International law: more realism than utopia

A critical examination of Rawls' theory of international law

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Overview

Democracies do not wage wars. In view of the last three wars in the 1990s, Kant's own conviction can be corrected to the extent t h a t democracies do not wage wars "among themselves". The question therefore immediately arises as to when and with what justification democracies may wage wars. What justification under international law is permissible for such wars? How can peace be secured at international level?

One of the most renowned philosophers of our century, John Rawls, attempts to find a systematic answer to these questions. This text will first examine the extent to which he has succeeded in doing so. Then a pluralistic theory of international law will be presented, which is based on self-interest and equilibrium and thus implicitly perceives a treaty in a second original state.

Rawls' theory of justice is, as he himself presents it, a realistic utopia and an ideal social order that would actually work in this world. However, he is not concerned with the realization of his theory, but much more with the fact that the very possibility of human justice can reconcile us with this world.[1]

His work "A theory of justice" (TJ) was published in 1971. Some 22 years later, in 1993, he developed and expanded his theory in "Political Liberalism" (PL). In 1999, "The Law of Peoples" (LP) was published. In LP, he systematically attempts to derive a theory of international law at the international level from his theory of justice, which applies to domestic societies. It is therefore useful to first present a summary of his theory of justice in TJ and PL.

TJ and also PL are about the idea of public reason, but they are asymmetrical: PL is concerned with how to get from overarching and comprehensive doctrines of justice already received from TJ to reasonable political liberal conceptions that are not comprehensive. The religious doctrines are comprehensive but not liberal. These are two different kinds of public reason: public reason in TJ as given by a comprehensive liberal doctrine and public reason

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[1] Pogge, Th.: 1994, John Rawls, Beck, 37

of PL as a way of establishing the political values represented by free and equal citizens.

The tension between the equality postulate for just action and the demand for free development of the personality (self-interest) has been re-dimensioned, especially since Hobbes. Aristotle's classical concept of equality is now understood not only in the sense of a universal claim to validity or in the sense of a balance of interests, but also as a moment that restricts the natural freedom of individuals. Natural law lays claim to the binding nature of norms that should apply equally to all.

For Rawls, as for Plato and Aristotle, justice is the first virtue of a social institution. Justice as fairness is the fundamental criterion of political institutions.

Rawls' concept is justice as fairness, which can be summarized in four theses: [2]

- Justice as fairness stands in contrast to utilitarianism.
- Decisions are made scientifically through rational prudent choice.
- The methodological goal of scientific ethics is a balance of reasoning between rationally legitimized principles of justice and considered moral convictions.
- Cooperation for mutual benefit takes place through identity of interests, as cooperation enables a better life for everyone.

Conflicts of interest arise because everyone strives for the largest possible share of the benefits. The principles of conflict resolution are identical to the principles of distributive justice.

For Rawls, justice is a necessary condition with absolute priority, but not a sufficient condition. Principles of justice can be derived from rational self-interest under certain ideal conditions.

Rawls' theory of justice is fairness justice because

- everyone has the same advantage.
- justice is based on voluntariness.

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[2] Höffe, O.: 1977, On John Rawls' Theory of Justice, Suhrkamp, 11-40

- cooperation is the basic prerequisite for justice.

John Rawls is an advocate of the original contract as an implicit contract: the original contract is the only legitimate form of establishing a state, but it must always be renewed. In such a state, a fair contract can come about. Two of Rawls' criteria of justice are: 1) Equal rights within the most comprehensive overall system of equal fundamental freedoms. 2) Economic and social inequalities should bring the greatest possible advantage to the least advantaged.

According to Rawls, a contract comes about in various stages: 1) There is a complete veil of ignorance. The contracting parties know nothing about their own situation and advantages in society. 2) The constitution is drawn up and the veil is lifted. 3) The fictitious characteristics of the decision-making situation that is constitutive of just legislation as the result of rational choice are made known. 4) The rules received are to be applied by the administration and the judiciary and by citizens in general to individual cases.

The moral subject in contract theory is a subject with self-interest. With the veil of ignorance, the relationship between the subjects in Rawls' contract theory can be seen symmetrically.

According to Rawls, the fairness principle has two characteristics:

- Duty of fairness: Rights and obligations arise from the reciprocity of benefits.
- Fairness itself: Fair (just) is everything that has been decided under fair (equal for all) conditions.

