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Justice, Stability and Toleration

In a federation of Well-Ordered Peoples

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The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination.

*Treaty establishing a Constitution
for Europe Article I-2: The Union's
values*

it makes sense to think of liberal and decent peoples together in an original position when joining together into regional associations or federations of some kind, such as the European Community, or the commonwealth of the republics in the former Soviet Union. It is natural to envisage future world society as in good part composed of such federations together with certain institutions, such as the United Nations, capable of speaking for all the societies of the world.

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Abstract

Europeans currently reflect on how to express and promote human rights and solidarity in their common institutions in the new Constitutional Treaty now facing ratification. What is the scope of toleration towards states that violate human rights, within and beyond its borders? And what is the scope of permissible economic inequality across states in such a federation of democracies committed to domestic solidarity?

John Rawls' *Law of Peoples* sought to be a plausible extension of a liberal conception of justice for a domestic regime to a Society of Peoples, laying out "the ideals and principles of the *foreign policy* of a reasonably just *liberal* people". The mixed reception of *The Law of Peoples* suggests that better justifications are required on at least two counts, concerning respect for states that deny its citizenry certain human rights, and concerning standards for distributive justice.

The paper develops aspects of a theory of federal justice to offer further – and perhaps better - Liberal Contractualist arguments regarding these two issues. The European Union may need a differentiated human rights policy, and denies that the Difference Principle, even if appropriate for domestic justice, should apply to a federal order. Disagreements with Rawls' Law of Peoples largely concern the arguments offered for these conclusions.

Introductionⁱ

Scholars of international relations debate the withering of the Westphalian world of states, in Europe and elsewhere.ⁱⁱ Normative political theorists follow suit, and assess the transformed system of states, the norms of internal and external sovereignty, immunity and intervention, and other regional and global regimes. In *The Law of Peoples* (LP) John Rawls succinctly identified the intertwined issues of toleration, stability and legitimacy that face these political relations across political bordersⁱⁱⁱ. Can this Law of Peoples shed light on how the European Union can address these issues? In particular, Europeans currently reflect on how to express and promote human rights and solidarity in their common institutions in the new Constitutional Treaty now facing ratification^{iv}. What is the scope of toleration towards states that violate human rights, within and beyond its borders? And what is the scope of permissible economic inequality across states in such a federation of democracies committed to domestic solidarity? These reflections share the objective of the Law of Peoples, to be a plausible “extension of a liberal conception of justice for a *domestic* regime to a *Society of Peoples*”. The Liberal Contractualist account below agrees with some of the conclusions of the Law of Peoples. They both respect state sovereignty in the face of some human rights violations, and they both accept a degree of material inequality among individuals in different sub-units of a federation. In particular, the European Union may have a differentiated human rights policy, and solidarity does not require a European-wide Difference Principle. Disagreements largely concern the arguments offered for these conclusions.

Background: the European Union and the Law of Peoples

The ‘Reactions against Austria’ illustrate the Union’s human rights challenges. In 2000 Austrian democratic elections put the allegedly xenophobic Freedom Party in government. Other EU Member States responded swiftly, though without involving the EU. They sent diplomatic protests, ended bilateral political contacts, and rejected Austrian candidates for international posts. The reactions had two distinct effects. In the short run they were counterproductive since they mobilised Austrians in defence of their

democratically elected government – a government many despised. These reactions and their aftermath also led the EU to develop procedures for future cases where a Member State is suspected of systematic violations of human rights^v. The fundamental issue is how to best respond to alleged human rights violations, within a federation and abroad. The objective must be to promote long term compliance, while avoiding criticism of applying double standards among states within or beyond the borders. Can a ‘unified human rights approach’ be effective and consistent?

The obligations of federal solidarity is expressed in the Constitutional Treaty:

the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions or islands, including rural areas.^{vi}

This challenge increases in the EU with the recent inclusion of poor Central and Eastern European states. Justice may require institutions that burden richer Member States, at high economic and political costs. Such obligations are especially strenuous at a time when economic integration seems to force restructuring if not dismantling of many domestic structures of solidarity in the Western states.^{vii} Yet to deny federal solidarity seems contrary to the egalitarian norms expressed in the welfare arrangements of Member States. One strategy is to explore whether sound theories of global or federal distributive justice allow greater material inequality across borders

As with John Rawls’ earlier work, his Law of Peoples frames these issues of human rights and distributive justice in a fruitful institutional perspective.^{viii} Institutions are of crucial normative importance and pose particular normative challenges, not least because the basic institutional structures shape our life plans and preferences and affect our resources and opportunities to fulfill them.

