

GLOBAL DISTRIBUTIVE JUSTICE AND INTERNATIONAL LAW: ASSURING JUSTICE AMONG SOVEREIGNS

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INTRODUCTION

David Archard has succinctly described the theory of Justice as a theory where “*publicly agreed and final principle defines the fundamental terms of social cooperation.*” These theoretical principles regulate institutions which in turn form the basic structure of society.¹ The concept of global distributive justice has sparked debates among political philosophers, economic theorists over a long period of time. The debate is primarily based on the stark difference that we see in the status of development of various states and the consequent diversity in the life of various citizens. The debate is based on the idea as to how Developed Nations actually became developed and how is the plight of the Less Developed Countries to be addressed? If there are huge differences between the social, political and economic infrastructures of different states, then how can they be corrected? How has the present international economic system perpetuated inequalities? Do developed states have an obligation to correct the imbalance? Do Less developed Countries have a Right to be the recipient of the benefits that accrue from the pooling of international Resources? What are the relevant academic theories that support the concept of Global Distributive Justice? These questions have been the point of debate for a considerable period of time.

The concept of Global Distributive Justice received an impetus when the argument started as to whether John Rawls’ ‘Difference Principle’ is applicable at the global level or not. Rawls seminal work ‘A Theory of Justice’ is one of the best recognized academic works of the 20th century and has garnered varied reactions from the academic circle. Rawls is responsible for re kindling the contractarian tradition in the academic circle in the 20th century. His vision of a hypothetical contractarian society, whose basic structure is based on Justice, has spawned an array of theories in the present era of liberalism. The Rawlsian vision, although limited to a domestic order of the states, caught the imagination of the intelligentsia which was

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¹ David Archard, ‘Political and Social Philosophy’ in The Blackwell Companion to Philosophy, Edited by Nicholas Bunin and E. P. Tsui James (1996), Oxford, Blackwell Publications, p. 260

disgruntled with The Breton Woods system. It is to be noted that the Rawlsian vision intersected with the Dependency Theories as propounded by Andre Gunder Frank. This claim is substantiated by Neera Chandhoke.² Thomas Pogge and Charles Beitz spearheaded the debate on the application of Difference principle at the global level.

The application of Distributive Justice on an international level becomes a Sisyphus task because of the nature of International Law itself. The de centralized nature of International law makes it difficult for the idea of global distributive justice to realize its imperative nature. The Realists and the Positivists have developed a skeptical tone towards the nature of International Law itself, which further adds to the difficulty of Global Distributive Justice. However, recent endeavors have paved way for the 'actual realization' of the vision of Global Distributive Justice. As far as the theoretical justifications are concerned, it is essential to develop a nexus between Global Distributive Justice and Kantian notion of morality. Kantian notion of Categorical Imperative and Provisional Duty provide strong scaffolding for Global Distributive Justice.

Before mentioning the relationship between International Law and Global Distributive Justice, it is imperative to mention the basic nuances of Rawlsian notion of Distributive Justice and the related political theories that have supported the idea. The next section will discuss in brief the notion of Rawlsian Distributive Justice and the relevant political theories attached to it.

SECTION-I

Rawls' Distributive Justice: John Rawls in his seminal work, 'A Theory of Justice' revived the contractarian tradition in political philosophy by elaborating on a hypothetical thought experiment where he envisioned a society whose 'basic structure' was based on the Principle of Justice rather than on Rights. Rawls work was a reaction against the Doctrine of Utilitarianism, which according to him ignored the notion of individuality. In his criticism of Utilitarianism, he was in tune with John Stuart Mill, who had criticized the hedonistic approach of the Utilitarianism. In his work, Rawls speaks about a hypothetical contractarian society, whose basic structure is based on the notion of justice. The book envisions the basic principles of justice which in turn formulate the laws and regulations of the society.

