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Uma disputa em família: Rawls versus Habermas

A family dispute: Rawls versus Habermas

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Resumo

Rawls afirma o seu primeiro princípio de justiça sublinhando que todas as pessoas devem ter um direito igual ao maior sistema de liberdades básicas iguais possível, de modo que o sistema de liberdades de uma pessoa seja compatível com [o] das demais. Esse princípio seria escolhido dentro da posição original, uma situação de imparcialidade na qual as partes não teriam acesso as suas características sociais, econômicas e até mesmo psicológicas. No que diz respeito ao seu P1, Rawls afirma uma lista de liberdades básicas iguais que precisariam ser asseguradas em uma sociedade bem ordenada. E destaca que as liberdades podem ser limitadas quando entrarem em conflito com as outras liberdades, desse modo elas não são vistas como absolutas. Porém o filósofo estadunidense afirma que as liberdades políticas possuem uma natureza especial, fazendo do primeiro princípio de justiça como equidade um princípio de igual participação política. Habermas, por sua vez, crítica Rawls afirmando que as liberdades políticas, no pensamento de Rawls, desempenham meramente um papel instrumental, assim como o fato de que o desenho da posição original não conseguiria explicar e assegurar o ponto de vista da avaliação imparcial de princípios de justiça entendidos de modo deontológico. Nesse trabalho ter-se-á como objetivo central investigar se as críticas apresentadas por Habermas são procedentes, sobre as quais se argumentará que as objeções do pensador alemão a Rawls, apesar de terem apresentado importantes desafios ao liberalismo político rawlsiano, não se confirmam.

Palavras-chave: posição original; liberdades básicas fundamentais; Rawls; Habermas.

Abstract

Rawls affirms the first principle of justice as fairness, stressing that all people should have an equal right to the greatest possible system of equal basic liberties, so that the system of liberties of one person is compatible with those of others. This principle would be chosen within the original position, a situation of impartiality where the parties would not have access to their social, economic and even psychological characteristics. With regard to his P1, Rawls affirms a list of equal basic liberties that would need to be guaranteed in a well-ordered society. And he points out that liberties can be limited when they conflict with other liberties, so they are not seen as absolute. However, the American philosopher affirms that political liberties have a special nature, making the first principle of justice as fairness a principle of equal political participation. Habermas, in turn, criticizes Rawls by stating that political liberties, in Rawls' thought, play merely an instrumental role, as well as the fact that the design of the original position would fail to explain and secure the point of impartial evaluation of deontologically understood principles of justice. In this paper, the central objective will be to investigate whether the criticisms presented by Habermas follow, on which it will be argued that the German philosopher's objections to Rawls, despite having presented important challenges to Rawlsian political liberalism, do not follow.

Keywords: *original position; basic fundamental liberties; Rawls; Habermas.*

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RAWLS, THE ORIGINAL POSITION AND FUNDAMENTAL BASIC LIBERTIES

John Rawls (1999a) seeks to present principles of justice that express the idea that all social values – liberty and opportunity, income and wealth, and the social bases of self-respect – should be distributed equally, unless an unequal distribution of any one of these values, or all of them, is advantageous to everyone. (Later, as is known, Rawls modifies the idea of being advantageous to everyone, with the idea of the difference principle, according to which inequalities can be accepted as long as they benefit the least advantaged). The basic structure is the main theme of justice because its effects are profound on people's lives and are present from the beginning in the life of any human being. According to Rawls (1999a), when stating that "basic structure is the principal subject of justice," the background is the idea of society as a cooperative enterprise for mutual advantage, i.e. "[...] the basic structure is a public system of rules which defines a scheme of activities that leads people, collectively, to act in order to produce the greatest sum of benefits and to assign to each of the recognized claims a share of the profits [...]" (Rawls, 1999a, §14, p. 74).

