

Rawls's List of Human Rights and Self-Determination of Peoples

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Abstract

Scholars have struggled with identifying the exact reasoning that leads to the list of human rights in Rawls's *Law of Peoples*. This essay argues that the list can best be explained by a reasoning based on the value of self-determination of peoples. At the same time, it argues that this reasoning still has serious difficulties. In particular, it is necessary to clarify whether human rights may always be enforced by coercive means against states that violate them. However, once this has been clarified, the balance of reasons on which Rawls's argument rests no longer indisputably supports his conclusion.

Introduction

For many advocates of human rights, Rawls's *The Law of Peoples*¹ proved disappointing. Although Rawls makes respect for human rights one of the principles of a just "Society of Peoples", his account of these rights differs significantly from international human rights documents such as the Universal Declaration of Human Rights from 1948. Rawls omits rights such as unrestricted freedoms of speech and of association, the prohibition of discrimination, and the right to universal and free elections.

It is not easy to determine the reasoning that leads Rawls to his conception of human rights. The text contains several lines of thought, and there has been much debate on which of these matter most. Human rights theorists who have attempted to build on Rawls's theory have emphasized the "special role" that Rawls accords to human rights within the international order (Beitz 2009: 98).² While this is certainly an important feature of Rawls's account, it is probably not the decisive element in his argument, for reasons that will become apparent later. In contrast, there is another point that Rawls mentions repeatedly but which has been relatively under-explored: the claim that "self-determination [...] is an important good for a people" (Rawls 1999: 85). Rawls uses this claim in order to back up the assertion that liberal peoples should tolerate so-called decent hierarchical societies, which in turn is closely connected to his conception of human rights.

¹ In the present chapter, "*The Law of Peoples*" (in italics) refers to Rawls's book with this title from 1999, whose main ideas are already laid out in Rawls's essay with the same title from 1993. In contrast, "Law of Peoples" (non-italicized) refers to the conception of international justice that Rawls develops in both works.

² See also Raz (2010: 328).

In this chapter, I attempt to reconstruct an argument for Rawls's conception of human rights which is based on his claim about the value of self-determination of peoples. I want to show that such an argument provides a better explanation for Rawls's view than other arguments that have been discussed in the literature. At the same time, I argue that it still has serious difficulties. In particular, it is necessary to clarify whether human rights may always be enforced by coercive means against states that violate them. Once this has been done, the balance of reasons on which the argument rests no longer indisputably supports its conclusion.

I start by describing the central features of Rawls's conception of human rights in the framework of the *Law of Peoples*. I then examine three problems with interpreting his position. Next, I review several proposals for how Rawls might justify his list of human rights, concluding that they furnish at best only part of his reasoning. I then present an argument based on the value of self-determination. Finally, I identify three difficulties with this argument.

1. Human Rights in the Justificatory Framework of Rawls's *Law of Peoples*

As many scholars have noted, the *Law of Peoples* builds on Rawls's *Political Liberalism*.³ While this latter work asks what rules may legitimately be imposed on the citizens of a modern liberal society, the *Law of Peoples* asks what rules for an international order would be legitimate. It does so from the perspective of a liberal society, i.e. a society which guarantees all citizens the basic rights and liberties of a constitutional regime and assures them the requisite goods to make effective use of their freedoms (Rawls 1999: 14).⁴ Thus, it asks what kind of norms should govern the relations between different societies (Rawls 1999: 42).

In order to answer this question, Rawls uses the original position, the justificatory procedure developed in *A Theory of Justice* and *Political Liberalism*, and takes it to the international level. At this level, representatives of different societies must agree on a set of norms.

The international original position has two stages. In a first stage, only societies that are committed to liberal principles are represented and agree to a set of principles of the Law of Peoples. At the second stage, Rawls aims to show that certain nonliberal societies (so-called decent hierarchical societies and possibly others) can adhere to this same set of principles and should therefore be accepted as "members in good standing" of the international order. Other types of societies which are not able or willing to respect the principles of the international order are not represented in either stage of the original position. The appropriate conduct towards these societies is determined largely by asking how they can be induced or helped to become societies that respect the international order.

³ For example, Wenar (2006: 100ff.).

⁴ See also Rawls (1993: 166).

The design of the international original position has been criticized by many who nevertheless support the idea of the original position in the case of a single society. Several authors have claimed that individuals, not societies, should be represented in a global original position.⁵ They have argued that the international order ultimately has to be acceptable to the individuals that are governed by it, not to their societies which can have different interests. In response, others have attempted to show that the justificatory framework is coherent with Rawls's prior work. One argument for this is that in Rawls's political liberalism, the justification of political norms must start from ideas found in the political culture of a society. On the global level, the public political culture contains few ideas about how persons should relate to each other, but many ideas about the proper relations between peoples (Wenar 2006: 102 f.). We should therefore regard peoples as the central agents on this level. A further argument is that Rawls regards peoples as collective agents which are constituted, among others, by "shared ideas that are capable of being articulated into a theory of justice" (Pettit 2006: 48). In this chapter, I assume that Rawls's procedure can be defended in this or another way.

