

# IS LIBERTY POSSIBLE? THE TRAJECTORY OF LIBERAL INSTITUTIONALIZATION OF LIBERTY IN POST-COLONIAL SOCIETIES

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**ABSTRACT.** *The gradual emergence of the **order of freedom** in a traditionally structured society creates an illusion that the emerging order will provide an unprecedented freedom and no coercive mechanism will be there to deny human will. This expectation of unquestionable freedom in traditional, tribal, religious or patriarchic societies will be interpreted a social form without any restrictions or limitations if not purely order-less. This unreasonable expectation from the order of freedom is not the result of inappropriate knowledge of liberal order of freedom rather it is due to the understanding of the notion of freedom through post-colonial spectacles.*

*The liberty as political ideal is one of the most important political ideal in post-colonial historical context but due to specific colonial legacy the meaning of freedom presumed or at least idealized in these parts of the world is actually in-formalized in the sense that it generally defined in antagonism with any form of authority i.e. religious, traditional, communitarian, patriarchal and most importantly bureaucratic order of governance. The empirical justification of this claim is in itself a domain of research but this actually not the core concern of our paper. In this paper it will be argued that our post-colonial notion of informal non-institutionalized freedom is beyond the scope of freedom make available by liberal order. The demand of unprecedented freedom is anarchic. An attempt will be made in this paper to conceptually explicate the order of freedom rather than freedom itself. It will be argued that freedom without order is not acceptable for liberal socio-political order thus it offers certain restrictions and limitations on human expression which are presumed to be necessary to guarantee individual freedom.*

**KEYWORDS:** *post-colonial society, order of freedom, civil disobedience*

## Introduction

It is an acknowledged fact the freedom in political sense is the area of non-interference defined, acknowledged and protected by the State apparatus. This formalization of the area of non-encroachment is presumed to be one of the most celebrated political ideal of liberal political order. It means that liberal order must necessarily presumed a very well defined institutional mechanism to define the area of non-interference, it's possible encroachment and its legal corollaries. Secondly it must also presume a very clear role of State apparatus regarding the determination of

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legitimate public sphere and the limits of the freedom of expression in a given public order.

The culturally non-liberal societies according to Fareed Zakarya are the real cause of illiberal democracies or the dis-functionality of democratic political procedure. But this actually an over simplified understanding of post-colonial non-liberal tendencies which manifest in the form of illiberal democratic orders. In such democratic order people (due to their non-liberal particularities) often consider “*order of freedom*” as illegitimate because it not only provides you freedom but at the same time limits your freedom by defining the area-of non-encroachment or in other words defining what ought not to do i.e. not to encroach others freedom which most of the times contradictory to the values of the people of post-colonial societies and their notion of informal freedom.

The ordered life is generally being considered as a socially recognized mechanism of discipline and punishment. The nature of order is in itself instrumental to overcome the fundamental existential vacuum of human urge for security and stability. Different justifications have been given to bridge the gulf caused by the fear of instability and insecurity for instance traditional, tribal, religious orders have their own justifications to legitimize their mechanism of discipline and punishment to overcome the fear of instability and insecurity. Historically different institutions have been emerged or evolved for the determination of well-ordered society. The most important question is whether the security or stability is end in itself or they are the mean to an end. In this sense it was traditional to provide a teleological justification of a given social order. The nature of social order will be determined by the *telos* it guarantees. It is important to note that the mechanism of discipline and punishment is one of the integral aspects of social order. Thus social control is legitimized by virtue of its capacity to actualize the *telos* which has been emerged from the tradition, intuition, revelation or the collective historical experience of a given civilization. The teleologically grounded *grand-narrative* provides a hermeneutical space to reasonably argue the justification of a given order. It reveals that the institutionalization of a given order and its corresponding mechanism of discipline and punishment is not just a political issue which can be resolved by coercive State apparatus and by certain bureaucratic mechanism. Rather gradual historical process which provide condition for evolving the “telos” actually interwoven into the socio-cultural fabric of a given society.

Thus the order of religion in a society which considers the order of tradition, or tribe, or patriarchy or matriarchy etc. as legitimate as the imposition of the order of religion will be considered by such society as coercive. Similarly if the order of freedom is going to be imposed through direct state apparatus or indirectly through humanitarian aid incentives, strengthening civil society net works and international bureaucratic institutions etc. is equally coercive from the perspective of those who do not consider encroachment in individual’s private sphere as immoral or illegitimate.

It reveals that principally establishment of any mechanism of order presumes a particular grand-narrative which has to be acknowledged as meta-rational. Secondly any mechanism of order cannot be established without identifying the theoretical

limits of the notion of tolerance i.e. it should be clear in that mechanism of order that what cannot be tolerated otherwise no order can be maintained. If any establishing order fail to legitimize the sanctity of the given telos from which the order is to be derived than the coerciveness of a given order can be presented as threat to the given political community hence its order will be considered as illegitimate.

