Whose public? Which law? Mapping
the internal/external distinction
in international law

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- a. A violent order is a disorder; and
- b. A great disorder is an order. These
Two things are one.

– Wallace Stevens¹

1. Introduction

The chapters in this volume address different aspects of the same basic dilemma: how to understand the conceptual relationship between the rights of states and the rights of individuals. Classic Westphalianism offers a relatively clear picture. The fundamental rights and duties of states, regardless of their ‘private’ belief systems, forms of political organisation or cultures, are to be determined by that body of customary and consensual norms known as ‘public’ international law. The fundamental rights and duties of individuals, regardless of their ‘private’ comprehensive religious, philosophical or moral doctrines, are to be determined by that body of constitutional, administrative and criminal norms known as ‘public’ law. The former defines the ‘sovereignty’ of states as subjects of an international community; the latter defines the ‘liberty’ of individuals as subjects of a national community in the form of a state.

In each case a particular distinction between ‘public’ and ‘private’ spheres, and a particular conception of fundamental rights, is advanced. These approaches in turn generate the distinctive internal/external dichotomies and contradictions that characterise both fields of law. It is critical to realise at the outset, however, that the underlying rationale of the move to ‘public law’, whether domestic or international, is to

establish the conditions necessary for community and social order by *limiting* the freedom of legal subjects.² In other words, ideas of public law and public reason are invoked to answer the normative question: how are individuals (whether persons or states) divided over comprehensive conceptions of the good to live together in a just social order? Conversely, the rationale underlying the move to notions of a putative public-private divide and fundamental rights is to *limit* the demands of social order itself by *protecting* the (pre-existing) liberty of the subjects of that order. In other words, in response to the constraints on pluralism and diversity imposed by public law and public reason, notions of a public-private divide and fundamental rights are invoked to answer the normative question: what limits should exist on the demands that a just social order may impose on its subjects? This is what we may term the 'double-bind', the controlling paradox of the liberal project.

The difficulty today is that an overly idealised and static conception of the divide between a public *international* law and a public *domestic* law is both descriptively and normatively unconvincing. As a descriptive matter, the increasing effects of globalisation and integration between state and non-state actors in all areas of economic, social and political life is today leading scholars to advance more sophisticated accounts of 'trans-national', 'supranational', and 'global' law.³ As a normative matter, the Westphalian picture has been radically disrupted over the last half-century by the rise of cosmopolitan norms of universal justice and human rights.⁴ Public international law no longer regulates relations between states only, but has extended its reach to regulate the rights and duties of individuals *within* states. This has both challenged and undermined Westphalian accounts of the public-private divide and the sovereignty of states.

For liberal internationalists such as Charles Sampford, this 'erosion' of sovereignty is seen to be driving us towards a 'post-Westphalian convergence': '[a]s the walls between states break down so will the walls between public law and public international law'.⁵ Central to this argument is a particular view of the Enlightenment,⁶ and the fact that '[i]nternational law is still based on an idea of sovereignty arising out of the century preceding the Enlightenment'.⁷ This has created a disjunction between the international and domestic bases of legitimacy. On the grounds that the 'shift within domestic constitutional theory to the consent of the governed reverses the direction of power, authority and accountability',⁸ Sampford argues for an 'international enlightenment' capable of generating a new jurisprudence and political philosophy in

international law. With the basis of international legitimacy reconceptualised, any conflict between sovereignty and the protection of human rights is said (and hoped) to disappear as sovereignty – now defined as ‘the collective right of a people to participate in, and benefit from, an independent political community’ – *becomes* a human right.⁹

My purpose in this chapter is to challenge and problematise this convergence thesis between sovereignty and human rights. I believe it to rest on a partial understanding of the liberal tradition in international law, commonly referred to as ‘liberal anti-pluralism’.¹⁰ While relying on a contingent and thus contestable conception of individual autonomy, liberal anti-pluralist accounts do not in fact seek to challenge the *rationale* for public law or public reason itself. On the contrary, such accounts advance a vision of ‘universal’ or ‘global’ social order governed by a ‘neutral’ public law that limits the freedom of its subjects pursuant to the single ‘trumping’ or ‘covering’ value of individual freedom itself. This understanding, I believe, is at the heart of the project that Sampford anticipates over time will ‘erode the distinction between (domestic) public law and public international law’.

The difficulty with such a conception of social order, however, is that it now *itself* poses a danger to freedom and diversity by threatening to eviscerate the law’s existing *limits* on the demands placed by international social order on the liberty of its subjects. It does so by effectively eliminating the public–private distinction and by redefining fundamental rights to mean only, or ultimately, the rights of autonomous individuals. On this view, the very idea of sovereignty as a mediating device between a wide diversity of ‘private’ or ‘national’ political communities and ways of life and a ‘public’ or ‘inter-national’ community dissolves ultimately to be replaced by a universal or global law. Similarly, the idea of collective subjects as rights-holders – whether ‘peoples’, ‘nations’ or ‘minorities’ asserting various claims to self-determination – is rejected, or at least premised on the notion that the rights of groups are derivative of or contingent on the rights of their members.¹¹ On this view, sovereignty *becomes* a human right and thereby loses its traditional intersubjective and value-pluralist function in international law: that is, to maintain the conditions necessary for peaceful coexistence *between* different ways of life as opposed to their merging *into* that single form of life we have known since at least the late nineteenth century as ‘civilization’.

Paradoxically, human rights have exposed not only injustices carried out in the name of sovereignty but also the limits of liberal theory itself

and its prescription for a universal regime. We can see this, for example, in John Rawls's surprising rejection of cosmopolitan accounts of human rights in his *The Law of Peoples* (*Law of Peoples*). In the discussion that follows, I argue that both of these issues – state sovereignty and individual human rights – are sites of struggle between certain 'internal' and 'external' forms of rationality, and between certain 'private' and 'public' modes of justification. The chapter considers how to make sense of these distinctions and asks whether the problem may be that, in order to justify and maintain these oppositions, we need to qualify liberal theory by something other than itself. If so, what are the implications of this insight for both national and international public law?

There are three parts to the argument. Section 2 first sets out the two main contradictory philosophies of liberal toleration in international law. Section 3 illustrates this tension by considering John Rawls's admirable attempt in *Law of Peoples* to grapple with the difficulties of value pluralism in international law and by seeking to explain why Rawls ultimately rejected any possibility of a global conception of liberal cosmopolitan justice. Finally, Section 4 raises three issues concerning the nature and justification of human rights in international law to illustrate the extraordinary difficulties confronting the convergence thesis. The chapter concludes by positing some thoughts on the implications of value pluralism for the relationship between national and international public law.