When defending standards for assessing the domestic basic structure of liberal states, Rawls famously sought principles and their immediate justification that were acceptable

to a broad range of duly modified philosophical and religious world views. The theory of Justice as Fairness itself alleviates assurance problems among individuals who would otherwise likely mistrust each other to not comply. The theory promotes stability by offering a public justification for just social institutions that all can endorse.

The normative assessment of global or federal institutions must likewise consider issues of stability, and Rawls underscores the contribution of the theory itself. The allegedly universal values of equality and human rights challenge other established norms of political autonomy and stability. The tension prompts careful reflection about the grounds and limits of toleration - and intervention. In particular, should non-liberal states have to continually fear intervention by liberal states eager to promote democracy, human rights and economic distributive justice – and contested conceptions of liberalism? LP seeks to prevent this source of global instability. Liberal peoples have good reason to tolerate and even respect the political autonomy of some non-liberal ‘decent’ hierarchical peoples. They can live free from fear of liberal humanitarian intervention.

Such international stability requires more than a plausible statement of the limits of toleration – “how far nonliberal peoples are to be tolerated” (10) The limits must be based on convincing public reasons for respecting such political autonomy: “the ideals and principles of the *foreign policy* of a reasonably just *liberal* people”.^{ix} The mixed reception of *The Law of Peoples* suggests that better justifications are required on at least two counts, concerning respect for states that deny its citizenry certain human rights, and concerning standards for distributive justice.^x

The comments below develop aspects of a theory of federal justice to offer further – and perhaps better - Liberal Contractualist arguments regarding these two issues. It agrees with the apparent implications of the Law of Peoples, that the European Union may need a differentiated human rights policy, and denies that the Difference Principle, even if appropriate for domestic justice, should apply to a federal order.

Overview

Section 1 sketches why LP grants moral standing in the form of political immunity to "hierarchical peoples" that allegedly fail to secure political rights, freedom of religion and gender equality. Criticisms motivate an alternative account of the grounds and limits of intervention for human rights in section 2. Section 3 presents LP's arguments for permitting economic inequalities in a federal or global setting. Section 4 presents an alternative account of why claims to equal shares are not as decisive for federal distributive justice as in unitary states. Section 5 returns to check whether these accounts secure toleration and stability.

1 The argument of Law of Peoples: standards and grounds for international stability

The Law of Peoples seeks to rebut fears of intervention by arguing that both liberal and non-liberal peoples endorse its principles of non-intervention.^{xi} In particular, we must consider why liberal peoples should respect the non-liberal 'hierarchical' peoples as "equal participating members in good standing of the Society of Peoples". (59, 5) The hypothetical, hierarchical peoples have a system of laws that is guided by a "common good" conception of justice, defended publicly by judges and other officials, and their system of laws respects certain Proper Human Rights that are said to secure the common good. These include the right to life with subsistence, freedom from slavery, and sufficient liberty of conscience to ensure freedom of religion and thought, to personal property and to formal equality (65). LP also recognizes 'implied human rights' expressing such as rights against genocide and apartheid (80). The system of laws satisfying these human rights "specifies a decent scheme of political and social cooperation" which imposes *bona fide* moral duties and obligations (66-67).^{xii} But the citizenry has no political rights, only opportunities for dissent through a consultation hierarchy. Freedom of religion for some is 'freely' curtailed for the sake of the dominant religion. These peoples are safe from interventions, which are only permitted against violations of Proper Human Rights or Implied Human Rights (80, 83).

The upshot is that neither military, economic nor diplomatic intervention is permitted as a means to foster or establish liberal political structures such as equal freedom of association, democratic political rights, freedom of expression, equal pay for equal work, or right to education, - or any of the other rights listed in the Universal Declaration of Human Rights beyond Art. 18 (cf. 65). Indeed, single countries or organizations of reasonable and decent peoples (such as a revised UN or IMF) should not even provide economic incentives for hierarchical peoples to change (84).

Critics may argue that LP fails to show why hierarchical peoples are decent. There are empirical reasons for including political rights and freedom of the press as what we may think of as *Instrumental Human Rights*. These are necessary institutional safeguards to reliably prevent hunger, and to secure other human rights over time. In their absence the society is likely to deteriorate into an absolutist state, a burdened society or even an outlaw state.^{xiii} This institutional perspective requires mechanisms to ensure that governments remain effectively responsive over time. One imperfect mechanism is competitive democratic elections.^{xiv} The long term effectiveness of the consultation hierarchy remains unclear. It is therefore difficult to imagine such a society remaining hierarchical over time without Instrumental Political Rights (*pace* fn 16, p 75).

LP's main defense is presumably not to deny the importance of such instrumental rights, but rather to deny that they are human rights in the relevant sense. The point would be that international intervention to promote these rights is ill guided. In the Law of Peoples human rights only play this trigger function – a point that is sometimes overlooked by critics.^{xv} In further support of this view, LP argues that respect, rather than intervention, best promotes domestic reforms (61).

