

# Sovereign Justice

Global Justice in a World of Nations

Edited by

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and Regina Queiroz

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## Introduction

This volume collects papers presented at the conference on *Global Justice and the Nation State*, held in Lisbon in November 2008 with the support of the Portuguese Foundation for Science and Technology. The conference was part of a larger research project, still in progress, which tries to consider the idea of global justice against the background of the recent rise of transnational terrorism. It aimed chiefly at pondering on the challenge that thinking about “justice beyond borders”, as Simon Caney calls it, represents to the existing international order.

Bibliography about this matter has been increasing over the last 20 years. Until the end of the 1980s politicians, theorists and scholars thought of global justice as if it were an exclusively moral issue. For instance, *A Theory of Justice* (1971), the most famous work of John Rawls, does not discuss the question of a fair international distribution of the world's wealth, assuming instead that the principles of justice are developed just for a more or less closed space, in which social cooperation is feasible and can be implemented. Between states the author endorsed, at best, a respectful relationship, regardless of their regimes. So, when the Cold War ended and the countries living under the communist political influence became once again independent nations, Rawls' book, linking nationalism and justice, seemed to present a very suitable theory.

However, by that time, globalization was already increasing, not only because of the new technologies, which made possible a free and fast communication among the people of all countries, but also because of a deeper awareness of several global problems whose solution was impossible to achieve only at a national level. In a word, we were facing global challenges and owning new means to face them. So, the idea of a cosmopolitan government might seem, at least to some people, as feasible as the international trade of agricultural goods, technology and knowledge. Despite the rebirth of the old nationalist feelings in Eastern Europe after the end of proletarian internationalism, the cosmopolitan idea was reborn as well, both in Political Theory and in common political discourse. When the upsurge of nationalisms started sparking new conflicts – such as the wars in the Balkans after the disintegration of Yugoslavia – people looked at the United Nations, for the first time in their history, not only as an international forum with moral authority, but also as a kind of legal and

## Rawls' *via media*: Between Realism and Utopianism

Paulo Tunhas<sup>1</sup>

I begin with a very general remark on the topic of relations, from a metaphysical point of view. Its significance to what I intend to say will be, I hope, clear in a moment. According to the Australian philosopher David Malet Armstrong, "Two or more particulars are *externally* related if and only if there are no properties of the particulars which logically necessitate that the relation, or any relation which is part of the relation, holds"; and "Two or more particulars are *internally* related if and only if there exist properties of the particulars which logically necessitate that the relation holds"; Armstrong also speaks of "mixed relations", "partially internal and partially external" (Armstrong, 1980, II, p. 85; see also Tunhas, 2009).

When reading textbooks on international relations, such as *Contending Theories of International Relations*, by Dougherty and Pfaltzgraff (Dougherty and Pfaltzgraff Jr., 2001), it is easy to see that the problem of contingency and the modalities of the integration of contingency in a stable system lie at the heart of international relations theory.

Irrespective of the schools of thought – realist, neorealist, utopian, neoliberal (see Keohane, 1986; Baldwin, 1993; Spegele, 1996) –, the main concern seems to be double: to determine the most relevant factors of instability; and to find the best way of eradicating them, by their integration in a comprehensive order. In other words, to prevent the transformation of contingency into risk and of risk into disorder, by adopting the most efficient stabilizing mechanism.

Stability also means equilibrium. And it is not difficult to find here, in a different context, certain ideas that belong to Talcott Parsons's structural functionalism (Parsons, 1991) and to Niklas Luhmann's systemic approach to societies (Luhmann, 1995).

Realism, namely in Morgenthau's version (Morgenthau, [1948] 1973), postulating, as Hobbes had done, anarchy at the foundation of international relations, sees in the balance of power the process of obtaining a precarious but reasonably effective stability. The organizing principle

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<sup>1</sup> This investigation was supported by a scholarship granted by the Fundação para a Ciência e a Tecnologia.

seems to be here a principle of *accommodation* of contingency. This principle draws its legitimacy from the assumption of the externality reigning in the relations between the individuals, the unities, that states are, and from the power relations established among them. Various particulars are *externally* related; there are no properties of the particulars which logically necessitate that an internal relation holds between those particulars. This doctrine lies at the core of the scepticism Charles R. Beitz determined as essential to classical realism of Morgenthau's or Keenan's type (Beitz, [1979] 1999, pp. 185 ff).

