

HUMAN RIGHTS IN A WELL-ORDERED SOCIETY

While laying the philosophical groundwork for a global political order in his book, *The Law of Peoples (LoP)*, John Rawls insists that the concept of ‘human rights’ must be constrained in many ways that may seem counterintuitive to those who ascribe to his previous theories in political and moral philosophy. The society of peoples that Rawls defines is composed of two types of “well-ordered peoples”: liberal societies and decent peoples. In his rendition of political liberalism, Rawls is famous for his theory of justice that incorporates many fundamental constraints on society for the purpose of *justice as fairness*; but some of these are missing as mandatory standards for what Rawls deems decent peoples in *LoP*. These standards are notably missing when he delineates an account of human rights that is binding on all peoples. That these standards are not required allows for decent peoples to have the same international political status as liberal peoples in the society of peoples. The decent peoples are thereby allowed into the second original position, in which the Law of Peoples is formulated by representatives of the constituent peoples.

Many political philosophers have taken issue with Rawls’s abandonment of liberal principles on the international level, arguing that the scope of human rights at this level must be broader; others have defended Rawls. I will argue that the Rawlsian view of international justice is too lenient on decent societies inasmuch as these societies fail to meet some of the human rights that are found in liberal societies.

I. THE BASIC RAWLSIAN FRAMEWORK AND HUMAN RIGHTS

Rawls’s society of peoples includes certain peoples in a second-original position, wherein representatives of the various peoples engage in a sort of reflective equilibrium in determining international relations. Roughly stated, there are four main types of peoples:

well-ordered peoples, outlaw states, societies burdened by unfavorable conditions, and benevolent absolutisms. Among well-ordered peoples, there are two types: *reasonable liberal peoples* and *decent peoples*. These are the two main peoples of consideration when we confront the issue of human rights, although I may mention outlaw states and benevolent absolutisms in a few instances. Liberal peoples maintain an internal political structure very much in line with political liberalism, although they might not be ideally liberal. Decent peoples are those that are not liberal, but have a structure that allows them to be included in the second original position. Outlaw states are states that fail to be well-ordered because of two conditions: either (1) they are aggressive toward other peoples, or (2) they consistently violate human rights. Benevolent absolutisms are non-aggressive states that honor human rights, but fail to give their citizens any political role.

Rawls maintains that decent peoples can be included in the society of peoples in spite of the fact that they are not fully just according to the liberal conception. He lists two main criteria for a people to be a *decent hierarchical society*. The first deals with its basic international relations: the society must not be aggressive, and must attain its ends through peaceful means (diplomacy, trade etc.). The second relates to domestic policy, and is composed of three conditions: (a) the society must respect human rights; (b) the society's legal system must impose *bona fide* moral duties and obligations on all members of the society; and (c) there must be a sincere and reasonable belief by officials in the legal system that the law is guided by a common good idea of justice. In addition to providing a necessary condition for being a decent hierarchical society, human rights also establish the grounds for legitimacy in intervening in another people's or state's affairs, either militarily, economically, or diplomatically. The greater the degree of violation of human rights, the more drastic the intervention may be. The main issue, however, is what

the human rights actually are.

Among human rights, he explicitly defines these: the right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property; and to formal equality as expressed by the rules of natural justice (similar cases are to be treated similarly).¹ In section 10.2, Rawls expands this set to articles 3 to 18 of the Universal Declaration of Human Rights of 1948.² Noticeably missing are articles 1 and 2, and several others. Article 1 establishes the freedom and equality of all humans, while Article 2 prohibits discrimination. Article 19 declares the right of freedom of opinion and expression, including the dissemination of information through any form of media. Article 20 declares the right to freedom of peaceful assembly and association, and strictly disallows being compelled to belong to any particular association. Article 21 declares the right to democratic processes (either direct or representative), the right of equal access to public service, and the right of universal suffrage.

Because these (and others) are not included in Rawls's list of human rights, we can infer that decent societies have several allowances regarding their internal political structure. For instance, humans needn't be viewed as free and equal in dignity and rights. Decent peoples may disallow democratic processes; they may discriminate against any particular group (such as racial minorities, religious minorities, women, or homosexuals).

