John Rawls and Philippe Van Parijs

Three letters on *The Law of Peoples* and the European Union

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Preamble

On the 30th of April 1998, at the end of a term as a Visiting Professor at Yale, I visited John Rawls at his home in Lexington in order to discuss the manuscript of *The Law of Peoples,* the latest version of which he had previosuly sent to me. As I was leaving, I promised to send him some documents I had mentioned in our conversation and a brief written formulation of the central objections I had put to him. He responded to what I sent him with a carefully argued letter, which remained inexplicably stuck for three months in Oxford (where I spent the rest of that academic year) before reaching me miraculously in Louvain. I reacted to this letter as soon as I could, with a new formulation of my objections. But *The Law of Peoples* was already at the printer's.

The three letters just mentioned are reproduced below, with no alterationor omission. They therefore required to be read with the supplement of indulgence one owes to what was not meant to be read by anyone but the addressee. This holds in particular for the second one, whose author is no longer there to correct the interpretations that might be made of it. As those who knew John Rawls can witness, his intellectual honesty was exemplary, as he ceaselessly endeavoured to express as well as he could the answers he tried to provide to questions he

regarded as essential. However carefully written, this text would no doubt have been further modified if its author had intended to publish it. Its readers should take this into account.

In August 2003, I asked John Rawls for his permission to quote (in my contribution to *La République ou l'Europe ?*, P. Savidan ed., Paris : Le Livre de Poche, 2004) the most striking passage of his letter, to my knowledge his most openly « anti-capitalist » text and the only writing in which Rawls deals explicitly with the European Union. After rereading it carefully, he gave his go-ahead, which his wife transmitted to me. I warmly thank Mardy Rawls and Tim Scanlon, John Rawls,'s literary executors for having granted permission for a full publication of the letter, which enables the reader to locate the positions expressed in the passage in question within the framework of the conception of international justice developed in *The Law of Peoples*. We have not found necessary to alter the letters by erasing the few personal allusions they contain. These can serve to give a glimpse of Rawls's modest and kind personality ant to illustrate that mutual affection and intellectual disagreement are fully compatible.

While having some « rawlsological » interest, the main purpose of this publication, loyal to Rawls's memory, is to help feed in-depth thinking, reasonable yet committed, about what justice requires in the world, and in particular in this case about the promises and perils generated, from this standpoint, by the European construction process.

pvp

[English translation of the preamble published in French in *Revue de philosophie économique* 7, 2003.]

Première lettre

All Souls College, Oxford, 8 May 1998.

Dear Jack,

It was a great pleasure, as usual, to talk to you last week. I was delighted to see that your health problems had in no way affected your intellectual alertness and very much hope that the medication will have the desired effect on the bones.

It took a little while for one of the promised papers to emerge from my luggage, but I have now found the lot, and all are enclosed, namely:

1) three articles from a special issue of the *European Law Journal* 1 (3) 1995, on the German Supreme Court's decision declaring the superiority of the German constitution over the EU Treaties:

• one by Dieter Grimm (member of the German Supreme Court) defending the position of the Court on the ground that there is no European "demos", followed by

• a comment by Habermas, arguing that a European "demos" (not a single "ethnos") is needed and can be gradually brought about, and

• one by the Harvard European Law Professor Joseph Weiler (tracing the position adopted by the Court to Carl Schmitt — no democracy without a sufficiently homogeneous *Volk* — and criticizing that position)

2) two brief pieces in French from a special issue of the *Revue nouvelle* (Brussels) 11, November 1993, on the ethnic dimension of the future of the Belgian Welfare state:

• a French translation of some cultural Flemish organizations' manifesto that first stated the claim that Belgium's welfare state should be split along linguistic lines, with each of its two "peoples" (Dutch-speaking Flemings and French-speaking Walloons) organizing its own system with its own means (the short manifesto itself, pp. 65-66, you may find worth reading even in French, as it sounds so strikingly as a *Law of Peoples*- based argument for reducing the strong solidarity betweell richer and stronger regions embodied in the federal welfare state to a mere duty of assistance), preceded by

• a brief article in which I try to spell out the ethical issues raised by such a claim.