Utopianism – “the legalistic-moralistic approach”, to use George Keenan's phrase (Keenan, [1951] 1984, p. 95) –, in its turn, shares the same assumption of a reigning externality between the states, but the moral here is different: such externality would be something *contra natura*. The organizing device suggested by utopianism obeys a principle of *surmounting* contingency. This principle supposes that relations amongst the individuals, the states, should be conceived as internal relations, as relations between parts of a whole which is posited, at least ideally, from the beginning. Various particulars are *internally* related: there are properties of the particulars which logically necessitate that the relation holds. And this holding must absolutely come to light. It is a definite characteristic of utopias to conclude, from the imagined perfection, to the necessity of its realization. As in the ontological argument.

Neorealism and neoclassical realism, but also neo-liberalism, seem to point, although in different ways, to an intermediary position, defined by Armstrong's “mixed relations”, “partially internal and partially external”. Such position may be characterized by a conjunction of the accommodation and surmounting principles, its basis being a relational model differing both from the perfect externality defended by the realists – all relations are contingent – and the extreme internality posited by the utopians – all relations are logically necessitated by the nature of the particulars. A lot of the pessimism and scepticism specific to classical realism is rejected, and the role of international institutions in the cooperation between the states is not explained away. The kind of external/internal relations, which belongs properly to this model, seems to be the one that best succeeds in integrating contingency.

Let us take Kenneth E. Waltz's *Theory of International Politics* (Waltz, 1979) as an example of this approach. Anarchy, the major sign of relational externality, remains, according to the systemic approach, something not quite surmounted, but the systemic, or structural, level – as distinct from that of the interaction amongst simple unities – partially absorbs, so to say, this very same externality or, to put it another way, makes sense out of it.

The ‘balance of power’ – which exists whenever two, and only two, requisites prevail: anarchical order and the existence of unities who strive to survive – is the frame of such sense. The active unities, the States, the “unitary actors”, as Waltz calls them, cease to be the only agents and also – Hegel would certainly approve of this development – are no longer thought as possessors of a self-conscious and transparent intentionality: their actions are loose, disordered. Contingency is conceived through this blending of externality – states exist as basic particulars, with no properties logically necessitating that the relation holds – and internality – there are properties of the states which, at the systemic level, logically necessitate that the relation holds –, which distinguishes international relations from foreign policy.

At another level, John Rawls's “law of peoples” seems equally to point to a middle way between externality and internality. (Thomas Nagel's position (see Nagel, 1991, Chapter XV) is, in many aspects, similar to Rawls's.) Before discussing *The Law of Peoples* (Rawls, 2002) and the previous 1993 article with the same title (Rawls, 2001, Chapter XXIV), some remarks seem, notwithstanding, to be appropriate.

As it is well known, the Third Part of *A Theory of Justice* (Rawls, [1971] 1989) deals with the question of the conditions under which justice as fairness can be realized. Rawls shows that justice as fairness – being itself a stable conception of justice, generating a great sense of justice, obtained through reflexive equilibrium (*Ibid.*, pp. 48 ff) – is capable of guaranteeing a greater social stability than its rival conceptions. (It is important that social stability should be distinguished from the simple regulation of conflicting situations, which would be merely a *modus vivendi* contingent upon circumstances (Rawls, 2005, p. 157). A decisive function of the veil of ignorance in the original position is nullifying the effects of the knowledge of individual contingencies (Rawls, [1971] 1989, p. 136)).

The very possibility of realization of justice as fairness (a problem which is linked to the frailty of political institutions and of the remedies to this frailty) gains a greater importance in Rawls' later work, from his 1985 article “Justice as Fairness: Political, not Metaphysical” (Rawls, 2001, Chapter XVIII) onwards, leading to the views of *Political Liberalism* (Rawls, 2005). In the search for an overlapping consensus – which is a precondition for stability – Rawls discards any comprehensive conception of justice. Coherently, Rawls' Kantianism becomes more mitigated – or, if you prefer, it becomes analogical – and the original universalism is partially substituted by the consideration of local particularities: it is for our societies, for the liberal democratic societies, that justice as fairness serves as a model. It seems fair to say that the negative action of contingency is more easily tamed if its existence is accepted from the very beginning.

It is in the context of this evolution – and supported by some ideas already expressed in paragraph 58 of *A Theory of Justice* (Rawls, [1971] 1989, pp. 377 ff) – that Rawls turns to the *ius gentium*, the law of peoples, as something distinct from international law. The law of peoples – which, by its very nature, supposes some kind of internality of relations – “provides the basis for judging the conduct of any existing regime, liberal as well as non-liberal” (Rawls, 2001, p. 562).

