
Et tu, Ratio! The Treachery of Reason in Rawls

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I. Introduction

John Rawls' jurisprudence is a significant contribution to political philosophical discourse this century. It revives Kant's critiques of pure and practical reason in the light of contemporary empiricism so as to arrive at a *grundnorm* for ethical discourse understood as political law making.

Rawls' postulates of the 'original position' and the 'overlapping consensus', described in precis below, are ways of escaping what he perceives as the bias inherent to the systems of reference on which people rely when making value judgements, ie reasonable comprehensive doctrines. In Rawls' Enlightenment utopia where reason prevails, the operation of the original position and the overlapping consensus ought enable us to arrive at both a minimal social contract and a meeting place for public ethical discourse in a tolerant, pluralist society or world.

For instance, Rawls makes much of the example of post-Reformation sectarian intolerance. It is as if Rawls thinks that we could overcome the difficulties caused by competing reasonable comprehensive doctrines by meeting on the common ground of pure reason, free from the prejudice of those doctrines, and so achieve, if not social harmony, then at least a minimal social contract.

The proposition advanced here is that Rawls' jurisprudence is hoist by its own petard. Rawls invokes reason as the way of both escaping subjective bias and ensuring objectivity in both the original position and the overlapping consensus. Yet ultimately, Rawls' understanding of reason betrays his objectives.

It is submitted that Rawls is unmindful that reason is not a univocal experience. Rawls' unmindfulness results in his adopting an understanding of reason which itself constitutes a reasonable comprehensive doctrine. The form of reasoning adopted and which it is submitted constitutes a reasonable comprehensive doctrine is that of the Enlightenment. Thus Rawls' Enlightenment reason is yet another competing reasonable comprehensive doctrine and not a discourse *sui generis* to reasonable comprehensive doctrines. This renders the original position self-defeating and the overlapping consensus a chimera.

In an earlier volume of this journal,¹ Stuart and Tracey Rowland identified five philosophical assumptions made by Rawls. On the basis of these assumptions the Rowlands argued that Rawls was 'rigging the rules so that only liberal values are politically legitimate'.²

The proposition advanced here is that the philosophical assumptions which the Rowlands correctly identified and the critique which they advanced can be framed in more radical, fundamental terms.

After a brief reprise both of Rawls' original position and overlapping consensus and of the Rowlands' argument, this article will continue where the Rowlands' critique finished.

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1 S & T Rowland, 'The "Political Values" of the "Public Conception" in the Work of John Rawls' (1995) 18 *University of Queensland Law Journal* 342-349.

2 *ibid* at 345.

II. Rawls: a precis

Harris described Rawls' work as a 'refined version of the social contract theories of Locke and Rousseau'.³ This clarifies both Rawls' goals and phobias.

Rawls' goal is a minimalist Enlightenment utopia, ie what would justice be in a society constructed purely on rational lines. Rawls is phobic about the influence of cultural, social, religious, metaphysical, bourgeois or proletarian bias and self-interest. Both the original position and the overlapping consensus are designed to transcend this subjective pettiness.

Thus in the original position, Rawls postulates an imaginative congress of peoples' representatives operating behind a veil of ignorance of their eventual lot in life. Free of self-interest, that congress identifies those principles of political justice which reasoned debate would ultimately conclude — principles of political justice which Rawls argues are both rationally self-evident, inevitable, and of the greatest benefit to all regardless of one's revealed self-interest once the veil of ignorance is lifted from the real world.⁴

Following the Kantian tradition, Rawls offers principles of *political* justice which do not purport to describe justice *per se* in a metaphysical sense. Here 'political' means that which is proper to the domain of public discourse — that which can be reasonably agreed upon within the polity.⁵

The two principles of justice in the original position postulated in *A Theory of Justice* and refined in *Political Liberalism* are:

- (1) Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
- (2) Social and economic inequalities are to be arranged so that they are both:
 - (a) to the greatest benefit of the least advantaged; and
 - (b) attached to offices and positions open to all under conditions of fair equality of opportunity.⁶

Rawls contends that these principles are inevitable if one is reasonable. For if reason rules then there is but one self-evident result: practical reason demands that universals, such as justice, be defined by reaching a reflective equilibrium between one's own understanding of justice and other peoples' different understandings of justice. This equilibrium is reached through the good will, perspicacity and compromise characteristic of reasonable people, not the bias and self-interest characteristic of reasonable comprehensive doctrines.⁷

