Justice and Culture: Rawls, Sen, Nussbaum and O'Neill

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Is it possible, in a multicultural world, to hold all societies to a common standard of decency that is both high enough to protect basic human interests, and yet not biased in the direction of particular cultural values? We examine the recent work of four liberals – John Rawls, Amartya Sen, Martha Nussbaum and Onora O'Neill – to see whether any of them has given a successful answer to this question. For Rawls, the decency standard is set by reference to an idea of basic human rights that we argue offers too little protection to members of non-liberal societies. Sen and Nussbaum both employ the idea of human capabilities, but in interestingly different ways: for Sen the problems are how to weight different capabilities, and how to decide which are basic, whereas for Nussbaum the difficulty is that her favoured list of capabilities depends on an appeal to autonomy that is unlikely to be acceptable to non-liberal cultures. O'Neill rejects a rights-based approach in favour of a neo-Kantian position that asks which principles of action people everywhere could consent to, but this also may be too weak in the face of cultural diversity. We conclude that liberals need to argue *both* for a minimum decency standard and for the full set of liberal rights as the best guarantors of that standard over time.

Dilemmas of Justice

Liberals face a dilemma. On the one hand, they are committed not only to tolerating but to celebrating cultural diversity. It is a core liberal belief that there are many different good ways for human beings to live, and that it is seriously oppressive when people are made to live according to values that they do not share and that have been imposed on them from the outside. On the other hand, liberals also believe that there are universal norms of conduct which individuals and groups everywhere must abide by: there are, for example certain basic rights the violation of which must prevent human beings from leading worthwhile lives of any kind. So how much diversity should liberals be willing to tolerate? They need to find some way of drawing a line between cultural practices and ways of life that, despite failing to meet liberal standards of freedom and equality, nonetheless embody recognisable human values, and should therefore be tolerated, and other practices and ways of life that are so detrimental to human flourishing (at least for some of those engaged in them) that they cannot be condoned. Liberals need, in other words, to find a standard of decency that allows them to respond in a discriminating way to the

existence of societies, of which there are many in the contemporary world, that do not live by liberal principles.

Why do they need such a standard? Why not simply grade all societies on a sliding scale with the most perfectly liberal at one end, and the most repressive, inegalitarian, inhumane, etc. at the other? A decency standard, if one can be found, would enable liberal peoples to respond differently to societies on either side of the line. In the case of societies that clearly fell below it, they would not hesitate to use all the effective means at their disposal – economic sanctions, diplomatic isolation, perhaps even military force – to push those societies towards reforms that would make their members' lives decent. In their dealings with societies above the line, by contrast, they would attempt to persuade and encourage these societies to adopt more liberal institutions and practices, but they would refrain from using coercive or punitive means to bring about this result. Just as in domestic contexts liberals distinguish between harmful practices that can properly be punished and practices that they disapprove of, but are unwilling to use coercion to prevent, so in international cases they would reserve their most powerful weapons for societies that failed the decency test, while tolerating, at least, those non-liberal societies that passed it.

But this, of course, presupposes that a suitable decency standard can be found. Is it possible, in a multicultural world, to hold all societies to a common standard of decency that is both high enough to protect basic human interests, and yet not biased in the direction of particular cultural values? In this essay we investigate some recent work by liberal political philosophers that, explicitly or implicitly, attempts to identify and defend such a cross-cultural standard. We ask how they specify and defend their favoured criterion, and we also ask whether the standards in question are genuinely cross-cultural, that is, whether they should, or could, be adopted by members of all societies irrespective of their distinctive cultural traditions.

