



Libraries and Learning Services

University of Auckland Research Repository, ResearchSpace

Suggested Reference

Brock, G. (2015). The original position in The Law of Peoples. In T. Hinton (Ed.), *The Original Position* (pp. 247-265). Cambridge: Cambridge University Press.
<http://www.cambridge.org/catalogue/catalogue.asp?isbn=9781107044487>

Copyright

Items in ResearchSpace are protected by copyright, with all rights reserved, unless otherwise indicated. Previously published items are made available in accordance with the copyright policy of the publisher.

This material has been published in *The Original Position* edited by T. Hinton. This version is free to view and download for personal use only. Not for re-distribution, re-sale or use in derivative works.

© Cambridge University Press 2015

For more information, see [General copyright](#), [Publisher copyright](#).

The Original Position in the Law of Peoples

Draft only

Final copy published as follows:

BROCK, G. "The Original Position in Rawls's Law of People". In Timothy Hinton (ed.) *The Original Position*, Cambridge: Cambridge University Press, 247-265, 2016.

ISBN: 978-1-107-04448-7 (hbk).

ISBN: 978-1-107-62751-2 (pbk).

1. Introduction

What kinds of principles should guide liberal peoples in their international affairs, especially when dealing with people who are not apparently committed to liberal values? If they are true liberals, should they insist, wherever possible and likely to prove effective, that other peoples conform to liberal standards or at least gradually evolve in a liberal direction? Alternatively, should they be tolerant of others who hold non-liberal commitments and not attempt to steer them towards liberal democratic ideals? How are we to identify the limit for any appropriate tolerance that we ought to exercise? What responsibilities do affluent developed societies have to those that are poor and developing? What form should any assistance take when advantaged countries try to help disadvantaged ones?

Clearly, these are important questions worthy of considerable reflection. And these are the sorts of issues that Rawls attempts to address in his highly influential work, *The Law of Peoples*. The original position plays a central role in deriving the principles that should guide liberal foreign policy. In this chapter

we discuss Rawls's original position argument in *The Law of Peoples*. In the next Section I outline the argument Rawls offers for the principles that constitute his Law of Peoples highlighting the role played by the original position in arriving at guidance in international affairs. Section 3 covers some critical engagement with those arguments while Section 4 discusses some ways in which Rawls, or rather those who would defend him, might address key challenges. Section 5 takes stock of the debate between the two sides and emphasizes the strengths of both Rawls's peoples-focussed and cosmopolitan perspectives in pursuing a global realistic utopia. I show how Rawls's position on duties to address global poverty and his views concerning how to interact with non-liberal societies contain considerable insights that are not adequately acknowledged.

2. Rawls' *Law of Peoples*: some highlights featuring the original position

To appreciate the dynamics of the debate surrounding *Law of Peoples* we must very briefly highlight several key moves Rawls makes in his earlier groundbreaking work, *A Theory of Justice*. There he sets out to derive the principles of justice that should govern liberal societies. He makes use of the innovative original position technique to craft an ingenious thought experiment. As is well covered in this volume, the original position is a theoretical device often used to test the fairness of principles that aim at justice. It is a hypothetical device which aims to place us in a particular choosing situation that shields us from well-known distortionary influences. Features of our situation (especially whether we occupy a position of advantage or disadvantage) can radically influence what we consider to be fair. The veil of ignorance attempts to shield us from these biasing factors, by stripping us of such relevant knowledge. Rawls invites us to

consider which principles we might chose in the original position to govern the basic structure of society if we do not know what position we will occupy in that society. Rawls famously argued that it would be rational to select two principles; namely, one protecting equal basic liberties and a second permitting social and economic inequalities when (and only when) they are both to the greatest benefit of the least advantaged (the Difference Principle) and attached to positions that are open to all under conditions of fair equality of opportunity (the Fair Equality of Opportunity Principle).

In *A Theory of Justice*, Rawls' focus is on the principles that should govern closed communities — paradigmatically, nation-states. Cosmopolitans (first Charles Beitz [1979] and then Thomas Pogge [1989]) argued that these two principles should apply globally, because the same kind of reasoning that led to their endorsement at the domestic level should apply to the global case. After all, if the point of the veil of ignorance is to exclude us from knowledge of factors that are morally arbitrary, where one happens to have been born (or citizenship) qualifies as one of those quintessentially arbitrary factors from the moral point of view.

It was a disappointment, then, when Rawls later explicitly rejected such a suggestion.¹ He argued that, though the two principles should apply within liberal societies, they should not apply across them. Rather, in the international arena, Rawls argues that “well-ordered people” (that is, roughly, those that have institutions of self-governance or of consultation in their internal set-up) would choose eight principles (which constitute his Law of Peoples). These are principles acknowledging peoples' independence, their equality, that they have a right to self-defense, that they have duties of non-intervention, to observe

treaties, to honor a limited set of human rights, to conduct themselves appropriately in war, and to assist other peoples living in unfavorable conditions. In addition, Rawls believes three international organizations would be chosen: one aimed at securing fair trade among peoples, one which enables peoples to borrow from a cooperative banking institution, and one which plays a similar role to that of the United Nations (Rawls 1999, pp. 37-42).

