

【논문】

# Are *Decent* Non-Liberal Societies Really Non-Liberal?

—A Critical Response to John Rawls's *The Law of Peoples*—

Chung, Hun

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【Abstract】 A notable feature of Rawls' theory of international justice, which he presented in *The Law of Peoples*, is his insistence on the toleration of non-liberal states provided that they are *decent*. Many political philosophers have criticized Rawls for being too generous towards non-liberal states. These critics feared that Rawls' theory would safeguard non-liberal states to perform many forms of domestic injustices. In this paper, I make an entirely opposite objection. I claim that the real problem with Rawls' theory of international justice is not of its being too generous, but rather of its being too stringent. Specifically, I will argue that when *The Law of Peoples* is correctly interpreted, it turns out that “the decent non-liberal societies” that the theory so emphatically proclaims to tolerate are not really non-liberal societies, but rather are only more than sufficiently liberal societies.

## I . Introduction

After the publication of John Rawls' *A Theory of Justice* in 1971, many political philosophers started to wonder what implications Rawls' theory of justice (better known as "Justice as Fairness") would have when applied to the international society. Some people argued that we should extend and apply Rawls' standard of domestic justice universally throughout the global community.<sup>1)</sup>

In 1999 with the publication of *The Law of Peoples*, Rawls presented his own answers to this question. In *The Law of Peoples*, Rawls rejects a global extrapolation of his theory of justice. One notable feature of Rawls' theory of international justice presented in *The Law of Peoples* is his insistence on *the toleration of non-liberal societies* provided that the non-liberal societies meet a certain level of *decency*. Here, we need to get clear of what Rawls means by "toleration". Toleration of non-liberal societies doesn't merely mean that non-liberal societies should be free from political or economic sanctions; more importantly, it means that non-liberal societies should be properly *respected* and deemed as *equal members* of what Rawls calls "the Society of Peoples".<sup>2)</sup>

This polemic claim has generated intense controversy among political philosophers. The main criticisms have been made by political philosophers who have cosmopolitan inclinations. For instance, Nussbaum argued that there is no reason to relax the requirements of human rights and to tolerate certain injustices that are being performed just because a certain non-liberal group has successfully established an independent state rather than being located within the boundaries of a liberal state.<sup>3)</sup>

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1) See Beitz (1975), "Justice and International Relations", *Philosophy & Public Affairs* 4

2) Rawls (1999), *The Law of Peoples*, Harvard University Press, p. 59

However, in this paper, I would like to propose an entirely different criticism: what I think is wrong with Rawls' theory of international justice is not that it tolerates too much, but rather, that it tolerates too little. That is, when *The Law of Peoples* is correctly interpreted, it will turn out that "the decent non-liberal societies" that the theory so emphatically proclaims to tolerate are not really non-liberal societies, but rather are more than sufficiently liberal societies. And if we strictly apply Rawls' criteria of "well-ordered societies" (which is comprised of liberal democratic societies and decent non-liberal societies),<sup>4)</sup> not only do all non-liberal societies in our current international order fail to meet this standard and have to be reclassified as "outlaw states", but also a bulk of liberal (which includes libertarian) societies will fail to meet this standard and will have to be reclassified as "outlaw states" as well. And since, according to Rawls, outlaw states should not be tolerated and should be subject to political sanctions and even military intervention, the practical result will be that liberal societies must interfere with other society's politics far more often than it currently does.

## II. What Feature Distinguishes a Non-liberal Society from a Liberal Society?

As I have briefly explained, in *The Law of People*, Rawls contends that the international society should accept even non-liberal societies as *bona fide* members. However, Rawls is not recognizing just any kind of non-

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3) See, Nussbaum (2004), "Women and theories of global justice" contained in *The Ethics of Assistance*, Cambridge University Press

4) The five types of domestic societies which Rawls distinguishes are: (1) reasonable liberal peoples, (2) decent peoples, (3) outlaw states, (4) societies burdened by unfavorable conditions, and (5) benevolent absolutisms. (Ibid., p. 4, 63)

liberal society as a *bona fide* member of the Society of Peoples. There are certain conditions that a non-liberal society has to meet in order for it to be properly regarded as a genuine member of the international society. So, what kind of non-liberal societies is Rawls considering when he claims that those societies should be regarded as legitimate members of the international society?

According to Rawls, the international society should acknowledge two types of *well-ordered societies* as genuine members: one is *the liberal democratic society*, and the other is *the decent non-liberal society*. Rawls often calls the decent non-liberal society as “decent hierarchical peoples” (or just “decent peoples” for short) and identifies the basic political structure of this type of non-liberal society as a “decent consultation hierarchy”.

Here, we must note the adjective ‘hierarchical’ that is being used in “decent hierarchical peoples”; it is contrasted with the adjective ‘liberal democratic’ which implies that *hierarchy* is the essential feature that distinguishes a non-liberal society from a liberal society. However, we should not be carried away with what the term implies.