The four books we shall discuss have other specific aims that we shall not consider at any length in this essay. Amartya Sen's *Development as Freedom* (*DF*) represents a further step in his long campaign to find a better metric of human development than per capita GDP: Sen lays out his basic capabilities approach and argues that this can best be understood as a measure of the amount of real or substantive freedom that human beings in different places possess. Martha Nussbaum's *Women and Human Development* (*WHD*) also employs a capabilities approach, but goes beyond Sen in giving a fuller and more concrete account of the capabilities in question, and in relating these specifically to the interests and demands of women. John Rawls's main aim in *The Law of Peoples* (*LP*) is to lay down a set of principles to govern the conduct of international relations that he thinks could reasonably be endorsed not only by liberal societies, but also by certain non-liberal societies, those that he calls 'decent hierarchical societies'. Onora O'Neill has collected together in *Bounds of Justice* (*BJ*) a number of important essays reflecting on international morality, and presenting a Kantian account of the principles that vulnerable human beings must adopt to govern their dealings with one another.[1] It is noteworthy

that none of these authors advocates a strongly egalitarian approach to inter-national justice: they do not regard their liberalism as requiring that human beings everywhere should enjoy the same set of rights, opportunities and resources (Rawls in particular repudiates the idea that international resource distribution should be governed by the difference principle in the same way as resource distribution within domestic societies). Nevertheless they are all con-cerned to delineate a threshold of acceptability below which a society cannot be regarded as minimally just or decent. What societies decide to do once all their members have reached that threshold is of lesser concern. In addition, *LP* and *BJ* seek to establish that should a society not be able to lift its own members above the threshold, richer societies are under a duty to help.

Universal Standards of Justice

We begin, then, by examining the conceptual framework that each author uses in order to specify the threshold in question. As noted above, Sen and Nussbaum, in keeping with their previous works, adopt the capabilities ap-proach. That is, they both claim that there are central human capabilities which human beings everywhere ought to possess and whose protection they can demand from their governments. But although Sen and Nussbaum use the same terminology, their accounts of capabilities differ in interesting ways. (For Nussbaum's own account of those differences, see *WHD*, pp. 11–13.) Rawls and O'Neill, by contrast, invoke the view that all human beings need to be granted certain basic freedoms and given certain basic resources in order to lead a min-imally flourishing life.

Sen's aim is to develop a metric that can serve both as a general measure of 'advantage' or 'well-being' for purposes of studying economic development and as a means of identifying poverty. He draws attention to familiar defects in other commonly used measures: income fails to take account of the many factors that may affect the ability of different groups and different individual to convert income into well-being; utility is too dependent on psychological features of individuals, such as adaptive preferences; as to Rawlsian primary goods, they are subject to indexing problems and insensitive to factors that may affect the value of particular primary goods to particular persons. In place of these he proposes that we should measure development in terms of 'sub-stantive freedom', meaning roughly the range of options that are substantively (as opposed to merely formally) available to a person. The capability approach starts from the idea of a functioning – an activity or a condition that a person is able to achieve. Relevant functionings might include being adequately nourished, being employed, speaking freely. A person who is able to achieve a functioning is said to have the equivalent capability, whether or not she actually chooses to realise that functioning. Thus a person who chooses volun-tarily to fast but otherwise has access to suitable food has the capability to be adequately nourished. A person's substantive freedom can be measured either by looking at her capability set – the entire set of opportunities she has to choose from – or more narrowly at the best choice of functionings from within that set – the functionings she would choose to achieve if well-informed and

rational. (Sen hedges a little here, and we shall consider the implications of this below.)

There are a number of problems with this position. One has to do with the language in which it is couched – the language of freedom. Aside from the generally favourable connotations that the term carries, Sen has a particular reason to present the capabilities approach in this way. He wants to underline the importance of political freedoms in development, *contra* the 'East Asian' argument which holds that economic development may in some circumstances best be promoted by authoritarian forms of government. Let us suppose that Sen is right when he claims that political freedom – civil and political rights – provides the greatest security against famines and other forms of economic deprivation. He argues that on this basis we are justified in giving political freedoms special weight when constructing the general index of freedom, for they are both constitutively and instrumentally valuable. To illustrate, voting is presented both as intrinsically valuable to the voter – it is a functioning that he values for its own sake – and as instrumentally valuable in helping to protect both him and others from government oppression (loss of economic rights, for instance). But the latter value depends on the truth of Sen's empirical claim about the consequences of political freedom. The instrumental value should not be included if 'substantive freedom' is supposed to be a measure of individual advantage or well-being: Sen's choice of language here involves begging the question about the relative importance of freedom in its more familiar sense of civil and political liberty as against other components of human well-being.