One may object that these claims about the efficacy of intervention only for Proper Human Rights must be defended, empirically or otherwise. Surely there may be good reasons to consider intervention aimed at promoting political rights and freedom of speech, as much as interventions to protect against torture. The upshot is that LP as it stands does not provide a reasoned basis for stability. The arguments provided do not

give liberal peoples sufficient reason to respect hierarchical societies. Hierarchical peoples therefore have reason to fear a broader intervention agenda by liberal peoples. One response is to provide better reasons why liberal peoples should be cautious regarding military intervention.

2 Human Rights in federations

The present section addresses the justification and prohibition of various forms of human rights interventions in another way than LP.

Consider first that human rights serve many different roles within a federation of liberal peoples, exemplified by the European Union.

Legally codified human rights are action guiding, often taken to regulate *different actions of different agents*. This is a point sometimes missed by critics who charge that the EU – as many states – apply double standards with regards to human rights violations. One problematic area concerns alleged inconsistencies between the ‘internal’ and ‘external’ aspects of EU. The human rights protections for EU residents are stronger than the impact of human rights on EU foreign policies.

Professors Alston and Weiler have recently argued that “only a unified approach embracing both dimensions of the Union’s approach to human rights is viable.”^{xvi} I submit that the Charter of Fundamental Rights, now Part II of the Constitutional Treaty, is necessary but not sufficient to alleviate the apparent inconsistencies. We must also consider the multiple roles of human rights within federal political orders that give rise to different standards for various actions.

Harking back at least to John Locke human rights compliance by government has been required for citizens’ political obedience.^{xvii} LP is instead concerned with human rights as conditions for immunity by the international community of states.^{xviii} Since these two functions are different, it should come as no surprise that the standards are likely to differ as well.^{xix}

The list of human rights regulating intervention must be specified not only in light of their importance for individuals, but also in light of the dangers of intentional and unintentional abuse by intervention-prone states, and the likely effects of intervention. These considerations may well lead to a more limited list of human rights to be protected internationally, by intervention if necessary and efficacious.

Human rights can also serve at least three other functions in federal political orders. Human rights may specify the scope of immunity and discretion for sub-units and their citizens, to protect them from central authorities. For instance, citizens may be guaranteed some scope of cultural and institutional variation for expression of national identity and sub-unit preferences. Violations may merit reactions by the sub-units.

Secondly, human rights may protect minorities living within a sub-unit. Violations may warrant rescue by other subunits against the local tyrant, as Montesquieu hoped.^{xx} A third task is to promote trust in sub-unit cooperation. Europeans of different Member States agree to be jointly governed by bodies consisting of representatives of all sub-units who sometimes decide by majority rule. They must be trusted to not only serve their own electorate, but also be guided by common European values and an ‘overarching loyalty’ to Union citizens. If one government in the EU violates human rights, other governments and union citizens may reasonably conclude that it cannot be trusted to exercise Union political authority responsibly on their behalf.

In each of these five functions, the substantive human rights requirements should presumably be quite different. The lists should reflect several considerations of “proportionality”: The risks and benefits of the various actions and granting of authority, including the likelihood of mistaken assessment of violations and the prospects for success by intervention and through alternative mechanism of change. The institutional perspective is important to bear in mind: the question is not only the likelihood of an individual case of intervention, but whether such a public intervention practice fosters compliance with legitimate institutions in the long run.

Recall that the actions regulated by these five different roles range from compliance with law by individuals to humanitarian armed intervention. The Law of Peoples is quite right to raise concerns about stability. Indeed, fear of abuse and instability has restrained

institutions and humanitarian intervention policies even by the United Nations, at least until the 1990s. The last ten years have witnessed an increased readiness by the Security Council to allow interventions, in Somalia, Rwanda and Haiti^{xxi} Unfortunately these interventions have not achieved enough in the way of success.^{xxii}

In federations the sub-units are mutually interdependent to such an extent that milder forms of interventions may suffice. Human rights interventions may also backfire, causing hostility and suspicion rather than transformation, as LP notes.

This brief sketch suggests that the set of human rights serving each function must be argued with great care in light of the objectives and forms of intervention. So even though we may agree that the EU needs a consistent set of human rights policies regarding interventions of different kinds. But a unified account does not mean a *unitary* approach requiring intervention whenever the Charter is violated. Different, possibly higher standards may apply among Member States than when reacting against Union institutions, or when considering international intervention. A satisfactory account must also differentiate among the forms of intervention ranging from military to economic reactions.