There is considerable debate as to whether Rawls' position should be applauded or rejected. Relevant to any assessment are Rawls' own views about what he is trying to achieve in this work. In *The Law of Peoples*, Rawls aims to derive the laws to which well-ordered peoples would agree. For Rawls, well-ordered peoples include reasonable liberal peoples and "decent peoples," that is, though they are not liberal, they have a "decent consultation mechanism," among other features to be discussed below. Rawls argues that the Law of Peoples he endorses is a realistic utopia. It is realistic because it takes account of many real conditions, by (for instance) acknowledging a fair amount of diversity exists in the world; not all peoples of the world do or can reasonably be made to endorse liberal principles. Furthermore, the view he offers is realistic because it takes people as they actually are, and "its first principles and precepts" must be "workable and applicable to ongoing political and social arrangements" (Rawls, 1999, p. 13).

Rawls' derivation occurs in several stages. Rawls makes use of multiple original positions in efforts to arrive at what liberal and decent people would agree to guide them as principles governing international relations. He says: "Each of these agreements is understood as hypothetical and nonhistorical, and entered into by equal peoples symmetrically situated in the original position

behind an appropriate veil of ignorance. Hence the undertaking between peoples is fair” (Rawls 1999, p. 10). Rawls first concerns himself only with liberal peoples and the principles they would endorse, deploying both a domestic and an international original position device to arrive at his position. Thereafter, he focuses on the principles decent peoples would choose, using a further original position scenario in which to do so. Let us consider these three parts of the argument in turn.

Rawls employs two original positions to derive his Law of Peoples for liberal peoples: the first original position grounds the social contract of the liberal political conception of a constitutionally democratic regime while the second operates among representatives of liberal peoples. The parties in the first original position must decide the fair terms of cooperation that will regulate the domestic basic structure of society. They are modeled as rational and “their aim is to do the best they can for citizens whose basic interests they represent, as specified by the primary goods, which cover their basic needs as citizens” (Rawls 1999, p. 31). Since parties are behind a veil of ignorance, they will be motivated to choose a basic structure of society that reflects the freedom and equality of persons, and so they choose his famous two principles of justice.

After the principles governing the internal affairs of the liberal society have been derived, Rawls moves to the international level. Now a second original position is employed to derive the foreign policy that liberal peoples would choose. The representatives of peoples are subject to an appropriate veil of ignorance for the situation. For instance, they do not know the size of the territory or its “relative strength” (Rawls 1999, p. 33). Representatives then “select from among available principles for the Law of Peoples guided by the principles of justice for a democratic

society” (Rawls 1999, p. 32). Rawls argues first that they would reject utilitarianism “since no people organized by its government is prepared to count, as a first principle, the benefits for another people as outweighing the hardships imposed on itself. Well-ordered peoples insist on equality among themselves as peoples, and this insistence rules out any form of the principle of utility” (Rawls 1999, p. 40). Rather, he argues that they would choose principles 1-8 of his Law of Peoples, namely:

- “1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to the agreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right to self-defense but no right to instigate war for reasons other than self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime” (Rawls 1999, p. 37).

In addition, Rawls believes three organizations would be chosen: one aimed at securing fair trade among peoples, one which enables people to borrow from a cooperative banking institution, one which plays a similar role to that of the United Nations, which he refers to as “a Confederation of Peoples (not states)” (Rawls 1999, p. 42). Rawls contends that “the eight principles of the Law of Peoples are superior

to any others” (Rawls 1999, p. 41). How does Rawls arrive at these eight principles? He argues that “[t]hese familiar and largely traditional principles I take from the history and usages of international law and practice” (Rawls 1999, p. 41).² He also adds later on that “in proposing a principle to regulate the mutual relations between peoples, a people or their representatives must think not only that it is reasonable for them to propose it, but also that it is reasonable for other peoples to accept it” (Rawls 1999, p. 57).

Having made his argument concerning what liberal peoples would select as the eight principles and three organizations governing international affairs, he moves on to maintain that decent peoples would make the same selection. What, first of all, is a “decent people”? Rawls specifies that for a people to count as a decent one, at least four central conditions must be met. First, the society must conduct its affairs in ways that are peaceful and respectful of other societies. Second, the system of law and its idea of justice must secure basic human rights for all members of the people. However, it is important to realize that at this stage in the argument, the indicative list of particular rights that Rawls offers is very short (Rawls 1999, p. 65). In describing these, Rawls specifies only the following: (a) the right to life, by which he means the rights to the means of subsistence and security; (b) the right to liberty, which equates to freedom from slavery or forced occupation but also includes some liberty of conscience, enough to ensure freedom of religion and thought; (c) the right to personal property; and (d) the right to formal equality, by which he means that similar cases be treated similarly. The third condition a decent people must satisfy is that judges and others who administer the legal system must believe that the law incorporates an idea of justice according to which there is a common good.