The overlapping consensus is an aspect of political life *after* the original position. In the on-going real world after the imaginative congress of the original position, which yields principles of justice, the overlapping consensus is the mechanism by which principles of justice can continue to be rationally applied in a pluralist society. While in the original position rational people agreed on necessary social primary goods such as liberty, opportunity and wealth,⁸ the overlapping consensus is an expression of social primary goods as applied to on-going political institutions and conventions of justice.⁹

The overlapping consensus is thus that common ground where members of every

3 J W Harris, *Legal Philosophies*, Butterworths, London, 1980, p 263. Locke argued for a social contract against assertions of an absolute (paternalistic) royal prerogative. Rousseau argued for a social contract by premising the sovereignty of the people.

4 J Rawls, *A Theory of Justice*, Belknap Press, Cambridge, Mass, 1971, pp 136–142.

5 Ibid, pp 253, 256.

6 Given that the further condition of 'just savings' is not directly relevant here, it has been omitted.

7 A 'reasonable comprehensive doctrine' is any worldview, be it religious, metaphysical, economic or aesthetic which a rational person could either create or understand without necessarily agreeing with it, eg capitalism and communism: J Rawls, *Political Liberalism*, Cambridge University Press, New York, 1993, p 36.

8 Rawls, *A Theory of Justice*, pp 90–95.

9 Rawls, *Political Liberalism*, p 40.

reasonable comprehensive doctrine can meet. Just as reason dictated the outcomes of the imaginative congress in the original position, so too the assumption of rational debate in the real, on-going overlapping consensus after the original position demands a bare minimum of political agreement about the exercise of justice in a society containing competing reasonable comprehensive doctrines.¹⁰

It is as if each reasonable comprehensive doctrine is a different language and the overlapping consensus is the agreed way of communicating between each language group. This postulate is similar to French being the language of diplomacy and Latin once being the language of international scholarship.

Thus the overlapping consensus in Rawls' conception neither arises from, nor relies for its ultimate justification on, any reasonable comprehensive doctrine.¹¹ It is a mechanism which flows on from the need in the real world to continue the rational identification of justice and the application of principles of justice to political institutions in a manner consistent with the idyll of the original position and the original position's 'constructivist conception of political justice'.¹² Constructed by rational agents, the overlapping consensus thus yields a conception of justice as fairness which is derived from an assumed 'idea of the reasonable'.¹³

To conclude this precis, Rawls lowers his sights by considering justice not as a universal (in the philosophical sense *qua* ideal) but as a political reality, ie how do people talk about justice? The only way to legitimate such an approach is to invoke a nominalist epistemology, ie to say that all we ever know is words and concepts and not real things in and of themselves. A problem inherent to nominalism is that if something means what I or others say it means in our minds, how does that relate to the outside world? Are we trapped in subjectivity?

To escape this impasse of subjectivity, Rawls adapts Kantian moral constructivism (an ethic based on practical reason identifying ethical choice as a logical necessity from our knowledge) and re-defines both objectivity and the purpose of the exercise. Rawls assumes that mine is not a subjective definition if my definition of justice is shared by everyone else. Thus the way in which people talk about justice is itself an objective phenomenon observable in the world.

Why this convoluted reasoning? It is because Rawls associates untenable, ambitious metaphysical systems with reasonable comprehensive doctrines and because Rawls eschews any association with reasonable comprehensive doctrines that he wants to be metaphysically unambitious. Thus Rawls follows Aristotle's advice to stick with the observable world and not risk doubling the problems of philosophy by postulating another metaphysical, ideal world as Plato tried to do.

Yet while following this advice, Rawls still wants to investigate universal concepts like justice. So instead of investigating ideal justice, Rawls investigates *political* justice, hoping thereby to say something objectively meaningful about a universal idea which, *qua* idea and unlocatable apart from peoples' thoughts, has an inherent subjective dimension.

It is in this context that the Rowlands' argument can be considered as a preliminary critique of Rawls' work.

