Religion in Politics: Rawls and Habermas on Deliberation and Justification

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Abstract

John Rawls’s concept of public reason lumps together a selection of political activities (voting, deliberation, decision-making) and a set of political institutions (legislatures, courts), without sufficiently distinguishing between them or identifying the distinct normative considerations that are relevant to each. Moreover, Rawls’s concept of public reason is very ambiguous. This over-inclusiveness and ambiguity of the concept has spilled over to much of the lively discussion of Rawls’s political liberalism.

I elucidate Rawls’s concept of public reason by recasting it in terms of two major concepts that are relevant to our understanding of the political: deliberation and justification. I argue that Rawls’s public reason should be read as having to do with justification rather than deliberation, and that Jurgen Habermas’s position on public reason is superior to that of Rawls in that it is premised on a clear distinction between deliberation and justification. However, some of Habermas’s critiques of Rawls are unjustified, and there is a contradiction in Habermas’s position.

I also argue that Habermas’s and Rawls’s positions epitomize “the anthropologization of politics” that follows from the substitution of the nation-state paradigm by the multicultural paradigm of the state. The rise of the multicultural paradigm also occasions “the anthropologization of courts”: liberal courts intervening in the cultural practices of non-liberal groups need to support their rulings with justifications internal to those groups, including justifications borrowed from the human rights doctrine.
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Religion in Politics: Rawls and Habermas on Deliberation and Justification

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In this article I argue that John Rawls’s concept of public reason - clearly one of the central concepts of his political liberalism - lumps together a selection of political activities (voting, deliberation, decision-making) and a set of political institutions (legislatures, courts), without sufficiently distinguishing between them or identifying the distinct normative considerations that are relevant to each. Moreover, Rawls’s concept of public reason is very ambiguous. This over-inclusiveness and ambiguity of the concept has spilled over to much of the lively discussion of Rawls’s political liberalism.

I shall try to elucidate Rawls’s concept of public reason by recasting it in terms of two major concepts that are relevant to our understanding of the political: deliberation and justification. I argue that Rawls’s public reason should be read as having to do with justification rather than deliberation, and that Jurgen Habermas’s position on public reason is superior to that of Rawls in that it is premised on a clear distinction between deliberation and justification. However, some of Habermas’s critiques of Rawls are unjustified, and there is a contradiction in Habermas’s position.

I also argue that Habermas’s and Rawls’s positions epitomize “the anthropologization of politics” that follows from the substitution of the nation-state paradigm by the multicultural paradigm of the state. The rise of the multicultural paradigm also occasions “the anthropologization of courts”: I argue that liberal courts intervening in the cultural practices of non-liberal groups need to support their rulings with justifications internal to those groups, including justifications borrowed from the human rights doctrine.

A. Deliberation and Justification

I. Deliberation
Political theory of the last decades of the twentieth century has taken “a strong deliberative turn.”¹ Several justifications have been offered in support of a deliberative view of democracy.

One justification focuses on legitimacy: for decisions undertaken by a democratic political system to be legitimate, they need to be the outcome of deliberation among the citizens who would be made subject to those decisions.²

A second justification of the deliberative view of democracy focuses on the notion of respect: if human beings are viewed as being capable of forming and acting on intelligent

¹ JOHN S. DRYZEK, DELIBERATIVE DEMOCRACY AND BEYOND (2000) 1. See also: Richard H. Pildes, Competitive, Deliberative, and Rights-Oriented Democracy, 3 ELECTION L. J. (2004) 685, 685. It is often argued that deliberative democratic theory developed as a reaction against aggregative accounts of democratic politics, also known as interest groups liberalism, which view politics as functioning according to the logic of the market. See: Clarissa Rile Hayward, What Can Political Freedom Mean in a Multicultural Democracy? On Deliberation, Difference, and Democratic Governance, 39(4) POL. THEORY (2011) 468, 471. See also: Jane Mansbridge, Self-Interest in Political Life, 18 POL. THEORY (1990) 132.

conceptions of how their lives should be lived, then respect for citizens in a democracy requires that they have the opportunity to deliberate over the desirability and content of political decisions that may affect them.

A third justification claims that deliberation among citizens enriches and improves the quality of decisions undertaken by a democratic political system. It is on this justification that I wish to focus.

The claim that deliberation improves the quality of political decisions may be traced back to its roots in Aristotle, who phrased “the doctrine of the collective wisdom of the multitude”: “There is this to be said for the Many. Each of them by himself may not be of a good quality; but when they all come together it is possible that they may surpass - collectively and as a body, although not individually - the ability of the few best.” Aristotle takes his analogy from the feast:

Feasts to which many contribute may excel those provided at one man's expense. In the same way, when there are many (who contribute to the process of deliberation), each can bring his share of goodness and moral prudence; and when all meet together the people may thus become something in the nature of a single person who - as

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he has many feet, many hands, and many senses - may also have many of the qualities of character and intelligence.  

According to Thucydides, Pericles had the same insight: “instead of looking on discussion as a stumbling-block in the way of action, we think it an indispensable preliminary to any wise action at all.”  

In *On Liberty*, J. S. Mill sees deliberation as a dialectical process that leads to “new synthetic truth.” For Mill, opposites complement each other with the elements of truth contained in them, and thus “[a]s agents rebut opposing views and defend their own against critics, a dialectical process emerges that, by convincing people of their limited views and pointing out the value of alternative positions, discovers new, positive positions.”  

Mill’s insight is shared by John Rawls. Behind “the veil of ignorance” legislators are already impartial, writes Rawls. So what would deliberation add to their decision-making process? The answer lies in the fact that “discussion among many persons is more likely to arrive at the correct conclusion […] than the deliberations of any one of them by himself”:

> [T]he exchange of opinion with others checks our partiality and widens our perspective; we are made to see things from their standpoint and the limits of our vision are brought home to us. […] [E]ven representative legislators are limited in knowledge and the ability to reason. No one of them knows everything the others know, or can make all the same inferences that they can draw in concert. Discussion is a way of combining information and enlarging the range of arguments. At least in the course of time, the effects of common deliberation seem bound to improve matters.

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In the same vein, in Political Liberalism Rawls writes that “Citizens learn and profit from conflict and argument, and when their arguments follow public reason, they instruct and deepen society's public culture.”

Likewise, Amy Gutmann and Dennis Thompson write that:

Through the give-and-take of arguments, participants can learn from each other, come to recognize their individual and collective misapprehensions, and develop new views and policies that can more successfully withstand critical scrutiny. When citizens bargain and negotiate, they may learn how better to get what they want. But when they deliberate, they can expand their knowledge, including both their self-understanding and their collective understanding of what will best serve their fellow citizens.

James Bohman claims that the enrichment rationale is “the best defense of public deliberation”:

When deliberation is carried out in an open public forum, the quality of the reasons is likely to improve. In such a forum, public opinion is more likely to be formed on the basis of all relevant perspectives, interests, and information and less likely to exclude legitimate interests, relevant knowledge, or appropriate dissenting opinions. Improving the quality of the reasons employed in political justification will ultimately affect the quality of the outcomes that they produce.

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12 Gutmann and Thompson, note 4, 12. See also: Gutmann and Thompson, note 2, at 44; Amy Gutmann, Rawls on the Relationship between Liberalism and Democracy, in THE CAMBRIDGE COMPANION TO RAWLS (Samuel Freeman ed., Cambridge University Press, 2003) 168, 202, 203-204.