Fourth, a decent people must have a “decent consultation mechanism” whereby constituent groups are consulted in an attempt to reflect all groups’ significant interests.

Rawls’ derivation of his Law of Peoples continues with a third original position, this time an international original position reserved only for decent non-liberal peoples that parallels the international original position for liberal societies. Rawls briefly argues that a decent people would accept the same Law of Peoples he earlier derived. Reflecting on the advantages of these principles for promoting equality among peoples, decent peoples “see no reason to depart from them or to propose alternatives” (Rawls 1999, p. 41).

Rawls then turns to describe a case of a hypothetical decent people, Kazanistan, that he believes fulfills his requirements. Kazanistan is an idealized Islamic people in which only Muslims are eligible for positions of political authority and have influence in important political matters, though other religions are otherwise tolerated and encouraged to pursue a flourishing cultural life (Rawls 1999, p. 76). Rawls believes Kazanistan can be admitted to the society of well-ordered peoples. Liberal societies should tolerate states such as Kazanistan. For those who have trouble with the idea that such a society should be considered as a member of the Society of Peoples,³ Rawls believes that “something like Kazanistan is the best we can realistically — and coherently — hope for” (Rawls 1999, p. 78). Moreover, he thinks that liberal peoples should “try to encourage decent peoples and not frustrate their vitality by coercively insisting that all societies be liberal” (Rawls 1999, p. 62). By way of further defense of the view, Rawls argues that it is crucial that we maintain “mutual respect among peoples” (Rawls 1999, p. 62).

Critics of Rawls's account of international justice -- especially those identified as cosmopolitans -- often challenge Rawls' views concerning duties of assistance, so it is worth understanding these in more detail. According to Rawls, some societies "lack the political and cultural traditions, the human capital and know-how, and, often, the material and technological resources needed to be well-ordered" (Rawls 1999, p. 106). Well-ordered peoples have a duty to assist such societies to become part of the society of well-ordered peoples. The aim of assistance is to "help burdened societies to be able to manage their own affairs reasonably and rationally and eventually to become members of the society of well-ordered peoples. This defines the target of assistance. After it is achieved, further assistance is not required, even though the now well-ordered society may still be relatively poor" (Rawls 1999, p. 111). The aim is to realize and preserve just (or decent) institutions that are self-sustaining.

According to Rawls, the political culture of a burdened society is all-important to the levels of prosperity experienced in particular societies: wealth owes its origin and maintenance to the culture of the society rather than (say) to its stock of resources. He says: "I believe that the causes of the wealth of a people and the forms it takes lie in their political culture and in the religious, philosophical, and moral traditions that support the basic structure of their political and social institutions, as well as in the industriousness and cooperative talents of its members, all supported by their political virtues" (Rawls 1999, p. 108).

Rawls does engage directly with central claims made by some (though by no means all) cosmopolitans, who maintain that the principles of justice that applied in *Theory of Justice*, particularly the Difference Principle, should apply globally. He takes up Charles Beitz's claim that, since a global system of cooperation already

exists between states, a Global Difference Principle should apply across states as well. Rawls argues against this for a couple of reasons, but notably, as we have just seen, because he believes that wealth owes its origin and maintenance to domestic factors such as the political culture of the society rather than (say) to its stock of resources. Furthermore, any global principle of distributive justice we endorse must have a target and a cut-off point, which are secured by ensuring the requirements of political autonomy. As to other common cosmopolitan concerns that Rawls fails to be sufficiently attentive to inequalities between the lowest income groups in different societies, Rawls' central response is (essentially) similar. Any principles of global redistribution must have a target and a cut-off point. For Rawls, these are achieved when just institutions are in place that can ensure political autonomy. By contrast, Rawls believes that since cosmopolitans are concerned with the well-being of *individuals*, there is no obvious cut-off point at which redistribution ceases in the global arena, and this result is problematic for several reasons, for instance, in undermining proper incentives for a people to take responsibility for its well-being.

3. Some critical responses to Rawls' *Law of Peoples*

In this section I consider some of the more important or commonly advanced critical responses made to *The Law of Peoples* focusing particularly on challenges made to the way delegates might reason in the original position in this crucial decision-making position. One of the most frequently raised objections is that the background picture Rawls invokes incorporates outmoded views of relations between states, peoples, and individuals of the world. Rawls presupposes that states are (sufficiently) independent of one another, so that each society can be held responsible for the well-being of its citizens. Furthermore, according to

Rawls, differences in levels of prosperity are largely attributable to differences in domestic factors such as political culture and the virtuous nature of its citizens. Critics point out, however, that Rawls ignores both the extent to which unfavorable conditions may result from factors external to the society and the fact that there are all sorts of morally relevant connections between states, notably that they are situated in a global economic order that perpetuates the interests of wealthy, developed states with little regard for the interests of poor, developing ones. Those who live in the affluent, developed world cannot thus defensibly insulate themselves from the misery of the worst off in the world, since they are complicit in keeping them in a state of poverty.

