

Matter of rightful institutions

Щодо питання правових інститутів

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Though the idea of justice is quite complex and disunited, it is always a measure of law which attempts to define it and which is to be led by it. This statement should be valid also in connection with rightful institutions.

We would like to pay our attention to the matter of rightful institutions.

In 20th Century there was J. Rawls who had played an important role in this matter and who had seen optimum functioning society mainly through the well-functioning institutions.

J. Rawls defines Institution as "Public system of rules defining offices and their authorities, rights and obligations, duties and privileges"¹. These rules divide forms of activities as those which are permissible and others which are prohibited. He has two views on the institutions namely (1) "as an abstract object, i.e. as a possible form of behaviour reflected in the system of rules and (2) as an execution of proceedings defined by these rules in particular persons' thinking and behaviour in certain period of time"². According to Rawls Institutions are more beneficial only if these rightful institutions are kept within the well-organized society and everyone strives for their persistence and acts for their favour and benefit. It is obvious that everyone would like the basic institutions to be rightful and effectively designed in order the objectives and interests needed for their persistence to be supported.

In terms of Justice as a Virtue the Justice is a basic natural duty and obligation requiring us to respect and support for us mandatory and rightful institutions. Human nature according to Rawls depends on social institutions; if we declare it is good, that means nation has been growing within the terms of sensible and rightful institutions³. Nation accepts existing institutions as rightful and usually there is no intention to breach or again re-negotiate terms and conditions of the social cooperation provided that their current and future social position has been defined.

In the plural liberal society people do not have jointly shared ethical ideas of Goodness, however they can advocate same concept of Justice. For Rawls this means that they can have certain common basic objective such as support of rightful institutions and complying with this objective they can behave fair to each other. Preserving these rightful institutions can be then understood as Goodness which can be jointly shared also by people having different concepts of Goodness. Nation has capacity of having concept of Goodness as they are able to create them, follow them rationally and test them critically; they also have a sense for Justice as they are able and willing to understand it, apply it in their activities and they are also able to consider rules of Justice⁴.

According to Rawls a primary issue of Justice is a basic structure of the society or better said how key social institutions fit into one system of social cooperation and how the basic rights and obligations are applied, how the thereby generated benefits and advantages are distributed within the society. In terms of Justice as Virtue the Justice is deemed to be basic natural duty requiring all of is to respect and support for us mandatory and valid rightful institutions.

¹ Rawls J. *Teorie spravodlivosti* / J. Rawls. – Praha : Victoria Publishing, 1995. – S. 10.

² Rawls J. *Teorie spravodlivosti. Hlavná idea spravodlivosti* / J. Rawls // Rawls J. *O slobode a spravodlivosti* / J. Rawls. – Bratislava : ARCHA, 1993. – S. 96.

³ Hohoš L. *Globálna nerovnosť: Spravodlivosť a právo v podmienkach globalizácie* [Electronic resource]. – Access mode : <http://www.akademickyrepozitar.sk/Ladislav-Hohos/globalna-nerovnost-spravodlivosť-a-pravo-v-podmienkach-globalizácie>.

⁴ Velek J. *Spravodlnost a dobro v politickém liberalizme Johna Rawlse* / J. Velek // *Filozofický časopis*. – 1994. – №. 6. – S. 934.

As one of the most important institutions Rawls ranks "political establishment and key economic and social mechanisms"⁵. Basic structure creating background of the social system within which various activities of associations, fellowships as well as individuals operate is, according to Rawls, political establishment with independent judge courts and with by law respected forms of ownership and economic structure such as competitive markets and private ownership, monogamous family and most of all legal protection of freedom of thinking and conscience.

Key institutions of the basic structure of society are institutions of constitutional democracy. Liberal constitutional democracy should ensure freedom and equality for each individual and protect his basic rights and freedoms⁶. Within the constitutional regime the Power is a Power of Public, i.e. power of free and equal individuals as a collective body. Institutions of basic structure have deep and long term social impact and they play significant role by forming nature and objectives of people, i.e. what they are and what they want to become.

According to Rawls if people in the constitutional regime follow rational reasons by their actions, we can say that regardless their comprehensive doctrines they wish justice for everyone. They jointly attempt to ensure justice for each particular individual.

