



DISCUSSION NOTE

RECIPROCITY AND LIBERAL LEGITIMACY: CRITICAL COMMENT ON MAY

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A FUNDAMENTAL CONCERN OF John Rawls' theory of political liberalism is the justification of the exercise of coercive political power.¹ According to the "liberal principle of legitimacy" (hereinafter LPL), "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."² Simon May has argued recently that the LPL is *not* justified by the theory of political liberalism, as the parties in the "original position"³ would not select the LPL to regulate the exercise of coercive political power.⁴

In this critical comment, I explain that May's argument against the LPL fails, as the role of the original position in political liberalism is such that it cannot play any necessary role in the justification of the LPL. Rather, the LPL follows directly from what Rawls calls the "criterion of reciprocity,"⁵ and the criterion of reciprocity *cannot* be justified by the original position. This is because, according to the theory of political liberalism, it is the criterion of reciprocity that justifies the original position. If the criterion of reciprocity directly justifies both the original position and the LPL, it is not necessary to appeal to the original position in order to justify the LPL. The underlying problem with May's argument is that it fails to appreciate the fundamental justificatory role played by the criterion of reciprocity with respect to *both* the LPL and the original position in political liberalism.

I.

According to Rawls, the exercise of political power is always ultimately coercive in nature.⁶ Thus the institutions that exercise political power face a special justificatory burden. There are two reasons for this special justificatory burden. First, coercive political power in liberal democratic societies is authorized, and ultimately exercised, by citizens working together as a collective

¹ John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001), pp. 40-41.

² J. Rawls, *Political Liberalism*, Expanded Edition (New York: Columbia University Press, 2005), p. 137.

³ On the "original position" device, see Rawls, *Justice as Fairness*, §§6, 23-40.

⁴ Simon Cabulea May (2009), "Religious Democracy and the Liberal Principle of Legitimacy," *Philosophy & Public Affairs* 37, no. 2, pp. 136-170.

⁵ On the "criterion of reciprocity," see Rawls, *Political Liberalism*, pp. xlvii-xlix, 226-227, 381. On the relation between the criterion of reciprocity and the LPL, see *ibid.*, pp. xlv, 446-447.

⁶ See Rawls, *Justice as Fairness*, p. 40.

body.⁷ In order to exercise political power as a collective body, citizens need to provide mutually acceptable justifications for that exercise. Second, coercive political power necessarily limits citizens' freedom and, because citizens are conceived of as free and equal by political liberalism,⁸ such restrictions need to be justified to citizens. Thus citizens' dual role as sovereigns and subjects with respect to their society's coercive political institutions imposes on those institutions a special justificatory burden. Complicating any attempt to meet this justificatory burden is what Rawls calls "the fact of reasonable pluralism" – the fact that reasonable persons living in liberal democratic societies invariably will come to subscribe to a variety of different "comprehensive doctrines" (religious, moral and philosophical views).⁹

Conceptions of justice that satisfy the LPL can provide justifications for the exercise of coercive political power that reasonable persons would judge to be mutually acceptable, despite the fact of reasonable pluralism.¹⁰ Conceptions of justice that can satisfy the LPL are "political" in nature. A political conception of justice satisfies (inter alia) what can be called the "freestanding condition" – that is, its principles are compatible with the various comprehensive doctrines endorsed by reasonable persons.¹¹ When coercive political power is exercised in accordance with a constitution that is justified by a political conception of justice, then that exercise is justified by principles and ideals acceptable to all reasonable citizens (even if that conception is not the most preferred one of all reasonable citizens). The ideal of shared political autonomy thereby is realized.

According to May, Rawls' justification for the LPL is to be found in the original position: the parties in the original position select the LPL as the appropriate principle to regulate the exercise of coercive political power. May finds this justification for the LPL inadequate: "My thesis is that the parties in the original position have no compelling reason to select the liberal principle [LPL] in addition to a democratic principle of legitimacy."¹² According to

⁷ According to Rawls, political power "is ultimately ... the power of free and equal citizens as a collective body" (Rawls, *Political Liberalism*, p. 136).

⁸ See, for instance, Rawls, *Justice as Fairness*, 7-8.