One prominent advocate of such a view is Thomas Pogge (e.g. 1994, 2001, 2002, 2008). According to Pogge, two international institutions are particularly worrisome: the international borrowing privilege and the international resource privilege. Any group that exercises effective power in a state is recognized internationally as the legitimate government of that territory, and the international community is not much concerned with how the group came to power or what it does with that power. Oppressive governments may borrow freely on behalf of the country (the international borrowing privilege) or dispose of its natural resources (the international resource privilege) and these actions are legally recognized internationally. These two privileges have enormous implications for the prosperity of poor countries because they provide incentives for coup attempts, often influence what sorts of people are motivated to seek power, help maintain oppressive governments, and, should more democratic governments get to be in power, they are saddled with the debts incurred by their oppressive predecessors, thus significantly draining the country of

resources needed to firm up fledgling democracies. All of this is disastrous for many poor countries. Because foreigners benefit so greatly from the international resource privilege, they have an incentive to refrain from challenging the situation (or worse, to support or finance oppressive governments). For these reasons, the current world order largely reflects the interests of wealthy and powerful states. Local governments have little incentive to attend to the needs of the poor, because their being able to continue in power depends more on the local elite, foreign governments, and corporations. Those in affluent developed countries have a responsibility to stop imposing this unjust global order and to mitigate the harms inflicted on the world's most vulnerable people. As one initial proposal for making progress in the right direction, Pogge suggests that we impose a Global Resources Tax of roughly 1% to fund improvements to the lives of the worst off in developing societies.

Furthermore, critics maintain that the boundedness and separateness of political communities is difficult to sustain in our world today, due to phenomena such as globalization and integration (Hurrell, 2001). Rawls assumes we can talk coherently of bounded political communities that constitute self-sufficient schemes of political co-operation. However, critics argue this is an untenable assumption. Some authors argue that we have a system of global co-operation between societies and this gives rise to obligations to the worst off (Hinsch, 2001). Several critics argue that the basic global structure is a scheme of coercive institutions that importantly affects individuals' life prospects. That structure should be transformed so that it becomes a fair scheme of cooperation among all citizens of the world (Forst, 2011).

In addition, critics question whether the notion of a people is sufficiently clear or important to do the work Rawls thinks it can do (Pogge 1994, p. 197; Kuper 2000). Rawls often takes the boundaries of states to mark off distinct peoples, which leads his view into difficulties. If we take a people to be constituted by commonalities such as shared language, culture, history, or ethnicity, then the official state borders and peoples do not coincide well. National territories are not typically comprised of a single people, nor is it clear that individuals belong to one and only one people.

Furthermore, critics charge that Rawls' reasons for excluding more socio-economic equality are unconvincing (Moellendorf 2002; Pogge 1989; Tan 2000). As Pogge notes, Rawls assumes that representatives of peoples are interested in the justice of domestic institutions and care nothing about the well-being of members beyond what is essential for just domestic institutions. But why assume this? It is more plausible to assume that each delegate is interested not only in just domestic institutions but also, all else being equal, in having "a higher rather than a lower average standard of living" (Pogge 1994, p. 208). Even if this interest is only slight, the representatives would be inclined to adopt at the very least something like Pogge's Global Resources Tax proposal. However, if delegates also know that great international inequality can negatively affect the institutions of domestic justice in poor countries, representatives would have at least a "tie-breaking reason to favor a more egalitarian law of peoples over Rawls's" (Pogge 1994, p. 214). It would also seem that there is substantial tension in the reasoning Rawls offers for our interest in socio-economic equality at the domestic level and our apparent disinterest in this at the international

level, claiming that the reasons for our interest in equality at the domestic level apply as well to the global.

Critics also charge that Rawls provides little argument for why decent societies would endorse even the limited set of human rights that Rawls offers initially (Pogge 1994, pp. 214-215). Liberal societies, by contrast, would want to add more to the list of human rights; for instance, freedom of speech, democratic political rights, and equal liberty of conscience. In neither the case of decent peoples nor liberal ones would the precise list Rawls offers be chosen, and moreover it is noted that the attempt to find a politically neutral law of peoples acceptable to both peoples is not promising (Pogge 1994, p. 215). Rawls' failure to include democratic rights is often remarked upon as a mistaken move (Kuper 2000, pp. 655-658). Amartya Sen, for instance, provides extensive evidence to support the claim that non-democratic regimes have severely adverse consequences for the well-being and human rights of those over whom they rule (Sen 1999, pp. 147-8 and 154-155). Sen also argues that respect for human rights and ideas of democracy are not confined to liberal societies, but rather that substantial elements of these ideas can be found in all major cultures, religions, and traditions.