Human rights are treated at both stages of Rawls's procedure. At the first stage, the duty of all societies to honor human rights is one of the principles that is decided by the representatives of liberal peoples.⁶ However, it is only in the discussion of the second stage that Rawls explicates the content and role of human rights. The aim of this stage is to show that decent hierarchical societies, which do not meet liberal standards of justice but the less demanding criteria of "decency", support the same principles of the Law of Peoples and should be "tolerated" by liberal societies. Fulfillment of human rights is one of the criteria of decency.⁷

Yet being a criterion of decency is not an exhaustive description of the role that human rights are supposed to play in the Law of Peoples. In a central passage, Rawls characterizes this role by the following features:

1. Their fulfillment is a necessary condition of the decency of a society's political institutions and of its legal order [...].
2. Their fulfillment is sufficient to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions, or in grave cases by military force.
3. They set a limit to the pluralism among peoples (Rawls 1999: 80).

Rawls elsewhere possibly adds a fourth feature of human rights, stating that they are "necessary conditions of any system of social cooperation" (Rawls 1999: 68). It may be questioned whether these features are in accordance with each other. I will return to this topic in the next section.

As to the content of human rights, according to Rawls, human rights consist only in "a proper subset of the rights possessed by citizens in a liberal constitutional democratic regime"

⁵ Beitz (2000: 683); Pogge (2004: 1744f.); Tan (1998: 287). The text by Tan is based on Rawls's essay from 1993 rather than the book from 1999, but the point in question is identical in both texts.

⁶ Rawls (1999: 37).

⁷ Further criteria are: they must have a "decent consultation hierarchy" through which all groups of the society can express their dissent with the government; they must be non-aggressive towards other peoples, and the law must be based on a common good conception of justice that imposes duties on all individuals and that is administered in good faith by officials. See Rawls (1999: 64-66).

(Rawls 1999: 81). This is not surprising since decent hierarchical societies are supposed to fulfill them as well. To be sure, human rights are supposed to cover more than an existential minimum: besides the right to life and to basic liberty, they also include the right to “a sufficient measure of liberty of conscience” and the rights to personal property and to formal equality (Rawls 1999: 65). They deliberately omit, however, standards which are typical for liberal democracies. They do not forbid all kinds of discrimination on the grounds of religion (and possibly other criteria);⁸ they do not encompass the full equal liberties possessed by citizens in a liberal democracy, but only “a sufficient measure” of these liberties;⁹ and they do not contain the right to equal political participation, but only to participate in accordance with a “decent consultation hierarchy” (Rawls 1999: 71ff.).

In all these aspects, Rawls’s human rights fall short of the human rights contained in prominent international legal documents, such as the Universal Declaration of Human Rights (UDHR) from 1948. His conception leaves out, among others, the commitments to equal human dignity (art. 1 UDHR) and to non-discrimination (art. 2), (full) freedom of expression (art. 19), and the right to participate in elections by universal and equal suffrage (art. 21).¹⁰ The guiding idea behind this view is that the Law of Peoples should not prescribe “the liberal idea that persons are citizens first and have equal basic rights as equal citizens” (Rawls 1999: 69). Human rights, as well as other norms for the relations between societies, are based only on the weaker standard of decency.¹¹

Rawls shortened list has led to criticism from various scholars.¹² However, many have found it difficult to identify the reasoning that is supposed to justify this list. The difficulties stem partly from the facts that Rawls provides different considerations at different places and that the relative weight of these is not easy to determine. A further source of difficulties is the interpretation of certain details of his views on toleration and human rights. Hence I will first discuss three problems of interpretation in the following section. Subsequently, I will examine how Rawls’s reasoning for his list of human rights has been understood and propose my own view of this reasoning.

⁸ Rawls states that it is consistent with his conception of human rights that “one religion may legally predominate in the state government”. See Rawls (1999: 65 Fn.).

⁹ For example, with respect to freedom of religion, there may be an established religion with certain privileges, but all other religions must be allowed to be practiced in peace and without fear. See Rawls (1999: 74).

¹⁰ These rights have also been recognized in the International Covenant on Civil and Political Rights from 1966 which has been ratified by the large majority of states. In addition to the mentioned rights, Rawls’s conception also omits most economic and social rights, but presumably for different reasons, so this point will not be discussed here.

¹¹ However, Rawls’s conception of human rights is more demanding than minimal standards for state conduct as they are conceived in international law under the concept of *ius cogens*, i.e. peremptory norms of international law which may not be changed by states. While there is no consensus on the content of *ius cogens*, it has been thought to encompass norms such as prohibition of genocide, prohibition of crimes against humanity, basic rules of international humanitarian law, prohibition of racial discrimination and apartheid, prohibition of slavery, and prohibition of torture. Rawls’s rights to a “sufficient measure” of liberty of conscience and to personal property go beyond this list. See Carrillo Salcedo (1997: 593), Cassese (2005: 202-03), and Shaw (2021: 107).

