

human rights & human welfare



working papers

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working paper no. 18

**A more original position: toleration in John Rawls' Law of Peoples**

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Posted on 4 May 2004

<http://www.du.edu/gsis/hrhw/working/2004/18-eckert-2004.pdf>

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## **A More Original\* Position: Toleration in John Rawls' Law of Peoples**

*Amy E. Eckert*

### **Introduction**

John Rawls' proposes that liberal democracies accept certain well-ordered hierarchical societies<sup>1</sup> as equals on the basis that the latter would accept the same principles of global justice as liberal democratic peoples. Well-ordered hierarchical societies are those illiberal societies that do not commit aggression against their neighbors, and respect basic human rights. However, the list of human rights that well-ordered hierarchical societies must respect is short, and it excludes some familiar democratic rights such as the right to free speech or the right to vote. Because of the brevity of his catalog of human rights, Rawls' proposal of tolerance for these well-ordered hierarchical societies has subjected *The Law of Peoples* to criticism by liberals who argue that the Law of Peoples creates a double – and lower – standard for well-ordered hierarchical societies, which view their members as components of larger groups rather than free and equal citizens.

While they raise some important considerations, these critics undervalue the good reasons for tolerating well-ordered hierarchical societies. Rawls places a premium on toleration of well-ordered hierarchical societies because toleration recognizes and allows for a reasonable diversity of human values. These well-ordered hierarchical societies, organized around a comprehensive idea of the good, lack the perfect justice of liberal peoples. Some individuals may even be excluded from certain positions or opportunities based on the principles of the comprehensive doctrine on which society is organized. However, as Rawls states, an injustice is tolerable where it is necessary to prevent a greater injustice.<sup>2</sup> In the present case, accepting these well-ordered

hierarchical societies, which do secure some justice for those within their borders, avoids the greater injustice that would ensue from potentially destructive attempts to enforce global ideological conformity. Additionally, we should not discount the capacity of these hierarchical societies to reform. Toleration, Rawls argues, grants well-ordered hierarchical societies their due measure of self-respect and allows for the peaceful transformation of these well-ordered hierarchical societies into just liberal peoples.

Yet Rawls himself undermines his commitment to the toleration of decent, but non-liberal, peoples through his segregation of decent peoples into two separate original positions at the international level. Rawls' original position models conditions of fairness and serves as the initial situation from which parties enter into a social contract. At the global level, Rawls uses the original position once for representatives of liberal peoples, when the principles of the Law of Peoples are selected, and again for representatives of well-ordered hierarchical peoples, when they opt to accept or reject the principles selected by liberal peoples. If both liberal and well-ordered hierarchical societies enjoy membership in the Society of Peoples, and both types of communities are considered equal members in good standing of that society, then segregating them into two separate international original positions creates an unwarranted and harmful distinction. The placement of well-ordered hierarchical societies in a second and more limited original position injures the *amour-propre* of these decent peoples, the preservation of which Rawls sees as central to any possibility of peaceful reform. The use of separate original positions also infringes on the model of the original position as developed in *The Law of Peoples* and Rawls' earlier work, *A Theory of Justice*. Significantly, the original position composed of only parties representing liberal peoples skews the principles yielded by that original position.

While liberal peoples and well-ordered hierarchical societies share a number of interests and ethical commitments, there are also some important differences.

My argument is largely sympathetic to *The Law of Peoples*. I accept implicitly some of Rawls' key assumptions: that toleration is a valuable component of the Law of Peoples, and that representatives of communities, rather than individuals, are the proper parties to act on the global level. Both of these propositions have been vigorously contested.<sup>3</sup> I begin by tracing the development of Rawls' theory from *A Theory of Justice* to *A Law of Peoples*, with a focus on differences between the original position at the domestic and global levels that influence the nature of the Law of Peoples. I continue by exploring how *The Law of Peoples* undermines Rawls' goal of achieving toleration for well-ordered hierarchical societies by placing decent peoples in separate and unequal original positions. Finally, I propose an alternative formulation of the Law of Peoples, derived from an inclusive original position for all decent peoples, that both reflects and reinforces toleration among decent peoples and that reflects the interests that well-ordered hierarchical societies would bring to the original position. These differences include a central position for toleration within the Law of Peoples itself, a more robust conception of human rights, and a principle of redistributive justice.

***From Justice as Fairness to the Law of Peoples*** { TC "From Justice as Fairness to the Law of Peoples" }  
{ FC W "I" }

The Law of Peoples, a set of principles governing international relations among communities, grows out of Justice as Fairness. In *A Theory of Justice*, Rawls argued that rational individuals would, under appropriate conditions, select two principles of justice for their society: a first principle securing equal rights and liberties for all individuals and a second egalitarian

principle to mitigate the effects of economic inequality within society. The Law of Peoples shares significant connections to Rawls' earlier work on domestic justice.

In both domestic and international original positions, parties' representatives select principles of social justice from behind a veil of ignorance that denies them certain types of information about themselves and prevents them from choosing principles for self-interested reasons. At the domestic level, parties in the original position represent possible social positions.<sup>4</sup> In the position, behind a veil of ignorance, representatives have no knowledge of their particular circumstances or endowments and therefore cannot select principles that would give them an unfair advantage. Because they cannot gain an unfair advantage for themselves, parties in the original position select principles that would be fair even to those in society who enjoy the smallest share of social advantages. Without knowledge of their position within society, parties in the original position may find that they represent the least advantaged. Stripped of selfish biases, representatives select principles for the right reasons. While Rawls borrows the original position from *A Theory of Justice* in developing *The Law of Peoples*, the differences appear to overwhelm the similarities. Before turning to Rawls' conception of global justice, I take a closer look at Justice as Fairness.