Liberal order in culturally non-liberal societies is generally considered as unjust and coercive because its far more judgmental regarding the traditionally or religiously emerged mechanism of discipline and punishment which most of the times do not respect the sanctity of the area of non-encroachment and individual's inviolable right of self-determination.

It is because of this reason internalization of liberal order i.e. order of freedom, in a culturally non-liberal society through constitutional codification, legislation and its corresponding institutionalization eventually emphasizes more on *what should not be done?* Rather than, *what should be done?*

The gradual institutionalization of individual freedom through active state interventions pave the way for a constant antagonistic dialectics between non-liberal communal attachments and individual urge to transcends those pre-modern coercive particularities and historical specificities. As a result of this the liberal activists emphasize more on *what they don't want? Rather than what they do want?*

In the following section we will provide Rawlsian attempt to institutionalize the order of freedom. This exposition of the institutionalization of individual freedom will be helpful to understand the order of freedom, its theoretical limits of tolerance and possible conditions of being violent towards those who challenged the order of freedom.

## Section 1

In his analysis of liberty, Rawls is not concerned with the definition of liberty. It is more than obvious that he is much more interested in “the relative values of the several liberties and why they come into conflict” with each other<sup>i</sup>. So he sets aside the traditional distinction between positive and negative conceptions of freedom expounded by Berlin.

According to Rawls, any meaningful explanation of freedom must address three questions as follow:

- i) Who are the agents of freedom?
- ii) Freedom from what? I.e. what kind of restrictions or limitations is required to be eliminated?
- iii) What legitimate constraints are needed to enhance general freedom i.e. “what it is that they are free to do or not to do?”<sup>ii</sup>

It is customary to define freedom in terms of obstacles and maximization of freedom is considered as synonymous to the elimination of the identified obstacles. The identification of obstacles (political, social, cultural, religious, emotional, aesthetical etc.) is a never-ending phenomenon; therefore, the absolute realization of freedom is not possible. For Rawls, these questions<sup>iii</sup> are organically linked with each other as well as they pose a challenge for contemporary political philosophy to

resolve. “This or that Person (or persons) is free (or not free) from this or that constraint (or set of constraints) to do (or not to do) so and so”<sup>iv</sup>.

Rawls focuses on the constitutional and legal restrictions, which refrain individual’s freedom. He acknowledges that there is no one sense of liberty because there are different agents of freedom, for instance i) person ii) associations or organization or cooperation and iii) state.

Therefore liberty is in fact the name of “certain system of public rules defining rights and duties.”<sup>v</sup> This means that freedom is just a space whose frontiers are determined by the system of rights. According to Rawls, in political sense the meaning of freedom is determined by the publicly acknowledged institutions, because the prioritized system of rights cannot be protected without having proper institutional structure.

There are different spheres of liberties due to which there is always an open possibility of clash among different spheres of liberties. The role of institutions (political, legal, and economic) is to protect one agent (person, association, state) from the interference of the other. It is the institutional framework, which imposes legal obligations over the agent, not to interfere in others political, religious, moral etc. affairs<sup>vi</sup>. Since there are different spheres of liberties, therefore basic liberties should be assessed in a single system rather than particular liberties on their own. The task of the delegate (in a constitutional convention)<sup>2</sup> and legislator is to balance one sphere of liberty against that of the other for the attainment of “best total system of equal liberties”<sup>vii</sup>.

In the Rawlsian framework, the conception of freedom is not anarchic. He acknowledges certain restrictions and limitations as legitimate and necessary for the sustenance of the system of liberty. The limitation of freedom is not unjust because “these limits are subject to certain criteria expressed by the meaning of equal liberty and (the) serial order of the two principles of justice.”<sup>3,viii</sup>

He acknowledges that the framework of constitutional democracy is not a perfect political system but in such a system two conditions must necessarily be satisfied namely i) the principle of equal liberty and ii) the possibly “just and effective system of legislation”<sup>ix</sup>.

In Rawlsian framework, the principle of equal liberty is concretized (in constitutional procedure) in the form of “principle of equal participation”. The initial

<sup>2</sup> Here the constitutional convention has been used in the specific Rawlsian sense which he has used in the analysis of original position i.e. a hypothetical choice situation in which fair principles of justice will be discovered behind the veil of ignorance.