The term ‘hierarchical’ can be misleading in two ways. First of all, when anybody hears the expression “hierarchical” it is very easy for the person to imagine a rigid caste system similar to that of traditional India, where the life prospects of individuals are totally determined by the contingent fact of being born into a certain social class, and that it is this kind of society that Rawls is urging us to recognize as genuine members of the international society when he claims that the Society of Peoples should tolerate non-liberal peoples and include them, along with liberal peoples, as genuine members. However, it is far from true that Rawls is acknowledging these kinds of rigid caste societies as genuine members of the international community. Rawls is suggesting a set of strict

conditions that must be met in advance in order for a hierarchical society to be regarded as a genuine member of the Society of Peoples. So, it is important to remember that Rawls is not acknowledging hierarchical societies *per se*, but only *decent* hierarchical societies; that is, the term 'decent' is important. However, the expression 'decent' is not usually strong enough to alleviate the negative connotations that are naturally associated with the word 'hierarchical'. It is very easy for people to bypass the adjective 'decent' in 'decent hierarchical peoples.'

Second, the expression 'hierarchical', by being contrasted with 'liberal democratic', gives a false impression that liberal societies in general are free from hierarchical social structuring. However, this is obviously false. Almost all societal groups that are organized and maintained under a liberal democratic regime are hierarchical in their organizational structure; including several government bodies, the military, private corporations, the universities, etc. And in all types of these societal groups, individuals who assume the role of a higher ranking position have certain prerogatives and privileges that enable them to conduct certain activities which the individuals assuming lower ranking positions cannot.

Not only are there hierarchies within societal groups but there are also hierarchies among different societal groups in relation to one another as well. However, societies displaying these features of hierarchical structuring can still be perfectly regarded as liberal societies as long as they meet other kinds of standards that define what it is to be a liberal society. So, it is not the existence of hierarchy itself that distinguishes a non-liberal society from a liberal society. But the term 'hierarchical', in 'decent hierarchical peoples', misleads the reader to think that it is.

Then, what exactly is the distinguishing feature of non-liberal societies that make it different from liberal societies? Rawls seems to have two

things in mind; one is how the society regards the moral status of individuals, and the other is how the idea of justice is justified by the society as a whole.

Let us start with the first feature: the moral status of individuals. As I have explained above, almost all societal groups (both official and unofficial) in a liberal society, are structured in a hierarchical way; individuals occupying different social positions assume different responsibilities and enjoy a different set of rights and privileges. However, despite the different social positions different individuals happen to occupy, in a liberal society, all individuals are primarily regarded as *free and equal citizens*. In other words, in a liberal society, individuals are free and equal citizens *prior to* their contingent social roles.

However, in a non-liberal society, this is not the case; individuals are, from the very start, regarded as members of a certain group or association. And most of the groups and associations that a certain individual gets identified with are determined from birth. Rawls calls this type of society *associationist* in form.<sup>5)</sup>

We should note that there is nothing unacceptably wrong with the mere fact that individuals are identified by his or her group membership; what is wrong is when individuals are denied of the right to exit from certain groups which they have automatically become a member of from birth, and when the range of basic rights and liberties as well as the opportunities to succeed in life are officially allocated unequally among the different groups in society. This is usually the case with all traditional forms of non-liberal societies (e.g. the traditional caste system of India, the feudal system in medieval Europe, the slave institution in the American south, etc.). And it is non-liberal societies in this traditional

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5) Ibid. p. 64

sense that is morally abhorrent. However, if “non-liberal societies” are defined in this traditional sense, then it is clear that Rawls is not defending non-liberal societies.

The second characteristic which distinguishes a non-liberal from a liberal society is the way the society in question justifies the conception of justice it affirms. In a liberal society, the conception of justice is justified *politically* by *public reason*.<sup>6)</sup> This means that the conception of justice doesn’t and shouldn’t rely on any particular comprehensive religious or philosophical doctrines for its public justification. However, in a non-liberal society, the realm of the political is not strictly distinguished from the realm of the private, and the conception of justice can itself be regarded as a certain part of a particular comprehensive religious or philosophical doctrine that the society as a whole affirms. In this way, state-religion becomes possible in a non-liberal society.

### III. The Criteria for a Decent Hierarchical Society

So, what Rawls was trying to argue in *The Law of Peoples* was that non-liberal societies, whose view of its individual members is essentially connected to their group membership, and whose conception of justice is part of a broader religious or philosophical world view, can be regarded as genuine members of the international society provided that the non-liberal societies in question pass a certain threshold of *decency*. So, what are the conditions that Rawls requires for a non-liberal society to meet in order to be regarded as decent, albeit non-liberal?

Rawls presents broadly two criteria which the second has three sub-

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6) See Rawls (2005), *Political Liberalism (expanded edition)*, Columbia University Press, Lectures I, IV, VI.

parts. The first is somewhat obvious; the society in question should not have any aggressive aims and should recognize that it can only pursue its ends via peaceful means such as diplomacy and trade.<sup>7)</sup> This seems obvious since we wouldn't want to acknowledge societies such as Nazi Germany as genuine members of the international society that deserve equal respect. In order for one's society to be equally respected by other societies it is necessary for one's society to show equal respect to other societies as well; and the least possible way to do this is to not inflict physical aggressions towards other societies.

I do not have very much to say about this first criterion. Rather, I will focus on each of the three sub-parts of the second criterion and one last criterion that deals with the actual political processes of decent non-liberal societies.