Despite the relative 'freedom' of domestic political structure allowed of societies to be considered decent, they are restricted in certain ways that are in need of attention. Decent peoples, in order to be deemed as such, must also ensure a *common good idea of*

¹ John Rawls, *The Law of Peoples*, Cambridge, MA: Harvard University Press, 1999, pp. 64-66.

² Rawls, *The Law of Peoples*, p. 80.

justice. The main condition of this idea of justice is that decent societies must maintain a decent consultation hierarchy with an established procedure of consultation in political affairs: persons belong to groups that are “represented by a body in the consultation hierarchy”; persons engage in “distinctive activities” and play “a certain role in the overall scheme of cooperation.”³ In addition, persons must be able to dissent (although not necessarily by peaceful assembly), judges must be willing to address objections that may arise, and the judges must provide a public explanation for their decision.

Liberal peoples might see the rights denied to citizens of decent societies as unjust, and therefore argue that decent societies are ineligible for membership in the society of peoples, but Rawls issues an argument to hold that the liberal conception of human rights should not be required for membership in the society of peoples. The next sections will deal with various approaches to this claim.

II. HANDLING PAROCHIALISM

Allen Buchanan has a specific criticism regarding Rawls’s desire to avoid parochialism in determining human rights. I will show how Buchanan questions Rawls’s minimal list and also strengthen the challenge that he offers. Before this, we should give an adequate assessment of what Rawls’s justification of his minimalist account of human rights:

[Human rights] do not depend on any particular comprehensive religious doctrine or philosophical doctrine of human nature. The Law of Peoples does not say, for example, that human beings are moral persons and have equal moral worth in the eyes of God; or that they have certain moral and intellectual powers that entitle them to these rights. To argue in these ways would involve religious or philosophical doctrines that many decent hierarchical peoples might reject as liberal or democratic, or as in some way distinctive of Western political tradition and prejudicial to other cultures.⁴

So it is necessary for any account of human rights to avoid any particular comprehensive doctrine of human nature in order to avoid being parochial.

³ Rawls, *The Law of Peoples*, pp. 71-72.

⁴ Rawls, *The Law of Peoples*, p. 68.

The objection to this argument is that it is not entirely clear that most of the more robust theories of human rights involve a comprehensive doctrine of human nature, despite Rawls's insistence that they do. As Buchanan points out, many theories of human rights point to specific interests and capabilities that humans have in common, but these theories do not provide the necessary *and sufficient* conditions for a fulfilled human life. Instead, there are interests that must be met "if a human being is to have the opportunity to live a *decent* or *minimally good* human life."⁵ Here I would emphasize the word 'opportunity': these shared interests simply offer *necessary conditions for the possibility of a fulfilled life* – they do not define what a fulfilled life is. So there is reason to believe that the more robust theories of human rights do not rely on a comprehensive doctrine of human nature.

Buchanan suggests that Rawls's objection to this point would be that such theories *are* comprehensive because we can understand *comprehensive conceptions* by contrasting them with *political* ones. Political conceptions apply only in the realm of "public principles of justice for the regulation of the basic structure of a society."⁶

Comprehensive considerations involve a wider range, such as "what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole."⁷ Rawls would argue that because the necessary conditions for the possibility of a fulfilled life go beyond the scope of the principles of justice for the regulation of the basic structure of society, they constitute a comprehensive conception.

Buchanan's response to Rawls's objection is rather simple. He admits that some

⁵ Buchanan, "Taking the Human out of Human Rights," *Rawls's Law of Peoples: A Realistic Utopia?*, Malden, MA: Blackwell Publishing, 2006, p. 153.

⁶ Buchanan, p. 152.