2. The two faces of international law

At the heart of international law is a double-bind. Liberal theory assumes the separateness of individuals (whether persons or states) from each other and denies the existence of a natural, objective social order that pre-exists man's entry into it. In the absence of a controlling natural order that establishes a firm hierarchy of values, interests and ultimate ends, it logically follows that individuals are both free and equal in some essential sense. But as Martti Koskeniemi has famously argued, a 'fully formal idea of "freedom" is incapable of constructing a determinate, bounded conception of statehood as well as giving any content to an international order'.¹² This is the controlling contradiction of the liberal project:

Just like individuality can exist only in relation to community – and becomes, in that sense, dependent on how it is viewed from a non-individual perspective – a State's sphere of liberty, likewise, seem[s] capable of being determined only by taking a position *beyond* liberty.¹³

As soon as we seek to describe what it means for a state to be 'free' within social order, that is, as soon as we ascribe determinate content to the attributes of sovereignty – a state's competences, set of 'fundamental rights' and legitimate spheres of action – we thereby delimit state freedom and construct an argument that stands in tension with our initial premise of state freedom. As indicated in the introduction, this is the basic paradox of the liberal structure of international law: 'to preserve freedom, order must be created to restrict it'.¹⁴

The international legal project is driven by this dialectic, which creates a dynamic of contradiction and oscillation between 'ascending' and 'descending' patterns of argument seeking to legitimate social order against individual freedom.

How to guarantee that States are not coerced by law imposed 'from above'? How to maintain the objectivity of law-application? How to delimit off a 'private' realm of sovereignty or domestic jurisdiction while allowing international action to enforce collective preferences or human rights? How to guarantee State 'freedom' while providing the conditions for international 'order'?¹⁵

To imagine such a project as feasible and coherent, one must first assume the idea of a 'harmony of interests', the presence or attainability of 'an underlying convergence between apparently conflicting State interests'.¹⁶ In a widely pluralistic world of different peoples, religions, cultures, languages, ideologies and ways of life, this is quite an assumption. What if, for example, the interests and ends of states are not finally compatible? What if the true nature of international politics is (as the Realists have long contended) conflict rather than harmony? How is a political community defined by the rule of law premised on some notion of shared interests and values beyond the state to be imagined or realised in such circumstances?

2.1 *Formalism and instrumentalism*

The traditional response to this dilemma has been to employ the technique of legal formalism. First, the subject of the law is defined in formal terms as 'the state'. Second, the liberty of states is described and given material content in terms of 'sovereignty'. The function of the law is to secure both liberty and order: to provide for the mutual coexistence of states in such a way that their sovereignty is equally respected and ensured (to use the Dworkinian term). The basic axiom of the system

is sovereign equality. International law provides the “flat substanceless surface” [which] expresses the universalist principle of inclusion at the outset and makes possible the regulative ideal of a pluralistic international world’.¹⁷ This is absolutely critical as the form of the law

constructs political adversaries as equals, entitled to express their subjectively felt injustices in terms of breaches of the rules of the community to which they belong no less than their adversaries – thus affirming both that inclusion and the principle that the conditions applying to the treatment of any one member of the community must apply to every other member as well.¹⁸

In any decision to attach meaning to legal norms, sovereign equality means that states can articulate their interpretations as subjects that share equal standing. They are thus included in the ‘normative universe as subjects of rights and duties or carriers of distinct identities’. It is only because the regime comprises non-instrumental rules (i.e., ‘understood to be authoritative independent of particular beliefs or purposes’) that the freedom of its subjects to be different becomes possible.¹⁹ This is what Anne Orford has aptly called the ‘gift of formalism’.²⁰

On this view, international law can be understood as a project to reach political settlements and forms of reconciliation between the conflicting claims to freedom of differently situated subjects and the divergent assertions of right and justice to which they continually give rise. International law, in other words, is an ineliminably intersubjective undertaking. If political power is to be exercised in the name of some common social end – say to protect international peace or security, or justice – such that the sovereignty of a particular state or states is to be limited, then that exercise of power must be justified to the state or states so affected. This remains the case even though, and especially because, states differ greatly in their comprehensive views about the good and true way of life.

This is an attractive picture so far as it goes. The problem, however, is that any argument for such a formal view is highly ambiguous and open to criticism. For one thing, any formal doctrine of sources of law will be unable to exclude political considerations.²¹ For another, any notion of a ‘pure’ or ‘complete’ theory of public law is vulnerable to familiar charges levelled against doctrinal utopianism and its disconnectedness from actual state interests, values and practice.²² What if, for example, a state asserts that its sovereignty derives not from some imagined, pre-social liberty but ultimately from God? Or, conversely, a state asserts that its sovereignty is subject to no external limit other than that to which it expressly consents?

Questions such as these compel us to look *behind* the 'formal validity' or 'binding force' of legal norms. They ask us to consider the *purpose of* or *reasons justifying* such norms, their capacity to further social goals.²³ This generates an 'anti-formal' mode of reasoning that defines itself in response to the criticisms of formalism. On this view, the traditional attributes of sovereignty – political independence, autonomy, dignity, territorial integrity etc. – are merely legal forms. What really counts is whether they help or hinder certain (as yet unspecified) objectives, values or ends. Do these formal rules stand in the way of protecting basic norms of democracy and human rights? Do they shield undemocratic states that lack a system of government based on free periodic elections in which government is elected by the citizens of the state? Do they shield *illiberal* states that fail to offer their citizens a range of individual rights? These are the questions that trouble Sampford and justify his attempt to redefine the notion of sovereignty.

But these examples also reveal the dangers of instrumentalist reasoning. If international law is judged only in terms of its instrumental effectiveness, it becomes no more than an apology for the (contested) interests or ends of certain powerful states.²⁴ Moreover, by emphasising concreteness in this fashion the law risks losing its binding force and normativity altogether. To offset these dangers, instrumentalist reasoning resorts to tacit naturalistic or 'objective' ideas of justice. The fundamental norms of democracy and human rights are not just American or Western values, they are 'universal' values arrived at by rational consensus and expressing ideals that either are, or should be, embedded in international law as an expression of 'international right'.²⁵

In this way, anti-formalist reasoning paradoxically returns to the initial problem it had sought to overcome as it tacitly invokes the basis on which it first criticised formalism. There is no escape from the double-bind of this argumentative structure. States are free and unfree at the same time. In this respect, it is important to realise that the structure of international law reflects a theory of liberal toleration. At issue in the tension and oscillation between formal and anti-formal modes of reasoning is the scope and limits of that regime. Here we return to the issue of the 'state' as the primary subject of international law.

2.2 Dualism and the modern structure of international law

The demanding idea of equal concern and respect for the rights of the individual in Western political philosophy has historically been associated with two closely related modifications. The first is the idea that

conceptions of religious and moral value are 'private' matters to be excluded from the sphere of public reason. On this view, religion is 'private' – the domain of irrationality and charismatic authority – while the law is 'public' – the realm of reason and universal authority.²⁶ The second idea is that, on the basis of this public-private divide, the demands of equal freedom have been understood to apply only within the public sphere. This is the double-bind again in a uniquely static and historically contingent form.