### 1. The First Part of the Second Criterion: Human Rights

In addition to having no aggressive aims, which is required by the first criterion, in the first part of the second criterion, Rawls requires a decent non-liberal society to secure *human rights* for every individual living in that society.<sup>8)</sup> Remember that the notion of human rights itself is fundamentally a liberal notion. Of course, I am not denying that this fact should be used as a reason to deny human rights for non-liberal states. However, we should be clear that when Rawls is requiring non-liberal societies to secure human rights for every member of their society, what Rawls is actually doing is restricting the range of acceptable non-liberal ways of life by a strictly liberal standard.

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7) Ibid. p. 64

8) See Rawls (1999), *The Law of Peoples*, p. 65

Moreover, Rawls is demanding non-liberal societies to secure these human rights in a very strict sense; he is demanding these human rights to be officially enshrined in the system of law of the non liberal-society in question. And in this way, we can say that Rawls is already requiring non-liberal societies to conform to liberal ways of life to a significant degree.

So, what kind of human rights is Rawls considering? It seems that Rawls is considering a broad range of human rights that hardly seems minimal. First of all, Rawls requires the non-liberal state to secure the right to private property for all of its members. (p. 65) Now, the right to possess private property is one of the fundamental notions of classical liberalism; that is, the institution of private property is one of the key features that distinguish a modern liberal society from a medieval feudal society. By conforming to this requirement certain forms of non-liberal societies are already ruled out; communist societies that deny the very notion of private property, non-liberal societies that deny the right to private property to a certain social class and so forth. So, by requiring a non-liberal society to secure private property rights, Rawls is already making the institutional arrangements of the non-liberal society quite similar to that of a modern liberal state.

Moreover, Rawls requires the non-liberal state to secure the right to 'liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought) (p. 65)'. Here, non-liberal societies that affirm the institution of slavery and other similar forms of subjugation are obviously ruled out. This kind of ruling out does seem intuitive correct. However, the requirement also rules out certain traditional forms of communal societies where individuals are required to inherit and follow the occupations of his or her family members. Whether this kind of social

enforcement should be universally enforced is not entirely obvious.

The more important thing to notice is that Rawls is requiring non-liberal states to ensure freedom of religion and thought. What's so important about freedom of religion and thought is that they are the distinctive characteristics that make a society liberal.

I believe that what makes a society non-liberal is the fact there is some sort of control in the society that a typical liberal society lacks. The most usual form of control that takes place is that of thought and religion. This is because a society that is based on a particular comprehensive religious or ideological doctrine cannot maintain its ideological or religious basis unless the majority of the population upholds the comprehensive doctrine in question. And in a global world with unprecedentedly advanced mass communication and media technology, (plus the fact of what Rawls calls 'the burdens of reasons'<sup>9)</sup>), it is simply a social fact that pluralism will emerge within a society that is free from any significant control of thought.

And, it is also a social fact that this pluralism undermines the theological and ideological basis of the society. So, in order for a non-liberal society to remain non-liberal, it is essential for it to exercise some form of control that is incompatible with freedom of thought and religion. In this way, I doubt that state-religion can ever be possible in practice if a state really guarantees the freedom of thought and religion to all of its members. And this is why it is hard for us to regard a society that guarantees freedom of religion and thought as a genuinely non-liberal society; since by guaranteeing freedom of religion and thought, the society jeopardizes the very feature that makes the society non-liberal in the first place.

In fact, Rawls is quite aware that, by securing these rights and liberties

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9) See Rawls (2005), *Political Liberalism*, pp. 54-58

for every individual, it is very likely that the non-liberal society will gradually disintegrate and transform itself into a more liberal society. In fact, this is what Rawls actually hopes will happen:

If a liberal constitutional democracy is, in fact, superior to other forms of society, as I believe it to be, a liberal people should have confidence in their convictions and suppose that a decent society when offered due respect by liberal peoples, may be more likely, over time, to recognize the advantages of liberal institutions and take steps toward becoming more liberal on its own. [Rawls (1999), *The Law of Peoples*, p. 62]

From this paragraph, we can extrapolate two things: (a) Rawls is expecting that a non-liberal society will naturally transform itself into a more liberal society provided that a certain set of rights and liberties are secured; and (b) Rawls is not really respecting non-liberal societies as such, i.e. as an alternative way to pursue life, but rather respecting non-liberal society's *capacity to change itself* into a more liberal society *by its own efforts*.

In other words, it is misleading to say that Rawls is respecting non-liberal societies as genuine members of the Society of Peoples provided that they are decent; rather, Rawls is merely respecting decent non-liberal society's *potential* to, one day, become a genuine member of the Society of *Liberal Peoples*. By requiring non-liberal societies to secure human rights, Rawls is, from the very start, ruling out non-liberal societies that lack this potential to become a genuine member of the international society.

In this sense, Rawls' position is somewhat elusive; he contends that we should genuinely respect non-liberal societies as *bona fide* members of the international society. But then, he claims that only non-liberal societies that have the *potential* to transform itself into a *liberal society* can properly be respected as a genuine member of the international

society. And, the non-liberal societies which he regards as having this potential are, in almost every significant sense, already *sufficiently liberal*, which makes us doubt whether they should still be called as non-liberal societies in the first place.