Rawls advocates opinion that we accept and apply principles of Justice in four-steps sequence. Four-steps sequence is most of all scheme how the principles of Justice shall be applied within institutions and we can say that it is even the only one and best procedure. In this case even concept of Justice as Virtue would be really justified. Each of these principles directs institutions in certain sphere, not only in terms of basic rights, freedoms and opportunities but also in terms of requirements of equality. Second part of the second principle then underlines importance of these institutional guarantees.

Both principles together whereby the first one has priority direct activities of basic institutions through which aforementioned values are implemented. Priority of freedom means that primary principle of Justice assigns special status to basic freedoms as they are given. For example same political freedoms cannot be refused to certain social groups because of the fact that if they would have these freedoms they could block processes needed for economical effectiveness and growth. In terms of priority of basic freedoms we must distinguish between their limiting and directing. Priority of these freedoms is not breached if they are only directed and they must be directed in order to be combined within one system and in order to adjust to certain social conditions which are necessary for their permanent implementation. If that what Rawls calls "central scope of application" of basic freedoms is ensured, then principles of Justice are followed.

On the first grade of the scheme the Parties accept principles of Justice in their original state behind the veil of unknowingness. Form how Rawls implements original state covers the fact that this implementation itself represents act of choice. Original state must be, compared to other options, accepted as the best starting position for decisions on moral rules to be made.

Other grades include grade of constitutional treaty, legislation grade where the laws are approved in compliance with the constitution and then the last grade in which rules are applied and implemented by their administrators such as judges and people must follow them and adhere to.

Once the principles of justice were accepted the contractual parties come to constitutional assembly where they must decide on fair and rightful political forms. They shall suggest system of constitutional authorities granted to the Government and system of basic civil rights. One of the most important tasks is that they must work out the Constitution. Rawls makes a statement that: "Contractual Parties should, referring to their theoretical knowledge and average common facts of their society, select effectively the most fair and rightful Constitution that meets principles of Justice and that is most suitable for fair, rightful and effective legislation"⁷. Such accepting of Constitution is to be governed by universal knowledge how political and social institutions work as well as by general facts about existing social terms and conditions.

In the first case the Constitution is deemed to be a fair and rightful procedure containing same freedoms and attempting to ensure their fair values in order in the decision making process these to be accessible under the same terms and conditions for everyone. Constitution must also guarantee freedom of thinking if the implementation of these freedoms should be free and based on informing. Primary emphasis is given to the Consti-

⁵ Rawls J. *Teorie spravedlivosti* / J. Rawls. – Praha : Victoria Publishing, 1995. – S. 19.

⁶ Prusak B. Interview časopisu *Commonweal* s Johnom Rawlsom / B. Prusak // *Kritika a kontext*. – 1997. – S. 62.

⁷ Rawls J. *Teorie spravedlivosti* / J. Rawls. – Praha : Victoria Publishing, 1995. – S. 126.

tution which defines fair, rightful and feasible procedure though without any explicitly expressed constitutional limitations of the legislative outcome. It is understood these limitations are results of implementation of the first principle of Justice within the Constitutional Assembly.

It is obvious that fair and rightful legislation can be reached by ensuring politeness in representing and by the means of other constitutional instruments. Such a Constitution meets traditional idea of a democratic Government and simultaneously it creates space for institution of examining constitutionality of legal and jural decisions. According to this concept the Constitution is not based firstly on the principles of justice or on basic and natural rights. Rather it is based on concepts of individuals and social cooperation in order to meet public culture of modern democratic society. Ideal case would happen if the fair and rightful constitution results from a fair and rightful process by the means of which fair and rightful results would be achieved. Rightful process would also lead to constitutional directing of political issues through the set of adopted laws.

Main role of Justice is to prepare safer and more acceptable base for constitutional laws, basic rights and freedoms. All freedoms most of all freedom of equal citizenship would be included in the Constitution and by this Constitution also guaranteed. These freedoms inherently include equal political freedoms as freedom of speech, freedom to assemble etc. Those are inevitable for developing and implementing civil sense of justice and they are necessary mostly if citizens shall evaluate adopting of fair and rightful political objectives and executing effective social policy. Political system in the constitutional democracy would not be a fair and rightful process without these freedoms.

In the society there are no such political procedural rules which would guarantee no unjust and unfair laws to be adopted. Political injustice can be eliminated only by implementation of basic rightful institutions. In the constitutional regime there is not possible to implement perfect procedural justice. The best option to be achieved is an imperfect procedural justice.