The reasons underlying these two modifications are what animate the Rawlsian shift from 'comprehensive' to 'political' liberalism. Because democratic societies are characterised by a pluralism of 'incompatible but reasonable' comprehensive religious, philosophical and moral doctrines, the aim of political liberalism for Rawls was 'to uncover the conditions of the possibility of a reasonable public basis of justification on fundamental political questions'.²⁷ This requires the development of impartial and neutral means by which to separate and justify 'public' reason from the many non-public or 'private' conceptions of reasonable comprehensive doctrines. By distinguishing moral from political philosophy, Rawls sought to justify a strictly *political* conception of justice in contrast to a moral doctrine of justice general in scope and applicable to all areas of life. In this sense, the two views have been seen to express a disagreement as to the fundamental value of liberalism: the former favouring the idea of toleration, the latter the idea of individual autonomy.

The move from comprehensive to political liberalism arises from the need to resolve the problem that the account of stability advanced in *A Theory of Justice* is unrealistic and inconsistent with realising its own principles of a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible comprehensive doctrines.²⁸ Comprehensive liberalism of the Millian variety is plausible only if liberty is first understood in 'eighteenth century North Atlantic Enlightenment' terms as a matter of 'private' conscience and belief as opposed to protecting the 'public' manifestation of a religion or comprehensive way of life. Similarly, political liberalism of the Rawlsian variety is plausible only if the specific form of separation between public and private spheres that is advanced allows for the members of that society to pursue their ends and 'reasonable' comprehensive conceptions of the good. I return to these issues in Section 4.

Adapting the domestic analogy, that is the view of liberal internationalists since at least the sixteenth century of states-as-individuals in a putative state of nature, I want to suggest that a similar set of assumptions shapes modern

international law. This is the case both in terms of the definition of the legal subject (the state) and in terms of working out the rights and duties of legal subjects so identified (sovereignty). In each case, the internal/external tension of the double-bind is evident: the state, it turns out, is the 'nation state' reflecting a people's right to self-determination; sovereignty, it turns out, defines a right to act *externally* to protect the state's anterior liberty; at the same time, it protects from external interference a certain *internal* autonomy for a people freely to conduct its own affairs and pursue its own conception of the good. The former is the international equivalent of the liberal notion of natural or 'fundamental' rights; the latter is the mirror image of the public-private distinction. Sovereignty in this way mediates between the claims of legal subjects *inter se* in a 'public' international community while at the same time defining a 'private' national sphere.

My concern here is the first issue regarding the *internal identity* of the state. This issue has traditionally been regarded as settled. Since the end of World War II, the 'flat substanceless surface' of international law as embodied in article 2(1) of the UN Charter has been understood in strongly pluralistic terms. The sovereign equality of states has extended to republics, centrally planned socialist states, theocracies, kleptocracies and modernising post-colonial territories. In more recent times, however, and especially since the end of the Cold War, Western states and the international institutions they control have advanced various anti-pluralist arguments that seek to give greater moral substance to the criteria for recognition as full, independent and equal subjects of international society. Gerry Simpson defines such criteria as constituting a 'liberal democratic regime'.²⁹ The criteria for inclusion and exclusion in this regime turn not on the *external* behaviour of or conduct between states (which would raise familiar issues concerning the scope and shape of the attributes of sovereignty) but rather on the *internal* identity of the legal subject itself.³⁰ The case study discussed in ensuing chapters of UN sanctions regimes applied against Iraq after 1990 and culminating in the second Gulf War in 2003 is a powerful illustration of this thesis. This, of course, is precisely the issue which formalism, and its underlying rationale of liberal toleration and political inclusion, had hoped to avoid.

3. The question of human rights in Rawls's Law of Peoples

What are the implications of these two views of liberal theory for the relationship between sovereignty and human rights? On this point, the literature is sharply divided. The first view is characterised by the work of

Rawls who in his final work, *Law of Peoples*,³¹ sought to apply the central ideas of his theory of political liberalism to international law. The second is characterised by cosmopolitan theorists such as Brian Barry, Charles Beitz and Thomas Pogge³² who have argued for a fully-fledged and unapologetic account of egalitarian liberalism in international law (of the kind earlier developed by Rawls in his seminal *A Theory of Justice*).³³ These two liberal views have variously been described as Reformation versus Enlightenment liberalism, or as *modus vivendi* versus Kantian or Millian liberalism.³⁴

Irrespective of their points of disagreement, both schools of thought have sought to project and apply liberal theory beyond questions of political philosophy to the global context of international legal discourse and relations between states and peoples. Rawls accordingly defines his task in *Law of Peoples* as formulating a 'particular conception of right and justice that applies to the principles and norms of international law and practice', the content of which is to be 'developed out of a liberal idea of justice similar to, but more general than, the idea ... called *justice as fairness* in *A Theory of Justice* (1971)'.³⁵

The extension of political liberalism to international law necessarily includes the doctrine's foundational ideas of social contract and toleration of non-liberal comprehensive doctrines, and these are accordingly central features of the Law of Peoples:

[I]t is important to see that the Law of Peoples is developed within political liberalism and is an extension of a liberal conception of justice for a domestic regime to a Society of Peoples. I emphasize that, in developing the Law of Peoples within a liberal conception of justice, we work out the ideals and principles of the *foreign policy* of a reasonably just liberal people ... we go on to consider the point of view of decent peoples ... not to prescribe principles of justice for *them*, but to assure ourselves that the ideals and principles of the foreign policy of a liberal people are also reasonable from a decent nonliberal point of view. The need for such assurance is a feature inherent in the liberal conception. The Law of Peoples holds that decent nonliberal points of view exist, and that the question of how far nonliberal people are to be tolerated is an essential question of liberal foreign policy.³⁶

This emphasis on the idea of toleration does not, however, represent the quest for a mere *modus vivendi* in the face of global religious and cultural diversity. Rather, the Law of Peoples seeks to achieve a genuine overlapping consensus between 'liberal peoples' and non-liberal but 'decent peoples', societies that together Rawls terms 'well-ordered peoples'.³⁷

In order to achieve such a consensus, Rawls envisages a two-stage process employing his famous device of an 'original position'. In the first stage, the liberal idea of the social contract is extended to the Law of Peoples. This involves two levels, each using the original position with a veil of ignorance as a model of representation for liberal societies only. At the first (domestic) level, citizens of the same liberal democratic society work out a political conception of justice in the manner described by Rawls in his *Political Liberalism*. At the second (international) level, the original position is used again, but this time by representatives of citizens of different liberal societies who, guided by appropriate reasons, are to specify the ideals, principles and standards of the Law of Peoples and how these apply to relations among peoples.³⁸ Rawls identifies eight principles of political justice that free and democratic peoples are prepared to recognise as the basic charter of the Law of Peoples.