In the respective contexts of the European Union and of a multinational state,

these various pieces document my central objection to the perspective adopted in *The Law of Peoples* (which I greatly enjoyed reading for many reasons, not least because of the neat way in which it articulates the position some implications of which I find so disturbing both in the Belgian and the European context). This objection is probably an "old world" objection, as the "new world" (with Canada the main exception) raises the difficulty I am bothered by in a far less acute form than the Euro-Afro-Asian continent. Let me try to restate it.

1. One point of departure is that there are over 3000 living languages and only 212 sovereign countries to accommodate them. This means that *The Law of Peoples*'s "standard case" (assuming a simple matching of language and territory) can hardly be the typical case beyond Australia and America North and South (where minority languages have effectively been driven out, except in Québec). And in this typical ("old world") case, a key issue that immediately arises is who the peoples are and (given the undeniable impact of institutions: for example, less than 50% of France's population spoke French in 1789, and I am told that some Southerners wanted the American constitution to start with "We the peoples" rather thall "We the people") who they should be made to be, with massively different material consequences depending on whether country-wide solidarity is meant to be governed by a sheer duty of mutual assistance in extremities applying to its various peoples or by the difference principle applying to all its citizens. (This is illustrated by the Belgian debate, with the Flemish cultural organizations adopting roughly the first position, and my article defending the second one.)

2. Furthermore, in a continent that used to be torn by international wars, institutions have developed that go far beyond standard pacts of cooperation or confederation (no unanimity rule among the representatives of the member states on important issues, no feasible exit option, directly elected Parliament, etc.), for the sake of securing peace, of promoting economic efficiency, but also increasingly of preserving the conditions for effective environmental and social policy. The question then becomes whether the emerging political entity will (and should) never be more than a conglomerate of ethnoi-demoi, between which only assistance is required on grounds of justice, or whether it can constitute a poly-ethnic demos to which a more demanding conception of distributive justice can conceivably apply. (This is illustrated by the European Union debate, with Grimm and Schmitt — as interpreted by Weiler— adopting roughly the first position, and Habermas and Weiler adopting the second one.)

How can one adjudicate between the two conflicting positions? Any reader of *The Law of Peoples* as it is will no doubt interpret it in a way that brings ammunition to the first (and far stingier) position in both debates. If this is to be avoided, it is obviously

insufficient to say: "Of course, if two peoples want to merge, there is nothing to prevent them.", as there is obviously sharp disagreement on these issues — unsurprisingly, given the conflicting interests involved. The question is whether there is any criterion that would enable us to plausibly say: "In these cases, a demos must be kept or formed (despite the plurality of ethnoi, which it may not be possible, and it is anyway undesirable, to abolish), with the more demanding distributive implications that follow."

A useful clue may be given by your counterexample (i) to the global difference principle in §16.3.[1] An analogous story could of course be told about two families within the same society (rather than two peoples on the same continent) across generations, one with a culture that leads it to accumulate wealth, while the other, more laid back, remains poor. Why would this not be a counterexample to the local version of the different principle, just as your own variant is meant to be a counterexample to the global version ? Presumably, because one tacitly assumes that there is more mobility, more contact, more interdependency, more potential competition for opportunities between the members of the two families than between the members of the two peoples. But what if the relations between the members of today's peoples (within Belgium or within Europe) are better captured by the assumptions implicit in the families variant than in the (isolated) peoples variant? In order to decide whether the more ambitious or stingier conception of distributive justice applies, the relevant factual question is then not whether there is one or more ethnoi involved (a matter of cultural distance), nor whether there currently happens to be a common demos (a matter of political institutions and of sufficiently common public space), but whether the circumstances (mobility, contact, interdenpencies, etc.) are such that there *should* be a common demos — if only to enforce the requirements of justice.