² Neera Chandhoke, 'Who Owes Whom, Why and to What Effect ?' in Global Justice : Critical Perspectives, Edited by Sebastiano Maffettone, Aakash Singh Rathore, (2012) (New Delhi), Routledge Publications, p. 144

The basic structure of the society includes the most vital institutions of a society, like an educational system, system of taxations and basic liberties.³ An important constituent of ‘A Theory of Justice’ is ‘Original Position’. It is a hypothetical situation in which people choose the basic principles of justice. According to Juha Raikka the people constituting the Original position are rational and egoistic.⁴ In this sense, Rawls contract resembles Hobbes’ Leviathan. As far as Rawls ‘Original Position’ and Hobbes’ Leviathan is concerned, Samuel Freeman comments that the parties to the Original Position make a, “rational choice and are not morally motivated”.⁵ But at the same time, the concept of “veil of ignorance” adds a notion of morality to it. Rawls notion of Justice is referred as ‘justice as fairness’, which simply means that procedures for choosing options should be just as it will make the outcome just and Rawls aims for ‘perfect procedural justice’ where procedures are fair and the outcome is also just.⁶ The original position happens in the sub set of veil of ignorance.⁷ Veil of ignorance denotes a state of mind where people in the original position are not aware of their status (race, economic status, religious status etc.) but have a general understanding about the way society works. This veil of ignorance is a neutral ‘impartial device’ where participants are required to set aside their social, political, historical positions which make differentiate them from others. Rawls’ contention is that factual position about a person which includes his religion, race, wealth, is not good principles which justify the principles of justice.⁸ These conditions are not known to the parties and their views about society are based on the general knowledge of psychology, social cooperation, biological and physical sciences.⁹ This veil of ignorance is lifted when the just institutions are formed on the basis of principles of justice. The idea of veil of ignorance makes Rawls’ theory proximate to the lineage of Natural Rights.¹⁰ After considering these assumptions, Rawls states the two basic principles of justice.

(1) *The First Principle of Justice: The Basic Liberties* - Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is

³ Juha Raikka, ‘Rawls John’, Encyclopedia of Global Justice (Volume 2) J-Z, (2011), London, Edited by Deen K. Chatterjee, Springer Publications, page 927

⁴ Ibid

⁵ Samuel Freeman, ‘Rawls’ (2007), Sonapat Haryana, Routledge Publications, Page 16

⁶ George P. Fletcher, ‘Basic Concepts of Legal Thought’ (1996), New York, Oxford University Press, page 82

⁷ *Supra* note 2 at p. 927

⁸ *Supra* note 4 at p. 155

⁹ *Supra* note 4 at p. 155

¹⁰ Ibid at p. 18

compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.

(2) *The Second principle of justice:* Social and economic inequalities are to be arranged so that they are both:

(a) *to the greatest benefit of the least advantaged, consistent with the just savings principles, and*

(b) *attached to the offices and positions open to all under conditions of fair equality of opportunity*¹¹

These two principles of justice have a lexical priority, i.e. Principle 1 has priority over Principle 2. Access to basic civil liberties is the starting point for every just society. The second principle of justice cannot be realized without attaining the First Principle. However, much of the debate of global justice is centered on the “Difference Principle” i.e. part (a) of the Second principle of Justice. The origins of Difference Principle can be traced back to Pareto Condition which states that if a move from state of affairs A to State of Affairs B leaves nobody feeling worse off than before and is able to make the least advantaged person better off than he originally was then it satisfies what is called a Pareto Improvement.¹² Rawlsian Difference Principle is applicable to Institutions First and it is through these institutions that the notion of distributive justice will be transferred to individuals. The institutions include market mechanism, system of property, contract, inheritance, securities, taxation etc.¹³ the difference principle creates norms and principles which further guides human conduct.¹⁴ As far as the question of identifying the criterion of being ‘least advantaged’ is concerned Samuel Freeman comments that according to Rawls the ‘least advantaged’ means the economically least advantaged people in the society who are measured according to the income they have obtained from gainful employment.¹⁵ The difference principle is thus an intriguing concept and its application has been debated over a considerable period of time. Rawls had maintained that the Difference Principle was applicable only in domestic societies and its application at the International level was not

