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REASONABLE PLURALISM AND INTERNATIONAL LAW

By John Linarelli*

To avoid misunderstandings, I want to be clear on the tradition in which my contribution is situated. I work in a tradition of political and moral philosophy that goes back at least to Kant and Rousseau, focusing on a well-established set of questions, using concepts and a language well-known in philosophy and subject to serious and rigorous intellectual demands.

¹¹ See, e.g., Jean d'Aspremont & Eric de Brabandere, *The Complementary Faces of Legitimacy in International Law: The Legitimacy of Original and the Legitimacy of Exercise*, 34 *FORDHAM INT'L L.J.* 190, 207 (2011).

¹² KLAUS DINGWERTH, *THE NEW TRANSNATIONALISM: TRANSNATIONAL GOVERNANCE AND DEMOCRATIC LEGITIMACY* 27–28 (2007); Gráinne de Búrca, *Developing Democracy Beyond the State*, 46 *COLUM. J. TRANSNAT'L L.* 221, 227 (2008).

¹³ Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification* 2–3, available at <http://ssrn.com/abstract=1593543> (last visited Feb. 24, 2011).

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In the very few words allotted to me, I will strive to keep the discussion as clear as possible for those who may not work in this tradition.

It is important to identify the relevance of this tradition to international law. A central focus of contemporary political philosophy is on state power and its relationship to the legitimacy of states and their legal and political institutions. In contrast, although state power is fundamental to international law, lawyers have been prone to ignoring its effect on international law, from its formation to its content to its source of authority. Power is the proverbial elephant in a room of international lawyers. While lawyers tend to see their work as pragmatic and that of political theorists as fanciful or unrealistic, it is likely that the opposite is true. International law risks irrelevance if it does not take questions of power seriously.

Let's start with a standard set of questions, which have been asked many times of domestic law or of law generally, but too rarely of international law. Do states and persons have an obligation to obey international law? Why? What gives international law its practical authority, which is the authority to direct persons to act? Why does international law make claims on states and persons deserving of respect? These are important questions to ask about international law. We are asking if there is some way to justify the use of power, often in the form of coercion, beyond state borders. We have to justify an international law that authorizes the use of force by one state against another, in situations in which a state's interest trumps the basic human right to life. We have to justify an international economic law that sustains the wealth of rich countries at an enormous cost to the planet and that perpetuates vast inequalities across societies. We have to justify a legal system that bases its authority on sovereignty, which is not a moral concept but a political one, and which respects the authority of despotic regimes to make international law. It is no small task.

Think of Hart's distinction between being obliged and having an obligation.¹ Being obliged is about incentives, grounded in prudential reasons to comply or not to comply with international law, regardless of whether an obligation exists to comply. Game theoretic accounts about international law are about compliance. A state or other actor may have an obligation to comply with international law, but if the payoffs do not favor compliance, then the state or other actor may breach the obligation and not comply. Compliance tends to be a question about how people actually behave. In an account of law's normative force based on compliance, when reasons of prudence do not dictate compliance, then the law will lack authority. We cannot base law's authority on such contingencies. We need to understand law's normative powers when reasons of prudence dictate against compliance. We want to know why international law imposes an obligation in cases in which the law is against the interest of the agent.

Having an obligation rests on some authoritative reason to be bound to a particular command or set of commands. Moral reasons are one set of authoritative reasons supporting legal obligation. In such a case, law gets its authority from moral justification. This is at least how legal obligation might be understood in normative jurisprudence. Note the narrowness of the claim. I am not saying that all law gets its practical authority from moral reasons. Nor am I saying that morality provides the only authoritative reasons for law's authority. Rather, all I am saying is that in some cases, law may be said to derive its authority from morality. There may be other sources for law's authority, including the need to coordinate

¹ H.L.A. HART, *THE CONCEPT OF LAW* 82–83 (2d ed. 1994).

large numbers of people in a society.² A legal rule that specifies driving on the left or right gets its authority from the need to coordinate, not from morality.

