

Abstract

In *A Theory of Justice* John Rawls formulates an intricate domestic foundation for justice. Thomas Pogge considers the implications of this domestic foundation for global justice in his work *Realizing Rawls*. When doing this, Pogge argues that Rawls' scheme is unstable because it leaves open the possibility of global justice devolving into a *modus vivendi*. I argue that Rawls' work directly addressing global justice, *The Law of Peoples*, is also vulnerable to this critique, especially due to his oversight of what I refer to as the aggressive state.

To flesh out this argument I give a brief overview of how Pogge's critique applies to *A Theory of Justice* and then explain Rawls' conception of global justice as seen in *The Law of Peoples*. To demonstrate the persistent weakness of Rawls' argument and its continued susceptibility to Pogge's critique, I illustrate where there is room left for the aggressive state.

Rawls' Instability and the Aggressive State

Imagine two states that rely upon each other for limited natural resources: K and A. K keeps to itself while A is aggressive. Now imagine that A threatens to invade K, unless K exports its natural resources to A for no compensation. K is prohibited from intervening upon A by the governing international institutional structure unless (i) A violates human rights in some manner, or (ii) A *actually* attacks K. That is, pre-emptive self-defense in the face of a threat is impermissible. The international institution consequently allows A to extort K while facing no repercussions for reprehensible behavior.

The institution that permits this situation is hardly just, yet John Rawls' conception of global justice as presented in *The Law of Peoples* deems it as such. Thomas Pogge was the first to recognize Rawls' susceptibility to this critique when he interpreted the implications of the domestic foundation laid in Rawls' *A Theory of Justice* for justice on a global scale. Pogge argues that Rawls' model is unstable, because it may devolve into a *modus vivendi*. Among the many criticisms of Rawls' account of global justice¹, little consideration is given to the pivotal point that the model is unstable. I argue here that Rawls' *The Law of Peoples* is also vulnerable to this critique due to his oversight of what I refer to as the aggressive state.

In Section I, I explain Pogge's conception of global justice according to *A Theory of Justice*, and explain why he thinks this is vulnerable to becoming a *modus vivendi*. Next, in Section II, I explain Rawls' conception of global justice as seen in *The Law of Peoples*. Finally, in Section III, I illustrate how *The Law of Peoples* permits aggressive states, arguing that this ensures Pogge's original critique applies to Rawls' later work as well.

¹ Most criticisms are primarily concerned with his characterization of human rights. For a sampling of literature treating this issue see Allen Buchanan's *Taking the Human out of Human Rights*, David Reidy's *Political Authority and Human Rights*, or Wilfred Hinsch and Markus Stepanians' *Human Rights as Moral Claim Rights*

I. Pogge's Critique of *A Theory of Justice*

To understand Pogge's critique, one must first grasp his second interpretation, R_2 , of global justice as suggested in *A Theory of Justice*. In R_2 there are global parties representing states that are primarily concerned with furthering their national interest. To do this, they aim to maintain their just institutions. The parties define a just world as one composed of just states, and select criterion of justice that focus on those states with the least just domestic institutions. A thick veil of ignorance is used to determine those principles of justice that self-interested rational participants would agree upon when treated as equals.² From this, it is plausible that this model renders a value-based world order where the shared ultimate values of parties are just arrangements.³

Pogge points to a few interconnected reasons that parties would be justified in rejecting R_2 , which contribute to the most weighty critique: this model is inherently unstable, because to accept it leaves open the possibility of international relations devolving into a *modus vivendi*.⁴

First, R_2 is insensitive to distributional concerns. Free bargaining between peoples or states offers no assurance against participants in international economic relations lacking "...a sufficient material base for making the equal liberties effective."⁵ But it seems that parties would want such an assurance.

Without assurance against international inequality, commitment becomes strained. For example, consider what Pogge calls the situated assurance problem. A government bound by an outdated and now unfavorable trade negotiation was developed in a time of need when

² *A Theory of Justice*, 17.

³ It should be noted that R_2 is merely concerned with maintaining just arrangements that may permit a certain level of socioeconomic inequality.

⁴ Pogge identifies a *modus vivendi* as coordinated self-restraint of competitive behavior between two or more parties that places limitations upon war and aids in the achievement of peace. For his discussion of this, see *Realizing Rawls*, 219-221.

⁵ *Realizing Rawls*, 244.

bargaining power was not evenly distributed. The government may be tempted to now violate that trade negotiation. The problem arises when a party's reasons for accepting the burdens associated with social cooperation are undermined due to a lack of assurance that other parties will adhere to the same standards of social cooperation.⁶ It seems plausible that the situated assurance problem will surface due to the failure of R_2 to include measures against noncompliance.