This immediately begs the question as to whether the device of the original position and the fiction of the contract also apply in this case. The answer – I will omit the details – is: yes. With an important difference: the representatives, hypothetically assembled, don't represent individuals anymore, but peoples. There is an objection – which has been put forward by Peter Singer (2002), Thomas Pogge (1990) and Charles Beitz ([1979] 1999), among others – according to which the law of peoples should begin with representatives of individuals, and not with representatives of peoples with their traditional attributes of sovereignty (an objection which clearly is formulated against the externality principle, from the standpoint of radical internalism). Rawls' answer to this objection proceeds in a number of steps: First, the represented peoples must obey certain conditions, some of them restrictive of their sovereignty as habitually understood (Rawls, 2002, pp. 26-27; 2001, pp. 534-535) (It is maybe useful to recall that one of the greatest proponents of a restrictive conception of sovereignty was Leibniz, who, both in the *Caesarinus Fürstenerius* (1677) and in the Preface to the *Codex Iuris Gentium* (1693), defended – against Bodin and Hobbes – that sovereignty implied only a high degree of independence and internal supremacy, not absolute independence and absolute internal supremacy) (Riley, 1972, pp. 111 ff and 165 ff). Secondly, it would be to take utopianism too far to suppose the non-existence of peoples as they exist nowadays (Rawls, 2001, p. 536) – the utopia must be realistic (Rawls, 2002, p. 11 ff). In third place, following Kant, Rawls points to the fact that the law of peoples should not, in any case, lead us toward a Universal State (*Ibid.*, p. 36; Rawls, 2001, p. 539). Finally, the existence of frontiers favours the individual responsibilities concerning what appears to the state's citizens somehow as their own property (in ecological matters, for example) (*Ibid.*, pp. 8, 38-39; Rawls, 2001, p. 541). (A similar argument can be found in Roger Scruton (2002, pp. 24-25).) Rawls' answer combines elements of internality (the first step) and externality (the three other steps, namely the defence of the existence of frontiers).

Rawls begins, accordingly, with a “family of societies”. This “family of societies” doesn't include, however, only the liberal societies, but also the kind of societies Rawls calls “hierarchical societies” (I will return to them later). From this fact it follows that “liberal and hierarchical societies can

agree on the same law of peoples, and thus this law does not depend on aspects peculiar to the Western tradition” (Rawls, 2001, p. 534), it is not “ethnocentric” (Rawls, 2002, pp. 121-122). It doesn't depend, for example, on the exclusivity of a “political conception of the person rooted in the public culture of a liberal society” (Rawls, 2001, p. 549). As with justice as fairness in the interior of each society, the law of peoples supposes no comprehensive doctrine, be it of a religious, philosophical or moral kind. An agreement concerning the law of peoples, which guarantees the respect of human rights is not an agreement that can only be accepted by liberal societies.

General conditions for the extension of liberal ideas to the law of peoples are less demanding than those, discussed in *A Theory of Justice*, which are required for particular societies. They include some basic rights, freedoms and opportunities; a high priority concerning basic freedoms; and some measures that can ensure citizens the necessary means to the actual practice of those freedoms.

The extension of justice as fairness to the law of peoples includes two stages – “ideal theory” (Rawls, 2002, Parts I and II) and “non-ideal theory” (*Ibid.*, Part III) –, each of them being composed of two steps.

Let us begin with “ideal, or strict compliance, theory”. In accordance with it, all the participants (liberal, as well as hierarchical societies) respect the basic requirements for the application of the law of peoples. The two steps consist in the elucidation of those questions related to the general organisation, first, of liberal societies, and, secondly, of hierarchical societies, “societies which are well-ordered and just, often religious in nature and not characterized by the separation of church and state” (Rawls, 2001, p. 537). In the original position, under the veil of ignorance, “the representatives of well-ordered hierarchical societies would adopt the same law of peoples that the representatives of liberal societies do” (*Ibid.*, p. 544; cp. Rawls, 2002, p. 63).

The society of democratic peoples must obey the good stability aforementioned, it must be stable in what concerns justice – and it should be noted once again that such stability is not identical to a mere equilibrium resulting from the balance of power (a pure externalist device). Concerning war, for example, Rawls underlines the frequently mentioned fact that liberal societies rarely go to war with one another, a fact that is “as close as anything we know to a simple empirical regularity in relations among societies” (*Ibid.*, pp. 52-53; cp. Rawls, 2002, pp. 8, 16, 44 ff; Rawls, 2001, p. 543).