Other important freedoms we ought to mention are equal civil freedoms such as freedom of conscience, right to assemble, right to employ. They are necessary for nation to be able to develop and apply concept of Goodness, i.e. their ability to form, evaluate and reasonably to apply anything individual considers be important in a human life.

In the legislative level the key and primary role is to work out such a Constitution which most likely will lead to an effective and fairly organized society which will be prerequisite of fair, rightful laws and political programs. Laws and political programs are fair, rightful when they are implemented legislatively and in compliance with the rightful and fair Constitution. Laws must not only follow principles of Justice but they also must meet all constitutional conditions. Since there is not only perfect procedural justice in the constitutional regime the most important issue is at least to assume that the laws and political programs are not visibly unjust and unfair.

Both principles of justice are applied within different levels and define different tasks of basic structure. In the constitutional regime the laws and regulations must comply with fundamental rights and freedoms covered by the first principle of justice. These freedoms are in general specified in the Constitution which requires these to be protected and political process as a whole to be fair and rightful. The first principle is applied and implemented within the constitutional agreement and whether constitutional bases are guaranteed is visible mostly in relation with the constitution, political establishment and in their functioning in practice.

On the other side, the second principle is implemented and applied within legislation and it refers to all types of social and economic legislation and therewith related issues. It requires social and economic policy to maximize long term perspectives of least advantaged individuals under terms and conditions of equal opportunities whereby same freedoms shall be kept and maintained for everyone. We can state that priority assigned to the first principle rather than to the second is undoubtedly reflected in preferring constitutional assembly prior legislation.

The last stage for general, universal rules to be applied within the particular cases by the respective administrators is the one where everyone has full access to all facts. In this stage there was adopted an entire system of rules which has been applied to individuals according to their character and circumstances.

Scheme of four-levels sequence belongs to the theory of justice as virtue but it does not apply to how constitutional assembly and legislation really work; it only applies to how the particular problems of justice are to be solved whereby all of them depends on terms and conditions which had been applied within the particular

stages. Rawls's idea of fair, rightful constitution is based on being accepted by sensible members of parliament under the terms and conditions of the second level. Similarly the laws and political programs adopted on the legislation level are to be fair and rightful. Content of a liberal concept of justice as virtue are rules rightful institutions must respect and adhere to.

1. Political authority must respect lawful state and concept of universal wealth which includes Good for everyone.
2. Freedom of thinking and conscience must be guaranteed.
3. Equal political rights must be guaranteed.
4. Fair equality and freedom in employment selection must be ensured.
5. Fair share on material sources must be secured in order people to be independent enough and in order to be able to use their equal basic rights, freedoms and chances in their favour⁸.

Prerequisite for these rules to be applied and implemented within the constitution is to create harmonious and fair society which shall be governed by these fair and rightful institutions.

Rawls assumes that in the constitutional regime people as one should prefer basic political and civil freedoms and rights and they should also consider they could get into worst social and economic position within the society and therefore they should choose such norms and standards which would at least reduce these inequalities as these cannot be completely eliminated. Result of these fair conditions was in adopting fair principles of justice in the society.

Under polite and virtuous societies Rawls understands such societies "which though not accepting democratic ideal in the politics still respect basic human rights of their citizens and provide them at least limited option to participate on decision-making process in forms of consultations held between government and representatives of various corporations or associations to which people belong to"⁹. States which do not breach human rights and which are not outwardly aggressive can be considered to be tolerant.

Civil societies must ensure maximum security and justice for everyone rather than interfering into individual spheres which remains sacred. Only limitation of freedom is allowed in the name of freedom. On the other side Rawls requires everybody to behave in compliance with the fair basic structure of the society which cannot be a set of individual desires. Individual is addressed by challenge to evaluate interests which are different from his own and rather to follow justice and public wealth than his individual inclinations¹⁰.

Only value which is worth of free consent with certain limitations of our own freedoms is pleasure or happiness from which freedom is inseparable. It is because we do not attempt to be free for being free but for being happy. That means that in the name of Justice we ought to agree with limitations of our desires even those rational.

In the constitutional regime it is the Constitution which shall satisfy certain basic principles and secure democratic election procedures for political rivalry to be reduced. In addition it secures and guarantees basic rights, freedoms and fair opportunities for individuals and at least relevant share on multi-purpose material sources in order citizens it represents to be able to apply these rights and utilize advantages of secured opportunities.