Jeremy Waldron writes that deliberation enables citizens and decision-makers to be exposed to “perspectives and experiences with which they are initially unfamiliar”;\(^ {14}\) “to open [their] mind to other perspectives, hear what others are saying, remind them of things they may have overlooked, exchange experiences, proverbs, images, and insights;”\(^ {15}\) and thus to come up with decisions that are superior to those that could have been made on the basis of the “prejudices with which the people went into the forum.”\(^ {16}\)

Seyla Benhabib claims that as “no single individual can anticipate and foresee all the variety of perspectives through which matters of ethics and politics would be perceived by different individuals,” and as “no single individual can possess all the information deemed relevant to a certain decision affecting all”, deliberative processes are “essential to the rationality of collective decision making processes.”\(^ {17}\) Even more significant, according to Benhabib, is the fact that

the very procedure of articulating a view in public imposes a certain reflexivity on individual preferences and opinions. When presenting their point of view and position to others, individuals must support them by articulating good reasons in a public context to their co-deliberators. This process of _articulating good reasons in public_ forces the individual to think of what would count as a good reason for all others involved.\(^ {18}\)

Jorge M. Valadez too sees the main contribution of deliberation in a democracy as being the enrichment of the discourse that leads to political decisions: deliberation increases citizens’ understanding of policy options; it deepens their understanding of the collective good; it examines and critiques even “the most fundamental and cherished values and beliefs”; and it is the force of the better argument that becomes “the primary legitimizing factor of social policies.”\(^ {19}\)

\(^{14}\) Waldron, note 6, at 841.  
\(^{15}\) Id., at 834.  
\(^{16}\) Id., at 841.  
\(^{17}\) Benhabib, note 2, at 69, 71-72.  
\(^{18}\) Id.  
\(^{19}\) JORGE M. VALADEZ, DELIBERATIVE DEMOCRACY, POLITICAL LEGITIMACY, AND SELF-DETERMINATION IN MULTICULTURAL SOCIETIES (2001) 5.
Some writers go even further, claiming that the more culturally diverse a country is the more enriching its processes of political deliberation are likely to be. Thus, James Bohman writes that “[i]n the case of cultural pluralism […] diversity can even improve the public use of reason and make democratic life more vibrant.”\(^{20}\) And Amy Gutmann writes: “Multiculturalism […] can aid adequate deliberation. Our moral understanding of many sided issues […] is furthered by discussions with people with whom we respectfully disagree especially when these people have plural identities different from our own.”\(^{21}\)

And finally, reflecting on Kant, Onora O’Neill writes that thinking and the communication of thoughts are inseparable: we cannot reason or even think correctly “unless we think in common with others.”\(^{22}\) Reason, for Kant, develops and emerges through uninhibited debate in which it withstands criticism and challenge, and therefore the communication of thoughts cannot be made subject to any external authority; the only authority to which reason may be made subject is that of reason itself. Likewise, any limitation on our freedom to communicate our thoughts amounts to a limitation of our freedom of thought.\(^{23}\)

II. Justification

“‘Public justification’ is the most important idea in contemporary liberal-democratic political theory.”\(^{24}\) But there are at least three contexts in which the notion of justification is used in political theory.\(^{25}\)

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\(^{20}\) Bohman, not 13, at 72.

\(^{21}\) Gutmann, note 12, at 203-204.


\(^{23}\) Id.


One is the justification of the liberal-democratic regime to the citizens living under it. Prime contemporary examples of that are Rawls’s *A Theory of Justice* and his *Political Liberalism*, and together with Rawls “[m]any philosophers now argue that grounding political principles in public justifications is a fundamental feature of liberalism.”

A second context has to do with the requirement of justifying to the citizens of a state a particular decision made by a leader or state institution, a coercive action by a leader or state institution, or a proposal made by a citizen that may end up coercing other citizens or that may adversely affect other citizens.


The third context in which justification is used in political theory concerns the requirement of citizens to provide justifications for the arguments made by them in the course of political discussions. As Christopher J. Eberle writes: “A citizen’s obligation to provide public justification governs not just political decision making but also political advocacy: it governs the reasons a citizen may employ to convince her compatriots that they ought to support her favored coercive laws. When a citizen seeks to convince them, she ought to articulate a public justification for that policy; and if she cannot do so, then she ought to refrain from advocating that law.”

Obviously, the dividing line between deliberation and justification is fuzziest in this last context, and clearest in the second. While deliberation deals with a process meant to culminate in a decision, justification of a coercive decision assumes that a decision-making process has already taken place (not necessarily with the participation of the person to whom the decision is about to be applied) and been completed.

The main underlying rationale of the justification requirement, in all three contexts, is the need for state leaders, state institutions and citizens to treat citizens with respect. As Charles Larmore explains with reference to the justification of coercion:

[T]he use or threat of force cannot be deemed wrong in itself, for then political association would be impossible. What we must regard as improper is rather to seek compliance by force alone […] P]ersons are beings capable of thinking and acting on the basis of reasons. If we try to bring about conformity to a rule of conduct solely by the threat of force, we shall be treating persons merely as means, as objects of coercion, and


30 CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTION IN LIBERAL POLITICS (2002) 57. See also: Thomas A. Spragens, Jr., Justification, Practical Reason, and Political Theory, in 28 NOMOS (J. Roland Pennock and John W. Chapman eds., 1986) 336, 338 (“Political justification is the reflective side of phronesis, of practical reason”); DON HERZOG, WITHOUT FOUNDATIONS (1985) 18; Gaus, Value and Justification, note 27, at 321, 322, 325-328; Virginia Held, Justification: Legal and Political, 86 ETHICS (1975) 1, 1, 9, 10; Audi, note 25, at 89, 90; Waldron, note 29, at 78, 116.
not also as ends, engaging directly their distinctive capacity as persons.\(^{31}\)

### B. Rawls’s Failure to Distinguish between Deliberation and Justification

Several authors have criticized the ambiguity in Rawls’s discussion of public reason. Paul J. Weithman writes that much of Rawls’s exposition of the concept “is extremely puzzling.”\(^{32}\) Samuel Freeman writes that “the idea of public reason takes on increasing complexity each time Rawls discusses it.”\(^{33}\) Colin Farrelly writes that even after Rawls’s latest exposition of the concept (in “The Idea of Public Reason Revisited”), the question regarding the role of public reason in normal politics “is still left unresolved.”\(^{34}\)

One of the problems with Rawls’s discussion of public reason is that it fails to make the distinction between deliberation and justification. Charles Larmore comes somewhat close to this claim when he writes that “neither in Political Liberalism nor in ‘The Idea of Public Reason Revisited’ does he [Rawls] note the difference between two forms of public debate – open discussion, where people argue with one another in the light of the whole truth as they see it, and decision making, where they deliberate as participants in some organ of government about which option should be made legally binding.” Rawls “fails to discriminate between the two. Yet the distinction is plain and important,” writes Larmore.\(^{35}\)

### I. Public Reason as Deliberation

\(^{31}\) Larmore, note 4, at 607. See also: Eberle, note 30, at 11, 68, 84; Macedo, note 26, at 293; Gutmann, note 12, at 185.

\(^{32}\) Weitheman, note 29, at 181. Weithman also writes that “A full Rawlsian theory of public reason that elaborated its strictures and laid down moral requirements for their observance would be enormously complicated. It would require sensitivity to a large number of important distinctions.” Paul J. Weithman, Rawlsian Liberalism and the Privatization of Religion, 22 J. RELIGIOUS ETHICS (1994) 3, 21.

\(^{33}\) Freeman, note 27, at 224.

\(^{34}\) Colin Farrelly, Book Review, 109 MIND (no. 4, 2000) 598, 600.