Turning now to hierarchical societies. What is it that makes them well-ordered societies, what is it that qualifies them for the law of peoples? First, they must be peaceful societies, relating to other societies by diplo-

macy and trade, and they must not be guided by some sort of religious expansionism; they must practice religious toleration. Secondly, they must be societies where a legal system, guided by a common conception of justice, prevails and that system must be put in practice by judges and other officials. Even if the persons living in hierarchical societies are not – in comparison with those living in liberal societies – citizens, they must be responsible members of such societies. In the third place, the members of these societies must have certain minimum rights to means of subsistence and security, to freedom and private property, and to some formal equality; that is, hierarchical societies must respect basic human rights (Rawls, 2002, Part II; Rawls, 2001, pp. 544 ff).

The problem of human rights, “a special class of rights” (*Ibid.*, p. 560; Rawls, 2002, p. 78 ff), and an internalizing factor, so to say, is obviously a fundamental problem, dealt with extensively, amongst many others, by R. J. Vincent, who, in *Human Rights and International Relations* (Vincent, 1986), insisted on the primacy of subsistence rights. According to the law of peoples, “these rights do not depend on any particular comprehensive moral doctrine or philosophical conception of human nature” (Rawls, 2002, p. 68; Rawls, 2001, p. 551), they express “a minimum standard of well-ordered political institutions for all people who belong, as members in good standing, to a just political society of peoples”, they are “politically neutral” (Rawls, 2001, p. 552) (political neutrality, excluding ideological confrontation, is a sign of internalization). They represent “the outer boundary of admissible domestic law of societies in good standing in a just society of peoples” (*Ibid.*, p. 554). Their respect defines the legitimacy of a regime, and excludes any right to internal intervention by other states (in the form of economic sanctions or by military force); they establish a limit to pluralism amongst peoples, in the sense that they determine (in conjunction with the non-expansionism and a legal system which enjoys legitimacy in the eyes of its own people) “the limits of toleration in a reasonable society of peoples” (*Ibid.*, p. 561). Concern for human rights “should be a fixed part of the foreign policy of liberal and hierarchical societies” (*Ibid.*, p. 562). Ideal theory is reasonably internalist in its stance. The “outer boundary of admissible domestic law of societies in good standing in a just society of peoples” (*Ibid.*, p. 554) defines the space where peoples are internally related in view of a common end.

Let us now move to the second stage, which will confront us, at least partially, with the opposite view. The second stage – the “nonideal theory” – deals with a different situation; it deals with “the highly non-ideal conditions of our world” (*Ibid.*, p. 555) and with the possibility of the achievement of the ideal theory. The first step – the noncompliance theory – regards the relation between just societies (liberal or hierarchical) with

states that “refuse to comply with a reasonable law of peoples” (Rawls, 2001, p. 537), the “outlaw regimes” (*Ibid.*, p. 555). The second step poses the problem of “unfavourable conditions” (poverty, poor technological development, etc.) which prevent certain peoples of attaining a situation where fair institutions (liberal or hierarchical) could be established.

As to outlaw regimes, everything that liberal and hierarchical societies can do is to establish with them a *modus vivendi* founded on the balance of power – an externalist device –, because the relation between just societies and outlaw regimes “exist in a state of nature” (*Ibid.*, p. 556). The legitimacy of war against such regimes is limited: limited to self-defence, and, “in grave cases, of innocent persons subject to outlaw regimes and the protection of their human rights” (*Ibid.*, p. 556). (Rawls seems to share some of Michael Walzer's assumptions in *Just and Unjust Wars* (Walzer, 1977).) We are no longer – as we were in ideal theory – in a space where individuals are internally related: the brute fact of basic externality defines the context of nonideal theory. At the same time, democratic and hierarchical societies share the obligation, through external policy and with help from political wisdom and good luck, of promoting the integration of other societies in the law of peoples. There must be an “existential utopianism”, to use Robert Nozick's phrase, not an “imperialist” one (Nozick, [1974] 2006, pp. 319-320). For such project, the creation of a “federative centre”, representing “the alliance of well-ordered peoples” (Rawls, 2001, p. 557), is possibly a helpful device, and its effect could be of greater consequences than usually believed, as even outlaw regimes are not immune to a certain type of arguments. (These two points are already evident in Kant) The very idea of a federative centre (as opposed to the proposal of a universal state) joins internal and external relations.