Of course, this demos has to be conceived in a strongly decentralized, ethnos–diversity–respecting way – which has the advantage of making even the idea of a world state less threatening, but also raises a number of tricky questions (e.g. the moral hazard of decentralized government and the fragility of a plurilingual public opinion). For reasons sketched in Habermas's comment, however, moving in this direction may well be one of the most urgent demands of justice. Rather than freezing the status quo by decreeing that only the "law of peoples" should govern the

[1] [« Two liberal or decent countries are at the same level of wealth and have the same size population. The first decides to industrialize and to increase its rate of (real) saving, while the second does not. Being content with things as they are, and preferring a more pastoral and leisurely society, the second reaffirms its social values. Some decades later, the first is twice as wealthy as the second. 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

distributive relations between existing demoi (cf the EU debate), rather than regressing down from the status quo by freeing the ethnoi within existing demoi from any liability that exceeds the requirements of the "law of peoples" (cf the Belgian debate), the priority is rather to build ever broader (and hence poly-ethnic) demoi, thereby gradually reducing the scope remaining for the "law of peoples". Even for the sake of the survival and integrity of the ethnoi, this broader demos seems bound to perform far better, under present and future conditions, than the formal independence of ethnoi-demoi increasingly subjected to the competitive pressures of the world market.

Note that the above is in no way incompatible with the main line of *The Law of Peoples* as it stands, providing the intuition behind your counterexample of § 16.3 (and its family variant) can be interpreted in the way suggested above. By freeing the division of labour between domestic justice and inter-peoples justice from any connection with any notion of homogeneous ethnos and from the contingencies of existing demoi, this interpretation blocks a complacent use of *The Law of Peoples* for the justification of what I am sure you would also regard as stagnation (in the EU example) or regression (in the Belgian example). In a world that becomes ever more" global" (in both its economic and communicative dimensions), the demands of domestic justice and of the "law of peoples" are then best seen as corresponding to two ideal types in polar opposition, with no doubt whatever as to which scope is shrinking and which is growing.

So, this was my main comment, as a perhaps slightly extreme but not that untypical "old world" reader, not too sure as to what his « people » is supposed to be. I hope it can be of some use, if only to correct some misunderstandings, and apologize for its ending up so long.

Thanks again, not only for the other day's conversation, but also for all the stimulation I got from reading your draft (not to mention your previous two books).

Please tell Mardy that Josh made a copy of the article about her – which I found very nicely and sympathetically written. And good luck with Liz's wedding.

Affectionately

Philippe Van Parijs

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to give funds to the second ? [...] This seems unacceptable. » (J. Rawls, *The Law of Peoples*, Harvard University Press, 1999, p.117.)]

Deuxième lettre

Harvard University
Department of Philosophy
Cambridge. MA 02138

June 23, 1998.

Dear Philippe :

I am sorry to have been out touch with you for so long. I had a little set–back around the middle of May and that interrupted my ability to write anything for a while. Then there was our daughter's wedding on May 30th. We were lucky : there was heavy rain on Friday, heavy rain again on Sunday, yet Saturday, wedding day, was lovely and sunny, and all went well. Now after some time I am back trying to complete the LofPs [*The Law of Peoples*] and hope the end is in sight. However, I wouldn't feel comfortable about the LofPs until I can formulate a reasonable reply to your long letter to me, together with the enclosures which are extremely helpful indeed.

I believe that you interpret LofPs differently from me. Thus, suppose that two or more of the liberal democratic societies of Europe, say Belgium and the Netherlands, or these two together with France and Germany, decide they want to join and form a single society, or a single federal union. Assuming they are all liberal societies (or liberal enough to apply LofPs to them), any such union must be agreed to by an election, in which in each society the decision whether to unite is thoroughly discussed. Moreover, since these societies are liberal, by the LofPs they adopt a liberal political conception of justice, which has the three characteristic kinds of principles, as well satisfying the criterion of reciprocity, as all liberal conceptions of justice must do (see LofPs, §1:2). Beyond this condition, the electorate of these societies must vote on which political conception is the *most* reasonable, although all such conceptions are at least reasonable. A voter in such an election may vote for the difference principle (the most egalitarian liberal conception), should he or she think it is the most reasonable. Yet so long as the criterion of reciprocity is satisfied, other variants of the three characteristic principles are consistent with political liberalism. This criterion doesn't say which particular liberal conception the voters must vote for, so long as the criterion itself is met.

