play governs a man's [person's] actions only when some benefit or harm turns on whether he obeys". This requires a small enterprise where the cooperation of each individual can make or break the endeavour. Modern political societies are much too large for this to ever be the case for the average citizen. If I do not pay my taxes I will not be hampering the government. This criticism holds only on the assumption that what matters is well-being (not dissimilar to Hobbes), and not something else, such as principles of right. It is by now clear that well-being cannot be all that matters when it comes to justifying political authority. One construction of Kant's categorical imperative – the so called golden rule: treat others as you wish to be treated – if coupled with the principles of right, support justification through fair play; as does Rawls, who couples fair play with the principles of reciprocity and respect for persons.

Lastly, membership or association expresses the idea that simply by being a member of a group, an individual has an obligation to comply with the norms of the group. As this

holds even for families, consent is not a determining factor. Thus, by virtue of being a South African (that is, having South African parents, neither with nor without my consent), I have the duty to obey the South African government. The strongest challenge to this position (presented by Dagger (2010:17)) is that not all groups are morally upstanding. A justification such as membership or association would have bound every German citizen to the Nazi cause – German Jews included. The general idea expressed by justification through membership or association is close to McPherson's: that it is an analytic truth that to be a member of a group (for McPherson, a political citizen) necessarily involves the duty to obey the authority. Likewise the criticisms are similar, and the underlying motivation for the criticisms of both is also similar: they tend to reduce political authority to *de facto* authority.

It is clear, therefore, that certain kinds of reasons cannot oblige us to obey a political authority. Firstly, reasons that speak only to a specific kind of citizen, or only to a specific group of citizens (Zoroastrians, for example) are much too limited and ignore the obvious truth that our world is a plural one. Such a justification relies on a particular metaphysics, one which is (or can) rarely (be) argued for, and excludes those who do not share the metaphysics, yet who are citizens nonetheless. Secondly, reasons that do not offer individuals *any* say in the matter are unable to oblige us to obey, for these simply collapse political authority into *de facto* authoritativeness, and thus do not carry obligations. I here have in mind a position like McPherson's. Thirdly, due to the inherently messy nature of human life generally, and political life specifically, any reason proffered as justifying political authority that understands legitimacy as an all or nothing concept cannot oblige us either. As the plethora of counterexamples offered in moral and political philosophy attests, there are always exceptions of pockets of grey. Setting up an all or nothing kind of reason is begging to fail. Justifying reasons work in degrees, and is therefore the last kind of unsuccessful reason: justificatory reasons that depend upon a single reason cannot oblige us either. Such justifications are necessarily fickle. The legitimacy debate is a robust and lively debate, and all of the positions above have important shortfalls. For this reason I have illustrated that Rawls (though not him exclusively) should be placed in more than one; forcing Rawls into a single category would be to manhandle his thought disrespectfully and dishonestly. This last type of reason, the single justificatory reason, can also be seen as a different but similar iteration of the first unsuccessful kind of reason

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listed here. But the difference is one worth noting. I deem the first kind of reason unsuccessful due to its severe metaphysical implications, and the third for having a single reason, metaphysical or not.

Other reasons may have more success. However, my aim here is not to argue for a particular reason or set of reasons that must feature in any theory of legitimacy, but rather to show that, for a theory of legitimacy to be convincing, it must necessarily exclude certain kinds of reasons. I will pick up the question of reasons and reason-giving again in the chapters to follow. In light of the foregoing analysis of authority and obligation, it is now possible to identify the criteria for a convincing theory of legitimacy.

4.3 The Criteria

First and foremost – and also the most general – a convincing account of legitimacy must provide a means of evaluating a government. In direct opposition to a descriptive account of legitimacy which can speak only of citizen's beliefs, a convincing account of legitimacy must be normative – it must speak of the quality of governance; it must allow and even invite normative judgements about the government. How this is done will form the rest of the criteria that I discuss.

The primary function of government, as I have argued above, is to address and manage coordination problems. A large population may encompass disparate interests and desires, interests that can lead (and so often has led) to violence. A government must govern, and to do so it must issue commands, and have the right to do so. The justification for its authority must thus be applicable to as many citizens as possible. In fact, it should aim to justify its authority to all reasonable citizens. (The concept reasonable will enjoy more detailed attention later, for now it can simply be understood as any citizen who commits to the basic liberal conviction that liberty is fundamental.) The second criterion is thus that any convincing account of legitimacy must respect plurality and conceive of legitimacy as pertaining to plurality.

In order to govern, a government must also have some assurance that the commands or orders or laws it issues will be followed. It can either do this through coercion or the use of force, through embodying a moral authority, creating a moral authority, or through

capitalising on other reasons for action (authorities) that its citizens already possess. The former and latter are unconvincing due to the limitations this places on the government's ability to rule: the former results in a massive cost to the government and the latter means a government cannot innovate. The third criterion is thus that a convincing account of legitimacy must justify its political authority.

Closely related to the third is the fourth criterion. Having the authority to issue commands does not necessarily place the citizens under an obligation to obey. A convincing account of legitimacy must address this also. Under what conditions can a citizenry's actions be expected to coincide with a government's directives? And is it only a matter of coinciding? When, how and why can a government oblige its citizens to obey its commands? A different way of making this point is to say that the power a government wields or holds must be justified to those over whom it is exercised. Again, this is either apologetic – "seeking justifications for an existing structure of power" (Beetham, 1991: 5) – or critical – "exposing its deficiencies, and advocating revisions or alternatives to it" (*ibid.*). A convincing account of legitimacy must thus account for government's right to rule: it must defend a relation between authority and duty or obligation (thus with the government's correlative right).

Finally, the fifth criterion. And this one introduces aspects of a descriptive conception of legitimacy in my primarily normative conception. A government must pursue stability. This criterion needs to be explained in various different manners, and functions on a slightly wider terrain than the previous criteria. A convincing account of legitimacy must justify itself *to the citizens*, though not only to the citizens. Without citizens' belief that a government is legitimate (even though it may be so in theory), a government will face stability issues and may lose its ability to govern. A second explanation of this criterion is that a government cannot anchor its legitimacy in a fleeting sentiment shared by the populace. Its legitimacy must be anchored in justificatory reasons that can be reasonably assumed will remain convincing reasons for the foreseeable future.

Conclusion

In this chapter I have shown why legitimacy is a question at all – what the importance of legitimacy is and why it is a necessity for governments. The answer to this is that without

legitimacy governments will find it excessively difficult and costly to govern. I then argued for a predominantly normative account of legitimacy and showed that a descriptive account is not sufficient, as it does not allow for the evaluation of the government itself but merely of the beliefs held by the citizens about the government. I also argued that to simply argue against a descriptive account is not sufficient to endorse a normative account, and thus presented arguments in favour of a normative account, concluding that a *primarily* normative account is preferable. This is because a normative account can evaluate the quality of government. I have also discussed what legitimacy entails – its relation to obligation and authority. I then discussed the factors that made the question of legitimacy explicit and from there dealt with the main historical philosophical theorists who dealt with legitimacy. I then surveyed the legitimacy debate as it currently stands, at the hand of two opposing theorists: Simmons, a philosophical anarchist and Estlund, an epistemic proceduralist. I related them both to the traditional voluntarist account. Most importantly, in the chapter as a whole (but specifically in the last section) I explained what a normative and convincing account of legitimacy must accomplish. The main thrust of my argument has been that a convincing theory of legitimacy must deal with political authority and political obligation, though my other criteria are that it must do so while acknowledging that pluralism is a fact about modern liberal democracies, it must justify its authority through moral reasons; and lastly, it must also justify its legitimacy in terms of stability. I will rely on these five criteria in my analysis of the cogency and validity of the theories of Rawls and Benhabib in the next two chapters.

Chapter Two: John Rawls: A Liberal Theory of Political Legitimacy

Introduction

This chapter is devoted to Rawls's theory of political legitimacy. As will become clear, Rawls ultimately understands political legitimacy as one of the conditions for citizens to be reconciled to their society (see Rawls 2001: 3). For Rawls, citizens are reconciled to their society to the extent that the authority exercised by the state, its coercion, is justified in terms of reasons that are, in principle, acceptable to all citizens *as reasons*. Hence, argues Rawls, the justification of political authority cannot depend on comprehensive doctrines such as religious views. Furthermore, the legitimating reasons for the exercise of political authority must be stated in the language of public reason, derived from shared public, political culture rather than from the comprehensive doctrines embraced by particular individuals or groups. This culture is propagated and furthered through society's institutions, which themselves are reflections of the will of the populace. In this manner, Rawls's theory of political legitimacy is part of his overall attempt to solve the problem of pluralism – namely, under which conditions can one secure the good faith cooperation of citizens with differing and sometimes conflicting comprehensive doctrines, when organising the fundamentals of a liberal society in such a manner so as to safeguard the just distribution of goods and burdens.

After explaining Rawls's theory of political legitimacy, I move on to the critique of this theory in Section 2. For the purposes of this thesis, I will focus on the critiques developed by Chantal Mouffe, John Horton and David Reidy. I begin with Mouffe's criticisms that Rawls's determined effort to remain neutral in terms of comprehensive doctrines is unsuccessful and is in fact a strategic *political* choice, and not a moral choice as presented. Mouffe alone is not fatal for Rawls, but it does bring to light the very sharp distinction he makes between reasonable citizens and unreasonable individuals. The sharpness of this divide is troublesome.

After dealing with Mouffe's critique – which I endorse – I move on to Horton's criticism that it is problematic to ascertain when public reason can or cannot clarify an issue, in which case we require some kind of procedural mechanism (voting, for example). Horton also argues that even after the use of such a procedure, it is by no means clear that the

matter has been resolved. Finally, while Horton points out that public reason is incomplete in one sense (the difficulty with using public reason to know when public reason fails to solve an issue), Reidy points to a host of specific issues that instantiate this problem. Reidy, arguing that Rawls's public reason is not wide enough, also shows that widening it opens the door to non-public reasons carrying political weight. This extends Mouffe's point that Rawls's neutrality is in fact politically motivated and not neutral, and also that, were public reason able to account for these types of issues in the future (after some reworking), then the political would yet again have been removed from politics.

All three of the above critiques point to a problem with Rawls's aim to foster good faith cooperation in the name of justice and "stability for the right reasons" (Rawls, 1999: 24), namely that stability as Rawls conceives it is precisely precluded by his theory of legitimacy. My aim in the second part of the chapter is to explicate this problem in light of the critiques developed by Mouffe, Horton and Reidy. In order to do this, I will also show how stability is the criterion towards which the other four work. (For example, barely tolerating your neighbour of a different faith merely to keep up appearances of being a good Christian is not a stable kind of toleration.)

I ultimately conclude that Rawls does very good work to try to take plurality seriously, and doing so through the use of public reason. Limiting political discussion to reasons that are, in principle, understood by all reasonable citizens *as reasons*, can legitimise such a well-ordered society. However, Rawls must introduce a fairly stringent distinction between the public and private sphere, where in the former the appropriate language is that of public reason, and the latter carries no such restrictions. This distinction also then brings with it the stringent demarcation of the political sphere, one which I argue is too narrow and restrictive. It does not necessarily allow for all potential conflicts to be discussed publicly, which poses a serious threat both to plurality and thus stability.

1. The Liberal Principle of Legitimacy

Three years after the publication of Rawls's *A Theory of Justice*[25] in 1971, Robert Nozick claimed that "political philosophers now must either work within Rawls's theory or explain why not" (Nozick, 1974: 183). Clearly Rawls had an immense influence on

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25 Henceforth simply *Theory;* and *Political Liberalism* simply *PL*.

political philosophy. Haworth (2004: 237) suggests that this influence was due to the fact that, while political philosophy since World War II was mostly analytic and descriptive, Rawls had single-handedly revived the tradition of normative political thought. A second reason for Rawls's traction within the field of political philosophy is provided by Rawls himself. Rawls states that before *Theory* "the predominant systematic view in the English-speaking world had been some form of utilitarianism" (1996: xiv). In a word, utilitarianism is a comprehensive doctrine arguing that what is morally good is to maximise as much as possible, the utility or happiness of as many people as possible. One of the strongest critiques of utilitarianism is also one of Rawls's greatest concerns: justice. The argument is that utilitarianism allows for the sacrificing of individual lives and interests if this could maximise general utility – a situation that is decidedly unjust. In short, Rawls (1999: 27) holds that utilitarianism, in viewing social welfare as a property belonging to a group, dismantles or does not take seriously the distinction between persons. His aim, then, is to think though the fundamental problems in political philosophy in opposition to the previously dominant utilitarian tradition (see Wenar, 2012: 4).

Against this background, Rawls can be said to view the problem of legitimacy as the problem of how distinct persons, with differing comprehensive doctrines, can agree on an arrangement of society acceptable to all (Rawls, 1999: 4). By "comprehensive doctrine" Rawls means one's "view about God and life, right and wrong, good and bad" (Wenar, 2012: 5); in the strictest sense a comprehensive doctrine is a world view, inclusive of the metaphysical world. A comprehensive doctrine is best typified by, but need not be, a religious standpoint: Christianity, for the Christian, explains or provides an answer for life, the universe and everything. He sets out to work out the kinds of reasons that can justify state coercion, reasons which all citizens will endorse as justified and justifying reasons, irrespective of their comprehensive religious and moral views.

Alternatively formulated, for Rawls, society poses the problem of cooperation. Citizens must cooperate in order to enjoy a stable and relatively peaceful life (presumably, what the majority of human beings want), and the benefits and burdens of cooperation must be fairly distributed (*ibid.*). The solution to the latter problem is his theory of justice as fairness. This theory, however, is conceptually – though not chronologically – preceded by

his theory of political legitimacy. Before a government can begin to distribute burdens and benefits, it must have the authority to do so; alternatively, its authority can be derived from the manner in which the distribution takes place. If the latter, the manner of distribution must be agreed upon before the distribution takes place. In the same vein, the manner in which a government coerces, if agreed upon before the coercion, points to a theory of legitimacy. And this – legitimacy: or how just coercion is possible – is the focus of this chapter.

In terms of Rawls's theory, legitimate political authority is one to which citizens consent, and what is to be consented to must be just. While it is likely that all citizens will hold comprehensive doctrines, the justification for the principles according to which a society ought to be structured, and for their interpretation and enactment, cannot be grounded in a particular comprehensive doctrine. If that were the case, then the justifications will only be accepted as justifications by those adhering to the comprehensive doctrine on which the justifications depend. Moreover, it is inevitable that in a liberal democracy citizens will develop and adhere to divergent comprehensive doctrines. For these reasons, Rawls proposes a freestanding, political conception of justice, compatible with a plurality of reasonable comprehensive views, which is to provide the principles according to which a state and its institutions ought to be organised. These principles are just that: they are structuring principles, and do not and cannot provide answers to the type of fundamental questions that often emerge in politics, such as who can vote, or how taxation is calculated. These principles define the terms of social co-operation; they do not prescribe *how* these terms are to be enacted.

In *Theory* Rawls presents a conception of justice that is merely political and does not depend upon a single comprehensive doctrine. I present it here, in summary: Imagine yourself in the original position, asks Rawls, outside of society, but not before it. Moreover, you and everyone else are behind the veil of ignorance. That is, all individuals are deprived of knowledge regarding their race, sex, gender, class, comprehensive doctrines. In fact, all contingencies from the so-called 'genetic lottery' are obscured. Further, these individuals all know that "citizens in the society have different comprehensive doctrines and plans of life; that all citizens have interests in more primary

goods"[26] and all know "general facts about human social life; facts of common sense; general conclusions of science (including economics and psychology) that are uncontroversial" (Wenar, 2012: 12). In short, everyone in the original position is very much the quintessentially free and equal citizen – so free and equal, in fact, that we are all nameless, faceless and uninfluenced (uninfluencable) by our particularities.