⁹ On "comprehensive doctrines" and the "fact of reasonable pluralism," see Rawls, *Political Liberalism*, pp. xxiv, 4, 36-38, 55, 129, 135-36, 144, 216f, 441, 445; and *Justice as Fairness*, pp. 3-4, 33-34, 36, 40, 84, 197.

¹⁰ Roughly, a commitment to satisfying the "criterion of reciprocity" (explained in section II) and an acknowledgement of the fact of reasonable pluralism characterize persons as "reasonable." (See Rawls, *Political Liberalism*, pp. xlv, 16, 49-50, 54.)

¹¹ See Rawls, *Justice as Fairness*, pp. 26-27, and *Political Liberalism*, pp. 11-15. Political conceptions of justice also satisfy what can be called the "basic structure restriction." According to the "basic structure restriction," a political conception of justice is limited in its scope of application to the main political and economic institutions of society, understood as an overall system of cooperation. For an interpretation and defense of the "basic structure restriction," see Blain Neufeld (2009), "Coercion, the Basic Structure, and the Family," *Journal of Social Philosophy* 40, no. 1, pp. 37-54. All *justified* political conceptions of justice also satisfy the "criterion of reciprocity" (explained in the next section).

¹² May, "Religious Democracy," p. 136.

the “democratic principle of legitimacy” (hereinafter DPL), “political power must be exercised within a constitutional order that respects the equal status of all citizens and that effectively guarantees each citizen the basic liberal rights and entitlements necessary to participate in political processes on equal terms.”¹³

The DPL is a “less restrictive” principle of legitimacy than the LPL, as it permits citizens to exercise coercive political power in accordance with a constitutional structure that can be justified on the basis of a greater range of reasons than the LPL. Among such reasons are those that presuppose the truth of a particular comprehensive doctrine. Such reasons are ones that not all reasonable citizens could accept, given the fact of reasonable pluralism. In contrast to the LPL, then, it is possible for a constitutional structure that is justified by a particular comprehensive doctrine, including a religious doctrine,¹⁴ to satisfy the DPL. Because the DPL is a “less restrictive” principle than the LPL, the parties in the original position, according to May, have a *prima facie* reason to select the DPL over the LPL.¹⁵

II.

I will not assess May’s argument that the parties in the original position would select the DPL instead of the LPL.¹⁶ Instead, I will explain that the original position plays *no necessary role* in the selection of a principle of political legitimacy in political liberalism. Rather, the LPL follows directly from the criterion of reciprocity, and the criterion of reciprocity cannot be justified by the original position, as it is the criterion of reciprocity that justifies the original position.

The criterion of reciprocity, roughly, holds that citizens must offer terms of social cooperation – principles of justice – that they think other citizens¹⁷ might accept as free and equal.¹⁸ Principles that satisfy the criterion of reciprocity specify terms of social cooperation amongst free and equal citizens over time that are fair because they are mutually acceptable, despite the fact of reasonable pluralism.¹⁹ The idea of society as a fair system of social cooperation amongst free and equal citizens, and the criterion of reciprocity that is an integral part of this idea, comprise the “intrinsic normative and moral ide-

¹³ *Ibid.*

¹⁴ May gives as an example of such a constitutional structure that of a hypothetical religious democratic state called “Apostolica.” (*See ibid.*, pp. 139-141.)

¹⁵ *Ibid.*, p. 150.

¹⁶ May considers four arguments that a defender of the LPL might advance to explain why the parties in the original position would select the LPL over the DPL, and finds them all unsuccessful (*Ibid.*, pp. 151-169).

¹⁷ Specifically, those citizens who are “reasonable persons,” and therefore similarly committed to satisfying the criterion of reciprocity. *See* note 10.

¹⁸ *See* Rawls, *Political Liberalism*, p. xlv, 35, 50, 300, 446-47; and *Justice as Fairness*, pp. 6–7.

¹⁹ *See* Rawls, *Political Liberalism*, p. xlv; *Justice as Fairness*, p. 6.

al” of political liberalism.²⁰ Because of the criterion of reciprocity’s fundamental normative role in political liberalism, Rawls asserts that *all* liberal conceptions of justice must satisfy the criterion of reciprocity.²¹

Concerning the relation between the criterion of reciprocity and the LPL, Rawls writes:

[T]he idea of political legitimacy *based on the criterion of reciprocity* says: Our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions ... are sufficient, and we also...think that other citizens might also reasonably accept those reasons. ... [P]olitical conceptions [of justice] must justify only constitutions that satisfy this principle.²²

Thus the criterion of reciprocity, when combined with respect for the fact of reasonable pluralism, *directly* justifies the LPL. There is no role for the original position in this derivation.