⁷ Rawls, *Political Liberalism*, New York, NY: Columbia University Press, 1993, p.13.

of the more robust theories of human rights do involve rights that, because they are grounded in human interests, have implications beyond the political realm; but he simply denies that any implications regarding a “comprehensive doctrine” can be derived from this fact. “Why should the mere fact that a theory of human rights has some implications beyond the political realm make it parochial?”⁸

Although I think Buchanan has an important point here, there are two ways of criticizing Rawls *without* necessarily denying his suspicion or definition of comprehensive doctrines. First, the additional necessary conditions might be simply as generic as the ones that Rawls includes; and if the rights that Rawls includes are not “comprehensive”, then other additional rights that are the same in type are not comprehensive either. For instance, assurance of the equal rights of women or the right to moderately democratic political processes do not seem to firmly establish “what is of value in a human life” or the “ideals of personal character” any more than the right to have personal property (a right that Rawls has included in his minimalist conception). Indeed, according to Lockean thought, the right to property is derived from more fundamental rights of personal freedom and equality with others.⁹ Do these establish what Rawls finds parochial? The establishment of comprehensive values or ideals might occur if the society *forces* people to vote or *forces* women to exercise their equal rights, but this would be to establish civic obligations as opposed to rights. Advocates of Rawls must establish a clear moral difference between, say, the right to religious freedom and the right to democratic representation; and this difference must be a difference in *kind*, not in *degree*. If the difference is only a matter of degree, then we have at best two different rights such that

⁸ Buchanan, p. 154.

⁹ Of course, it is important to recognize that the Lockean justification for the right to property is not necessarily the justification of the right to property that Rawls might endorse

respective violations only merit different degrees of intervention; we do not have one right such that violation merits intervention, and another such that violation merits no intervention. And we certainly do not have a strong case for making one a condition for being a decent hierarchical society, but not the other.

The second problem for Rawls's account of comprehensive doctrines is that Rawls himself suggests that liberal societies *do not* have a comprehensive doctrine of human nature; and he offers a satisfactory reason for believing that they don't, despite the robust view of human rights endorsed by liberal societies. This can be understood by taking into account Rawls's notion of a comprehensive conception of the good:

The [first] original position denied to the representatives of citizens any knowledge of the citizens' comprehensive conceptions of the good. That restriction called for a careful justification. There is also a serious question in the [the second original position]. Why do we suppose that the representatives of liberal peoples ignore any knowledge of the people's comprehensive conceptions of the good? The answer is that a liberal society with a constitutional regime does not, *as a liberal society*, have a comprehensive conception of the good. *Only citizens and associations within the civic society in the domestic case have such a conception.*¹⁰ [final emphasis added]

I should note that Rawls uses the term 'comprehensive conception of the good,' which may be different from the term 'comprehensive doctrine of human nature.' However, if they are more-or-less the same or the former is derived from the latter, then a liberal society does not have a comprehensive doctrine of human nature. Is this an appropriate analysis? Given that the citizens and associations within the society are free to shape their lives in accordance with their own conception of the good, it would seem that this conception could only be based on their own doctrine of "what is of value in human life", or "ideals of personal (or associational) character": in other words, a comprehensive doctrine of human nature. So it follows that a comprehensive doctrine of human nature is something to be freely and individually determined by the members or associations of a liberal society, not the society itself. If this is the case, then a liberal society does not have

¹⁰ Rawls, *The Law of Peoples*, p. 34.

a comprehensive doctrine of human nature, and requiring a more robust view of human rights for membership in the society of peoples is no more problematic than requiring the narrower view.

I am willing to consider that Rawls may have a defense to this criticism: perhaps I am distorting his view of a comprehensive conception of the good. But there is prima facie evidence that suggests that my interpretation is accurate; and his advocates certainly bear the burden of proof in either differentiating a conception of the good from a doctrine of human nature, or in showing that a comprehensive conception of the good is not derived from a comprehensive doctrine of human nature. If they cannot this, then the liberal view of human rights does not count as a comprehensive view of human nature, and is not thereby parochial.

III. REIDY'S DEFENSE

David Reidy attempts to offer a sympathetic explication of what Rawls means by “human rights” and a more plausible account of Rawls’s position. I find Reidy’s attempt to be flawed in a number of ways. I will present and criticize three arguments that he puts forward in his defense of Rawls.

i. The “Common Good” Argument

The first argument Reidy puts forward relates to a “common good” within a decent society, and argues that this may be an appropriate standard for non-liberal yet decent peoples. Decent peoples

[M]ay organize themselves around various group memberships and affirm a “common good” rather than a liberal conception of justice. Accordingly, they may not find congenial a liberal jurisprudence of rights belonging to individuals simply as individuals or citizens and functioning as “trumps” over competing claims tied to the common good.¹¹

What is this conception of a “common good” that Reidy is concerned with? Of course, in

¹¹ David Reidy, “Political Authority and Human Rights,” in Martin and Reidy (eds.), *Rawls’s Law of Peoples: A Realistic Utopia?*, Malden, MA: Blackwell Publishing, 2006, p. 176.

liberal societies, the common good is not the main goal of political order – some rights do “trump” an overall gain in utility (i.e., the rights derived from the difference principle).