A second problem has to do with weighing many different capabilities against one another in order to construct an overall index of freedom for different societies. Depending on how the weights are chosen, societies will appear more or less free relative to one another (Charles Taylor highlighted the problem some years back when he pointed out that communist Albania could be shown to enjoy more freedom than liberal Britain if one weighed the absence of traffic lights more heavily than the prohibition of religious worship). Earlier critics of Sen have drawn attention to the problem. Here he attempts to make a virtue out of necessity by arguing that his approach makes the need for evaluative reasoning explicit, whereas other approaches, such as utilitarianism, pretend to avoid it by using just a single homogeneous measure of human welfare. This, however, does not explain how the evaluation of different capabilities is supposed to be carried out. Sen appeals finally to 'public discussion' as the means whereby the relative value of different capabilities can be assessed. But then *prima facie* different societies might come to quite different conclusions as a result of this exercise. We return in the following section to the implications of cultural diversity for Sen's approach.

Finally, the capabilities approach does not by itself tell us when a society has crossed the threshold of decency. There is no obvious cut-off point such that we could say that a society which fails to secure its members' capabilities up to that point is not even minimally just. He must, it seems, have such a cut-off point in mind, for he defines poverty as 'the deprivation of basic capabilities'

(*DF*, p. 87) and gives as examples of such deprivation premature mortality, undernourishment and illiteracy (*DF*, pp. 99–103). But although the examples may seem convincing enough in their own right, Sen does not explain how they are to be brought together and generalised, so that we could say when a capability lack was 'basic' and when it was not.

Thus, Sen's conceptual framework provides no clear criterion for saying when a society has developed to the point where it counts as minimally just. Nussbaum's framework, by contrast, is somewhat more helpful, if still controversial in some respects. It dispenses with the notion of functionings, precisely, or so Nussbaum claims, so as to be true to the central role of freedom: what matters is that people should be given access to various goods, not that they actually *have* those goods (*WHD*, p. 86ff). Moreover, unlike Sen, she gives a full list of what she thinks are central capabilities, and her account is thereby much less abstract in that regard (*WHD*, pp. 78–80).[2] To be sure, it is centred around the special needs of women, but it can be applied with equal validity to men. Nussbaum's concern is to show that the left liberalism she favours can cope adequately with women's difference; in her view, then, to focus on women does not undermine the universal appeal of her position.

However, her list of capabilities is problematic in at least two crucial respects. First, some of the capabilities that she claims are central to all human beings are contestable. One can doubt, for example, whether being able to express oneself artistically is so central a capability that a regime which fails to provide all its members with the opportunity for doing so would count as unjust; or one can wonder whether being able to 'live with concern for and in relation to animals, plants and the world of nature' (*WHD*, p. 80) is so universally crucial either.

Second, Nussbaum's description of human capabilities is explicitly supposed not to rely on fundamental metaphysical assumptions about human beings, precisely so as to have universal appeal. And yet, it is unclear that it can avoid relying on such assumptions, any more than Rawls's political liberalism (which Nussbaum invokes in support of her approach) can. For consider, Nussbaum tells us that we should all have 'opportunities for sexual satisfaction and for choice in matters of reproduction' (*WHD*, p. 78): in the context of her book, this particularly applies to women. Whether or not that claim is true, it is clear that it must involve denying, contrary to what many people think, that God has allocated women the task of reproduction. To take the issue even further, if (as one might reasonably surmise) having reproductive choice means, for Nussbaum, having access to reliable contraception (perhaps, even, to abortion), this particular capability presupposes a certain relationship between mind and body (and, in the case of abortion, confers a status on the embryo) with which many people would take issue. More generally and fundamentally still, her account rests on the central assumption that individuals *are* autonomous beings, capable of shaping their own destiny. This in turn rests on a set of metaphysical presuppositions about what a person is, whether or not a person has free will, whether or not there is a God who determines the course of her life, etc. Nussbaum may be right that all human beings could have the capabilities

she lists, but whether those capabilities are important enough to warrant constitutional protection (which is the benchmark she uses), and can appeal to cultures whose metaphysical assumptions are radically different, are different questions altogether.