Consider another human right that Rawls requires non-liberal societies to secure: the right to life (to the means of subsistence and security).<sup>10)</sup> So, what exactly is ‘the right to life’ that Rawls is thinking of? We can get a fair picture of what Rawls was aiming at by reading the footnotes:

(Henry) Shue (...) and R.J. Vincent (...) interpret subsistence as including *minimum economic security*, and both hold subsistence rights as basic. *I agree*, since the sensible and rational exercise of all liberties, of whatever kind, as well as the intelligent use of property, always implies having general all-purpose economic means. [Rawls (1999), *The Law of Peoples*, p.65 footnote, emphasis added]

So, the right to life that Rawls requires non-liberal societies to secure for all of its members can be interpreted as a right to a *basic social minimum*.

Now, this, I believe, is a very stringent requirement; it rules out all societies that adopt a libertarian or neo-conservative social policy that leans towards a minimalist government. In fact, there are very few societies that are able to meet this requirement in today’s world; Northern European countries located in the Scandinavian peninsular and probably Canada are the only countries that meet this criterion in the strict sense. This means that not only does Rawls rule out all of the non-liberal societies, but he also rules out almost all of the societies that we ordinarily regard as liberal in today’s world as well. In other words, most of the liberal states in the world today cannot even be deemed as *decent*;

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10) Ibid. p. 65

this means that, according to Rawls' own classification of five types of domestic societies,<sup>11)</sup> most of the liberal states in today's world would be classified as '*outlaw states*'.<sup>12)</sup> And according to Rawls, outlaw states are simply intolerable, which, by that very fact, justifies liberal societies to impose political and economic sanctions and even to militarily intervene into the states in question.<sup>13)</sup> The corollary of this is that welfare societies such as Sweden or Canada should impose political and economic sanctions, and even, in grave cases, conduct military operations towards almost every other country in the rest of the world. This doesn't seem quite right.

## 2. The Second Part of the Second Criterion: *Bona Fide* Moral Duties & Obligations

The second thing that Rawls requires non-liberal societies to follow is that the system of law in these non-liberal societies should impose *bona fide* moral duties and obligations.<sup>14)</sup> Then, what does Rawls mean by *bona fide* moral duties and obligations? Again, Rawls doesn't really explicate what it means for something to be a *bona fide* moral duty or an obligation. So, we would have to make another intelligent guess.

Remember that one of the distinguishing features of a non-liberal society, as Rawls himself defines it, is that the society's conception of justice derives from a particular comprehensive religious or philosophical world view. However, it's not just aspects of social justice that derives

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11) The five types of domestic societies which Rawls distinguishes are: (1) reasonable liberal peoples, (2) decent peoples, (3) outlaw states, (4) societies burdened by unfavorable conditions, and (5) benevolent absolutisms. (Ibid., p. 4, 63)

12) They are certainly not 'societies burdened by unfavorable conditions' or 'societies of benevolent absolutisms'. The only remaining option is 'outlaw states'.

13) Ibid. pp. 80-81

14) Ibid. p. 65

from the comprehensive doctrine that the society affirms; rather, it can be said that all aspect of morality is derived from the society's comprehensive doctrine. (So, the second distinguishing feature of a non-liberal society should be read as, all aspects of morality and *even* conceptions of justice are derived from the society's comprehensive doctrine.)

So, in a non-liberal society, all moral duties and obligations derive from (and is explained by) the particular comprehensive doctrine that the society in question adopts. However, we would not want to say that just any moral duty or obligation should be regarded as a *genuine* (or *bona fide*) moral duty or obligation simply because the moral duty or obligation is *derivable* from the comprehensive doctrine that the society happens to adopt. If this were the case, then we would have to say that slaves have genuine obligations towards their masters and that housewives have genuine obligations towards their abusive husbands provided that these obligations are derivable from the society's particular comprehensive doctrine. So, we need to impose a certain constraint on what can and what cannot count as a genuine (or *bona fide*) moral duty or obligation among the several moral duties and obligations that are derivable from a particular comprehensive doctrine. So, what is this constraint?

Again, Rawls' footnote is suggestive. he says:

So I see the second part of the above criterion—that a decent people's system of law must be such as to impose *bona fide* moral duties and obligations—as following from a *liberal conception of justice* extended to the Law of Peoples. [Rawls (1999), *The Law of Peoples*, p.66 footnote, emphasis added]

Here, Rawls seems to be suggesting that the system of law of a certain

non-liberal society must impose not mere coercions, but *bona fide* moral duties and obligations, and what counts as *bona fide* moral duties or obligations is determined by whether or not the duties or obligations follow from a liberal conception of justice. This means that the constraint that Rawls requires us to impose is essentially a liberal constraint.

So, if a non-liberal society successfully meets the second part of the second requirement, then the extension of duties and obligations that are imposed by the system of law of a particular non-liberal society will be *exactly the same* as the extension of duties and obligations that are imposed by the system of law of a typical well-ordered liberal society. In other words, the members of the non-liberal society will have exactly the same set of legal duties and obligations as the members of a liberal society. The only difference is how these legal duties and obligations are *justified*; that is, in a liberal society, the legal duties and obligations will be justified politically by public reason, whereas in a non-liberal society, the same set of legal duties and obligations will be justified by the society's particular comprehensive doctrine.