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 the agreements that bind them.
4. Peoples are to observe a duty of non-intervention.
5. Peoples have the right of self-defence but no right to instigate war for reasons other than self-defence.
6. Peoples are to honour 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 unfavourable conditions that prevent their having a just or decent political and social regime.³⁹

In the second stage, the Law of Peoples thus conceived is extended to non-liberal peoples. Here, Rawls would have us ask, in an international 'original position' with a veil of ignorance, whether the representatives of nonliberal peoples would freely assent to the same principles.⁴⁰ In this way the Law of Peoples marks the limits of toleration in international relations. Liberal peoples are not only to refrain from exercising political sanctions to make a people change its ways but further to *recognise* and *respect* non-liberal societies as 'equal participating members in good standing of the Society of Peoples'.⁴¹ The need for such an idea of toleration in international law is premised on analogous reasoning to Rawls's move from comprehensive to political liberalism in the domestic case:

If all societies were required to be liberal, then the idea of political liberalism would fail to express due toleration for other acceptable ways ... provided a nonliberal society's basic institutions meet certain specified conditions of political right and justice and lead its people to honor: a reasonable and just law for the Society of Peoples, a liberal people is to tolerate and accept that society.⁴²

This distinctive conception of toleration has important and controversial implications for Rawls's sixth principle of political justice in the *Law of Peoples* – the role of human rights. The need for liberal peoples to tolerate non-liberal but decent societies leads Rawls to formulate an account of human rights that he claims cannot be rejected as 'peculiarly liberal or special to the Western tradition'. He defines human rights as expressing a 'special class of urgent rights' that include:

the right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly).⁴³

Understood in this way, human rights are those norms that belong to both a liberal constitutional democracy and to what Rawls terms an 'associationist social form'.⁴⁴ They do not depend on any comprehensive religious doctrine or any philosophical doctrine of human nature. Rather, they represent those norms upon which *both* liberal and non-liberal societies may build an overlapping consensus in line with their own deeper and broader conceptions of the good.⁴⁵

It is this distinctive contention in the *Law of Peoples* that I wish to focus on for the remainder of this chapter. What does it mean to speak of a 'sufficient measure of liberty of conscience to ensure freedom of religion and thought'? Sufficient for what? More broadly, what are the implications of employing political liberalism as the theoretical basis for human rights in international law? Is it coherent and defensible to distinguish between a 'special class of urgent rights' on the one hand, and 'liberal' rights on the other?

An opposing liberal school of thought provides one set of answers to these questions. For cosmopolitans, Rawls's *Law of Peoples* is insufficiently liberal because it tolerates the denial by nonliberal peoples of human rights held by citizens in a reasonable constitutional democratic regime. In the cosmopolitan view, the liberal idea that persons are citizens first and have equal basic rights should apply universally. The

problem with the two-stage social contract envisaged in the *Law of Peoples* is that it denies *individual* persons in non-liberal societies an original position, whether at the domestic or global levels.⁴⁶ Cosmopolitans believe that any liberal conception of international law should begin by taking up the question of global justice for all persons.⁴⁷

On this approach there is no distinction between 'urgent' or 'fundamental' rights and 'liberal' rights. All persons have the equal rights of citizens in a constitutional democracy. The difficulty with non-liberal societies is that they 'fail to treat persons who possess all the powers of reason, intellect, and moral feeling as truly free and equal'.⁴⁸ The idea that liberty of conscience may not be 'as extensive nor as equal for all members of society', is seen as unjust and impermissibly tolerant of intolerance.⁴⁹

Rawls acknowledges that, at least judged by liberal principles, the Society of Peoples is not fully just. But for him the logic of extending a liberal conception of political justice to the international sphere rules out the possibility of a global conception of liberal cosmopolitan justice. In the second (international) original position, the 'parties are the representatives of equal peoples, and equal peoples will want to maintain this equality with each other'.⁵⁰ Thus, even as between liberal societies, no 'people will be willing to count the losses to itself as outweighed by gains to other peoples; and therefore the principle of utility, and other moral principles discussed in moral philosophy, are not even candidates for a Law of Peoples'.⁵¹ The same reasons that necessitate the move from comprehensive to political liberalism in the domestic case thus make the purported application of the former in international relations, where the pluralism of comprehensive doctrines is far greater, even more problematic and unjustified.

In this respect, the extension of the Law of Peoples to decent peoples is premised on parallel reasoning to Rawls's idea of the 'reasonable' in political liberalism. The notion of 'decency' is said to be a normative idea of the same kind as reasonableness, though 'weaker' (in the sense of 'covering less'). To be regarded as 'decent,' hierarchical societies must meet two criteria. First, they must honour the laws of peace by renouncing aggressive aims in foreign policy and respecting the independence of other societies. Second, their system of law must respect human rights and impose duties and obligations on all persons in their territory, and there must be a sincere and not unreasonable belief on the part of judges and other officials that the law is guided by a common good idea of justice.⁵²

Rawls adds a further reason for rejecting the cosmopolitan position in international law. Liberal peoples should not require all societies to be liberal, nor subject those that are not to political sanctions, because to do so would deny *mutual respect* between peoples. This lack of respect is likely to 'wound the self-respect of decent nonliberal peoples as peoples, as well as their individual members, and may lead to great bitterness and resentment'. The denial of respect to other peoples requires strong reasons to be justified and, on the basis of the criteria discussed previously, these are unavailable under the Law of Peoples.⁵³ According to Rawls, liberal peoples should 'try to encourage decent peoples and not frustrate their vitality by coercively insisting that all societies be liberal'.⁵⁴

For these reasons, Rawls concludes that political liberalism requires a conception of toleration that rejects the comprehensive liberal notion of global cosmopolitan justice in international law. If a post-Westphalian convergence is indeed possible, for Rawls this would not mean 'collapsing the walls' between public law and public international law. Liberal and non-liberal societies alike should continue to develop their national systems of public law, and public international law should both set limits to and recognise this pluralism within the society of peoples.

4. The implications of value pluralism for public law

The argument in *Law of Peoples* has both surprised and disappointed scholars.⁵⁵ One deep misgiving about the book is how Rawls's unusual conception of the nature and interests of 'peoples' as the subject of international law led him to reject global egalitarianism and important liberal rights such as *equal* political representation and *equal* liberty of conscience. As Wenar notes, '[c]osmopolitan egalitarian views are concerned with the *well-being of individuals* ... while [Rawls's] law of peoples is concerned with the *justice of societies*'.⁵⁶ Why does Rawls, himself the doyen of egalitarian liberalism, make this perplexing move at the international level? It is to this puzzle that I now turn.