III. The Rowlands' critique of Rawls

The Rowlands identified five philosophical assumptions made by Rawls:

(1) 'Reason cannot be used to make a value judgement about competing goods' where

10 Ibid, p 38.

11 Ibid, pp 213, 143.

12 Ibid, p 40.

13 Ibid, pp 93-94, 99-101.

objectivity is understood as the publicly shared point of view of citizens in a well-ordered society.¹⁴

- (2) Given the first assumption, political values are not to be distilled from reasonable comprehensive doctrines but from 'plain truths now widely accepted, or available, to citizens generally'.¹⁵ Thus political values are 'what remains once the ether of moral philosophy has evaporated'.¹⁶
- (3) To be reasonable or rational 'means using the intellect in an instrumental sense only, it does not mean directing one's intellect to the pursuit of truth'.¹⁷
- (4) Liberal political values are neutral since they are not derived from idea of morality generally.¹⁸
- (5) It is 'possible to find "political values" which are untainted by contact with "reasonable comprehensive doctrines"'.¹⁹

The Rowlands identified two problems which flow from these assumptions:

With respect to the *original position*, it is 'unclear how Rawls can justify his particular political ideals, such as the ideal of equality, without reference to a reasonable comprehensive doctrine such as liberalism'.²⁰

With respect to the *overlapping consensus*, 'expecting citizens to adopt different moral perspectives according to such variables as time, place and social position may not be psychologically healthy'.²¹

Thus the problem which the Rowlands identified with the original position is that Rawls is not only rigging the rules in favour of liberalism but he is also making of liberalism itself a reasonable comprehensive doctrine.²² Indeed, it will be argued in this article that not only is this true, but in addition Rawls makes a reasonable comprehensive doctrine of the Enlightenment conception of reason which underpins liberalism.

The problem which the Rowlands identify with the overlapping consensus, which is not furthered in this article, is similar to that identified by the social justice critique this century of traditional Protestant theology. That theology had a tendency to bifurcate the kingdom of God and worldly kingdoms, thus enabling one to maintain a private morality diametrically opposite to one's actions as a public figure. The Rowlands rightly point out both the psychological tension inherent in such an approach and the logical outcome of people with moral integrity withdrawing from public life, thereby impoverishing the pool of people prepared to be public figures.²³

It is submitted that further and more fundamental questions could have been asked of Rawls on the basis of the assumptions which the Rowlands identified in his work.

With respect to the first assumption one can ask, how does Rawls escape, if at all, from the relativism inherent in this definition of objectivity?

Of the second assumption, apart from innate ideas, what mechanism could explain the assumed universality of the 'plain truths' which Rawls invokes?

Of the third assumption, how viable is the distinction between the instrumental and the pure use of the intellect?

Of the fourth assumption, given the Enlightenment flavour of Rawls' methodology, his

14 Ibid, p 38.

15 Ibid, p 225.

16 S & T Rowland op cit at 343.

17 ibid. See also: Rawls, *Political Liberalism*, p 237.

18 S & T Rowland op cit at 344. See also: Rawls, *Political Liberalism*, p 243.

19 S & T Rowland op cit at 344.

20 Ibid at 345.

21 ibid.

22 ibid.

23 ibid at 346.

reliance on reason and the constructivist morality typical of the Continental Enlightenment, how can liberal political values be described as underived from ideas of morality generally?

And with respect to the fifth assumption, how can one arrive at political values which are not part of a world-view, ie is there any such thing as a 'world view-less' perspective?

The critique of Rawls which follows expands the questions asked here of Rawls' assumptions.

IV. Rawls: a radical critique

Rawls' major contributions to jurisprudence are the original position and the overlapping consensus. The first is a mechanism for identifying the social contract while the second rules on unforeseen contingencies according to the spirit of that original contract.

It is in this context that Rawls can rightly be described, despite the obvious contractarian content of his theory, as advocating an Aristotelian natural law. For Aristotle, natural law is a system of law which everywhere has the same force of enhancing activity in accordance with the excellence of the intellect or reason. Thus law speaks universally, guided by the phenomenon of, and so in accordance with, reason (Rawls' original position). But when the universally stated law does not cover a particular case, the task of equitable jurisprudence is to say 'what the legislator himself would have said had he been present' (Rawls' overlapping consensus).²⁴

Whether consciously or not on Rawls' part, the parallel with Aristotle ought not be surprising given the identification earlier in this article of Rawls' Aristotelian approach. It is submitted that the role of reason in Rawls is similarly Aristotelian, though seen through the prism of Enlightenment scientific reason.