According to Rawls, the concept of justice in the original state is acceptable to all parties. In Rawls' theory of justice, certain inequalities are permitted. Social and economic inequalities should be designed in such a way that it is reasonable to expect them to serve everyone's advantage. This principle can be interpreted in two ways: On the one hand, the phrase "to everyone's advantage" can be understood in the sense of the optimality principle, in the sense of the criterion of Pareto optimality commonly used in normative economics, but on the other hand it can also be specified in the light of a principle that Rawls c a l l s the difference principle. According to Rawls, we can

We cannot define fairness using the characteristic of Pareto optimality, as fair distributions are always only a subclass of Pareto-optimal distributions. This means that the better prospects of the beneficiaries are only fair if they or the socio-economic circumstances that make them possible contribute to improving the prospects of the least favored members of society.

His coherence model of justice is quite different: the moral judge in the coherence model is an empirical self. A deliberative equilibrium is a state in which the judgments and principles can come together in equilibrium. Here, unanimity no longer applies (as in the contract model), but rather a balance of recognized principles in the foreground. The derivation process of the principles is no longer deductive and linear, but dialectical and inductive, and the result has a provisional validity status, as a perfect balance cannot be achieved. The subjects do not start from the general principles of fairness, but the concrete individual judgments as everyday judgments operate as initial judgments. The moral judges have a sense of justice in the deliberative equilibrium whereby the agreements are to be achieved. According to Rawls, a moral or political conception is only objective if it establishes a framework of deliberation, reasoning and judgment with the aforementioned characteristics of the conception of objectivity.

The right of peoples

In his work "The Law of Peoples", Rawls extends his theory of justice to peoples. This is much more of a utopia, which Rawls describes as a realistic utopia.[3] Rawls' theory is about peoples and not about governments: peoples do not wage wars and because of their culture and history they are bound by certain moral concepts, so that no people wants to destroy another people.

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[3] Rawls, J.: 1999, the law of peoples, Harward, 6

The main question of "The Law of Peoples" is: can democracy and comprehensive religious and non-religious doctrines be compatible? Rawls' answer is: yes; whereby tolerance (modus vivendi) is in the foreground here.

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Rawls distinguishes five different types of societies:

- reasonable liberal peoples
- Respectable peoples
- Rogue states (outlaw state)
- Companies burdened by unfavorable circumstances
- absolutist societies

The first and second companies are well organized.

The well-ordered constitutional democracy is a deliberative democracy. The three elements of deliberative democracy are:

- the idea of public reason
- the constitutional democratic institutions
- the knowledge and aspirations of the citizenry to follow public reason.

Different peoples and states have different interests. However, the interests of all peoples can be reduced to a common denominator. This is why Rawls speaks of international law and not state law.

The criteria for respectable hierarchical societies are:

- The company has no aggressive goals,
- Security is guaranteed for all members of society. This means
- Bona fide morality is considered a duty.
- There is a generally accepted notion of justice.

In his theory (the non-ideal theory), Rawls relies on the principle of tolerance: a liberal people must tolerate a non-liberal people. Tolerance means that political sanctions are refrained from when exerting influence on a people.

A liberal people must tolerate a non-liberal people if the basic institutions of that non-liberal society fulfill certain established conditions of political right and its people have reasonable and just right for the

Respect for the society of peoples (respectable peoples or decent peoples).[4]

No people would accept that their own disadvantages could be compensated by the gains of other peoples, so the principle of utility and other moral principles discussed in moral philosophy are not even candidates for a right of peoples.

The interests of peoples (unlike those of states) can be reconciled with fair equality and due respect for other peoples.

The respectable hierarchical peoples (respectable consultative hierarchy) are states that do not grant their members a significant role in political decision-making (not well-ordered). They have no aggressive goals and recognize that they achieve their legitimate goals through diplomacy and trade or other peaceful means.

The legal system of a respectable hierarchical people is guaranteed in accordance with its common good concept of justice for all members of the people and human rights are respected. The legal system of a respectable people shall be such that it imposes moral bona fide duties and obligations on all persons within the territory of the people. On the part of the judges and other officials who administer the legal system, there shall be a sincere and not unfounded conviction that the law is indeed guided by a common good conception of justice.[5]

According to Rawls, there is no general definition of respectability from which the criteria could be deductively derived, yet they appear to be acceptable.