Thus, political liberalism as incorporated into the LofPs leaves to the voters and their further philosophical arguments to select which liberal conception is to be adopted by their union. Here we have a division of labor between the LofPs, which is to serve as a scheme of norms for international law and practice, and the decisions of free

and equal citizens in liberal societies. I don't feel that this division of labor, once it is correctly understood, is stingy. True, it doesn't mandate any particular liberal conception, because it is not itself a complete philosophical doctrine ; it must serve for a reasonable Society of Peoples as its international norms of conduct in which considerable differences of religious and philosophical opinion always will remain.

You write as if what I call later the duty of assistance is relevant to the situation we are discussing. Yet that, however, is a misunderstanding. This duty applies to a separate matter, namely, to the duty that liberal and decent peoples have to assist *burdened* societies. The latter are described in (§15). These societies are neither liberal nor decent. What Belgium and the Netherlands owe to each other in a union between them cannot be a decision between say, the difference principle on the one hand and the duty of assistance on the other. Perhaps I fail to grasp your meaning.

You are critical also of my use of the idea of the nation–state. But I think you overlook what I say about that idea in §2.1. There it says that the requirement that a liberal people have a common language, history and culture, with a shared historical consciousness, is rarely if ever fully satisfied. Historical conquests and immigration have caused the intermingling of groups with different cultures and historical memories, who now reside within the territory of most contemporary liberal democratic governments. Despite this, the Law of Peoples starts with this standard case[2]– with nations as J. S. Mill described the concept of nationality strictly understood.[3] Perhaps if we begin with this standard case we can work out political principles that will, in due course, enable us to deal with more difficult cases. In any event, a simple presentation using only liberal peoples as nations in this strict sense is not to be summarily dismissed. In a matter so complex as the Law of Peoples we must start with fairly simple models and see how far we can make them go.

One thought that encourages this way of proceeding is that within a reasonably just liberal polity, it is possible, I believe, to accomodate the reasonable cultural interests and needs of groups with diverse ethnic and national backgrounds. We

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[2] This standard case is not to be mistaken for an ideal case, politically (or morally) speaking.

[3] At this initial stage, I use the first sentences of the first § of Ch. XVI of J.S. Mill's *Considerations* (1862) in which he uses an idea of nationality to describe a people's culture. He says : « A portion of mankind may be said to constitute a Nationality, if they are united among themselves by common sympathies, which do not exist between them and any others — which make them cooperate with each more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves, or a portion of themselves, exclusively. This feeling of nationality may have been generated by various causes. Sometimes it is the effect of identity of race and descent. Community of language, community of religion, greatly contribute to it. Geographical limits are one of its causes. But the strongest of all is identity of political antecedents; the possession of national history, and consequent community of recollections; collective pride and humiliation, pleasure and regret, connected with the same incidents in the past. None of these circumstances, however, are necessarily sufficient by themselves. » *Considerations on Representative Government*, ed. J.M. Robson (Toronto : University Press, 1977) , *Collected Work*, Vol XIX, Ch. XVI, p. 546.

proceed on the assumption that the political principles for a reasonably just constitutional regime allow us to deal with a great variety of cases, if not all.[4] There are bound to be exceptions and we try to face them when they come.

One question the Europeans should ask themselves, if I may hazard a suggestion, is how far–reaching they want their union to be. It seems to me that much would be lost if the European union became a federal union like the United States. Here there is a common language of political discourse and a ready willingness to move from one state to another. Isn't there a conflict between a large free and open market comprising all of Europe and the individual nation-states, each with its separate political and social institutions, historical memories, and forms and traditions of social policy. Surely these are great value to the citizens of these countries and give meaning to their life. The large open market including all of Europe is aim of the large banks and the capitalist business class whose main goal is simply larger profit. The idea of economic growth, onwards and upwards, with no specific end in sight, fits this class perfectly. If they speak about distribution, it is [al]most always in terms of trickle down. The long–term result of this — which we already have in the United States — is a civil society awash in a meaningless consumerism of some kind. I can't believe that that is what you want.

So you see that I am not happy about globalization as the banks and business class are pushing it. I accept Mill's idea of the stationary state as described by him in Bk. IV, Ch. 6 of *his Principles of Political Economy* (1848). (I am adding a footnote in §15 to say this, in case the reader hadn't noticed it). I am under no illusion that its time will ever come – certainly not soon – but it is *possible*, and hence it has a place in what I call the idea of realistic utopia.