Because Rawls' concern lies with the basic structure of society, he focuses on principles of justice that govern major social institutions and their capacity to distribute rights and duties as well as the division of the advantages that arise from social cooperation.<sup>5</sup> In order to derive principles of justice for these institutions, Rawls places representative members of that society in a hypothetical original position where, deprived of knowledge about themselves and the community in which they live, they consider an array of alternatives and ultimately select the two liberal principles of Justice as Fairness. The original position, with its veil of ignorance,

models conditions of fairness under which parties can choose principles of justice for the basic structure of society. The veil of ignorance strips away factors that Rawls sees as morally arbitrary. If the conditions of the original position are fair, Rawls contends, then the principle selected by parties in the original position will also be fair.<sup>6</sup>

*The Original Position* { TC "The Original Position" \f C \l "2" }

Like the state of nature employed by Rawls' predecessors in the social contract tradition,<sup>7</sup> Rawls' original position is a hypothetical forum in which representatives form a social contract that will bind them together. Like these other initial situations, the original position is a position of equality, meaning that all parties are modeled as equal to one another.<sup>8</sup> For social contract theorists, the assumption of individual equality exists prior to the formation of the social contract and cannot be overridden by the terms of that contract.<sup>9</sup> The implication of all parties being modeled as equal is that all equal parties are represented in the original position. From within this original position of equality, individuals select principles of justice to apply to the basic structure of society, which form the basis of their original agreement.<sup>10</sup> Aside from the assumption of equality, the original position also includes assumptions about the characteristics of the parties as well as the information available to those parties. In the original position, the parties are modeled as mutually disinterested, in the sense that they do not take an interest in each other's interests, and rational, because they seek the most effective means to their given ends.<sup>11</sup> Parties in the original position will seek to secure adequate social goods for their own ends, without regard to the projects of other members of their society.<sup>12</sup> While Rawls' model does not necessarily place individuals in opposition to one another in a Hobbesian sense, Rawls views them as being primarily interested in their own ends rather than their compatriots'.

Ultimately, individuals in the original position are stripped of far more than social ties. To eliminate the possibility of individual bias from entering into the selection of principles of justice, Rawls places parties in the original position behind a veil of ignorance. An individual behind the veil of ignorance does not know “his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like.”<sup>13</sup> In the original position, people are also ignorant of their gender and their racial or ethnic identity.<sup>14</sup> These attributes are subject to a “natural lottery,” and should not, therefore, determine principles of justice.<sup>15</sup> Parties’ ignorance of their personal attributes and social situation opens up the possibility that any individual in the original position could find herself among the least advantaged members of society, with the least advantaged being those who possess the smallest share of certain social goods including class position, native endowments or talents, and good fortune.<sup>16</sup> In addition to these demographic qualities, individuals lack knowledge of their beliefs and values. Parties in the original position know that those they represent may have a comprehensive idea of the good but do not know the content of that idea.<sup>17</sup> Without knowing the content of that conception of the good, individuals want to ensure their ability to pursue their own purposes and values. This desire discourages them from selecting perfectionist conceptions of justice that rely on a conception of the good that individuals in the original position may or may not share.<sup>18</sup> The veil of ignorance is a powerful constraint on the possibility of selfishness in the original position. A party in the original position may be wealthy or homeless; they could be a genius or mentally handicapped. Individuals with knowledge of their social position and natural attributes could easily skew principles in a direction that would benefit them. Without such knowledge, rational parties in the

original position have no choice but to consider social justice from the position of the least advantaged.

While stripped of knowledge about their own particular circumstances, parties in the original position do know about society more generally, such as the basic facts of social organization, and principles of economic theory and human psychology which will bear on the efficacy of the conception of justice that they must develop.<sup>19</sup> Being rational and mutually disinterested, the parties prefer a greater share of primary social goods – rights, liberties, and resources – rather than a smaller share even without knowledge about themselves, their values, their ends, or their society. Parties believe that the largest possible share of primary social goods will help them to pursue their ends and purposes regardless of what those projects might be. As rational maximizers, parties in the original position seek to develop principles of justice that would guarantee them the largest possible share of these social goods regardless of their particular position in their respective societies. Behind the veil of ignorance, Rawls contends, representatives will select principles that would maximize their share of social goods in the worst case with what Rawls calls the “maximin” principle.<sup>20</sup> In other words, without knowing their position in society, those in the original position choose principles that they would be willing to accept even as one of the least advantaged in society and they evaluate them according to this worst-case scenario. Given parties’ uncertainty about their personal attributes and their risk averseness, Rawls believes that parties in the original position would adopt two principles that he calls Justice as Fairness.



*Two Principles of Justice as Fairness* { TC "Two Principles of Justice as Fairness" \f C \l "2" }

Against alternatives including utilitarianism and intuitionism limitations, Rawls anticipates that those in the original position would select liberal principles that preserve the equal rights and liberties of individuals and secure each of them a fair share of social goods necessary to pursue their ends. Specifically, Rawls believes that parties will select the following two liberal principles, lexically ordered:

First Principle

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

Second Principle

Social and economic inequalities are to be arranged so that they are both:  
(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and  
(b) attached to offices and positions open to all under conditions of fair equality of opportunity.<sup>21</sup>

The terms of the first principle require that each citizen receive an equal share of these basic liberties. According to Rawls, basic liberties in a democratic society include

political liberty (the right to vote and hold public office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.<sup>22</sup>

The lexical ordering of the principles means that the first principle must be satisfied prior to, and cannot be infringed upon by, the demands of the second principle, also known as the difference principle. In other words, citizens cannot bargain away their basic liberties in exchange for greater prosperity and they cannot have their basic liberties taken from them for the benefit of other members of society. Their share of basic liberties must remain equal and inviolable.

In addition, those in the original position will want to guarantee that they do not suffer as a result of economic inequalities within their society, by securing for themselves the greatest possible share of economic wealth, especially if they are among the least advantaged members of their society. The difference principle that they would adopt has strong egalitarian tendencies. Only those economic differences that benefit the least advantaged can be justified under the difference principle. If economic differences do not serve the interests of the least advantaged, then an egalitarian distribution is preferable.<sup>23</sup> Any justifiable social arrangement, though it may benefit some disproportionately, can only improve the expectations of the least advantaged, so they will never be worse off in absolute terms than they would be under an egalitarian distribution. In this way, the two principles of Justice as Fairness guarantee even the worst off the right to pursue their own conception of the good life and provide them with the social goods required to do so.