As indicated earlier, Rawls's aim in *LP* is to identify a set of principles by which both liberal and non-liberal societies can govern their interactions, and in the course of doing so he draws a line between non-liberal societies that should count as 'decent' and those that should not, either because they fail to protect their members' basic interests, or because they pursue aggressive policies externally, or both. So what conditions must a society satisfy to count as decent in Rawls's book? In that book he discusses only *decent hierarchical societies* while allowing that there could be decent societies of other kinds. A decent hierarchical society (a) protects its members' human rights, (b) is governed by 'a common good idea of justice', and (c) incorporates a 'consultation hierarchy' whereby representatives of various groups in the society can make their views known to state officials on matters of common concern. These three criteria together define a threshold above which, Rawls claims, a society deserves the respect of liberals, and should be admitted as a member in good standing of 'a reasonable Society of Peoples'. To understand Rawls's position we need to look more closely at how he interprets these criteria.

In the case of human rights, Rawls makes it clear that his criterion falls short of current international law, as evidenced by the numerous and detailed covenants on human rights adopted by the United Nations since 1948. In para 8.2 he lists as human rights the right to life (subsistence and security), the right to freedom of conscience, to freedom from slavery, serfdom and forced labour, as well as the rights to private (personal) property and formal equality. Many social, economic and cultural rights are missing from this list, and more notably still several political rights: there is no general right to freedom of expression, and of course no rights of democratic participation since decent hierarchical societies are not, *ex hypothesi*, democratic regimes.

Thus Rawls's account of human rights in decent hierarchical societies is, as has been noted elsewhere, extremely conservative.[3] But there is a further point here that is equally noteworthy. Although such societies *de facto* protect human rights, Rawls leaves it unclear whether these rights are actually recognised in the public culture of these societies as rights belonging to individual people *qua* human beings. Indeed, is the *language* of human rights used when their substance is being discussed? Rawls's ambivalence on this point is revealed when he says that 'a decent hierarchical people's system of law … secures for all members of the people *what have come to be called human rights*' (p. 65, italics added). This leaves it open whether they are so called by the people in question. Why does this matter? Where human rights are recognised within a society's public culture, it is acknowledged, first, that all human beings have equal claims to certain freedoms and certain resources irrespective of their specific characteristics or the group to which they belong; and, second, that these claims cannot be overridden by general considerations of public policy. If, on the other hand, human rights are respected, but for other reasons (for

the sake of securing a *modus vivendi*, for example), there is no such acknowledgement and no such guarantee. In decent hierarchical societies as Rawls describes them, how are the basic rights of individuals, particularly those of political dissenters, actually secured?

Here we must turn to the second and third conditions specified by Rawls, namely that these societies pursue a 'common good idea of justice' and embody a 'decent consultation hierarchy'. Such a hierarchy 'allows an opportunity for different voices to be heard – not, to be sure, in a way allowed by democratic institutions, but appropriately in view of the religious and philosophical values of the society as expressed in its idea of the common good' (*LP*, p. 72). It must permit the expression of political dissent. Moreover, not only must dissenters be allowed to raise objections to current policy; those objections must also be taken seriously, and addressed (*LP*, p. 72). According to Rawls, consultation will allow the common good idea of justice to be reformed, over time, in such a way as to reflect the needs and interests of the society's various members.

We have three comments on this argument. First, although Rawls says that each member of society must belong to a group, he does not say whether the government must accept, at the consultation table, *any* group whose specific interests have not yet been taken into account. It is clear that religious minorities, if there are any, should have representation rights, and so should women, in so far as they have been denied basic human rights. But what about other groups, such as homosexuals? Should they be given such rights, and if not, on which grounds? In order to illustrate what a decent hierarchical society looks like, Rawls describes an imaginary Islamic people named Kazanistan. Now, it is well known that Islam does not regard homosexuality as an acceptable way of expressing one's sexuality: it is, in fact, expressly forbidden. Accordingly, it is hard to imagine that Kazanistan would allow, at the consultation table, a group of homosexuals determined to press their claim for, say, same-sex marriage.