Rawls uses the concept of the original state for respectable hierarchical peoples, as they are considered well-ordered. These peoples accept symmetrical positioning (equality) in the primordial state as fair. They may raise some objections that the equal treatment of representatives of peoples is inconsistent or unfair if there is no equality within their own domestic societies. The intuitive force of equality, however, only applies to relations between individuals. Rawls therefore disagrees with the thesis that the equal treatment of

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[4] Rawls, J.: 1999 the law of peoples, Harward, 7.1ff

[5] Rawls, J.: 1999 the law of peoples, Harward, 8.2ff

It is not the case that the equality of societies depends only on the equal treatment of their members: rather, equality always exists between reasonable or respectable and rational individuals or collectives of different kinds if the relationship of equality between them is appropriate. For example: churches can be treated equally even though their members are not treated equally for hierarchical reasons.

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The concept of the original state in the law of peoples is applied three times: twice for liberal societies (for domestic societies for "the law of peoples") and once on the second level for respectable hierarchical societies.

In the case of a respectable hierarchical society, the concept of the original state cannot be applied to domestic justice, as the necessary criteria are lacking. The respectable and liberal peoples can be brought together into a primordial state.

The pursuit of common goals should be promoted by the common good concept of justice. Although a state religion has ultimate authority in respectable hierarchical societies, this authority does not extend to political relations with other societies.[6]

Religious doctrines that do not allow complete freedom of conscience are not unreasonable. As an example of a respectable hierarchical people, Rawls brings a state he calls Kazanistan. In Kazanistan there is no institutional separation between church and state. Jihad is interpreted in a spiritual and moral sense. These states are governed in a strongly group-hierarchical manner: All groups are c o n s u l t e d on the important decisions, everyone belongs to a group; each group is represented by some of its members, but judges and other officials are independent. Attention is p a i d to relative minorities. Respect for human rights is also of central importance for Rawls here. It is the necessary condition for the respectability of political institutions.

institutions   of a   society.   It   is   sufficient   to   to rule out justified forced intervention by other peoples.

An alternative to Kazanistan, according to Rawls, would be a fatalistic cynicism that conceives of the good life only in terms of power.

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[8] Rawls, J.: 1999 the law of peoples, Harward, 14.2ff

A rogue state that violates human rights must be condemned and, in difficult cases, through intervention. [7] Rogue states are not rational and wage war out of their own rational interest.

However, any society that is not aggressive and honors human rights has the right to self-defense.

This is where Rawls develops his concept of just war:

- The goal of a just war is a just and lasting peace.

- Well-ordered peoples do not wage war against each other, but only against non-well-ordered states.

- A distinction should always be made between three groups: the leaders and officials of a rogue state, its soldiers and its civilian population.[8]

- For Rawls, natural law is a part of divine law. The right of peoples, however, is a political concept. Both support the right to military self-defense, but the content of the principles of warfare is not the same.

The burdened states are neither expansionist nor aggressive, but they lack the political and cultural tradition, human capital and necessary technical resources to be well-ordered. They should therefore be supported by liberal states. The struggle against the lack of affinity between peoples is the task of the statesman.

For Rawls, the limits of reconciliation lie in the lack of recognition of the fact of reasonable pluralism on the one hand, and in the misfortune and distress of a spiritual doctrine on the other. Reasonable pluralism is an expression of public reason. It is essential for public reason that there should be no criticism of comprehensive religious and non-religious teachings. It is public because it is the reason of free and equal citizens. Its object is the public good, such as constitutional issues and fundamental questions of justice. According to Rawls, citizens are only rational if they are free and equal.

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[7] Rawls, J.: 1999t he law of peoples, Harward, 10.1f

[8] Rawls, J.: 1999 the law of peoples, Harward, 14.2ff

Is Rawls' theory of international law a realistic utopia?

- Rawls' theory of international law is a utopia, which Rawls describes as a realistic utopia. Utopias answer questions such as: what does a possible world look like in which certain values are realized? In this sense, utopias are a thought experiment whose correspondence with the "future reality" depends on the framework conditions of the theory. According to Rawls, a utopia is realistic if its limits are determined by practical political possibilities.

  In connection with international law, according to Rawls, the principles of realistic utopia are those principles that are conceivable as possible facts. They are, among others:
  - There are fundamental rights of constitutional government and these rights are prioritized.
  - In a realistic utopia, people are taken as they are according to the laws of nature and civil rights are taken as they could be in a democracy.
  - The overriding principles are practicality.
  - The principles of concepts of justice must satisfy the criterion of reciprocity: reasonable principles of free and equal citizens are also reasonable for others. This presupposes that everyone follows the same concept of justice.
  - The reasonableness of tolerance through public reason.