¹² For example, Beitz (2000: 688); Buchanan (2004: 160ff.); Nickel (2007: 100ff.); Nussbaum (2006: 253); Tasioulas (2002: 382ff.).

2. Problems of Interpretation

Both the concept of toleration and that of human rights raise problems of interpretation. In particular, how both concepts relate to international coercion is problematic.

Societies can act towards other societies in coercive or uncoercive ways. The military occupation of a foreign territory is a clear case of coercive behavior, whereas criticizing another society (without threatening to use force) or offering a reward for certain actions is uncoercive. Rawls is acutely aware of this distinction since he frequently refers to the coerciveness or uncoerciveness of certain measures.¹³

Yet it is not easy to see how he understands international toleration in this respect. Generally speaking, it is uncontroversial that toleration refers to a situation where one society disapproves of certain aspects of the conduct of the other, but it is morally required to *refrain* from certain actions that could halt the conduct of the other society. However, *what types of actions* must be refrained from in order to be tolerant is problematic. Clearly it would be intolerant to force a policy on the other society by coercive means, such as military force, but is it also intolerant to attempt to influence the internal behavior of the other society in uncoercive ways, for example by officially condemning its policies or by denying certain kinds of cooperation?

Rawls seems to give conflicting answers to this question. On the one hand, he makes clear statements in favor of a demanding account of toleration which forbids certain kinds of uncoercive interference: “to tolerate means not only to refrain from exercising political sanctions – military, economic, or diplomatic – to make people change its ways. To tolerate also means to recognize these nonliberal societies as equal participating members in good standing of the Society of Peoples” (Rawls (1999: 59)).¹⁴ He emphasizes that the institutional features of decent hierarchical societies “deserve respect” (Rawls 1999: 84). Accordingly, Rawls also disapproves of uncoercive attempts to influence other societies, such as “the granting of subsidies to other peoples as incentives to become more liberal” (Rawls 1999: 85). On the other hand, when replying to objections, Rawls often seems to presuppose that his position is only directed against coercive interferences in other societies. For example, he claims that a “decent hierarchical society meets moral and legal requirements sufficient to override the political reasons we might have for imposing sanctions on, or forcibly intervening with, its people and their institutions and culture” (Rawls 1999: 84).¹⁵

¹³ See, for example, Rawls (1999: 61) or Rawls (1999: 83).

¹⁴ Rawls also uses the term “*bona fide* members of the Society of Peoples” to express this idea (61).

¹⁵ See also Rawls’s reference to “politically enforced sanctions” (61), his disapproval of “coercively insisting that all societies be liberal” (62) and his claim that the toleration of a decent hierarchical society forbids “imposing sanctions on, or forcibly intervening with, its people and their institutions and culture” (83).

How should we interpret Rawls's position, given the conflicting evidence? In light of central elements of the text, it seems preferable to stick to the view that toleration demands more than refraining from coercion. Rawls states this view explicitly, and at length, and he embraces its consequences when he claims that incentives to adopt liberal institutions are unreasonable. In contrast, his remarks about the coercive imposition of liberal norms occur only in passing and when dealing with views other than his own. However, as a consequence, the passages where Rawls refers to international coercion must be treated with caution. We cannot accept without reservation his claim that less international toleration necessarily means more international coercion.

There is a corresponding problem of interpretation for the concept of human rights. As mentioned above, Rawls attributes a number of different roles to human rights. The second of these explicitly refers to coercive international action: the fulfillment of human rights is "sufficient to exclude justified and forceful intervention by other peoples" (Rawls 1999: 80). In contrast, the others do not necessarily do so, in particular the fact that the fulfillment of human rights is "a necessary condition of the decency of a society's political institutions and of its legal order" (Ibid). For the decency of a society means that it is to be tolerated, and toleration probably does not refer exclusively to coercive interactions, as I have just shown. This raises the question if the first role of human rights has to be interpreted in light of the second or the second in light of the first.

Some scholars have chosen the former option, claiming that Rawls conceives human rights "as norms whose violation, if sufficiently extensive and persistent, generates an in-principle justification for forceful intervention by liberal and decent peoples" (Tasioulas 2007: 86).¹⁶ However, such an interpretation seems doubtful for several reasons. First, Rawls does not say that human rights violations generally justify coercive interventions (not even just "in principle", i.e., that an intervention is justified if it is likely to succeed, is proportional to the possible damages, etc.); he merely says that interventions are *not* justified if human rights are respected. This leaves the possibility open that there are human rights which may never be enforced by coercive intervention. Second, although Rawls's list of human rights is shorter than most lists, it is still too long for a list of those rights that could plausibly justify coercive interventions (even if only in principle). For example, it seems implausible that ensuring the freedom to practice a particular religion can justify a coercive intervention, or that Rawls would think so. Third, as the discussion of toleration has shown, Rawls repeatedly emphasizes that liberal societies may not even offer uncoercive incentives in order to become more liberal. Liberal societies have more demanding duties towards decent ones (i.e., those which fulfill conditions such as respecting human rights) than just to refrain from coercive interference; they must also recognize them "as equal participating members in good standing of the Society of Peoples" (Rawls 1999: 59). This suggests that non-respect for human rights by one society need

¹⁶ See also Nickel (2007: 101) and Raz (2010: 328).

not always justify the coercive interference by other societies, but may sometimes justify only softer reactions.