From such a position, Rawls maintains that all individuals will choose conservatively, rationally and in self-interest. No one would, for example, advocate for a distribution of wealth such as the world currently has. The chances of re-entering society as one of the 85 wealthiest individuals, and not as one of the 3.5 billion poorest is a one in 41.1 million chance[27]. Nor will one design a society based on principles of gross gender inequality, as there is a more than 50% chance that you will re-enter society as one of the subservient genders. Likewise for racism, ethnocentrism, etc. From such arguments, Rawls is able to abstract the two principles that he believes all reasonable individuals will come to accept and endorse – the principles of justice as fairness. They are:

First Principle: Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.

Second Principle: Social and economic inequalities are to satisfy two conditions:

a) They are to be attached to offices and positions open to all under conditions of *fair equality of opportunity*;

b) They are to be to the greatest benefit of the least-advantaged members of society (the *difference principle*) (Rawls, 2001: 42-43).

These principles have a lexical priority (Rawls, 1996: 6). This forbids trading equal basic liberties for social goods.

The above hypothetical contract establishes, in the terminology of Rawls's liberal principle of legitimacy, the essentials of a constitution. There are very many ways in

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26 Understood as "liberties and opportunities, income and wealth, and the social conditions of self-respect" (Nussbaum, 2011:4).

27 According to Shin (2014), the richest 85 individuals on this earth own as much wealth as the lowest 3.5 billion individuals! Closer to home, in South Africa I have a 47% chance of reentering society below the poverty line of $43/month [R470] (Bhorat, 2013).

which these principles can be translated into a constitution; there are many different ways in which freedom, equality and fairness can be specified (Wenar, 2004: 6) – there are different liberalisms. Justice as (non-comprehensive-based, or: a freestanding conception of justice) fairness is one of a host of possible reasonable conceptions of justice. After *Theory* Rawls came to realise this fact – that there are many reasonable, liberal conceptions of justice – which he then addressed in *PL*[28]. This is why I state above that *PL* is conceptually prior to while chronologically preceded by *Theory*. In *PL* the focus shifts to the terms in which specific principles of freestanding conceptions of justice are advocated and defended, namely, public reason. Public reason can be found in public political culture.

In the above specific conception of a freestanding justice, what justifies the first and most important principle (the principle securing as much freedom as is compatible with all) is public political culture. The political culture of liberal constitutional democracies entails the recognition of individual freedom, and it is this fact on which Rawls capitalises. From public political culture public reason can be extracted: the kinds of reasons with which political actions and decisions can be justified. That these justificatory reasons are not bound to a specific comprehensive doctrine presents an opportunity for adherents of various comprehensive views to accept the justification as a justification (they need of course not agree, but they must recognise the reason(s) provided as (a) *valid* reason(s) for committing to a particular action or standpoint). The idea is that the reasons given for fundamental political standpoints can be accepted by all, independent of total doctrine, and in such a way there can be political agreement on the most fundamental political questions faced by citizens of a constitutional democracy. Finally, Rawls's concern is that justifications will not simply be accepted, but that citizens will have strong personal motivations for cooperating with and endorsing the state so as to fairly structure cooperation in society; justifications offered in the language of public reason will be such that adherents of all reasonable comprehensive doctrines are able to endorse them. In a word, the hope is that citizens can be reconciled to their government and support and value its aims, for reasons that others will also endorse, and for reasons that are already present in the public political culture.

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28 In a footnote, Rawls (1997: 774, note 27) refers to a previous footnote (1992: 167, note 1), wherein he states "I do think that justice as fairness has a certain special place in the family of political conceptions … But this opinion of mine is not basic to the ideas of political liberalism and public reason".

The understanding of stability that Rawls employs is two-fold. He understands stability as the need for an appropriate consensus, and secondly, as the need for peaceful coexistence (Rossi, 2014: 3). Appropriate consensus is of course the question of legitimacy as traditionally understood, and peaceful coexistence is the question of stability (as the term is understood generally). These two are separate, but most certainly well connected. The inclusion of legitimacy in stability precludes what Rawls calls a *modus vivendi* – a pragmatic, begrudging allowance of one comprehensive doctrine (or doctrines) by another. Such an arrangement is contingent, and Rawls seeks a kind of fundamental or stable stability (Rawls, 1996: 147). Other worldviews must be tolerated for the right reasons: moral ones; they must be reciprocally respected. This fundamental stability arises from the overlapping consensus on the principles of justice, the values of which are found in public political culture, and when public reason is relied upon to interpret these principles.

Before I continue on to discuss the role of public reason in the above, I want first to expand upon stability. Recall from Chapter One, that it is not an uncontroversial statement to make when stating that the state's right to be obeyed necessarily includes a duty placed on the citizens to obey. Rawls's legitimacy theory answers the question: how does the state have the right to rule. What answers the second question: what ensures that citizens will obey (is it a duty to do so, or some other principle?), is stability. Stability, says Rawls (1996: 142–143) "is secured by sufficient motivation for the appropriate kind acquired under just institutions. The kind of stability required ... then ... [is] addressed to [citizens'] public reason". It is from citizens' public reasons that stability hopes to draw its power. In this way, one can assign one of the tasks of political culture and public reason as securing stability. Without this aspect, "the legitimacy of political authority" would be "an account of how those who hold political power can satisfy themselves, and not citizens generally, that they are acting properly" (*ibid*.: 143-144). In short, stability is what gives citizens a very strong reason for acting in accordance with the political authority. This strong reason, or motivation, cannot be a single reason applicable to all – Rawls takes pluralism seriously. If justice requires of the reasonable citizen to uphold justice, the citizen must endorse a freestanding conception of justice from within their own particular comprehensive doctrine. This is Rawls's overlapping consensus. Phrased differently, reasonable citizens adhering to any reasonable comprehensive doctrine will have reasons,

already affirmed within their comprehensive doctrine, to accept a political conception of justice (Freeman, 2003: 36).

According to the Rawls of *PL,* for citizens with divergent comprehensive doctrines to all tolerate for the right reasons, means that total doctrines must be kept out of the political arena. However, in a later text, Rawls (1997) widens this narrow understanding of public reason. The concept is widened, because Rawls holds that citizens and public officials may appeal to non-public reasons provided they are able and willing to justify these positions in public reason: non-public reasons are allowed in so far as they are translatable into public reason; there is not a total embargo on religious (or other comprehensive doctrine) language in the public forum. In Rawls's (1997: 774-5) own words, "political liberalism, then, does not try to fix public reason once and for all in the form of one favoured political conception of justice ... For instance, political liberalism also admits ... Catholic views of the common good ... when they are expressed in terms of political values." When doing politics, human beings become for Rawls political citizens. The challenge is thus to find a language of reasons and justifications that comprehensive doctrines will actively endorse, but which do not themselves depend on a total doctrine for justification.

Rawls (1996: 137) summarises his position in his liberal principle of legitimacy:

> Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.

What this deceptively simple principle expresses, is that political power is justified if it is based on principles that all citizens can endorse. Immediately it is clear that Rawls has a certain kind of citizen in mind – a reasonable one. A jihadist is not interested in cooperation (a reciprocal task); an individual holding such a comprehensive doctrine wishes to eliminate or convert those who hold (even slightly, marginally) differing comprehensive doctrines. A reasonable citizen, on the other hand is a citizen who upholds and respects the criterion of reciprocity. This entails a sincere belief that the reasons offered for political action may reasonably be considered as reasonable reasons justifying

political action to other citizens (Rawls, 1999: xliv). This is reciprocal because the other to whom we offer these justificatory reasons clearly understands that we are trying to offer reasons which they could reasonably accept, *because they do the same*. The tolerant tolerate the tolerant. A reasonable citizen does not tolerate a jihadist and, reciprocally, a jihadist does not tolerate a reasonable citizen. But a reasonable citizen does more than just tolerate. One tolerates in a begrudging manner; toleration is a *modus vivendi*, while Rawls is after a stronger notion: stability for the right reasons means toleration with respect. Likewise, 'free and equal' denotes a reciprocal relationship. To be equal is to be equal *to*, equality is relational in the sense that if *A* is equal to *B*, then *B* is equal to *A*.

The content of reasonableness is neither precise nor fixed, as Rawls uses the term. "[T]he content of reasonable" can only be "specified by a reasonable political conception" of justice (Rawls, 1999: 94). One possible political conception of justice is described, though regardless of the particularities, it is here important to note that reasonableness is appended to *political* values. Reasonable, in the hands of Rawls, is a political reasonableness, as opposed to reasonable in one's comprehensive doctrine. Reasonable does decidedly not mean moderate. Nonetheless, some primary features of a reasonable citizen emerge. As stated in the paragraph above, reasonable citizens accept the fact that there are other comprehensive doctrines that are also valid. Additionally, reasonable individuals desire to cooperate with other reasonable individuals holding different reasonable comprehensive doctrines, and want to do so on terms that all can reasonably accept (Freeman, 2012: 32); reasonable citizens share with other citizens the view that society should be a task of living *and working* together. Cooperation

> involves the idea of fair terms of cooperation: these are terms that each participant may reasonably accept, provided that everyone else likewise accepts them. Fair terms of cooperation specify an idea of reciprocity: all who are engaged in cooperation and do their part as the rules and procedures require, are to benefit in an appropriate way (Rawls, 1993: 16).

This quotation clearly illustrates that mere toleration, a *modus vivendi* is inadequate. Passive toleration is not enough, but actively reciprocating, working together is what is meant.

The reasonable citizen justifies her political action with recourse to public reason, and public reason depends on a shared public political culture. As Rawls (1999: 100) expresses the point:

> Since justification is addressed to others, it proceeds from what is, or can be, held in common; and so we begin from shared fundamental ideas implicit in the public political culture in the hope of developing from them a political conception that can gain free and reasoned agreement in judgment.

A society of reasonable citizens will engender (cultivate, and then in turn draw on or be formed by) a public reason. This is a restatement of a reasonable citizen, but applied to groups. Public reason dictates that "[c]itizens engaged in certain political activities have a duty of civility to be able to justify their decisions on fundamental political issues by reference only to public values and public standards" (Wenar, 2012: 6; all emphasis in original here removed). This is one of the very few times that Rawls makes use of a duty. A second time he makes use of this concept is not dissimilar to Kant's position: we have a natural duty to obey just institutions (1999: 142).

Public values and standards, the language in which reasonable citizens express justification for political action, must itself be justified – they must come from somewhere, and must in principle be reasons that others belonging to other comprehensive doctrines can endorse as reasons. They can clearly not be seated in a particular comprehensive doctrine. Rawls thus looks to public political culture to find and anchor these values and standards. Public political culture "comprises the political institutions of a constitutional regime and the public traditions of their interpretation (including those of the judiciary), as well as historic texts and documents that are common knowledge" (*ibid*. 13). Public reason is a manifestation of public culture; the values and justifications used in public reason are grounded in a shared political culture. In established western liberal democracies, for example, religious freedom is very much part of the public culture.

Looking to the public political culture of a typical liberal constitutional democracy, Rawls extrapolates three fundamental elements. Citizens want to be free, citizens want to be (or

be treated as) morally equal and society should be a fair system of cooperation (Wenar 2012: 5). If any assurance is required that Rawls takes public political culture seriously, one need only look to how he phrases the problem of legitimacy. Public political culture not only informs Rawls's point of departure for his work on legitimacy, but it also informs and shapes the views of citizens living within the culture. It does so not only for those currently living in such a society, but also for those future generations to be born into such a society. Rawls places much emphasis on this futurity – a reasonable and liberal society must be able to continue to be reasonable and just. That is: such a society must be stable. In this manner, by relying on public political culture, Rawls's hope is that the principles according to which society is structured will "win its support by addressing each citizen's reason, as explained within its [society's] own framework" (Rawls, 1996: 143). The support won takes the form of the duty to obey just institutions, emanating from our natural sense of justice inculcated by those institutions:

> those who grow up under just basic institutions acquire a sense of justice … Expressed another way, citizens' sense of justice, given their traits of character and interests as formed given a just basic structure, is strong enough to resist the normal tendencies to injustice (Rawls, 1999: 142).

Returning to Rawls's liberal principle of legitimacy, it is now clear that the founding principles of a liberal democratic constitution cannot themselves be derived from a comprehensive doctrine, and therefore neither can public reason, and by extension nor can public political culture. Within a reasonably pluralist society no single reasonable comprehensive doctrine will be accepted by all, and if this were attempted an inordinate amount of force would be required, as well as a fundamental loss of freedom for some: the freedom to select for themselves what kind of life is worth living. Thus, what grounds these constitutional principles? It must be something that all citizens can be said to reasonably share; these principles must be neutral regarding comprehensive doctrines, and as such they create the space of neutrality between and within them. Public political culture can accomplish this (Rawls, 1999: 46), individuals socialised in a democracy will consent to principles justified in terms of a language that is reasonable to all. As we have seen in Chapter One, a common manner in which consent has, historically, been thought to be given to a state is through contractarianism.

Rawls presents a form of social contract theory, but differs from the classic social contract theorists. For them, the contract is hypothetical; for Rawls the contract itself is not actual (there is no paper to sign), but the endorsement is. Public political culture is *public*, and shared by the public, and thus the justification of state coercion based on this culture will enjoy actual endorsement. Bearing this difference in mind, Rawls is also closer to Kant than to the other contract theorists. Kant does pose a contract that individuals *could* consent to, but Kant also qualifies voluntary consent. For him, we have a duty to consent to a contract *if* the content of the contract is based on principles of right. For Rawls, we likewise have a duty to consent, *if* the contract expresses principles of justice.

The two principles that Rawls provides in *Theory* are fair and just. The conception of justice expressed in them is, just as the justification for state coercion, free of comprehensive doctrines – this is a political conception of justice, formulated in the language of public political culture. Justice understood as fairness (or any other instance of the reasonable liberalisms possible) is certainly a moral conception, but as Rawls (1996: 11) writes, "it is a moral conception worked out for a specific kind of subject, namely for political, social and economic institutions". The principles do not prescribe the good. Rather, they open and safeguard a space wherein many kinds of 'the good' can be achieved. This is the meaning of an overlapping consensus: from *within* their reasonable comprehensive doctrines, citizens can support the moral (and political) conception of justice, and thus the structure of their society. As Rawls puts the point, "there are many reasonable comprehensive doctrines that understand the wider realm of values to be congruent with, or supportive of, or else not in conflict with, political values as these are specified by a political conception of justice for a democratic regime" (1999: 169).

The principles belonging to a political conception of justice have a double status. They are objective criteria to use for evaluating a regime, and citizens can be asked whether these principles can be justified to them in terms that they accept. In the latter, Rawls approaches Simmons' attitudinal conception of legitimacy (Song, 2012: 187) (recall that the focus on citizens' attitudes belongs to descriptive conceptions of legitimacy). As we have seen, descriptive theories of legitimacy are vulnerable to the criticism that they reduce political legitimacy to individual beliefs, leaving out of account the justification of

political authority. However, since the principles of a political conception of justice also serve as normative criteria, this criticism is mitigated. Citizens are to derive their political conception of justice from the public political culture of a liberal, constitutional democracy, which treats freedom and equality as fundamental concerns (they are already predisposed to accept these principle). What it is that individuals are consenting to, is not consented to out of self-interest (as with Hobbes), but because of the soundness of the principles – their just nature.