Constitution should be a fair procedure meeting requirements of equal freedom for everyone and leading to fair, rightful and effective legislation. Principle of equal freedom for everyone that is applied within the political processes defined by the Constitution Rawls named to be Participation Principle relating only to institutions. He does not define any ideal of citizenship nor any duty to participate in political affairs. If this principle is met then everyone has general status of equal citizens. Thanks to this principle people have right to participate and co-decide in constitutional process upon which laws are construed. Everyone can participate in the political processes and every voter has one vote, i.e. each vote has same weight and importance for the result of elections. Elections take place regularly and they are free and righteous.

In the constitutional regime according to Rawls there is accepted a principle of loyal opposition, i.e. conflict of political interests and constitutional rules which specify and protect and without which any democratic politics can duly operate. We can say that most comprehensive political freedom is Constitution itself which uses

⁸ Chovancová J. Liberalistické koncepcie spravodlivosti 20. storočia / J. Chovancová. – Bratislava : PRAF UK, 1994. – S. 22.

⁹ Škabraha M. Rawlsův „večný mír“ bez politiky / M. Škabraha // Filosofický časopis. – 2010. – № 1. – S. 97.

¹⁰ Audardová C. John Rawls a pojetí političina / C. Audardová // Filosofický časopis. – 1993. – № 2. – S. 258.

majority rule for all important political decisions according to which minority cannot control the majority. If certain people have more votes than others then political freedom is unequal and the same is valid for the case if the votes of some people have greater importance than those of others or if certain part of the society has not any voting rights. This is one of samples of unequal freedom. Nevertheless here Rawls opinion gets to confrontation with the John Mill's opinion who states that wiser and more sensible individuals with higher intelligence and education should have more votes in order their opinions and judgments to have more significant impact. Only under these conditions the unequal voting would be fair.

Political freedoms not only enable individuals to vote, apply for political positions, act on the political scene, express their opinion on public, assemble, make proposals in connection with the constitution and/or laws, they also empower and improve their self-confidence, their intellectual and moral sensibility and they also balance the base of their sense of duties and obligations on which depend the stability of rightful institutions.

All human rights are protected by law. Under lawfulness we understand proper and equitable application of public regulations if these are applied within the system of laws. Rawls consider proper and equitable application of laws to be formal justice. Justice of laws refers to ratio between individuals and groups and social whole having in mind general wealth. It is mostly based on common Goodness and willingness to contribute to general wealth and goodness by the means of provisions of law. Individuals should have positive attitude to political duties and obligations, i.e. such an attitude which exceeds only their willingness to adhere to laws. In general, there is prevailing a thought that people accept laws when people respect laws and these can be executed.

All laws adopted by legislators must be in compliance with both principles of justice as well as with the Constitution. In this frame there is a limited freedom. Legislators, judges as well as other authorities must be convinced and sure that laws are to be obeyed and they should presume that all orders and decrees will be met. Their persuasions must be accepted also by those by whom they refer to. They mustn't act in good faith, this also limits their freedom. Lawfulness requires certain form of a due process control and management aimed at securing the truth.

Dominating component of the lawful State which we attempt to reach and which is also advocated by Rawls is an independent judiciary. Judges are supposed to comprehend social concept of political justice deeper than others and that they will better apply its principles and adopt reasonable decisions mainly in hard cases. Judges' capabilities depend on acquired wisdom and they require special training. In a well-organized society has everyone his own real task and status including status of equal citizenship. Then in terms of what is expected from everyone their sense of justice is equally sufficient. In original state everyone is represented equally. In this perspective everyone is then provided with same protection of public principles. Judges must be independent and nobody can judge only according to his/her own considerations or make obviously and indisputably unfair decisions in favour or detriment of somebody. Their decisions must be fair, rightful and must not be affected by the public. This is precluded and prevented by the Principle of Legality upon which similar cases shall be judged equally.

Principle that same cases shall be judged equally limits freedom of judges as well as that of principals. Another principle limiting freedom of judges is a principle that "without law there is no crime (*Nullum crimen sine lege*)"¹¹. This principle is based on the requirement the laws to be known and always expressly announced and promulgated. Their meaning must be clearly and understandably expressed in the act of law itself in order to prevent judges from their own interpretations; this prevents unjust and unrighteous decisions which could damage certain persons. This principle should also guarantee that Acts of Law must not have retroactive validity.