There is a third, more general question about how we should interpret the doctrine of human rights. It concerns the relation between Rawls's theory, which develops an idealized framework for its norms, and normative judgments about the actual international law and political practices. Can we derive from Rawls's theory clear statements about the norms of international law that we should support? If so, does Rawls's doctrine of human rights imply a critique of the currently recognized international legal human rights? Some commentators assume that it does and think Rawls would advocate limiting international legal human rights to the list of rights given in § 8.2.¹⁷ Against this view, David Reidy has argued that human rights in the Law of Peoples and human rights in actual international law are two different types of norms: the former are merely those "rights binding on states regardless of and prior to any consent they may or may not give [...]," whereas the latter rest, to a large part, on the consent of the states parties to international treaties (Reidy 2006: 173). In consequence, Reidy thinks that one can consistently both affirm Rawls's shortened conception of human rights and support the human rights practices which are based on the more expansive lists of human rights found in international documents (Reidy 2006: 174).

This argument, however, neglects the fact that international human rights law is embedded into political and social practices which go beyond the strict meaning of the law. Reidy emphasizes that no state is bound by an international human rights treaty if it has not voluntarily become a party to it. From a legal point of view this is clearly true (leaving aside the possibility that certain treaty norms may become customary international law over time).¹⁸ However, widespread political practices create at least informal pressure on many states to subscribe to and comply with these treaties regardless of their own will.¹⁹ For example, some states use human rights as a standard when making decisions about the distribution of development aid.²⁰ Furthermore, the wording of the treaties themselves suggests that they are to be understood as rules that all states have a *moral* duty to respect, above and beyond any legal obligation: the preamble of the International Covenant on Civil and Political Rights (ICCPR) affirms that states should "promote universal respect for, and observance of, human rights and freedoms". In political practice, international legal human rights are tied to a project, shared by a sizable part of state actors and pursued by varying kinds of uncoercive pressure, to establish them as universally applied standards.

¹⁷ For example Nickel (2007: 101f.); Buchanan (2013: 141f.).

¹⁸ While current customary international law may prohibit "gross and large-scale violations of basic human rights," as scholars such as Cassese (2005: 58) argue, it is not the case that all human rights from the UDHR or the two International Covenants are recognized as norms of customary international law.

¹⁹ Buchanan emphasizes this point when he argues that "the efficacy of international human rights law exceeds its legal reach" (2013: 26).

²⁰ There is intense debate about the extent and the effects of this practice. See, for example, Chenwi (2022), Nelson/Dorsey (2018), and Nielsen (2013).

As I have shown, Rawls rejects not only that societies try to impose liberal standards internationally by coercive means, but he also thinks that even uncoercive pressure to comply with liberal standards is incompatible with the respect owed to decent societies (Rawls 1999: 84) and condemns the idea “to shape all not yet liberal societies in a liberal direction” (Rawls 1999: 82). Thus, he cannot endorse the practices tied to current legal international human rights as well as some of their stipulations. His theory surely provides no determinate set of rules supposed to become new international law, but it does contain a critique of the existing law.

3. Justifications for Rawls’s List of Human Rights

This last result shows that Rawls’s shortened list of human rights challenges both established political practices and the convictions of many scholars. This makes it even more urgent to understand the reasons that Rawls provides for it. In particular, we need to understand how such reasons can be part of a political theory which takes as its starting point the perspective of a society that is committed to the equal political status of all human beings in a society. Furthermore, it is desirable to identify reasons which have a potential to be convincing even to those who do not yet share Rawls’s particular claims made in *The Law of Peoples*. At the face of it, Rawls’s reasoning sometimes seems to be heavily dependent on the framework and the concepts of his theory, so much so that it appears that central tenets are presupposed rather than argued for. Yet even aside from this challenge, it is difficult to understand Rawls’s argument for his list of human rights, since he provides different pieces of argumentation in various places, and it is not easy to see how they work together.

In trying to understand Rawls’s reasoning, I will examine the four different arguments that Allen Buchanan has identified (Buchanan 2006: 152ff.). These arguments each make a different critical point against the traditional list of human rights that is based on the equal political status of all citizens. These critical points are the following: 1) the list based on equal political status is “parochial,” being designed exclusively for liberal societies; 2) it violates the duty to tolerate associative social forms; 3) it goes beyond the requirements for social cooperation (which should define the content of human rights); 4) it justifies too many international interventions. Although these claims are clearly important for Rawls, I will argue that they are not sufficient to give a satisfactory account of Rawls’s reasoning. This is why I will go on to explore the role that Rawls’s claim about the value of collective self-determination might play in his reasoning. But first I will consider the four mentioned arguments.