- The idea of the realistic utopia is a second return to the idea of the original state. Instead of parties, representatives of peoples are present here. Rawls uses the idea of the original state three times:
  - for moral persons in a liberal society.
  - for liberal peoples for the right of peoples in the second formula

- and for respectable companies also in the second formula.

In the 1st original state, participants are equal and free and have a concept of the good. In the 2nd original state, the peoples are free and equal, but lack a comprehensive concept of the good. Even a liberal people lacks a concept of the good. This is due to the fundamental difference in interests between the people and the individual: an individual (as a citizen) possesses two moral powers, namely the capacity for a sense of justice and a concept of the good. A people, however, has a fundamental interest in a political concept of justice. Therefore, the 1st and 2nd original states are not analogous to each other, but are based on different interests. The 2nd original state can therefore be designed with "less" pluralism compared to the 1st original state, but contain larger and tougher positions under fronts.

- All participating peoples in the 2nd original state agree on certain moral principles, as all peoples, even if they are not liberal, have a relative concept of the good due to their culture and history. Although, as already mentioned, the peoples' concept of justice is not comprehensive and overarching, certain moral principles, such as respect for other peoples and human rights, can be derived from it. However, this concept is more utopian than realistic: it is true that all peoples who can come together on the aforementioned moral basis in a primordial state would conclude a treaty for peaceful and just coexistence. But in fact, peoples are always "represented" and the representatives cannot be any institutions or parties, but the governments or states, since only they have the authority to conclude a treaty. The governing parties or institutions can, even in the case of respectable societies, be at a cultural distance from the people. It is unclear how Rawls envisions a respectable society and how to deal with it in this case.
- Kazanistan is a thought experiment and is intended to be an example of a respectable society that is just and fair with a liberal society.

can conclude treaties in a 2nd original state. It can be assumed that Rawls has certain Islamic countries in mind, which are peaceful but have no internal democratic structures. However, it is unclear how a just treaty can be reached on an international legal level if the representatives of Kazanistan in a primordial state do not represent the interests of the people, which is what we see in the reality of Arab-Islamic countries. Thus, Kazanistan remains largely a utopia and an unrealistic thought experiment.

- He defines just war within the framework of his realistic utopia. War must be included as a case in a realistic utopia. War may be waged by liberal peoples when it is a matter of defense and against aggression. War must have peace as its goal. Such a war must still be able to distinguish between ethnic groups and government. A theory of international law that excludes the possibility of war against an aggressor will only remain utopian and will not come into contact with reality and will contribute less to a realistic theory of international law. But a theory of international law, if it wants to be more realistic than utopian, must demand more peace than justice. This is not taken into account in Rawls' theory. That is why the question of " contractual"   or "non-contractual" dealings with rogue states and dictators. This raises the question of non-comprehensive and non-liberal (religious or non-religious) doctrines that are neither held by liberal nor respectable societies. TJ deals with comprehensive doctrines of public reason and PL with non-comprehensive but liberal doctrines; LP, on the other hand, with comprehensive and non-liberal doctrines of respectable societies. The non-comprehensive and non-liberal doctrines held by non-liberal and non-respectable governments (and not by the peoples) (examples are the governments in China, Iran and North Korea) have no place in his theory. Certainly, war with these countries without a direct threat is not a justifiable solution under international law (also in view of the

economic policy aspects). We can also conclude from this that Rawls' distinction between five different types of society cannot be a realistic utopian approach. For Rawls, tolerance means refraining from political sanctions when exerting influence on a people. At this level, tolerance remains a moral appeal and not a binding obligation under international law.

- With the opening question as the main question of LP, whether democracy and comprehensive religious and non-religious doctrines are compatible, it is already clear what Rawls has in mind in his theory of international law: a world full of conflicts, the cause of which is not directly seen in economic and political inequalities, but in the question of compatibility between comprehensive doctrines and democracy. A theory of international law that sees the cause of all conflicts in the answer to this question as the main question is very thin indeed, especially if it wants to maintain its claim to realism as a utopia. If we want to be realistic, we realize that a part (even a small part) of the conflicts of our world is caused by comprehensive religious and non-religious doctrines, so that the question of their compatibility with democracy may be a marginal question of international law. It is very naïve to limit the conflicts between Israel and Palestine, the Balkan conflicts and many other conflicts in the world to the question of the democratic compatibility of doctrines. Many such conflicts are conflicts of interest between individual peoples. However, Rawls does not just stop at answering this question and puts forward further postulates for a just theory of international law.