Rawls (1999a) states that a basic structure must be regulated by a just constitution that ensures equal citizenship, guaranteeing liberty of conscience and liberty of thought (the first principle of justice), as well as the equitable value of political liberties and fair equality of opportunity, as opposed to formal equality (the second principle of justice). The political process, in turn, is conducted when circumstances permit, as a fair procedure for choosing between governments and for enacting just legislation.[1] In §10 of the TJ, Rawls (1999a) states that institutions are a public system of rules that defines offices and positions with their rights and duties, powers, immunities, and the like. In §75, the assertion is that institutions are standards of human conduct defined by public systems of rules, and the very possession of offices and positions indicates certain intentions and objectives. This is because the rules will specify certain forms of action as permitted or prohibited, as well as provide for certain sanctions and penalties when violations

[1] Rawls (1999a) argues that the political process is important for enacting and revising rules and attempting to control the legislative and executive powers of government. Even if everything is done according to constitutional procedures—as constitutionalists desire—it is necessary to explain why these procedures are accepted. In this formulation, nothing resembling the constraints of a competitive market will be valid, and there will be no legal sanctions in the common sense for many types of unconstitutional actions by parliaments and chief executives—and the political forces they represent. According to the American philosopher, therefore, the main political actors will be guided by what they consider morally admissible, and since no system of constitutional checks and balances can establish an invisible hand to guide the process toward a just outcome, they also rely on a public sense of justice. Thus, Rawls (1999a) presupposes a theory of justice that explains how moral sentiments influence the conduct of public affairs – civil disobedience would be an example of this, but this topic will not be discussed further here (cf.: Tomé, 2018).

are committed. The main institutions will be the political constitution and the economic and social arrangements, which, considered together, will define the rights and duties of people and influence their life prospects. Rawls (1999a) cites as examples of these institutions the legal guarantee of liberty of thought and conscience, competitive markets with private ownership of the means of production, and the monogamous family[2].

It is emphasized that the social system, according to Rawls (1999a), shapes the desires and aspirations that citizens will have, as well as partly determining the type of people they want to be, and the type of people they are. The principles of social justice, therefore, regulate the choice of a political constitution and the main elements of the economic and social system. According to Rawls (1999a), the principles of justice for institutions should not be confused with the principles that apply to individuals and individual actions in particular situations[3]. The principles of justice were stated by Rawls (definitively in TJ) as:

> First Principle:
> Every person is to have an equal right to the widest total system of equal basic liberties compatible with a similar system of liberty for all.
>
> Second Principle:
> Social and economic inequalities are to be arranged so that they both:
> (a) bring the greatest possible benefit to the least advantaged, obeying the principle of just savings; and
> (b) are linked to offices and social positions open to all under conditions of fair equality of opportunity (Rawls, 1999a, §46, p. 266).

In Rawls's thinking (1999a), the principles of justice would be chosen from what the author called the original position. The principles aim to define the institutional ties and the connection of people with one another. The conception of justice will be incomplete, it is emphasized, until these principles are chosen. Furthermore, the original position would be a form of pure procedural justice, as it is defined as a status quo in which any agreement reached is just. "The idea of the original position is to establish a fair procedure so that any agreed principles are just. The aim is to use the notion of pure procedural justice as the basis of the theory [...]" (Rawls,

[2] Although the author cites these cases as examples of social institutions that are objects of the basic structure, Rawls could have cited other examples, just as it does not mean that a society, to be just, needs to have the means of production concentrated in private hands. In particular, it is worth highlighting the fact that Rawls, after facing criticism from feminist authors, altered the idea of the monogamous family to the nuclear family.

[3] The principles for individuals would be chosen after the principles for institutions. According to Rawls (1999a), the principles for individuals would be the natural duty of justice (with the principles of obligation complementing it) and the duty of fairness. According to Rawls (1999a), these principles correspond to the two aspects of moral personality. As it is known, from the 1980s onwards, Rawls developed the concepts of reasonableness and rationality to explain his considerations about the moral personality of people.