While the above *is* a hypothetical contract situation, it is not yet a contract position which binds citizens to obeying each and every law. I name it a contract situation, because it takes the form of a contractual agreement. It is not yet a full agreement, but without at least this first agreement regarding the principles, legitimacy is precluded. Citizens select the principles in the original position, and if the state upholds them, then legitimacy becomes at least a possibility. The above hypothetical contract establishes, in the terminology of Rawls's liberal principle of legitimacy, the essentials of a constitution. Which particular reasonable liberalism is to be implemented, and how it is to be implemented, is the work of the actual, non-hypothetical contract. To pinpoint Rawls's legitimacy, then, is to state that if the duty of public reason is adhered to, and if in this language the values of liberalism – equality, freedom, fairness – are fostered, then a state's coercion will be both legitimate and foster a stability.

As should be clear from the above, Rawls does not entirely need to account for an obligation that citizens have to obey the state. Rawls's very sparse use of either duty or obligation (within the context of legitimacy) usually relates to the duty of public reason. This specifies that citizens have a duty of civility – here understood as the duty to use public reason – when engaged in certain political duties. Rawls (1999: 215) details these specific instances: "when [citizens] engage in public advocacy in the public forum" understood as, for example, electioneering, and when "citizens are to vote in elections when constitutional essentials and matters of basic justice are at stake". This duty of civility is borne out of a natural sense of justice (reasonable citizens have a natural sense of justice when they have the reasonableness to adhere to fair terms of cooperation even it if were to be to their own personal detriment, provided others would do the same (Wenar, 2013: 25)), which, clearly, a just society capitalises on and inculcates.

The thought is that legitimacy is not generated *through* public reason, but that public reason merely serves to formalise conceptions of legitimacy (and justice) *already inhabiting* the minds of citizens. More specifically, Rawls depends upon the concept of reflective equilibrium in order to explain the interplay between individual values and a political conception of justice. In its most perfect state, reflective (not that property of a surface, especially a shiny one: a mirror simply reflects without absorbing; reflection here pertains particularly to absorption, of thoughts and ideas, thus a slow and careful thinking) equilibrium is when all of one's beliefs, on all levels of generality, are in perfect coherence with one another (Wenar, 2013: 3). From such a position of perfect reflective equilibrium one could justify one's beliefs to another also in such an equilibrium – provided the two individuals hold the same beliefs. However, the perfect state is an impossibility[29]. Thus this method of reflection can be used to approximate the ideal. In a reasonable liberal state, however, one could state that all citizens believe slavery to be morally bad, and this belief can be found in the public political culture. This then forces, in the name of coherence, the belief that all have equal freedom. If one wants to reject the latter belief, one must also reject the former. Public political culture is the pool from which beliefs commonly shared are taken and reflected on by the individual. Rawls (1996: 8, note 8) further differentiates between narrow and wide equilibrium. Narrow is simply one's initial, 'uppermost' beliefs, the one's with which one would respond immediately when asked about one's beliefs. Wide reflective equilibrium is approached when theories of political science and political philosophy have been duly considered. At the outset of this method, "all [beliefs] may have an initial credibility ... no one level ... is considered fundamental ..." (*ibid*.), and as one progresses one slowly alters or adapts ones beliefs so as to reach coherency within oneself.

It is in this way, the individual comparing her beliefs with that of public political culture, and thus in the terms of public reason, that the individual begins to inculcate political conceptions of legitimacy and justice. This individual, of course, also herself contributes to public political culture, and thus in turn makes a contribution to the conception of a political notion of justice.

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29 If it were not, if it were fully achievable, then Fukuyama may have been correct in announcing the end of history.

This does not bring Rawls any closer to Simmons's philosophical anarchism, however. For Simmons, without an obligation to obey the government, one may still decide to obey the government so long as it is in your interest to do so (either because the alternatives are worse, or because that state coincidentally harbours goals which you support). Rawls "is not interested in simply illuminating the generic benefits that states provide" (Song, 2012: 171), nor is it coincidental that the state harbours goals which we support. According to Rawls, citizens of a just society do not merely endorse or obey their state, but they are *reconciled* to it. The motivation to obey the state therefore stems from the moral commitments that citizens already hold, according to which the state is structured. Aptly phrased by Song (2012: 172), "obligation is replaced by enthusiasm". Citizens of a liberal constitutional democracy characterised by an overlapping consensus endorse political authority as a formal expression of moral ideals to which they are already committed. In this regard, Rawls's theory of political legitimacy draws on Hegel's notion of reconciliation in the political domain (cf. Song 2012). As Rawls interprets Hegel, "[w]hen in our reflections we understand our social world as expressing human freedom and enabling us to achieve it as we lead our daily life, we become reconciled to it" (2001: 332). It is a condition of such reconciliation that citizens recognise that the basic structure of their society advances their freedom. While this fact must be duly acknowledged by citizens in their private reflections, such acknowledgement is only possible in so far as government makes its workings publicly known and any principles of justice are able to withstand public scrutiny on a continual basis.[30] Rawls thinks that, under these conditions, we will not find our duties or our obligations owed to the state a burden; we will see our institutions and government as rational and reasonable. If we understand that our institutions enable human freedom and flourishing, and do so because they reflect and form our public culture, then we may (maybe) be free. If our state institutions do not reflect our public culture, or are not reasonable and rational, or if they are but we do not recognise them as such, freedom and stability is precluded. Cynicism and impotence then overwhelm us.

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30 This is what is known as the "publicity principle". In Rawls's words: in "public political life, nothing need be hidden" (1999:68). He specifically opts for the term "publicity" rather than "openness" here. While openness implies nothing is hidden and it is there if you ask for it, publicity implies *making* public, in the vein of a marketing strategy.

2. Evaluating the Argument

The above is not a full account of Rawls's theory of political liberalism, but it does explain the central tenets of his conception of political legitimacy. I now turn to the evaluative part of my analysis. My aim here is to test Rawls's conception of political legitimacy against the five criteria I had developed in Chapter 1. In doing so, my main focus will be on his conception of public reason, since it is precisely public reason that is meant to legitimate state control over the actions of these free and equal citizens.

To recall: A convincing account of legitimacy should fulfil the following criteria: 1) it must provide a means of evaluating government action; 2) it must respect plurality and conceive of legitimacy as pertaining to plurality; 3) it must justify political authority; 4) it must account for government's right to rule; that is, it must explain the relation between authority and duty or obligation; and 5) it must allow for and ultimately foster stability.

For Rawls, however, as we have seen, the question of legitimacy is partnered with stability; a legitimate state is the answer to the following question: "How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?" (1999: xx). The justice of 'just' is ensured through conceiving of a political justice, and the stability is ensured through reconciling citizens with their constitution and institutions. The former justifies the state's rule; the latter replaces the more conventional idea of a duty to obey that is placed on citizens. Recall, that justice is stable if it inculcates a desire, amongst citizens, to uphold this justice. I thus break with numerical order, and start with the last of the criteria. To a large extent, the other four criteria are addressed in terms of the fifth.

I visit two forms of critique here, operating on two different levels. Both of these critiques undermine Rawls's claim that legitimacy would necessarily render a stable political world. The first, more fundamental challenge comes from Chantal Mouffe, who holds that Rawls's attempt to remain neutral in terms of reasonable comprehensive doctrines is, firstly, not a neutral move and secondly, that such a strategy removes the political from politics. The second criticism, which derives from John Horton, holds that public reason, as Rawls conceives it, is not wide enough, that it is insufficient to resolve fundamental

political disagreements. Finally, I follow David Reidy in applying this criticism to a number of concrete cases.

What kind of citizens tolerate others for the right reasons? Reasonable citizens. According to this logic, reasonable citizens *qua* their reasonableness (and only reasonable citizens) will consent to a particular morally acceptable state. (Clearly, this refers to citizens holding reasonable comprehensive doctrines.) Moreover, only consent given freely counts. (This is the actual consent Rawls is after – a hypothetical consent *should* be given, but it may be that it is not given; citizens who should, but nonetheless do not consent, do not contribute to the stability of a society, and are either unreasonable or irrational.) Thus the logic here goes: reasonable citizens will, by definition, respect the equality and freedom of other citizens; only reasonable citizens are allowed to partake of the deliberative process of governing (citizens appealing to public reason in good faith); thus only the consent of those who *do* consent counts. Further, what does it mean for stability if those who will not consent may not partake of the process of structuring society? Chantal Mouffe (2005) investigates both the limits and the origin of reasonable pluralism, and concludes that both the fact of the exclusion (of the unreasonable), and the nature of that exclusion are politically motivated decisions. They are not, as Rawls presents them, moral exigencies (Mouffe 2005: 223). This political decision, she concludes, allows for the denial of reasonable political antagonism.

Rawls, holds the charge, delineates 'reasonable' in such a way that "there cannot be pluralism as far as the principles of the political association are concerned" (*ibid*.). Mouffe's (*ibid*.) argument is that Rawls's distinction between 'reasonable' and 'unreasonable' serves to "draw a boundary" between comprehensive doctrines that either accept or oppose liberal principles. There can be no reasonable debate or discussion between these two general camps, for the one is simply unreasonable and thus excluded from debate or discussion. The political world has immediately shrunk down substantially, and Rawls' justification for such a move can only be a political justification. Challenging this boundary makes one unreasonable, unless one could challenge it on reasonable grounds. Stated differently, one would have to challenge this exclusion, or boundary, through the language of public reason.

Pluralist democracy, replies Mouffe, is not an absence of violence or domination. Rather, it is a political landscape in which institutions are established in order to limit or contest violence or domination. If this conception of pluralist democracy is correct, it precludes the notion of a rational political consensus, and especially one premised on exclusions. We are not exclusively, maintains Mouffe, rationally self-interested: some of the most confounding problems of politics are passion, envy and inevitable antagonism. To summarily exclude these, and even more forcefully, to declare any challenges to these exclusions illegitimate and so remove their voice, may remove these antagonisms from Rawls's carefully tailored political sphere, but does not undermine their existence. Envies and passions have a way of emerging, and Blake's words should be heeded: rather murder an infant in its cradle than nurse an unacted desire.

This critique does not singlehandedly crush Rawls, but does raise the pressing question of public reason and what can be done with it. For this I move on to Horton, and will return to Mouffe below.

Much hangs on public reason, for as the legitimacy principle states, government coercion is only justified in so far as it can be justified in terms of public reason (or through public reasons). If so, the justification will be considered reasonable by all (whose consideration matters). I therefore want to ask: does Rawls's conception of public reason succeed in the justificatory work is has to do? Can a broad range of comprehensive doctrines, through public reason, converge on a set of political principles to which reasonable citizens cannot object? In short, before I answer whether or not public reason can allow for a reasonable discussion regarding those excluded from the political world, can it adequately deal with what it is tasked with, from within the political arena?

Rawls happily concedes that "political liberalism does not hold that the ideal of public reason should always lead to a general agreement of views, nor is it at fault that it does not," because such disagreement can be edifying, through them "citizens can deepen their understanding of one another" and contribute to the political culture (Rawls, 1997: 799). This is a watered-down political agonism (a political theory that accepts a permanent space for political conflict, and values political conflict (some, not all) for its potentially positive aspects) – a highly structured and restricted agonism. Edified citizens with a

deeper understanding of one another is a worthwhile pursuit, yet there *do* remain questions that *do* need answers. In such instances, Rawls proposes we default to a procedure which is reasonably agreed upon (as a legitimate procedure), such as a vote (*ibid.*: 798). To be clear, the procedure of voting is what there is reasonable agreement about, not the outcome of the vote. The outcome will be respected if the procedure is accepted. Horton (2003: 13) extracts two points from this. Firstly, in those instances when deliberation through public reason cannot yield satisfactory answers, it is thus imperative that voting be accepted as a legitimate means of dealing with these problems. That this is the case is not clear. Horton does not provide an argument, but it is not difficult to construct one. If the disagreement is such that argument cannot solve it, majority decision should function as a stronger argument. You may not be convinced through deliberative argument, but the argument that most citizens agree that *x* is convincing – is not a convincing argument.

The second point Horton extracts has two elements. Firstly, who decides that public reason is, in fact, indeterminate regarding a specific disagreement? Some may reasonably think that it is not indeterminate. A second order disagreement can thus emerge: whether or not this specific disagreement is solvable through discussion anchored within public reason. Secondly, if it is somehow agreed upon that public reason cannot solve the original disagreement, and a vote is undertaken, what are the assurances that the voters voted according to public reason (a condition which legitimizes the vote)? (*ibid.*). Presumably the issue is contentious, and citizens have a strong motivation for seeing their preference implemented. Compounding the matter, democracy demands a secret vote. There is no way of checking whether votes were cast according to public reason. And even further, *how* does one check? What is the standard? As Rawls prescribes, citizens must vote for what they honestly consider to be the *best* expression of what public reason dictates (*ibid.*). How is this 'best' measured? If public reason could not solve the disagreement in the very first place, it is problematic to depend on public reason to judge the answer which best expresses public reason (this was the second order disagreement).

The above is a pressing concern for Rawls's theory only if it can be shown that such types of disagreements can and do occur, are connected to fundamental issues within politics and occur frequently enough that stability (in this case, as it is fundamental issues at stake, it is the stability of the conception of justice that is in question) is placed under pressure. If this is the case, Rawls's notion of overlapping consensus is problematized and agreement

cannot reliably be found regarding fundamental political questions. Recall, overlapping consensus is what, for Rawls, drives, stability. Reidy (2000) provides just such an argument.

Rawls categorises his public reason as wide (recall: non–public reasons may be used, provided they be translatable into the language of public reason); thus it is exclusively public reason (or reasons translatable into public reason) that can resolve fundamental political issues. Public reason is autonomous (freestanding) and complete (Reidy, 2000: 52), and carries a force and authority which cannot be reasonably rejected, thus legitimising government coercion through consent.[31] Further, what justifies public reason is precisely its ability to provide reasons suitable for all. Failing to do so delegitimises public reason.

Public reason so understood has both a sincerity and a motivation requirement (*ibid.*: 58). Rawls fulfils these through what he calls "the duty of civility". Take special note of the phrasing. This entails the duty to sincerely appeal to what is in good faith believed to be public reasons. The individual casting a vote, for example, may not be hypocritical. When voting, one must do so sincerely – that is, one must sincerely believe that the public reasons motivating one's vote are in fact sufficient motivators for your particular action[32]. Or, if one has not the time to work through the vocabulary of public reason, one can vote on non-public reasons, provided a parallel argument can be made in the language of public reason. As Reidy (*ibid.*: 67) terms it, if one votes or takes a position based on non-public reasons, there is the requirement that at a later date the self-same issue must be argued or defended "*de novo*" (as if anew), and the same conclusion must be reachable through using public-reason alone. Individuals occupying more formal official positions than a citizen voting in an election, such as a Supreme Court Judge, must always, when acting in this capacity, restrict their resolution-determinative reasons to public reason.