1) After having introduced his list of human rights in § 8.2, Rawls states: “Human rights, as thus understood, cannot be rejected as peculiarly liberal or special to the Western tradition. They are not politically parochial.” This suggests that human rights might be “politically parochial” if they were liberal (i.e., if they included the rights possessed by citizens in a liberal democracy). But it is not completely clear what the charge of parochialism means.

Following the reference to “Western tradition”, one might think that Rawls regards a norm as parochial if it has hitherto only been accepted within a certain political tradition, e.g. in Western societies. Thus, Rawls would take it to be wrong to require societies to conform to norms which are not based on their own political tradition. However, this cannot be Rawls’s view because he thinks that all societies are required to respect human rights, regardless of their particular political traditions.

A more plausible interpretation of “parochialism” might be that it means to take a norm from one’s own political tradition to be appropriate for the rest of the world *without adequate critical reflection*. On this interpretation, it is indeed parochial for a member of a liberal society to simply *assume* that all societies should follow liberal principles. In contrast, it is not parochial to come to such a judgment through an examination of the relevant reasons (for example, of the importance of all involved interests of individuals and collectives). As a consequence, it is not easy to determine whether a liberal conception of human rights is parochial or not. Such a judgment requires an extensive debate in which the relevant reasons for and against this conception are considered; it is not sufficient to consult the political traditions of different societies. As a result, the charge of “parochialism” cannot have a grounding role in the reasoning for the list of human rights; it is at best the result of such a reasoning.

2) According to Rawls, the decent hierarchical societies which have to be tolerated internationally have a special social form that he calls “associationist.” As he explains, “the members of these societies are viewed in public life as members of different groups, and each group is represented in the legal system by a body in a decent consultation hierarchy” (Rawls 1999: 64). This has led Buchanan to conjecture that Rawls implies that in these societies “any characterization of the individual’s good is irreducibly social” (Buchanan 2006: 157). Thus, Rawls might be taken to argue that in associationist societies with their conception of an individual’s good, nonliberal political institutions are appropriate and that a list of human rights should reflect this fact.

However, this is probably not Rawls’s argument since he acknowledges that the political institutions in an associationist society constitute an “injustice” (Rawls 1999: 62). Such a society “does not treat its own members reasonably or justly as free and equal citizens” (Rawls 1999: 83). Liberal peoples merely have reasons to accept these societies as equal partners in the international realm *despite* this injustice, but they do not have reasons to acknowledge that their institutions are ultimately appropriate for them.

That being said, a further explanation of why associationist societies are worthy of toleration is needed. Rawls sometimes seems to circumvent such an explanation by appealing to the intuitive judgment of the reader about “whether a decent people, as given by the criteria, is to be tolerated and accepted as a member in good standing of the Society of Peoples” (Rawls 1999: 67). However, given that Rawls’s conception of international toleration is rather controversial among scholars, there does not seem to be any widely shared intuition on this

question. In contrast, an explanation might be given by the fact that associationist societies are instances of social cooperation.

3) Rawls makes a strong connection between human rights and social cooperation. He writes: “What have come to be called human rights are recognized as necessary conditions of any system of social cooperation. When they are regularly violated, we have command by force, a slave system, and no cooperation of any kind” (Rawls 1999: 68). According to Freeman, this is the crucial idea for understanding Rawls’s conception of human rights (Freeman 2007: 436). Social cooperation is highly important because it is central for our personal development, for the protection of our rights and for economic activity. Thus, it is understandable to secure it in the form of human rights. However, this argument does not explain why human rights should be *restricted* to the protection of social cooperation. It does not tell us why it would be bad to have a more comprehensive list of human rights than the list that is strictly necessary in order to protect social cooperation. The argument may play a role in explaining Rawls’s list, but it cannot be the whole explanation.

4) The last argument has already been discussed above. A number of scholars take Rawls to argue that human rights have a special role in the international order: if they are violated, forceful interventions into this society are in principle permissible. If human rights had this role, this would indeed provide a strong reason to limit them to a short list, given the serious consequences of international interventions. I have argued that this interpretation is probably wrong: despite the appearance, Rawls does not think that all human rights violations justify forceful intervention (even if only in principle) because in his view the related principle of toleration requires accepting other peoples as “member in good standing” of a Society of Peoples and not just refraining from coercing them.

To conclude, the arguments I have discussed are not sufficient to provide a satisfactory account of the reasoning that underlies Rawls’s list of human rights. Hence, there is good reason to search for additional elements in the text that can be used to reach a better understanding of this reasoning. In the following section I will explore the idea that Rawls’s reference to the value of collective self-determination is such an element.

4. The Argument from Self-Determination of Peoples

I want to arrive at an argument, based on the text, that establishes why liberal peoples ought to accept only Rawls’s list of human rights as part of the Law of Peoples, instead of accepting a more comprehensive list based on the equal political status of all human beings in a society. I take for granted the central tenets of Rawls’s approach: the principles of the Law of Peoples are decided in an original position in which peoples are represented, on the basis of the fundamental interests of peoples. These interests are “to protect their political independence and their free

culture with its civil liberties, to guarantee their security, territory, and the well-being of their citizens,” as well as a “proper self-respect of themselves as a people” (Rawls 1999: 34).