This leads us to the second point. When discussing political dissent, Rawls writes that 'dissent is respected in the sense that a reply is due that spells out how the government thinks it can both reasonably interpret its policies in line with its common good idea of justice and impose duties and obligations on all members of society' (*LP*, p. 78). For example, one can imagine that, in Kazanistan, 'dissent has led to important reforms in the rights and role of women, with the judiciary agreeing that existing norms could not be squared with society's common good idea of justice' (*LP*, p. 78). Both statements suggest that groups and associations can challenge the government's *interpretation* of the common good conception of justice, and have a right to a reply. But cases where a group challenges not the government's interpretation of the common good conception of justice, but that very conception itself, are left unexplored. And indeed, Rawls does say, explicitly, that 'dissent expresses a form of public protest and is permissible *provided it stays within the basic framework of the common good idea of justice*' (*LP*, p. 72, emphasis ours). To return to homosexuals in Kazanistan: in demanding that they be allowed to engage in homosexual sex without discrimination, they would challenge a very deep,

very fundamental value of the society in question. Similarly, imagine a society whose common good conception of justice holds that women must either stay at home or, if they choose to work, can only take up menial jobs. Women cannot complain that their *basic* human rights have been violated. Accordingly, they cannot argue that their society violates its own common good conception of justice. All they can say is that this conception is one that they find un-acceptable. But in so doing, they are not staying within the basic framework of the common good idea of justice, and it does not seem that the govern-ment must address their concerns.

This raises a third question: to what extent is a common good conception of justice a *common good* conception, as opposed to a conception endorsed by the majority (be it the numerical majority, or whatever group is in power) within the restrictions imposed by respect for basic human rights and the con-sultation procedure? Rawls admits that, in a decent hierarchical society, the state religion, if not unreasonable (that is, if not intolerant of other religions), can serve as the ultimate authority. The state religion, then, shapes and informs the society's common good conception of justice. But it is rather doubtful that a Catholic minority in a Muslim country would identify with, regard as *theirs*, the society's conception of justice, if that conception takes it as central that Jesus is not the Messiah, that polygamy is acceptable in the eyes of the Prophet and therefore can be allowed, etc.

To sum up: when Rawls lists the honouring of human rights as one of the eight basic principles making up the law of peoples, he sets a decency standard that is less demanding than at first appears; when he attempts to reinforce it by delineating the consultation procedures which, according to him, a society must respect if its conception of justice can be deemed to be in the common good, his description remains, in three crucial respects, somewhat ambiguous. Although 'decent hierarchical societies' are not flagrantly oppressive, they clearly do not treat individuals as having equal moral standing; they may thereby allow for quite a lot of discrimination against some individuals on the part of the state but also, perhaps, on the part of the cultural or ethnic subgroup to which they belong. A firm commitment to human rights as an entry ticket to the Society of Peoples might mean that there are fewer quali-fied candidates than Rawls appears to believe.

O' Neill, in her recent *Bounds of Justice*, departs from the positions taken by the three authors discussed so far by taking *principles of action* as the starting point for an account of transnational justice.[4] Rather than trying to set stan-dards of decency by identifying capabilities or rights that all human beings ought to possess securely, she invites us to ask which principles human beings, given their known characteristics such as mutual vulnerability, could accept to govern their conduct towards one another. This neo-Kantian approach is said to yield principles such as those prohibiting violence, coercion, deception and the like. These principles are primarily addressed to powerful agents who are likely to have the opportunity to exploit or deceive the relatively powerless. But by extension, O'Neill argues, this approach gives us reason to create insti-tutions that reduce the vulnerability of the latter. Thus not only liberties but

also various forms of resource provision can be justified on the grounds that they 'support the capacities of vulnerable agents' (*BJ*, p. 140). Both forms of protection might be cashed out in the form of rights. But rights, she thinks, cannot play a foundational role in our thinking about justice. This is for two main reasons. First, in starting with rights we overlook obligations that are not grounded in rights; second, the rhetoric of rights, heady and powerful as it is, all too often loses sight of the necessity of carefully defining corresponding obligations and of identifying their bearers (*BJ*, pp. 99–105, 125–6).