1999a, §24, p. 118). This original position also differs from that used for interstate relations[4] and should be seen as a useful analytical device.

In the original position, the parties (i.e. 'artificial persons' who will decide the terms of cooperation and who can be seen as if they were lawyers in everyday life) need to be under a veil of ignorance, as the effects of specific contingencies that put people at odds must be nullified, without allowing the parties to try to exploit social and natural circumstances for their own benefit (or that of their representative). Under the veil of ignorance, the parties do not know their places in society, their class positions or social status, as well as the luck or misfortune in the distribution of goods and natural abilities, intelligence, strength, etc. They would also not have access to their conceptions of the good or their special psychological propensities. Furthermore, the parties would also not know the particular circumstances of their own society, i.e. they would not know their economic or political situations, or the level of civilization and culture that their society has been able to achieve. They would also be limited in their knowledge of which generation they belong to; they would only know that they are all contemporaries.

Rawls (1999a) states that the veil of ignorance prevents parties from shaping their moral views according to their own particular attachments and interests. With the veil, they view the social order from a perspective that everyone can adopt, on an equal footing. According to Rawls (1999a), it is reasonable to assume that the parties, in the original position, are equal, with the same rights in the procedure of choosing principles, being able to make proposals, present reasons, etc. The equality of *status* between the parties, in the original position, aims to "[...] represent the equality between human beings as moral persons, as creatures with a conception of their good and capable of a sense of justice [...]" (Rawls, 1999a, §4, p. 17). Equality is considered similar given two aspects: (i) the systems of ends are not classified by means of their

[4] In three distinct instances, Rawls employs an original position regarding the relationship between countries: in the TJ itself when discussing the justification of conscientious objection, and in his eponymous article (1993) and book (1999b), entitled *The Law of Peoples*. In the TJ, Rawls argues that the interpretation of the original position can be extended to consider the parties as representatives of different nations who must jointly choose the fundamental principles for judging conflicting claims between states. He emphasizes an important difference from the original position of domestic society: the parties will not represent individuals, but rather peoples. As in the official original position, the parties will be under a veil of ignorance, so that although they know they represent different nations, they know nothing about the particular circumstances of their own society, its power and strength compared to other nations, thus negating the contingencies and biases of historical destiny. The principle governing interstate relations, according to the American philosopher, would be that of equality, granting them the right to collective self-determination and self-defense. In his works from 1993 and 1999b, Rawls maintains this idea, facing a series of criticisms from cosmopolitans.

values, and; (ii) it is presumed that people possess the necessary capacity to understand and act according to the principles agreed upon in the original position.

Rawls (1999a) presupposes that the parties, despite not knowing their conceptions of the good, are rational. This means that the parties know they have some rational life plan, however, they do not know the details of this plan, nor the particular ends and interests they seek to promote. Under the veil of ignorance, the parties have no way of knowing how the various alternatives available in the original position will affect the particular cases of their clients and, therefore, must evaluate the principles only on the basis of general considerations. It is highlighted that, in §64 of TJ, Rawls (1999a) states that since the parties would be deliberating rationally, a certain competence would be presupposed, namely, that the parties would know the general characteristics of their desires, as well as the ability to estimate their relative intensity. However, the parties in the original position will have a strictly deductive reasoning of the assumptions about their beliefs and interests, as well as about their situations and the options offered (TJ, §20). Thus, the best that each party could do for its "representative" relates only to a condition of least injustice and not of greatest good. With the veil of ignorance, the alternatives open to the parties, as well as knowledge of their circumstances, are limited in various ways, representing the restriction of justice over good.