As I want to show, an argument that meets these conditions can be based on the idea of the value of the self-determination of peoples.²¹ Although Rawls does not explain this idea in detail, he refers to it in several passages. The first of these occurs in § 7.3 (repeated almost literally in § 15.4), which reads as follows:

It is surely, *ceteris paribus*, a good for individuals and associations to be attached to their particular culture and to take part in its common public and civic life. In this way political society is expressed and fulfilled. This is no small thing. It argues for preserving significant room for the idea of a people’s self-determination [...] (Rawls 1999: 60).

Based on this passage and on his general account of peoples, a sketch of Rawls’s argument for his list of human rights can be attempted. As he emphasizes, he conceives of peoples as having a “moral nature”. This means that they have a “firm attachment to a political (moral) conception of right and justice” (Rawls 1999: 24). Consequently it is among their fundamental interests “to protect their political independence and their free culture with its civil liberties, to guarantee their security, territory, and the well-being of their citizens” (Rawls 1999: 34). Moreover, “[b]eyond these interests, a liberal people tries to assure reasonable justice for all its citizens and for all peoples” (Rawls 1999: 29). In other words, a liberal people is not only committed to securing its own liberal democratic institutions; it also regards these institutions as valuable for all peoples and thus to propagate them beyond their borders.

Nevertheless, Rawls assumes that there is a competing value that liberal peoples should recognize, namely the attachment of a people to its culture (which encompasses its political practices and institutions). This means that it is *prima facie* valuable for a people to participate in the political practices of his society even if these are not based on the equal status of all citizens. If there is widespread attachment to such nonliberal practices in a people, then this people is self-determined if it can continue to follow its established practices without interference from the outside.

So in developing a stance towards other peoples, liberal peoples should consider both their commitment to liberal democratic institutions and the self-determination of these peoples. These considerations have to be weighed against each other. Rawls thinks that the attachment of a people to its political practices can be so weighty as to make respect for the self-determination of another people more important than to propagate liberal democratic institutions.

However, there is a clear limit to the weight that respect for a people’s self-determination can have. Since this respect rests on the assumption that it protects an important good of individuals of a people, it is not appropriate for a society whose political institutions do not protect the good of its members. Put differently, a people deserves only respect for its self-determination if it is a system of social cooperation. Rawls thinks that his list of human rights,

²¹ Although this line of argument has often not received the attention it deserves, its importance is recognized by Macedo (2004), Maffettone (2015: 548ff.) and Nickel (2007: 100).

in combination with the further criteria of decency, determines whether a society is such a system of social cooperation. Thus, a people only deserves respect for its self-determination if it protects the human rights (in Rawls's sense) of its members; so all peoples can be demanded to protect these rights.

Whether this argument is ultimately sound or not, it makes what the reasoning behind Rawls's list might be understandable. It explains how this list can be compatible with a general commitment to the equal status of all citizens. It does not appeal to idiosyncratic elements of his own theory, risking to make the reasoning circular. Instead, it appeals to a value that liberals can in principle consider, i.e. the attachment of individuals to their own political culture, which is postulated as constituting part of their good. Indeed, Joshua Cohen has argued, similarly to Rawls, that "the value of political self-determination itself recommends resistance to the idea that every political society has to meet the requirements of equal basic liberties" (Cohen 2006: 234).

To be sure, the value of self-determination, as presented by Rawls, is still controversial, and Rawls does not make much effort to explicitly back up his claim about it. Yet it might be justified by reference to his general conception of the agency of peoples that is fundamental to his approach. As Rawls emphasizes, he conceives of liberal democratic and decent peoples as agents in their own right (Rawls 1999: 23).²² As such, they have fundamental interests with some moral weight, among which there are the protection of their "political independence" and their "receiving from other peoples a proper respect and recognition of their equality" (Rawls 1999: 34f.). Any sort of agency is only effective if the agent has a certain realm in which she can freely pursue her aims. Thus, the value of self-determination is already implicit in Rawls's conception of peoples.

Alternatively, the value of collective self-determination has been defended on the basis of the good of the members of a group in a variety of ways. Different scholars have argued that self-determination is valuable for the members of a group if they share the commitment to their political cooperation and accordingly to certain political ideals and institutions.²³ Since Rawls assumes that the members of decent hierarchical peoples are committed to their political institutions, an argument along these lines provides further support for his position.

5. Challenges for the Argument

Even if the argument from self-determination can provide a justification for Rawls's list of human rights with a certain plausibility, it is not beyond criticism. In particular, I will highlight three difficulties with Rawls's argument.

²² See Pettit (2006).

²³ For example, Levitov (2015: 8ff.), McMahan (1996: 9ff.), and Stilz (2016: 109ff.).