Reidy contrasts what a common good can be in a decent society with the good will of a benevolent absolutism. The difference is that the ruler of a benevolent absolutism honors rights on the basis of her own good will, not by the notion of a common good for the members of the state. However, a decent society allows certain methods of dissent from the political order, dissent that citizens can do publicly, legally, and in a way that is institutionally recognized. Dissenters may

insist on the content of their basic human rights. They can criticize or dissent from violations or failures to deliver that content. They can demand a public justification. And so on.¹²

What Reidy fails to mention is that the criticism or dissent need not lead to change despite its apparent injustice, and that the “public justification” may be in accordance with a discriminatory practice – and these are perfectly acceptable for societies that may count as decent. For instance, a decent society ruled by-and-large by a particular Islamic coalition may have discriminatory practices against women, perhaps denying them financial aid for a university education. When the women dissent, the political authorities may simply say that the policy is in line with their conception of justice, which views women as undeserving of government subsidy for religious reasons XYZ.

What more can the women say? They have been heard, and their dissent has been considered within a sexist framework. Of course the justification of a given policy must be “faithful to the content of basic human rights,” but with such a minimalist list in place, denying women certain rights or services is no violation. A decent consultation hierarchy, regardless of the consultation involved, can still maintain discriminatory practices in line with its notion of “common good,” even if it displeases the minority group; and this may

¹² Reidy, p. 177.

continue indefinitely while the society enjoys its standing as an equal member in the society of peoples. Making this implication explicit serves to show how injustices can remain in decent societies, and puts Rawls and Reidy in troubling position.

ii. Overlapping Consensus

Reidy's second argument maintains that human rights are to be determined by an overlapping consensus of various peoples. He determines the overlapping consensus by inquiring

firstly, into what liberal democratic peoples from an appropriate moral point of view would reasonably affirm between themselves regarding basic human rights, and then inquiring, secondly, into whether, should any exist, other apparently decent peoples – Islamic, Confucianist, perhaps some form of nondemocratic and nonliberal socialist, and so on – could also reasonably affirm those same commitments from their own moral points of view without manipulation, coercion and so on.¹³

Thus we have a form of reciprocity between decent and liberal societies in determining what human rights we should include. But the important point is that a decent society, in order to be deemed decent, must uphold human rights. If they uphold the human rights that they have simply selected amongst the 'offerings' of liberal societies, we are clearly begging the question regarding the legitimacy of any exclusions.

Reidy's point here may be a little more manageable, however. He might say that we have prima facie reasons to assume that some societies would be decent, and can see what overlap they have with ours. So, we have, to some degree, a preconceived notion of what a decent society would most likely be, and then we can see what they hold as human rights. Perhaps this is what Rawls intends to show with his imaginary example of Kazanistan in *LoP*.¹⁴ But this argument is hardly going to satisfy those with a wider conception human rights. When these critics look at such societies, they might say, "well, of course these societies are better than outlaw states or benevolent absolutisms, but why

¹³ Reidy, p. 178.

¹⁴ Rawls, *The Law of Peoples*, pp. 75-78.

on earth should we give them *equal* status when there are so many injustices in their society?” The argument has little or no force with those that disagree with Rawls and Reidy about justice, and they would deem this as merely making concessions to less-than-liberal societies.

