

# REPLY TO JON MANDLE

---

Kai Nielsen

I

When I first read John Rawls's short version of his *The Law of Peoples* I was depressed, and in reading afterward his longer version my depression was not relieved, not even ameliorated. I thought sadly that what we were seeing was an old phenomenon repeating itself once again: a Whig in youth and a Tory in old age. And I was not alone in so reacting. Some with views close to the Rawls of *A Theory of Justice* and sometimes even of his *Political Liberalism* thought much the same: Thomas Pogge and Brian Barry, for example, who both even thought the "rot" set in with *Political Liberalism*. As I indicated at the beginning of my reply to Norman Daniels, my admiration for Rawls's earlier work (including most particularly his *Political Liberalism*) is very considerable. How could there be, I thought, such a falling off of his powers in this last of his full-length works and with it such a switch in his views, a switch that seemed to me thoroughly wrongheaded? As I read the burgeoning literature that was arising around *The Law of Peoples*, much of it very critical, and reread and taught *The Law of Peoples*, I began to change my mind. Rawls was again breaking new ground and had a different task (but not an incompatible task) in mind than he had in his earlier work. What I began to sense (though not very clearly) was that what he was now saying about the international order was compatible with his earlier work, extending it in an arguably plausible, arguably insightful, and perhaps even correct way without extending his two principles of justice to global considerations and particularly without trying to extend the difference principle as a principle of global justice as many of his followers had tried to do, for example, Charles Beitz, D. J. A. Richards, and Pogge.

I began, though somewhat ambivalently, to stumble toward a way of

reading *The Law of Peoples* that fit with his robust liberal (social democratic) egalitarianism that kept him firmly as a Left liberal in the spirit (but with importantly different philosophical structures) of John Dewey and Jürgen Habermas. But all that remained and still remains rather intuitive and not worked out on my part.

Enter Jon Mandle. Mandle, who in my view has written in his *What's Left of Liberalism?* the best single-authored book on Rawls (a book written before *The Law of Peoples*), now in his "Identity, Justice, and Legitimacy" has elegantly, clearly, and succinctly given us a carefully argued account of how Rawls's *The Law of Peoples* is to be understood so that it is compatible with the rest of the body of his work and does not backtrack on his robust egalitarianism.

I do not want here to set out in detail Mandle's account. He does it himself briefly, clearly, and forcefully enough. What I want to do is to call attention to some of the things the naysayers raise against *The Law of Peoples* and then ask if there are sufficient resources in Mandle's way of interpreting *The Law of Peoples* to yield an appropriate response in the spirit of Rawls's liberal egalitarianism.

Rawls argues that a type of a nonliberal decent hierarchical society, what he calls a decent consultation hierarchy, should be treated as a full-fledged member of the Society of Peoples. Rawls points out that *The Law of Peoples* does not presuppose the actual existence of such decent peoples any more than it presupposes the existence of actual reasonably just constitutional democratic peoples. "If we set the standards very high," Rawls remarks, "neither exists. In the case of democratic peoples, the most we can say is that some are closer than others to a reasonably just constitutional regime. The case of decent hierarchical peoples is even less clear."<sup>1</sup> He proffers no examples of such a people. *Perhaps* the Ottoman Empire is about as close to such a people as we have ever had. Instead, he describes a hypothetical Muslim people, Kazanistan, as a hypothetical decent hierarchical people. "Kazanistan's system of law does not institute the separation of church and state. Islam is the favored religion, and only Muslims can hold upper positions of political authority and influence the government's main decisions and politics, including foreign affairs."<sup>2</sup> But other religions are tolerated. No religion is persecuted. Civil and social conditions permit the practice of these religions, for example, Judaism and Christianity, in peace and without fear. Unlike liberal democratic regimes, all state offices are not open even in principle to each citizen.<sup>3</sup> Yet Kazanistan encourages other religions to have "a flowering cultural life on their own and to take part in the civic culture of the wider society."<sup>4</sup>