<sup>3</sup> The two principles of justice which Rawls put forward as likely to be chosen are: **First Principle** “Each person is to have an equal right to the most extensive system of basic liberties compatible with a similar system of liberties for all.” (See Rawls J. A Theory of justice, op.cit p. 302 – 303)

**Second Principle**

“Social and economic inequalities are to be arranged so that they are both a) to the greatest benefit of the least advantaged, and b) attached to offices and positions open to all under conditions of equality of opportunity.”(Ibid. p. 302–303).

reference of constitutional democracy is equal political participation. The worth of a democratic decision is determined by the fact that to what extent the principle of equal participation is realized. Before discussing the relation between liberty and political participation, Rawls mentions the general features of constitutional statecraft as follows:

- i) Socio-political and economic policies are decided by elected representatives for a limited period.
- ii) These representatives are accountable to the electorate.
- iii) The representatives have advisory capacity for effective legislation according to the legitimate public sentiments.
- iv) The executive body (i.e. judiciary) is responsible for monitoring legislative procedure according to the constitution or the spirit of constitution.
- v) Political parties are not just interest groups rather they must have some political agenda and public conception of the good.
- vi) The constitution determines the parameters of the legislative body; however, “a firm majority of the electorate is able to achieve its aims by constitutional amendment”<sup>x</sup>.
- vii) All sane adults have the right to vote (one man one vote).
- viii) Fair, free and regular elections are also important for the sustenance of constitutional regime.
- ix) The need of a loyal opposition to counter one party dictatorship, to open up healthy bargain and clash of opinion for the realization of the principles of justice, for the promotion of public good, and to critically evaluate and analyze the prevailing socio-economic and political policies of the government<sup>xi</sup>.

In the Rawlsian framework, the principle of equal liberty is institutionally concretized (constitutional procedure) in the form of the principle of equal political participation. Therefore the initial reference of constitutional democracy is the realization of the principle of equal political participation.

Rawls believes that there is always an open possibility of the clash of certain spheres of liberties therefore, there is a need of a “firm constitutional protection for certain liberties particularly freedom of speech and assembly and to form political association.”<sup>xii</sup> The institutionalization of the principle of equal liberty in the form of equal participation requires three-dimensional analysis namely the meaning of equal participation, the extent of this participation and its limitation and the measures which are necessary to be taken for the enhancement of its (i.e. equal participation) worth. In this regard, the equal participation is characterized by a) one man one vote, b) if the electorate is divided into single member territorial constituencies, the constituencies must have about the same number of electors (TJ, page 223) and c) every citizen has equal access to public offices. It means that everyone is free to i) join political parties, ii) run elective positions and iii) hold places of authorities.<sup>xiii</sup> However reasonable constraints of “age limit” and condition of permanent residence must be imposed.

As far as the question of the extent of participation is concerned, Rawls is not very clear though he believes that the problem of the extent of political liberty (equal participation) is raised if:

- a) The constitution establishes majoritarian dictatorship.
- b) The ability of majority (of electorate) to achieve its objectives through constitutional amendments.

In order to cope with these problems there is a need to limit the scope and authority of the majority through constitutional checks and balances, separation of state power, judicial review of the bill of rights etc. But the problem is that these constraints eventually “limit the scope of the principle of participation”<sup>xiv</sup>. Interestingly Rawls believes that these constraints are consistent with the principle of equal participation, because “similar restrictions apply to everyone and the constraints introduced are likely over time to fall evenly upon all sectors of society”<sup>xv</sup>. Lastly there is always a need of institutional backing to promote the sanctity of the principle of equal liberty through the systematic, coherent, and consistent realization of the principle of participation.

Rawls precisely identifies that the major cause of the failure of constitutional government is the lack of systematic institutionalization of the principle of participation. He believes that the root cause of all defects is the “failure to insure the fair value of political liberty”<sup>xvi</sup>.

It is a historical fact that ironically the disparities in the distribution of material welfare were tolerated by the legal system of the constitutional governments. The reason of this was that the economic inequalities were mistakenly considered as compatible with political equality. The natural corollary of this is that no measures have been taken to develop such institutions (distributive), which are necessary for the sustenance of the formally given political equality. However Rawls believes that the political injustice is much more disastrous than that of market imperfections. Concentration of political power is much more dangerous than that of capital concentration. It is another question that in today’s world capital and power (political) is become synonymous. Rawls acknowledges that “parties and elections are financed not by the public funds but by private contributions, the political forum is so constrained by the wishes of the dominant interest.”<sup>xvii</sup> This simply means that the dominant finance group directly or indirectly affects the political process in general and individual’s liberty in particular which is constitutionally guaranteed and institutionally protected. It implies that between the lines Rawls acknowledges market domination as an unintended consequence of the constitutional democracy, which needs to be countered. Rawls believes that since these problems are in fact the problems of political sociology, therefore they are not directly addressed in his theory of justice. In other words theory of justice must not be taken as “a theory of political system.”<sup>xviii</sup>

Rawls believes that the existence of a loyal opposition is necessary for just political process, because it helps to derive a conception of the good (according to the will of the people), and at the same time without negating the only legitimate public good i.e. “individual freedom” (freedom of conscious, freedom of thought, assembly,

expression and property). Thus the loyal opposition creates a hermeneutical circle to keep on interpreting or reframing the meaning of public good. There is no single and ultimate policy or methodology to maximize individual liberty, therefore the purpose of opposition is to critically analyze the socio-political policies and constantly identifying the obstacles which obstruct individual's freedom.