It is in this context that this article presents a critique of reason in both the original position and the overlapping consensus, claiming that the former is self-defeating since it collapses into untenable philosophical assumptions, while the latter is a chimera — an unnatural hybrid which exists only in Rawls' myth of reason and not in the real world.

(1) *The original position: self-defeating?*

It is submitted that Rawls' metaphysical assumptions about both the status of the concept of justice and the universality of reason render his original position self-defeating. Essentially, this is because Rawls is consciously metaphysically unambitious yet the philosophical assumptions he makes are very ambitious.

In philosophical terms, Rawls envisions the equivalent of a 'content-less' universal in constructing the original position. A content-less universal is a concept without feature, a universal without a predicate, eg at one level — a superhuman, the perfectly straight line; at another level — number, parallel world, idea.

The content-less universal is a device typical of unambitious metaphysical systems, such as the early Wittgenstein who postulated an ineffable metaphysic beyond that viewpoint which climbing the ladder of empirical reason can afford.²⁵ The early Wittgenstein's ineffable metaphysic was often construed as being anti-metaphysics when it was simply unambitious.

Similarly, Rawls is not metaphysically unconscious, just unambitious. Rawls is aware that metaphysics is an unavoidable concomitant of value statements and judgments, hence

24 Aristotle, *Nicomachean Ethics*, (trans W D Ross), Oxford University Press, London, 1915, 1134b, 15; 1177a, 10; 1178a, 5; & 1137b, 20.

25 L Wittgenstein, *Tractatus Logico-Philosophicus*, (trans C K Ogden) Routledge & Kegan Paul, London, 1922, paras 6.53 and 7. Wittgenstein argued that transcendental idealist philosophy had overstretched itself and spoken of things which we cannot hope to prove, eg absolutes of good and evil. Better, he thought, to recognise that our language admits of the possibility of speaking of such things but not pretending that our language is actually capable of speaking meaningfully about such things in a sustained manner.

he postulates reasonable comprehensive doctrines as a way of explaining the world views — the frames of reference — which underpin decisions.

Within the original position, and consistent with Enlightenment figures such as Locke, Rawls pictures us as *tabulae rasa* waiting to be written on, waiting to be shaped by self-interest. Hence the fanciful congress behind the veil of ignorance. The idea is that if we were content-less — if we did not rely on reasonable comprehensive doctrines in our decision making — then we could be guided solely by our native reason in constructing the original position's minimalist social contract. This posits us as *homo intellectus* in the Aristotelian ideal typical of Rawls' approach.

In response to this scenario, Shapiro argues that Rawls limits the autonomy of the congress representatives by denying them the possibility of acting irrationally, thus presupposing the virtue of rationality.²⁶ This article goes further, arguing that not merely does Rawls presuppose the virtue of rationality but he presupposes the virtue of a *particular kind of rationality*.

For reason is not an univocal experience. Consider, for example, the plethora of logics: Newtonian, Oriental Confucian and Buddhist systems plus the assertions of feminist reason.²⁷ These are not merely different theories of knowledge, for all of these systems of thought posit different rules both for argumentation and validity.

Also consider the relationship between the structure of our thought and the structure of the world. For instance, would a binary system seem so natural and obvious an option (with its difficulty of the undistributed middle) were it not for the constant interchange between day and night? Were our Earth to have either two suns or more and brighter moons, would the binary system have developed with such seeming necessity? It is not that the binary system has come about because there is such a severe dissonance between night and day. Rather the quality of the seeming necessity of that system is enhanced by similarly structured experience.

In Rawls' original position, the experience of reason is thought to be universal. A universal which pierces the veil of ignorance behind which the fanciful congress deliberates. No other universal pierces the veil — all reasonable comprehensive doctrines are excluded. But reason pierces the veil for the sake of being able to construct a second universal within the sanctuary of the congress, that is justice.

This second universal, which unlike reason does not pierce the veil but is constructed within the congress of the original position, is similarly a content-less universal. For it too is untainted by contact with reasonable comprehension doctrines. This presupposition of justice as content-less means that for Rawls justice can only ever be a universal idea, and not a *relationship* — which is a significant departure from Aristotle's understanding of justice as proportionality.²⁸

For Rawls, justice *qua* idea is only ever accessible by reason. And furthermore, *qua* idea and part of the life of the mind, justice can be universalised apart from experience. It is as if justice exists 'out there' somewhere as a reality which only our reason can access, something which we discover rather than create.