I hope this finds you well and happy to be home with your family,

Very best,

Jack

[4] Here I think of the idea of nation as distinct from the idea of government or state, and interpret it as referring to a pattern of cultural values of the kind described by Mill in the footnote above. In thinking of the idea of nation in this way I follow Yael Tamir's highly instructive *Liberal Nationalism* (Princeton University Press, 1993).

Troisième lettre

Université catholique de Louvain
Chaire Hoover d'éthique économique et sociale

8 November 1998

Dear Jack,

I hope you received the e-mail message I sent as soon as your kind, thorough and instructive letter of 23 June reached me — with an incredible delay, owing to having been stuck for three months in Oxford in a parcel of forwarded mail. My very warm thanks again for all the time and thinking that went into your letter, about which I have pondered ever since I received it. Here is at very long last, with a number of post-sabbatical emergencies out of the way (including a family move to Brussels after 18 years in Louvain-la-Neuve), a longer, though no doubt inadequate, response.

My general impression is, as usual, that our gut feelings are very close and that, whatever happens, we'll always be on the same side of the barricades! Yet, I am not certain that the threat I feel *The Law of Peoples* implies for (existing and potential) redistribution in multinational polities is fully appreciated. Let me try again, by commenting briefly on each of the four disagreements you express in your letter.

(1) The duty of assistance is irrelevant.

[The duty of assistance is a duty of liberal or decent societies towards burdened ones, which are neither liberal nor decent because of adverse conditions. Hence it is not relevant to the relationship between two liberal peoples, and it makes no sense to compare the duty of assistance and the Difference Principle as two rival ways of understanding the distributive obligations between, say, Belgium and the Netherlands.]

But:

Although the duty of assistance is not one that currently applies, say, to the Netherlands with respect to Belgium, since the latter cannot currently count as a "burdened" society, can't it nonetheless be said that the Netherlands have such a duty towards the Belgian population *in the event* circumstances led the latter to be "burdened" in the appropriate sense? Since the duty of assistance is the only principle of the Law of Peoples which includes (though does not reduce to) a significant redistributive dimension, it then seems to make sense to compare this weak distributive obligation of justice (currently not triggered off) which holds between the Belgian and

Dutch populations if they are to be viewed as two different peoples, to the undoubtedly stronger distributive obligations of justice which would hold if they were viewed as, or became, components of a single people. Admittedly these obligations may be acceptably captured, in your present view, by a reasonable principle less egalitarian than the Difference Principle. Moreover, circumstances may be such (identical living standards in both populations, for example) that no net transfer would be mandated by the relevant principle. Nonetheless, it seems correct to say that, in historical conditions under which the borders between peoples are up for challenge or redefinition (whether outward or inward), there is a choice between linking people on different sides of some border by weaker (sheer assistance) or stronger (Difference Principle and the like) distributive obligations.

(2) The Law of Peoples is not stingy.

[The fact that it makes no substantial redistributive claim on peoples simply reflects a division of labour that follows from the Law of Peoples not being a complete philosophical doctrine. The rules of international law it consists in are compatible with each people opting for generous domestic redistribution.]

But:

(a) Is it not the case that the decision to treat two populations (say the Flemings and the Walloons in Belgium) as two distinct peoples will generally mean that a less generous redistribution is required between them as a matter of justice than would be the case if treated as one people? (This is just a reformulation of the above remarks.)
(b) What if the fact that the Law of Peoples is not more demanding on the distributive side leads, under current conditions of global asset mobility, to each people becoming ever stingier domestically as it increasingly has to compete with others to retain and attract taxable assets? (This is a distinct point raised in the final ("Penguins Island") section of *Real Freedom for All*.)

(3) The Nation-state is the best point of departure.

[The Nation-State is not recommended as an ideal but as the simplest case for the problem at hand, and hence a necessary step towards handling the more complex case of multi-national states.]