When commitments become strained, R_2 perpetuates "...the perennial scourge of war..."⁷ This occurs by failing to have "...effective mechanisms of adjudication and enforcement that could offset these considerable strains..." and, in turn, failing to provide a fix for the situated assurance problem.⁸ Since there is room left for fundamental disagreement and there are no measures in place to prevent violation, war is likely.

From this, it is evident that there is an apparent and permanent danger of noncompliance and war. If R_2 is embraced on a global scale, it is foreseeable that parties will deem themselves entitled to shift ground rules for negotiation to become less vulnerable to the whims of other parties.

So, although Rawls' global model appears to be a value-based world order, it has the earmarks of becoming a *modus vivendi*. By focusing exclusively upon maintaining just arrangements, R_2 leaves open the possibility of an extremely unbalanced distribution of power by essentially ignoring socioeconomic inequality. R_2 fails to address the assurance problem, leaving open the possibility of horrible outcomes for parties who play by the rules while others ignore them with no repercussions. A focus on shared ultimate values and concern about complications arising from the assurance problem might leave a party unable to give precedence to their own

⁶ *ibid.*, 100.

⁷ *ibid.*

⁸ *ibid.*

values. This suggests that since Rawls' value-based world order is capable of becoming a *modus vivendi*, it too is inherently unstable.

This is a problem Rawlsian scholars ought to take seriously, given how Rawls considers stability a necessary component of any theory of justice. He takes stability to be an institution's ability to remain just when changes are made to accommodate new social circumstances. If there is a deviation from justice, the institution will still be considered stable if said deviations are "...effectively corrected or held within tolerable bounds by forces within the system."⁹ As established above, a *modus vivendi* is evidently unstable. If a model of global justice is capable of devolving into a *modus vivendi*, it too is inherently unstable. It follows from this that Rawls' global order will be neither peaceful nor just.

I maintain that Rawls is vulnerable to this critique, despite taking a route in *The Law of Peoples* that departs from Pogge's second interpretation. To illustrate why, I provide the relevant portions of Rawls' conception of global justice from *The Law of Peoples* and point to his oversight of the aggressive state.

II. Rawls' *The Law of Peoples*

To determine the nature of global justice, Rawls implements his second original position.¹⁰ Like in the first original position, representatives operate from behind a veil of ignorance that prevents them from knowing such things as level of economic development, resources, "...the size of the territory, or the population, or the relative strength of the people whose fundamental interests they represent."¹¹ They do know, however, that reasonable and

⁹ For Rawls' treatment of institutional stability, see *Theory of Justice*, 401.

¹⁰ For Rawls' treatment of the second original position and the principles of the Law of Peoples, see *The Law of Peoples*, 32-40.

¹¹ *ibid.*, 32-33.

favorable conditions obtain that make a constitutional democracy plausible. Representatives negotiate to determine the terms of cooperation that are fair, just as in the first original position, but they select principles of justice from varying interpretations of the Law of Peoples pre-set list of eight principles. These terms of cooperation will be implemented in the Society of Peoples.

The Society of Peoples has only those peoples who subscribe to the ideals and principles of the Law of Peoples as determined by implementing the second original position. These are the liberal¹² and decent peoples. It is easiest to understand the status of decent peoples, as well as those not included in the Society of Peoples, if one first examines the role of human rights in *The Law of Peoples*.

According to Rawls, human rights are a special class of urgent rights that include "...the right to life...; to liberty...; to property...; and to formal equality..."¹³ Human rights set a necessary, though not sufficient, standard for the decency of an institution. Human rights have three features: (i) fulfillment is a necessary condition for a society's institutions and legal order to be considered decent, (ii) fulfillment is sufficient to exclude "justified and forceful intervention by other peoples", and (iii) they set a limit to reasonable pluralism.¹⁴ Essentially, if the standards set by human rights are not met, liberal peoples have *pro tanto* justification for intervention of various kinds.

Decent peoples, like liberal peoples, respect human rights¹⁵. This prohibits liberal peoples from intervening upon them. Decent peoples also respect their members' rights to be consulted in political decisions and to voice dissent, despite members not having democratic rights.

¹² Liberal peoples have three features: (i) they have, "...a reasonably just democratic government that serves their fundamental interests...", (ii) the citizens are united by common sympathies, which are essentially synonymous with a feeling of nationalism, and (iii) a moral nature (*ibid.*, 23). By virtue of (i), liberal peoples respect human rights.

¹³ *ibid.*, 65.

¹⁴ *ibid.*, 81.

¹⁵ For Rawls' explanation of decent peoples, see *Law of Peoples*, 60-65.

Dissenters must be heard fairly, and not dismissed as incompetent. Perhaps most importantly, decent peoples lack aggressive aims and must seek legitimate ends through peaceful channels (such as diplomacy and trade). It is thought that these features of decent peoples afford them the opportunity to transform into fully liberal peoples eventually.