This liberal society, governed by Justice as Fairness, remains divided from the rest of the world. Rawls' describes his society as "more or less self-sufficient,"<sup>24</sup> and assumes that people enter society only through birth and exit only by death, overlooking the possibility of international migration.<sup>25</sup> Consequently, Rawls devotes minimal attention to questions of global justice, which he views as subordinate to principles of domestic justice. Rawls would not address questions of international justice in depth until *The Law of Peoples*.<sup>26</sup>

### ***The Law of Peoples***{ TC "*The Law of Peoples*" } C \ "I" }

Rawls' Law of Peoples extends a liberal conception of justice from a domestic society to a society of peoples.<sup>27</sup> The liberal conception of justice Rawls that discusses in *The Law of Peoples* is based on, but more general than, the conception of Justice as Fairness found in *A*

*Theory of Justice*.<sup>28</sup> This family of liberal conceptions distinguishes itself by its inclusion of three types of principles:

the first enumerates basic rights and liberties of the kind familiar from a constitutional regime; the second assigns these rights, liberties, and opportunities a special priority, especially with respect to the claims of the general good and perfectionist values; and the third assures for all citizens the requisite primary goods to enable them to make intelligent and effective use of their freedoms.<sup>29</sup>

The relaxation of these constraints allows for cultural and ideological diversity in a way that Justice as Fairness does not. As described below, Rawls even will incorporate certain nonliberal conceptions of justice into the Society of Peoples. To accomplish this extension, Rawls uses familiar concepts from *Theory* to build such toleration into the Law of Peoples.

In *A Theory of Justice*, Rawls begins his account of domestic justice with the reasonable citizen. The relevant unit in *The Law of Peoples* is the community, including liberal peoples, well-ordered hierarchical societies, outlaw states, and burdened societies. Individuals' interests have presumably been taken into account at the domestic level, obviating their participation in an original position at the global level. The assumption that individual interests have been accounted for holds for decent peoples, but these communities do not represent the interests of those their members to equal degrees. Outlaw states will not and burdened societies cannot adequately account for the interests of their populations through political representation. Liberal peoples and well-ordered hierarchical societies, referred to collectively as decent peoples, both incorporate the interests of their members to some degree. These communities incorporate some degree of political participation that is lacking in outlaw states and burdened societies.

Rawls distinguishes his liberal peoples from other types of communities by their reasonably just constitutional democratic government, "common sympathies," and their moral nature.<sup>30</sup> He also distinguishes liberal peoples from states, as traditionally understood, through

limitations on their sovereign rights and interests. Where states enjoy unrestricted sovereignty, peoples enjoy limited sovereignty by virtue of their acceptance of limitations on the right to wage war and on the treatment of their own citizens. While states as traditionally conceived pursue their rational interests, liberal peoples limit themselves to the pursuit of their reasonable interests.<sup>31</sup> Because they limit themselves to pursuit of reasonable interests, liberal peoples pursue only those interests that they would allow other peoples to pursue.<sup>32</sup> The fundamental interests of liberal peoples include protection of their territory, the security and safety of their citizens, and the preservation of their free political institutions and culture.<sup>33</sup> In addition to these fundamental interests, liberal peoples attempt to secure justice for their citizens and for other peoples by extending a conception of liberal justice globally. In this sense, *The Law of Peoples* is an extension of Rawls' domestic conception of liberal justice in *Theory*.

*The Original Position at the Global Level* } TC "The Original Position at the Global Level" } C \l  
"2" }

Rawls contends that liberal peoples' fundamental interests and their desire to secure justice for other peoples underlie the principles that they would select to govern their relations with each other and with other types of communities, including the outlaw states and burdened societies that lie outside the Society of Peoples. To derive these principles, representatives of liberal peoples enter the original position from behind a veil of ignorance. Rawls will, eventually, use the original position twice at the global level. In this original position, liberal peoples' representatives select the principles of the Law of Peoples. In the second original position, well-ordered hierarchical societies decide whether to accept the Law of Peoples selected in the first original position. The differences between these two original positions mean

that well-ordered hierarchical societies have no input into the selection of the principles that will govern them; their choice is limited to whether or not they should accept the principles that liberal peoples have selected.

Significant differences ensue from this division. In this first original position, in which representatives of liberal peoples participate, the veil of ignorance is considerably thinner than in Rawls' use of the original position at the domestic level. While parties in the domestic original position have no knowledge of their beliefs or values, parties in the first global original position know that they are acting on behalf of liberal peoples. This knowledge means that the parties are aware of their community's normative commitments. As at the domestic level, parties in the original position also have access to true facts and general social theories. This would include the fact that, as Rawls concedes, some minimal level of wealth is necessary to establish and maintain decent political institutions.<sup>34</sup> Because the parties in this original position know that a certain level of wealth is required to establish liberal political institutions, and that they represent liberal peoples, the parties would correctly infer that their societies would not be among the very least advantaged. This piece of knowledge removes a significant motivation for parties to select principles that are fair to the least advantaged. Rather than placing themselves in the position of the least advantaged, they know they occupy the position of the more advantaged.

While parties possess this significant piece of information, the veil of ignorance restricts parties' access to other types of knowledge. Parties do not know the size or population of their peoples, or their military strength relative to other peoples or states.<sup>35</sup> While parties can infer that their society possesses favorable conditions that make liberal justice possible, including some degree of wealth, they do not know the precise degree of their people's economic or social development.<sup>36</sup> While the parties possess little information about the peoples on whose behalf

they are selecting principles of justice, even this limited information renders the veil of ignorance substantially more transparent at the global level than at the domestic level. Because these pieces of information would tell the parties that they represent peoples who are among the better off globally, they would not possess the same incentive to act on principles of maximin as would parties in the domestic original position who know that they could be among the worst off in society. The potential of this worst-case scenario motivates parties in the domestic original position to choose principles of justice that would maximize their well-being if they find themselves in such a position once the veil of ignorance has been lifted. Knowing that they will more likely be donors than recipients of economic assistance, it is unsurprising that parties at the global level select a much weaker principle of economic justice than do parties in the domestic original position.