The upshot is that much more must be said to make a convincing argument that peoples should be protected from *all sorts of intervention* if they fail to secure what we may think of as “Liberal Human Rights”: democratic political rights, freedom of the press, and gender equality. LP’s conclusion seems sound regarding military intervention in defense of political rights. Such measures seem particularly ineffective and prone to abuse, and a such a practice therefore seems illegitimate. Other modes of intervention and sanctions may be effective. One important objective may be to strengthen domestic mechanisms for improving the situation by means of economic or diplomatic measures which carry lower risks. These actions may entice - or sometimes coerce - a government to grant universal voting rights, or promote women’s right to education, or freedom of the press. It would seem feasible and legitimate to offer international loans conditional on such changes, and to refuse to nominate officials from these countries to public offices (*pace* 84-85).

Rawls' concern for stability and compliance for the right reasons led him to warn that "the reasons for not imposing sanctions do not boil down solely to the prevention of possible error and miscalculation in dealing with a foreign people." (83) Reticence is also appropriate out of respect for political autonomy, in the sense that those who live under a regime are often better at improving it - if given the real opportunity to do so. However, this is not an argument against intervening in hierarchical societies.^{xxiii} () whose citizens are hardly free to make their own political decisions. Interventions may indeed foster the ability of citizens to take control over their governors in the absence of democratic rights. LP may be correct in holding that intervention and the withholding of respect for governments sometimes discourage internal change and mobilized counterproductive popular support (61) – as the Reactions against Austria illustrated. But non-military interventions and international expressions of contempt for non-elected governments may also foster popular dissatisfaction and protest.

I conclude that there are reasons to not prohibit all forms of international intervention to promote democratic rights, freedom of the press and gender equality. Military intervention is extremely unlikely to further this objective, and hence should not be permitted especially not in hierarchical or liberal states. But other forms of intervention may be accepted, especially when they aim to foster domestic accountability and hence legitimate political autonomy.

3 The argument of Law of Peoples for inter-people inequality

The second normative issue addressed by both the Law of Peoples and by the European Union concerns standards of just economic distribution in a world with several somewhat independent states. The egalitarian commitment of domestic Liberal Contractualism would seem to require massive transfers to poorer states, but possibly at a cost to political autonomy. They may be required to pursue particular economic and political strategies to reduce richer states' burden. Alternatively, poorer states and their poorest citizens in particular may be left with less than what, say, a Global Difference Principle would allow. LP argues the latter. There are limited duties of assistance to *burdened*

societies, but only to establish and preserve their just or decent institutions. This objective does not limit inequalities among societies (106pp). Other obligations hold among peoples who set up cooperative organizations for mutual advantage in the longer run, such as in the European Union (42pp).

LP seems to provide two main sorts of reasons for limited trans-border egalitarianism. Firstly, differences in economic development are largely regarded as a result of domestic political culture. This is the responsibility of the domestic population in both liberal and hierarchical peoples, rather than a responsibility of the international community: “Assuming, as we do, that both societies are liberal or decent, and their peoples free and responsible, and able to make their own decisions, should the industrializing country be taxed to give funds to the second?” (117)

This argument makes several problematic assumptions. It is difficult to grasp reasons to hold the population in hierarchical societies responsible for the political culture and the outcomes of government policies. By definition, they lack popular political control over ‘their’ government, which is not accountable except in the weak sense of a moral obligation to listen to citizens’ concerns, and address and answer them.

Secondly, LP sees the causes of economic development as endogenous to each society (108). An alternative view is that the global basic structure *also* plays crucial direct as well as indirect roles. It affects the legal and hence what counts as material resources available to each society. Consistent with LP’s claims, the global basic structure affects the domestic political culture indirectly, for instance by the international legal recognition it grants non-democratic governments who can thereby gain power domestically.

Other reasons seek to defend institutionalized inequalities among foreigners across borders, even in a system of somewhat independent, liberal states. LP dismisses three reasons in support of equal shares to citizens across borders: to relieve suffering, to prevent stigmatization, and to ensure that political processes work fairly(113). Such

claims to equality seem stronger in federal arrangements. Still, there are other reasons to reject a global difference principle for federations.

4 Distributive Justice in Federations

Federal arrangements are often introduced to solve perceived problems suffered by independent states or by unitary governments: to secure peace, promote institutional innovation, efficiency or liberty.^{xxiv} Yet egalitarian cosmopolitans may not permit federal arrangements in practice.

The federations of concern are non-unitary political orders where the central and multiple regional loci of government enjoy final legislative or executive authority with regards to some functions, often by way of constitutionally enumerated powers.^{xxv} Federations challenge strict egalitarian requirements that would restrict the distributive impact of local autonomy.