The force of this criticism would be more obvious had Rawls' congress been asked not only to establish principles of justice but also the principles of other universals, for example table, red, poem. Had that occurred, then Hare's criticism that Rawls' methodology in the original position is really a kind of subjectivism would be more obvious.²⁹

26 I Shapiro, *The Evolution of Rights in Liberal Theory*, Cambridge University Press, Cambridge, 1986, p 243.

27 See entries under these headings in S Blackburn, *The Oxford Dictionary of Philosophy*, Oxford University Press, Oxford, 1994.

28 Aristotle, *op cit*, 1131b, 15.

29 R Hare, 'Rawls' Theory of Justice' in N Daniels (ed), *Reading Rawls: critical studies on Rawls' A Theory of Justice*, Blackwell, Oxford, 1975, pp 82–83, 85.

Hare's charge of subjectivism — where Rawls' intention was to anoint his methodology with objectivity through his appeal to reason — is based on the nominalism identified earlier in this article. Rawls seeks to create objectivity out of thin air by saying that his definition of justice is not subjective if it accords with everyone's definition of justice. Thus the way in which we all talk about justice, the polity's sense of justice and hence Rawls' ascription of *political* justice, itself becomes an observable phenomenon in the real world. A limited sense of 'justice' to be true but one with pretensions to objectivity nonetheless.

But does an accurate description of how we all talk about justice arrive at an objective definition of justice or is it merely an accurate description of a shared, subjective point of view?

For instance, if one applied Rawls' method to the definition of the solar system at a time before Copernicus' theory was advanced, could the Ptolemaic definition — of the sun orbiting earth — be accepted as an objective definition? A less accessible though perhaps more accurate example would be this: at a time before Marx, if one asked what everyone thought was the lot of the working class, could that common viewpoint be called objectively true?

Rawls' assumption is that Enlightenment reason enables us to transcend the bias of our (religious, moral, political) reasonable comprehensive doctrines. Rawls wants to redefine Enlightenment reason so that it is not itself a reasonable comprehensive doctrine by saying that it applies solely to the *political* definition of justice, whereas an understanding of justice *per se* is the prerogative of reasonable comprehensive doctrines. It is as if reasonable comprehensive doctrines are intellectually smug, considering themselves as possessing ultimate truth *content* whereas Enlightenment reason possesses only the *method* for discovering truth as it is accessible from time to time.

Hence Rawls' presuppositions about justice made in the original position are not about the *definition* of justice but about its *status*. As to its status, Rawls postulated the separate objective existence of a concept of justice accessible to the congress through sheer force of reason without recourse to experience. This is:

- (1) to characterise justice as a noun and deny its relevance as either an adjective of relations or adverbial of people;
- (2) to characterise universals as self-defining and independent of both the language which expresses them and the experience which shapes that language; and
- (3) inconsistent with his Lockean insistence elsewhere of our being *tabulae rasa* within the original position and able to create justice *ex nihilo*.

Thus the pertinence of the analogy in this article between Wittgenstein's content-less universals and Rawls' content-less understanding of reason. For Rawls to succeed in maintaining this distinction he has to show both the universality of reason and the metaphysical viability of content-less reason.

As already argued, reason is not a univocal experience and therefore not a universal. The metaphysical viability of the distinction is also suspect.

The failing inherent to Wittgenstein's and Rawls' content-less universals is that one cannot posit a content-less idea. For while philosophy has hitherto asked the question of what is a universal and posited their status in reality, few have ever asked whether 'idea' is a universal. The postulate of content-less universals assumes that an idea is a universal and one can think of something without at the same time thinking of anything.

Wittgenstein resolved this problem by positing the concept of 'metaphysical work'. Wittgenstein asserted not that universals exist as real ontological items but that they do genuine ontological work in our picturing of reality. Thus universals are akin to

operators, not nouns, and help us to paint rather than name reality.³⁰

But Rawls *does* insist on treating universals as nouns. Justice for Rawls, as already argued, is not proportional of relationships in the Aristotelian sense — it is not adverbial or adjectival, but a noun. And furthermore a noun which *qua* idea exists as a real ontological item. Finally, the concept of metaphysical work requires a more ambitious metaphysical system than Rawls wishes consciously to employ.