May recognizes that the LPL is an “implication” of political liberalism’s criterion of reciprocity.²³ Nonetheless, May thinks that political liberalism cannot take for granted any necessary role for the criterion of reciprocity in its justification for the LPL: “Whether the criterion of reciprocity best expresses the value of fair social and political cooperation between free and equal citizens is a difficult issue about which sincere and reasonable people disagree.”²⁴ According to May, Rawls needs a justification for specifying citizens’ willingness to accept fair terms of social cooperation as a commitment to the criterion of reciprocity, and thus the LPL.

III.

May thinks that the justification for the LPL is to be found in the original position. In the passage that serves as the main target for May’s argument, Rawls states:

[T]he parties in the original position, in adopting principles of justice for the basic structure, must also adopt guidelines and criteria of public reason for applying those norms. The argument for those guidelines, and for the principle of legitimacy, is much the same as, and as strong as, the argument for the principles of justice themselves. In securing the interests of the persons they represent, the parties insist that the application of substantive principles be guided by judgment and inference, reasons and evidence that the persons they represent can reasonably be expected to

²⁰ Rawls, *Political Liberalism*, p. xlv.

²¹ On the existence of different political conceptions of justice (in addition to “justice as fairness”), see *ibid.*, pp. 450-52. Despite the existence of different political conceptions of justice, Rawls maintains that the “the limiting feature of these forms is the criterion of reciprocity” (*Ibid.*, p. 450; see also pp. xlvi, 375).

²² From Rawls, *Political Liberalism*, pp. 446-47 (my italics); see also p. xlv.

²³ May, “Religious Democracy,” pp. 142-144.

²⁴ *Ibid.*, p. 144.

endorse. Should the parties fail to insist on this, they would not act responsibly as trustees. Thus we have the principle of legitimacy.²⁵

Contrary to what Rawls claims in this passage, May contends that the parties in the original position would *not* select the LPL; instead, they would select the DPL.

When we look at what Rawls says about the original position and the LPL elsewhere, however, it is clear that he thinks that the original position is not *necessary* to justify the LPL. In a footnote to one of his presentations of the LPL, Rawls writes:

This paragraph can be stated more rigorously if we wish. *One way* to do this is to look at the question of legitimacy from the point of view of the original position. We suppose the parties to know the facts of reasonable pluralism and of oppression along with other relevant general information. We then try to show that the principles of justice they would adopt would *in effect incorporate* this principle of legitimacy and would *justify only institutions it would count legitimate*.²⁶

This note makes it clear that the use of the original position in order to state “more rigorously” the rationale for the LPL is optional. This is because the criterion of reciprocity provides a sufficient justification for the LPL.

Moreover, this note suggests that the sense in which the LPL is “chosen” by the parties in the original position simply is that the principles of justice that would be chosen would justify only institutions that the LPL would count as legitimate. Supporting this reading of the relation between the original position and the LPL is Rawls’ discussion of the constraints on knowledge and forms of reasoning available to the parties in the original position, in which he treats the LPL as (at least partially) *justifying* the imposition of such constraints.²⁷ If the LPL helps justify the content and structure of the original position – the knowledge and forms of reasoning available to the parties – then the original position, in turn, cannot coherently justify the LPL.

Whatever Rawls regarded the exact relation between the LPL and the original position to be in his various writings on political liberalism, what is clear is that the criterion of reciprocity is not, and indeed cannot be, justified by the original position. Instead, it is the criterion of reciprocity that justifies the original position. “[E]ach of us must have principles and guidelines to which we appeal in such a way that the criterion of reciprocity is satisfied,” Rawls writes. “I have proposed that one way to identify those political prin-

²⁵ Rawls, *Political Liberalism*, p. 225.

²⁶ *Ibid.*, p. 137, note 5, my italics.