In the global original position, Rawls argues that the representatives of liberal peoples would select eight principles to govern their international relations:

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples are to observe treaties and undertakings.
3. Peoples are equal and are parties to agreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
6. Peoples are to honor human rights.
7. Peoples are to observe certain specified restrictions in the conduct of war.
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.<sup>37</sup>

Aside from the duty of assistance and the obligation to respect human rights, this set of principles reflects classical rules of international law.

To promote compliance with the Law of Peoples, Rawls envisions liberal peoples joining together into mutually beneficial international organizations, including such institutions as a trade organization, a cooperative banking system, and a Confederation of Peoples analogous to

the actually-existing United Nations.<sup>38</sup> In addition, Rawls sees liberal peoples as members of a Society of Peoples. This Society of Peoples, however, reaches beyond the community of liberal peoples to other communities that are also willing to abide by the Law of Peoples. Rawls argues that some communities based on illiberal, hierarchical principles would nevertheless accept the principles of the Law of Peoples. These well-ordered hierarchical societies would do so by means of a second, more limited, global original position.

*Toleration of Decent Nonliberal Peoples* { TC "Toleration of Decent Nonliberal Peoples" \f C \l "2" }

A central tenet of Rawls' vision of global justice requires liberal peoples to tolerate these decent, though nondemocratic, peoples. By toleration, Rawls means more than simply refraining from sanctions against the communities in question. Liberal peoples must

recognize these nonliberal societies as equal participating members in good standing of the Society of Peoples, with certain rights and obligations, including the duty of civility requiring that they offer other peoples public reasons appropriate to the Society of Peoples for their actions.<sup>39</sup>

Rawls explains the liberal requirement to tolerate reasonable pluralism globally by means of an analogy. Just as the government of a liberal society respects the comprehensive views of its citizens, Rawls argues, the Society of Peoples must respect, within reason, the comprehensive doctrines of well-ordered hierarchical societies. If liberal peoples refuse toleration to well-ordered hierarchical societies, Rawls contends, they deny these societies their due measure of self-respect.<sup>40</sup> While we may prefer a global society of liberal peoples, refusing toleration to well-ordered hierarchical societies is not, Rawls argues, the most promising strategy to pursue this goal. Welcoming such societies into the wider Society of Peoples on an equal basis with liberal peoples encourages them to reform.<sup>41</sup>

Rawls carefully defines the scope of well-ordered hierarchical societies to which liberal peoples must extend toleration. While Rawls' critics contend that his toleration extends too far, in fact membership in the Society of Peoples is carefully limited. First, well-ordered hierarchical societies reject aggression as a means of advancing their comprehensive views, seeking to advance their legitimate ends solely through peaceful means. Rawls' second criterion relates to the internal legal system. Well-ordered hierarchical societies have a common good idea of justice that secures human rights, including the right to life, to liberty, to property, and for formal equality before the law.<sup>42</sup> This rather minimal list of essential rights, he argues, transcends cultures and cannot be construed as Western.<sup>43</sup> In addition to respecting human rights, the legal system of a well-ordered hierarchical society imposes moral duties and obligations on all persons within the territory. Finally, judges and other legal officials possess a sincere and reasonable belief that a common good idea of justice guides the society's legal system.<sup>44</sup> This careful circumspection of toleration prevents Rawls' account of toleration from descending into moral relativism. Toleration is not limitless, but is instead restricted to well-ordered hierarchical societies organized around reasonable comprehensive doctrines. The nondemocratic societies included in the Society of Peoples secure a considerable degree of justice and human rights for their members. The well-ordered hierarchical societies to whom Rawls extends toleration are not those like Nazi Germany, Pinochet's Chile, or others that exemplify the worst of hierarchical societies. Instead, they are communities that do not inflict severe injustices on their members or on other communities belonging to the Society of Peoples. These well-ordered hierarchical societies are reasonably, if not perfectly, just.

To illustrate the meaning of toleration in *The Law of Peoples*, Rawls developed the hypothetical example of Kazanistan. Kazanistan is a well-ordered hierarchical society organized



around Islam. While only Muslims may hold top political and military positions in Kazanistan, adherents of other religions may freely hold their own beliefs.<sup>45</sup> This distinguishes Kazanistan from a liberal people, in which such positions and offices are open to all citizens. Aside from the exclusion of their members from top political positions, however, adherents of other religions freely practice their religion and participate in civic life. Like all communities, Kazanistan is obligated to respect a list of human rights that includes the rights to life, to liberty, to property, as well as formal equality before the law, even before it makes a decision about accepting the principles of the Law of Peoples. Because Kazanistan is decent, it embraces those rights.

While Kazanistan is not a democracy, it does allow for some political participation. All members of society, including religious minorities, participate in public life by means of the decent consultation hierarchy. Kazanistan's consultation hierarchy satisfies six guidelines:

1. All groups must be consulted in the decision-making process.
2. Every member of society must belong to a group.
3. Representatives of each group must include some members of that group who share its fundamental interests.
4. The rulers of Kazanistan must weigh these views and claims and be prepared to justify their decisions.
5. The rules should make decisions in accordance with Kazanistan's special priorities, which include the establishment of a decent Muslim people that respects its religious minorities.
6. These special priorities form part of the terms of fair cooperation that govern society, and these should be publicly specified.<sup>46</sup>

These guidelines ensure that the fundamental interests of those within society play a role in the decision-making process. Key to the decency of a consultation hierarchy is the right to dissent. Decision-makers must respect, and even respond to, those who assert dissenting views.<sup>47</sup> Protecting the right to assert conflicting political views without fear protects the core of the right to free speech, a right vital to political participation in both liberal constitutional democracies and decent consultation hierarchies.

It is worth noting that Kazanistan, though fictitious, draws on practices of the Ottoman Empire.<sup>48</sup> The Ottomans organized religious groups into fairly autonomous millets. Members of these groups exercised rights not as individual citizens, but as members of their respective millets. Islam was the established religion of the Ottoman Empire, but important to the successful functioning of the millet system was the fact that Greek Orthodox, Armenian Orthodox, and Jewish millets were tolerated by the Muslim majority and freely practiced their faith without persecution.<sup>49</sup> These autonomous millets were equal *vis-à-vis* each other and were allowed to govern themselves according to their own beliefs and inclinations. Like Rawls' hypothetical example of Kazanistan, the Ottoman Empire was not perfectly just with regard to its internal political institutions, from which adherents of other religions were excluded, but it secured some basic human rights for those within its borders.