\(^{35}\) Charles Larmore, Public Reason, in THE CAMBRIDGE COMPANION TO RAWLS (Samuel Freeman ed., 2003) 368, 382.
There are many instances in which Rawls refers to public reason as delineating the limits of political deliberation. Thus, he writes that the idea of public reason applies to “the debates of political parties and those seeking public office when discussing constitutional essentials and matters of basic justice.” He writes that public reason is the ideal that refers to the way “citizens are to conduct their public political discussions of constitutional essentials and matters of basic justice.” He writes that the idea of public reason refers to “the structure and content of society's fundamental bases for political deliberations.” He writes that “[c]itizens learn and profit from conflict and argument, and when their arguments follow public reason, they instruct and deepen society's public culture.” He writes that “the ideal of public reason contains a form of public political deliberation.” He writes that public reason is made up of “citizens’ reasoning in the public forum about constitutional essentials and basic questions of justice.” He writes that public reason applies to “public discussion” and to “debates” concerning “constitutional essentials and matters of basic justice.” He writes that the ideal of public reason “hold[s] for citizens when they engage in political advocacy in the public forum, and thus for members of political parties and for candidates in their campaigns.” He writes that public reason applies “to legislators when they speak on the floor of parliament.” He writes that the ideal of public reason applies to the way “citizens are to conduct their fundamental discussions.” He writes that the ideal of public reason “expresses a willingness to listen to what others have to say and being ready to accept reasonable accommodations or alterations in one's own view.” He writes that public reason applies to “the discourse of candidates for public office and their campaign managers, especially in their

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36 Rawls, note 11, at 1.
37 Id., at lx.
38 Id., at lxxi.
39 Id., at lxx.
40 Id., at 10.
41 Id., at 44.
42 Id., at 48.
43 Id., at 216.
44 Id.
45 Id., at 226.
46 Id., at 253.
Menachem Mautner, Religion in Politics: Rawls and Habermas on Deliberation and Justification

public oratory, party platforms, and political statements.”\(^{47}\) He draws a distinction between the “public political culture” and the “background culture,” implying that both serve as contexts for deliberation.\(^{48}\)

Rawls’s understanding of public reason as having to do with deliberation comes out also from his discussion of the abolitionists of the nineteenth century and the Civil Rights Movement neither of whom were part of the state machinery.\(^{49}\)

A series of writers have read Rawls as using the concept of public reason to mean the body of political doctrine to be used by the citizens of a liberal democracy in their political deliberation.\(^{50}\)


\(^{48}\) [cite]

\(^{49}\) Rawls, note 11, at 249-252.

\(^{50}\) Charles Larmore writes that “Rawls’s recent writings on public reason outline a complex model of deliberative democracy.” Larmore, note 35, at 368. Samuel Freeman writes that “[p]ublic reason is the mode of discourse in deliberative democracy and one of its most essential features. Moreover, deliberative democracy is the primary forum within which public reasoning takes place [according to Rawls]”. Freeman, note 27, at 226. See also at 253, 254. Anthony Simon Laden writes that “the central idea and high point” of Rawls’s achievement in *Political Liberalism* is “the idea of public reason and its accompanying picture of political deliberation.” Anthony Simon Laden, *The House That Jack Built: Thirty Years of Reading Rawls*, 113 *ETHICS* (2003) 367, 379. Laden adds that “if the centerpiece of Rawls’s work is a model of political deliberation in a pluralist democracy, then we need to think of him as not primarily a liberal or an egalitarian but, first and foremost, a democrat.” Id., at 389. Samuel Scheffler writes that Rawls’s public reason is “the modes of reasoning that may be used and the types of considerations that may be appealed to in discussing and resolving political questions in a society regulated by the principles of justice. They impose constraints on acceptable forms of political argument.” Samuel Scheffler, *The Appeal of Political Liberalism*, in *THE PHILOSOPHY OF RAWLS* (Henry S. Richardson and Paul J. Weithman eds., 1999) 94, 104-105. Michael W. McConnell writes that “Rawls has been among a chorus of voices – perhaps the director of the choir – that has propagated the idea that democratic deliberation must be confined to secular arguments and
II. Public Reason as Justification

Even though there is much evidence in Rawls’s writings to support the view that public reason for him is a concept that determines the content and boundaries of political deliberation, there is just as much evidence to support the view that when Rawls talks about public reason he means to suggest the terms in which the decisions undertaken by the institutions of a liberal state need to be justified.

Thus, in several instances in his discussion of public reason, Rawls explicitly associates the concept with decision-making processes. He writes that public reason applies “to public and government officers in official forums, in their […] votes on the floor of the legislature.”51 He writes that public reason “applies in official forums … and to the executive in its public acts and pronouncements.”52 He writes that public reason specifies the public reasons in terms of which “questions of law or policy […] are to be politically decided.”53 He associates public reason with “cases in which some political decision must be made, as with legislators enacting laws and judges deciding cases”;54 with “the judiciary in its decisions”;55 and with voting.56 He writes that public reason applies to the judiciary, and


51 Rawls, note 11, at 252.
52 Id., at 216.
53 Id., at liii.
54 Id., at liv-lv.
55 Id., at 253.
56 Id., at 219, 252.
above all to the Supreme Court of a constitutional democracy, “because the justices have to explain and justify their decisions.”

In other places, Rawls associates the concept of public reason with the exercise of power, arguing that the exercise of state power requires justification, and this justification needs to be phrased not in terms of any “comprehensive view,” but rather by drawing on the shared and widely accepted public reason. He writes that “in a democratic society public reason is the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution.” He writes that “our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse.”

He writes that “[T]he ideal of citizenship imposes a […] duty […] to be able to explain to one another […] how the principles and policies they advocate and vote for can be supported by the political values of public reason.” He writes that “[o]ur exercise of political power is proper only when […] the reasons we would offer for our political actions—were we to state them as government officials—are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons.”

A series of writers have interpreted Rawls’s concept of public reason to imply the doctrine that may be used for justifying the exercise of coercive state power on citizens.

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57 Id., at 216. See also: Rawls, note 47, at 131, 133.
58 Rawls, note 11, at xlvi, 37.
59 Id., at xlvi, 214.
60 Id., at xlvi. [check page]
61 Id., at 217. [check page]
62 Rawls, note 47, at 131, 137. See also: Rawls, note 11, at lv.
63 Jeremy Waldron writes that “[p]ublic reason for Rawls, is reason oriented to the justification of political decisions. A decision is political when it concerns the ‘exercise of political power’.” Waldron, note 29, at 108. Waldron also writes that “Rawls writes as if each comment that is made in public debate is nothing more than a proposal to use public power to forcibly impose something on everyone else so that what we have to evaluate, in each case, an immediate coercive proposal.” Waldron, note 6, at 840. Charles Larmore writes that Rawls’s concept of public reason is concerned with “the very basis of our collectively
III. The Correct Interpretation of Rawls

I have argued that there is an ambiguity in the way Rawls talks about his concept of public reason. At some points in his theorizing, public reason is the body of doctrine to be used in political deliberation. At others, it is the body of doctrine to be used for justifying the exercise of political coercion. In spite of this ambiguity in Rawls, I think that his concept of public reason has to be associated with justification rather than deliberation.

However, when Rawls uses the concept of public reason as a repertoire of contents for providing justification, he has in mind two distinct contexts in which justification need be provided. In the first context, public reason serves as a repertoire of contents for the justification of the exercise of state and political power. As Charles Larmore writes:

binding decisions.” Larmore, note 35, at 368. Paul J. Weithman writes that “Rawls’s central idea is that we can isolate properties reasons must have if they are to be capable of justifying (or making good) the public advocacy and legal imposition of certain political outcomes.” Public reason is therefore the reasons provided “to justify their public advocacy of and their votes for outcomes on certain political questions,” as well as the “reasons governments must offer citizens to justify laws and policies that bear on those questions.” Paul J. Weithman, John Rawls’s Idea of Public Reason: Two Questions, 1 J. L. PHIL. & CULTURE (2007) 47, 49. See also: Jeremy Waldron, note 29, 107, 109-110; Weithman, note 29, at 190; Jurgen Habermas, Religion in the Public Sphere, 14 EUROPEAN J. PHIL. (2006) 1; Stephen Macedo, “Why Public Reason?” (unpublished paper); Vatter, note 50; Weithman, note 32, at 19-21; Freeman, note 27, at 221; Evan Charney, Political Liberalism, Deliberative Democracy, and the Public Sphere, 92 AM POL. SCI. REV. (1988) 97, 99; Wall, note 26.