Rawls argues for a respectful relationship between states (as representatives of peoples). Indeed, he argues that liberal democratic regimes have an obligation to deal with illiberal decent regimes as equals, and not to endeavor to impose their values on them. Some might think that Rawls' views appropriately acknowledge the importance of our cultural or national affiliations. Andrew Kuper (2000) argues that Rawls may take cultural pluralism seriously, but he does this at the expense of taking less seriously the reasonable

pluralism of *individual persons*. Decent societies may well contain individuals who hold liberal ideas. Rawls' account incorporates the wrong kind of toleration for such societies at the expense of liberal values. Indeed, it would seem that Rawls, in defending non-liberal states as he has, would be forced to defend the rights of states to impose inegalitarian policies on its citizens, even if a majority of the citizens were vigorously against such policies (Blake and Smith, 2013). Rawls gets into this kind of bind, according to some, because of a mistaken view about what tolerance demands. There is also a debate about what the appropriate unit of toleration should be: legitimate differences among individuals or among peoples. Liberalism does, in certain cases, require commitment to tolerance of views that are not liberal. However, critics argue that the appropriate object of toleration should be legitimate differences among individuals, not peoples, as this ensures better tolerance of legitimate differences where they matter, namely, among individual persons (Pogge 1994; Tan 2000).

Rawls aims at a realistic utopia, but critics charge that the result is neither sufficiently realistic nor utopian (Kuper 2000, p. 383). It is insufficiently realistic, they claim, because it fails to take account of interdependence or domination in the global arena. And the view is challenged as being insufficiently utopian as the ideals are not much of an advance over the status quo. Rawls has tried to ensure that the Law of Peoples results in stability yet, critics charge, the Law of Peoples might be quite unstable because it involves tolerance of unjust regimes, which are potentially much less stable than just ones. Critics also claim that Rawls' focus on getting consent from diverse societies leads him to tailor steps in his argument to produce a result that enjoys wide agreement. Indeed, according to Darrel Moellendorf, Rawls "sacrifices full justice for wider agreement"

(Moellendorf 2002, p. 15). According to Bruce Ackerman, Rawls has offered us nothing more than a *modus vivendi* with oppressor states (Ackerman 1994, p. 383).

4. Defending Rawls' Law of Peoples

Many philosophers have tried to defend Rawls against this litany of criticisms.⁴ Several lines of defense have been attempted. It is often pointed out that critics have failed to appreciate some salient issues that orient *Law of Peoples*. As Samuel Freeman emphasizes, *Law of Peoples* is commonly misunderstood to be asking questions like: what is the nature of global justice? What would a globally just world order look like? According to Freeman, Rawls' Law of Peoples addresses a less ambitious question, namely: what should the foreign policy of liberal peoples be? In particular, how should liberal peoples relate to non-liberal peoples? Should they tolerate and cooperate with non-liberal peoples, or should they try to convert non-liberal peoples to liberal ones? What are the limits of what liberal peoples should tolerate with respect to non-liberal peoples? Indeed, Rawls' primary aim in *Law of Peoples* it is to dislodge realism, the view that states should pursue their rational interests without attending to normative issues. This constitutes a more limited project than trying to come up with an entire theory of global justice (Heath 2005).

To address these less ambitious questions, Rawls needs to distinguish the concept of a decent society from a fully just one (in the liberal democratic sense), with the idea of a decent society playing the role of a theoretical construct. While liberal peoples should tolerate decent peoples, this is not the case with so-called outlaw regimes. It is not reasonable to expect all decent societies to conform to

all the norms of a constitutional democracy as a requirement of peacefully coexisting and cooperating with them (Freeman 2003, p. 46). If we reject Rawls' way of addressing the issues, it appears the only alternative is to intervene constantly in other states' affairs, which seems unattractive and destabilizing. According to Freeman, this stance does not entail that citizens of liberal states must refrain from criticizing illiberal societies. However, there is a key difference between liberal citizens engaging in criticism and their "government's hostile criticisms, sanctions, and other forms of coercive intervention. The Law of Peoples says that liberal peoples, as peoples represented by their governments have a duty to cooperate with, and not seek to undermine, decent non-liberal societies" (Freeman 2003, pp. 46-7).

While Rawls certainly does confirm that he is trying to work out what the foreign policy of a liberal peoples should be in *Law of Peoples* (see Rawls 1999, p. 10), he also suggests that an alternative interpretation of his project is plausible when he constantly reiterates that his view offers a realistic utopia. The phrase suggests that he is trying to determine the conditions under which a utopian world order might be possible, albeit that he constantly emphasizes that it is to be realistic (Rawls 1999, pp. 5-6). Here defenders are quick to point out that on this interpretation of Rawls' project, he aims to establish under what conditions we can secure a *peaceful and stable* world order, rather than one which is *just* (Audard 2006; p. 73). This is the proper ambition, it is maintained, because of the constraints provided by wide diversity, reasonable pluralism, and respect for peoples' self-determination. If securing a peaceful world order is our primary objective, we should permit coercion only in the most essential cases. The notion of legitimacy plays a key role. Rawls's work is concerned with the legitimacy of

global coercive political power, rather than with a range of other ideas that occupied him in earlier works, such as the arbitrariness of initial positions in determining one's fate, and matters concerning a more robust conception of justice as fairness.⁵

Defenders frequently claim that cosmopolitans underestimate the importance of global political stability and peace. Without peace there can be no justice, so establishing a peaceful order does seem to be the first crucial step in an international law of peoples. If peace is the first priority, it is but a short step to accepting that the building blocks for the law of peoples should be states (or Rawls's moralized form of them, peoples) rather than anything very different from what we currently recognize as the dominant players in the international domain.