Officials such as a Supreme Court Judge or a Constitutional Court Justice, one can safely assume, regularly deal with fundamental political matters – more so than the general voting public. However, as Reidy (*ibid.*: 64f) shows, it is possible to think of instances that

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31 An "essential feature of public reason is that its political conceptions should be complete" because "unless a political conception is complete, it is not an adequate framework of thought in light of which the discussion of fundamental political questions can be carried out" (Rawls, 1997: 777-8).
32 This is perhaps the best reply that Rawls can give to Horton's critique; it is not a strong reply.

call for precisely such decisions on fundamental political matters, but where public reason is neither autonomous nor complete. By "autonomous" Reidy means a public reason which does not depend on any reasons not within public reason. An autonomous public reason is autonomous from any specific comprehensive doctrine, while "complete" public reason would mean a public reason that is rich enough to account for all that it needs account for[33]. The first such instance is when a decision hinges on the ordering of "competing or contradicting political values of very great and apparently even weight" (*ibid*.: 64) (call this the Ordering Issue); the second instance is when a decision hangs on "the resolution of some background or preliminary issue with respect to which liberal public reason is more or less silent" (*ibid.*: 64) (call the second the Background Issue). Examples of Ordering Issues include gerrymandering in order to artificially bolster a minority candidate, questions raised by affirmative action, human cloning, prostitution, pornography and euthanasia laws (*ibid*.: 64). Examples of Background Issues include questions of animal rights, or whether or not an environmental laws result in the 'taking' of private property by government, should government severely limit what may be done with this property (*ibid.*: 68).

The Ordering Issue has two problems nestled within it. Firstly, Rawls insists that values be ordered independently of any specific issue, and then be applied to the issue. Questions relating to human cloning, for example, might be said to have a bearing on constitutional essentials (the freedom and equality of citizens) as well as on matters of basic justice (e.g. the allocation of primary social goods) and are therefore a suitable focus for public reason. However, ordering the values involved in decisions regarding human cloning (right to dignity for cloned individual; reproductive right of individual being cloned, and so forth), in turn, must be done according to public reason. The argument and reasons given for a specific ordering of these values must be done within the domain of public reason. However, for different specific issues, different ordering will be selected, and from within public reason there is no rational, determinate order, nor reason for ordering in any specific order. To solve this, one is thus forced to appeal to reasons *outside* of public reason. In such cases, public reason is not autonomous, it is not freestanding. And yet Rawls's position requires of public reason to be autonomous.

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33 A very young democracy, for example, may not have a public reason that is complete, or near complete enough. It can still be autonomous, however – it need not then default into comprehensive doctrine reasons, but it will have to, over time, enrich the public reason.

The second problem inherent in the Ordering Issue is the following: when a citizen votes for a certain order of values according to non-public reasons, but is willing to argue for the same position *de novo* on the basis of public reasons, she must nevertheless rely on non-public reasons in order to do so. When ordering values in terms of public reason, this order must coincide with the decision previously made, with the decision already taken. The earlier decision, however, was taken for non-public reasons. This means that the criteria used to determine the order of values derives from non-public reasons (albeit indirectly). Again, it is shown that public reason is neither autonomous nor complete.

Turning to the Background Issue, a second challenge emerges against the claim that public reason is complete and autonomous. Take the question of animal rights. Animal rights may bring with them, amongst other changes, the fundamental questions regarding private property rights, by limiting or prohibiting humans' property interest in animals. Further, settling this question will largely depend on how animals are thought of, in moral and political terms, in the wilderness (Reidy, 2000: 69). There are no values here that need to be ordered in order to resolve the matter through public reason. Rather, the background question: "What is the moral status of a higher primate?" must be settled before human property rights with regard to the higher primates can be settled. However, the moral status of a higher primate cannot be argued for (one way or another) through public reason alone. This is so because the moral status of the higher primates, for example, cannot be found in an overlapping consensus. It is a fundamental moral question that is answered (most commonly) through recourse to religion, and this can go either way (God made the animals so they must be cherished, or God made the animals for humans). Again, public reason is inadequate in this instance.

These examples of instances where public reason is inconclusive, or where it is neither autonomous nor complete, indeed pose a deep challenge for the Rawlsian theory of legitimacy. Recall that the problem of legitimacy is for Rawls the problem of how citizens, with vastly differing comprehensive doctrines, can agree on an arrangement of society acceptable to all. Rawls's solution is to keep comprehensive doctrines out of negotiations regarding fundamental political issues (in the sense of wide public reason). Above, however, are two kinds of fundamental political issues which cannot be solved by means of public reason alone. Were Rawls to try to expand his conception of public reason to

account for these instances, it would have to include that which is not, in the current sense, public – comprehensive doctrines or special moral judgements or idiosyncratic valuations.

Important to note for all of the above is that the scenarios sketched and examples given can easily all be taking place in a well-ordered society. While the moral status and rights of higher primates may be a relatively old question, the issue of cloning is fast becoming a pressing issue, and is but one example of where expanding technology will continue to bring with it more and more challenging political questions.

Lastly, it remains to point out that Ordering Issues, such as abortion and human cloning, and Background Issues, such as animal rights, can seriously threaten the stability of a political order. Some might claim that animal rights activist groups have, for decades now, been loudly, intensely and even violently campaigning for the banning of medical and cosmetic testing on the higher primates, and such societies have not suffered threatening instability due to this. But that is to miss the point. The point is that at least two instances have been identified where public reason simply cannot give an answer. Most importantly (and this relates to Horton's argument), in arguing that public reason cannot resolve these issues, I myself have had to employ a vocabulary from outside of public reason. Public reason alone, I must here conclude, is not sufficient for addressing or solving all fundamental political questions that can and mostly have already arisen in modern liberal democracies.

It is clear that Rawls's very well tailored political world is immensely important to his theory. In fact, to the question of how vastly differing, incompatible, but all reasonable comprehensive doctrine following individuals can successfully cooperate, Rawls replies: by acting strictly politically. Justice must be understood politically (and *only* politically) for it to remain stable; the various possible liberal principles possible must be selected strictly politically, discussed in the language of public culture (widened) which is public political culture. In short, by viewing individuals as citizens (utterly political), speaking the language of politics (public reason), Rawls hopes to mitigate the most likely sources of conflict: religion and fundamental morality. And yet, through Horton and Reidy I have shown that to remain strictly political is not feasible given the problems faced by modern liberal democracies.

Reidy and Horton show internal problems, problems that are, at the outset, phrased politically but which must then quickly move outside of the political realm if they are to be satisfactorily answered or dealt with. As stated above, Mouffe's critique is that Rawls's definition and thus exclusion of unreasonable amounts to a liberal commitment to only accept as reasonable other reasonable liberalisms. And this first move of Rawls is presented as a moral move, while in fact being a political move. This creates an insurmountable tension for Rawls's position. Banishing all unreasonable individuals, retaining only reasonable citizens and insisting on the exclusive use of political language, is too high a price to pay for what Rawls imagines he is getting in return – and he is not getting it in return. At some point in the near future, animal rights will have to be discussed, as will the implication on human property rights. Doing so, however, makes one unreasonable, for one cannot do so in the language of public reason. One can then remain quiet on the problem (which seems an irrational course to take), or insist it be addressed. Should one insist it be addressed, one is insisting that non-public reasons be included in the language of public reason – making one unreasonable, thus banished from Rawls's political realm. Ironically, she who insists on discussing whether or not some animals can be citizens, by that very act, disqualifies herself as citizen.

I conclude the evaluation by reinscribing the above challenges to public reason, and by extension Rawls's notion of the political and overlapping consensus onto the five criteria. As regards the provision that a theory of legitimacy must provide a means of evaluating government and government performance, Rawls does rather well. Government has the publicity requirement, and thus advertise their policies and actions, and the principles underlying them. More, government must communicate these in the language of public reason, which means that it is fairly clear what government is doing. Whatever type of reasonable liberalism is adopted in a given state serves as the fundamental criteria according to which government and government performance can be judged, by all reasonable citizens.

The second criterion, that a theory of legitimacy must respect plurality and conceive of legitimacy in terms of plurality, is one of the central components of Rawls's theory. Restricting politics to public reason is done precisely so as to remain neutral regarding the epistemic content of comprehensive doctrines, and thus respect plurality. Rawls explicitly tries to manage and negotiate plurality, not to eradicate it as a problem to be finally solved.

However, as shown above, only those who are reasonable will consent to reasonable public-reason reasons (or at least accept them as reasonable reasons). This is a political division. Politically, then, individuals are marginalised, and their consent or lack of consent does not count. This can potentially lead to violence from the marginalised, or at least to great frustration on the part of those who have been politically sidelined, and this in turn threatens stability. This is not to say that I suggest it would be more in the interest of political stability to fully include unreasonable individuals. I mean that the division cannot be as sharp and total as it is. Having no say in (not even being, in Rawls's conception, a citizen of) the country in which you live, will no doubt lead to immense frustration and anger. Rawls does speak to an already well-ordered society, but as shown above, when public reason proves incomplete and non-public reason must be appealed to (even in well-ordered societies), every citizen becomes, temporarily, an unreasonable one – every citizen is *forced* to reason from non-public reasons. The possibility for loss of stability is here very high, as these types of fundamental questions – for example, the right to gay marriage, or abortion rights – are usually as contentious as they are fundamental.

Penultimately, a theory of legitimacy must justify the use of political authority. This point need not be revisited at length, as the content has been covered above. For Rawls, a government is justified in exercising authority over the citizens of a state if those citizens are able, from their own idiosyncratic positions, to endorse their societal arrangement, translating their comprehensive doctrine precepts into the language of public reason. The authority exercised by the government is an authority that all can recognise as in principle an authority they themselves can agree with, or at best is the kind of authority each would themselves exercise were they the authority. Again, it is clear to see that a public reason that is neither complete nor autonomous can force a government to make decisions regarding fundamental political questions that does not conform to a legitimate exercise of authority. Returning to the cloning question, for example: government may feel forced to ban human cloning for pragmatic reasons, yet cannot have the legitimate political authority to do so, for they cannot express these reasons wholly in the language of public reason.

Finally, and closely related to the point above, a theory of legitimacy must account for a government's right to rule – that is, it must explain the relationship between the exercise of authority and the duty to obey such authority. And again, this relation is one which

Rawls, for the most part, handles deftly. The relation between authority and duty or obligation is one which Rawls dissolves and replaces with the notion of reconciliation. If citizens find that their institutions and constitutions resound with their own personal views and reasons then there need be no explicit argument for relating authority and duty. And yet again, this is the case until such moments as public reason proves insufficient or indeterminate.

Conclusion

The manner in which Rawls understands political legitimacy is markedly different from that of the traditional contract theorists. To be sure, there are many points of similarity (e.g. on the role of public reason as expounded by Rousseau; the emphasis on the priority of right), yet the main difference is a difference that makes a real difference. Rawls does his utmost to remain neutral in terms of the epistemic content of comprehensive doctrines; he proposes an open metaphysics, a space for metaphysics which does not favour one or another, provided they are all reasonable. The classical contract theorists take substantive positions. Rawls tries to fix on the type of fundamental rules that can be used to generate further rules; he calls these fundamental rules liberal democracy and concedes that there is a whole family of liberal democracies that are able to rely upon his foundational rules. That Rawls leaves an open space for metaphysics affords his position a fluidity. Citizens standing in a relation of reconciliation towards and with their governments, citizens having an enthusiasm for their government and its laws (rather than obeying due to an externally imposed duty or a threat of sanction), commends the well-ordered society. This fluidity is a fluidity of political arrangement: citizens are free to attempt to provide reasons to other citizens promoting certain laws of structural changes to the state, and the language in which these reasons must be given is well demarcated (even if, in some instances of fundamental questions, inadequate).

While fluid in this manner, Rawls's position is much too static in other respects. The above fluidity works for a well-ordered society, where each citizen (or the overwhelming majority) is reasonable, or in other words a liberal. Moreover, this fluidity only holds as long as no major, fundamental issues arise for discussion and decision-making. As illustrated through Reidy, there are at least two types of issues (Ordering and Background)

that public reason cannot address without stepping outside of itself. The idea behind public reason is to offer a language and a set of reasons that can be used to justify coercion – reasons that each could endorse from within their own comprehensive doctrine, yet which finds expression, also, in public reason. If citizens have to step outside of public reason to justify their decisions then there is a high possibility for conflict (generally, comprehensive doctrines are not prone to negotiation – one either gives one's life to Jesus or one does not), and thus a loss of stability. However, as Reidy is able to show, the issues involving same-sex marriage, euthanasia, abortion, human cloning and animal rights cannot be confined to public reason alone. And these issues, specifically, are all addressed rather decidedly in most popular religions – again with little room for negotiation. And it is issues of this very nature – usually about life or death – that can encourage normally law abiding citizens to become extreme. Accusations such as 'baby killer' or 'child murderer' have a knack of inciting violence, brutally and swiftly.

Issues of life and death will not go away. In fact, one could reasonably expect them to increase. How do religions feel about bionic limbs, about penis transplants, etc.? As technological capacity steadily increases and proliferates, these issues will only increase in number and intensity. Rawls is quite clear on the matter: *only* reasonable reasons are to be considered; only positions justifiable exclusively in public reason. Religious extremists are afforded no voice at all; the resolving of the higher primate moral status issue is muted. The point is not that such individuals or such topics cannot easily be discussed or afforded a voice, no, the loss of voice is absolute and the discussion of such topics simply cannot continue. That is not to say that the extremist will relax her views or the question of animal rights go away. As we have seen ample times, a very few determined and well placed terrorists or extremists can deeply threaten a society's stability.

Ultimately, thus, we may conclude that while Rawls's theory of legitimacy introduces both interesting and worthwhile components (specifically, for example, replacing a duty of obedience with a natural sense of justice inculcated through a relation of reconciliation with institutions one finds to be just), on the whole its limits are too limiting. In a very real sense, Rawls provides a theory which can legitimise a government which would already have been considered legitimate by its citizens. This added formalising of the legitimacy does deliver much of value and use to the public political arena, but cannot quite be said to

actually legitimise a government. I end with a last example: a reasonable citizen whose voice counts to a reasonable liberal government, has his voice counted because he values reasonable liberal values. With his voice counted or not, this reasonable citizen would have acted in a reasonable liberal manner regardless. And such actions contribute to the public culture, which public reason in turn draws on, and in which politics must be conducted – thus providing the government with direction.

In a word: it is only in a well-ordered society that Rawls's theory of legitimacy comes into its own. Unfortunately, it is precisely in such a well ordered society where the problem of legitimacy is no longer a problem.

Chapter Three: Seyla Benhabib: Political Legitimacy as a Feature of Deliberative Democracy

Introduction

In this chapter I will first present a brief overview of deliberative democracy in its more general form. To a large extent deliberative democracy can be seen as emerging from, and an extension of Rawls's work. Most deliberative democrats are supporters of Rawls's work (Rawls calls himself a deliberate democrat), though feel he has not gone far enough. Benhabib stands at the forefront of this. She is deeply appreciative of Rawls's work, but aims to push it much further.