Despite the requirement of toleration, well-ordered hierarchical societies participate in their own original position that is secondary to liberal peoples' original position. In this second international original position, well-ordered hierarchical societies have the limited choice to accept or reject the principles of the Law of Peoples previously selected by liberal peoples in the first international original position. Given this choice, Rawls believes that they would adopt the principles of the Law of Peoples. Because these well-ordered hierarchical societies reject aggression and seek justice for other peoples, Rawls argues that they would not object to any of the principles of global justice selected by liberal peoples.

***An Inclusive Original Position*** { TC "***An Inclusive Original Position***" \f C \l "1" }

In Rawls' formulation, decent peoples who all accept the Law of Peoples are divided into two separate and unequal original positions. Liberal peoples' representatives select the principles of the Law of Peoples, meaning that the principles reflect only the interests of liberal peoples, while well-ordered hierarchical societies' representatives decide only to accept or reject a set of principles in which they had no input and which do not account for the distinctive interests of well-ordered hierarchical societies. An original position comprehending the interests of both liberal peoples and well-ordered hierarchical societies would better reflect the fact that both types of communities belong to the Society of Peoples. If all decent peoples would respect the Law of Peoples, and therefore be treated as members in good standing of the Society of Peoples, then all peoples should be integrated into a single original position at the global level. Such an original position would, moreover, yield a Law of Peoples that reflects the occasionally divergent interests of well-ordered hierarchical societies. While some may view Rawls' liberal project as of no interest to decent hierarchical societies,<sup>50</sup> such a view does not comport with the fact that both well-ordered hierarchical societies and liberal peoples belong to a single Society of Peoples and a single global system. A scheme of social cooperation requires principles of justice to distribute its benefits.<sup>51</sup> At the domestic level, Rawls draws the boundaries of this social cooperation at the borders of the liberal society. At the global level, however, social cooperation extends to all decent peoples, including both liberal peoples and well-ordered hierarchical societies. An original position reflecting this fact would allow both liberal peoples and well-ordered hierarchical societies to participate equally in the selection of the Law of Peoples.

Furthermore, to the extent that the original position models equality, separating equal members of the Society of Peoples into two original positions is unjustifiable. The original position models positions of equality among parties to the social contract. At the domestic level, the original position reflects the equality of individuals in society. Because of their equal moral personality, parties enter the original position as equals, even before they select the principles of Justice as Fairness that provide for an equal distribution of rights and liberties. At the global level, parties in the original position are also modeled as equal.<sup>52</sup> If liberal peoples and well-ordered hierarchical societies are all to be treated as equal members of the Society of Peoples, then they should be modeled as equal in a single global original position. To divide equal parties into two separate original positions undermines their equality through its implication of inequality.

Finally, and most importantly, the exclusion of well-ordered hierarchical societies and their interests skews the principles of the Law of Peoples. As Rawls argues, well-ordered hierarchical societies share many of the same values as liberal peoples, including non-aggression and respect for human rights. However, well-ordered hierarchical societies have some divergent interests. Like liberal peoples, they would seek to preserve not only their decent political institutions, but they would also want to protect their right to structure their society around their comprehensive idea of the good. Concomitant with this interest comes a wish to protect individual human rights that support this social arrangement. Finally, removing the knowledge that parties represent liberal peoples would make parties more likely to adopt a principle of global distributive justice.

Skeptics may fear that including hierarchical societies would lead to a Law of Peoples based on some particular religious or philosophical doctrine. While alternative sets of principles

based on particular comprehensive doctrines may be proposed alongside liberal principles, these principles would be rejected. Behind a thick veil of ignorance like that in *A Theory of Justice*, parties would not know the comprehensive doctrines of their societies, if any. Under such conditions, supporting a conception of global justice based on a comprehensive idea of the good would be to risk being governed by a set of values that they did not share. For the same reasons that parties in the domestic original position would reject perfectionist conceptions of justice,<sup>53</sup> parties at the global level would reject conceptions of global justice tied to particular comprehensive doctrines. This will become clear with a discussion of the conditions governing such an inclusive original position.

An inclusive global original position would more closely resemble the domestic original position. Parties in the inclusive global original position would be placed behind a thick veil of ignorance, like parties at the domestic level. This thick veil of ignorance would deprive them not only of details about the size, population, and strength of their societies, but also of knowledge about the *type* of society they represent. In other words, a party may represent a liberal people or a well-ordered hierarchical society. Rawls' thin veil of ignorance allows parties at the global level knowledge about what type of community they represent, which can reveal significant facts to those in the original position. Parties in an inclusive global original position, behind a thick veil of ignorance, would know that the society they represent could be organized around a comprehensive idea of the good or significant moral commitments to individual autonomy, but they would not know which one.

An inclusive original position would also require some redefinition of the fundamental interests that parties seek to maximize. The fundamental interests of decent peoples would be similar to, but more general than, the fundamental interests that Rawls attributes to liberal

peoples. Rawls defines the fundamental interests of liberal peoples as including the protection of their political independence and free culture, as well as the preservation of their security, territory, and the well-being of their citizens. Peoples also seek to protect their *amour-propre*, or self-respect, which rests on their culture and history.<sup>54</sup> Decent peoples in the global original position would seek to protect their territory, along with the lives and well-being of their citizens. In addition, decent peoples would also seek to preserve their independence and decent political institutions, along with their *amour-propre*. They would also seek to preserve their right to organize their society around the particular comprehensive doctrine around which the society has been organized. While Rawls takes toleration seriously, the Law of Peoples as he formulates it does not. Finally, decent peoples would want to secure justice for other peoples. These are the fundamental interests that decent peoples' representatives would seek to maximize.