The case of peoples living under unfavourable conditions is substantially different from the one of outlaw regimes. The main reasons for those unfavourable conditions lie in the political traditions and in a certain number of connected factors which should be altered “before a reasonable law of peoples can be accepted and supported” (*Ibid.*, p. 557). In the process of changing unfavourable conditions it is impossible to ask for immediate transformations concerning the adoption of principles of distributive justice (which are *sine qua non* conditions for the existence of liberal societies). The main point lies in the fact that unfavourable conditions reside, as said before, in the peculiar political traditions of those societies and very rarely, if at all, in the effective absence of natural resources. Symmetrically, the main wealth of well-ordered societies lies in their political and cultural traditions and, coherently, the efforts of the community of well-ordered societies must consist in trying to put an end to “oppres-

sive government” and “corrupt elites”. The emphasis on human rights is once again instrumental.

Two short comments and a conclusion. First, the law of peoples according to Rawls – even more than the revised version of justice as fairness, political liberalism – gives pride of place to contingency. Both at the level of ideal theory (we deal with dissimilar societies, liberal and hierarchical) and at the level of non-ideal theory (we are confronted, from the beginning, with outlaw states and with societies which, on the account of their political and cultural traditions, live under unfavourable conditions). There is no immediate decisional mechanism which determines us to action – whatever that action may consist of, economical sanctions or the use of military force – in a situation of crisis. Decisions, ideally resulting from the common will of well-ordered societies united through a federative centre, are heavily dependent upon the situation and will of different peoples.

Secondly, the very structure of the *ius gentium* proposed by Rawls is, under many aspects, similar to the point of convergence of neorealism and neoliberalism I mentioned in the beginning. Rawls’ “realist utopia”, as he calls it, significantly joining the two key-words, also looks for a conjunction of the accommodation and surmounting principles, based on a relational model which is neither one of perfect realist externality nor one of extreme utopian internality. Peoples accommodate each other: the law of peoples does not impose moral, or philosophical, or religious visions of a comprehensive kind. Each people has a right to its own individuality. But, at the same time, a global political consensus is looked for, something akin to a mitigated conquest of plurality, fundamentally exhibited in the respect for human rights, which would count as the frontier of toleration accepted by well-ordered societies. From the point of view of the law of peoples, a prudent blending of realist externality and utopian internality seems to be the best of solutions.

I do not pretend, of course, that the metaphysical distinction between internal and external relations is capable of rendering justice to all the subtleties and intricacies of international relations theory nor of Rawls’ *law of peoples*. My aim was only to underline its descriptive potential. What I have called the accommodation principle at the core of the realist position can only be understood, I suppose, by reference to the externality of relations and, correspondingly, the surmounting principle proper to utopianism is only conceivable through the supposition of some kind of necessitation of an organic – that is, internal – relation between peoples (or, in its more radical formulation, through an absolute internalization which would dismiss the states as illegitimate entities). Finally, the integration of contingency – the proper aim of any theory of international rela-

tions – depends, I suggest, upon a mixture of internal and external relations, a mixture that would be able to deal with what Kant called the “un-social sociability” of mankind (Kant, 1973, p. 9)– or, perhaps, to coin a new phrase, the unrelational relationality of peoples.

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## Rawls's *The Law of Peoples* as a Guideline for the World as We Know It

Milica Trifunovic

### Introduction

John Rawls opens *The Law of Peoples* with the claim that his theory is to be seen as "realistically utopian" (Rawls, 2002). Being the servant of two masters, the idealistic and realistic one, the idea of a "realistic utopia" has raised several criticisms. Rawls's concept of international law is considered either as too idealistic or as too realistic. Those who consider it to be too idealistic lament that it does not take into account current problematic political issues, such as poverty and the fair global distribution of resources; those who consider it to be too realistic claim that it tends to be too accommodating with illiberal societies, narrowing the list of human rights to be protected (Buchanan, 2006). In this paper I will try to demonstrate that these criticisms miss Rawls's point.

I will first of all explain Rawls's key term *peoples*. Then I will briefly explain how Rawls constructs his theory of international relations. I will point out the weaknesses of this project by analyzing some well known objections, namely the ones advanced by Thomas Pogge. Finally, I shall present my reinterpretation of Rawls's argument. If I succeed in defending Rawls from those objections, it should become apparent how his project might support a theory of global justice.

### The Idea of 'Peoples'

The term *people* stands for two different kinds of domestic societies: liberal democracies as we know them from *Political Liberalism* and *decent* peoples, which Rawls also calls "decent consultation hierarchies", exemplified by the imaginary Kazanistan.

Liberal peoples are – institutionally speaking – constitutional democracies, organized around a political conception of justice as a "free-standing view", specified by the two principles of justice: The first says that