I look first to the major developments in the short but dense history of modern deliberative democracy, and in so doing introduce the major concepts and disagreements. There are a whole host of theorists working in the deliberative democratic tradition; I therefore start by noting what they all share, and then as the discussion gets finer I introduce the differences amongst them. The two main differences that I deal with is the value of a pure proceduralism, and then whether it is the epistemic or the moral tenets which should be emphasised, if one is emphasised at all. Having given a broad picture of the field, I then move on to Benhabib and formulate her theory of legitimacy. In so doing, I commence by stating what Rawls and Benhabib share, namely: a starting point from where society is seen as an exercise in cooperation. After pursuing Benhabib's conception of legitimacy, I return again to her relation with Rawls and point out the crucial differences. There are three differences as regards public reason: Rawls restricts public reason in two ways – the agenda and the sphere in which it is implemented – while Benhabib expands it; in the hands of Rawls public reason becomes more of a regulative principle than a procedure, while in the hands of Benhabib it remains decidedly a procedure. I attribute these differences to the different understandings of the public sphere and its limits, and to the view each holds of the individual: For Rawls the individual is a political citizen, for Benhabib a social, cultural and political person. I will ultimately conclude that due to these differences, Benhabib provides the more convincing account of legitimacy.

I present two criticisms of Benhabib, in order to evaluate according to the criteria extracted in Chapter One. Parkinson (2003) challenges the feasibility of deliberation,

arguing that not every individual can be present for deliberations, and thus representation must be relied upon. Representation, he argues, mitigates the benefits of deliberation, and can undermine the whole project. Secondly, Mouffe (1999) is critical of the possibility of agreeing on a language in which to deliberate, and draws upon Wittgenstein (1969) to try to show that in order to agree on a language, a life form must already be shared. However, the problem is precisely that in deeply divided plural societies a form of life is not shared. I am able to soften the blow of both of these challenges through showing how Benhabib could respond to them. They do not disappear, to be sure, but neither proves to be fatal.

1. Deliberative Democracy

> Democratic debate is like a ball game where there is no umpire to interpret the rules of the game and their application definitively. Rather, in the game of democracy the rules of the game no less than their interpretation and even the position of the umpire are essentially contestable. Contestation means neither the complete abrogation of these rules nor silence about them. (Benhabib, 1996: 79-80).

In order to make sense of Seyla Benhabib's theory of deliberative democracy and its solution to the problem of political legitimacy, I will first present a brief account of the general tenets of deliberative democracy. There are various forms of deliberative democracy. I first state what they all share, what the position in its most general entails, and then proceed to mark the main differences within this wider conception. The specific differences to which I turn are whether or not procedure takes the centre stage and whether the normative or the epistemic aspect should be emphasised. I frame both of these differences under the same task: that of feasibility (and there through, the justification) of deliberative democracy. I use feasibility as a framing device, for feasibility has been one of the largest concerns for deliberative democrats in the recent past. Lastly, I end this section with a brief statement of why, though himself a deliberative democrat, Rawls differs markedly from many deliberative democrats, including Benhabib. In a word, Rawls tasks deliberation with avoiding moral disagreement, while Benhabib sees moral disagreement as an edifying fact, and decidedly aims not to avoid it. Benhabib and Rawls' difference will then again be taken up in more detail in the last section of this chapter.

Theories of deliberative democracy, in their most general form, belong to a family of views that have large differences between them. Nonetheless, in all the various types of deliberative democratic theory there are fundamental phenomena shared by all. These are: the democratic element holds that decisions should be made collectively, by all who will be affected by them (or their representatives); and the deliberative element which holds that decision making should progress by argumentation offered by and addressed to individuals who are committed to the values of rationality and impartiality (Elster, 1998: 8). Of course, there is robust debate about what each of these two elements entail and how they are to be understood. Stokes (1998)[34], for example, defines deliberation by its outcome; Gambetta (1998) defines it as a process; Cohen (1998) is concerned to develop the conceptual implications of deliberation while Fearon (1998) finds the conceptual consequences of discussion most important. Wide as these differences may be, one can still state that all the above consider deliberative democracy a participatory democracy, in which deliberation stands opposed to brute aggregation or bargaining, where voting is undertaken and the will of the majority prevails.

Just as democracy itself can be traced back to the ancient Greeks, so can its deliberative variant – more particularly, to Aristotle. The notion of deliberative democracy also appears in the works of Rousseau, posed as a more 'radical' form of democracy (Bohman, 1998: 400). There is a strong strain of deliberative democracy running through the works of John Dewey in the 19th century and Hannah Arendt in the 20th century. However, the term "deliberative democracy" itself was only coined by Joseph Bessette in 1980 (*ibid.*: 401).

Much like Rousseau restricted the deliberation of his General Assembly to citizens alone, with a concomitant and stringent definition of citizen, deliberative democratic theorists have generally diluted their demands of inclusivity while emphasising public discussion, reasoning and judgement. Recently, deliberative democracy has become increasingly concerned with feasibility (*ibid.*). In short, deliberative democracy is moving away from being simply a democratic ideal, to a full democratic theory; *within* the work done on theory is a drive for practical implementation. Unlike, for example, Plato's *Republic* which

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34 All of these can be found in their respective chapters in Elster ((ed.) 1998).

proposes an ideal according to which systems of government can be evaluated (not an ideal to implement), deliberative democratic theorists aim to present a workable theory.

One of the positive consequences of democratic deliberation, in contrast to a brute aggregation of votes, is that it assumes that its citizens can change their views in light of persuasive reasons. Admittedly, some might change their views based on the outcome of the vote and end up siding with the majority. However, that this changing of view happens *after* the vote is problematic: in one sense because the 'official' register of interests does not reflect the actual state of affairs; the record of the vote is 'outdated,' and reflects what interests used to be, not what they currently are.   Secondly, the outcome of a vote – a majority – is not a very good reason for changing one's view. To simply side with the majority because one believes the majority to be right would again legitimate slavery in some instances, or Nazi Germany. Further, if the results of a vote do change the views of the electorate, then a new vote must be had after the first, to capture these changes. But, then, again a newer vote must be held, etc. The difference that is here important with deliberation, is that voting does not attempt to influence individuals, merely to document their interests. Deliberation, being actively participatory, *does* aim to alter individuals, and should members change their minds through the process of deliberation, it is seen as a deliberation that is functioning.

Deliberation, in so far as it requires active participation of individuals who are reasonable and thus open to being convinced through better reasons, is dynamic (contrasted with the pure procedure of brute aggregation, for example, which is static). Deliberative democracy is never purely procedural, nor is it purely substantive. Even if choice *x* were empirically proved to be the best possible choice to make, unless those concerned have reached this conclusion as free and equal deliberators, the choice is not a legitimate one. (Clearly, an argument based on epistemic validity has a stronger possibility of influencing others, but the point remains: it is not truth that is sought, but rational deliberation.) This dynamism also means that no perfect choices are ever presupposed. A decision, once undertaken, can be deliberated again – it is not a final decision. Deliberative democracy proceeds by way of provisionality.

Closely related to the above characteristic of dynamism, is what can termed the *accessibility* characteristic. Gutmann and Thompson (2004: 4) understand this characteristic to have two requirements. The first is that in a deliberative democracy reasons provided during deliberation must have content that is accessible to others. In a religiously plural society, reasons depending on a specific faith are not accessible to all. Secondly, the language use must be accessible to all. Those who are spoken to must be able to understand what is being said.

The dynamic nature of deliberation may prove self-defeating, and therefore a third characteristic is required. Gutmann and Thompson (*ibid.*: 5) write that deliberation is not like a talk show or an academic seminar. In a talk show, a host usually facilitates deliberation amongst studio guests, and they appear to argue for argument's sake. They raise awareness, they expound their point, and the like, but they do not do so with the aims of producing a decision that is binding for a specific time period. Politics must do this. The danger in the dynamism is that deliberations proceed indefinitely and that little other than deliberation would occur. Endless deliberation yields no decisions and renders a government impotent. Thus, deliberation must be aimed at reaching a decision, and then enacting a decision. The decision is also up for deliberation after the implementation, if new reasons for deliberation emerge.

Thus, with dynamism, temporary bindings, and provisionality, it seems unlikely that an entire citizenry will agree to a single choice. This is not the point of deliberative democracy, nor would it be feasible: deliberative democrats do not expect or demand of deliberation to yield total agreement or consensus. Rather, the question moves from one of finding consensus, to one of dealing with the disagreement that is evidenced everywhere in our political lives in modern democracies. It is, writes Gutmann and Thompson (2004: 7) by "[p]racticing the economy of moral disagreement" that the value and degree of mutual respect is promoted. Economising in this way on moral disagreements, common ground is capitalised on, found anew, and can then be applied to future disagreements. Deliberation, if correctly done, is edifying. And this is the heart of the matter with deliberative democracy: how does deliberation edify and find more common ground, rather than dividing and pitting one group against another? Firstly, deliberation must be feasible.

Bohman (1998: 401) identifies feasibility as "the most striking feature of the recent boom in theories of deliberative democracy". How, then, is deliberative democracy meant to achieve feasible decision making in what Benhabib (1996: 67) refers to as "complex modern societies" characterised by their deep ideological and metaphysical differences, vast pluralism, as well as what Bohman (1998: 401) calls "the blunt instruments of available intuitions"? In short, what precisely do deliberative democratic theorists have in mind when discussing deliberation? How does one deliberate, when, and about what?

Deliberation itself must always be conducted in a certain manner. As Cohen (1996: 99-100) states, legitimate decisions are ones that "everyone could accept" or at least "not reasonably reject". As the reasons must be reasonable to all, there is here a requirement of public reason. We have already encountered the concept of public reason in the previous chapter on Rawls. I here use it in the same general sense[35]. Public reason is a pool of existing public reasons that is drawn from in order to engage in public deliberation *accessibly*. Public reason further rests on the "ideal of political justification" (Cohen: *ibid.*) requiring equal citizens to reason freely and publicly. This requires of citizens to forgo reasoning based on personal preferences, and instead demands of deliberators to think and reason in terms of the public good.

Establishing the public good is therefore an important task. It is *the* task of deliberations. That the public good is deliberated, reasonably, through public reasons, is of immense importance for Benhabib. In Benhabib's view, writes Mouffe (199: 748) "the main challenge confronting democracy today lies in reconciling rationality with legitimacy". This claim is not only true for Benhabib, but can be taken as a characteristic of the broader understanding of deliberative democracy. Following from this, one can state that the process of public deliberation can only guarantee reasonable outcomes in so far as it embodies the conditions of ideal discourse.

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35 In so far as he is a deliberative democrat, Rawls's general understanding of public reason is consistent with other deliberative democrats. Recall, however, from the previous chapter that Rawls adds restrictions on public reason: it is only to be relied on for matters of constitutional essentials and for questions relating to basic justice. Benhabib objects to these restrictions (2002: 108). This will be taken up in far more detail in the next section of this chapter.

Drawing on Habermas' work on deliberation, Benhabib (1996: 70) formulates the process of ideal deliberation thus:

> 1. Participation in such deliberation is governed by the norms of equality and symmetry; all have the same chance to initiate speech acts, to question, interrogate, and to open debate;
> 2. All have the right to question the assigned topics of conversation;
> 3. All have the right to initiate reflexive arguments about the very rules of the discourse procedure and the way in which they are applied or carried out. There are no prima facie rules limiting the agenda or the conversation, nor the identity of the participants, as long as each excluded person or group can justifiably show that they are relevantly affected by the proposed norm under question.

As this is unlikely (most likely impossible) to ever realise in its ideal form, and as feasibility is such a concern to deliberative democratic theorists, this ideal process is a regulative idea, an ideal to approximate as closely as possible.

As a general trend, in the past 20 years of deliberative democratic scholarship, Bohman (1998: 402) states that the emphasis on feasibility has led to an emphasis in the process of deliberation itself, as opposed to its ideal and counterfactual procedures and conditions. In turn, this has led to an increasing emphasis on the epistemic and moral aspects of public justification. Lastly, different settings and procedures of deliberation have been compared and examined. This last point relates again back to the reflexive dynamism inherent in deliberative democracy: even the three characteristics of the deliberative ideal are up for deliberation.

The above concern with feasibility requires that deliberative democratic theory take existing social facts into account. If, hypothetically, a political theory is shown to be justified, appropriate, legitimate, fair and wonderful, we would still need to get there from our current position. Bohman (1996: 416) puts it very well: "Politics should be, if anything, the art of the feasible, without either identifying feasibility with what is currently attainable politically, or denying the better for the best". That is, politics should be aspirational, looking further than the present state of things (hopeful), but should not

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hold out for the best, at cost of small, local improvements. There is a dilemma here: not identifying feasibility with what is currently attainable politically is to draw a fine line – if one departs too far from realism then feasibility goes also; while too much realism can significantly limit and narrow feasibility (*ibid.*)[36].

Social facts, which constitute the context of democratic deliberation, are not immutable. "[D]emocratic procedure must be embedded in a context it cannot itself regulate," says Habermas (1996: 305) somewhat pessimistically. This claim can be interpreted in two ways. The strong interpretation of the claim is that formal democratic procedures cannot deliberately alter social facts[37]; the weak version that social facts are politically controllable in a meaningful sense. These two positions are extremes, and most theorists fall somewhere between them. Cohen and Rogers (1992: 434), for example, propose an 'associative democracy' model which "realises greater deliberative democracy precisely by changing the context in which deliberative democracy is embedded" (through formal political education, for example), while also acknowledging that some contexts "should be left to non-democratic organisation" – and presumably some contexts should not even be intentionally, politically organised at all, democratically or not. More to the point, it is neither feasible nor realistic to demand *all* social contexts to be democratically controlled. However, Bohman warns: "granting too much to non-political and market processes may eliminate the space for significant deliberation" (1998: 418). We here thus arrive at one of the means of establishing the limits of deliberative democracy, and it is tied directly to feasibility: too much political deliberation, in too many contexts is not feasible; nor is too little.

The work done by feasibility in the deliberative democratic scholarship, conjoined with public reason, also points to the fact that ideal deliberation cannot immediately replace existing decision making mechanisms such as bargaining and voting. Public reason dictates that social facts be taken into consideration. In particular, two social facts hamper

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36 Usually the conflict in the Middle East, and Israel-Palestine specifically, is discussed in these two extremes. 'Just stop fighting and love one another' denies realism (the social facts) and is clearly not feasible; 'there's been fighting there for millennia, and there will be for more millennia' is too realistic, leaving as feasible only a series of sporadic and fragile cease-fires, merely a begrudging *modus vivendi* that can collapse at any minute.

37 Social facts *must* change over time, as other factors change. These could include geological changes, meteorological changes, etc. The point is thus not that the strong interpretation believes social facts to be fixed facts in time, but that they change, for all intents and purposes, uncontrollably.

the realisation of an ideal deliberative process: the existence of constitutions (or similar political bedrock) and of voting procedures in all modern democracies. Gutmann and Thompson (1996: 26) refer to the former as the "deadlock between proceduralists and constitutionalism" – that is, the disagreement about whether democratic procedures have priority over outcomes, or whether just outcomes have priority over democratic procedures. If democratic deliberation is legitimated through ideal procedures, then it cannot support its epistemic claims, and if these epistemic claims can be substantiated, then "they can only be underwritten by standards that are not only procedure-independent, but independent of deliberation" (Bohman, 1998: 403). This means that if it is only a procedure which legitimises a deliberative decision making outcome, then there can be no way of evaluating the truth claims expressed in the procedure, unless one moves outside of the procedure and evaluates against another standard (usually a constitution). The question then becomes, what validates this constitution? – It could not have been deliberated on, for then we are again insulated within a procedure and have no recourse to evaluation mechanisms for epistemic claims.