Some writers follow this ambiguity. Wolterstorff ties together “political debate” with “political decisions”, and “discussions” with “decisions”, without ever making a distinction between debates and discussions, on the one hand, and decisions on the other. Nicholas Wolterstorff, The Role of Religion in Decision and Discussion of Political Issues, in ROBERT AUDI AND NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE (1997) 73; Nicholas Wolterstorff, Why We Should Reject What Liberalism Tells Us about Speaking and Acting in Public for Religious Reasons, in RELIGION AND CONTEMPORARY LIBERALISM (Paul J. Weithman ed., 1997) 162.
[T]he ideal of public reason ... ought to be understood as governing only the reasoning by which citizens – as voters, legislators, officials, or judges – take part in political decisions ... having the force of law. Rightly perceived, it does not thwart the uninhibited political discussions which are the mark of vigorous democracy. We can argue with one another about political issues in the name of our different visions of the human good while also recognizing that, when the moment comes for a legally binding decision, we must take our bearings from a common point of view.

Rawls never puts thing in this way, and so one cannot be sure that he would agree. But it is what the logic of his position entails.65

In the same vein, Seyla Benhabib discusses the ways “the Rawlsian model diverges from the deliberative model.” One aspect of this divergence is that “while the Rawlsian model focuses upon ‘final and coercive political power,’ the deliberative model focuses upon noncoercive and nonfinal processes of opinion formation in an unrestricted public sphere.”66

In discussing Mill’s writings on freedom of speech, Peter Berkowitz clearly alludes to Rawls when he juxtaposes Mill with “the spirit of much contemporary liberalism – which seeks to articulate principles whose purpose is to circumscribe public debate, and whose effect in practice is to stigmatize as unreasonable, and ostracize from public life, a range of

65 Larmore, note 35, at 383.

66 Benhabib, note 2, at 75-76. For a similar distinction see: Eberle, note 30, at 58: “[T]here’s an important distinction between advancing some argument for purposes of critical discussion and advancing some argument for purposes of convincing others to support some law. ... A citizen who articulates a religious argument for purposes of critical discussion without attempting to convince others that they ought to support some coercive law solely on the basis of that argument isn’t implicated in the sort of coercion that justificatory liberals regard as requiring public justification. Although there is no doubt some slippage between critical discussion and advocacy, I won’t impute to the justificatory liberal the view that a citizen may articulate in ‘public’ arenas only those arguments she takes to constitute a public justification for a given coercive law.”
fundamental opinions held by law-abiding citizens.”67 This juxtaposition, which paints Rawls’s liberalism in highly unattractive colors, is valid only if we read Rawls’s concept of public reason as referring to deliberation rather than justification. To preserve Rawls’s liberal integrity, we have to read his discussion of public reason as referring to justification, not deliberation.

The second context in which Rawls uses public reason as a repertoire for justification is in the justification by citizens of their arguments in the course of their deliberations over issues of constitutional essentials and matters of basic justice. As T. M. Scanlon writes:

The idea of public reason is … a norm of political justification: a specification of the kind of justification that citizens must be able to offer in political discussion when constitutional essentials and questions of basic justice are at issue.68

It is because justification is part of political deliberation in this context that some readers of Rawls interpret his concept of public reason as having to do with deliberation rather than the justification of decisions and the exercise of coercion.69

C. Rawls and Habermas on Religion in Politics

I. Rawls’s Two Phases

Rawls’s position on the role of religion in politics had two phases.

In *Political Liberalism* he distinguished between the “exclusive” and the “inclusive” view of public reason. According to the exclusive view, “reasons given explicitly in terms of comprehensive doctrines are never to be introduced into public reason.”70 According to the inclusive view, citizens are entitled “to present what they regard as the basis of political values rooted in their comprehensive doctrine, provided they do this in ways that strengthen

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69 See note 50.

70 Rawls, note 11, at 247.
the ideal of public reason itself,” 71 i.e., ways meant to promote “the constitutional values of a liberal regime” and that “would help to make society more just.” 72 Rawls adopted the inclusive view as the correct understanding of the meaning of his concept of public reason. 73

Later on, however, Rawls further revised and expanded the scope of public reason. Introducing the “proviso” and referring to this new formulation as “the wide view of public reason”, he dropped his previous inclusive view of public reason and argued that comprehensive doctrines may be introduced into public reason at any time, “provided that in due course public reasons, given by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support.” 74 This, according to Rawls, would have the advantage of showing to other citizens the roots in their comprehensive doctrines of their allegiance to the public reason. 75

In spite of this wide leeway for religious discourse in politics, 76 a series of writers have understood Rawls to mean that his concept of public reason amounts to the exclusion of religious contents from political deliberation. As Habermas put it, “Rawls's concept of public reason has met with resolute critics. The objections were leveled […] against an overly narrow, supposedly secularist definition of the political role of religion in the liberal frame.” 77

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71 Id.
72 Id., at li.
73 Id., at 248.
74 Id., at li-lii. See also: Rawls, note 47, at 131, 152, 155. “Rawls is insisting more and more that nonliberal but reasonable doctrines be expressible in public reason – subject always to the proviso – because of his recognition that as we come to the end of the twentieth century many liberal citizens hold nonliberal comprehensive doctrines.” Burton Dreben, On Rawls and Political Liberalism, in THE CAMBRIDGE COMPANION TO RAWLS (Samuel Freeman ed., Cambridge University Press, 2003) 316, 345. For criticism of Rawls’s proviso, see: Larmore, note 35, at 385, 387; Macedo, note 63.
75 Rawls, note 11, at li.
76 Larmore, note 35, 386 (“Rawls now believes that citizens may call upon their full convictions at any time. The sole qualification is what he terms ‘the proviso’.”)
77 Habermas, note 63, at 6.
II. Habermas’s Distinction between Deliberation and Justification

Jurgen Habermas joins those who interpret Rawls’s concept of public reason as dealing with deliberation and as restricting the role of religion in political discourse. On the basis of this interpretation, Habermas criticizes Rawls on two counts. As I shall show in the following discussion, Habermas’s position is superior to Rawls's in that it is premised on a clear distinction between deliberation and justification: deliberation may take place in varied political arenas and may unrestrictedly include religious contents; justification is to be part of decision-making processes (first and foremost legislation) and should support decisions of state institutions that have coercive power. However, I shall argue that some of Habermas’s critique of Rawls is unjustified. Also, Habermas’s position is incoherent.

a. Habermas on the Contribution of Religion to Political Deliberation

In his first critique of Rawls, Habermas forcefully claims that the exclusion of religion from politics entails an ideational and normative loss, as well as impoverishment of political discourse. He writes as follows:

[T]he liberal state has an interest in unleashing religious voices in the political public sphere, and in the political participation of religious organizations as well. It must not discourage religious persons and

communities from also expressing themselves politically as such, for it cannot know whether secular society would not otherwise cut itself off from key resources for the creation of meaning and identity. Secular citizens or those of other religious persuasions can under certain circumstances learn something from religious contributions. […]