Hence Wittgenstein's avenue of escape between idealism and realism — of asserting the value, but not the existence of, universals — is not open to Rawls. The paradoxical result is that the realist, metaphysically unambitious, nominalist methodology of Rawls ends up with the idealist albatross around its neck of a metaphysically ambitious assumption of universals as really existing ontological items. This conclusion is inevitable within Rawls system, for how else can justice exist with content-less reason and distanced from reasonable comprehensive doctrines or world-views in the congress of the original position?

Thus reason cannot yield a definition of justice which is purely a *political* definition without any pretence of defining justice *per se*. As the Rowlands' argument implies, given the assumptions in Rawls' own system one cannot use a 'moral conception of the good' which falls short of a reasonable comprehensive moral doctrine due to its application solely to the political domain, though Rawls thinks otherwise.³¹

It is in this context that this article contends that Rawls' understanding of reason, not merely liberalism as the Rowlands argue, itself constitutes a reasonable comprehensive doctrine. For rationality is not a univocal experience and the form of rationality which Rawls advocates (Enlightenment scientific reason) is not *sui generis* to reasonable comprehensive doctrines given Rawls' metaphysical assumptions. Thus Rawls ends up with a culturally relative position, which is the exact opposite of what he had intended to achieve and is indeed the problem he had hoped to overcome.

(2) *Overlapping consensus: a chimera?*

The concluding point of the previous section is the point of engagement with this section. If reason is itself a reasonable comprehensive doctrine, can it still serve as the vehicle for public discourse on political reality, thus forming the overlapping consensus? The previous section focussed on the metaphysical deficiencies of Rawls' approach with only a nod to his epistemological deficiencies. This section reverses that balance.

It has already been argued that Rawls fails to overcome the metaphysical difficulties of maintaining his distinction between a political definition of justice and justice *per se*. There is also an epistemological difficulty associated with Rawls maintaining such a distinction.

Rawls anticipated metaphysical critiques of the kind in this article by saying that the vehicle of the overlapping consensus is a rational 'moral conception' which falls short of a reasonable comprehensive doctrine. The difference being that the former is a political description of how society *could* be ordered whereas the latter is an idealist conception of how society *ought* be ordered. Rawls then sought to escape the charge that his descriptive 'could' is a *de facto* prescriptive 'ought' by appealing to 'basic intuitive ideas'.³²

These basic intuitions Rawls contends to be universal and accessible to all who reflect

30 L. Goddard & B. Judge, *The Metaphysics of Wittgenstein's Tractatus*, Australasian Association of Philosophy, Melbourne, 1982, pp 67ff.

31 Rawls, *Political Liberalism*, pp 224, 245.

32 J. Rawls, 'Justice as Fairness: Political not Metaphysical' (1985) 14 *Philosophy and Public Affairs* 225. Rawls says that these intuitive ideas are 'embedded in political institutions and public traditions of their interpretations'. It is as if ideas have an existence apart from the people who think them. It is as if the ideas are there waiting to be discovered, which begs the question of their origin.

on the necessary guidelines of an efficient, minimalist social contract. Of this process Rawls says:

Political convictions (which are also, of course, moral convictions) are objective — actually founded on an order of reasons — if reasonable and rational persons, who are sufficiently intelligent and conscientious in exercising their powers of practical reason, and whose reasoning exhibits none of the familiar defects of reasoning, would eventually endorse those convictions, or significantly narrow their differences about them, provided that these persons know the relevant facts and sufficiently surveyed the grounds that bear on the matter under conditions favourable to due reflection.³³

This methodology is identical to the bootstrapping already noted of the original position. Once again, Rawls is trying to use the way people talk about something as a criterion for objectivity. Yet once again the discourse on which Rawls focuses is the ideal of Western Enlightenment thinking. Once again, Rawls presupposes reason to be univocal. Once again it must be asked whether the overlapping consensus is itself just another reasonable comprehensive doctrine or is it *the* reasonable comprehensive doctrine?

Rawls needed to invent the overlapping consensus since his own definitions mean that 'a reasonable comprehensive doctrine cannot secure the basis of social unity'.³⁴ The basis of social unity must then be a genuine public discourse between members of different reasonable comprehensive doctrines. If one were to represent the plethora of reasonable comprehensive doctrines in a society with a Venn diagram from set theory, the overlapping consensus would be that bisection common to all the reasonable comprehensive doctrines.