The role of representatives in the political institutionalization of the theory of justice is decisive. The representatives are not the vehicles of the blind will of the majority or just the agent of their own constituencies. The legislators, according to Rawls, "represent their constituents in the substantive sense"<sup>xxix</sup>. By substantive representation he means just and effective legislation. The credibility of the representative is judged on the basis of his loyalty with the principles of justice. Moreover, the priority of equal liberty for all, without systematic and coherent institutionalization of the principle of political participation is meaningless. Rawls believes that constitutional democracy is a political procedure which has the capacity to not just ensure equal freedom but also its proper institutionalization. In such political procedure principle of equal liberty is only realized, when the principle of equal participation is satisfied. The principle of participation is applicable to institutions not the individuals therefore it should not be taken, according to Rawls, as a condition of citizenship to take an active role in political affairs. It means that the state craft cannot force their citizens to take active part in political affairs, however no state institution can refrain their citizens to take part in political affair. Rawls introduces certain moral and ethical argument regarding the importance of political life and one's participation in that aspect of life, but there is no legal compulsion legitimate in this regard. In more specific sense, the citizens are free to participate in the consolidation of the system, but they are not free to destabilize the system.

We have taken a brief survey of the corresponding institutions of the two principles of justice. Rawls differentiates principles for institution from principles for individuals.

Rawls believes that the principles of institutions are different from principles for individuals. He claims that justice as fairness not only derives fair principles which apply to institution but also identify principles for individuals. According to him, a complete theory of right not only derives principles for institution but "includes principles for individuals as well."<sup>xxx</sup> Rawls does not discuss the principles for individuals comprehensively but he acknowledges that "principles of this type are an essential part of any theory of justice."<sup>xxxi</sup>

Three sorts of principles are to be chosen:

- (1) The principles for the basic structure of society
- (2) The principles for the individuals
- (3) The principles for the law of nations

He discusses the first two principles and emphasizes that the lexical order of the choices of these principles must be followed. In order to defend his sequence he insists that in this way identification of moral obligation and duties are much easier and can be short listed after the settlement of the basic structure of society. In this regard, he agrees with Bradley's argument that "a person's obligations and duties

presuppose a moral conception of institutions and therefore that the content of just institutions must be defined before the requirements for individual can be set out.”<sup>xxii</sup>

Rawls believes that the agreement on the principles for institutions is not enough and there “must be an agreement on principles for notions such as fairness and fidelity, mutual respect and beneficence as these apply to individuals as well as principles for the conduct of the states.”<sup>xxiii</sup> The principles which apply to the individuals are considered as “principles of fairness.”<sup>xxiv</sup> The principles of fairness hold that an individual has to do his part accordingly, if two conditions are met. Firstly, the institution and the practices are just i.e. they satisfy the two principles of justice. Secondly, one has accepted voluntarily the benefits of the institutional structure.

It means that if a citizen takes advantage of the opportunities and benefits from the institutional arrangement then it is his obligation to act voluntarily for the sustenance, protection and stability of the just socio-political arrangement. Thus, the principle of fairness has two parts: “the first (part) states that institutions or parties are in question must be just, the second (part) characterizes the requisite voluntary act.”<sup>xxv</sup>

Rawls also identifies certain natural duties, for instance “the duty to help another....; duty not to harm or injure another; and the duty not to inflict unnecessary suffering.”<sup>xxvi</sup> The duty of mutual aid is basically positive, i.e., it tells you, what one ought to do. The rest of the two are negative in the sense that, they tell you what one ought not to do. Rawls believes that “negative duties have more weight than positive ones”<sup>xxvii</sup>, because the violation of negative duties is much more disastrous regarding the realization of fair and just scheme of social cooperation. Rawls identifies some important features of these natural duties, for instance, the natural duties do not hold between institutional relationships rather they hold between individuals. Moreover, the natural duties morally compel each and every citizen of a well-ordered society to consider every other citizen as equally moral, respectable and worthy.<sup>xxviii</sup>

The natural duty which is most fundamental to complement justice as fairness is the duty of justice. The duty of justice encourages us “to support and to comply with just institutions that exist and apply to us.”<sup>xxix</sup> It is important to note that the principles for institutions are prior to the principles for individuals. Therefore any realization (based on subjective or incorrect interpretation) of the principles for individuals which is in conflict with the actualization of the principles for institution would be illegitimate.

Rawlsian conception of “right” is derived from the principles of natural duty and obligation, in order to understand the whole body of right / duties and their institutional implication it necessary to understand these ideas which are organically linked with his concept of justice. The most important natural duty identified by Rawls is “to support and to further just institutions.”<sup>xxx</sup>

According to Rawls, in the context of the theory of justice, this natural duty has two dimensions:

- 1) The individuals (citizens) must comply with just institutions and also do their share when they (just institution) exist or function.

2) Every citizen should take part in the establishment of just arrangement and also be ready to sacrifice, for the stability of the just institutions at the cost of his (immediate) interests.