Religious traditions have a special power to articulate moral intuitions, especially with regard to vulnerable forms of communal life. In the event of the corresponding political debates, this potential makes religious speech a serious candidate to transporting possible truth contents, which can then be translated from the vocabulary of a particular religious community into a generally accessible language. 79

This position of Habermas is part of a broader view of his as to the important place religious contents deserve to have in modernity:

It would not be reasonable to reject out of hand the idea that the world religions […] assert a place for themselves in the differentiated architecture of Modernity because their cognitive substance has not yet waned. We cannot at any rate exclude the thought that they still bear a semantic potential that unleashes an inspiring energy for all of society as soon as they release their profane truth content. 80

Habermas acknowledges the contribution of religious contents not only to democratic political deliberation and to the culture of modernity, but also to Western philosophy: as the thinking of such varied thinkers as Kant, Hegel and Kierkegaard attests, he writes, philosophy may gain “innovative stimulation” from its encounter with religious traditions. 81

79 Habermas, note 63, at 10.
80 Id., at 17. (emphasis in the original text).
81 Id. The contribution of religious contents to philosophy, particularly to liberal political theory, as well as to politics, is also acknowledged by Waldron, note 6, at 835, 846-847; Jeremy Waldron, Secularism and the Limits of Community, Unpublished Paper, December 2010; Audi, note 25; at 77; Lucas Swaine, The Liberal Conscience
b. Justification: Habermas’s Institutional Translation Proviso

In his second critique of Rawls, Habermas adopts Wolterstorff’s and Weithman’s argument that Rawls’s approach imposes an undue cognitive burden on religious citizens. It is not only the case that because of the totalizing trait of religious belief, Rawls’s approach demands of them something they cannot do, namely conduct their political activities not according to their religious convictions but according to public reason; when religious people are demanded to phrase their positions in secular terms they face a burden from which their secular fellow citizens are exempt. Thus, Rawls’s approach, claims Habermas, results in different citizens facing asymmetrical burdens once they enter the political sphere.

However, Habermas does accept Rawls’s position that decisions adopted by the institutions of the liberal state may not be justified by religious arguments. Rather, such decisions need to be backed up by the shared secular public reason of the state. Habermas therefore offers a division between political deliberation, on the one hand, and political decision-making, on the other. In the context of political deliberation, religious arguments may be freely and uninhibitedly put forward. However, because of the coercive aspects of political decisions, they may not be justified by particularistic convictions, but only by the generally accepted contents of public reason. Habermas thus puts forward a position that is very much like Rawls’s, at least according to the way Larmore reads Rawls, namely that “[w]e can argue with one another about political issues in the name of our different visions of the human good while also recognizing that, when the moment comes for a legally binding decision, we must take our bearings from a common point of view.”

This means, however, that religious citizens who may freely express their political positions in religious terms would still have to bear the onus of translating their arguments into secular terms once decisions are about to become binding (the paradigmatic case is that

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Wolterstorff, The Role of Religion, note 64.

Weithman, note 29.

of enacted laws). Habermas expresses this transition from deliberation to decision by putting forward the concept of “the institutional translation proviso”:

Every citizen must know and accept that only secular reasons count beyond the institutional threshold that divides the informal public sphere from parliaments, courts, ministries and administrations.

...

The truth content of religious contributions can only enter into the institutionalized practice of deliberation and decision-making if the necessary translation already occurs in the pre-parliamentarian domain, i.e., in the political public sphere itself.\footnote{Habermas, note 63, at 9-10.}

Thus, Habermas “maintains a strong distinction between what may be said in the public sphere and what may stand as a reason for state action.”\footnote{Chambers, note 78, at 213.} The proviso “does not demand self-restraint from religious citizens or advocate the censorship of religious topics, reasons and arguments that may be incorporated in the deliberative agenda of the informal public sphere.”\footnote{Lafont, note 29, at 244.} “Translation is a requirement only when reasons become attached to coercive laws.”\footnote{Chambers, note 78, at 213.}

Habermas realizes that there may be instances in which religious citizens will find it difficult to clothe their religious convictions in secular terms. In cases of this type, religious citizens may be allowed “to express and justify their convictions in a religious language.”\footnote{Habermas, note 63, at 10.} And in any event they should be able to count on the cooperation of their fellow citizens in accomplishing the required translation:\footnote{Id.} the translation requirement “must be conceived as a cooperative task in which the non-religious citizens must likewise participate, if their religious fellow citizens are not to be encumbered with an asymmetrical burden.”\footnote{Id.} The participation of religious citizens in the translation task should be facilitated by the secular...
citizens “open[ing] their minds to the possible truth content” of what is presented by their religious fellow citizens and by entering into dialogue with them, “from which religious reasons then might well emerge in the transformed guise of generally accessible arguments.”

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c. Religious Fundamentalists and Non-Fundamentalists

The question that needs to be addressed is what kind of religious believers Habermas has in mind when he talks about the asymmetrical burden imposed on religious citizens. The answer is that Habermas’s concern is relevant only to religious fundamentalists, but not to non-fundamentalist religious believers.

We may distinguish between fundamentalism as an ideology and fundamentalism as personality traits.

One of the tenets of religious fundamentalism as an ideology is that nothing should be left “outside the boundaries of religion,” “[n]othing remains religiously neutral.”

93 For fundamentalists, religion is “the exclusive source of authority and guidance in the entire realms of the life of the individual and society.”

94 “No one can serve two masters; for a slave will either hate the one and love the other, or be devoted to the one and despise the other.”

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92 Id. See also: Habermas, A Conversation about God, note 78, at 150: “Each religious faith must build a relationship with competing messages of other religions, just as much as with the claims of science and a secularized, halfway scientific common sense.”

93 Gideon Aran, Jewish Zionist Fundamentalism: The Bloc of the Faithful in Israel (Gush Emunim), in FUNDAMENTALISM OBSERVED (Martin E. Marty and R. Scott Appleby eds., 1991) 265, 296.


95 Matthew 6, 24.
Habermas’s second critique of Rawls assumes religious citizens who accede to a fundamentalist ideology. But do they fully succumb to it? This brings us to the second question, namely whether there can be such a thing as a fundamentalist person – a person whose mind categories are composed only of religious contents to the exclusion of all or most secular categories. I would maintain that such human beings are rare, if they exist at all.

For many years anthropologists dealt with the cultures of “whole”, enclosed societies. They thought of culture therefore as an entity clearly bounded in terms of its contents and internal processes of development, and as widely shared and even agreed to by members of a society.96 In recent decades these views of culture have been abandoned and superseded by a new understanding of culture that is to a great extent the reverse of the former one: the culture of every society is viewed as highly fragmented, i.e., as composed of a large number of subcultures (on the basis of class, locality, age, gender, profession, etc.) whose contents are mastered to varying extent by different members of a society (in addition to one common cultural layer whose contents are widely disseminated by the state’s educational and other institutions and by the media, which make these contents widely shared, though not necessarily accepted,97 by a large number of the members of a society).98 Also, under the


97 Sewell, id.

current view of culture, there is no such a thing as a “pure” culture. Rather, the contents of
every culture are both produced internally and borrowed from other cultures through varying
means of contact with them. What all of this means is that people internalize cultural
contents whose origins lie in various cultural systems and give meaning to what transpires in
their lives by means of mind categories whose origins lie in various cultural systems. Put
differently, most people are multicultural beings. This line of reasoning has several
implications, the essence of which is that Rawls’s assumptions about religiosity, at least when
applied to Western religiosity, are more accurate than those of Habermas.