Outlaw states, however, do not respect human rights and thus cannot be considered decent¹⁶. They do not subscribe to the Law of Peoples, and, in turn, cannot participate in the Society of Peoples. In addition, they are vulnerable to intervention due to (ii). Rawls also characterizes outlaw states as regimes that justify engaging in war to potentially advance their rational (yet unreasonable) interests.

Finally, there are two other categories of peoples that cannot partake in the Society of Peoples. The first is the burdened society: a society that is greatly disadvantaged in the pursuit of becoming either a decent or liberal peoples due to external historical, social, and economic circumstances. The second is the benevolent absolutism: a society that is non-aggressive and respects human rights, but fails to be well ordered because it does not give its members a role in political decisions.

In order to consider how vulnerable this model, as it stands, is to Pogge's critique of instability, it is useful to recognize where Rawls' theory diverges from Pogge's R_2 interpretation. I find four substantial differences exist between them.

First is the importance given to human rights on Rawls' model. This feature solidifies the image of being a value-based world order. It also seems to provide a mechanism for protecting against some of the concerns associated with the situated assurance problem, although not all of them. Human rights solidify Rawls' model as a value-based world order by serving as the

¹⁶ For Rawls' treatment of non-liberal and non-decent societies, see *Law of Peoples*, 90-92.

fundamental shared values agreed upon by liberal peoples. Human rights are those rights crucial to human existence and cannot be permissibly violated under any circumstances. Since human rights violations are the only reason that intervention against other peoples is *pro tanto* warranted, they can protect against at least the failure of other peoples to commit to globally shared values (human rights) arising from the assurance problem.

A second substantial difference is that Rawls puts forth a set of eight principles that those partaking in the Society of Peoples must negotiate over; it is not merely a free-for-all of potential principles. A third is that Rawls delineates between types of peoples and states (liberal peoples, decent peoples, outlaw state, etc.), while Pogge's interpretation does not recognize certain peoples having a superior capacity for justice. The fourth difference is that Rawls refers to collections of individuals actively subscribing to the global order as peoples rather than states. Rawls' primary motivation behind using the term "peoples" is to set aside concerns regarding sovereignty, which Pogge must deal with if he leaves his terminology intact.

Despite these departures from and expansions upon Pogge's account – which are seemingly improvements – Rawls is still vulnerable to the critique that his model for global justice is inherently unstable due to the likelihood of devolving into a *modus vivendi*. Much like R_2 , Rawls' model leaves open the possibility of an extremely unbalanced distribution of power by giving little consideration to socioeconomic inequality, and this, in turn, allows inequalities to arise. This is due to the fundamental interests of peoples being established in maintaining just institutions and not in considering basic goods. None of the eight principles address this issue. One may argue that (8) does address this issue by requiring liberal and decent peoples to help burdened societies that are prevented from establishing just or decent institutions by "unfavorable conditions". But (8) says nothing about preventing severe socioeconomic disparity

between liberal and decent peoples that have achieved just and decent institutions respectively. It does not take much to imagine a society that is socioeconomically disadvantaged but meets the minimum standards for a decent society, preventing it from being classified as a burdened society. There is nothing in Rawls' model to aid these peoples.

Second, Rawls' model fails to adequately address the assurance problem. One might suggest that (2) does sufficiently address the assurance problem. (2) States that "...peoples are to observe treaties and undertakings."¹⁷ This, however, is merely a superficial demand. There is no hint at the repercussions for failing to observe treaties, and other components of Rawls' model preclude sanctions unless a human rights violation is involved. This leaves the Society of Peoples with no substantial method for enforcing that peoples reasonably observe treaties. The same problem arises even if one were to cite Rawls' claim that peoples must be respectful of each other and, because of this, treat each other as equals and observe treaties. Once again there is no method in place to ensure that respect is maintained. Rawls' failure to address the fundamental assurance problem leaves open the possibility that peoples that play by the rules will suffer while other peoples ignore them with no repercussions.

Finally, just as in R_2 , Rawls' focus on shared fundamental values, when accompanied by the concern of peoples about complications arising from the assurance problem, plausibly leaves peoples incapable of giving precedence to the shared values of their citizens. Peoples will understandably be more urgently concerned with simply protecting themselves and ensuring survival within the *modus vivendi*. Only once a peoples has secured its survival can it concern itself with promoting the values of its own citizens. One might respond as they did above, claiming that (2) resolves the assurance problem and relieves this concern of peoples. Just as

¹⁷ *Law of Peoples*, 37.

before, this is merely a superficial demand until it is backed with legitimate clout. It should again be noted that backing (2) more substantially contradicts the sufficient condition of merely satisfying human rights to escape intervention with sanctions. Until this problem is solved, the peoples' fear stemming from the assurance problem is warranted.