The principles yielded by an inclusive original position would differ from Rawls' in significant ways. Parties in an inclusive original position would likely accord a central role to toleration. Rawls advocates the toleration of well-ordered hierarchical societies by liberal peoples. Yet, the principles of Rawls' Law of Peoples do not reflect the significance of this value. Its treatment contrasts with the duty to respect human rights, which are treated as both a natural duty and a principle of contractual justice.<sup>55</sup> If parties in an inclusive original position did not know whether they represented liberal peoples or well-ordered hierarchical societies, they would likely grant toleration of well-ordered hierarchical societies a central role, as such a measure would protect their right to structure their government around principles of their choosing. Behind a thick veil of ignorance, parties would want to guarantee a place for their societies in the larger Society of Peoples, even if their societies are not democratic. It is likely, then, that the Law of Peoples resulting from an inclusive original position would reflect the

importance of self-determination and, specifically, the right of communities to organize themselves around comprehensive ideas of the good. Absent such inclusion, it is unclear that well-ordered hierarchical societies could enforce their entitlement to toleration against liberal peoples should liberal peoples reverse their position on toleration.

The interest of well-ordered hierarchical societies in toleration would also prompt them to favor a more robust catalog of human rights. Rawls' favors a minimalist conception of human rights at the global level, which pales in comparison to the existing set of recognized human rights as described in the International Bill of Human Rights.<sup>56</sup> These comprehensive doctrines of the good are presumed to be rooted in cultural beliefs and values, giving well-ordered hierarchical societies – or societies that, behind a thicker veil of ignorance, could be hierarchical societies – an interest in protecting the rights of individuals to participate in the cultural life of their community. Additionally, the right of individuals to hold and act upon their political beliefs supports their right to organize the political life of their community along the lines of their beliefs, making civil and political rights such as “the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance,”<sup>57</sup> the right to participate in cultural life,<sup>58</sup> and the right to a social order in which these rights can be realized<sup>59</sup> significant as well. In this respect, an original position that includes the interests of well-ordered hierarchical societies may yield a more extensive set of human rights than Rawls requires, because the society's right to organize itself around its comprehensive conception of the good depends on the right of its members to hold and act upon such beliefs and values.<sup>60</sup>

In addition to a more extensive role for toleration and a broader reading of human rights, an inclusive original position would yield a more demanding principle of economic redistribution. Rawls argues that at the global level parties would not accept anything like the difference principle. Rawls' Law of Peoples requires only that the better off assist burdened societies in establishing decent political institutions. The substance of this assistance may include economic aid as well as other measures intended to help create those institutions. Rawls asserts three reasons for the exclusion of something like the difference principle at the international level.<sup>61</sup> First, Rawls persuasively argues that decent political institutions do not require great wealth. The duty of assistance terminates once those institutions have been established.<sup>62</sup> Still, setting aside the fact that communities need not be wealthy to be decent, the economic differences have other effects that parties in the original position would seek to avoid.

Second, Rawls argues that well-ordered hierarchical societies would reject the difference principle as overly liberal. This argument ignores the significance of global economic differences, as well as the fact that well-ordered hierarchical societies want to preserve their equality *vis-à-vis* liberal states.<sup>63</sup> Economic differences, while significant in and of themselves, also matter because of their derivative effects.<sup>64</sup> Because of these derivative effects, hierarchical societies, even though they embrace some forms of inequality in their internal organization, would still be concerned about their own equality as measured against liberal peoples. Impoverished societies often find themselves without control over their own economic and political well-being. Such societies find themselves subject to unfavorable terms of trade, which create or exacerbate existing inequalities, or even austerity programs, which may deprive them of control over the well-being of their own citizens. Examining the effects of these global economic inequalities on individuals, Charles Beitz notes that “[m]embers of economically



vulnerable societies – particularly the worse off among them, who lack private means to fall back on – are exposed, without any effective recourse, to the consequences of decisions importantly affecting their life prospects which originate elsewhere.”<sup>65</sup> These considerations also apply at the social level. Impoverished societies must ride the waves of global economic turbulence with little capacity to direct their own destiny. Even a society which rejects equality among individuals or corporate entities domestically would seek to avoid these consequences through the selection of more egalitarian principles that would better protect their economic interests.

Third, Rawls argues that a global difference principle would lead to unacceptable results by rewarding societies that had failed to take steps to guarantee their own prosperity. A principle of global redistribution would not distinguish between a society that chose to develop economically and one that did not.<sup>66</sup> Rawls sees these choices as crucial to the autonomy of peoples and societies, which would be compromised by a global redistributive principle. In treating these policy decisions as a manifestation of autonomy, Rawls treats decisions about industrialization or population control as matters of choice. However, individuals “need not have freely consented to their countries’ policies – indeed, they likely would not have had the option if they belong to hierarchical and nondemocratic societies, or if these were policies implemented before their time.”<sup>67</sup> The distinction between choice and circumstance makes sense only at the individual level, where individuals can be said to have a meaningful choice. When treated collectively, individuals, especially those living under illiberal regimes, cannot be understood as having made a meaningful choice.<sup>68</sup>

In an inclusive global original position, parties representing decent peoples would maintain an interest in preserving their own global position. One of the fundamental interests of decent peoples lies in maintaining their *amour-propre*. In other words, they want to protect their

sense of self-respect. Given the derivative effects of economic inequalities on the global level, and the possibility that their societies lack the wealth necessary to sustain liberal political institutions, parties would require some principle of economic redistribution more extensive than that mandated by the duty of assistance. In the inclusive original position, even parties representing hierarchical societies want to maintain their equality relative to liberal peoples. The possibility that a party may represent an illiberal society would not prevent that party from choosing some more extensive system of economic redistribution. Self-interest would require them to maximize their worst-case scenario by securing some economic protection through the principles of justice that they select.

The other principles of the Law of Peoples, including the provisions limiting war and its conduct, would be consistent with the interests of decent peoples, whether they are liberal peoples or well-ordered hierarchical societies. With these amendments, the revised Law of Peoples acceptable to parties in such an original position would read as followed:

1. Peoples are free and independent, and their freedom and independence are to be respected by other peoples.
2. Peoples that respect human rights, provide for political participation, and secure a common good for their members are entitled to toleration as members of the Society of Peoples.
3. Peoples are to observe treaties and undertakings.
4. Peoples are equal and are parties to agreements that bind them.
5. Peoples are to observe a duty of non-intervention.
6. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense.
7. Peoples are to honor human rights.
8. Peoples are to observe certain specified restrictions in the conduct of war.
9. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.
10. Global economic inequalities must benefit the least-advantaged peoples.