4.1 *The logic of Westphalian sovereignty*

In order to answer this question, we must return to first principles and recall the rationale underlying the project of public law itself. Here, a critical distinction is to be made between public *domestic* law and public *international* law. As Sampford rightly notes, the emergence of the classical Westphalian notion of state sovereignty *preceded* the 'Enlightenment'

of the eighteenth century by at least a century. But what was it exactly that happened so dramatically in 1648? I have discussed this issue elsewhere,⁵⁷ but for present purposes I wish to make two observations. First, international law in the early modern (i.e., pre-Westphalian) era was shaped by a purely descending argument from divine law. Thus, the liberal distinctions that we today draw between freedom and order and public and private were non-existent in medieval thought.⁵⁸ To speak of a 'personal right' to or 'private realm' of liberty with independent legitimacy as against the world at large was meaningless within such a conception of social order. The result of this structure was an apparently unitary, communitarian conception of a universal, normative code derived from God, which drew no distinction between the domestic and the international, the moral and the legal, or the public and the private. The *ius gentium* was therefore a universal inter-*individual* rather than inter-*national* law. This did not mean of course that all law was regarded as 'divine' or 'natural', and indeed all the early writers developed complex distinctions between divine, natural, human and international law. Rather, they held that while the *content* of the law may be found in different sources, its *authority* derived from a relevant descending strand of justification.⁵⁹

Second, seventeenth-century jurist Hugo Grotius was the transitional figure between the descending, non-liberal order of medieval thought and the ascending-descending order of the classical liberal period. The underlying struggle here was to deal with the unfolding consequences of a loss of faith in a *singular* concept of the just and the difficulty of reconciling the 'Christian conception of the unity of the human race with the historical fact of the distribution of power among sovereign States'.⁶⁰ If previously conflict between a sovereign's freedom and the normative order had been impossible – the resolution of actual conflicts being achieved by the exercise of either revelation or reason to determine what the normative order *required* – in the wake of the bloodshed of the Thirty Years War the latent conflict between sovereign freedoms or sovereignty and the normative order began to surface. While Grotius himself did not do so, we see in his work the early signs of the need to recognise war as a conflict between formally equal sovereigns and to confront the question of how to 'balance' the freedoms of sovereigns. To do this, however, required rethinking the primacy of the normative order (now perceived as subjective and hence utopian) and to start international legal discourse from the sovereign's assumed *subjective* authority. Such a move from a descending to an ascending initial strand of justification would only follow in the post-Grotian classical scholarship of Locke and Vattel and their followers.

This is the story of the modern birth of the 'secularised' law of nations – the idea of positing a 'public' law between separate nation states each with their own 'sovereignty'. This moment in history is said to mark the 'great epistemological break' when religious medieval 'unity' gave way to a secular system of 'plural' territorially-limited sovereign states. Between the sixteenth and eighteenth centuries, this led to the emergence of what Koskenniemi has termed the 'liberal doctrine of politics,' the driving force of which was the attempt to 'escape the anarchical conclusions to which loss of faith in an overriding theologico-moral world order otherwise seemed to lead'.⁶¹ The basic point here is that once the historical and doctrinal shift has been made from moral unity to moral pluralism, the idea of a *single* universal morality becomes fraught with difficulty. We can see the nature and extent of these difficulties in three main areas: first, the problem of incommensurability of values; second, the complex conceptual problems associated with rights foundationalism; and third, the intrinsic value of communal goods and their relationship to personal autonomy. I consider each of these arguments briefly in turn as they relate to the distinctive logic of Rawls's *Law of Peoples*.

4.2 *Conflicts of rights and the problem of incommensurability*

Jeremy Waldron has observed that the 'liberal algebra' of rights seeks to secure public order in a way that is fair to the aims and activities of all. This aim is Kantian in inspiration: 'Act externally in such a way that the free use of your will is compatible with the freedom of everyone according to a universal law.'⁶² The difficulty is that in any pluralistic society this aim is unachievable. While the formality of rights discourse may obscure this, there is no principled way to resolve conflicts, not only between rights but also *internal* to rights themselves, other than by seeking a form of reconciliation between the particular conceptions of the good of different groups in the historical context of particular political communities. To do so, however, undermines the rationale for human rights in the first place, that is, the idea that rights are independent of the good (and thus not subject to the potentially unjust demands of public order). The underlying problem, as John Gray has argued, is that the freedoms that liberal rights protect are not necessarily compatible and may in fact be rivals:

[I]f such conflicts can be resolved only by invoking judgements of the good on which reasonable people may differ; if, in the absence of such

judgements, liberal principles are devoid of content; if, that is to say, applying liberal principles necessarily involves resolving conflicts among incommensurable values – then liberal principles have nothing of the simplicity of which Rawls speaks. Liberal regimes are no different from others in having to make choices between rival freedoms; but liberal principles cannot tell them how to make them.⁶³

Let me illustrate this proposition by considering Waldron's example of an entrepreneurial pornographer (P) who enjoys the public sale and display of his pornographic wares and the devout Muslim (Q) who abhors pornography and, according to the dictates of his religious beliefs, wishes to live and raise his family in a society free of the public displays of P. Waldron has argued that this example poses severe difficulties for Kantian liberalism and the two liberal requirements of compatibility and adequacy. The fundamental Rawlsian concept of 'reasonableness' is unable to resolve the dilemma that P and Q are unable to live together in a liberal arrangement. The reasons for this are as follows.

The first meaning of Rawlsian reasonableness – that persons accept the subjection of the good to the right – cannot tell us which of P or Q has a conception of the good that is incompatible with liberal principles.⁶⁴ The second meaning of Rawlsian reasonableness – that persons have conceptions of the good whose divergence from other conceptions is intelligible in light of the so-called 'burdens of judgment' – is similarly unable to tell us which of P's or Q's conceptions of the good is 'unreasonable'.⁶⁵ Waldron then asks whether the late Rawlsian strategy of the need to state one's conception of the good in 'publicly accessible terms' will not reveal that the problem with Q's conception of a certain public moral environment free of pornography and blasphemy is that 'it depends on premises that are internal to his religious faith, and that might seem perhaps arbitrary from an external point of view'.⁶⁶ But for Waldron this approach will not work either:

I don't think there is any way of saying that a set of permissions is adequate for the practice of a religion except by paying attention to how that set of restrictions seems from the internal point of view of the religion. To abandon any interest in that would be, in effect, to abandon any real concern for adequacy. An externally stated adequacy condition – which was quite at odds with internal conceptions – would be arbitrary and unmotivated.⁶⁷

Finally, imagining someone in the classic Rawlsian original position who is unsure whether he will turn out to be P or Q, we again face a predicament. By viewing religion a priori in Protestant, Enlightenment

terms as private 'conscience' – and thus restricting the 'field of aims' among which compossibility is to be sought – the real dilemmas involving religion in terms of its public role in shaping a communal set of practices and collective way of life are not resolved, but simply avoided.⁶⁸ In relation to P and Q then, Waldron concludes that there is 'no determinate solution to the problem' of compatibility of rights, with the result that:

we can no longer confront issues like the case of Salman Rushdie with the conviction that there is a perfectly good solution of live-and-let-live, if only people would restrain themselves sufficiently to adopt it. There is no such accommodating solution. It means that we can no longer organize liberal aspirations around the formula of the kingdom of ends. The algebra intimated in Rawls's principle of an adequate liberty for each, compatible with a similar liberty for all, is insoluble.⁶⁹

The problems of incommensurability and incompatibility raise a critical challenge to the notion of a liberal algebra based on a fixed structure of rights. We are left to ask whether the liberal premise rests on a misunderstanding – because it fails to take seriously the incommensurability of values – or on an impossibility – because not everyone's individual freedom can be respected and ensured consistently with the freedom of everyone else.⁷⁰ Liberal theory can resolve such conflicts only by (tacitly) positing a hierarchy of values – or perhaps a single, trumping, 'covering value' – or by drawing 'domain restrictions' between spheres of incommensurable values (e.g., between a putative public 'secular' and private 'religious' sphere) and by then developing theories of toleration based on open-textured principles such as 'reasonableness' (in liberal political philosophy) or 'decency' (in Rawls's *Law of Peoples*).