This gives us a picture of what such a decent nonliberal consultive hierarchical regime would be like. Rawls argues that such a society, should one exist, should be accepted by liberal societies as a legitimate and reasonable member of the Society of Peoples. Mandle, coming down forcefully on Rawls's notion of legitimacy, carefully argues that with a proper understanding of Rawls's notion of legitimacy we can come to understand how Rawls's contention that

there could be such a reasonable, though not on Rawls's account fully reasonable, decent hierarchical society is justified. I shall argue that, significant as Mandle's account is, it is still importantly flawed. He has still not shown how a robustly liberal egalitarian can consistently accept as legitimate a nonliberal so-called decent hierarchically ordered society as a full-fledged acceptable member of the Society of Peoples and not in some way or other not be for imposing sanctions against it. Criticizing it, as Rawls and Mandle believe, is not enough, or so I shall argue, where something more than criticizing it is possible without causing even more human harm.<sup>5</sup>

## II

Mandle correctly says, or so I believe, that there is a defeasible obligation for a citizen to obey the legitimate law of the state of which she is a citizen; moreover, she sometimes has such an obligation to even obey an unjust law. Furthermore, everyone, citizen or not, has such a *defeasible* obligation not to try to overthrow a political order if it has a legitimate rule of law and the political system to go with it. Rawls and Mandle are perfectly correct about this. My problem is that I do not see how what they call a decent nonliberal consultative hierarchical society could have a de jure legitimate legal system, and without that I do not see how they could have a legitimate political order.

Mandle remarks (rightly I believe), "Laws . . . when legitimate . . . represent the *collective will of the citizens*." He goes on to say:

Legitimate law, that is, represents a collective decision of the society, and not *only* an external constraint imposed on it or on parts of it through force. My suggestion is that a decent society is to be tolerated because it has a legitimate system of law [*italics mine*].

However, a nonliberal consultative hierarchical society said by Rawls and Mandle to be decent has neither the reality of nor the procedure for representing "the collective will of its citizens" or for its laws to represent "a collective decision of the society." Only a democracy with universal suffrage and a system of voting can do that. No nonliberal hierarchical society, however decent, can do that. Such a society has no plausible way of ascertaining whether its system of laws is *such* a collective matter. It can only baldly assert it and point out that the mass of its people does not make a ruckus about it. But we have no good reason to accept such an assertion. That their citizens do not make a ruckus may only show that they are intimidated or in some way bamboozled. By contrast, in a democratic society, at least as ideally modeled, their publicly recognized proposed rules of law, after public discussion and debate in the political culture of the society, and after examination and recommendation by a parliamentary committee or committees and subsequent

debate in parliament, are voted on in the parliament and either passed or rejected. In many democracies in various ways, for example, by a presidential veto or by a Supreme Court ruling declaring that a proposed law is unconstitutional, the ascertaining of things is made more complicated. But in a democracy, parliament in turn, by various weighted votes, can override a presidential veto or, by voting by a strong majority for a change, override a Supreme Court decision and, by voting for a change in the Constitution itself, make the proposed law the law of the land.<sup>6</sup> *Ultimately*, there is, in theory at least, parliamentary or congressional supremacy in any democracy, and the parliament (Congress) consists in people's elected representatives from the various parts of the country. We here get what we can reasonably (though not unchallengeably) call an expression of the collective will of the people.

This we all know is an idealization, but it does give content to the idea of there being in place the collective will of the people. There is a mechanism and a procedure that could be faithfully carried out, and if it is, it can be said, and without mystification, that the laws of the land represent the collective will of the people. But there are no such devices in even a reasonable and tolerant nonliberal consultative hierarchical regime. There is no way of giving sense to the idea of a collective decision of a society where, for example, at least half of the population, the women, cannot vote or where people of religions other than the state religion cannot vote or hold office. It could even be the case, without the norms definitive of a decent nonliberal consultive hierarchical order being violated, that only people of the same race, the same religion, or from the same strata or class (e.g., only property owners) are allowed to vote. Even if the nonvoting members of the society are consulted, and respectfully and honestly, still, after the consulting is finished, the ruling members of the hierarchy get together and decide what to do and what they decide is the rule of the land. There is no legitimacy there for there is no possibility for there to be an expression of the collective will of the people. And if something like these features did not obtain, we would not have a nonliberal hierarchical consultative society. A consultative one is better than one that is not, but in neither case will we get a legitimate rule of law, for neither can be an expression of the collective will of the people.