²⁷ “Faced with the fact of reasonable pluralism, and granted that, on matters of constitutional essentials, basic institutions and public policies should be justifiable to all citizens (*as the liberal principle of legitimacy requires*), we allow to the parties [in the original position] the general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science” (Rawls, *Justice as Fairness*, pp. 89-90, my italics).

ciples and guidelines is to show that they would be agreed to in ... the original position.”²⁸ The criterion of reciprocity itself therefore cannot be justified by the original position. Moreover, if the LPL is justified *directly* by the criterion of reciprocity (a justification that, as noted earlier, May acknowledges) then the selection of the LPL by the parties in the original position simply is not necessary.

Perhaps the original position might play a role in showing the overall coherence of Rawls’ account of political legitimacy and his conception of justice as fairness? If the parties in the original position would select the principles of justice as fairness but *not* the LPL, this might reveal an inconsistency within the overall theory of political liberalism.²⁹ It is not clear, though, how such an argument could help May’s overall position. May notes, correctly, that Rawls understands the concept of legitimacy to be “weaker” or “less demanding” than the concept of justice – a law might be unjust but nonetheless legitimate.³⁰ According to May, this requires *revising* the original position device when it comes to the selection of a principle of political legitimacy. Specifically, May claims that the parties in the original position must be understood as selecting a principle of legitimacy for what he calls a “well-constituted polity” instead of a “well-ordered society.”³¹ Thus May does *not* use the same original position device that Rawls does. Consequently, it is unclear how demonstrating that a different principle of legitimacy would be selected by the parties in a different original position than the one employed by Rawls should give rise to any concern regarding “inconsistency” in Rawls’ overall theory. The relevant consistency is achieved by the fact that the principles of justice selected by the parties in *Rawls’* original position “would in effect incorporate” the LPL.³²

²⁸ Rawls, *Political Liberalism*, pp. xviii-xlix. *See also*, pp. 226-227, 381.

²⁹ I owe this thought to some comments by Simon May on an earlier version of this paper.

³⁰ *See, for instance, ibid.*, pp. 393, 428-429.

³¹ *See* May, “Religious Democracy,” pp. 146-49. I dispute May’s claim that understanding the concept of legitimacy to be a “weaker” concept than justice requires the introduction of an entirely new original position. (This should be unsurprising, given that my central claim in this paper is that the original position device plays no necessary role in the selection of political liberalism’s principle of legitimacy.) At the level of “ideal theory,” Rawls acknowledges that different well-ordered societies can be organized in accordance with different political conceptions of justice. While not all liberal conceptions of justice are equally justified or “reasonable,” all can be *legitimate* insofar as they satisfy the criterion of reciprocity and thus the LPL (*see* note 21). With respect to “non-ideal theory,” it seems plausible to understand Rawls’ claim that legitimacy is “less demanding” than justice as simply noting that a non-well-ordered society can be “unjust” with respect to many of its institutions and laws, but nonetheless be adequately “legitimate.”

³² *See* note 26.

IV.

If the LPL is justified *directly* by the criterion of reciprocity – which, recall, is part of political liberalism’s “intrinsic normative and political ideal”³³ – and the criterion of reciprocity also justifies the original position, then clearly political liberals should remain committed to the LPL *irrespective* of whether the LPL would be selected by the parties within the original position. May’s argument against the LPL fails to recognize the fundamental justificatory role played by the criterion of reciprocity vis-à-vis *both* the LPL and the original position in the theory of political liberalism.³⁴

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³³ See note 20. Why is the criterion of reciprocity part of political liberalism’s “intrinsic normative and moral ideal”? I think that the normative authority of the criterion of reciprocity, and thus the LPL, is justified if we understand political liberalism as ultimately based on something like a principle of equal “civic respect” for persons. (I formulate such a principle in: Blain Neufeld (2005), “Civic Respect, Political Liberalism, and Non-Liberal Societies,” *Politics, Philosophy and Economics* 4, no. 3, pp. 275-299. See also Charles Larmore (1999), “The Moral Basis of Political Liberalism,” *The Journal of Philosophy* 94, no. 12, pp. 599-625.)

³⁴ I would like to thank Julius Sensat, Chad Van Schoelandt, two anonymous referees and (especially) Simon May for their helpful comments on an earlier draft of this paper.