These two dimensions basically reflect two different sorts of prescriptions. The first one tells us what the citizen ought to do, i.e. “to uphold justice, mutual aid, and mutual respect.”<sup>xxxix</sup> The second one prescribes what the citizen ought not to do, not to instrumentalize other, “not to injure not to harm the innocent.”<sup>xxxix</sup>

*In a well ordered society, individual’s involuntary acts are governed, ordered and structured through principles for institutions. But the voluntarily acts ought to be governed by the principles for individuals. It implies that the individuals may prefer principle of utility rather than principle of fairness as a governing principle for their voluntary acts. For instance, if a legislator presumes utility principle as a governing principle then, according to Rawls, this incorporation of the principle of utility to guide individual’s decision or conducts eventually leads to contrary directive and does not ensure individual’s commitment with just institutions at the cost of his immediate interests. As a result the spirit of the fair principles is unrealizable. It is very crucial to understand that Rawls emphasizes the need to harmonize the principles for institutions with principles for individuals. If the principles for individuals (i.e. utility maximization) is not compatible with the principle for institutions (i.e. two principles of justice) then the actualization of justice as fairness cannot be guaranteed.*

The principles which define the duties of individuals must be simple, clear and supportive to just arrangements. Rawls prefers the principle of “agreement” or “consensus” rather than principle of utility to guide individuals and the realization of their natural duties. However the principle of obligation just plays a complementary role in this regard. The natural duties identified by Rawls are presumed to be reasonable but they cannot be legally enforced. The adoption of the duties is a matter of choice which cannot be institutionally imposed upon individual. However, Rawls claims that actualization of natural duties (independent of any legal or institutional compulsion) enhances individual confidence on his own self, system of values and sense of worth etc. At times our sense of duty compels us to sacrifice our own interest for that of others. This voluntary help to others makes little difference to our self but it is very significant for the other. Rawls claims that the value of help is not determined by the qualification of the “help” rather “by the sense of confidence and trust in other men’s good intention and the knowledge that they are there if we need them.”<sup>xxxix</sup>

Rawls provides a pragmatic argument regarding the desirability to act according to the demand of natural duty. If people become indifferent regarding the realization of their natural duties then “it would express indifference if not disdain for human beings that would make a sense of our own worth impossible.”<sup>xxxix</sup>

Rawls believes that the principles for institutions and priority rules are finite. On the other hand, the moral principles (virtues of institutions) are infinite. Therefore, the violation of moral principle cannot be tackled institutionally. So “the significance of the moral reasons that are not accounted for becomes negligible as the conception of

right is more fully worked out.”<sup>xxxv</sup> This problem is of a practical nature because in a well-ordered society everything cannot be legalized. There must be a sphere of life which is independent of institutional intervention. Therefore Rawls believes that “the priority rules are sufficient to resolve conflicts of principles as at least to guide the way to correct assignment of weights.”<sup>xxxvi</sup> The finite conception of “right” provides a framework which is claimed to be enough to guide one’s moral actions in a given situation. As far as the problem of obligation is concerned, Rawls believes that all sorts of obligations are dependent on the principles of fairness.

The voluntary support of the institutional structure provides the basis of legitimate obligation. Moreover, all sorts of obligations are dependent on the “principle of fairness.” Rawls claims that principle of fairness has two dimensions the first part deals with the question of How? i.e. “How we acquire obligations?”<sup>xxxvii</sup> The second question deals with the conditionality of the obligations i.e. “the condition (is) that the institution in question is just, if not perfectly just, at least as just as it is reasonable to expect under the circumstances.”<sup>xxxviii</sup> This implies that obligations must not be superficial or subjective rather they should be institutionally backed as well as there must be some objective conditions of their satisfaction.

## **Section 2. Principle of liberty and the violation of institutional order**

In the light of the above theoretical discussion, further we will focus on the specific institutional problems which are closely related to the problem of civil duty. Rawls accepts the possibility of unjust laws in a just constitution. However he thinks that injustice of law is not the sufficient basis of legal violation. If the basic structure of the society is just then we have “to recognize unjust laws as binding provided that they do not exceed certain limits of injustice.”<sup>xxxix</sup> In the original position it is presumed that the principles of justice “will be strictly complied with and followed by everyone.”<sup>xl</sup> Therefore the tolerance of partial structural injustice is a crucial and questionable issue of the procedural conception of justice.

In the political scenario the problem of “civil disobedience” and “conscientious refusal” are the core issues of political theory in general and Rawlsian political liberalism in particular. According to Rawls, there is a need to discuss the issues of “political duty” and ‘obligations’ before discussing the problems and the legitimacy of civil disobedience and conscientious refusal. In some cases, non-compliance is justified, for instance, in case of the violation of fundamental rights. Similarly unjust laws can also be violated but there are certain conditions of such intolerant expression. He believes that “non-compliance is justified to the extent to which laws and institutions are justified.”<sup>xli</sup> According to him, there are two major reasons for non-compliance: firstly, the existing socio-political, legal arrangement and publicly accepted standards of justice are incompatible with each other. Secondly, the socio-political and legal arrangement of a given society reflects the sentiments and interests of the dominant class, which is apparently unjust.