4.3 *From foundationalism to intersubjectivity*

We have strong reasons to be sceptical regarding any agent-neutral political morality that claims to rest not on particularistic loyalties or conceptions of the good, but rather on deontological universal principles of justice or rights. It was the evident failure of this notion in the pre-modern period that led to the ascending-descending structure of modern international legal argument and its twin features of a public-private divide and fundamental rights. This suggests that the search for a definitive list of basic liberties is itself misconceived and any structure or scheme of rights that claims to promote and protect different human interests will necessarily be indeterminate and significantly variable.

This humbling conclusion does not necessarily leave us mired in a hopeless nihilism of ethical and moral relativism. Rather, by acknowledging the historicity of understanding and meaning, it points us toward dialogic and intersubjective approaches to rights discourse that seek to transcend the Cartesian anxiety generated by the dichotomy between subject and object and seek to recover, rather than deny, the indispensability of prejudice and tradition to any defensible conception of understanding and meaning. Rawls himself sought to address this problem in his later work by advancing the notion of an 'overlapping consensus' by which persons (or peoples) adhering to different comprehensive religious, philosophical and moral doctrines may affirm the same conception of justice on different moral and political grounds. But as Waldron has argued, this manoeuvre does not resolve the dilemma of 'justice-pluralism' and 'disagreement about rights'. Waldron identifies two models for thinking about the relation between disagreements about justice and disagreements about the good. On the first model, 'each conception of the good is associated with or generates a particular vision of the just society'. On the second model, 'particular theories of justice are not seen as tied to or generated by particular conceptions of the good' but instead 'are viewed as rival attempts to specify a quite separate set of principles for the basic structure of a society whose members disagree about the good'.⁷¹

The problems of rights foundationalism within the social contractarian tradition are therefore irresolvable. There is no single, objective foundation for human rights, whether in a putative state of nature, in a psychological conception of human nature, or in any unimpeachable theory of the relationship between individual autonomy and political order. As Gray suggests, 'human rights have neither substantive content nor moral weight until their impact on human interests, their contribution to human well-being, has been specified'.⁷² This dilemma can only meaningfully be addressed by recognising that human rights are not fixed entities to be arrived at either by abstract deontological deduction or (tacit) consensual agreement alone, but rather are sites of contestation and tension straddling opposing spheres – mediating between consent and justice, autonomy and community, freedom and order, passion and rationality. Critical legal scholars have thus suggested that human rights are best understood as *mediators* between the domains of factual and value judgments. The difficulty for liberal theory is that, on its own assumptions, it cannot consistently justify the normative, objective character of rights without resorting to concrete principles that, in turn, it is then unable to justify. The practical consequence for the politics of justice, as Waldron suggests, is the 'problem

of selecting a substantive principle of justice to act on (together) when we disagree about which principles are true or reasonable and which not'.⁷³

The role of human rights as a mediating concept has important implications for legal theory and our understanding of human rights in international law. The indeterminacy of rights discourse in political philosophy is unavoidable whether at the domestic or international level. Once liberal accounts of human rights are transposed to the international sphere, they suffer from the same conflicts and incommensurabilities. They claim the two sides – objectivity and formality – of law in contrast to the subjectivity of politics in either its utopian or apologist forms. But they fail to provide a convincing argument or theoretical basis for their favoured set of 'fundamental' or 'basic' liberty norms. Indeed, these are the very questions that rights discourse seeks to refer away from itself, preferring to maintain the illusion of the objectivity and compatibility of rights while seeking to hide their deeper incommensurability. We see this difficulty clearly in Rawls's conception of human rights in *Law of Peoples*. In the absence of a practical philosophy of critical praxis, rights discourse remains unable to reconcile the contradictory demands of individual freedom and social order.⁷⁴

4.4 *Individuals and peoples*

I have argued that the essential logic of the Westphalian conception of international law is one of toleration. In this respect, the concept of 'sovereignty' as a mediating device between the 'public' sphere of a community of states and a 'private' sphere of domestic jurisdiction has its historical origins in the Reformation concept of liberal toleration between competing religious traditions (the ethical *modus vivendi* of *cuius regio, eius religio*). State sovereignty is therefore the 'group rights' solution of the early liberal tradition to the problem of religious and cultural pluralism. By recognising that *communitarian* freedom and autonomy (i.e., the sovereignty of states) is necessary for the flourishing and co-existence of different religious and cultural values and ways of life, international legal theory is in this respect premised on a theory of group-differentiated rights. As already noted, however, according to the logic of a community of autonomous and equal legal subjects, the source and authority of the *meaning* of that sovereignty must be intersubjective. It is this understanding that underlies Rawls's distinctive conception of peoples rather than individuals as the proper subjects of international law.

If this is correct, then we need to pay more careful attention to the normative consequences of the shift from the *ius gentium* of the *respublica*

christiana to the *ius inter gentes* of the *ius publicum europaeum*. Following the Peace of Westphalia, no longer did the law govern a religiously-based, homogenous Christian *nomos* that received its validity from God as mediated by the right ecclesiastic and secular authorities claiming universal jurisdiction. It now regulated the relationship between European territorial states realising a sharp separation between secular and Church jurisdiction. This, I suggest, had two interrelated jurisgenerative dimensions – one as between European states *inter se* (i.e., as between the newly recognised political subjects of the former unified Christian *nomos*), and the other as between European states taken as a whole and non-European peoples and territory (i.e., as between European states separated as political subjects but united by their background identity and culture and those peoples and territories lying outside of Western Christendom).

In the case of the former, culturally European and religiously Christian background conditions underlay – and perhaps made possible – the Enlightenment idea of a ‘universal’ rational consensus on cross-cultural moral judgments and principles of international justice. Whether justified as secular abstractions from older Christian theologies or as deontologically independent ‘natural law’ principles, classical liberal claims of the priority of universal right and the neutrality of the good are thus premised on a deeper collective religious and cultural particularity.