¹¹ Ibid at pp. 44, 86

¹² Oxford Concise Dictionary of Politics Edited by Iain McLean and Alistair McMillan (2003), New Delhi, Oxford publication, p. 393

¹³ *Supra* note 4 at p. 99

¹⁴ Ibid at p. 100

¹⁵ *Supra* note 4 at p. 116

feasible. The municipal application of Difference Principle is understandable because in Amartya Sen's interpretation Rawls' vision is based on a transcendental approach which necessarily creates a nexus between Justice and Sovereign.¹⁶ This transcendental approach fosters the creation of a 'just society' by focusing on the Social Contract theory. As far as the attainment of justice at the global level is concerned, Rawls propounded a different theory in 'Law of The Peoples' which can be read as an argument for the justification of Humanitarian Intervention. The argument for the application of the Difference Principle at the international level was initiated by Rawls' foremost disciple Thomas Pogge. According to Christopher Heath Wellman, Pogge stood out from his contemporaries in two ways:

- (1) He was one of the earliest to suggest that justice shall not merely be applied to the institutions of domestic order.
- (2) Difference principle must be applied through the supranational institutions i.e. Rawls' Difference Principle shall be applicable at an international level.¹⁷

Further, Wellman states that it was Pogge who conceived Human Rights in an 'institutional' manner. It meant that whether Human rights are respected or not depends on the effectiveness of the institutions that have been created to implement the human rights regime. According to Pogge, human rights will not be protected effectively if institutions like State do not do a good job at protecting them.¹⁸ In this sense, Pogge's analysis can be compared to obligations of state under International Human Rights which is three fold in nature:

- (a) Obligation to Respect,
- (b) Obligation to Fulfill,
- (c) Obligation to Protect,

These obligations were proposed by Mr. Asbjorn Eide who was a special Rapporteur to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. Initially, these obligations were four in numbers, obligation to respect, obligation to protect, obligation

¹⁶ Amartya Sen, 'Global Justice' in *Global Justice : Critical Perspectives* (Edited by Sebastiano Maffettone, Aakash Singh Rathore), (2012) (New Delhi), Routledge Publications, p. 128

¹⁷ Christopher Heath Wellman, 'Pogge, Thomas' *Encyclopedia of Global Justice (Volume 2) J-Z*, (2011), London, Edited by Deen K. Chatterjee, Springer Publications, p. 847

¹⁸ Ibid at p. 848

ensure and obligation to promote.¹⁹ Later it was revised to become a tripartite division of obligation to respect, protect and to fulfill human rights.²⁰

Pogge's debate is also supported by Peter Singer's groundbreaking article, 'Famine, Affluence and Morality'.²¹ Singer's article was written in the background of the hunger crisis that had been brewing in India because of the refugee crisis of Bangladesh.²² Singer maintained a distinction between relative and absolute poverty and opined that affluent nations must make an effort to help the poor nations. He maintained that the realities of globalization must be solved through the ethical approach and moral ought to proposition.²³ Pogge's analysis shows that world's poverty is being perpetuated by global political and economic arrangements which are deliberately designed so by the wealthy nations.²⁴ Pogge's criticism is based on a critical analysis of the 'resource and borrowing privilege' where corrupt political leaders exploit the natural resources of their countries and in turn form a nexus with international institutions and wealthy states. The resource spectrum provides a lucrative raw material area for wealthy states. The privilege spectrum allows the financial institutions to give loans which eventually foster the wealth of the wealthy government and the global poor never get a fair share of the facility.²⁵ Pogge's points of view are against the present Bretton Woods system and the much popular Structural Adjustment Programme (SAP). In order to remove these inequalities, he advocates the global application of the Rawls Difference Principle. The basis of argument for a global distributive justice is primarily based on the following theories:

A) **Moral Cosmopolitanism:** Exponents of moral cosmopolitanism suggests that all human beings are important variables. In recent times the work of Immanuel Kant and other contractarians have been added to this. Diverse interpretations of Moral Cosmopolitanism has been given by various authors. Charles Beitz proposes that the

¹⁹ Olivier De Schutter, 'International Human Rights Law', (2010), New Delhi, Cambridge University Press, p 242

²⁰ Ibid

²¹ Peter Singer, 'Famine, Affluence and Morality', in Global Justice: Critical Perspectives, Edited by Sebastiano Maffettone, Aakash Singh Rathore, (2012) (New Delhi), Routledge Publications, Page 15

²² Lawrence Torcello, 'Singer, Peter' Encyclopedia of Global Justice (Volume 2) J-Z, (2011), London, Edited by Deen K. Chatterjee, Springer Publications, page 1008

²³ Ibid

²⁴ *Supra* note 16 at p. 848

²⁵ *Supra* note 16 at p. 848

global stature of every human being is a universal concern. According to him, all political institutions must be interpreted through the prism of human rights.

Charles Jones describes cosmopolitanism as a system that necessarily includes impartiality, universality, individualism and egalitarianism. Thomas Pogge mentions the twin concepts of interpersonal and international form of ethical cosmopolitanism. One aspect i.e. interpersonal cosmopolitanism refers to human beings and its conduct while the latter refers to states and its conduct. Darrel Moellendorff insists that duties of global justice exist irrespective of nationality or citizenship.²⁶

B) **Political Cosmopolitanism:** Political Cosmopolitanism: According to Held and Brown's analysis since the time of Immanuel Kant Political Cosmopolitanism are both a moral and a political project and ponders over the question as to how the vision of moral cosmopolitanism is to be institutionalized. The practical application of Moral Cosmopolitanism includes the following:

- (i) Global justice cosmopolitanism,
- (ii) Cultural Cosmopolitanism,
- (iii) Legal Cosmopolitanism,
- (iv) Political Cosmopolitanism and
- (v) Civic Cosmopolitanism.

According to Held and Brown, all the above mentioned categories are influenced by the political philosophy of Immanuel Kant.²⁷ Political Cosmopolitanism is an attempt to construct the legal, economic consequences of moral cosmopolitanism. It needs to be interpreted in the inequalities that have been created as a result of globalization. The following points reflect the reaction of global distributive justice against the present globalized economic system.

- (a) Lop sided development in the world economy which was perpetuated by the Bretton Woods System.

²⁶ Alyssa R. Bernstein, 'Moral Cosmopolitanism' Encyclopedia of Global Justice (Volume 2) J-Z, (2011), London, Edited by Deen K. Chatterjee, Springer Publications, pp. 711-716

²⁷ Alyssa R. Bernstein, 'Political Cosmopolitanism' Encyclopedia of Global Justice (Volume 2) J-Z, (2011), London, Edited by Deen K. Chatterjee, Springer Publications, pp. 857

- (b) Developing countries not getting a fair share in the international trade system.
- (c) Over production of food material as a result of subsidies offered by European Union.
- (d) Radical policies of New International Economic Order (NIEO).
- (e) Unsatisfactory patent regime envisioned in the TRIPS system.
- (f) Ill effects of Structural Adjustment Programme in the Developing Countries.
- (g) Integration of Financial markets.
- (h) The socio economic effects of Sub Prime Mortgage Crisis.
- (i) Inability of the Developed Countries to make Free Trade a Fair Trade.
- (j) Deepening of Hunger Crisis around the world.