If correctness is what citizens would agree to under ideal circumstances, then "it would be difficult to show why deliberation improves the quality of the decision in the sense that it is more likely to be true, just or well-justified" (Bohman, 1998: 403). The heart of the problem is that, should these epistemic and moral norms – being a reliable and fair procedure, respectively – be thought together, then the procedure can only be evaluated in terms of outcomes. This is so because to ask whether the reasons which are acceptable in terms of public reason, the reasons that are accessible, are also good, that is: convincing and correct, can only be ascertained once there is an outcome. This reduces deliberation to a mere instrumental value; it becomes one means amongst many that generates an outcome, and it is the outcome alone which is the final value. This would do little, if anything at all, to bolster deliberative democracy as a superior democracy.

There have been various general responses from deliberative democratic scholarship in response to the challenge of thinking together epistemic and moral norms. Some, like Christiano (1996; 1997) have distanced themselves from the position that procedures that are fair constitute the correctness of a decision; others such as Michelman (1988; 1997) think that these paradoxes are simply something inherent in political life, and are thus

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something to learn to live with. A third option is presented by Gutmann and Thompson (1996: 27ff), who argue that the dichotomy between the primacy of democratic procedures over just outcomes, or just outcomes over democratic procedures should be rejected, and replaced with a "dynamic interaction". I will not pursue these three further, it is enough merely to point them out. Instead, I will pursue Habermas' two-track reply, as it provides a solution to the paradox of outcomes-based procedures, and also addresses the second social fact that hampers the realisation of an ideal deliberative process, that is voting mechanisms already in place in all modern democracies. A second reason for following Habermas here is that he can be credited as one of the major players who worked out the theoretical position of an ideal speech situation, which allowed for the marriage of deliberation and democracy.

Habermas (1996: 341-350) does not regard deliberation and its limits (here: epistemic justification) in terms of an overall process. Instead, he distinguishes two dimensions within the social practise itself. These are the formal institutions of the state and the informal public sphere; the latter is where Habermas locates the epistemic ideals of deliberation. Bear in mind that the legitimacy of a state depends, in large part, on a constitution safeguarding and allowing for freedom and equality. Thus, for Habermas, the only real feasible deliberation is one that occurs between the formal institutional decision-making mechanisms, and informal and anonymous public sphere discussion[38]. The public sphere can influence the formal debates regarding legislation in this manner, through influencing either or both the agenda and the pool of reasons drawn on (that is, the anonymous public can deliberate with the more formal institutions through influencing public reason). Ultimately, the "pool of reasons" upon which the more formal, institutional debate draws is formed (constructed) by the informal, social sphere. What this translates into regarding specifically the existing formal procedures of voting as decision making mechanism, is that Habermas understands deliberation not as a replacement for voting, but a pre-supplement. Deliberation between the informal and formal spheres happens before voting, and that which is voted on is guided by this deliberation. Habermas is not alone here: "few deliberative democrats," writes Bohman (1998: 415), "now think of

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38 Benhabib (1996: 87) agrees. She argues that "the chief institutional correlate of deliberative democracy is a multiple, anonymous and heterogeneous network of many publics and public conversations". I will return to this below.

deliberation independently from voting or bargaining. The question is only how to make them more consistent with deliberation rather than undermining it".

Habermas is not far from Rawls, who himself has stated to be a deliberative democrat ("a well-ordered constitutional democracy ... is understood also as a deliberative democracy" (Rawls, 1997: 771-2)). Rawls's (1993: 212; 253) idea of "free public reason" encapsulates both "guidelines of enquiry" and "virtues of reasonableness and fair-mindedness". The former is an epistemic facet, the latter a moral one. As previously shown, Rawls addresses the problem of stability in the face of divergent metaphysical doctrines by limiting public reasons to those given in the light of a 'political conception' of justice. The specific manner in which Rawls can be understood to be a deliberative democrat is that he too is committed to public reason guided by specific procedures relating deliberation (public reason, or *accessibility*, or publicity). However, Rawls also differs from deliberative democrats in the following manner: Rawls's aim is a well-ordered society, one where conflict and disagreement are avoided through specific procedures. Gutmann and Thompson (1996: 52), however, do not see persistent moral disagreement as an argument against deliberative democracy. In fact, persistent moral disagreement is its *raison d'être*.

Dryzek (1996: 150) offers an analysis of globalisation to illustrate how persistent moral disagreement, if accepted, can enhance deliberative democratic possibilities, and should thus not be avoided. Globalisation has increased global economic interdependency, which can overwhelm the individual nation state's desire to exercise political (democratic) power within its borders[39]. So understood, globalisation hinders deliberative democracy. On the other hand, globalisation has severely limited the human desire for military expansion, and has therewith lessened the non-democratic military rule of the past. In turn, new options for cooperating internationally, or international agreements are opened up. For Dryzek (1996: 151), it is "a vigorous society containing oppositional public spheres" that drives the need for democracy. Globalisation of course encourages a global society, and as such there is no lack of oppositional public spheres. Dryzek's analysis concludes that due to globalisation, a number of powerful forces and institutions that oppose democracy have abated in their power, in many parts of the world. Many of the social facts that limit

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39 In fact, through globalisation, borders themselves become a vague term – physical borders are, indeed, a line in the sand; cultural borders, limits of influence, etc., are no such discreet lines.

deliberation within a nation state, now encourage deliberation on the global stage – in novel manners and institutions. And, of course, such new manners and institutions, such practises, should themselves result out of wide and inclusive public reason.

To summarise, then: deliberative democracy is a democracy that demands active participation from citizens, all equal and free, and with therefore equally valuable contributions to make, provided the deliberation proceeds reasonably. To proceed reasonably the deliberation must be accessible, that is, must use public reason, which is itself informed by social facts. These social facts can either be politically controlled or not (depending on the specific theorist), while public reason can always be altered. Public reason is altered through the edifying nature of deliberation, which is dynamic, where through common ground is found and nurtured. As individuals' opinions are altered through deliberation, public political culture likewise changes. And finally, thus, a legitimate authority is one which exercises its authority (also through its institutions) in light of the outcomes of deliberations; where the exercise of political authority becomes, itself, a deliberative process. The ideal outcome to aim for is to make a decision based on reasons that all could (not *do*, necessarily) accept. In short, reasonable becomes legitimate.

I am now in a position to delve into Benhabib's specific version of deliberative democracy, and her account of political legitimacy. I will do this by drawing on the concepts and arguments visited above, and position Benhabib within the larger field of deliberative democracy. This will also serve to further differentiate Benhabib from Rawls. While they share a starting assumption, and have much overlap, there are differences that make, indeed, a difference.

2. Benhabib's Account of Political Legitimacy

In the previous chapter, I stated that contemporary political theorists must either work within Rawls or justify why they aren't doing so. While Benhabib is not a straightforward Rawlsian, she remains appreciative of Rawls's endeavour and in many ways builds on foundations laid by him. However, in her own conception, cultures (and here one can include political culture) are not pure; cultures inform one another, are formed against and with one another, while cultural boundaries themselves are porous and mutable. In this regard, Benhabib allows for a wider range of value pluralism than does Rawls, which, as

we will see, means that she develops a conception of political legitimacy that is more attune to the complexity of modern societies and hence, as I will claim, ultimately more feasible than that of Rawls. I will first state the points of agreement – starting with both their outgoing positions – and then move on to an exposition of Benhabib's theory of legitimacy proper. Thereafter I will be in a position to remark on the differences between the two. The differences are in the procedure, and I will explain why Benhabib's procedure differs from Rawls, in large part, due to her conception of culture.

Just like Rawls, Benhabib makes her start from game theory. Both of these thinkers understand society as a game played according to certain rules, and both focus our attention on the moral justification of those rules, which they both derive from a particular procedure. Compare Rawls's (1996: 137) liberal principle of legitimacy:

> Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in light of principles and ideal acceptable to their common human reason

with Benhabib's (2002: 105) conception of democracy:

> Democracy, in my view, is best understood as a model for organizing the collective and public exercises of power in the major institutions of a society on the basis of the principle that decisions affecting the well-being of a collectivity can be viewed as the outcome of a procedure of free and reasoned deliberation among individuals considered as moral and political equals

taken in conjunction with her (*ibid.:* 105-106) conception of legitimacy:

> The basis of legitimacy in democracy can be traced back to the presumption that the institutions that claim obligatory power do so because their decisions represent standpoint [sic – presumably standpoints] equally in the interest of all. This presumption can be fulfilled only if such decisions are in principle open to appropriate processes of public deliberation by free and equal citizens[40].

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40 Elsewhere Benhabib (1996: 69) offers a slightly different formulation: "The basis of legitimacy in democratic institutions is to be traced back to the presumption that the instances which claim obligatory power for themselves do so because their decisions represent an impartial standpoint said to be equally in the interests of all." As the formulation in the main text appeared after this footnoted one, I will use it, rather.

We here clearly see the similarities. Both of these thinkers understand the legitimation of political power as well as the scrutinising of the justness of institutions as a process that is open to all citizens, that is: public (Benhabib, 2002: 108). For Rawls it is open to all reasonable citizens, and for Benhabib it is open to all citizens willing to engage in reasoned deliberation. That the justness of institutions is a matter for public scrutiny and discussion is fundamental to both. I now turn to Benhabib's conception of legitimacy.

"Complex modern societies, since World War Two," writes Benhabib (1996: 67), "face the task of securing three public goods." These three goods are legitimacy, a viable sense of collective identity, and economic welfare. Further, failure to attain one or any combination of these goods will hamper the functioning of these modern, complex societies to such an extent that they will tumble into crisis (*ibid.*). Benhabib's ideally functioning society contains these three goods in equilibrium[41]. I will focus specifically on her treatment of the good of legitimacy, while referring to the goods of collective identity and economic welfare in so far as they contribute to an understanding of Benhabib's conception of legitimacy. This conception, in a nutshell, is that, in a complex modern society characterised by value-pluralism, the legitimacy of political institutions is a function of "the free and unconstrained public deliberation of all about matters of common concern" (Benhabib 1996: 73). A public sphere of deliberation, in which members of the society can meet and deliberate as moral and political equals, is therefore essential for the realisation of democratic political legitimacy (*ibid.*). The question then becomes: How is this open and public space negotiated through deliberation?

Before I turn to answering that question, the notion of public space must be understood properly. Benhabib (1992: 89ff) delineates three conceptions of public space, each corresponding to three major streams in western political thought. These are the agonistic conception favoured by republican virtue or civic virtue tradition and can be attached to Arendt. The second is a legalistic model, provided by the liberal tradition, particularly those concerned with a just and stable public order. These two do not concern us here. The

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41 Too much emphasis on collective identity could infringe upon at a minority's rights or voice; economic welfare could be secured but at the cost of legitimacy by restricting unions; too much economic welfare could also come at a cost of collective identity, should competition turn worker-citizens against each other, and lastly, a strong collective identity, if severely nationalistic, could isolate the nation from the world economy and have a negative impact on the economic wellbeing of its members (Benhabib, 1996: 67-68).

third, however, does. This conception, implicit in the work of Habermas, and can be termed a discursive public space. Such a public space is what Benhabib has in mind. It is characterised by a broader sociological context than the previous two, and the meaning of participation is changed. The shift is one from political participation to a more inclusive discursive will formation (*ibid.*: 104). Participation here now extends into social and cultural spheres. It does so due to what both Habermas and Benhabib consider a prerequisite for modernity, a time when "tradition ... loses its legitimacy of simply being valid because it is the way of the past" (*ibid*.). The modern individual is for Benhabib continuously enmeshed in the process of will-formation and identity forming, all of which build and inform political convictions and political interests and identities – and which occurs to a very large degree in the social and cultural spaces of our societies ("political and moral learning and value transformations occur" (Benhabib, 2002: 106) in this discursive space). To that extent, the social and cultural spaces of our publics are also political[42].

The public space is thus very large, and is also plural: there is a plurality of public spaces. Clearly, it is in this public space[43] where Benhabib sees deliberation occurring. However, as this space is now so vast and plural, principles are needed to regulate the discussion in some manner. These Benhabib extracts from Habermas's work on deliberation as dealt with above; specifically, they expand on the principles that are central to discourse ethics: universal respect and egalitarian reciprocity. And they are also the most "compatible" with the resolutions of multicultural dilemmas (Benhabib, 2002: 106). She presents the following norms: egalitarian reciprocity, voluntary self-ascription and freedom of exit and association. These norms ("general rules of action and institutional arrangement" (Benhabib, 2002: 107)) are valid ("morally binding" (*ibid.*)) if all those affected by their consequences would agree, and if agreement was reached through a process of deliberation which I present for ease, here again in a summarised form:

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42 "Participating in a citizen's initiative to clean up a polluted harbor is no less political than debating in cultural journals the pejorative presentation of certain groups in terms of stereotypical images (combating sexism and racism in the media" (Benhabib, 1992: 104).

43 Henceforth, the simple "public space" will refer to a discursive public space. The other conceptions will be referred to as either agonistic public space or legalistic public space.

1) participation in such deliberation is governed by the norms of equality and symmetry; all have the same chance to initiate speech acts, to question, to interrogate, and to open to debate;

2) all have the right to question the assigned topics of conversation; and

3) all have the right to initiate reflexive arguments about the very rules of the discourse procedure and the way in which they are applied or carried out (Benhabib, 1996: 73).

The reflexive point three carries the force here. It is due to this reflexivity, that the norms can be changed or altered until they become valid, or morally binding. The underlying assumption is that they will.

The above is a general moral theory of discourse, and not yet a political theory of democracy, nor a conception of legitimacy. It can also not simply be scaled up into a full-scale theory of deliberative democracy, for it is not feasible to always uphold the three characteristics of deliberation as presented above whenever one engages in politics – more so, in light of Benhabib's expanded boundaries of political to include cultural and social spaces also. (As a case in point, South Africa's 11 national languages, her even more heterogeneous cultures, and her more than 55 million inhabitants cannot in any conceivable manner all participate in the same discussion, *even if* they were to somehow settle the reflexive questions about the very rules of the dialogue, and for that matter, the problem of language.) Rather, the value of Benhabib's discourse theory for our understanding of political legitimacy lies in its emphasis on practical rationality. Benhabib specifies three ways in which the process of deliberation enhances the rationality of collective decision-making: (i) deliberative processes impart information, (ii) they play a central role in the formation of coherent preferences and (iii) and the act of expressing a view in public inevitably instils "a certain reflexivity on individual preferences and opinions" (Benhabib 1996: 71-72).

As should be very clear by now, Benhabib is a thorough proceduralist. For her, "proceduralism is a rational answer to persisting value conflicts at the substantive level" (Benhabib, 1996: 74). One of the differences within the scholarly field of deliberative democracy that I explored in the previous section was precisely the difficulty of a pure

proceduralism: whether it is the normative or the epistemic elements that should take precedence. Benhabib is aware of this problem, and writes that procedures are open to misapplication, misinterpretation and abuse (*ibid.*: 72). Procedures cannot, she continues, dictate outcomes, nor can they define the quality of reasons produced in argumentation, nor the reasoning and rules of logic employed by fellow deliberators. What mitigates such abuses and misuses of procedure, is the built-in reflexive condition, which allows for such misuses or abuses on the first level of discussion, to be discussed on the second level. As one characteristic of deliberation is that all have rights to instigate discussion on any topic, it seems very likely that at least someone will notice these abuses, and introduce them into the discussion. In this manner it is clear that as far as Benhabib (*ibid.*) is concerned, no outcome of the procedure is "prima facie fixed". Not even an outcome that dictates majority rule. In fact, Benhabib (*ibid.*: 72) understands her deliberative model as providing a normative justification for majority rule *in certain instances*. I cannot stress enough that this is the case only in certain instances. Specifically, *only* when the deliberative model is correctly followed.