Indeed, the most notable feature of the early modern societies from which liberal theories of rights emerged was their religious and cultural homogeneity.⁷⁵ Sampford’s suggestion that the more recent history and philosophy of liberal thought – eighteenth-century Enlightenment ideas of the rights of man and democracy – led to the ascent of modern, tolerant, inclusive liberal states is deeply mistaken. The European state was a *nation* state first that emerged in the early modern era following massive religious conflict, intolerance and exclusion.⁷⁶ As contemporary liberal-nationalists remind us, it is the assumption of membership in a *nation* state coextensive with a single national culture that underlies accounts of rights and obligation in the *liberal* state.⁷⁷ This assumption is evident in *Law of Peoples* and has been criticised accordingly.⁷⁸ Respect for individual freedom is sure to be an easier proposition in a state *already* comprised of a dominant majority that shares the same understanding of the public-private divide and conception of the good!

This has two direct consequences: first, assertions of ‘natural’ or ‘universal’ right in liberal rights discourse are the products of a distinctly *particular* historical and cultural *nomian* sphere of normative meaning and struggle; and second, such assertions either ignore or are insensitive to

the plurality of assertions of right that have existed, and continue to exist, outside of struggles within Western Christianity. Modern international law constitutes in this respect the projection of the doctrines and norms of the *ius publicum europaeum* into a wider globalising world of both non-European and late modern societies in which there exists a deeper pluralism of ways of life and diversity of values and beliefs. We should expect, therefore, that any (unforced) claims of liberal neutrality and principles of right and justice that portend to stand aloof from conflicts over the good will be strongly contested in those states and societies with their own comprehensive culturally and religiously derived normative systems.

In the case of the latter, Enlightenment commitments to purportedly ahistorical, rational and universal moral norms – conceived as independent of any particular way of life or religious and cultural differences – in combination with a ‘civilising’ imperial mission premised on a doctrine of historical progress, were used to justify the subjugation of non-European peoples. Here, the structure of legal argument discussed above helps to explain an enduring paradox: how is it possible that a moral and political doctrine premised on the universal and equal moral status of human beings could not only exclude certain peoples from such norms, but actually also be deployed to justify cruel acts of slavery, dispossession and even genocide? The reasons are tied, in part, to the Enlightenment’s severing of the connection between the human self and cultural diversity – what Sankar Muthu describes as the uniquely rational ideal that cultural difference is not *integral* to the universal human subject.⁷⁹ Not only was this proposition in denial of the cultural and religious sources of and authority for (European) ‘universal’ moral norms, it rendered impossible the relevance of non-European ‘culture-specific designs of particularistic meaning’ as sources of and authority for such norms.⁸⁰

In this respect, the logic of the argument I have advanced is similar to the critiques of formal equality advanced by critical legal scholars. Consider again Waldron’s two-subject case of P and Q above where:

the rights claimed by P, as necessary for the pursuit of his aims, may be different from the rights claimed by Q, as necessary for the pursuit of hers. Of course, the rights claimed by P will be correlative to the duties imposed on Q and vice versa. But although P’s rights are correlative to Q’s duties, and P’s duties correlative to Q’s rights, P cannot simply take the set of rights he has and the set of duties he has and, replacing proper names with variables, regard them as correlative. He is therefore no longer able to work out what duties he has simply by considering what would be correlative to the rights he claims. He must really pay attention to the *situation* and *needs*

of the other person, Q, because these may *differ significantly from anything he can extrapolate from his own case, or any understanding of what he would demand if we were standing in their shoes.*⁸¹

If we substitute 'European states' for P and 'non-European peoples' for Q, the argument is the same. An abstract conception of universal liberty (i.e., the 'universal proposition that everyone is to have whatever is necessary for the pursuit of his or her own good') will not entail equal or uniform rights of differently situated subjects at a more concrete level. As difference theorists have argued, this requires a conception of justice that pays great attention to the concrete and the particular and emphasises context-sensitive judgments regarding claims of culture and identity arising from different conceptions of the good.

5. Conclusion

This chapter has advanced two arguments. The first is that any descending conception of 'external' public reason must recognise the limits of its own rationality and inevitable subjectivity. This requires a theory of 'reasonable' toleration as we see evidenced in the distinction between certain public and private spheres and a notion of fundamental rights making these essential and permanent features of both international and domestic public law. At the same time, legal subjects – whether states or individuals – holding their own 'internal' comprehensive conceptions of the good must recognise others as reason-giving and reason-receiving subjects in need of mutual justification. This creates the impetus for an ascending convergence toward and search for overlapping consensus on shared objective norms. Each argument has potentially far-reaching implications for the central themes of this volume – sanctions, accountability and governance. Failure to recognise the former will result in the violence of domination while any (unforced) attempt to achieve the latter will result in a shifting patchwork of normative dispensations. These two things, as Wallace Stephens says, are one.

Notes

1. Wallace Stevens, 'Connoisseur of Chaos' in Wallace Stevens, *Collected Poems* (1954).
2. Recall Grotius's statement that 'maintenance of the social order ... which is consonant with human intelligence, is the source of [international] law properly so called'. Hugo Grotius, *De Jure Belli ac Pacis, Libri Tres, Volume 1* (trans. Francis Kelsey, first published 1625, 1925 edn) 12–13.
3. See Christopher Whytock, 'Thinking Beyond the Domestic–International Divide: Toward a Unified Concept of Public Law' (2004) 36 *Georgetown Journal of*

- International Law* 155; Daniela Caruso, 'Private Law and State-Making in the Age of Globalization' (2006) 39 *New York University Journal of International Law and Politics* 1.
4. See Noah Feldman, 'Cosmopolitan Law?' (2007) 116 *Yale Law Journal* 1122.
 5. Charles Sampford, 'The Potential for a Post-Westphalian Convergence of "Public Law" and "Public International Law"' in Jeremy Farrall and Kim Rubenstein (eds.), *Sanctions, Accountability and Governance in a Globalised World* 53, 54.
 6. Sampford invokes the 'eighteenth century North Atlantic Enlightenment' which 'sought to civilize ... authoritarian states by holding them to a set of more refined and ambitious liberal democratic values – notably liberty, equality, citizenship, human rights, democracy and the rule of law.' *Ibid.*
 7. *Ibid.* 57.
 8. *Ibid.* 56.
 9. *Ibid.* 63–4 (emphasis original).
 10. See, e.g., Gerry Simpson, 'Two Liberalisms' (2001) 12 *European Journal of International Law* 537–71 juxtaposing an historically situated *Charter liberalism* with an ahistorical *liberal anti-pluralism* in international law.
 11. Sampford defines sovereignty as the 'collective right of a people to participate in, and benefit from, an independent community, participating as an equal in the community of nations'. But for him collective rights are most attractive if conceived as 'individual rights to the benefits of group life': Sampford, 'The Four Dimensions of Rights' in Galligan and Sampford (eds.), *Rethinking Human Rights* (1997) 50, 63.
 12. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989) 192 (*Apology to Utopia*).
 13. *Ibid.*
 14. Immanuel Kant, *Critique of Pure Reason* (trans. Norman Smith, 1933) 601–2.
 15. Koskenniemi, above n 12, xvii.
 16. Martti Koskenniemi, 'What is International Law For?' in Malcolm Evans (ed.), *International Law* (2003) 89, 92.
 17. *Ibid.*
 18. *Ibid.* 102–3.
 19. Terry Nardin, 'Legal Positivism as a Theory of International Society' in David Mapel and Terry Nardin (eds.), *International Society: Diverse Ethical Perspectives* (1998) 17, 31.
 20. Anne Orford, 'The Gift of Formalism' (2004) 15 *European Journal of International Law* 179.
 21. Koskenniemi, above n 12, 29.
 22. *Ibid.* 28.
 23. Martti Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4, 10–11.
 24. As discussed by various chapters in this volume, the instrumental use by powerful states of comprehensive economic and political sanctions both within and beyond the UN Charter legal framework has potentially far-reaching and deleterious consequences for human rights and the rule of law.
 25. Thomas Paine, *Common Sense* (1776).
 26. See David Kennedy, 'Losing Faith in the Secular: Law, Religion and the Culture of International Governance' in Mark Evans and Carolyn Evans (eds.), *Religion and International Law* (1999) 312, 312–13.