To put it bluntly and crudely, but I think truthfully: without democracy we can have no legitimate (de jure legitimate) law. Not all (or even any) of Rawls's nonliberal, nondemocratic hierarchical societies need be brutish, and certainly the decent ones cannot be (ideal types that they are), but still they can have no legitimacy for they do not rest on the collective will of the people. There is no way of even determining the collective will in such a society. Even if practically all people obey, this may be because, though we have a reliable procedure for ascertaining this, they obey out of fear or lethargy, a sense that there are no alternatives (this is just how it is and must be), or out of the sense that they are not to question their superiors, or just out of an enculturated habit. We have nothing here to give legitimacy to even the most reasonable

(Rawls says none of them can be fully reasonable, not even the best of them) of such “decent” (now I put it in scare quotes) nonliberal consultative hierarchical societies. There is no reason, other than pragmatic *modus vivendi* ones, to act in accordance with their laws. We should have respect for the law, for the rule of law, and for the system of law only when it is *legitimate* (de jure legitimate) and for it to be so legitimate it must be expressive of the collective will of the people. Without that there is no way in Rawls’s sense of legitimate of giving sense to his own claim that we can have a nonliberal decent hierarchical society: a society that is well-ordered. Thus a “decent nonliberal hierarchical society” is plausibly viewed as a contradiction in terms rather than as being pleonastic or being substantially true. (See footnote 1 in Mandle’s essay.)

### III

Mandle is on base in asserting that citizens have a defeasible obligation “not to use force to attempt to change the *legitimate* laws and constitutional procedures of their society” (italics mine). But, since in so-called decent hierarchical regimes there can be no reason to say that their legal systems are legitimate, there are no reasons (other than purely prudential ones) to obey them and not to try (if circumstances are favorable) to topple the society that instances them. In a society where only the men, or only property owners, or only the ruling class or the wealthy and entitled elite call the shots, there are principled reasons for rebellion and revolt. What could reasonably deter rebellion and revolt are calculations about the death, misery, and repression resulting from a rebellion and revolt, the massive oppression that would be put in place against the revolutionaries, and the likelihood of victory of those rebelling and distinctly the likelihood that the victory (if that is a likelihood) will soon turn sour and lead to the same old thing, that is, to control by a gang of bosses (though now a different one).<sup>7</sup> Democracy may be illusory; it is often close to being a cruel joke in most of our societies. Still only with it can we get a de jure legitimate constitutional order. It is baffling to me how Rawls can *deny* that “a democratic political mechanism based on the principle ‘one person one vote’ is necessary for legitimacy.” A benign and benevolent authoritarianism would, of course, be better than a malevolent one (the usual sort of dictatorship we know and hate), but by Mandle’s and Rawls’s own criteria, even a benign one would have no legitimacy, for it, by its very structure, does not and cannot represent the collective will of its citizens. Kindly though (we stick now with ideal theory and forget about political realities) the controlling elites may be (whatever and whomever they may be), they still rule by the arbitrary exercise of power and, as Mandle correctly quotes Rawls, “laws supported merely by force are grounds for rebellion and resistance.”<sup>8</sup> If “decency” is in a necessary part cashed in in terms of “legitimacy,” there can be no “decent nondemocratic societies.” That is an inescapable conclusion, at least for a liberal (in the Rawl-

sian, Deweyan social democratic sense) or for a socialist. So why be a social democrat or a socialist? Because, among other reasons but most relevantly, we want people to have control over their own lives.