The federal contractualist normative theory sketched below pursues a middle ground. It is ‘cosmopolitan’ in being concerned with the well-being of individuals (120), yet allows that the well-being of the globally worst off not be maximized. This account thus defends the somewhat startling claim in LP that the difference principle would not emerge as the ‘most reasonable’ political conception even for a federal union of liberal democratic societies (fn 53 p 43). Limited inequality may be acceptable because the same interests that ground claims to equality support sub-unit autonomy rather than a unitary political order. First, consider various arguments for equality in unitary and federal states. Secondly, it seems that gains in political influence provided by local autonomy and immunity can sometimes be advantageous even for those who are left economically worse off.^{xxvi}

On reasons for equality

Some liberal theories appear to take for granted that equal respect for all entails equal shares -- be it of goods, opportunities, resources, or initially un-owned objects.^{xxvii} Rawls’ Justice as Fairness gives a similar impression since it famously requires a baseline of equal shares of economic and social goods (Rawls 1971).

However, contractualism allows substantive inequalities if they withstand reasonable objections.^{xxviii} At least four grounds for lamenting inequalities merit discussion.

Equality is sometimes necessary to prevent misery. Acceptable institutions must engender and distribute benefits so as to meet the basic vital needs and secure the survival of all when possible. Human rights can be regarded as identifying some such conditions on domestic and international regimes.^{xxix} This argument from basic needs and human rights may limit permissible inequalities as a necessary means, for instance in the market place for food. But misery prevention does not require equality of condition.

Equality may also be required for fair procedures that require a roughly equal distribution of procedural input levers, such as education, income and wealth. The relative share of certain goods matter for the real value of formal political power, and for acceptable food markets.^{xxx} Inequalities of wealth or knowledge may also foster domination, leaving some subject to the arbitrary will of others.^{xxxi} Those inequalities that threaten fair procedures or foster domination are therefore objectionable.

Finally, individuals may claim equal shares of certain goods when they have contributed equally to their production, and when no one can be said to have prior claims to the benefits. This may occur when there is no prior agreement regarding distribution and each party's contribution cannot be determined. When several individuals jointly labor to produce such goods, they have equal claims to them. I submit that this 'constitutive' argument strengthens Rawls' argument for equal claims to *social primary goods*. We may think of social institutions as social practices that are maintained by the use of legal powers such as sanctions and authoritative interpretations. Political power, property rights and even income are such legal rights. They are products of co-operation in a significant sense. A person's claim to own something is true -- and can be made sense of -- only when and because the rules of ownership are generally complied with by those participating in that practice. Her entitlements are of course hers, but the entitlements exist as entitlements only insofar others regulate their actions according to public rules. The constitutive argument for equal shares of products applies to such legal rights. Citizens therefore have equal moral claims on how social institutions should regulate the legal distribution of political power, income and other legal rights, when they all

contribute to upholding these practices and where there are no prior claims. This is appropriate when discussing which institutional rules of acquisition and transfer should exist. Since these legal rights exist only through the cooperation of all, all participants in social institutions have a prima facie equal moral claim to the legal rights that arise within such institutions.

I submit that this account provides an argument in favor of Rawls' egalitarian principles for Social Primary Goods -- that is, political and civil rights, and equality of opportunity and income and wealth. These goods are clusters of legal rights, existing as aspects of public practices maintained by citizens.

These various arguments for equality only apply to a limited range of objects, and often only put limits on permissible inequalities.

Federal and global implications

These reasons against inequality do not hold across solid state borders where external sovereignty effectively prevents cross-border causes of misery, domination and unfair procedures. The 'constitutive' argument for equal shares of products of co-operation also fails, if citizens of different states do not participate in common institutions. But states in an interdependent world have restricted real autonomy due to such factors as global market competition, oligarchic trans-national corporations, structural adjustment policies and international human rights norms. The present world order is clearly of this kind. The LP discussions about the best relations among fully independent states must therefore be supplemented to consider standards for cooperative arrangements (114-115).^{xxxii} Reflections on federal distributive justice shed some light on the significance of claims to equality under interdependence.

Member States of the European Union have pooled sovereignty to a large extent. They share institutions and maintain freedom of movement for capital, workers, goods and services. Many also have a common currency that renders their citizens more vulnerable to trans-border economic shocks. Many decisions are made by majority vote among government representatives in combination with a common directly elected European Parliament. Normatively, it is difficult to distinguish sharply between the effects of

domestic social institutions and those of neighboring states and of the union as a whole. The same arguments for equal shares and against certain forms of inequality therefore seem to apply as within a unitary state.^{xxxiii} However, there may be a further reason for permitting inequality.