In this vein, Reidy has another argument against critics’ claims that Rawls is making “concessions” to less-than-liberal societies. Many claim that Rawls’s desire to avoid parochialism makes him too tolerant, but Reidy argues against such a point. “Rawls gives every impression of believing that his conception of basic human rights is the conception that would be morally appropriate even in a world of only liberal democratic peoples.”¹⁵ But this claim is subject to a challenging thought experiment. Imagine that the entire world is full of liberal societies, and none else. What would happen if, for some reason, through a democratic political process, one society reinstates discriminatory practices against, say, Hispanic citizens? Although the society is now merely “decent,” it still maintains its full status within the society of peoples. According to Rawls, other societies should be content with this, and maintain the same relations with the deviant society. Something sounds displeasing about this scenario. If so, it suggests that Rawls *is* in fact making concessions to decent peoples in order to expand his society of peoples, not merely finding overlap between liberal societies and some theoretical “decent society” to get at an understanding of what human rights should be.

iii. Historical Implications

Reidy’s third argument is initially an attempt at a *reductio*. He considers the inclusion of certain rights in the list that I have mentioned. For example, let’s take universal suffrage. States that do not fulfill universal suffrage would be denied equal standing within the

¹⁵ Reidy, p. 178.

international moral order. He considers the historical implications of this view. “At the end of the nineteenth century, then, England and the United States would have had no right against coercive or forceful intervention, diplomatic, economic, perhaps even military, by other states keen to see that women got the right to vote.”¹⁶ Because we have reason to believe that the United States *was* entitled to self-determination without intervention at this time, it follows that universal suffrage is not a human right for the society of peoples.

There are two serious objections to this argument. The first is that lack of the ability to intervene does not imply the theoretical impermissibility of intervention. In line with our example, we should keep in mind that the end of the nineteenth century had no international moral order; rather, it was an international system run on balance-of-power politics. The system remained largely Hobbesian until after World War I, and even after that it was still by-and-large anarchic. The United States was able to exercise self-determination because and only because no other peoples, or a society of peoples, could have seriously intervened. So, although we might be committed to the view that other nations might have been morally justified in intervening, it serves little purpose to imagine this happening, since no powerful governing body existed to enforce such rights.

Second, there are obvious cases that make intervention permissible, but Reidy's reasoning might not lead us to conclusions that allow this. For instance, only fifty years before the end of the 19th century, the United States allowed slavery in many parts of the country. If Reidy would not want to allow intervention against the United States because of a mere violation of universal suffrage, what might he say regarding slavery? Even within the Rawlsian conception of human rights, England would have been justified in

¹⁶ Reidy, p. 179.

intervening with US affairs in the name of abolition. Did England have the right to do so? If so, then we seem to be at a loss to say what it is that makes intervention permissible here, but not in the case of universal suffrage. If not, then we might have to exclude the right to be free from slavery and forced servitude as a fundamental human right. I suspect that the reason that allowances of intervention in these cases sound strange is because there was no real possibility of international order or justice at the time, not because intervention was really inappropriate.

IV. CONCLUSION

Rawls and Reidy, despite attempts to account for differences among people, provide a much too lenient account of human rights. Although some elements of the Universal Declaration of Human Rights may be a bit demanding, and perhaps parochial, it is far from adequately shown that the fundamental and primary articles and their immediate corollaries are such. The UDHR remains a primary document that, at its minimum, gives an idea of how the most basic human rights should be formulated: they should be in accordance with respect for individuals as equal, moral beings.

With that in mind, there is something to be said for decent peoples, even if they do not meet up with the standards of the robust view of human rights. They are ordered in a way that does not demand the type of intervention that would be expected for, say, a tyrannical state that routinely participates in the morally repugnant actions that we have seen in our time. There is definitely room to say that decent peoples deserve some standing, or that intervention regarding discriminatory practices or non-democratic political processes might be less severe as opposed to intervention in societies with no consultation process. Indeed, the governing bodies established by a society of peoples (entities akin to, but with more power than the World Court or the UN Security Council)

may look at policies or governments on a case-by-case basis, determining the appropriate measures of intervention in relation to the severity of the violation. Furthermore, intervention needn't always be military; in fact, that should be a last resort given the nature of war, and only occur under the gravest of violations (say, genocide, mass torture etc.). Despite a continual record of disappointments, the last fifty years have shown that diligent diplomatic and economic measures can be successful in ensuring human rights. This would be much more assuredly so if a genuine society of peoples in a second original position established rules for international relations in a fair and just way.