In conjuring the institutions of Political Cosmopolitanism, various authors have given their different points of view. Kok Chor Tan idea is based on Luck egalitarianism, while Thomas Nagel idea of a global distributive justice is based on a global minimum which can be realized only in a state centric global society.²⁸

C) ***Luck Egalitarianism:*** International Law and Global Distributive Justice: The onus of ‘institutionalizing’ Global Distributive Justice lies on International Law. As far as the ethical aspect of the problem at hand is concerned it has been nurtured by theorists over a period of five decades but the real problem lies in the realization of the theories. This task of realization is possible in the domain of International Law itself. The intersection of International Law and Global Justice demands contemplation on various issues. The de centralized nature of International Law itself begs the question as to what methods should be adopted by the international legal structure to ensure justice among sovereigns. If political and moral cosmopolitanism justifies the existence of Global Distributive Justice at a theoretical level then it is left to the subject of international law to actualize the concept in the existing international legal

²⁸ *Supra* note 27, p. 859

structures. The analysis of Global Distributive Justice through International Law imports the relevancy of morality in the international arena. In order to understand the notion of global distributive justice, international law and international morality Steven R. Ratner considers the following approaches to Public International Law :

- (i) Positivistic Approach
- (ii) Policy Oriented Approach
- (iii) Critical Approach²⁹

According to Steven R. Ratner all these three approaches do not provide an adequate linkage between International Law and Global Distributive justice. Policy Oriented Approach (or New Haven Approach) despite being couched in the prism of the rational expectation of the international society, does not readily mixes it ideas with ethics.³⁰ Critical legal School has failed to provide a theoretical ground to move forward.³¹ In addition to these three approaches, a direct engagement of International Law with Global Distributive Justice is reflected in the incorporation of ethics, morality in the subject of international law.

Section-II

Kantian Philosophy and Global Distributive Justice: An import of international ethics into the subject of Global Distributive Justice has gained momentum in recent times. Kantian philosophy has made a return to legal research and the results are rewarding. It is noteworthy to mention the work of Heather M. Roff whose brilliant analysis of Kantian notion of Provisional Duty of Justice has provided a much needed philosophical base to the concept of Responsibility to Protect.³² Kantian Critical Method and his notion of morality have provided strong scaffolding for myriad subjects including international ethics, international politics and international law. Kant's 'Perpetual Peace' paved way for some of the peremptory norms of international law. The notion of international ethics has gained much popularity in the area of global distributive justice.

²⁹ Steven R. Ratner, *Ethics and International Law : Integrating the Global Justice Project(s)*, Michigan law University of Michigan Law School Public law and Legal Theory Research Paper Series, Paper No. 315, February 2013, pp. 1-46

³⁰ Ibid at p 8

³¹ Supra note 29 at p. 11

³² Heather M. Roff, 'Global Politics and The Responsibility To Protect' : A provisional duty (2013), New York, Routledge Publications

The notion of global distributive justice needs to gain legitimacy in the world order. Legitimacy, as a social tool, allows any concept to be entrenched in the sub consciousness of a society. Kant 'deontological' approach to morality has opened a gateway for some of the perplexing questions of our time. Global Distributive Justice can gain ascension in the international order if recourse is made to Kantian notion of morality. According to Thomas Donaldson Kantian methodology shows two pertinent traits:

- 1) His methodology is agent centered and,
- 2) Principles trump consequences.³³

For Kant ideas are a surer guide than empirical certainty and cosmopolitanism is mandatory.³⁴ Kant's Critical Philosophy is based on the idea of Deontology which avoids the Consequentialist and the Utilitarian. The key to Kantian notion of morality lies in his interpretation of 'a priori' and the notion of 'categorical imperative'. Deontology has been equated with Agent centered approach where principles out trump consequences.³⁵ The emphasis is on moral motives and not on its consequences. Heather M. Roff's work 'Global Justice, Kant and the Responsibility to Protect.' is the latest example to inject Kantian morality into the realm of International law.³⁶ Roff's analysis of Kant's taxonomy of duties shows that a defense for the institutional preparedness of state actors in international law in the field of global distributive justice can be made if a resort is made to the notion of Kant's Provisional duties. Roff's analysis starts by distinguishing between right and virtue where is shown as one's inner freedom and if a person's conduct is guided by morality and not by some external interventions like law then an action is virtuous. It has a higher moral appeal.³⁷ This is followed by the familiar category of perfect and imperfect duties. Perfect duties are coercible, subject to external legislation, have a specified content for fulfillment, fully dischargeable and demanded by right. Imperfect duties on the other hand are incoercible, subject to internal legislation, ethical, they do not specify a particular content, and they are not fully dischargeable. It is wider in nature because its scope is decided by the agent itself.³⁸ However, the novelty of Roff's analysis lies in the concept of Provisional Duties. This is the