These difficulties are again connected to the issue of coercion. The first one concerns the very meaning of the notion of self-determination of peoples. Usually this notion is understood as a claim to be free from coercive interference. For example, in international law, self-determination is associated with claims to statehood or to political autonomy. These claims include that other states should not coercively interfere into the political processes of the people, but they neither include nor entail such far-reaching claims as the prohibition of offering incentives in order to encourage internal change.²⁴ Scholars who discuss self-determination of peoples from the perspective of political philosophy most often take this meaning of the term for granted. For example, Daniel Philpott defends the claim that “self-determining peoples should be emancipated from outside control” (Philpott 1995: 352).²⁵

In contrast, Rawls needs to associate the term with more demanding claims. As we have seen, Rawls insists that the duties of liberal peoples towards others go beyond refraining from coercive interferences. Since the notion of self-determination is supposed to justify this claim, he must hold that the self-determination of a people is violated already when it is confronted with soft forms of international pressure to make its political institutions more liberal, such as being offered incentives.

As a consequence, the bar for the justification of Rawls’s claim about the value of self-determination raises considerably. The claim that peoples that fulfill certain standards should be free from coercive interference of others may enjoy wide support, but Rawls needs to defend a far more controversial claim: peoples that fulfill these standards should not even be confronted with certain forms of non-coercive pressure to adopt higher standards; in particular, other peoples should not create the impression that they are required to adopt these higher standards.

The difference between these two claims is sometimes neglected, both by Rawls himself and by those who defend his argument. Rawls justifies his position by stating that “[d]ecent societies should have the opportunity to decide their future for themselves” (Rawls 1999: 85). This claim is echoed by Macedo when he argues that “[c]itizens of countries that are capable of decently conducting their own affairs do not want to be deprived of their political independence” (Macedo 2004: 1730). In these statements, the references to decision-making power and to political independence understate the claim that is needed in order to support Rawls’s position.

A second difficulty with the argument concerns the status of the norms of the Law of Peoples, as compared to the status of the norms of actual international law. The way in which Rawls describes the norms of the Law of Peoples seems to leave no place for the role that

²⁴ According to Cassese (1995: 319), the principle of self-determination has been recognized in international law mainly as a norm against colonialism, as a ban on foreign military occupation and as a standard requiring that racial groups be given full access to government.

²⁵ See also, among others, Archibugi (2003: 493), Jones (2018: 453), and Stilz (2016: 99). Banai (2015: 31) interprets self-determination quite differently, emphasizing the requirement of domestic inclusiveness of political power, which entails in her view that the larger public should not be deprived of economic opportunities. A discussion of this view would be beyond the topic of this chapter; however, such a view is likely to legitimize more international interference into the political and economic affairs of states.

human rights play in current politics. As has already been argued, Rawls often presupposes that all norms which certain societies try to establish in the international sphere are coercive. For example, he states that “[l]iberal peoples must try to encourage decent peoples and not frustrate their vitality by coercively insisting that all societies be liberal” (Rawls 1999: 62). Norms which are based on the Law of Peoples generally justify intervention into societies; any other interaction in support of norms without intervention can only originate from private citizens: “In political liberalism we must distinguish between, first, the political case for intervention based on the public reason of the Law of Peoples and, second, the moral and religious case based on citizens’ comprehensive doctrines” (Rawls 1999: 84).

However, the system of international legal human rights, as it has evolved since 1945, falls in between these two categories. On the one hand, it rests on the support of states and clearly expresses their official view that these rights should be universally recognized, as is apparent, for example, from the reference to the “equal and inalienable rights of all members of the human family” in the preamble of the ICCPR. On the other hand, human rights are generally conceived as not being enforceable against a state by coercive action of the international community. Exceptions to this rule only concern the gravest human rights violations, not violations of those human rights that Rawls (partly) rejects, such as the prohibition of discrimination or freedom of speech.²⁶

So it seems that Rawls’s framework does not even offer the possibility to give a correct description of international legal human rights in their current form. Due to this defect, Rawls tends to interpret them in a way which is biased against them. This problem is repeated by Freeman when he asks rhetorically: “Is it reasonable to expect well-ordered decent societies to conform to all the liberal egalitarian norms of constitutional democracy as a condition of peaceable co-existence and cooperation with them [...]?” (Freeman 2007: 431). This rhetorical question attacks a straw man, since neither the international practice nor Rawls’s prominent critics regard the violation of liberal human rights as a reason to go to war; thus neither understands these rights “as a condition of peaceable co-existence”.

The final difficulty with Rawls’s argument concerns the way in which it balances conflicting values. First of all, it is important to see that the argument fundamentally rests on the balancing of different considerations, not on the simple subordination of a case under a principle.²⁷ In particular, the argument balances the attachment of citizens to their political culture against the commitment of liberal peoples to their view of justice. However, following the logic of this argument, it is necessary to spell out more explicitly the two sides of the

²⁶ Under Chapter VII of the UN Charter, the UN Security Council may enact economic sanctions and the use of force in the case of “threat to the peace, breach of the peace, or act of aggression.” This rule has been interpreted to cover interventions with the aim of ending an “existing or potential humanitarian catastrophe”, cf. Zifcak (2010: 508). Beyond this rule, the Responsibility to Protect doctrine, whose legal status is still disputed, legitimizes military interventions as a last resort when a state manifestly fails to protect its population against genocide, war crimes, ethnic cleansing, and crimes against humanity. For a defense of the doctrine, see Evans (2008).