Rawls acknowledges that different conceptions of justice are relatively reasonable to each other but he claims that, “the principle of justice and the related principles of natural duty and obligation define the most reasonable view among

those on the list, others principles are not unreasonable.”<sup>xlii</sup> The incompatibility between the existing socio-political structure and generally accepted standards of justice eventually lead to civil disobedience. However if the principles of justice are not specifically violated then it will be illegitimate. In short civil disobedience is legitimate only when the principles of justice (derived in the original position) are structurally violated (by structural violation he simply means the establishment of such institution which i) either in conflict with the institution derive from the principles of justice or ii) against the spirit of the principles of justice). The structural violation indicates the contradiction between the theory and practice, though Rawls grants the reasonable deficiencies regarding the complete realization of the theory into practice. The structural violation may be identified as

- a) the incapacity of the theory to be practically realized,
- b) the methodological error in the institutionalization of the theory and
- c) the corruption of the agency of the just procedure (i.e. individuals), which is the decisive factor.

Rawls discusses the possibility of (a) and (b) while ignores (c) as a factor of injustice.<sup>xliii</sup> Because he is apparently structuralist and does not deal with the role of agency in the establishment of just order.

Rawls acknowledges that the political process governed by the constitution is just but imperfect because no one “guarantees that the laws enacted in accordance with it, will be just.”<sup>xliv</sup> He also accepts the practical deficiencies of procedural justice whereas “in practical affairs perfect procedural justice cannot be achieved.”<sup>xlv</sup> There are a number of reasons for this imperfection as follows:

- (1) The role of voting or election for the continuation of constitutional process
- (2) Majoritarian suppression, i.e. the narrow and self interested pursuit of majority

Since disparities (either political or economic) are inevitable even in a well-ordered society, therefore it is only our natural duty to be committed with just institutions which compels us to “comply with unjust laws and policies”<sup>xlvi</sup> or at least refrains us to pursue any illegal way to oppose unjust outcome (enacted legislation) of just institution until they do not exceed certain limits of injustice. It is important to note that “justice” in Rawlsian framework simply means the realization of the principles of justice. The problem arises that how the term “realization” is to be interpreted. The realization of the principles of justice is possible at two different levels namely formal level and practical level.

An institution is considered to be just if it formally accepts principles of justice as initial reference to the realization of a just social order. The institutional enforcement of the principles of justice is the practical dimension of the theory of justice. The dilemma is that if an institution fails to practically implement (though it is a question of interpretation of the principles of justice) the just principles, it eventually yields injustice in Rawlsian sense. Since the institutions are embrionically just (formal acceptance of the principles of justice) therefore illegal or violent political expression is not legitimate according to Rawls. It is important to note that

the practical or actual realization of the principles of justice is a problem of interpretation. A highly complex hermeneutical activity is required to consider legislation just or unjust.

In theory, a well-ordered society is a contractual society. In such a society, all socio-economic, political relations are established on the basis of contract among equally free, rational self interested individuals. Rawls believes that apparently it seems to be obnoxious that free, autonomous and self-interested individuals “rationally accept a procedure that may decide against (their) own opinion and give effect to that of others.”<sup>xlvi</sup> Rawls emphasizes that despite all the limitations, constitutional democracy does have some substantive qualities which appeal to rational individuals to be committed with this political procedure. He offers two reasons in this regard. First, in the constitutional convention, very few procedures have been accepted unanimously. And there is no such procedure which always favors’ one group. Second, the minimal agreement at any procedure (political process governed by constitution) is a more better than no consensus at all. These pragmatic reasons reveal that constitutional democracy is, if not the best then one of the best political procedures. Rawls claims to identify three concrete facts which must be faced by any political process assuming the framework of constitutional democracy. The three facts are as follows:

- (1) The parties necessarily make concessions to each other for the realization of consociational ventures in the constitution of just political order.
- (2) The clashes regarding the interpretation of fairness are inevitable.
- (3) The choice of best possible constitution necessarily presumes some form of majority (suitably defined and circumscribed) role<sup>xlvi</sup>.

Rawls opines that the basic liberties can never be denied in any form of constitutionalism. He claims that constitutionalism is the only political form which guarantees equal liberty for all. He introduces the idea of “civility”. By civility he means a duty to tolerate the weaknesses of the inevitable imperfections in a constitutional system which is embrionically just. According to him, in a constitutional framework the role of majority is not ignorable. The consent of majority is necessary to ensure just and effective legislation. In a liberal political order, majority is a form of collectivity which is motivated by its general interests. He accepts majoritarian rule with certain conditions that it must insure the, “political freedom, freedom of speech and assembly, freedom to take part in public affairs and influence by constitutional means, the cause of legislation and the guarantee of the fair value of these freedoms.”<sup>xlix</sup> However he acknowledges that majority rule does not necessarily legislate justly<sup>l</sup>.