But:

My challenge is not to the methodological priority of simpler cases, but to the substantive importance of the question of where the borders between peoples should be drawn. There may be some countries and episodes of history in which the location and meaning of borders are so intangible that they are tantamount to facts of nature.

But there are many other countries and periods in which either the location of these borders or their meaning or both is under challenge or negociation, at least as much as most of the domestic political and socio-economic institutions. And then it seems to me that we are entitled to expect from political philosophers something more specific about what the borders should be and what they should mean than "The peoples must decide democratically", just as they are expected to say something more specific than this about the just pattern of political and socio-economic institutions. (The fact that scholars in the "Rawlsian" tradition are prepared to stick their necks out in this way, by offering substantive principles of justice, I have always regarded as a decisive advantage over the purely procedural "Hamermasian" tradition.)
So, I am not saying that the majority of complex cases should be treated before, or on a par with, the minority of simple cases; rather that they should alert us to a practically important, and logically prior question, which is: which populations should be regarded as, or turned into, peoples, or become more or less people-like than they are. Of course, they will and should decide themselves. But just as in the case of political and socio-economic institutions, is it not part of our role as political philosophers to guide their decisions?

(4) The US are no model for the EU.

[There is a great value in Europe's separate political and social institutions. If the EU goes for a large open market with the goal of indefinite growth (rather than Mill's stationary state) and distribution only in the form of trickle down (rather than, say, a property-owning democracy), the deplorable long term result will be, as in the US, a "civil society awash in a meaningless consumerism".]

I strongly agree with the underlying intuition.

But

(a) Isn't there something about the following argument held by (left of centre) advocates of the so-called "common" and later "single" market (say, Jean Monnet or Jacques Delors): "Getting rid of the inefficiencies stemming from limited scale and local monopolies is a good thing, providing the growth it generates improves the fate of the worst off in our respective countries, of course with the help of mechanisms that need to go far beyond spontaneous market trickle down." ?
(b) Whether or not the above reasoning made sense at an earlier stage, we now have the single European market and (soon) the single European currency, and the transition costs of rolling them back seem high enough to believe them to be irreversible. In this context, is the erection of a genuine European polity that would encompass the European single market not far better than letting each national polity, immersed in

this market (and, beyond, an increasingly globalized world market), struggle with the latter's contraints? (See 2b above) Of course this would mean transforming the populations of Europe into something like a people (a demos, not an ethnos). But this could and should be compatible with vigorous measures to protect their linguistic and hence cultural diversity (esp. through a tough application of the territoriality principle for official language use). Indeed it would be essential to prevent a rapid erosion of their precious cultural differences under the crushing pressure of the obsession with the nation's competitive position — which would inexorably occur if we had the single market without (anything resembling) a single people. My suggestion, in other words, is that something more like the US in terms of political institutions (a stronger federal Union) is required to prevent Europe becoming more like the US in both social and cultural terms.

This is still quite abstract and elliptic. I enclose a paper (for a Harvard workshop on health equity directed by Amartya Sen), in which I try to articulate more concretely the threat, to the redistributive systems of multinational states, of dichotomic views of the type illustrated by *The Law of Peoples* — and to formulate a "Rawlsian" alternative. [5]

I also enclose another paper on a distinct, but no less "Rawlsian" topic. Its last sentence probably anticipates where our present discussion too will eventually lead me! [6]

I was delighted to hear that your daughter's wedding was a success, including weather-wise, and to see that, despite a setback in May, you could resume your usual activities. I hope the Autumn is also treating you well, and look forward to receiving the final version of *The Law of Peoples* if and when you can spare a copy.

Most affectionately,

Philippe

[5] [P.Van Parijs, "Just Health Care in a Pluri-National country", in *Public Health, Ethics and Equity*, Sudhir Anand, Fabienne Peter & Amartya Sen eds., Oxford: Oxford University Press, 2004, pp. 163-180.]

[6] [« Does this mean that the same holds for Rawls as for Pascal's God : 'Un peu de pensée éloigne de [lui], beaucoup y ramène' ? » (P. Van Parijs, « The Disfranchisement of the Elderly and Other Attempts to Secure Intergenerational Justice », Philosophy & Public Affairs 27(4), 1998, 292-333 fn 86.]