Both criticisms of rights discourse are familiar, and both are overstated. For a start, far fewer liberal philosophers than she seems to assume actually 'start' with rights, that is, argue that rights are the foundation of moral discourse. It is perfectly possible to recognise the special place that rights occupy in our moral and political thinking, and at the same time to explain and justify principles of other kinds, including principles specifying obligations that do not correlate with rights. Second, whilst O' Neill usefully reminds us that the language of rights can become too vague and meaningless to be of any use, she does not show why one can avoid these problems simply by switching to the language of obligations. In *Development of Freedom*, Sen considers and rejects objections similar to those she advances in support of her obligations approach. In particular, he argues that rights need not impose correlative duties on specific agents in order to be cogent (*DF*, pp. 230–31). This is correct as far as it goes, but it leaves open the vitally important question of which agents, individual or collective are to be assigned responsibility for protecting the rights at issue. In drawing attention to this further question, O'Neill performs a useful service, which can be detached from her critique of human rights discourse as such.

In summary, each of these attempts to specify standards of decency that are to apply transnationally has both important strengths and weaknesses. Sen and Nussbaum both defend the view that a regime counts as just, no matter what its culture and history, if it allows and enables individuals to deploy their central capabilities. As we have seen, the capabilities approach as articulated by Sen is too indeterminate to serve as a universal benchmark; as delineated by Nussbaum, it is too demanding. Rawls allows that standards of justice may legitimately vary from one political community to the next, but claims that every decent society must at least respect its members' basic rights. We have suggested that this sets too low a decency threshold, given Rawls's understanding of what it means to protect basic rights. O'Neill suggests that we should start by thinking about what powerful agents owe to vulnerable patients, and this may serve as a useful corrective to the recipient-centred thinking of the other three philosophers, but it need not involve dispensing with or downgrading the language of human rights.

Are these Norms of Justice/Decency Genuinely Cross-cultural?

A claim to the effect that certain norms of conduct are universally valid can succeed only if it can be shown that people in vastly different societies have

reason to accept them. All four authors under study claim that their accounts of justice can and should be accepted by all societies; but they deploy distinct strategies in order to defend that claim. None of them, or so we shall argue, really succeeds.

Nussbaum and Sen use a similar strategy to justify their claim that the capabilities approach is cross-culturally valid: they both examine selected non-Western traditions of thought, and attempt to show that there are strands within each which can accommodate the capabilities approach. Both refer to Buddhism in this context, while Sen pays particular attention to Islam and Confucianism. It is beyond the scope of this paper to assess in any detail whether their interpretations of these religious and cultural traditions are correct.[5] Suffice it to say that they show, powerfully, that those traditions are not as homogeneous as they are often taken to be by those who represent them as wholly alien to Western liberalism; but they fail to explain why the 'liberal' strands that they discover are more representative of those traditions than their illiberal components, or why illiberal protagonists of such traditions *should* move towards a more liberal position. In the second section, we pointed out that Nussbaum's list of capabilities does rest on metaphysical assumptions about human beings, and in particular on their abilities to act as free agents. Why should opponents of freedom for all, especially for women, be swayed when presented with the list? The same can be said of Sen's analysis of Islam, Confucianism and Buddhism: to claim that all three traditions *could* accept the capabilities approach is one thing, but it does not amount to showing that they should. Neither Sen nor Nussbaum fully recognise that this is where we reach the limit of what a philosophical argument can achieve. One cannot indeed prove that the principle 'respect all human beings as free agents with equal moral standing' is true, any more than one can prove that it is false. Someone who does not agree with the principle and who rejects the capabilities approach *on that ground* will remain unconvinced, and there is not much that an advocate of the principle can add without begging the question. But conversely, *she* will remain unconvinced by the claim that values which restrict freedom of choice to such an extent as to render someone's life less than decent should be imposed on individuals; and there is not much that the opponent of the principle can add without begging the question. The best one can do, as indeed Nussbaum does at length, is show that criticisms of cross-cultural norms of conduct are internally flawed. To hope for more, or to hope that one can simply bypass the issue by constructing a moral and political theory devoid of metaphysical assumptions, seems rather misguided.