Now, the same question arises again: if the members living in a decent non-liberal society have exactly the same set of legal duties and obligations as the members living in a reasonable liberal society, (that is, duties and obligations which are indistinguishable from an empirical point of view), then to what extent can we properly say that the decent non-liberal society is non-liberal in any significant sense? How confident are we to say that despite the observable similarities of the two societies, the two societies are intrinsically different?

One possible answer might come from the notion of “overlapping consensus”.<sup>15)</sup> That is, one might say that due to the differences in how each society justifies their conception of justice as well as their legal

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15) See Rawls (2005), *Political Liberalism*, Lecture IV

duties and obligations, the members living in a decent non-liberal society, unlike members living in a reasonable liberal society, will not be able to participate in overlapping consensus. And that this is the key difference between the two societies despite their external similarities.

So, what exactly is this claim? Remember that the overlapping consensus is a *two stage process*; in the first stage, the society's conception of justice is presented as a free-standing political conception which is justified solely by public reason alone, and in the second stage, each member of the liberal society gives additional supporting reasons for the society's conception of justice from their own particular comprehensive doctrines. In this way, the liberal conception of justice becomes *stable* in a twofold way.<sup>16)</sup>

However, (the argument goes): since the conception of justice is, from the very start, justified by the dominant comprehensive doctrine in a decent non-liberal society, it would be impossible for the members in a decent non-liberal society to participate in the very first stage of overlapping consensus and, therefore, overlapping consensus will itself be impossible in a non-liberal society no matter how decent it is.

This might be true, but we must ask whether being unable to participate in overlapping consensus is necessarily a bad thing for a decent non-liberal society. To explain this, we must first remember why the notion of overlapping consensus was introduced in the first place; it was in order to settle *the problem of stability* in a reasonably pluralistic society. That is, Rawls noticed that, due to what he calls the burdens of reason, even people who are perfectly rational and reasonable can come to a disagreement in a free liberal society. And in this way, pluralism inevitably follows from a free liberal society. Now, the problem is this: if pluralism is inevitable in a free liberal society, then how can a workable

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16) See Rawls (2005), *Political Liberalism*, p. 140

conception of justice gain mutual support and remain stable over the course of time in a free liberal society?

And the answer is to initially present the conception of justice as a free-standing political conception, which doesn't rely on any particular comprehensive doctrines for its justification, and which can be justified solely by the type of reasons that are regarded as public. In this way, the conception of justice can be supported by all members of society regardless of what particular comprehensive doctrine each happens to affirm, and once the conception of justice is justified politically, it is up to the individual citizens themselves to find additional supporting reasons that derive from their own particular comprehensive doctrines. This whole process, as I have just mentioned, is what Rawls calls the "overlapping consensus".

Now, if this is the case, then we are able to see that the set of conditions that make it necessary for a free liberal society to adopt the process of overlapping consensus in order to settle the problem of stability doesn't really obtain in a decent non-liberal society.

In a decent non-liberal society, there is a dominant comprehensive doctrine that the majority of its members affirm; in other words, a decent non-liberal society is essentially a *monistic* society. Therefore, there is no reason to present the conception of justice as a free-standing political conception which can be solely justified by public reason alone. In a decent non-liberal society, reasons that count as public are themselves reasons provided by the dominant comprehensive doctrine. So, the very need for a process such as overlapping consensus is totally absent in a decent non-liberal society.

In a decent non-liberal society, the conception of justice is, from the very start, presented and justified by the dominant comprehensive doctrine of the society. And this alone suffices the conception of justice

in question to be *stable* over time. In fact, in such monistic societies, conceptions of justice that are derived directly from the society's dominant comprehensive doctrine might be far more stable than a conception of justice that is derived from a free-standing political conception, since in the former case, the conception of justice will have direct emotional appeal rather than relying on the person's disinterested intellectual reasoning powers which will likely be the case of the latter. (e.g. In a religiously predominant society, a conception of justice that is deemed to be the orders of God might be able to receive more willing support than a conception of justice that is alleged to show equal respect for everybody as moral persons.)

So, it is true that members living in a decent non-liberal society will not be able to participate in overlapping consensus. However, in a decent non-liberal society there will be no need for the society to adopt such process in the first place. Therefore, the sole fact that the decent non-liberal society lacks the process of overlapping consensus doesn't really show that the decent non-liberal society is different in any significant sense with the free liberal society when the two types of societies impose exactly the same legal duties and obligations to its members.

### 3. The Third Part of the Second Criterion: The Internalist Requirement

The third thing which Rawls requires for non-liberal societies is that:

There must be a sincere and not unreasonable belief on the part of judges and other officials who administer the legal system that the law is indeed guided by a common good idea of justice. [Rawls (1999), *The Law of Peoples*, p. 66]

I call this the *Internalist Requirement*. The internalist requirement requires the government officials in a non-liberal society to have sincere and not unreasonable belief that their actions are in accordance with the society's conception of justice that is derived from the society's dominant comprehensive doctrine whenever they implement a certain social or legal policy. However, there is an *epistemic problem*: how are we supposed to know whether a certain non-liberal society has successfully met this requirement? How can we ever know whether the government officials really had sincere beliefs or not? By the way, we cannot get inside their heads, right?