Rawls aims at the objective political processes and judicial decisions and resolutions fall under requirements of the theory of Justice in order to prevent judges to make their own interpretations of law and this leads at least to real doubts concerning valid legislation. Of course even by application of these rules and principles we cannot avoid injustice and unfair, unjust decisions. Injustice for example can be find in failures of judges or other authorities if these apply inappropriate regulations or if they interpret them wrongly. Regardless the fact that regulations guarantee only impartial, objective and proper application and implementation of any regulations they still can be reconciled and connected with injustice.

Lawfulness, legality is closely related with freedom. Should we implement principle of legality we must consider rights and obligations as a whole determining freedoms and regulating respective claims. Principle of

¹¹ Rawls J. *Teorie spravlivosti* / J. Rawls. – Praha : Victoria Publishing, 1995. – S. 147.

legality therefore represents solid grounds in consensus of reasonably thinking sensible persons with the aim to secure as equal freedom as possible. However, if any of basic freedoms such as equal freedom for everyone or virtuous equality of opportunities would be seriously breached, civil disobedience can be justified under these circumstances. Civil disobedience can be characterized as public illegal act that is nevertheless not violent and conscious and its aim is to cause change of law or governing politics. Justifiable civil disobedience is usually reasonable and effective form of the dissent if the society is ruled mostly by the sense for Justice. Democratic society recognizes that any individual who acts according to his/her own conscience and consciousness is liable for his/her own interpretation of principles of justice and for his/her behaviour.

Rawls considers the most suitable regimes of the society to be a democracy based on ownership and liberal socialism because these regimes are aimed at implementation of two principles of justice. Rawls states that "both these regimes apply constitutional framework for the democratic policies, guarantee basic freedoms with fair value of political freedoms and equal opportunities, they regulate economic and social inequalities if not upon the principle of difference then upon the principle of reciprocity and interdependence"¹². Business and Entrepreneurship in the liberal socialism shall be performed through system of a free and real competitive market. Social system shall be planned in such a manner for final distribution to be fair and rightful under all circumstances. This justice can be, according to Rawls, ensured only by competitive markets which prevent monopolies, price wars and also other wars for the control over market to be gained. Government regulates economic environment e.g. by controlling total amount of investments, interest rate or total amount of cash. Advantage of this system is its compatibility with same and equal freedoms for everyone and with virtuous equality of chances.

Free market system shall be determined within political and legal institutions which regulate long term trends in economic powers in order to prevent excessive concentration of ownership and property, namely of that leading to political supremacy. Market system also decentralize execution of political power, maintains reasonable competitiveness in prices and prevents excessive economic power to control and overwhelm the market. Individual households and companies can decide independently. There is also equality of opportunities for entrepreneurs applied and free choice of employment and certain level of living are guaranteed too.

Basic rights also include right to own and use private property arbitrarily. Rawls cannot imagine Market mechanism without private property. This freedom's role is to provide sufficient material base for personal, individual independence and self-esteem/self-respect to be secured because both these factors are crucial for moral values to be developed and applied. One of social grounds of self-esteem/self-respect is just this right and ability to use it effectively.

Principles of justice relate to family which Rawls considers to be "part of basic structure of the society because one of their basic roles is ensure regular generating and reproducing of the society and its culture for generations"¹³. Justice as fairness declares that in view of constitutional base and issues of basic justice and under presumption that there is a well-organized constitutional regime the family represents basic political values which express its principles and ideals and this provides family with sufficient power to outweigh all other values it usually gets into conflict with.

Institutions of basic social structure as being defined by aforementioned principles are fair and everyone recognizes that in full. Justice as virtue is not determined by theoretician of constitutional law but rather by the individual citizen in the constitutional regime. Its role is people to create their own idea of common and guaranteed status as equal citizens and it attempts to connect certain understanding of freedom and equality with certain concept of individual who according to Rawls' assumption meets common ideas and basic convictions and beliefs resulting from public culture of a democratic society.

Summary

Article is aimed at issue of Justice and fair, rightful institutions. Attention is given to Rawls's understanding of fair institutions and rightful organization of the society.

¹² Rawls J. *Spravodlivosť ako férovosť* / J. Rawls. – Bratislava : KALLIGRAM, 2007. – S. 213.

¹³ Tamtiež. – S. 248.

Анотація

Стаття розкриває питання про правосуддя та справедливість, правові інститути. Особливу увагу приділено розумінню Дж. Ролзом законних інститутів та правової організації суспільства.

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