If Rawls' aim were to establish the conditions for a peaceful and stable world order, rather than a just one, the concepts of legitimacy and respect for legitimate governments would play a key role. But even if we accept the significant role legitimacy plays, critics argue that that would still not explain away other puzzling features of the Law of Peoples. One criterion by which we gauge legitimate governments is how well they respect human rights. Critics frequently remark that Rawls endorses a very concise list of human rights. Would his commitment to legitimacy not require him to embrace several of the rights he notably excludes, such as freedom of expression, association, political participation, and nondiscrimination?

Much has been said in attempting to defend Rawls' abbreviated list of human rights. Two approaches are standardly used: one revolves around a concern with wide acceptability and the other draws attention to the way

violations of human rights can function to legitimate coercion in Rawls' account.⁶ According to the first line of defense, Rawls is concerned with how one might justify a generous list of human rights in the face of a wide range of views about conceptions of valuable lives in the international community, so only the most essential of human entitlements would gain the relevant international consensus. According to the other common line of defense, attention is drawn to the status of violations of human rights in justifying coercion in the international order.⁷ Intervention in the affairs of a sovereign people being such a weighty matter, we should reserve space on the list of human rights for only those rights for which non-compliance could adequately justify considering the full force of international interventive measures. This might explain why certain rights, such as the right to belong to a trade union or free speech, are not included, it is thought.

Some argue that there is a widespread misconception about Rawls' views on human rights. David Reidy argues that Rawls's endorsed list of human rights is much fuller than his critics seem to appreciate. In the commonly identified passages in which Rawls presents his list, Rawls offers only an incomplete sketch of what he has in mind. Reidy notes that most readers mistakenly think Rawls' list is excessively minimalist, but he draws attention to the fact that Rawls begins his list with the words "Among the human rights are..." and therefore leaves open the possibility that what he presents is not an exhaustive treatment (Reidy 2006a, p. 170).⁸

What do defenders have to say to the charges that there is a global basic structure and that Rawls has ignored the unjust global economic order (which includes privileges such as the international resource and borrowing privileges,

as Pogge discusses)? Joseph Heath argues that there is no *global* basic structure because key characteristics of such an order are absent, notably, a way to guarantee reciprocity and mutually beneficial cooperation. The rule of law provides the necessary assurance and it is absent at the international level (Heath 2005, pp. 201-205). Without some international authority or means of enforcing global rules, we cannot talk of a global basic structure. Samuel Freeman also argues that there is no global *basic* structure and that all global norms supervene on those of states. For instance, contracts are specified and enforced according to the laws of one or other society. There are no basic global institutions – no world state and no independent legal order (Freeman 2006, pp. 243-260; Freeman 2003, p. 39).

Freeman also maintains that Rawls recognizes the many injustices to which Pogge refers. Rawls himself says that given current injustices, the appeal of something like a Global Difference Principle, as a transitional principle to establishing a well-ordered Society of Peoples, is easy to understand (Rawls 1999, p. 117). Furthermore, Freeman maintains that the states Pogge describes as taking advantage of the International Resource and Borrowing Privileges are not well-formed but rather outlaw states. As outlaws, they are not to be tolerated and it would be “wrong for well-ordered peoples to do anything to perpetuate them” (Freeman 2006, p. 251).

Rex Martin argues that we can find space to accommodate duties to change unfair features of the global order (such as the International Resource and Borrowing Privileges) by examining the duty of assistance in more detail. He argues that this duty entails a requirement to assist burdened societies to become self-supporting in a variety of ways, including economically. This duty

therefore entails the need to revise “the financial and economic environment in which formerly burdened societies interact with wealthier and more technologically advanced societies” (Martin 2006, p. 238). On this account, we can include rather large duties to reform the existing global order in ways that work against the goal of helping burdened societies achieve political autonomy (Freeman 2006, p. 35).

5. The strengths of both perspectives in pursuing a global realistic utopia

Both critics and defenders of Rawls’s people-centered account make many reasonable points and both have valuable perspectives to offer as we develop a realistic utopia applicable to international affairs. In the space remaining I aim to cover two important sets of concerns that are raised in this debate and show how Rawls presents subtle approaches that can usefully inform models of global justice.

We have canvassed two central critiques of Rawls’ view which run through much of the debate.

- 1) Rawls’s allegedly inadequate approach to our duties to assist with addressing global poverty
- 2) Rawls’s allegedly problematic toleration of nonliberal societies.