First, even people who subscribe to fundamentalist ideologies, at least in Western
countries, are rarely familiar only with the cultural contents of their religions. It is almost
always the case that they are familiar with both the religious culture of their group and the
contents of the culture of the surrounding society, including its political culture. Habermas’s
concept of “translation” is far too strong when applied to the participation of such people in
political deliberation. The need for translation arises when a person lacks any command of a
language. But at least with respect to religious fundamentalists living in Western countries,
the assumption that they lack any command of the liberal-democratic political culture and
discourse of their countries is overstated.

A good example is Mohamed Morsi, who in June 2012 was elected president of
Egypt. Morsi is a leader of the fundamentalist Muslim Brotherhood movement. However, he
received a Bachelor's and Master's Degree in engineering from Cairo University, studied for
four years at the University of Southern California in the U.S., and then served for another four years as an Assistant Professor at California State University, Northridge. Two of Morsi’s five children were born in California and are U.S. citizens by birth. Indeed, Morsi’s public pronouncements attest to his being versed in Western parlance.

I wish to emphasize that my claim is a modest one: I am not contending that religious fundamentalists give weight to Western contents when they think about political issues; obviously they don’t. All I am saying is that Western fundamentalists are usually able to phrase their political convictions in terms borrowed from liberal-democratic political culture, albeit not as easily as when they draw on their religious doctrine.

Second, the asymmetrical burden of which Habermas writes is exaggerated.¹⁰¹

Third, there is a contradiction in Habermas’s argument. On the one hand, he assumes religious citizens who are religious fundamentalists. On the other hand, however, he calls on the citizens of a liberal state, both secular and religious, to embark on “complementary learning processes” that will acquaint them with and make them appreciate the best of the other group's heritage.¹⁰² But how can religious fundamentalists be expected to go beyond the

¹⁰¹ To Wolterstorff, on whom Habermas draws, the same critique applies: he writes that the liberal restraint on the use of religious reason in politics “is totally unrealistic as a proposal. Most people who reasoned from their religion in making up their mind on political issues would lack the intellectual imagination required for reasoning to the same position from premises derived from the independent source.” Wolterstorff, The Role of Religion, note 64, at 78. Wolterstorff also writes that Rawls’s assumptions about American society are unrealistic: “[L]arge numbers of Americans … do not accept the Ideal of liberal democracy... Rawls works with an extraordinarily idealized picture of the American political mind.” Id., at 97. For a depiction of American religious believers in fundamentalist terms, see: McConnell, note 50, 173. See also: Margaret Moore, Political Liberalism and Cultural Diversity, 8 CANADIAN J. LAW & JURISPRUDENCE (1995) 297. Cf. Audi, note 25, at 82: “I shall indeed assume that in the United States, at least, reflective religious people, particularly those in what we might loosely call the Hebraic-Christian tradition, are on the whole committed to preserving not only democratic government but also religious liberty, including the liberty to remain outside any religious tradition.”

¹⁰² Habermas, note 63.
doctrines of their religion and, moreover, give positive value to what exceeds their own religious heritage?

Fourth, there are many religious people in the world who reject religious fundamentalism and who willingly consume cultural products of both their religion and the culture of the surrounding society.

Fifth, it is clearly the case that Rawls had in mind people of the latter type. Therefore, Rawls’s distinction between comprehensive religious doctrines and political doctrine makes a lot of sense for many religious people living in liberal countries.

Sixth, Habermas talks about translation. But religious people of the kind Rawls had in mind, those non-fundamentalist whose lives are governed by a comprehensive religious doctrine and by a liberal political doctrine, go through the process of translation, so to speak, routinely throughout their lives: when they address a normative question they think about it both in terms of the doctrine of their religion and in terms of the political culture of the country in which they live.

The Israeli legal scholar Yedidia Stern refers to this situation using the term “normative duality”:

Jewish society in Israel is composed of two civilizations: the western-liberal and the Jewish-traditionalist. …

The vast majority of the Jews living in Israel draw on the rich contents of both cultures.

Only part of the public who experiences cultural duality also feels the burden of normative duality. The latter are simultaneously subject, due to their personal choice, to two legal systems: the law of the state, which is one of the products of the western-liberal culture, and Halakhic law, which is one of the products of the Jewish-traditionalist culture. …

My personal existence is one of both cultural duality and normative duality: I am fully and wholeheartedly committed … to the rule of law. At the same time I am fully and wholeheartedly committed to Halakah (as it is interpreted by the religious circles to which I
belong). I deem both legal systems as being part of my primary and unmitigated responsibility.¹⁰³

D. Deliberation following the Anthropologization of Politics

Jurgen Habermas talks about “translating” religious contents into shared public reason contents. Even though Rawls does not explicitly use the term, it is clear that his proviso anticipates such translation as well. The fact that both philosophers envision the carrying out of the task of translation is part of a process I would like to call “the anthropologization of politics”. In this part of the article I would like to note two problems, which bear on the conduct of political deliberation following the anthropologization of politics in liberal democratic countries.

For some two centuries after the French Revolution the common paradigm of the state was that of a nation-state – a state serving as the political framework for a homogenous national group; a state carrying out policies aimed at cultural homogenization of the various groups living in its territories, as well as policies for the cultural assimilation of immigrants. This paradigm led to the view that it would be only a matter of time until complete cultural uniformity of states' populations was accomplished.

In recent decades, however, many authors have suggested that this prevalent paradigm of the state is false; after two centuries of homogenization and assimilation, the populations of most states of the world are multicultural: they are composed of more than one national group and/or more than one religious group, and of many ethnic groups (tribes, immigrant groups, etc.).¹⁰⁴ As Sylvia Walby wrote in 2003, “Modern societies have often been equated


with nation-states … But nation-states are actually very rare. … They may be widespread as imagined communities, or as aspirations, but their existence as social and political practice is much over-stated. There are many states, but very few nation-states.”

What this development means is that problems once faced by anthropologists who used to reach out to cultural groups living outside the boundaries of their states are now routinely arising in the context of the internal relations between liberal states and non-liberal cultural groups living in their territories, and in the context of the relations of cultural groups inhabiting the same states. I wish to briefly point out two such problems that I deem central.

The first problem is that of understanding: the question arises whether people located in one culture are able to correctly understand the true meaning of cultural practices in another culture.

There is a longstanding tradition in Western culture premised on faith in the ability of people living in one culture to grasp the meaning that people of another culture ascribe to their lives. This tradition is epitomized by the academic discipline of anthropology. Anthropologists usually work across cultures. The underlying premise of their discipline is that people located in different cultures can "converse" with each other, "translate" each other’s meanings, and "understand" them. In the same vein, a series of thinkers have applied


106 Vico, for example, in a famous passage, expressed astonishment at the fact that human beings invest so much intellectual energy in the study of nature, to the neglect of the study of human society, including “the world of nations”: “[T]he world of civil society has certainly been made by man … Whoever reflects on this cannot but marvel that the philosophers should have bent all their energies to the study of the world of nature, which, since God made it, He alone knows; and that they should have neglected the study of the world of nations, or civil world, which, since men had made it, he could come to know.” THE NEW SCIENCE OF GIAMBATTISTA VICO (Thomas Goddard Bergin and Max Harold Fisch trans., 1984) section 331.

107 For a review and discussion of "the interpretive approach" and "the subjectivist approach" to this issue, see: Suzanne R. Kirschner, "Then What Have I to do with Thee?": On Identity, Fieldwork, and Ethnographic Knowledge, 2 CULTURAL ANTHROPOLOGY (1987) 211. See also: Talal Asad, The Concept of Cultural Translation in British Social
Hans-Georg Gadamer's dialogical hermeneutics to cross-cultural encounters, emphasizing the change such encounters may effect in the self-understanding of the parties involved in them.

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Hans-Georg Gadamer's dialogical hermeneutics to cross-cultural encounters, emphasizing the change such encounters may effect in the self-understanding of the parties involved in them.