Local autonomy and immunity can provide political influence that is advantageous even for those economically worst off. To show this we must consider arguments for splitting legal authority between a central and sub-unit levels of a federal political order, sometimes addressed in the forms of arguments for 'subsidiarity.'^{xxxiv} The legitimacy of such split authority may be assessed by a hypothetical contract between representatives of joining nations or states, deciding on the terms of their federation without knowing which nation or people they represent.^{xxxv} Why and when would individuals reasonably seek to protect and further their interests by means of federal arrangements?

One classical argument is to protect against unjust domination. In a federal system "the parts are so distant and remote that it is very difficult, either by intrigue, prejudice, or passion, to hurry them into any measures against the public interest."^{xxxvi} Majority coalitions in larger polities are presumably less likely to harm local minorities. But this argument favours centralization without explaining why sub-units should have any powers at all.

Sub-unit autonomy allows room for institutional experimentation and innovation, "compass and room enough to refine the democracy." These "experiments in living" allow citizens to learn from the experiences of other sub-units.^{xxxvii} Local autonomy is also valuable when individuals' interests and preferences vary according to geographical parameters such as geography, resources or cultural tastes and values. At least six reasons can be discerned. Immunity can protect such groups from majorities.^{xxxviii} Local powers are sometimes more likely to address the "local circumstances and lesser interests" without neglect.^{xxxix} Sub-units may also be more competent at this task, and they may be able to create "club goods" or "internalities" for the affected individuals.^{xl} If the only effects occur locally, there is little reason to burden outsiders with information gathering, reflection and decisions. Sub-unit autonomy also allows preexisting political

units some control over institutional changes, which promotes individuals' interest in maintaining legitimate expectations.

On the other hand, local government has its own risks and must be curbed to prevent tyranny against local minorities and "selfish mismanagement of local interests by a jobbing and borné, local oligarchy."^{xli}

To sum up, sub-unit autonomy on certain issues can yield identifiable benefits for citizens in the form of more political influence than in a unitary political order. But is it advantageous for the "sub-unit poor"? Their income share is fair compared to others in their sub-unit, for instance according to a Difference Principle. But they are economically worse off than the worst off in a unitary political order regulated by a Difference Principle. I submit that they would have reason to prefer a federal arrangement at some economic cost for at least three reasons.

The division of political agendas reduces their vulnerability to the larger majority, preventing domination due to ill will, incompetence or insufficient attention.

Sub-unit autonomy over certain issues makes these political bodies more responsive to the sub unit poor and others in that sub unit. Immunity and more political power over these issues can therefore be of more value to the individual than somewhat more economic resources within a unitary political order. The authority to shape institutions to local circumstance may gain them more than marginally more material resources to use within institutions which provide less of a fit.^{xlii} Finally, sub-unit autonomy reduces each person's burden to reflect on the political issues largely affecting other sub-units. The economic inequality that follow from such local autonomy may thus be unobjectionable - at least when kept within certain limits. There must be no or few externalities, and local knowledge is required. Furthermore, the sub-units must have fair working democratic processes in place. Under such conditions, sub-unit autonomy may be preferable even at some economic cost to the sub-unit poor - within limits set by their interest in avoiding misery and domination.

5 Toleration and Stability Reconsidered

The arguments presented allow non-military intervention in some cases to promote democratic rights, freedom of the press and gender equality. Economic inequalities across sub-units of a federal political order are justifiable within limits, defending LP's view that a global difference principle is not required. Do these aspects of a federal theory of justice avoid the problems of toleration and stability?

Firstly, is this theory indefensibly based on liberalism? Of course, democratic political rights, freedom of the press, and gender equality may well be Western in origin. But genesis is not an objection: if so, claims to external sovereignty should also be dismissed, since state sovereignty is also largely a Western concept (Follesdal 2005). The defense of intervention for Instrumental Human Rights is not based on particularly 'liberal' conception of the person, but on empirical findings that universal suffrage are central to secure basic needs and Proper Human Rights.

A second objection is that stability is at risk when compared to the criteria of intervention laid out in LP. In response, note firstly that we agree with many of LP's conclusions, but for other reasons. There are good *empirical* grounds against a practice of *military intervention aimed at establishing democratic governments*. Such interventions are seldom successful, and such authority is easily abused.^{xliii} It might be objected that these are merely empirical grounds, and that they are less trustworthy than the more philosophical argument of LP. However, these empirical generalizations are acceptable in public reason. LP indeed appeals to such generalizations when it claims that withholding respect will stifle change in hierarchical peoples (64). Moreover, and most important: if the argument in LP fails, it does not bolster trust.

Unlike LP this account is prepared to allow non-military interventions in hierarchical peoples. This does not render a legitimate global order less stable. The empirical premises for Instrumental Human Rights hold that in their absence the population faces a higher risk to their Human Rights Proper. So such violations will often warrant intervention anyway. Successful interventions for Instrumental Human Rights will also foster the citizenry's political autonomy to protect themselves against future human rights violations, and promote longer term just stability.