I believe both these critiques are unfair and fail to appreciate Rawls’s sophisticated perspective on some complex problems. I start by attempting to defend his views on our duties to assist as elements of these views can also help us appreciate his views on toleration.

Consider two important questions that are important to address when we discuss our duties to assist: What are the causes of prosperity? How can we help

promote prosperity in countries struggling with widescale poverty? There is an enormous literature on these topics and a lively debate continues on these themes.⁹ The quality of institutions in a particular state is especially important, no matter what other factors are also found to play a role.¹⁰ So on this view, those institutions that promote (for instance) respect for the rule of law and accountability make for an environment conducive to innovation and investment in education, health and infrastructure, all key ingredients for lifting people out of poverty.

Because Rawls is a strong proponent of the institutional thesis, he holds the view that the simple transfer of resources is not necessarily an effective way to assist developing countries. The simple transfer of wealth (without adequate and strategic focus) is not what will transform burdened societies. What such burdened societies need is reformed domestic institutions so that members can make effective use of resources and opportunities. On this account, we need to target domestic institutional reform if we aim to assist effectively. There are sound normative and empirical grounds for focusing on robust domestic institutions. As Rawls himself notes, the institutions that govern the basic structure have profound and pervasive effects on people's life prospects. And the body of empirical literature that identifies institutions as key to beneficial development is also vast.¹¹ Effective states capable of self-determination, the protection of citizens' basic rights, and the promotion of citizens' well-being all require adequate institutional capacity.

While Rawls is (rightly) committed to the importance of institutions in promoting beneficial development, Rawls' approach to issues of development also permits much more scope for societies to explore and embrace novel

solutions to their own circumstances. The approach is less prescriptive, more open-minded, and therefore more flexible about what form those solutions may take. Rawls does not assume that developing societies *must* adopt a particular formula (such as the so-called Washington Consensus) though as we see further along, he also does not shy away from offering advice about what courses of action are likely to yield important gains for beneficial development, such as when he highlights the important role attending to the fundamental interests of women is likely to play.

In what ways is Rawls more open-minded about the possibility of a multiplicity of successful ways towards beneficial development? One example is that Rawls does not require that nonliberal societies must commit to democratization, as a condition of receiving development assistance or as a condition of being considered legitimate by the international community. He is open to the possibility that burdened societies may be able to develop in ways different to liberal societies, exploring alternative paths in which a self-determining people may plausibly arrange their affairs consistent with their own non-liberal worldviews and traditions. And a certain range of alternative non-liberal societies deserve respect from liberal peoples.

Is it conceivable that forms of governance might exist that are capable of protecting basic human rights and other important interests of members of those societies, but are not democratic as we have come to characterize democracy in liberal societies? Perhaps a form of governance might be deliberative, consultative and responsive to citizens' views, and therefore include liberal democratic elements, without specifically including rights to stand for office and to vote in elections? Such reflective questions are worthy of

genuine consideration, and I believe there is considerable merit in Rawls's entertaining them.

A charitable interpretation of Rawls' project might also emphasize other elements, such as concern with effectiveness of assistance or a sense of humility about what we can claim to know about the way we ought to live. If we are concerned about effectiveness of assistance, it is not irrelevant that societies are often more likely to arrive at liberal positions if they follow their own internal reform processes in their own ways and at their own pace. And we should be appropriately cautious about what we can claim as "the truth about how we ought to live". This humility about our own knowledge should ground an attitude of considerable openness to alternative ways of life that are worthy of respect. As Catherine Audard says, Rawls theory offers "a truly 'critical' theory of international justice avoiding both the dogmatism of cosmopolitans and the skepticism of both realists and cultural relativism. This is a difficult and courageous position" (Audard 2006, p. 273).

Having so far said much in defense of Rawls, let me also point to some ways in which his arguments are weaker and vulnerable to attack. Rawls makes some strong claims about tracing the origins of prosperity. In an influential passage Rawls boldly states that:

"I believe that the causes of the wealth of a people and the forms it takes lie in their political culture and in the religious, philosophical, and moral traditions that support the basic structure of their political and social institutions, as well as in the industriousness and cooperative talents of its members.....The crucial elements that make the difference are the political culture, the political virtues and civic society of the country" (Rawls 1999, p. 108).

As it stands, Rawls's claim is a relatively easy one to rebut given the strength of what is being asserted. Note that Rawls does not say that the wealth of a people is *influenced by* or *correlated with* political culture, philosophical traditions, characteristics of members (and so forth). As Rawls states this position, the causal origins of the wealth of a people are entirely attributable to local factors.¹² This position is much too strong and ignores other important factors that influence the prosperity nations are able to achieve, namely, all the factors outside of local control that also undeniably play a role. Thomas Pogge helpfully indicates some of these. For instance, international institutions (such as the International Borrowing and Resource Privileges) can play an important role in explaining persistent high levels of local poverty. Pogge often talks about this phenomenon in terms of the international institutions creating a headwind against which nations must struggle.¹³ So Pogge does not deny that domestic factors can play a role, but rather makes more visible the headwind against which many nations must struggle and, importantly, the headwind that is within the power of developed countries to alter (at low cost to the global advantaged). So, in responding to Rawls's overly strong claim, Pogge usefully draws attention to the ways in which international institutions, policies and practices also contribute to domestic prosperity. Any claim that global poverty is the result *exclusively* of international political and economic factors or *exclusively* the result of domestic factors is sure to be false.