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Anthropology, in WRITING CULTURE (1986) 141; Ladislav Holy, Introduction: Description, Generalization and Comparison: Two Paradigms, in COMPARATIVE ANTHROPOLOGY (Ladislav Holy ed., 1987) 1. Gellner points out "the interesting fact" that "no anthropologist … has come back from a field trip with the following report: their concepts are so alien that it is impossible to describe their land tenure, their kinship system, their ritual." Ernest Gellner, General Introduction: Relativism and Universals, in UNIVERSALS OF HUMAN THOUGHT (B. Lloyd and J. Gay eds., 1981) 1, 5. Martha Nussbaum writes that “[d]espite the evident differences in the specific cultural shaping of the grounding experiences, we do recognize the experiences of people in other cultures as similar to our own. We do converse with them about matters of deep importance, understand them, allow ourselves to be moved by them.” Martha C. Nussbaum, Non-Relative Virtues: An Aristotelian Approach, 13 MIDWEST STUDIES IN PHILOSOPHY (1988) 32, 46.


And yet, anthropologists, linguists and cultural researchers are well aware of the difficulties involved in attempts to understand foreign cultures and to “translate” meaning that is prevalent in one culture into the meaning terms extant in another culture without suffering misunderstandings, distortions and losses,\(^{111}\) as well as the difficulties involved in maintaining intercultural communication.\(^{112}\) Indeed, there are too many instances in which Western liberals have failed to understand the meaning of cultural practices prevalent in non-liberal groups. It is often the case that liberals attach certain meanings to such practices, while in the groups themselves they bear wholly different meanings.\(^{113}\)

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\(^{112}\) MICHAEL CLYNE, INTER-CULTURAL COMMUNICATION AT WORK (1994);

\(^{113}\) For a discussion, see: Menachem Mautner, A Dialogue between a Liberal and an Ultra-Orthodox on the Exclusion of Women from Torah Study, in RELIGIOUS REVIVAL IN A POST-MULTICULTURAL AGE (Rene Provost and Shai Lavi eds., expected 2012); Menachem Mautner, From "Honor" to "Dignity": How Should a Liberal State Treat Non-Liberal Cultural Groups?, 9 THEORETICAL INQ. L. (2008) 609, 619-621 See also: J. W. Fernandez, Cultural Relativism, Anthropology of, INT’L ENCYC. SOC. & BEHAV. SCI. (2001) 3110 ("People are usually aware from their domestic everyday experience of the difference of perspective and the relativity in understanding between men and women, the old and the young, the parent and the child, the slow and the quick.") For a strong argument that Western activists against FGM fail to understand the true meaning attached to this practice by the cultural groups that engage in it, see: Richard A. Shweder, “What About Female Genital Mutilation?” and Why Understanding Culture Matters in the First Place, in ENGAGING CULTURAL DIFFERENCES (Richard. A. Shweder, Martha Minow, and Hazel Rose Markus,
Menachem Mautner, Religion in Politics: Rawls and Habermas on Deliberation and Justification

Thus, when Habermas talks about “the institutional translation proviso” and about translation being “a cooperative task”, he envisions cross-cultural encounters and implicitly assumes that the parties involved in such encounters can overcome the problems of misunderstanding that may be part of such encounters. (When Rawls in his proviso assumes that those introducing comprehensive religious contents into political discourse will in due course present public reason to support their positions, he assumes religious persons who are multicultural persons).

The second problem is that of evaluation: the question arises whether and how people located in one culture can normatively evaluate practices taking place in another culture.\footnote{For discussion, see: Mautner, A Dialogue between a Liberal and an Ultra-Orthodox, id.}

E. Justification following the Anthropologization of the Courts

Rawls presents the Supreme Court as the institution that epitomizes the public reason of a liberal state.\footnote{For Waldron’s criticism of Rawls’s position see: Waldron, note 29.} (And note that when he does so, it is not clear whether what he has in mind is public reason as a vehicle of deliberation – the constitutional tradition that the Court cultivates in its opinions – or public reason as a means of justification – the constitutional arguments the Court puts forward in support of its operative rulings). Rawls is well aware, however, that though his notion of public reason may neatly apply to “well-ordered societies” (“the ideal case”), it requires some adaptations when applied to societies which fall short of that. Indeed, when Rawls discusses the cases of the Abolitionist and Civil Rights Movements he has in mind societies of the latter type. Rawls, however, discusses the political discourse

\footnote{For discussion, see: Mautner, A Dialogue between a Liberal and an Ultra-Orthodox, id.}

eds., 2002) 216. Pinhas Shifman provides a list of examples of misunderstandings that arise when religious people invoke religious terms in Israel’s public discourse. For instance, when a mass accident occurs, religious people often claim that it is God’s response to the proliferation of religious sinfulness. Secular people are annoyed by such pronouncements, because they see them as manifestations of a cruel accountancy and flawed causality. But religious people understand such pronouncements very differently, namely as calls for religious soul-searching. PINHAS SHIFMAN, ONE LANGUAGE, DIFFERENT TONGUES (2012) 30-35 (Hebrew).
of such societies, not their legal discourse – the discourse of courts in their opinions. The question that needs to be addressed is what role public reason should fulfill as a means of justification in the opinions of courts in liberal states that fall short of the ideal case, namely liberal states whose political doctrine and culture are contested by significant non-liberal religious groups. Put differently, the question is how liberal courts should justify their coercive decisions bearing on citizens that belong to non-liberal religious groups.

Israel is a case in point. In the Emanuel affair, the Supreme Court intervened in the cultural practices of an ultra-Orthodox community, specifically the blatant separation between Ashkenazi and Sephardic children in the community’s school. The community claimed that the separation was grounded in religious motives: since Judaism is a religion of practices, and the religious practices of Sephardic Jews are less strict than those of Ashkenazi Jews, there was an imminent danger that the exposure of Ashkenazi children to the religious practices of Sephardic children would undermine their religious socialization. The Court held that the community’s practices amounted to unlawful ethnic discrimination. (It could therefore be argued that the Emanuel affair represents the failure of a liberal court to adequately understand the meaning of a non-liberal community’s cultural practice.) The confrontation between the Court and the community ended up in the sending of dozens of members of the community (both men and women) to jail for failing to comply with the Court’s orders. What kind of justifications should we find in the opinions of a liberal Supreme Court (such as Israel’s) that, with the aim of uprooting or modifying the cultural practices of non-liberal groups (such as the Israeli ultra-Orthodox), exercises coercive power over members of the group?

Rawls himself, in dealing with the justification of the moral premises of the liberal-democratic regime, acknowledged the problem of cross-cultural justification. “Justification is always addressed to some particular group of persons,” he wrote. “What constitutes the most reasonable basis of public justification for one society may not be a basis of justification for another; and the same holds for the same society at different times.” Rawls is not alone in that; the problem of cross-cultural justification of a moral-political system has been

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acknowledged by other writers as well.\textsuperscript{118} From a broader perspective, the problem is part of the accessibility requirement, which has been widely discussed following Rawls’s exposition of the notion of public reason.\textsuperscript{119}

What is the problem with justifying coercion with a ground borrowed from a normative system not shared by the coerced person? The answer is clearly that such justification amounts to disrespect of the coerced person and thus undermines a central value not only in Rawls’s political liberalism, but in contemporary political theory as well.