As noted earlier, O'Neill uses a Kantian universalisability test to back up her claim to have identified cross-culturally valid principles of justice. She asks which principles individuals *could* consent to adopt in the light of well-known general facts about human power and vulnerability. In particular, she argues, people *cannot* consent to principles whereby others would deny them the resources and freedoms they need in order to be autonomous; for in consenting to them, they would bring about a world in which some individuals, through fear, coercion and serious deprivation, would be unable to abide by those very principles. Here she tries to steer a middle course between two

extremes, focusing neither on 'arrangements to which ideally rational and mutually independent beings *would consent*', nor on 'arrangements to which others in possibly oppressive situations *do* consent' (*BJ*, p. 162). In other words, we should not look for principles suitable only for angels, but nor should we accept principles that flesh-and-blood people can be shown to endorse if it can be proved that their endorsement is a result of necessity or coercion. Clearly this test is a hard one to apply: if we find that in certain cultures women embrace religious precepts that limit their autonomy – in work or marriage, say – should we allow these in as possible interpretations of justice, or should we say that the women's consent cannot be genuine? Is it possible to say what people can reasonably agree to independently of their overall cultural commitments?[6]

Rawls, as we have seen, appeals to basic human rights as a way of distinguishing liberal and decent societies from outlaw and burdened societies. He does not, however, present an argument in favour of this standard; instead, because decent societies are defined in part by their acceptance of the Law of Peoples, and because the honouring of human rights is an essential component of that law, respect for human rights simply becomes one criterion for a society's being decent, and the normative question is evaded. It is true that in paragraph 8.4, Rawls describes an original position made up of representatives of decent societies, and claims that these representatives would choose to adopt the eight precepts of the *LP*, one of which prescribes the honouring of human rights, but at best this shows that societies that already recognise human rights domestically should reasonably agree to the honouring of these rights internationally. The argument will do nothing to persuade anyone who is not already convinced that 'decency' requires the respecting of human rights.

Standards of Justice

We began by saying that liberal thinkers face a dilemma when they have to legislate for a culturally diverse world. When the issue is setting cross-cultural standards of decency, we can now see more precisely where the dilemma lies. If, like Rawls and O'Neill, liberal political philosophers search for principles that they think must command the consent of all reasonable people whatever their cultural commitments, the result may be principles that are too weak: they offer potentially vulnerable individuals or groups too little protection. Thus we found that Rawls's criterion of decency failed to endow individuals with a sufficiently strong set of basic rights. If, on the other hand, the quest is for principles that secure what liberals themselves would regard as a minimally adequate set of rights and resources, as in the case of Sen and Nussbaum, they expose themselves to the charge that they are foisting Western liberal priorities on to societies whose underlying values are different.

To escape from this dilemma, we need to explore a little more fully why liberals need to establish a decency standard in the first place. Liberals are, after all, committed to achieving the full panoply of liberal rights and freedoms wherever it is possible to do so. However, they also value cultural diversity and are committed to tolerating different ways of life. A decency standard

is meant to set the bounds of toleration: it is supposed to tell us when we are permitted to take forceful steps to combat brutal and oppressive regimes, and when, in the case of regimes that are non-liberal but still decent, we must confine ourselves to political argument and persuasion. But what our enquiry shows is that it is difficult to draw such a sharp line. Societies that are not, in general, oppressive may still impose fairly severe restrictions on those of their members who hold dissenting views or want to engage in practices that are not condoned by the majority culture. And societies that do not, at any given moment, violate their members' basic rights may lack the institutional framework that would render those rights secure over time. For this reason, liberals may come to believe that no society is really decent unless it offers its members the full set of liberal rights. This, we saw, was the route taken by Sen when he argues for the importance of civil and political rights as a means for securing basic human functionings, and also by Nussbaum when she argues for the constitutional protection of a wide range of rights, including reproductive rights for women. Even Rawls, who aims to set a less demanding standard of decency, admits in a footnote that 'some writers maintain that full democratic and liberal rights are necessary to prevent violations of human rights. This is stated as an empirical fact supported by historical experience. I do not argue against this contention, and indeed it may be true' (*LP*, p. 75). But if so, decent hierarchical societies as he describes them become a mere conceptual possibility of no practical significance.