²⁷ Maffettone (2015) argues forcefully for this point.

balance: the goods that are at stake and the extent to which they are promoted or endangered by a decision.

On one side, counting in favor of Rawls's shortened list of human rights, is the fact that the members of decent peoples are "attached to their particular culture" (Rawls 1999: 61).²⁸ This also holds for minorities which do not enjoy a fully equal political status. According to Rawls, it is realistic to assume that there can be societies in which such minorities are "loyal subjects of society" (Rawls 1999: 76). Rawls also tells us that a requirement to be liberal "may wound the self-respect of decent nonliberal peoples as peoples, as well as their individual members, and may lead to great bitterness and resentment" (Rawls 1999: 61). These statements express empirical assumptions which may be debatable, but I will accept them for the sake of argument and thus acknowledge that the attachment of persons to their political culture may ground a claim to self-determination of a society. However, Rawls seems to overstate the extent to which self-determination is endangered by a more expansive list of human rights. As already discussed, it is misleading to conceptualize the human rights in question as coercive norms. In actual practice, violations of these rights lead at best to a limited amount of pressure on the state by other states or international organizations. The society retains the factual possibility to continue its policies and thus to be self-determined. This fact is somewhat obscured by Maffettone when he argues that liberal societies, out of concern for their self-determination, would not prescribe, as a principle of the Law of Peoples, the basic constitutional liberties that are covered by the first principle of justice as fairness. He writes: "If they did, the way in which these rights are implemented, the interpretation of their concrete meaning and how they are entrenched in the domestic constitution of a liberal people, would all be turned into matters of international concern and partially removed from the democratic process of each liberal people" (Maffettone 2015: 549). He is right insofar as other states would indeed be concerned with the interpretation of these rights, but it is important to emphasize that each state can retain effective control over their implementation on its territory.²⁹

On the other side of the balance, there is the commitment of a liberal society to the principles of justice that it affirms. According to Rawls, this means that a liberal society does not only want to protect its own liberal institutions, but also tries to ensure these institutions for others. However, it is difficult to say how strong the commitment to ensure justice for other peoples is. Presumably it has a lower priority than the commitment to its own institutions and thus may be outweighed more easily by other considerations. Yet we should also consider the commitment to protect one's own liberal institutions. Liberal institutions may be threatened

²⁸ One can make the case, as does Maffettone (2015: 546ff.), that an argument from self-determination applies already to the first stage of the original position in which only liberal societies are represented. However, I have followed the argument as presented by Rawls, which is situated at the second stage.

²⁹ To be sure, international courts such as the European Court of Human Rights may interfere in domestic democratic processes. However, not all states are subject to the jurisdiction of such a regional human rights court, and it is a further question, not to be discussed here, whether the acceptance of human rights should necessarily be accompanied by the judicial oversight of such a court. Furthermore, when such a court is confronted with a state's refusal to implement its decision, the court's powers remain limited.

from the inside of the society when anti-liberal forces come to power in democratic procedures. Although the main defense against this threat must surely come from agents within the society, a liberal society might well decide that a measure of outside pressure would be helpful in such a situation and preemptively agree to a certain international oversight over its liberal norms. Maffettone objects against this reasoning that it mixes considerations of ideal and non-ideal theory in a way that Rawls's theory does not permit (Maffettone 2015: 547). However, one should note that the reasoning assumes that the liberal peoples which choose a principle are fully committed to comply with it; they aim at protecting themselves against a potential and foreseeable harm. Thus, it is less clear that the reasoning makes use of considerations which have to be treated in non-ideal theory.

In sum, the balance of considerations appears to be less clearly in favor of Rawls's shortened list of human rights than Rawls affirms. Indeed, one might well argue that the balance is now in favor of a more expansive list of rights, based on the idea of the equal political status of all members of a society: the extent to which this more expansive set of rights endangers interests of peoples is rather small because the rights may usually not be enforced internationally in a coercive way, whereas liberal societies may have a reason to protect their institutions against dangers from within. However, it is difficult to compare the elements on both sides of the balance. Thus, it is hard to argue that the reasons for the more expansive set of human rights *must* be weightier. Yet it is at least equally hard to argue that the reasons for Rawls's list *must* be weightier. As a result, the argument shows at best that it is not unreasonable to draw the balance in the way that Rawls does, but fails to establish that it is unreasonable to support a more demanding list of human rights than Rawls's list.

6. Conclusion

I have argued that Rawls's text contains conflicting accounts of the coerciveness of the norms of the Law of Peoples, in particular of human rights. Resolving these tensions is necessary for getting a clear picture of his arguments. I have also argued that there is evidence to prefer the view that some requirements of the Law of Peoples, among which there are certain human rights, are not coercive norms in the international realm. However, this has serious implications for the interpretation of concepts such as the self-determination of peoples and for the evaluation of Rawls's argument. As a consequence, the balance of considerations on which this argument rests might well shift, making Rawls's case against certain human rights weaker than a number of scholars think.

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