Another source of instability may be that citizens of rich countries may not be prepared to participate in redistributive arrangements beyond a duty of assistance: “with a global egalitarian principle without target, there would always be a flow of taxes as long as the wealth of one people was less than that of the other. This seems unacceptable” (117). A first response is that this worry seems inappropriate for our subject matter, the distributive effects of institutions. The principles do not regulate single acts of transfers. I have also argued that principles of distributive justice may be less egalitarian in federal arrangements, and by extension in the global political order. This result would seem to reduce the ‘burdens of compliance’. Finally, this source of instability from lack of motivation does not seem different in kind from the instability wrought by the risk that rich citizens will not comply with institutions required by the difference principle. A response faithful to Justice as Fairness would be that such compliance should be fostered by reflective socialization by the just institutions themselves (13 fn 2). It is in part a matter of providing sound public arguments against certain kinds of inequality.

The concern for stability thus seems secured as much by this theory of federal justice as by the Law of Peoples.

Rawls wrote regarding the Law of Peoples that

The social contract conception of that law, more than any other conception known to us, should tie together, into one coherent view, our considered political convictions and political (moral) judgments at all levels of generality (58).

The social contract conception Rawls singlehandedly did so much to revive and develop may avoid some of the criticisms raised against his own arguments in *The Law of Peoples*. His objective remains paramount: to provide a public, reasoned basis for an overlapping consensus that may contribute to a just and stable political order.

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- ⁱ I am very grateful for helpful comments and suggestions from Alyssa Bernstein, Michael Doyle Anne Julie Semb and Andrew Kuper.
- ⁱⁱ Cf. Keohane, Robert O. (1995). "Hobbes's Dilemma and institutional change in world politics" in *Whose World Order?* Hans-Henrik Holm and Georg Sorensen, eds. Boulder: Westview Press; Krasner, Stephen D. (1999) *Sovereignty: Organized Hypocrisy*. Princeton: Princeton University Press; MacCormick, Neil (1999) *Questioning Sovereignty*. Oxford: Oxford University Press.
- ⁱⁱⁱ (1999) Cambridge, Mass.: Harvard University Press.
- ^{iv} <http://ue.eu.int/igcpdf/en/04/cg00/cg00087.en04.pdf>
- ^v Now Article 58 of the Constitutional Treaty.
- ^{vi} Article III-116.
- ^{vii} Pierson, Paul, ed. (2001) *The new politics of the welfare state*. Oxford: Oxford University Press.
- ^{viii} Rawls, John (1971) *A Theory of Justice*. Cambridge, Mass.: Harvard University Press; (1993) *Political Liberalism*. New York: Columbia University Press.
- ^{ix} – leaving aside broader issues such as the normative legitimacy of the global order in general.
- ^x Cf. articles in *Ethics* 110:4 (2000); *Fordham Law Review* 72:4 (2004).
- ^{xi} Note for another occasion that the notion of reflection on these principles (41-42) is drastically different from the contractualist argument of ranking alternative principles familiar from Rawls (1971).
- ^{xii} Whether liberal peoples must agree with this assessment is unclear.
- ^{xiii} 75, fn 16. Rawls notes Amartya Sen's arguments to this effect (9, 75, 109, 110); and cf. Dahl, Robert A. (1998) *On Democracy*. New Haven: Yale University Press., ch 5; Siegle, Joseph T., Weinstein, Michael M., and Halperin, Morton H. (2004) "Why Democracies Excel." *Foreign Affairs*: 57-71. Olson, Mancur (1993) "Dictatorship, democracy, and development" *American Political Science Review* 87, 567-76.
- ^{xiv} Przeworski, Adam, Stokes, Susan, and Manin, Bernard, eds. (1999) *Democracy, Accountability, Representation*. Cambridge: Cambridge University Press.
- ^{xv} For a defence against such critics cf. Bernstein 2000?
- ^{xvi} Alston, Philip and Weiler, J. H. H. (1999) "An 'Ever closer Union' in need of a human rights policy: the European Union and Human Rights." *Harvard Jean Monnet Working Paper* (1).
- ^{xvii} Locke, John (1963) [1690]. *Two Treatises of Government*. Laslett, Peter, rev. and introd. New York: New American Library, Mentor., para 6, 16.
- ^{xviii} LP 49, 51, 70, 71, 79. Cf. Follesdal 1991. Alyssa Bernstein defends a Rawlsian theory of human rights partly on the basis of this distinction in (2000) *Human Rights Reconceived: A Defense of a Rawlsian Law of Peoples*. Ph. D. Dissertation. Harvard University, and in this volume.
- ^{xix} LP appears to waver, since even hierarchical peoples have *bona fide* political obligations (66).
- ^{xx} Montesquieu (2002) [1748] *Spirit of Laws*. Prometheus: New York, book 9.
- ^{xxi} Res. 794 in 1992, Res. 929 and Res. 940 in 1994, respectively. Cf. Semb, Anne Julie (2000) "The New Practice of UN Authorized Interventions: A Slippery Slope of Forcible Interference?" *Journal of Peace Research* 37, 4: 469-488.
- ^{xxii} Brahimi, Lakhdar (2000) "*Brahimi Report*" of the Panel on United Nations Peace Operations, A/55/305 - S/2000/809. http://www.un.org/peace/reports/peace_operations/: UN.
- ^{xxiii} *pace* LP 117 and Macedo, Stephen (2004) "What self-governing peoples owe to one another" *Fordham Law Review: Symposium: Rawls and the Law* 72[5], 1721-38.
- ^{xxiv} Cf. Follesdal, Andreas (2003) "Federalism" *Stanford Encyclopedia of Philosophy* - Ed. Zalta, Edward N. <http://plato.stanford.edu/entries/federalism/>.
- ^{xxv} Riker, William H. (1993). "Federalism." *A Companion to Contemporary Political Philosophy*. Goodin, Robert E. and Pettit, Philip, eds. 508-514. Oxford: Blackwell, 509.
- ^{xxvi} Follesdal, Andreas (2001). "Federal Inequality among Equals: A Contractualist defense." *Metaphilosophy* 236-255
- ^{xxvii} Cohen, G. A. (1989) "On the currency of egalitarian justice." *Ethics* 99: 906-944.
- ^{xxviii} I draw on Scanlon, Thomas M. (1997) *The Diversity of Objections to Inequality*. Lawrence, KN: University of Kansas; Follesdal, Andreas (1991) *The Significance of State Borders for International*