How do we get to moral justification of international law in a pluralistic world? I will provide a tentative strategy here to do so, grounded in the universally accepted notion of moral equality. In a domestic society, political obligation has its source in the moral equality of citizens. In global society, political obligation has its source in the moral equality of persons regardless of state citizenship. Moral equality is not a controversial concept. It is a very basic concept in political philosophy. It is well accepted in the major religious traditions.³ Moral equality means that each person deserves equal dignity and respect. As Thomas Nagel elegantly puts it, “everyone’s life matters, and no one is more important than anyone else.”⁴ While it is beyond the scope here to provide the complete argument, I hope to at least make you think about how equal dignity and respect might lead us to a way of accepting a reasonable pluralism that does not conflict with the universalism of human rights.⁵

It is by no means clear that pluralism is as radical as we might think it to be. Rawls seems to have rested his *Law of Peoples* on an assumption of radical inter-society pluralism: “If a reasonable pluralism of comprehensive doctrines is a basic feature of a constitutional democracy with its free institutions, we may assume that there is an even greater diversity in the comprehensive doctrines affirmed among the members of a Society of Peoples with its many different cultures and traditions.”⁶ In his recent work, James Griffin clarifies: “Too many contemporary writers merely echo Rawls’s belief that a pervasive and ineradicable feature of international life is a radical inter-society pluralism of conceptions of justice and the good. But Rawls’s reasons for regarding these differences as ineradicable are difficult to find.”⁷ It is likely true that increasing economic interdependence and irrelevance of distance give credibility to Griffin’s claim. We can, however, simply assume that Rawls is right about radical inter-society pluralism, and proceed to account for it in our approach to developing moral reasons for the practical authority of international law that can handle even radical pluralism.

Pluralism is a notion about which a great deal of confusion persists. I will argue that pluralism connects to moral relativism, a notion that has received attention in moral philosophy. Let’s stipulate to a non-skeptical notion of moral relativism that seems widely accepted: moral relativism means that no single ultimate standard exists for moral appraisal by all moral agents.⁸ Distinguish moral disagreement, in which two people reach different conclusions on

² I agree with John Morss on this point.

³ Stefan Gosepath, *Equality*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2011), <http://plato.stanford.edu/archives/spr2011/entries/equality/>.

⁴ THOMAS NAGEL, EQUALITY AND PARTIALITY 11 (1991).

⁵ I am grateful for Dean Claudio Grossman’s comments during the discussion following the panel presentations, which encouraged the panelists to focus on the universalism of human rights.

⁶ JOHN RAWLS, THE LAW OF PEOPLES 40 (1999). See also NAGEL, *supra* note 4, at 169.

⁷ JAMES GRIFFIN, ON HUMAN RIGHTS 138 (2008). For just such a recent writer, see Robert D. Sloane, *Human Rights for Hedgehogs?: Global Value, Pluralism, International Law, and Some Reservations of the Fox*, 90 B.U. L. REV. 975, 976 (2010). For a view similar to Griffin’s, see JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS 168–84 (2d ed. 2007).

⁸ T.M. SCANLON, WHAT WE OWE TO EACH OTHER 333–34 (1998) (citing Gilbert Harman, *What is Moral Relativism?*, in MORAL RELATIVISM AND MORAL OBJECTIVITY? 3–64 (G. Harman & J.J. Thompson eds., 1996)). Scanlon calls this a benign moral relativism. A skeptical form of moral relativism challenges the basic idea of morality as authoritative. Some claim that value does not have truth conditionality but is simply a matter of taste or preference. We have all had students in class who say “We all have our own personal morality.” Finally, some claim that morality is simply a matter of social convention. These ways of “handling” morality can be described as skeptical. I will put them aside here. Those who accept these arguments likely reject my moral justification thesis for the force of international law, so I am not going to get anywhere in dealing with these arguments.

what is right but are applying the same moral standard.⁹ Relativism is about differences in ultimate moral standards, not differences in contexts, social facts, or material conditions of a society.¹⁰

Ultimate moral standards may have their grounding in shared forms of life that may constitute customs and traditions.¹¹ How is international law to be morally justified in a world with moral relativism in the form of customs and traditions? The strategy I employ here is to look to moral forms of contractualism for assistance. Contractualism is a form of moral argument that accommodates customs and traditions. Contractualists claim that an action is wrong because it is not justifiable to others. To a contractualist, judgments about right and wrong are about what would be permitted by principles that no one could reasonably reject.¹² “Reasonable” can take cultures and traditions into account. Stephen Darwall adds another meta-ethical element to contractualism, that its source of authority is the “second personal,” found in the idea of recognition respect, or equal dignity and respect for others.¹³ So understood, contractualism offers an attractive account of our attitudes about relativism across domestic societies and in global society. Placing these notions in service to institutional design, the move would be one of finding a global public reason—an overlapping consensus of moral principles that no one could reasonably reject. A way to do this would be to employ a wide reflective equilibrium procedure, as Brian Lepard has effectively done in his influential book on customary international law.¹⁴