27. John Rawls, *Political Liberalism* (1993) xxi.
28. *Ibid.* xviii–xx.
29. Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2003) esp. ch. 10.
30. See, e.g., Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599, 2633; Anne-Marie Burley, 'Toward an Age of Liberal Nations' (1992) 33 *Harvard International Law Journal* 393; Anne-Marie Slaughter, 'International Law in a World of Liberal States,' (1995) 6 *European Journal of International Law* 503.
31. John Rawls, *The Law of Peoples* (1999).
32. Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (2001); Charles Beitz, *Political Theory and International Relations* (1979); Charles Beitz, 'Rawls's Law of Peoples' (2000) 110 *Ethics* 669; Thomas Pogge, *Realizing Rawls* (1989); Thomas Pogge, 'An Egalitarian Law of Peoples' (1994) 23 *Philosophy and Public Affairs* 195.
33. John Rawls, *A Theory of Justice* (1971).
34. See, e.g., William Galston, 'Two Concepts of Liberalism' (1995) 105 *Ethics* 516; Kok-Chor Tan, *Toleration, Diversity, and Global Justice* (2000) 3.
35. Rawls, above n 31, 3–4. Rawls derives the term 'law of peoples' from the ancient *ius gentium* and notes that the phrase *ius gentium intra se* refers to 'what the laws of all peoples have in common'. He uses the term 'law of peoples' to mean the 'particular political principles for regulating the mutual political relations between peoples' (emphasis original).
36. *Ibid.* 9–10 (emphasis original).
37. *Ibid.* 4.
38. *Ibid.* 32, 40.
39. *Ibid.* 37.
40. *Ibid.* 70.
41. *Ibid.*
42. *Ibid.* 59–60.
43. *Ibid.* 65 (footnotes omitted).
44. *Ibid.* 64.
45. *Ibid.* 79–80.
46. Beitz, *Rawls's Law of Peoples*, above n 32, 673–4.
47. See, e.g., Brian Barry, *Theories of Justice* (1989); Charles Beitz, *Political Theory and International Relations*, above n 32, part III; Pogge, *Realizing Rawls* above n 32, part 3.
48. Rawls, above n 31, 60.
49. *Ibid.* 65.
50. *Ibid.* 60.
51. *Ibid.*
52. *Ibid.* 65–7.
53. *Ibid.* 61.
54. *Ibid.* 61–2 (footnotes omitted).
55. See, e.g., Rex Martin and David Reidy (eds.), *Rawls's Law of Peoples: A Realistic Utopia?* (2006).
56. Leif Wenar, 'Why Rawls is Not a Cosmopolitan Egalitarian' in Rex Martin and David Reidy (eds.), *Rawls's Law of Peoples: A Realistic Utopia?* (2006) 95, 100 (emphasis original).

57. Peter Danchin, 'The Emergence and Structure of Religious Freedom in International Law Reconsidered' (2008) 23 *Journal of Law and Religion* 455, 471.
58. Koskeniemi, above n 12, at 56–7.
59. Ibid. 76–7.
60. Charles de Visscher, *Theory and Reality in Public International Law* (1957) 13.
61. Koskeniemi, above n 12, 52.
62. Jeremy Waldron, 'Toleration and Reasonableness' in Catriona McKinnon and Dario Castiglione (eds.), *The Culture of Toleration in Diverse Societies: Reasonable Tolerance* (2003) 13, 14–15.
63. John Gray, *Two Faces of Liberalism* (2000) 69.
64. Waldron, above n 62, 22.
65. Ibid. 22.
66. Ibid.
67. Ibid. 23.
68. Ibid. 18.
69. Ibid. 33.
70. See Iris Marion Young, *Justice and the Politics of Difference* (1990) 103.
71. Jeremy Waldron, *Law and Disagreement* (1999) 149–50.
72. John Gray, *Enlightenment's Wake: Politics and Culture at the Close of the Modern Age* (1995) 72.
73. Waldron, above n 71, 161.
74. For a recent attempt to respond to the failure of rights foundationalism in international law, see Joseph Raz, *Human Rights Without Foundations* (2007) (unpublished manuscript) (advancing an antifoundational 'political conception' of human rights setting limits on the sovereignty of states).
75. This is not to say, of course, that such states were *entirely* religiously and culturally homogenous. The more general point is that this diversity, to the extent that it existed, did so *within* the context of broadly *Christian* emergent European nation states.
76. For a detailed argument on this point, see Danchin, above n 57, part III.
77. Some commentators draw a connection between individual liberty and the need for a collective cultural life which is said to be possible only in a nation state. See Yael Tamir, *Liberal Nationalism* (1993); Avishai Margalit and Joseph Raz, 'National Self-Determination' (1990) 87 *Journal of Philosophy* 439. Others link democratic consent theory to national self-determination. See Harry Beran, 'Self-Determination: A Philosophical Perspective' in W. J. Macartney (ed.), *Self-Determination in the Commonwealth* (1988). Yet others view national self-determination within a communitarian conception. See Michael Walzer, 'The Communitarian Critique of Liberalism' (1990) 18 *Political Theory* 21.
78. See Allen Buchanan, 'Rawls's Law of Peoples' (2000) 110 *Ethics* 716.
79. Here I follow Muthu's call to 'pluralise' the Enlightenment through exploration of the anti-imperial political thought of philosophers such as Diderot, Kant and Herder. See Sankar Muthu, *Enlightenment Against Empire* (2003).
80. Robert M. Cover, 'Foreword: *Nomos* and Narrative' (1983–1984) 97 *Harvard Law Review* 4, 12.
81. Waldron, above n 62, 35 fn 10 (emphasis added).