If that general picture were accepted, the decency threshold would no longer have any fundamental ethical significance. It would not discriminate between societies that are tolerable to liberals and those that are not. It might nonetheless help to distinguish between cases where conditions of life are so bad that immediate intervention is justified, and other cases where liberal aims can best be pursued by an indirect strategy. Such an indirect strategy would not insist that all societies should immediately adopt the full set of liberal institutions. Instead it would mean engaging in a political dialogue with non-liberal societies (or with those of their members who are politically influential) to persuade them that the conditions of decency are best safeguarded by the progressive adoption of such institutions. The argument would be instrumental in form. It would not try to convince members of non-liberal societies that their cultural values were already consonant with liberalism; for reasons given earlier, we think such arguments are unlikely to succeed, since they must rely on a highly selective interpretation of religious and other traditions. Instead, the argument would stress the role of liberal institutions in creating a stable political order, in protecting people against economic deprivation, and so forth. The assumption is that these values at least, corresponding to the set of basic human rights identified by Rawls, are genuinely shared across cultures.

As part of this dialogue, liberals should be prepared to offer incentives to societies that are willing to secure their members' basic rights by moving in a liberal direction. Rawls's reluctance to countenance the use of such incentives is one of the more puzzling aspects of *LP* (see pp. 84–5). Rawls seems to believe that the offering of incentives – making development loans available on favourable terms, for instance – shows disrespect for the cultures of non-liberal societies,

and will lead to serious conflicts. But incentives need not be given on the grounds that liberal cultures are intrinsically superior; instead they can be given on the basis that liberal institutions can be proved, empirically, to be the best means of securing the conditions of decency. We can agree with Rawls that assisting what he call 'burdened societies' – societies that lack the material and other resources needed to protect basic rights – is the most urgent duty of liberal societies, but that is no reason not to encourage societies with more ample resources to develop institutions that will secure such rights over the longer term.

In short, liberals need a fairly minimal decency standard to enable them to respond to humanitarian disasters, and for this purpose something like Rawls's notion of basic human rights serves adequately. But they also need a more expansive account of the institutional conditions under which such rights can be securely protected – for everyone, including cultural or political dissidents – and this is where the arguments of Nussbaum and Sen about political freedom and the constitutional protection of rights come into their own. By distinguishing in this way between minimal decency and the securing of human rights, liberals can avoid excessive modesty on the one hand and excessive ambition on the other. They can also show respect for cultural differences between peoples without giving up their conviction that there are core elements – identified above all in the various charters of human rights – that every society must possess if it is to count as minimally just.

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Notes

1 Hereinafter, Sen, *Development as Freedom* as *DF*; Nussbaum, *Women and Human Development* will be referred to as *WHD*; Rawls, *The Law of Peoples* as *LP*; and O' Neill, *Bounds of Justice* as *BJ*.

2 See *WHD*, pp. 11–13, for her own account of the main differences between her approach and Sen's.

3 See for example, Beitz (2000) and Buchanan (2000).

4 Like Nussbaum, O'Neill believes that the predicament of women can be accommodated within a liberal framework, and does not necessitate a different understanding of justice or indeed jettisoning justice altogether. Thus, she is quite opposed, for example, to the view, articulated by advocates of the ethics of care, that women's legitimate demands cannot be accommodated by the language of justice (*BJ*, pp. 108, 148.) Rather acutely, O' Neill points out that the neglect of women in standard liberal thought was structurally similar to its neglect of foreigners: relationships between states, just as relationships between men and women, were assumed for a long time to be entirely unproblematic.

5 On this issue, see Bell (2000) and Bauer and Bell (1999).

6 Tim Scanlon (1998, pp. 340–1) whose reasonable rejection test for moral principles seems at least a close neighbour of O'Neill's possible consent test, puts it:

What matters, in deciding whether a principle can reasonably be rejected for application to a certain society, is whether, in that society, people in the positions that the principle describes have good reason to want a certain opportunity or a certain form of protection. … In societies which have different forms of commerce, or in which different ideas of personal dignity prevail, people will generally have different reasons for wanting forms of protection of the sort that rules of privacy provide. When this is so, the sets of rules that no one could reasonably reject, and that therefore could become binding if generally accepted, will be different.'

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