The debate between Pogge and Rawls raises a number of very interesting questions which deserve further consideration. These would include: What factors are important in sustaining such currently high levels of global poverty? No doubt the factors are complex and multi-dimensional and we would do well

to understand more of this complexity. Relatedly, what strategies and mechanisms prove to be effective in addressing poverty? Which proposals for reform might be most normatively desirable, feasible, and effective?

We might interpret Rawls's controversial views as motivated by reflections on these kinds of topics. In fairness to Rawls, when he does make the bold assertions about the causes of wealth it is in a context where his target is a view that access to resources is a crucial feature which importantly determines prospects for prosperity. It is in contrast to such a view that he makes a plea – certainly in language that is too strong – for the under-appreciated role of political culture and local factors. And he goes on to reflect on how difficult it is to change destructive patterns that may be found in political culture. Simply dispensing funds won't change political culture. But, he says, an "emphasis on human rights may work to change ineffective regimes and the conduct of rulers who have been callous about the well-being of their own people" (Rawls 1999, p. 109). After a very interesting discussion on prospects and challenges with discharging the duty of assistance, he concludes: "there is no easy recipe for helping a burdened society to change its political culture. Throwing funds at it is usually undesirable... But certain kinds of advice may be helpful, and burdened societies would do well to pay particular attention to the fundamental interests of women" (Rawls 1999, p. 110). He also emphasizes again the important role discourse about human rights can play in improving the political culture and its institutions.

So here Rawls is acknowledging the important role human rights can play in changing political culture and reforming unjust societies, contra his critics. And in emphasizing that particular attention should be paid to the fundamental

interests of women, Rawls indicates that he thinks there is a role for criticism albeit that it might be carefully embedded in carefully worded, diplomatic and strategic conversations. The impression that critics have that Rawls is overly tolerant of non-liberal societies is, I think, mistaken. Rather, as I have been suggesting, we might interpret Rawls's position as one in which he is sensitive to a range of important considerations that must be balanced in international affairs. We should be particularly attentive to when and how we offer advice, if we are concerned about which courses of action are likely to be effective and which are likely to prove counterproductive in trying to assist constructively in any reform process. Rawls identifies an important role for political leaders, particularly "the statesman" to play in this process. The statesman must make judgments assessing when opportunities are ripe for offering advice that might prove to be constructive and when it would be more appropriate to refrain from doing so. Altogether then, if we reflect on the problems Rawls was grappling with, particularly the issues of how we can appropriately discharge our duties of assistance given obstacles blocking prospects for promoting robust institutions, we see that Rawls offers subtle advice that critics have been too quick to dismiss.

Notes

¹ Though Rawls does discuss principles for a 'law of nations' (which applies to all nations) in *A Theory of Justice*, section 58, the treatment there is extremely brief and focused anyhow on the justification for conscientious refusal to participate in war. As it is his later treatment that constitutes his considered views on the topic of international justice and that critics target, this earlier

treatment need not detain us here. But it may be worth observing that there is significant overlap between the earlier and later treatments, though the later one importantly adds two principles concerning human rights and aid to burdened societies.

² Rawls adds that while the eight principles are open to different interpretations, these “interpretations, of which there are many... are to be debated in the second-level original position” (Rawls 1999, p. 42).

³ By “Society of Peoples” Rawls means all those peoples who follow the principles of the Law of Peoples in their relations.

⁴ For some notable attempts see Heath (2005); Freeman (2006); Reidy (2004); Mandle (2005).

⁵ The concern with legitimacy is present in earlier works, so there is more continuity in Rawls’ body of work than critics have so far acknowledged. See Wenar (2006).

⁶ Indeed, Rawls says as much in *Law of Peoples* at p. 65, p. 80, and, more generally, section 10.

⁷ Rawls says this in *Law of Peoples* at p. 80. See also, Tasioulas (2002); Hirsch and Stepanians (2006, pp. 126-7).

⁸ For some further analysis of Rawls’s view on human rights see Brock (2014).

⁹ For an introduction to these debates see Brock (2009, Chapter 5).

¹⁰ For more on this topic see Brock (2009, Chapter 5).

¹¹ For some of that literature see Brock (2009, Chapter 5).

¹² Rawls does indeed mean to convey a strong claim, by bolstering it with other assertions that the factors he picks out are “all-important” (Rawls 1999, p. 108).

¹³ See for instance, Thomas Pogge (2001, p. 17).