What accomplishes the task of legitimation in a majority rule outcome from the procedure is not the quantity. What justifies it is the fact that if a majority are convinced at some time that *x* is the right thing to do, and are convinced on the basis of reasons that have been formulated as closely as possible as a result of a process of discursive deliberation, then this conclusion may remain valid until such time as good reasons are offered for challenging this decision. The point is that if a large number of citizens see a certain matter in the same light, "as a result of following certain kinds of rational procedures of deliberation and decision making" (*ibid.*) then such a claim can be presumed to being rational until shown otherwise[44].

I am now, finally, in a position to clarify *how* one *does* deliberative democracy. I earlier raised the problem of size (South Africa's more than 55 million citizens can never deliberate all together). One part of the solution is representation. The other, larger part, is what Benhabib refers to as a plurality of modes of association (*ibid.*). Having opened up

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44 And she continues: the practice of opposition parties embodies this also. Even when we accept the voting procedure as legitimate, we may still have serious worries about its outcomes. Oppositional parties in parliament can query and scrutinize the grounds upon which the majority party claims to govern. In extreme cases, presidents can be impeached. This speaks to the provisional nature of choices made, and further supports the fact that the claim to validity and rationality that the majority party rides on, can be and should be publicly reexamined.

public space, those affected by decisions can raise their views through citizens' initiatives, social movements, voluntary associations, consciousness-raising groups, and the like. "It is through the interlocking net of these multiple forms of associations, networks and organisations that an anonymous 'public conversation' results. It is central to the model of deliberative democracy that it privileges such a public sphere of mutually interlocking and overlapping networks and associations of deliberation, contestation, and argumentation" (*ibid*: 73-74). Thus, in light of the above, how does one do deliberative democracy? In a word, it is all about what happens before and after a decision is made. The procedural deliberation and the space it creates both before the choice is made and after it is, ironically, where legitimacy is found; no decision is in itself a valid or legitimate decision. If the procedure was correctly (reflexively) followed, then the decision it yields is, for the time, necessarily valid. But then, it is so only until such time as good reasons can be given for showing why it is not. If so, then the deliberation process starts again. Likewise, democratic institutions exercise power legitimately if they do so through deliberation, and if deliberation is done correctly: if it edifies.

In light of the above, it now remains for me to point out the differences between Rawls and Benhabib. As stated, these centre around both these theorists' understanding of public reason. The first is that Rawls restricts the agenda of public reason; secondly, Rawls restricts his public reason to the state and its institutions, and its organisations, specifically the legal sphere and its institutions; lastly Rawls does not appear to use his public reason as a process of reasoning, but rather as a regulative principle (Benhabib, 2002: 108-109).

While Rawls restricts public reason to matters of constitutional essentials and questions of base justice, Benhabib imposes no such agenda restrictions. In fact, her conception of public space (the space wherein public reason operates) brings *into* deliberation the demarcation of the public from the private sphere. One reason accounting for Rawls' agenda restriction is that he conceives of the individual as a political citizen. This is closely tied to the second restriction that Rawls imposes: for him the domain for public reason is the legal public sphere, not civil society. Rawls (1993: 220) makes the distinction between background culture (which correlates to Benhabib's social and cultural spheres) and contrasts this with public political culture. For him, the procedure of public reason does not apply to personal deliberations, or to universities (*ibid.*: 215). For Rawls, universities are non-public to the citizenry as a whole, and only public to their members.

The third difference regards whether or not public reason, in the hands of Rawls, is in fact a procedure. Benhabib thinks not. She argues that in his hands, it is a regulative principle, which imposes certain specific standards on citizens, agencies and institutions, standards that dictate how these entities "ought to reason about public matters" (*ibid.*: 108); standards for public reason that are set by a political conception of liberalism. What this amounts to, is that for Rawls the reasons already existing in public (political) reason are to be used as standards according to which reasoning is to be conducted. And because the standards are set by a political conception of liberalism, it further entrenches the sharp divide Rawls makes between background culture and the political sphere. As a liberalist, personal (as he would call them: private) freedoms are wholly untouchable, while Benhabib wants to include these in deliberation as well.

The consequence of these three crucial differences is that Rawls arrives at an autonomous, political citizen, and Benhabib at a person as a cultural, social and political product. Benhabib demands a larger field and scope for engaging with one another politically. This brings into sharp focus the role of Rawls's overlapping consensus. Before this is arrived at, Rawls requires of his citizens to undergo reflective equilibrium. This is a solitary task, involving thinking by oneself, about (strictly) political values. Benhabib, on the other hand, calls this process edifying, and extends its practise to both social and cultural spheres, presumably resulting in more nuanced and considered processes of reflective equilibrium, that accounts for much more of the complexity of modern western societies. Lastly, Rawls's overlapping consensus deals only with the public good, with what is in the common interest of all, regardless of comprehensive doctrine. This does not include non-public practises (provided, of course, that they do not undermine individual liberty however characterised), while for Benhabib the public extends well into Rawls's private practises.

Rawls hopes for citizens to be reconciled to their institutions; Benhabib hopes for individuals to be reconciled with their social, cultural and political spheres, including all their institutions.

Benhabib's account of legitimacy requires careful deliberation before a decision, making the decision in light of the foregone deliberation, and revising the decision as dictated by the emergence of reasons to do so. All those affected by a decision have a right to be

included in the deliberation, and all involved must, at least, concede that, while they do not necessarily endorse the decision made, they understand that it is reasonable and in the common interest of all (an understanding gleaned from the deliberations occurring in the enlarged public sphere). Not only does Benhabib locate the generation of legitimacy in a procedure, but built into this procedure is a consensus theory which further aids the generation of legitimacy of state power. State power exercised in the manner decided by the citizens is legitimate as long as the reasons for exercising this power have not been successfully challenged since the decision was made.

3. Evaluating the Argument

Having now laid out the theory of deliberative democracy generally, and Benhabib's model specifically, I turn to the evaluation of her model. To do so, I first visit two challenges her model faces. The first comes from Parkinson (2003) and contains three parts. The first manifestation is presented in the form of representation, the second relates to the threat of illegitimacy due to an eroding of the motivations for persons to engage with politics, and the last concerns the reason of reasoned deliberation. The overall theme of Parkinson's challenges are that, while it is a built-in requirement that all affected by a decision are involved in the deliberation of the decision, this is problematic due to precisely the understanding that Benhabib has of modern societies – they are complex, plural and large. The second main challenge comes from Mouffe (1999), who takes aim at Habermas's understanding of deliberation. Central to Benhabib's conception of legitimacy is that all affected by a decision must be included (somehow) in the deliberations, and for this deliberative procedure to yield legitimate outcomes, the dialogue must be both neutral and rational. Drawing on the work of Wittgenstein (1969), Mouffe attempts to show that neutrality or rationality in a procedure (here, deliberation) is heavily problematic.

What distinguishes democratic deliberation from simply deliberation is a modifier: procedural conditions. These ensure that no force but the force of the stronger argument is used (Habermas, 1975: 108), and do so by requiring communicative competence, reciprocity and inclusiveness, and "a willingness to be persuaded, to have one's pre-formed preferences transformed in the face of a better argument, and thus to set aside strategic concerns and behaviour in the pursuit of those preferences" (Dryzek 2000: 2).

Recall Benhabib's assertion that "only freely given assent of all concerned" generates legitimacy. On the surface this seems an impossible task. Benhabib concurs, and thus allows representation. Not everyone who will be affected by an outcome may be motivated enough to partake of the deliberations or restrictions on time (an especially scarce good in modern democracies) and location may prohibit many from attending deliberations: one then appoints a representative to do this work for you. In Catt (1999:77), Parkinson (2003:188) finds two types of representation, the delegation and the trustee models. The delegation model entails the represented giving specific instructions to the representative, stating the represented's interests; the trustee model entails that the represented inform the representer of her interests, but the representative has free reign to deliberate in the name of the represented, that is, to make decisions and such. The latter model works much better than the former for deliberative democracy, as a representative armed with a detailed and specific list of instructions may find it challenging, if not impossible, to deliberate in the spirit that Benhabib demands. The trustee-type representative is entrusted with the interests of the represented, and are thus enabled to deliberate, to concede that the individual who she represents would, yes, change her mind regarding *x* due to the force of the better argument.

The question remains, however, "in what sense can non-participants be present in the deliberations of trustees, pure delegation having been ruled out" (Parkinson 2003:188)? There are two separate challenges here. The first deals with representation generally. A representation of a dog – a cartoon sketch, for example – lacks many of the characteristics of the dog it represents. This is not, generally, a problem, for the overwhelming majority of individuals will have knowledge of the actual dog (a generic dog will suffice for present purposes) that the cartoon is representing. The fact that the cartoon representation does not appear to have fur is not a real fault, this is a detail that most if not all will fill in for themselves when coming across the cartoon. With individuals or groups of individuals, however, these 'lost' characteristics are not so easily accessible to all. In many instances, the representative will be the *only* engagement others have with the one being represented. And the representative faces the same problem! She must first enter into dialogue with those she represents, to know the scope of the possible decisions she can make. However,

if the problem was one of a lack of time to deliberate, then this extensive dialogue with the representative could likewise be the same problem.

Even more significant is the second challenge brought forth by the trustee-type representative. One of the reasons encouraging deliberation, for Benhabib, is that deliberation encourages an enlarged mentality. One is also informed through deliberation; one's interests and concerns are formed through deliberation. Should one send a trustee in one's stead, one is not present in the moment of deliberation. The represented does thus not benefit from the enlarged mentality potential of deliberation. Nor is the represented able to form, reform, augment or alter their preferences in the light of deliberation – they do not deliberate. The representative will simply report back to the represented what the outcome was, and the represented will either be satisfied or not. But there is no reason to think the represented will be informed by the process. Of course, the represented can ask the representative to recount the deliberations, though if time was the initial problem then this is not feasible. And even if the representative does recount the deliberations to the represented, this may then alter or reform the represented's preferences, and the deliberation will have to commence anew. This process could repeat forever.

Secondly, as all the above conditions must be met for deliberation to proceed legitimately, there is a danger of perpetual illegitimacy. As Rawls (1996:82) states, people's pre-formed interests and preferences are usually what motivates them to engage with politics – when their pre-formed interests are infringed upon .Why, then, would a fundamental Christian ever assent to partake of deliberation if it compels her to acknowledge that the truths of her religion are not as fundamental as she holds, and that, in principle, she is open to revising her religious belief? In this regard, the demands made of Benhabib's model may be too demanding, and many may resist the entry into politics (deliberation in the right spirit). Withholding their assent, such individuals may deligitimise the model.

And yet, the demands may be even stronger than this. Benhabib leaves open the process of deliberation. Much like the vote, even though the vote has occurred, a majority winner is established and sworn in, the opposition continue to challenge the winner. Legitimacy of the government, thus, does not happen as soon as the votes are tallied – it is an on-going process that accumulates over time. Should the governing party remain true to the

electioneering promises (the basis of their vote) for long enough, then they acquire more legitimacy. In the same vein then, it is expected of our fundamental religious individual to not just open herself up to the possibility that her deepest beliefs may be wrong (or at least enter into deliberation with the possibility of being persuaded by the better argument or reasons). Should she do so, and actually change religious allegiance, then she must be, again, willing to do it all anew in the next moment when she deliberates. All sacred truths that individuals hold onto – the whole category of 'sacred truths' – are under pressure from the stringent demands placed upon citizens in a deliberative democracy. Fundamental agnosticism, at best, may be safe.

The third strong demand made by Benhabib is that of reasoned deliberation. Gutmann and Thompson (1996; 135-60) point out that it is often in the pursuit of 'reasoned consensus' that genuine injustices suffered by others become submerged. In such cases, it is very much unreasonable acts such as protesting, resisting, and the like, that finally challenge the dominant consensus. Taken in conjunction with the above point, it is very likely that the fundamentally religious will only enter into deliberation regarding their faith *after* an unreasonable act prompts them to.

What makes these three related challenges real challenges is that, if successful, they threaten the edifying process of deliberation. Recall, the point of deliberation is to find common ground and to do so through learning from others, to embrace an enlarged mentality. Sending a representative, however, removes this edifying benefit, and could result in more static, pre-formed interests and political views. Secondly, deliberation includes the requirement of being open to persuasion, yet is appears as if a great many conflicts the world over occur precisely because individuals are not willing to compromise or negotiate their deepest beliefs. And the third shows that it is usually only after unreasonable action (prompted by an unwillingness to be persuaded) that individuals holding fundamental beliefs are willing to engage about them at all. And, again, this usually takes the form of a second unreasonable act: a defence at all costs. Disagreement can edify and bolster individuals, or it can turn them against one another.

Mouffe continues this theme of the reasonable in her critique. She investigates whether or not deliberation, or any language use, can ever be neutral or rational. Bear in mind,

however, that Benhabib does not require *absolute* impartiality and rationality, but does expect of deliberators to approach these standards as best as possible. Mouffe has taken this into cognisance, but concludes that the nearest we can ever get to impartiality and rationality is simply not good enough.

In the work of Wittgenstein (1969), Mouffe (1999: 749) reads that to have an agreement of opinions, the language used must first be agreed upon. And an agreement on language implies agreement in terms of forms of life. That is, people who share the same general types of lives are more able to agree upon a language, in which agreement can then finally occur. This is best typified in proceduralism: in order to share an agreement regarding the validity or legitimacy of a specific procedure, the forms of life embodied by all those party to the procedure must already be such that they accept proceduralism, or at least come to see the value of procedures. Benhabib would respond to this by stating that the procedure itself is open to these types of discussions, regarding the procedure itself, and that any reasonable individual will come to see that this procedure is currently the best available, for it gives voice to as many as possible. Moreover, Benhabib could argue that her use of Habermas's work on deliberation allows for the formation of opinions (even about the process), *through* the process. As Habermas (1996: 130) writes, a strong proceduralism "leave[s] more questions open because it entrusts more to the *process* of rational opinion and will formation."

Ultimately, Mouffe seeks to argue that "procedures always involve substantial ethical commitments" (199: 749), and is thus never truly impartial or rational. Benhabib can respond in the vein of Habermas above, and state that even if these are impossibilities, through even wildly imperfect deliberation, one learns from others, or at least learns of the existence of others' views and opinions, which must necessarily influence one's own view. That procedures always involve substantial ethical commitments is not a fatal point to make against Benhabib, for the substantive commitment is also up for deliberation.

What could, however, lend more force to Mouffe's position is Parkinson's three related challenges above. *If* representation eliminates the edifying role of deliberation (few individuals deliberate, merely their representatives do), *then* deliberation cannot be called on to meet this challenge. I thus conclude this part by revisiting Parkinson. Parkinson is

rather pessimistic, in focusing only on representation. As Benhabib states, there is the option of representation, but also of associations, of consciousness-raising groups, of organisations, and so forth. Many, if not most of these are initiated by citizens themselves. These groups also tend to be focussed groups, such as the harbour clean-up example provided by Benhabib above. The group's aims are clear: to clean the harbour. Should they send a delegate to the harbour authorities to deliberate, one can assume that she will present the best argument the group can come up with, and report back to the group on the counter arguments. That this group is a voluntary association indicates that the members *do* have a strong concern regarding the harbour, and *will* take counter arguments into account, and then respond in turn. Benhabib calls upon the interrelated plethora of networks of such groups to hold public dialogue. Individuals belong to many such groups, not just one, and can in this manner find adequate means of organising representation that does contribute to the edification of members.