This is a real problem since it is perfectly possible for a government official, living in a non-liberal society where slavery is officially institutionalized, to sincerely believe that the institution of slavery is really part of the common good idea of justice of that society. Furthermore, viewed from the perspective of the dominant comprehensive doctrine of that particular society, this belief may not even be unreasonable. Conversely, there might be a government official who implements a certain social policy which meets all the right standards of a just liberal welfare program, but doesn't really believe that the social policy in question accords with the common good idea of justice of that society. If this is the case, which society should we regard as more decent?

It seems that Rawls was aware of this problem. So, he proposes a certain form of *behaviorist solution*. That is, Rawls presents a way to decide whether or not a non-liberal society is meeting the internalist requirement by looking at the *actual practices* of the government policies that are being implemented in the non-liberal society in question.

It would be unreasonable, if not irrational, for judges and other officials to think that the common good idea of justice, which assigns human rights to all members of a people, is being followed when those rights are

systematically violated. [Rawls (1999), *The Law of Peoples*, p. 66]

So, according to Rawls, whether or not the *internalist requirement* is being met depends on whether or not human rights are *actually* being guaranteed *in practice* in the non-liberal society in question. If human rights are systematically being violated in practice, then this will just show that the government officials do not possess sincere and reasonable beliefs that their social policies are really realizing the common good idea of justice of that society. So, the internalist requirement isn't really an *internalist* requirement. Rather, it's an *externalist* requirement; it doesn't really require that the government officials should have the right beliefs in their heads, but rather, it requires the non-liberal society to guarantee human rights in their actual practices.

We can interpret this requirement as some sort of *safe-guard* against the violation of human rights that might, in practice, occur in a non-liberal society. That is, the first part of the second criterion requires non-liberal states to include human rights in their system of law. However, human rights can still be violated in actual practice even though they are enshrined in the non-liberal society's constitution. The third part of the second criterion guarantees that these human rights are not merely institutional lip-services but are actually guaranteed in real social life.

#### 4. Decent Consultation Hierarchy

There is one last thing that Rawls requires for the non-liberal society to meet which is extremely important. The last thing that Rawls requires for a non-liberal society is for its legal system to contain what Rawls calls a 'decent consultation hierarchy'. So, what is a decent consultation hierarchy? According to Rawls,

In political decisions a decent consultation hierarchy allows an opportunity for different voices to be heard (...) Persons as members of associations, corporations, and estates have the right at some point in the procedure of consultation (...) to express *political dissent*, and the government has an obligation to take a group's dissent seriously and to give a conscientious reply. (...) Judges and other officials must be willing to address objections. *They cannot refuse to listen* (...) Moreover, should the judges and other officials listen, the dissenters are *not required to accept* the answer given to them; they may renew their protest, provided they explain why they are still dissatisfied, and their explanation in turn ought to receive a further and fuller reply. [Rawls (1999), *The Law of Peoples*, p. 72, emphasis added]

In short, decent consultation hierarchy is a device that makes *political participation*<sup>17)</sup> possible in a decent non-liberal society. Now, Rawls emphasizes that this doesn't make the decent non-liberal society liberal, which here, he seems to mean *democratic*. This is because in a decent non-liberal society individuals are not seen as free and equal citizens who deserve equal representation separately according to the maxim; one citizen, one vote.<sup>18)</sup> However, this ignores how closely a decent consultation hierarchy resembles the political process in a modern liberal democratic regime.

In most modern liberal democratic societies, it is extremely rare for direct democracy to actually take place. This is not necessarily because direct democracy is undesirable, but rather that direct democracy is unpractical in modern circumstances. So, most liberal democracies take the form of *indirect democracy*. In an indirect democracy, it is not the

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17) Somebody might think whether we should really count participating in a decent consultation hierarchy as a form of political participation. However, it is clear that Rawls thought it should. This is evident when Rawls contrasts between a 'decent hierarchical society' and 'benevolent absolutism'; the only distinguishing feature of the two societies is that the latter lacks a form of political participation.

18) *Ibid.* p. 71

citizens themselves that devise government policies and enact new laws. Rather, citizens choose their own representatives, and it is these representatives that actually engage in political matters, not the citizens themselves.

This is analogous to the political process of a decent consultation hierarchy. Just as it is the political representatives and not the individual citizens themselves that conduct political policy making in a liberal democratic society, it is the group representatives and not the individual members of the group that do politics in a decent consultation hierarchy. Just as the political representatives in a liberal democratic society represent the interests of the people that have chosen them, the group representatives in a decent consultation hierarchy represents the interests of the particular group that they are supposed to represent.

Moreover, as I have noted previously, hierarchy is not a distinguishing feature of a non-liberal society. Just as different groups are represented proportionately according to their hierarchical standing in a decent consultation hierarchy, different interests of individuals are weighed differently according to their social importance and government officials who represent these interests are assigned unequal roles in a bureaucratic hierarchy in a liberal democratic society. So, it can be fairly maintained that a decent consultation hierarchy is practically equivalent to a modern indirect democracy which takes a bureaucratic structure.

Now, somebody might say that there is a crucial difference between an indirect liberal democracy and a decent consultation hierarchy, which makes only the former, and not the latter, democratic. The crucial difference is that in an indirect liberal democracy, although it is true that citizens do not directly participate in the political deliberation process themselves, every citizen has equal voting power to elect the representatives that they think will correctly represent their individual

interests themselves. This is not necessarily the case with a decent consultation hierarchy; the representatives of each group might not have been elected through a democratic voting process. And this is why the political procedures in a liberal society can still be regarded as democratic, albeit indirect, while the political procedures in a decent consultation hierarchy cannot even be called as democratic in form.