And why is Rawls confident that there is a bisection common to all the reasonable comprehensive doctrines? Because if they are all reasonable then by Rawls' univocal definition they ought be familiar with and prize rationality.³⁵ Thus Rawls can claim that the overlapping consensus is not a mere *modus vivendi* but a genuine public discourse wherein reason is the ultimate validating criterion.³⁶ However, one must ask whether Rawls is correct in attributing our lack of peaceful coexistence to conflicting reasonable comprehensive doctrines. Are there not other factors such as inequitable access to resources or political power?

Once again Rawls is speaking of rational discourse, as he did before of justice, as simply an idea and universalised apart from experience. It is submitted that Rawls' own application of the overlapping consensus to international law is useful for highlighting these weaknesses in his assumption.

Whilst *Political Liberalism* considers how to embrace a plurality of doctrines within a society, Rawls' later article, 'The Law of Peoples,' considers how liberal societies can tolerate non-liberal societies. Though again Rawls presupposes that the only cause of conflict is different reasonable comprehensive doctrines and not other factors, such as access to resources.

Rawls' first assumption is that peaceful coexistence is the only rational option. Rawls does not even consider that striving to dominate the world stage is a rational option. This is because Rawls considers tyranny to be a necessary characteristic of conquest just as he considers prejudice to be an inherent danger of reasonable comprehensive doctrines. Rawls cannot comprehend that a nation which itself espouses the rule of law might, by military or economic means, impose its rule of law on other societies.³⁷

Yet is it not arguable that the history this century, first of the League of the Nations and then the United Nations, is an extension of the USA's role as the world's policeman?

33 Rawls, *Political Liberalism*, p 119.

34 *Ibid*, p 134.

35 This Rawls terms 'the duty of civility', the ability to explain one another's position to each other: *ibid*, p 217.

36 *Ibid*, p 39.

37 J Rawls, 'The Law of Peoples' (1993) 20 *Critical Inquiry* 37–39, 48.

A form of conquest motivated not by avarice or irrational desire for domination, as Rawls presupposes is the case for all conquest, but motivated by a desire for peace. A conquest aimed both at extending and thereby preserving the *pax Americana*.

Rawls' second assumption is that 'whenever the scope of toleration is extended the criterion of being reasonable are relaxed'.³⁸ Rawls assumes that the inherent dynamic of liberal societies will make an overlapping consensus between societies more likely because those liberal societies will become more tolerant, thus increasing the possibility of meeting on common grounds by expanding the area of common ground.

Yet again this presupposes that there is but one form of rationality. Furthermore, it presupposes a unanimity of interpretation of actions across cultures. For example, it presupposes that a person's or society's tolerance is never judged by the beneficiary of that tolerance to be indicative of weakness of either character or conviction. Yet is not such a misunderstanding a commonplace of cross-cultural encounters?

This last example highlights the weakness of the innate ideas into which Rawls' position collapses. For if reason is not innate then from whence do Rawls' postulated basic intuitive ideas derive? And if reason is innate, then it ought to be the case that everyone has the same conception of rationality. Yet this is obviously not the case. Thus Rawls' epistemological assumptions render the overlapping consensus a chimera — a hybrid of his own creation which exists only in his mythical world wherein everyone is an Enlightenment savant.

V. Conclusion

Ultimately, Rawls' failure is attributable to his presupposing both that rationality is a univocal experience and that one can construct a content-less universal rather than just use it. Thus Rawls' epistemology lacks nuance and his metaphysic is too ambitious.

It is submitted that the original position is beyond redemption unless Rawls consciously expands its ambit to include Wittgensteinian metaphysical work as an attribute of justice. This Rawls is unlikely to do, since it requires him to abandon justice as an idea, *qua* attribute of reason, and instead view it as proportionality, *qua* attribute of relationships.

Similarly, the overlapping consensus — which it is submitted holds great promise for public, ethical discourse in multicultural societies — is of limited utility until it accommodates power or equity, not simply reason, as a motivation for action and a factor in relationships. Rawls presupposes that the peaceful coexistence which would flow from the overlapping consensus is because reason helps us to transcend the pettiness of our individual perspectives or reasonable comprehensive doctrines. Rawls appreciates neither that the peace of a *modus vivendi* is peace all the same nor that conflicting reasonable comprehensive doctrines are not the only source of tension between individuals or groups.

38 Ibid at 66.