³³ Thomas Donaldson, 'Kant's Global Rationalism', Traditions of International Ethics (edited by Terry Nardin and David R. Mapel) (1992), Cambridge Publications, page 136

³⁴ *Supra* note 32 at p. 136

³⁵ *Ibid* at p. 137

³⁶ *Supra* note 32

³⁷ *Ibid* at pp. 10-14

³⁸ *Ibid* at p. 15

novel addition by Heather Roff. The provisional or conditional duties are enabling duties which are conditioned by structural features. If people are 'enabled' then they are under a strict necessitation to act.³⁹ The term 'provisional' here means limited by special nullifying hindrance of a temporary nature. A movement can be made from Provisional to Peremptory if the institutionalization of mechanisms is made possible to make duties peremptory. This means that in a de centralized system, the institutionalization of structures that would entrench global distributive justice is the way forward for theories that support the cause of global distributive justice.

Roff's novelty lies in the way the Provisional duties are treated. They are different from imperfect duties. According to Roff, Kant uses the term 'vorlaufig' which implies temporariness. The hindrances caused to Provisional duties are temporary in nature. Provisional duties require the institutionalization of institutions, agency and other entities. Provisional duties can be converted into peremptory duties. Such is not the case with imperfect duties.⁴⁰

Once we relate global distributive justice with the notion of Provisional Duties, it becomes clear that theoretically, global distributive justice stands a good chance of surviving the academic debate if we use Kantian ethics and apply the same at an international level. Roff's argument is based on the idea that a movement towards the Provisional duties removes the stigma that global distributive justice is an imperfect duty.

CONCLUSION

The paper has argued that Rawlsian theory needs to be applied at an international level and in order to achieve this task frequent resort is made to the ethical arguments of leading contractualists. Kantian ethics is one of the best methods to inculcate the culture of global distributive justice and its assurance by the sovereigns would go a long way in removing the defects of the present neo liberal world order. In order to realize the true spirit of global distributive justice international law has to combine its institutions with a sense of non negotiating morality, a morality that is backed by reason and not by consequences. Kantian and Rawlsian model share the same contractarian view about the international ethics. This contractarian view is essential in the post-modern world as it allows the states to step out of

³⁹ *Supra* note 32 at pp. 25-28

⁴⁰ *Ibid* at p. 27

the state of nature in the international arena and enter into a co-operative mode where states would function in a seamless web. The neo liberal economic system is subject to constant fluctuations. The Asian crisis of 1997, Sub-prime mortgage crisis are its direct consequences that have fractured economies and thrown the social structure towards a downward spiral. Consequently, the world has witnessed strange phenomenon in the form of Occupy Wall Street movement. This 'headless' movement was one of the initial knee jerk reactions against a reckless, speculative economy that has pushed the world towards a suicidal direction. It was a unique and 'missed' opportunity where intellectuals and academicians could have infused a sense of ethics in the present Machiavellian economic system. Fortunately, Global Distributive justice is not to be considered an abortive attempt. Occupy Wall Street was unique because it was truly a 'people's movement' and was aimed at the reckless nature of the 'neo-yuppies'. Occupy Wall Street movement should be considered a part of the Global Distributive Justice universe. Unlike, Occupy Wall Street movement, Global Distributive Justice system is trying to institutionalize itself. The work of Thomas Pogge, Kant, Amartya Sen, Kok Char Tan are its examples. For the strengthening of the system it is imperative that a nexus is forged between International Trade law, human rights and the jus cogens principle. International Legal Theory must find a way to integrate jus cogens principles in the Trade treaties.