However, we should note what Rawls is exactly requiring for a decent consultation hierarchy for it to properly function. Let's go back to the passage that I quoted from Rawls above. In the passage, Rawls contends that individual members of a decent consultation hierarchy have a right to express *political dissent*. And this right to express political dissent is not merely a vacuous claim; the government officials are required to *listen*. And by 'listen', here, Rawls means that the government officials must take the opinions of individual dissenters seriously and provide adequate responses. And, since the individual dissenters, according to Rawls, are not required to accept the initial responses provided by the government officials and are allowed to renew their protest as long as they support their dissatisfaction with a sound argument, the process of government officials providing adequate responses to individual dissenters can continue *infinitely* until the individual dissenters are finally satisfied with the government's proposal. And if the government officials are unable to provide a satisfying response to the individual dissenters until the very end, the individual dissenters can always emigrate to another society, and when the individual dissenters choose to do so, Rawls requires the government to assist their emigration process.<sup>19)</sup>

So, although it might be the case that not all individual members living in a decent consultation hierarchy have equal voting powers to elect their own group representatives, this factor is offset by allowing the individual

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19) Ibid. p. 72

members to possess a certain form of *veto power* that always makes it possible for them to express political dissent towards the legitimacy of their group representatives which must be given adequate response by the government officials until the individual members are truly satisfied. And not only are the individual members allowed to express political dissent towards the legitimacy of their group representatives, but they are also allowed to express political dissent towards virtually any kind of social policy that the government implements. And by this, the issue of the non-democratic nature of decent consultation hierarchies is greatly diluted.

Moreover, when the individual dissenters and government officials are respectively presenting arguments and counter-argument to each other back and forth, it can be fairly claimed that, unlike the *passive* citizens living in a liberal democratic society who participate merely in a periodical election every once in a while, the individual dissenters living in a decent consultation hierarchy are *actively* participating in the actual political deliberation process of their society. And it seems that this process accords better with the requirements of contemporary deliberative democratic theories,<sup>20)</sup> which claims that citizens should actively engage in the deliberative process of politics that aims to formulate the common good of the people, by exchanging sound political arguments supported by good reasons in the political forum. And in this way, a decent consultation hierarchy might even be considered to be *more democratic* than a modern indirect liberal democracy in a certain respect.

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20) Here, I have in mind the works of contemporary deliberative democratic theorists such as Joshua Cohen, Jurgen Habermas, etc.

## IV. The Conclusion

So, Rawls claims that we should acknowledge a certain range of non-liberal societies as *bona fide* members of the international society. However, in order for a non-liberal society to be regarded as a *bona fide* member it must meet the following conditions:

- (1) The non-liberal society should not have any aggressive aims
- (2) Human Rights (including a right to private property, a right to various liberties including freedom of thought and religion, a right to life in the form of basic minimum, etc.) should be enshrined in the non-liberal society's system of law
- (3) The non-liberal society's system of law should impose *bona fide* moral duties and obligations that follow from a liberal conception of justice
- (4) The Human Rights enshrined in the non-liberal society's system of law should be sufficiently guaranteed in actual practice
- (5) Political participation of essentially a deliberative form must be guaranteed
- (6) And if all things do not turn out as the individual wishes, the individual should be allowed to leave the society with the assistance of the government

By meeting all of these conditions, a non-liberal society becomes a decent non-liberal society and earns the right to be respected as an equal member in the Society of Peoples. And a non-liberal society that actually meets all of these criteria really does seem to look *decent*; by meeting all of these criteria, the non-liberal society in question is clear from any kind of oppressive elements which make it traditionally objectionable; nobody is denied of a right to exit from a group which they do not wish to be identified and nobody is denied of certain fundamental rights and liberties just by being born into a certain social class. So, a decent non-

liberal society is quite *decent*. However, now the question is: how *non-liberal* is a *decent* non-liberal society? And the answer is: not very much.

A decent non-liberal society meets virtually every institutional requirements of a well-ordered liberal society; individuals can possess private property, they are guaranteed a basic social minimum, they are free from any form of slavery and forced occupation, they can exercise freedom of thought and religion and nobody is persecuted because their religious or ideological faith, they are able to participate in politics and express political dissent towards virtually any political matter, they are only required to discharge duties and obligations that are deemed *bona fide* from a liberal standpoint, they even have a right to government assisted emigration if they wish to leave. What more can we ask for?

Empirically, the institutional arrangements of a decent non-liberal society will be practically the same as the institutional arrangements of a well-ordered liberal society. The only difference will be on how the society views its individual members and how the society's conception of justice is justified publicly; whereas the individual members are seen as free and equal citizens in a liberal society, the individual members will be seen as members of a certain group or association in a decent non-liberal society; whereas the conception of justice is justified politically by public reason in a liberal society, the conception of justice will be justified by the particular comprehensive doctrine which the decent non-liberal society affirms. These differences are, of course, important. However, I am not sure whether these differences are big enough to sufficiently ground the claim that a decent non-liberal society is fundamentally distinct from a well-ordered liberal society.