Distributive Justice. Ph. D. dissertation. Harvard University: UMI No. 9211679; cf LP 113pp.

^{xxix} Follesdal 1991.

^{xxx} Dahl, Robert A. (1985) *A Preface to Economic Democracy*. Cambridge: Polity Press, 55.

^{xxxi} Pettit, Philip (1997) *Republicanism* Oxford: Clarendon Press; Skinner, Quentin (1998) *Liberty Before Liberalism* Cambridge: Cambridge University Press.

^{xxxii} Contributions include Beitz, Charles (1979) *Political Theory and International Relations*. Princeton: Princeton University Press; Lichtenberg, Judith (1981). "National boundaries and moral boundaries." *Boundaries*, Brown, Peter and Shue, Henry, eds. Totowa: Rowman and Allanhead, 79-100; O'Neill, Onora (1996) *Towards Justice and Virtue*, Cambridge: Cambridge University Press; Pogge, Thomas (2002) *World Poverty and Human Rights*. Cambridge: Polity.

^{xxxiii} Follesdal, Andreas (2000) "Global Justice as Impartiality: Whither claims to equal shares?" *International Justice*. Tony Coates, ed., Aldershot: Ashgate, 150-166.

^{xxxiv} Follesdal, Andreas (1998) "Subsidiarity." *Journal of Political Philosophy* 6, 2: 231-259.

^{xxxv} Norman, Wayne (1994) "Towards a Philosophy of Federalism." *GroupRights*. Baker, Judith, ed. Toronto: University of Toronto Press, 79-100.

^{xxxvi} Hume, David (1793) *Essays and Treatises on Several Subjects*. Edinburgh., 514-15.

^{xxxvii} Mill, John Stuart (1962) [1859]. *On Liberty*. Glasgow: Collins.

^{xxxviii} Althusius, Johannes (1995) *Politica Methodice Digesta*. F.S. Carney and D. J. Elazar, eds. Indianapolis: Liberty Press.

^{xxxix} Smith, Adam (1954) [1776]. *An Inquiry into the Nature and Causes of the Wealth of Nations*. London: Dent., 680; Beer 1993, 124; Follesdal 2005.

^{xl} Musgrave, Robert (1959) *The Theory of Public Finance*. New York: Mcgraw-Hill.

^{xli} Madison, James (1961) *The Federalist Papers* no. 10, New York, Mentor; Mill, John Stuart (1969). *Autobiography*. Boston: Houghton Mifflin, 116.

^{xlii} Follesdal, Andreas (1996). "Minority Rights: A Liberal Contractualist Case." *Do We Need Minority Rights?* Raikka, Juha, ed. The Hague: Kluwer, 59-83.

^{xliiii} Welch, David A. (1993) *Justice and the genesis of war*. Cambridge: Cambridge University Press.