A theory of international law: more realism than utopia

- A practical dimension of contracting between states and regimes is when Rawls' 2nd original state is imagined in a different way: the notion of a steady state in which a veil of ignorance about other people's interests prevails (rather than a veil of ignorance about self-interest, as is the case with Rawls)

- This allows international conflicts to reach a practical solution; the nature of the solution differs depending on the political and social conditions within the states and regimes.

- Depending on the relationship between the state and the people, different transitions and possibilities for contracts can exist.

- In such a primordial state, representatives of all regimes and states can participate without any moral precondition. The only necessary prerequisite is full knowledge of self-interest and minimal knowledge of the interests of other peoples, states and regimes.

- Among the most important treaties are those between different states. This is where there is usually the least cooperation, but the greatest conflict. International treaties can also cause conflicts to break out. Example: State A contractually assures State B of help if State B is attacked by State C. State C now attacks State B and State A is not sure whether it should fulfill its contractual obligations. Consequently, uncertain but contractual assurances pose a greater problem than the complete renunciation of such assurances. Based on the above-mentioned questions, the following differentiations can be made among non-liberal (according to Rawls) countries on the basis of liberalism and democracy:

  1) Countries that are neither state nor socially capable of democracy. These include Saudi Arabia and many other Arab countries. At the state level, democracy is consciously rejected. At the social level, Islam and its political ideals are predominantly internalized. Democracy in an Islamic context can

For such societies, the chances of a transition to democracy increase (status A in the figure).

2) Countries that are capable of state democracy but not social democracy. Current examples are Afghanistan and Iraq. For these countries too, the discussion of democracy in an Islamic context is intended to offer a transitional possibility. There is a danger of absolute totalitarianism after a democratic election. (Status B in the illustration)

3) Countries that are socially democratic but not state democratic. Among these, two types of states can be distinguished:

    a. Theocratically oriented governments, such as Iran.

    b. Western-oriented governments, such as Egypt.

    In both cases, democracy in a secular context is realistic and should be aspired to. The discussion of the question of the possibility of a contract between secular democracy and Islam plays an important role here. Furthermore, the possibilities of coherence between Islam and democracy at the level of a secular state should be considered here (status C in the figure).

4) Countries that are capable of democracy both in terms of state and society and are in this process, such as Turkey. Since there is always a risk of Islamic fundamentalism for such countries, a treaty or coherence theory approach would also be a guarantee for democracy (status D in the figure).

These classes are illustrated in the figure:
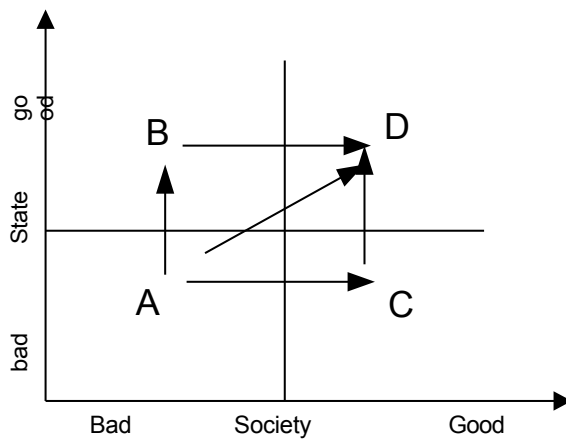
According to this classification, the following advanced transitions are then possible:

1) from A to B

Even if the social framework conditions for a democratic society are not in place, this option remains open as to whether the state function in its centralized infrastructure has a social context. The economic indicator of prosperity is a determining factor here. One example of this is Libya: even though it is a police state, the provision of life there is largely optimized for society in terms of health and pension insurance and, furthermore, women's rights. In a totalitarian context, the centralized state is solely responsible for this transition through its totalitarian tools. In this case, no contract-based consensus is necessary. However, there is another case in this category where the totalitarian government is committed to democratic principles at the state level as a result of a coup or external interference. One example of this is Iraq. A stable democracy is only possible here on the basis of a stable contract between the contracting parties, otherwise there is always the danger of a return to the old state A.

2) from A to C

Even if the possibility for democracy is largely present in society, totalitarian and despotic states are a major obstacle here.

A country like Iran is a good example here on a theocratic level. An example on the Western-oriented level would be Egypt.

3) from A to D

This category includes countries in which social and governmental change is brought about by a democratic revolution. There is no example of this, which indicates that this case has no real structure.

4) from B to C

This category can also b e disregarded as it has no realistic value.

5) from D to C

This category is also not realistic and there is no example.