Consider how we might understand law’s normative force in two contexts: variations of legal standards across societies, such as in different ways of implementing human rights obligations, and justifying the content of the primary sources of international law. Impartiality, reasonableness, and recognition respect help us justify the universality of human rights. Moral justification is necessary for universality. Contractualism accommodates universalism in human rights while still recognizing reasonable forms of pluralism. It seems that we do engage in a contractualist form of practical reasoning when we account for variations in human rights practices across societies. The margin of appreciation doctrine in European human rights law, for example, can be understood and infused with limits if we understand it as having a contractualist structure. As for international law principles, think of the rules on the lawful use of force, and the structure of international humanitarian law as examples. These rules appear to reflect contractualist notions of reasonableness, impartiality, and recognition respect.

But if Rawls was right about the persistence of radical pluralism, there will be gaps. One difference in ways of thinking by lawyers and philosophers is that lawyers focus on identifying and resolving disagreements, while philosophers focus on identifying and understanding more clearly what we all agree upon. My account may be sidestepping an intractable disagreement between liberals and traditionalists. Rawls used the term “reasonable pluralism” to describe a feature of liberal democracies in which basic notions of justice and Dworkin’s distinction

⁹ SCANLON, *supra* note 8, at 329. Scanlon calls the latter parametric universalism.

¹⁰ GRIFFIN, *supra* note 7, at 130–31.

¹¹ Rawls and Scanlon use the same language. See RAWLS, *supra* note 6, at 11, 40; SCANLON, *supra* note 8, at 335–42.

¹² SCANLON, *supra* note 8.

¹³ STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT AND ACCOUNTABILITY* 119–26 (2006).

¹⁴ BRIAN D. LEPARD, *CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS* (2010).

between ethics and morality are shared by at least an appreciable segment of society.¹⁵ If all peoples and societies accept Dworkin's notion of ethical independence—that many ways to live a good life exist across societies and within global society, and that political and legal systems should protect and support my right to live the life I choose, only if my practices are not reasonably rejectable by some other group—then standards of impartiality, reasonableness, and recognition respect may do the job. But conflicts between values may be so significant that giving some the freedom to pursue their own lives may be seen by others as unreasonable restrictions on their freedom. Some traditional societies may maintain comprehensive or perfectionist views incompatible with reasonable pluralism.

I do not have good answers to this dilemma. It is a clash of ultimate moral standards. Political philosophy has immediate practical relevance in our efforts to dissolve the dilemma by focusing on what we all agree on—which is a great deal, and which we take for granted—and to continue to help us understand what it means to put equal dignity and respect for each person into practice in the design of important institutions like international law.

PLURALISM IN INTERNATIONAL LAW: WARNINGS, OPPORTUNITIES, AND QUERIES

By John R. Morss*

International law is I think all about alliances: not only formal alliances between the representatives of nations, but also the informal alliances that constitute communities and other collectives, many of which cross the borders of states. Harmony and dissonance are of the essence of alliance. In this brief contribution I conjure an alliance between two major contemporary theorists of the political, Amartya Sen and Jeremy Waldron.

AMARTYA SEN'S PLURALISM OF REASON

Amartya Sen is a distinguished economist and political scientist who has a longstanding concern for human rights and capabilities, and a longstanding commitment to combating injustice. Sen has explored what a pluralist approach to justice would entail. As Sen emphasizes, pluralism is a serious commitment with continuing consequences. As one might say, pluralism “does not stay done.” For Sen,

even the most vigorous of critical examination can still leave conflicting and competing arguments that are not eliminated by impartial scrutiny. . . . [T]he necessity of reasoning and scrutiny is not compromised in any way by the possibility that some competing priorities may survive despite the confrontation of reason. The plurality with which we will then end up will be the result of reasoning, not of abstention from it.¹

This approach is consistent with Sen's insistence on a comparative approach to justice and rights. For Sen, this is to be distinguished from a *transcendental* approach, as represented by the design of ideal institutions or ideal procedures. He states, “There may not indeed exist any identifiable perfectly just social arrangement on which impartial agreement would emerge. . . . If a theory of justice is to guide reasoned choice of policies, strategies or

¹⁵ RAWLS, *supra* note 6, at 11, 15, 40, 54–57; JOHN RAWLS, *POLITICAL LIBERALISM* (1993); JOHN RAWLS, *THE IDEA OF PUBLIC REASON REVISITED* (1999). On Dworkin's notion of ethical independence, see RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 368–71 (2011).

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¹ AMARTYA SEN, *THE IDEA OF JUSTICE* x (2009).