These three deficiencies in Rawls' account suggest that his value-based world is inherently unstable since it is capable of devolving into a *modus vivendi*, just as Pogge previously suggested. This means that Rawls' account may not be peaceful or just. In an effort to strengthen Pogge's critique I present what I refer to as the aggressive state. This is a category of peoples that Rawls overlooked and leads to further unsatisfactory conclusions for his account.

III. The Aggressive State

The aggressive state recognizes human rights¹⁸ of both its citizens and the citizens of other peoples and states, thus meeting some of the necessary (though none of the sufficient) conditions for having its institutions and legal order considered decent. This state's recognition of human rights does, however, meet the sufficient condition to be protected from intervention, either by sanction or military involvement. Unlike decent peoples, this state does not consult members on political decisions, nor does it fairly listen to dissenters. In addition, this state seeks its ends aggressively rather than peacefully. This means that the aggressive state does not abide by seven of the eight principles that constitute the Law of Peoples.

Recall the following example presented at the beginning, intended to illustrate the nature of the quintessential aggressive state: imagine two states that rely upon each other for limited natural resources: K and A. K keeps to itself while A is aggressive. Now imagine that A

¹⁸ Here I utilize Rawls' limited conception of human rights, presented on pg. 6.

threatens to invade K, unless K exports its natural resources to A for no compensation. Here A has aggressively imposed a demand on K that K can do little about without losing the much needed natural resource it receives from A. K is prohibited from intervening upon A on Rawls' model unless (i) A violates human rights in some manner, or (ii) A *actually* attacks K. That is, pre-emptive self-defense in the face of a threat is impermissible according to Rawls.¹⁹ Rawls' model consequently allows A (the aggressive state) to extort K while facing no repercussions for reprehensible behavior until their (A's) actions have escalated to the point of attack.

As Rawls definitively states, “[human rights] 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.”²⁰ If we are to take Rawls' model seriously, the aggressive state is protected from intervention due to its satisfaction of human rights. Regardless of this, it hardly seems correct to say that it must be fully immune to intervention initiated by the Society of Peoples despite its aggressive aims, failure to have a consultation hierarchy, and failure to fairly listen to dissenters. Determining appropriate standards for handling this society seems possible, but at a cost.²¹ To maintain Rawls' framework one may either bite the bullet and grant full immunity to aggressive societies or, alternatively, reconsider basing his framework for intervention solely upon human rights. If one insists that human rights are the basis for intervention, one must at least conduct a substantive overhaul of the necessary and sufficient conditions pertaining to them. Even with a variety of alternatives, it is doubtful that Rawls' proponent will find any of them acceptable.

¹⁹ For Rawls' treatment of the circumstances of entering a just war, see *The Law of Peoples*, 89-93.

²⁰ *Ibid*, 80.

²¹ In *Are Human Rights Mainly Implemented by Intervention?* James Nickel suggests building in space for what he refers to as a delinquent state. Taken alone this seems like a suitable solution, but it is unlikely that Rawls would accept it due to their fundamental disagreement over the definition of intervention.

As it is currently formulated, Rawls' position lacks the means necessary to deal with the aggressive state that exemplifies the inherent instability of his model. This is due to the dangers that the aggressive state poses to other peoples and states while going unchecked. If the aggressive state is permitted to carry on because it is free from intervention and sanctions, the peoples that were not concerned about the assurance problem prior to its recognition should certainly be concerned afterwards.

Those threatened by the aggressive state risk being attacked or thoroughly disbanded. Prior to attack, the threatened cannot place sanctions on the aggressive state precisely because it (the aggressive state) is respecting human rights. The threatened also may not preemptively attack the aggressive state, because Rawls would consider this to be a violation of just war doctrine. Once attacked, liberal and decent peoples may go to war to defend themselves, but there is no guarantee that they will prevail. If the aggressive state prevails, the peoples overpowered will likely lose all of their control. One may respond by citing the principles of the Law of Peoples as providing protection for those peoples overpowered by the aggressive state. But as it stands, it is not clear to what extent liberal or decent peoples can permissibly aid those peoples in unfavorable conditions arising from being overpowered. Depending upon what formally amounts to intervention, liberal or decent peoples may not be able to provide aid to the overpowered peoples without intervening against the aggressive state. But, once again, this measure is prohibited under Rawls' model, since the aggressive state respects human rights.

The presence of the aggressive state within Rawls' model makes devolving into a *modus vivendi* even more plausible than suggested in Section II. This, in turn, illustrates the inherent instability of his model. Given Rawls' explicit acknowledgement of the importance of stability for any theory of justice, his failure to consider the aggressive state is a grave oversight.

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