Having presented, and mitigated challenges to Benhabib's deliberative democratic conception of legitimacy, I now reinscribe these challenges in such a way that I am able to evaluate Benhabib in terms of the criteria I extracted in Chapter One. For ease, I repeat them here:

The criteria that a convincing account of legitimacy must account for are: 1) it must provide a means of evaluating a government; 2) it must respect plurality and conceive of legitimacy as pertaining to plurality; 3) it must justify its political authority; 4) it must account for government's right to rule: it must defend a relation between authority and duty or obligation (thus with the government's correlative right); and 5) it must provide stability.

At first glance, Benhabib does provide a means of evaluating a government. Clearly, there is no objective standard to compare to. Rather, the evaluation occurs through deliberation, in a two step process. Firstly, deliberation occurs by all those concerned, to arrive at a decision or course of action. One simply evaluates the government in terms of the decision reached: is the government implementing it as was concluded in the deliberations? However, this *itself* will entail a deliberation to establish. In the strictest formulation, a

deliberative government is a very directly democratic government, it is almost an empty vessel, merely implementing what those concerned have decided.

There can be no doubt that Benhabib respects plurality and conceives of legitimacy as pertaining to plurality. She attempts to embrace the plurality, even going as far as stating that the more plural the 'anonymous' public conversation, the better the health of the democracy. A quick way to answer this question is to point out that the more pluralities involved in a deliberation, the more legitimate the outcome, for then the common goal found is indeed a truly common one. And even further, if the deliberation happens in the plural (i.e. if there is more than one deliberation, successively), then even more so. Recall, a government does not become legitimate as soon as they have won the majority vote – it is an on-going, provisional process.

Benhabib, as all deliberative democrats, is vehemently opposed to the aggregation of interests, the brute competition and strategies involved in having one's own interests fully met. The very heart of deliberation depends upon plurality (identical clones all unanimously agree, always), and does not advocate deliberation in order to homogenise the plurality. Deliberation is never complete, pluralities are encouraged to learn from and be informed by others. The concern, however, is that Benhabib has overstretched this criteria. Having emphasised plurality (not merely of interests, but of value also), and encouraged it, and opening the political sphere widely, she may have too much plurality to realistically deal with. Every individual is unique, and thus has interests and preferences and concerns slightly different to everyone else's. Strictly speaking, every individual is a plurality. Having so many pluralities, demanding of them all to deliberate, indefinitely, revising and altering previous decisions, challenging the basis on which the previous deliberation progressed, and such, can stifle the act of decision-making or implementation.

Again, it is through deliberation that Benhabib's model justifies the exercise of political authority. What authorises the government to wield authority is the assent of all those individuals who will or could be affected by the outcome of a decision. In a slightly circumlocutious manner, Benhabib follows the consent theory of political authority. Consent, however, is usually either given or withheld, while the assent that Benhabib is after can be crafted in the process of either assenting or not: the deliberative procedure.

Here the possible problem of representation enters. Learning from others in this way is aimed at a deeper understanding of one another and others' modes of life, a benefit that can be eroded with representation. Should this benefit fall by the wayside, it seems problematic for deliberation to be able to gain the assent of all those subject to the outcomes of the decisions to be made. However, as shown above, due to the mass of anonymous conversations in the public sphere, it is unlikely that a large portion of individuals will be able to escape the benefits of deliberation. As Benhabib enlarges the public sphere, one cannot always depend upon a representative. When a parent, for example, attends a parent-teacher conference, the parent cannot send a representative.

Penultimately, Benhabib's legitimacy theory must defend a relation between authority and duty or obligation (thus with the government's correlative right). She does not do this explicitly, but by implication. Citizens have not just the right to deliberate, but the duty also, softened in the form of a norm. The government's legitimate authority stems from the assent of all those involved in the outcomes, through deliberation. There is no clear-cut duty or obligation on the side of the citizen, unless one includes those duties and obligations they have consented to. The language of obligation and duty is much too sharp for Benhabib. The general theory of moral discussion is the closest she gets to such stern concepts, and even this very general theory is to be deliberated as required. The relation between obligation and duty, and authority is eroded. Ultimately, hopes Benhabib, the process of deliberation would have made (and continues to make) such deep impacts on citizens, with such enlarged mentalities, that *bona fide* deliberation replaces these traditional concepts. If in deliberation all assent to x, then the only real duty a citizen has is to abide by x, or if unhappy to do so any longer, to open afresh the deliberations.

Lastly, is Benhabib's legitimacy as espoused in deliberative democracy stable? The two challenges with which I began this section are all feasibility related. Feasibility, in this context, is stability. If, for example, not everyone affected by an outcome partakes of the process of deliberation (ignoring representatives for the moment) then the outcomes are not legitimate. If not legitimate, then it means that not everyone assented, and thus the government will have to either coerce individuals to follow the outcome of the deliberations, or coerce them to partake of the deliberations. Either of these bodes ill for stability.

The greatest challenge to stability is the great demands made on citizens by deliberative democracy. The deliberations could be lengthy, with current population sizes, they could never resolve, they could be re-deliberated indefinitely. Most importantly, there is no clear manner in which to ascertain whether someone is deliberating *genuinely*. An individual can perpetually stall a decision, or demand it be re-deliberated as soon as it is made. This makes the act of politics a very large one. The largest danger here is that there is too much talking and deliberating, and not enough action. Decisions, at the end of the day (not quite: the deadline for decisions to be made can also be deliberated; there is nothing special about precisely the end of the day, or sunset), have to be made. Should an urgent decision present itself in a moment of emergency (a sudden market crash), and the deliberation not yield decisive answers quickly, there is no legitimate way to respond (or not) to the economic difficulties. And yet, a decision must be made. With such heavy emphasis on deliberation, inclusivity, and forming preferences with and through one another, to suddenly have the government make a decision without adequate deliberation, or re-deliberation, does not bode well for stability at all.

Conclusion

Having now evaluated Benhabib as I have Rawls in his chapter, and shown in the current chapter where Rawls and Benhabib agree and disagree, it remains for me to explain why Benhabib presents the most convincing conception of democratic political legitimacy. Stated otherwise: the specific conditions provided by Benhabib, under which citizens have a moral obligation to obey their government, are more convincing than Rawls's. The way in which I phrase this argument stems (as I also started the section above which indicated their similarities and differences) from their different conceptions of culture, and the implications this has for the individual, for the individual as citizen, for public reason and background culture, and thus, ultimately, for democratic legitimacy.

Benhabib, as stated above, understands cultures as being less pure than Rawls does. This includes political culture. Benhabib understands cultures as informing one another, as being formed against and with one another and as having boundaries which are themselves porous and mutable. Rawls makes a very sharp break between background culture and public reason. In other words, what is truly public for Rawls is well delineated, while for

Benhabib it is not – and the vague delineations which do appear in her work are provisional and essentially contested and contestable. In a parallel manner, Rawls aims his political thought at the political citizen, a very well and rigidly defined term. The political citizen *is* only the political citizen when engaging in public reason, under the two specific limitations of dealing with constitutional essentials of matters of base justice. Otherwise, the individual is non-political, is simply a private individual, or even unreasonable.

In his chapter I characterised Rawls's conception of legitimacy as fluid. And indeed it is. But Benhabib's is more fluid – much more – and thus in relation to Benhabib, Rawls is rigid. We see this also in Rawls's process of reflective equilibrium. The point of this private exercise (accomplished solitarily, through reflection alone) is to distil one's political values into more and more general and fundamental positions. Again, when compared to Benhabib's equivalent mechanism – deliberation – Rawls seems more rigid, doubly. Firstly, the very goal of distilling one's political beliefs means that they are all coherent, or should be. Secondly, these values are purely political, and if they are to be voiced, they must also be in principle translatable into the language of public reason. Benhabib, on the other end of the spectrum, accomplishes this task of self-reflection about values through deliberation, which necessarily includes others and their *active* input. Benhabib also understands the individual as a plurality in herself, without a normative imperative for coherency. Benhabib calls this will formation (rather than organisation) and it is an inclusive discursive practice. This also speaks to one of the ultimate goals of deliberation: edifying citizens.

Rawls, with his sharp private and public boundaries, his drive to coherent organisation of political values, has in mind the avoidance of political conflict and disagreement. One can *almost* state that for Rawls a consensus reached with minimal political conflict or disagreement is the most legitimate. Benhabib, on the other hand, encourages political conflict as long as it remains a managed political conflict. Benhabib, one could *almost* say, identifies each individual as conflicted (with conflicting values), introduces a conflicted boundary between public and private (she certainly conflates the public with the private, and therewith the political and the non-political, in Rawlsian terms), and encourages, through deliberation, these various conflicts. She takes them seriously enough to hold that they cannot be suppressed, nor avoided as Rawls aims.

Rawls is able to avoid political conflict not by managing to mitigate conflict itself, but by strictly limiting the public sphere so as to expel conflict and fundamental disagreement from this carefully delineated sphere. This does not mean it will disappear – it may well emerge elsewhere. Almost conversely, Benhabib embraces political conflict, allows it to extend into the furthest corners of her political sphere (social and cultural life in its entirety) and views it is beneficial, as edifying, through deliberation.

Benhabib's conception of legitimacy is one where legitimacy is almost replaced with the deliberative procedure. To deliberate correctly, adhering to the criteria of deliberation, *is* to legitimise the government's action, for the action undertaken will be the one arrived at through deliberation, which includes within itself the clause of reasoned agreement. Deliberation and its procedures are the legitimising force. Two points can be made from the fact that Benhabib expands the political sphere so radically: firstly, that this is a demanding position. Even when in a bar, or at a sporting event, one must engage with others through the process of deliberation. On the other hand, this can be seen as *lessening* the demands placed on citizens, by asking of them to do what they already do fairly regularly in their private lives, in the more formal political world. A group of friends may decide to go out for an evening. They must first agree on a date, and each will (as normally does happen) state when they are available. If there is a scheduling conflict, reasons are proffered for a new date. Date thus established, venue is next. And in the same way, the group will make suggestions, deliberate them, and on the force of good reasons select a restaurant that all can reasonable consent to. In this manner, Benhabib already has a very large pool of deliberative instances and resources on which to draw. In this way, she merely asks for us to act in public as we do in our private social lives.

Rawls does not quite have such powerful resources at hand. He introduces a language split in the individual. For him, there is the private individual, and the political, public citizen. The citizen in us must translate (or be able to translate) our reasons and views into the language of public reason. This duality is taxing on individuals. On the other hand, to *always* be in the space of public reason gives Benhabib's individuals a single language to negotiate. Further, as Rawls restricts both the agenda and the space of public reason, the pool of public reasons is much smaller. They cannot assist the dinner party above, as this

is not a matter of constitutional essentials, nor one of base justice. This is perhaps one of the spaces in which conflict may find an outlet, although for Rawls it will not be political conflict.

Rawls aims for citizens to be reconciled to their governments and institutions, to see their own interests and views enacted in and safeguarded by these institutions. Benhabib aims for individuals to be reconciled to their lives, government and formal institutions, and informal associations included. The provisional nature of deliberative democracy, and its encouragement of a continuous deliberation (even to deliberate decisions that have been made, so as to alter them or to bring bearing on new, similar decision), allows issues such as euthanasia and penis transplants to be deliberated as the need arises. Recall that Rawls is unable to include such matters into the language of public reason. In short, Rawls depends on a restricted public reason to make sure reasons acceptable to all are exclusively used when deliberating the public good. These reasons must exist in the first place. Benhabib allows for the formation of these reasons *in* the process of deliberation – in the deliberation reasonable reasons not just emerge, but are formed.

With all of the above in mind, should I turn now to my five criteria, it will be clear why Benhabib's account of legitimacy is the more convincing. Specifically, my second, third and fifth criteria. These are, respectively, that a convincing theory of legitimacy must respect plurality and conceive of legitimacy as pertaining to plurality, it must justify government's political authority, and it must provide stability. On the other two, that such a conception must provide a means of evaluating government, and that it must account for government's right to rule, as has been stated above in the evaluative portion of these two thinkers' respective chapters, both conceptions accomplish this convincingly. To the three then, where there is a marked difference.

Benhabib provides an account that takes plurality seriously and respects this plurality more convincingly than does Rawls's account. Both Rawls and Benhabib would agree with this criterion as a valid one, as they both state, at the outset, that they are trying to solve the problem of plurality in complex modern societies. Rawls's answer to this problem, as we have seen, is to attempt to fix the public and political sphere, as well as public reason, to such an extent that the inevitable conflict generated by plurality is simply

avoided, and disallowed in these spheres. Benhabib embraces this plurality and concomitant conflict in order to transform it into a beneficial aspect of our lives in these plural, complex societies. Further, Benhabib sees plurality not merely in society but also in the individual. This can be stated in a single thought: while Rawls attempts to reconcile citizens with their institutions, Benhabib tries to reconcile individuals to each other, and to their institutions.

The above point regarding plurality and it's relation to legitimacy has a direct bearing on the justification of political authority. As is clear from the first chapter, political authority exercised by a government is an authority that extends into the private lives of individuals. What two consenting adults may do in the privacy of their own bedroom is governed by this authority, for example. In Rawls's conception, this question cannot be adequately discussed through public reason, for it is not one of constitutional essentials nor of base justice. But this remains a very contentious issue the world over. And it is but one example out of a great many. Benhabib's conception, on the other hand, does make available a space for this to be deliberated, both in public and with the public. Having the space for contentious issues to be publicly deliberated lends more legitimacy to her conception, for each specific authority exercised by a government over its citizens can be deliberated and all can add their voice to this deliberation. In this specific case, then, whatever the outcome of the deliberative procedure, it will be a provisionally legitimate and just answer. Rawls must relegate this debate to the private sphere, as he understands it, and it will most likely then be dealt with by churches – precisely the sort of decision making processes Rawls tries to sidestep.

Both of the above two points, in turn, have a strong impact on stability. Citizens over whom government exerts an authority, with regards to a specific social issue, yet who themselves cannot discuss this issue may have difficulty in accepting the authority. Even more so, if the particular issue cannot be translated into the language of public reason. Again, the homosexuality debate is usually cast in purely religious language and reasons ("it is wrong because one of the gods forbids it"). It tends to be these fundamental religious differences that drives instability. Secondly, Benhabib is able to deal with the realism of plural individuals – and this is a reality which cannot be denied. A complex and plural society breeds complex and plural individuals. Rawls's mechanism of reflective

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equilibrium illustrates this very well, as detailed above. That Benhabib can account for individual plurality better than Rawls (through her provisional decisions, her assertion that all decisions are always open for deliberation or re-deliberation) allows for a deeper reconciliation between citizens and institutions. And finally, Benhabib is able to mitigate the paradox of Rawls's stated aims of a well-ordered society characterised by pluralism and complexity and even contradictions. These are for her opportunities to increase individual complexity and pluralism, mimicking the current state of individuals in modern societies through institutions.

I conclude with a last remark, which I have already stated at the very outset. Benhabib provides the more convincing theory of legitimacy. But this is not to say that Rawls's is *not* convincing. It is. However Benhabib's account is *more* convincing. Benhabib required Rawls's work, she built on it and improved on his shortfalls. In this manner Rawls's work has much worth.

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