The problem is analogous to this: suppose that a state's athletic commission announces a controversial announcement that it will officially allow "no-holds-barred" fighting events to be held in public

places, provided that the fight event meets certain conditions of decency. And then, the state's athletic commission requires the following conditions to be met: each fighter must wear headgears, mouth guards, and low-blow protection; each fighter must wear 12 oz gloves; fighters are not allowed to kick; fighters cannot attack when the opponent is dropped; the fighting can only occur when both fighters are standing up; no head butts are allowed; biting is prohibited; elbow attacks are prohibited; and so on. By meeting all of these standards, it is true that the "no-holds-barred" fighting event will start to look more like a tolerable sports event. However, now the question arises: how different is the so-called *no-holds-barred fighting event* from an ordinary *amateur boxing match*? And the answer is: not very much.

And the same answer applies to Rawls' *the Law of Peoples*. Rawls starts with a polemical, and quite controversial, claim that the international society should show equal respect towards non-liberal societies and treat them as genuine members of the Society of Peoples. However, as it turns out, the so-called 'non-liberal societies' that Rawls asks the international society to tolerate doesn't really seem *non-liberal* in our ordinary understanding of the term. Rather, it seems that the 'non-liberal societies' that Rawls asks us to tolerate are sufficiently liberal societies which contain certain *communitarian elements*<sup>21</sup>) in it. And I believe that there would be nobody who will say that Rawls is allowing too much when his views are interpreted in this sense.

I believe that the initial negative responses that people usually have when they first read Rawls' *the Law of Peoples* are mainly due to his extensive use of the terms 'hierarchy' and 'non-liberal' which are misleading in many ways. These terms, in their normal usage, have negative connotations. By reading Rawls say that the international

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21) See Sandel (1982, *Liberalism and the Limits of Justice*; 1996, *Democracy's Discontent*)

society should tolerate non-liberal hierarchical societies, it is very easy for the reader to think that Rawls is claiming that we should tolerate such oppressive societies, as traditionally conceived, where the basic rights of gender and religious minorities are systematically violated by the system of law of that society. However, as we have seen, it is far from true that Rawls is trying to advocate these traditional types of oppressive societies. Rather, Rawls is arguing that these traditional types of societies should be strictly restricted by universal liberal standards.

According to Rawls' standards, no non-liberal society in the world today should be tolerated; there are simply no decent hierarchical peoples among the several non-liberal societies today. What's more striking is that any society that leans towards neo-conservative or libertarian social policies cannot even be deemed as 'decent' according to Rawls' standards. This is why I believe that we have to worry, not whether Rawls' international theory is allowing too much, but whether his international theory is allowing too little. According to Rawls' standard of decency, most liberal countries in today's world will have to be reclassified as 'outlaw states'. Only the few countries located in Northern Europe, and possibly Canada, can be truly regarded as, what Rawls calls, 'well-ordered societies'. And since outlaw states should not be tolerated, Rawls' theory suggests that Scandinavian countries such as Sweden, Denmark, Norway, Netherlands, and Canada should impose political or economic sanctions or even conduct military interventions to change the institutional arrangements of virtually every country in the entire world today. This is obviously absurd.

So, it is fair to say that Rawls international theory is rather far aloof from the realities of the world structure today. And I believe that it is this practical inapplicability which is the real problem of Rawls' international theory of justice which he presented in *the Law of Peoples*.

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**정훈**  
2012년 미국 코넬 대학교 철학 박사  
현 미국 로체스터 대학교 정치학 박사과정

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국문요약문

## “품위있는” 비-자유주의 사회들은 정말로 비-자유주의 사회들인가?

—롤즈의 <만민법>에 대한 비판적 고찰—

정 훈

<만민법>을 통해 드러난 롤즈의 국제정의이론의 주목할만한 특징 중 하나는 바로 롤즈가 비-자유주의 사회들을, 그러한 사회들이 일정 수준의 “품위”를 유지한다는 전제 하에서, 국제사회가 공식적으로 인정해줘야 한다고 주장했다는 점이다. 많은 정치철학자들은 롤즈가 비-자유주의 사회들에 대해서 지나치게 관대한 태도를 취했다고 비판하였다. 이들은 롤즈의 국제정의이론이 많은 비자유주의 사회들이 국내적으로 부정의를 행하는 것을 정당화해 줄 수 있다는 점을 우려하였다. 본 논문에서 필자는 롤즈에 관해서 이것과는 정반대의 비판을 가할 것이다. 필자에 따르면, 롤즈의 국제정의이론이 가지는 진짜 문제점은 그것이 지나치게 (비-자유주의 사회들에 대하여) 관대하다는 데 있다기 보다는, 오히려 지나치게 엄격하다는 데 있다. 필자는 롤즈의 <만민법>이 제대로 해석되고 나면, 국제사회가 용인을 해야 한다고 롤즈가 그토록 강조를 하는 “품위있는 비-자유주의 사회”들은 실제로는 비-자유주의 사회들이라기 보다는, 상당한 수준 이상의 자유주의 사회들 뿐이라는 것을 보일 것이다.

**주요어:** 롤즈, 만민법, 공정으로서의 정의, 지구촌 정의, 국제정의