The addition of the second and tenth principles results from the participation of well-ordered hierarchical societies in an inclusive original position at the global level. In this inclusive

original position, the veil of ignorance would be appropriately thick to conceal from parties the knowledge of the types of communities that they represent. Only in this way can parties truly be fair to one another.

## **Conclusion**

In *The Law of Peoples*, Rawls begins with a presumption of equality. On this point, Rawls states that:

[m]uch as in examining the distributive principles in justice as fairness, we begin with the baseline of equality – in the case of justice as fairness the equality of social and economic primary goods, in this case the equality of and the equal rights of all peoples. In the first case we asked whether any departure from the baseline of equality would be agreed to provided that it is to the benefit of all citizens of society and, in particular, the least advantaged... With the Law of Peoples, however, persons are not under one but many governments, and the representatives of peoples will want to preserve the equality and independence of their own society.<sup>69</sup>

This equality forms the basis of toleration, or the acceptance of decent hierarchical societies into the Society of Peoples. Segregating well-ordered hierarchical societies into a separate, inferior original position denies their equality and the significance of their interests and it does so for no apparent purpose. Without a compelling reason, we should not deviate from Rawls' commitment to the equality of peoples. Dividing decent peoples into separate original positions undermines this equality, and the division does not further such a compelling reason. On the contrary, separating decent hierarchical societies into a second original position and depriving them of the right to participate in the selection of principles of justice

The placement of all parties behind a thick veil of ignorance more closely mirrors the structure of the original position in *A Theory of Justice*. If Rawls' reasoning in support of the

thick veil of ignorance domestically was sound, as I believe it was, then utilizing a similar original position, with a thick veil of ignorance, is also a valid approach at the global level. Permitting parties to know that they represent peoples with liberal domestic institutions, and the favorable conditions necessary to sustain those institutions, skews the principles that result from the original position. Although liberal peoples do not themselves possess a comprehensive conception of the good, permitting their representatives access to this knowledge diminishes the value of the veil of ignorance is like allowing parties in the domestic original position access to information about their comprehensive ideas of the good and their social position. Utilizing a thick veil of ignorance imposes conditions of fairness in which all parties must evaluate the reasonableness of principles of justice from all relevant perspectives.

More importantly, this inclusive version of the original position better serves Rawls' purpose in promoting the central value of toleration. I have so far been taking for granted the value of toleration, but underlying the need for toleration is the obligation to respect the rights to freedom of speech and conscience held by the individuals within these communities. Their rights, the rights of their communities to self-determination, and Rawls' interest in promoting peaceful social change, make toleration vitally important. Segregating decent peoples into two separate original positions undermines Rawls' support for toleration by placing well-ordered hierarchical societies in a subordinate position, giving them no input into the content of the Law of Peoples. If we value toleration, then the original position and the Law of Peoples must be structured accordingly. Placing all decent peoples into a single original position in which they are deprived of all information about their societies better comports with the position that both liberal peoples and well-ordered hierarchical societies belong to the Society of Peoples.

The Law of Peoples loses nothing from the inclusion of well-ordered hierarchical societies. On the contrary, the thicker veil of ignorance induces parties in the original position to be fair to those living in well-ordered hierarchical societies, as well as those living in communities that are not well-ordered. While liberal peoples share bonds with each other, they also exist as part of a world occupied by decent hierarchical states, outlaw states, and burdened societies. The interests of those communities or, at least, their members, should also be accounted for in the Law of Peoples if it is to have a truly universal reach.

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**Endnotes**

\* The definition of original to which I refer is that meaning “source.” By more original, I mean that the inclusive version of the original position that I develop here is more consistent with the source of the idea as developed in Rawls’ earlier work.

<sup>1</sup> In *The Law of Peoples*, Rawls refers to well-ordered hierarchical societies as decent hierarchical societies. Because liberal peoples are also presumably decent, and my focus is on the treatment of these decent but non-liberal societies, I use here the earlier term from Rawls’ previous essay. This term is more descriptive and better suited for my present focus on relationships within the Society of Peoples. Where I use the term decent peoples I refer collectively to well-ordered hierarchical societies and liberal peoples.

<sup>2</sup> John Rawls. *A Theory of Justice*, revised edition. (Cambridge, MA: Belknap Press of Harvard University Press, 1999.) Hereinafter, I will abbreviate *A Theory of Justice*, revised edition, as “TJ.”

<sup>3</sup> For reasons why a cosmopolitan alternative to Rawls’ account might be desirable, see Charles Beitz, “Rawls’s Law of Peoples,” *Ethics* 110 (2000): 669-696. Cosmopolitans like Thomas Pogge and Andrew Kuper have developed Rawlsian versions of global justice based on individual interests rather than peoples’ interests. For these accounts, see Thomas W. Pogge, *Realizing Rawls* (Ithaca, NY: Cornell University Press, 1989), and Andrew Kuper, “Rawlsian Global Justice: Beyond the Law of Peoples to a Cosmopolitan Law of Persons,” *Political Theory* 28 (2000): 640-674.

Others take issue with Rawls’ inclusion of well-ordered hierarchical societies in the Society of Peoples. Leading examples of these views include Kok-Chor Tan, *Tolerance, Diversity, and Global Justice* (University Park, PA: Pennsylvania State University Press 2000) and Martha Nussbaum, “Women and the Law of Peoples,” *Politics, Philosophy & Economics* 1 (2002): 283-306.

<sup>4</sup> TJ, 120.

<sup>5</sup> TJ, 6.

<sup>6</sup> TJ, 11.

<sup>7</sup> Ibid.

<sup>8</sup> TJ, 17.

<sup>9</sup> Patrick Hayden, *John Rawls: Towards a Just World Order* (Cardiff: University of Wales Press, 2002), 13.