Rawls believes that the just political institutionalization must not be purely autocratic or technocratic. According to him, common people must be incorporated (through the process of election) in political decision making. He claims that the legislation is a highly complex hermeneutical activity even “rational legislator would often reach different conclusion, there is a necessacity for a vote under ideal condition.”<sup>li</sup>

## Concluding remarks

The natural outcome of the first principle of justice in political sphere is “universal suffrage”, i.e., equal political participation in the establishment of a constitutional body which “determines the outcome of the constitutional process and establishes the law with which they are to comply.”<sup>lii</sup> Rawls is interested to ensure individual’s participation in the constitution of legal body and collective decision making even indirectly (i.e. by elected representatives) for the realization of basic fundamental rights. There are two specific arguments for this approach:

a) Since everybody has equal right to pursue his own conception of good and interest in political sphere, therefore the exclusion of any individual or group from the power structure will necessary be exploited by the others<sup>liii</sup>.

b) Everybody has a unique capacity to participate in discussion (as consociational venture). The exclusion of any individual or group of individuals to participate in discussion negatively affects the quality of discussion and of course eventually affects the quality of final decision / agreement.<sup>liv</sup>

In Rawlsian framework the ideal political procedure or original agreement is not the manifestation of a compromise rather it is result of a fair bargain between opposing and self interested parties, who are trying to enhance their own interests. Therefore the importance of discussion and equal participation (direct or indirect) is necessary for the constitution of just and fair socio-political order. However, the legislative discussion must not be conceived as a contest between interests rather, “as an attempt to find the best policy as defined by the principles of justice.”<sup>lv</sup> Rawls has precisely mentioned that a just constitution is one which, on the one hand, satisfies the two principles and on the other, produces just laws under the condition of ideal legislation.

*Another important aspect which is needed to be highlighted is that the society emerges from such state / market relationship is market society. Market society is essentially a class based society, i.e., class domination of more advantaged class is the unintended consequence of market society. Rawls’s interventionist state stabilizes market society by protecting basic liberties and maximization of the benefits of the least advantaged group. In short we can say that the Rawlsian difference principle eliminates absolute poverty and legitimizes the enhancement of relative poverty as an unavoidable outcome of well-ordered society*

The above analysis reveals that the order of freedom although acknowledge the diversity regarding the determination of “**what ought to be?**” which creates an illusion that this order is only concerned about the institutionalization of **freedom from** and the autonomy principle will provide equal opportunity to all the citizens to exercise their particular conceptions of good according to their will but the above analysis reveals that the institutionalized order of freedom is equally concerned with “**what ought not to do?**”.

If we try to analyze the institutionalizing mechanism of the notion of **freedom from** in a society which is not culturally individualistic than the protection of the area of non-encroachment through active state apparatus will be more concerned with those encroachments which refrain individuals to determine his own conception of

good as per his will. It is an acknowledged fact that quantification of individual freedom is a central problem of liberal public order in general and order of freedom in particular. Because *freedom from* is quantified in terms of the negation of the obstacles or encroaching agencies of one's area of non-encroachments. It means that more obstacles less freedom or less obstacles more freedom. As far as the issue of the identification of obstacles is concerned it's an ongoing process. Thus the protection as well as the formal determination of the area of non-encroachment is not a static, well-defined objective which is to be realized and formally satisfied by active state intervention once for all rather it is in-itself an infinitive process. Thus what one should not do is actually the real challenge for the state apparatus rather than what one should do, that is for institutionalizing freedom and established the order of freedom.

### Endnotes

<sup>i</sup> Rawls J. A Theory of Justice", New York Oxford University Press, 1971, page 201.

<sup>ii</sup> Ibid page 202.

<sup>iii</sup> This sort of analysis of the issue of freedom is borrowed from Maclannan's article "Negative and positive freedom" by Rawls (Dimensions of freedom, New York st. Martin's Press 1961).

<sup>iv</sup> Rawls John A Theory of Justice, op. cit page 202.

<sup>v</sup> Ibid page 17.

<sup>vi</sup> However it is not the case, in reality, in liberal framework everybody is forced to be free. The prioritization of individual. Liberty disintegrates religious, racial cultural and even political communities.

<sup>vii</sup> Rawls John A Theory of Justice, op. cit page 19.

<sup>viii</sup> Ibid page 20.

<sup>ix</sup> Ibid page 21.

<sup>x</sup> This capacity of majority eventually opens up the possibility of majoritarian dictatorship see Ibid page 222.

<sup>xi</sup> See Ibid page 222-223.

<sup>xii</sup> Ibid page 223.

<sup>xiii</sup> Ibid page 224.

<sup>xiv</sup> Ibid page 224.

<sup>xv</sup> Ibid page 224.

<sup>xvi</sup> Ibid page 226.

<sup>xvii</sup> Ibid page 226.