## IV

I leave matters here with the above critique of Mandle's attempt at a justification of Rawls's way of doing things in *The Law of Peoples*. How does this fit with my growing conviction that Rawls in *The Law of Peoples* has not taken what in effect, if not in intention, is a conservative turn betraying his robust and democratic egalitarianism? If my critique is on the mark, it seems on the surface at least to be a denial of that and to support the contention of his being a Whig in youth and a Tory in old age. That *seems* to be what he is doing. I do not know how to support the claim that Rawls is not that and remains on a global scale as well as on a domestic scale a robust egalitarian. (But see here Jocelyne Couture's essay in this volume.) All I at least think I know concerning matters in this area is that Mandle's conception of legitimacy does not achieve what he wants it to.<sup>9</sup> In saying what I just have, I am not saying that acknowledging the vital moral importance of having respect for people, along with the pragmatic consequentialist reasons I did not disavow, motivates some respect for a non-liberal, nonbrutish, benevolent (though paternalistic) social order (if there can be one) that in its own paternalistic way respects its subjects (I use "subjects" deliberately). That there are (if there are) such rulers, together with the recognition of the consequentialist *modus vivendi* considerations, *might* lead us, and perhaps justifiably, to regard such a decent nonliberal hierarchical order as in some way acceptable, or at least not to be sanctioned. They (if there are or ever were such societies) are not renegade societies or harsh and brutal dictatorships. *Perhaps* they should *only* rightly be criticized and not sanctioned or made an object of destabilizing efforts. (Though remember here that sanctions admit of degree and kind.)<sup>10</sup> But pursuing that line of thought is for another day.<sup>11</sup>

## NOTES

1. John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), p. 75.

2. *Ibid.*

3. It has been argued, of course, that while in principle all state offices are open to all citizens in reality in most perhaps all actually existing democracies someone without the support of those with a lot of money has no chance of gaining any major office. (Or do I generalize too much from the United States?) Moreover, even the "in principle" does not hold for all citizens in all the democracies. In the United States, for example, no naturalized citizen can become president of the United States. And more

importantly in Israel certain offices and certain positions in the state apparatus are reserved for only Jewish Israeli citizens. They are not open to non-Jewish Israeli citizens.

4. Rawls, *Law of Peoples*, p. 76.

5. Someone could say that I am here simply assuming utilitarianism. But sometimes, and I believe this is one such occasion, consequentialist arguments are perfectly in order for a nonutilitarian. See Kai Nielsen, *Naturalism without Foundations* (Amherst, NY: Prometheus Books, 1996), pp. 229–59; and Brian Barry *Liberty and Justice* (Oxford: Clarendon, 1991), pp. 72–77.

6. In the United States it is even more complicated for Congress has to go back to the individual states to ratify the federal legislative decision before the US Constitution can be changed.

7. This means that revolutionaries must (a) be tactical and wait for conditions to be propitious before a revolution is tried and (b) must be confident that the revolutionaries, the people supporting the revolution, and constituting its leadership, have disciplined and thorough liberal democratic commitments where this doesn't mean capitalist liberal commitments.

8. Rawls, *Law of Peoples*, p. 66.

9. See my "State Authority and Legitimation," in *On Political Obligation*, ed. Paul Harris (London: Routledge, 1990).

10. If I had more space there are some other things I would probe. Rawls says, and Mandle backs him up, that a decent nonliberal hierarchical society will operate with a common good conception of justice rather than a liberal one. But do we have anything nonplatitudinous and non-question begging that counts as "a common good"? Would there be anything like that that was acceptable to the various groupings within that society, to say nothing of a liberal society interacting with it? Rawls also speaks of a core of human rights accepted by a decent hierarchical society. But what is striking is that such a society rejects some of the most essential human rights, i.e., the right to free speech, the right to vote, and the right to legal and political equality between men and women and between members of different religious sects and perhaps even between different races. Rawls tells us that decent hierarchical consultative societies have certain institutional features that deserve respect, but they also have a lot of them that do not. In view of this, do they not require not only criticism but some form of sanction where this is bearable from liberal societies? It is surely right to reject the inference from the proposition that nonliberal societies fail to treat persons as truly free and equal to the proposition that therefore nonliberal societies are always properly subject to some form of sanction. Rawls concedes the antecedent but objects to the inference that some form of sanction, some form of coercion, is always appropriate for such societies. But if "sometimes" or even "always prima facie" is substituted for "always," the inference (though it is not a deductive one) is appropriate. Moreover, justificatory reasons may not stand in inferential relations to what they justify at least in any straightforward sense.

11. Another key subject to be pursued here is that concerning what foreign policy liberal states should have toward such nonliberal states? Perhaps they should acknowledge them and not treat them as "evil empires" or pariahs?