<sup>10</sup> TJ, 10.

<sup>11</sup> Ibid.

<sup>12</sup> Because the parties in the original position are modeled as mutually disinterested, critics have objected that the Rawlsian self is unduly isolated and empty. For an excellent overview and evaluation of these critiques, see Chapter Four of Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press of Oxford University Press, 1991). Kymlicka argues that while communitarians quarrel with Rawls’ rather abstract conception of the individual in the original position, Kymlicka shows that both Rawls and the communitarians agree that the self is ultimately prior to her ends. In other words, the individual can form and revise a life plan rather than being constituted by her ends.

<sup>13</sup> TJ, 118.

<sup>14</sup> Justice as Fairness, 15.

<sup>15</sup> As Rawls states, “Contingent historical advantages and accidental influences from the past should not affect an agreement on principles that are to regulate the basic structure from the present into the future.” Justice as Fairness, 16.

<sup>16</sup> John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Belknap Press of Harvard University Press, 2001), 55.

<sup>17</sup> Ibid.

<sup>18</sup> TJ, 288.

<sup>19</sup> TJ, 119.

<sup>20</sup> TJ, 133.

<sup>21</sup> TJ, 266. Rawls later made further revisions to his two principles in *Justice as Fairness*. That version of his two principles reads as follows:

- (a) Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is fully compatible with the same scheme of liberties for all; and
- (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second,

they are to be to the greatest benefit of the least-advantaged members of society (the difference principle). *Justice as Fairness*, 42-3.

While Rawls describes the changes to the difference principle as basically cosmetic, the changes to the first principle respond to criticisms raised by H.L.A. Hart.

<sup>22</sup> TJ, 53.

<sup>23</sup> TJ, 66.

<sup>24</sup> TJ, 4.

<sup>25</sup> *Justice as Fairness*, 40.

<sup>26</sup> Rawls' book-length consideration of the Law of Peoples followed an earlier essay. John Rawls, "The Law of Peoples," in *On Human Rights: The Oxford Amnesty Lectures 1993*, ed. Stephen Shute and Susan Hurley (New York: Basic Books, 1993.) This early version of the Law of Peoples was also reprinted in John Rawls, *Collected Papers*, ed. Samuel Freeman (Cambridge MA: Harvard University Press, 1999). The concepts in this essay found further development in Rawls' subsequent book-length project.

<sup>27</sup> LP, 55.

<sup>28</sup> LP, 14, note 5.

<sup>29</sup> LP, 14.

<sup>30</sup> LP, 23

<sup>31</sup> LP, 28. Rawls contrasts these reasonable interests with rational interests that put states at odds with one another.

<sup>32</sup> Illustrative of this conception of interest is the problem of relative gains. Neorealists cast doubt on prospects for international cooperation because of the relative gains problem. While all states may gain from cooperation, they will probably not gain equally. Because power is relational, and states pursue their rational interest, they will forego absolute gains if relative gains would render rival states more powerful.

<sup>33</sup> LP, 29.

<sup>34</sup> LP, 107.

<sup>35</sup> LP, 32.

<sup>36</sup> LP, 33.

<sup>37</sup> LP, 37.

<sup>38</sup> LP, 42.

<sup>39</sup> LP, 59.

<sup>40</sup> LP, 61.

<sup>41</sup> Ibid.

<sup>42</sup> LP, 65.

<sup>43</sup> I am grateful to my colleague Oneida Meranto for reminding me that even this short list of rights is not without controversy. In particular, the right to individual property may not be recognized as a right in many non-Western and indigenous.

<sup>44</sup> LP, 66.

<sup>45</sup> LP, 75-6.

<sup>46</sup> LP, 77.

<sup>47</sup> LP, 72.

<sup>48</sup> LP 76, note 17.

<sup>49</sup> Michael Walzer, *On Toleration*. (New Haven: Yale University Press, 1997), 17-8.

<sup>50</sup> Beitz, "Rawls's Law of Peoples," 675. This view is consistent with Rawls' own understanding of the Law of Peoples as an extension of his project of liberal justice.

<sup>51</sup> TJ, 6.

<sup>52</sup> LP, 33.

<sup>53</sup> TJ, 288.

<sup>54</sup> LP, 34.

<sup>55</sup> Rawls treats the duty to honor human rights as applicable to outlaw states, which never participate in an original position and do not accept the Law of Peoples. LP, 80-1. In this respect the obligation to honor human rights is prior to the social contract of the Law of Peoples and applies even to parties that reject these principles of international justice.

<sup>56</sup> Fernando R. Tesón finds Rawls' Law of Peoples to be inconsistent with contemporary international law, arguing that the "range and kind of human rights that are now recognized by international law considerably exceeds the modest requirements of legitimacy proposed by Rawls." Tesón, *A Philosophy of International Law* (Boulder: Westview Press, 1998), 115.



<sup>57</sup> Universal Declaration of Human Rights, Article 18.

<sup>58</sup> Universal Declaration, Article 27.

<sup>59</sup> Universal Declaration, Article 28.

<sup>60</sup> I assume here that we are dealing with a well-ordered hierarchical state in which the majority of members share the conception of the good around which society is organized rather than a society in which this view is held by a minority. Henry Shue refers to such a case as a “true believer” state. Henry Shue, “Rawls and the Outlaws,” *PPE: Politics, Philosophy & Economics*: 1 (2002), 307-323.

<sup>61</sup> This section benefited considerably from conversations with Kok-Chor Tan.

<sup>62</sup> LP, 119.

<sup>63</sup> LP, 69-70.

<sup>64</sup> Charles Beitz, “Does Global Inequality Matter?” *Metaphilosophy* 32(2001), 95-112.

<sup>65</sup> *Ibid.*, 107.

<sup>66</sup> Rawls, LP, 117-8.

<sup>67</sup> Kok-Chor Tan, “Critical Notice,” *Canadian Journal of Philosophy* (2001), 122.

<sup>68</sup> Rawls recognizes this distinction in his discussion of outlaw states and the decision to go to war (LP 94-6), but discounts its significance in discussing matters of economic development.

<sup>69</sup> LP, 41.