<sup>xviii</sup> See Ibid page 227. The problem is that in his theory of justice Rawls categorically supports the liberal theory of political system and he obviously thinks that above mentioned problems will be eliminated by the reconciliation of the economic and political spheres (capitalism / liberalism) in the name of individual freedom.

<sup>xix</sup> Ibid page 227.

<sup>xx</sup> Rawls J. A Theory of Justice, op. cit p. 108.

<sup>xxi</sup> Ibid p. 108.

<sup>xxii</sup> Bradley F.H. Ethical studies 2<sup>nd</sup> ed. Oxford Clarendon Press 1927 p. 163–189. Quoted in A Theory of Justice by J. Rawls op. cit p. 71.

<sup>xxiii</sup> Ibid p. 71.

<sup>xxiv</sup> Ibid p. 111.

<sup>xxv</sup> Ibid p. 112

<sup>xxvi</sup> Ibid p. 144.

<sup>xxvii</sup> Ibid p. 114.

<sup>xxviii</sup> See Ibid p. 115.

<sup>xxix</sup> Ibid 115.

<sup>xxx</sup> Ibid page 334.

<sup>xxxi</sup> Ibid page 109.

<sup>xxxii</sup> Ibid page 109.

<sup>xxxiii</sup> See Ibid page 339. Between the lines the ulterior motive is actually interests i.e. to sacrifice short term or immediate interest for the protection of long term interests.

<sup>xxxiv</sup> The Rawlsian conception of self is ontologically “antecedently individual” otherwise the prioritization of individual’s freedom cannot be possible. In the context of such conception of self-the question of moral life is irrelevant. The moral questions like what “what should I want?” provides the criterion on the basis of which legitimate desires or wants can be judged. Since in Rawlsian system “right” has priority our “good” therefore the question of “good” is insignificant in the constitution of just social order. The theoretical corollary of this is that no moral life is possible, because to be moral there is a need of:

a) Knowledge of intrinsic goodness.

b) Agency or criterion to judge our desires, compatible with that of intrinsic goodness.

Since the question of “goodness” was suspended in the original position and it has trivial significance in the constitution of social justice. Therefore moral life is theoretically not possible in his system. There is one way to resolve this problem if we consider Rawlsian prioritization of right as “hyper good” and derived all implication from this good for instance. On the basis of that good one can differentiate between legitimate / illegitimate desires. In this way the questions like “what should I want” or “what should I desire” can specifically be answered. So on theoretical ground moral life would be possible. (see Ibid page 339)

<sup>xxxv</sup> Ibid page 340.

<sup>xxxvi</sup> Ibid page 341.

<sup>xxxvii</sup> Ibid page 343.

<sup>xxxviii</sup> Ibid page 343.

<sup>xxxix</sup> Ibid page 35.1

<sup>xl</sup> Ibid page 351.

<sup>xli</sup> Ibid page 352.

<sup>xlii</sup> Ibid page 352.

<sup>xliii</sup> It shows two things: (1) it seems that Rawls does not consider the role of agency, due to which it appears that he is a structuralist. (2) He prioritizes legality over morality, which is of course a structuralism approach regarding the solution of theory / practice contradiction.

<sup>xliv</sup> Rawls J. A Theory of Justice page 353.

<sup>xlv</sup> Ibid page 353.

<sup>xlvi</sup> Ibid page 354.

<sup>xlvii</sup> Ibid page 354.

<sup>xlviii</sup> These points reveals that although principles of justice affirm a-social individualism even then the framework of justice as fairness is such in which “the parties give up any hope of free – rider egoism” (354 T.J.).

<sup>xlix</sup> This prioritization of freedom eventually disintegrates any form of collectivity which might be dangerous for constitutional democracy in future. Secondly Social atomization and pluralism are inevitable outcome of such political rule.

<sup>1</sup> (1) By just constitution he simply means “a constitution that would be agreed upon by rational delegates in a constitutional convention who are guided by the two principles of justice”. (357 T.J.).

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(2) By just law and policies he simple means, the law and policies that would be enacted by “rational legislator who are constrained by just constitution and who are conscientiously trying to follow the principles of justice as their standard”. (357 T.J.)

<sup>li</sup> Rawlsian John A theory of Justice, op. cit page 357.

<sup>lii</sup> Ibid page 221.

<sup>liii</sup> I think this might be over simplified implication that in Rawlsian framework everybody is free to pursue his own political interests. It is not the case, in Rawlsian framework everybody is free to pursue his own conception of good (or interest) subject to the constraint that the only public good is will to freedom. Therefore any political interest which in conflict with that of “will to freedom” is not only unrealizable in Rawlsian political framework but also legitimately suppressible.

<sup>liv</sup> This view also foresees Rawlsian condition that the principle of justice must necessarily be presumed in the constitutional as well as legislative stage. Therefore those who disagree with the legitimacy of the principles of justice are necessarily being excluded from the discussion. It implies that, Rawlsian theory of justice is not theory of justice per say it is a liberal theory of justice.

<sup>lv</sup> Rawls J. A Theory of Justice, op. cit page 357.