So how should a liberal court (a court that accepts that it needs to treat the citizens of the state with respect) go about its business when it intervenes in the cultural practices of

\textsuperscript{118} Thomas Nagel writes that “The problematic cases are those in which either the impersonal value to which I appeal to justify coercion would not be acknowledged by the one coerced, or else it conflicts with another impersonal value to which he subscribes but which I do not acknowledge, though I would if I were he.” Nagel, note 26, at 225. Burton Dreben writes that the basic problem of political philosophy is “[h]ow can you justify to someone who does not share your comprehensive moral doctrine […] the action you have taken as citizen either directly or indirectly through your legislative representatives?” Dreben, note 74, at 337-338. Lucas Swaine writes that “not all reasons hold equally well for all people.” For instance, “theocrats and liberals simply are not similarly situated parties.” Swaine, note 81, at 19. T. M. Scanlon writes that in conditions of reasonable pluralism, justifications of a conception of justice that depend on a particular comprehensive view “will be ones that some citizens (those who do not share this view) have no reason to accept.” Scanlon, note 68, at 161. See also: Weithman, note 29, at 128 (“If someone offers what she should know cannot be good reasons for others, those she addresses may feel insulted, condescended to or patronized.”); Weithman, note 63, at 59 (if the fundamental conditions for the exercise of the moral powers can only be supported by a conception someone rejects, “then her situation can plausibly be described as one of subjection to an alien cause.”); Gaus, Justificatory Liberalism, note 27, at 123 (coercive interference with another person must be justifiable to that person in terms that could be persuasive to him or her, given his or her belief system or rational commitments); Audi, note 25, at 78 (“when governmental coercion is necessary, it should be justified by considerations of a kind that do not alienate those affected.”)

\textsuperscript{119} See e.g., Gutmann and Thompson, note 4, at 4.
non-liberal groups? Dicey’s view of the rule of law as the equal application of one uniform law to all the population of the state belongs to the era of the nation-state paradigm. As part of the accommodation that courts need to go through in the era of the multicultural paradigm of the state, and as part of the anthroplogization ensuing from this new paradigm, a court’s opinion in instances of this type should provide three layers of justification.

First is the regular layer of the court’s liberal tradition. It is the primary and indispensable mission of courts in liberal countries to preserve and cultivate a normative liberal tradition that guides the conduct of both other state institutions and the citizenry of the state. Courts need not give up this role even when they deal with the affairs of citizens who do not share their liberal convictions.

Second is the layer of human rights doctrine. The doctrine can be said to enjoy universality in the sense that its ideals may be found in many cultures around the world, and in the sense that it enjoys widespread acceptance in the world community: many people around the world, living in a variety of societies and cultures, endorse the doctrine and would like its contents to become an important part of the political culture of their country and of their personal lives. “No other ideal seems so clearly accepted as a universal good,” writes

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120 Dicey, who was particularly concerned that the powerful not have one law for themselves and another law for ordinary people, argued, among other things, that the rule of law stands for the exclusion of “prerogative” and “equality before the law, or the equal subjection of all classes to the ordinary law of the land.” ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10th ed. 1961) 42. According to this ideal, “the law should be the same for everyone: one law for all and no exceptions.” Jeremy Waldron, One Law for All? The Logic of Cultural Accommodation, 59 WASH. & LEE. L. REV. (2002) 3. See also: Kent Greenawalt, The Rule of Law and the Exemption Strategy, 30 CARDOZO L. REV. (2009) 1513, 1516.


122 William A. Galston argues that “we show others respect when we offer them, as explanation, what we take to be our true and best reasons for acting as we do.” WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES AND DIVERSITY IN THE LIBERAL STATE (1991) 109. For criticism of Galston’s argument see: Eberle, note 30, at 98-99.
Oscar Schachter.\textsuperscript{123} The doctrine of human rights is the only source available to us of standards that may be said to transcend any particular culture, for the purpose of evaluating cultural practices. Put differently, the doctrine may be said to enjoy an “overlapping consensus” among world cultures.\textsuperscript{124} Therefore, by providing non-liberal citizens with justifications that draw on the human rights doctrine, a court may be said to provide these citizens with justification that may be said to be “indirectly internal” to the normative system to which these citizens adhere.\textsuperscript{125}

Third is the layer of “directly internal” justifications, namely justifications explicitly drawing on the normative system that non-liberal citizens live by, and not on the liberal normative tradition of the court. While for Rawls the supreme court is the state institution that epitomizes public reason, in a country that is not well-ordered the court needs to add to its regular public-reason layer of justification an additional layer borrowed from the comprehensive doctrine of non-liberal religious groups in whose internal affairs it coercively intervenes.

\begin{footnotes}
\footnote{Mautner, From "Honor" to "Dignity", note 113. See also: Nagel, note 26, at 218 (“Defenses of political legitimacy are of two kinds: those which discover a possible \textit{convergence} of rational support for certain institutions from the separate motivational standpoints of distinct individuals; and those which seek a \textit{common standpoint} that everyone can occupy, which guarantees agreement on what is acceptable. There are also political arguments that mix the convergence and common standpoint methods.”)}
\footnote{See also: Claire L’Herreux-Dube, \textit{The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court}, 34 TULSA L. J. (1998) 15, 16 (“More and more courts, particularly within the common law world, are looking to the judgments of other jurisdictions, particularly when making decisions on human rights”); Anne-Marie Slaughter, \textit{The Real New World Order}, 76 FOREIGN AFFAIRS (1997) 183 (judges all over the world are increasingly drawing on decisions of foreign courts, particularly in the area of human rights); Ann-Marie Slaughter, \textit{A Typology of Transjudicial Communication}, 29 U. RICH. L. REV. (1994) 99 (“Courts are talking to one another all over the world”, particularly on matters of human rights).}
\end{footnotes}
Rawls himself was aware of the availability and importance of “directly internal” justifications. He makes a distinction between “two ideas of toleration”. One is purely political. It is expressed in terms of the doctrine of religious liberty, which is part of the widely shared “political conception of justice.” The other is “expressed from within a religious or a nonreligious doctrine.” Rawls calls this last idea of toleration “reasoning from conjecture,” and writes that it is conducted when “we reason from what we believe, or conjecture, may be other people’s basic doctrines, religious or philosophical, and seek to show them that, despite what they might think, they can still endorse a reasonable political conception of justice. We are not ourselves asserting that ground of toleration but offering it as one they could assert consistent with their comprehensive doctrines.” “However, it is important that conjecture be sincere and not manipulative,” he adds. We are back to the Habermasian task of translation, but this time the other way around: the need for a liberal court to translate its doctrine into the terms of religious doctrine.

Israel’s Supreme Court is a case in point. The Court routinely justifies its rulings by drawing on the vast resources comprising its rich liberal tradition. (As a result of the thirty years of British government over Palestine, Israeli law is, to a great extent, Anglo-American liberal law). Some of the Justices of the Court, however, often include in their opinions lengthy discussion of Halakhic sources in support of their rulings. That is what an opinion needs to look like when it deals with non-liberal religious groups, e.g., the ultra-Orthodox.

However, it could be argued that the respect requirement is not met when a liberal court interprets the contents of a non-liberal cultural group in a way that does not conform to, or

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126 Rawls, note 47, at 152. Emphasis mine.
127 Id.
128 Id., at 156. See also: Rawls, note 11, at li (“[I]f we argue that the religious liberty of some citizens is to be denied, we must give them reasons they can not only understand […] but reasons we might reasonably expect that they as free and equal might reasonably also accept.”) Swaine, note 81, at 137 (“liberals should employ reasons that theocrats should accept, instead of pro tanto reasons that elide theocrats' religious convictions or hold only for those affirming secular conceptions of the good.”)
129 Cf. Gaus, Value and Justification, note 27, at 321 (justification as part of political deliberation needs to draw on “the other’s perspective”).
even contradicts, the way the spiritual leaders of the group interpret these contents. But interpreting the internal normative contents of a group, even not in conformance to the way the group’s leaders do, seems to be the utmost a state institution may do to meet the respect and justification requirements with regard to non-liberal citizens.