The original position conveys the idea that principles of justice are agreed upon in an initial just situation, i.e. the principles of justice as fairness are the principles that free and rational people, interested in promoting their own interests, would accept in an initial position of equality as defining the fundamental terms of their association. Rawls (1999a) states that the original position is justified as an experiment in rational choice theory[5], according to which, since the veil of ignorance discards knowledge of the parties' inclinations in the original position, it causes the parties to not know whether or not they have an unusual aversion to risk-taking and, therefore, the choice of a conception of justice will depend only on a rational assessment of risk-taking that is not affected by the parties' peculiar individual risk-taking preferences.

In addition to the parties being equal and rational, it is noteworthy that there is, at the same time, a postulate of mutual disinterestedness in the original position, i.e. they have no interest in the objectives and desires of the other parties. They are not willing to sacrifice their objectives in order to harm the others[6]. Rawls (1999a) argues that since the parties are rational, they do

[5] In his works after 1971, Rawls will abandon this interpretation of the original position (cf.: PL, cf. II).

[6] The fact that the parties in the original position are characterized as mutually disinterested does not imply that people in ordinary life are disinterested in each other. According to Rawls (1999a), the two principles of justice and the principles of obligation and natural duty require people to consider the rights and claims of others, thus the

not suffer from envy and, therefore, would not be willing to accept a loss for their clients even if this implied a greater loss for the other parties. “[...] To accept less than equal to harm others would be irrationality [...]” (Volpato Dutra, 2014, p. 127). The parties will also be capable of a sense of justice, and this fact is public knowledge among them, ensuring that the chosen principles will be respected.

Rawls (1999a) states that the original position should not be thought of as a general assembly; Or, much less, as an assembly that would define how all people could live at some point. It is also not a meeting of all real or potential stakeholders. The original position must be interpreted so that its perspective can be adopted at any time, ensuring that the restrictions are always the same and the same principles are always reached. The American philosopher states that the original position is not conceived as a real historical state of affairs, nor as a primitive condition of culture. It should be understood as a purely hypothetical situation characterized in such a way as to lead to a certain conception of justice. Besides being a purely hypothetical situation, the original position does not aim to explain human conduct, except insofar as it attempts to account for the moral judgments of human beings and the existence of a sense of justice. In this way, justice as fairness would be a theory of moral sentiments that manifests itself from judgments weighed in reflective equilibrium. According to the author, these feelings presumably affect people's thinking and actions to a certain extent, and although the conception of the original position is part of conduct theory, it does not follow at all that there are real situations that resemble it.

It is highlighted that, based on reflective equilibrium in Rawlsian thought, one could explain the original position experiment, which would be seen as a mechanism responsible for analyzing whether the chosen principles correspond to people's convictions of justice, or whether the principles expressed by the original position could, at least, be accommodated with people's firmer convictions and provide moral guidance when necessary. This process is called reflective equilibrium because it will ensure that principles and judgments coincide (equilibrium), and because principles and judgments will conform to the derived premises (reflective). This equilibrium, according to Rawls (1999a), is not necessarily stable; it can be disturbed by a more in-depth examination of the conditions that must be imposed on the contractual situation and the particular cases that lead people to reconsider their positions.

sense of justice is a normally effective desire to comply with these constraints. Furthermore, the author emphasizes that assuming the mutual disinterestedness of the parties does not preclude a reasonable interpretation of the benevolence and love of humanity within the framework of justice as fairness.

As it turned out, for Rawls (1999a, §46, p. 266), “each person is to have an equal right to the widest possible total system of equal basic liberties, compatible with a similar system of liberty for all.” This is the ultimate affirmation in TJ of the first principle of justice, P1, and it would be reached through agreement between the parties in the original position. The underlying idea in Rawlsian thought is that the parties, in the original position, would accept a principle of equal liberty, even without knowledge of the more particular ends (of their clients), because they would agree to conform conceptions of the good to the demands of the principles of justice, or at least not to push for claims that directly violate the principles.

Rawls (1999a) states that from the first principle of justice as fairness, there would be a list of equal basic liberties that would need to be ensured in a well-ordered society. Before delving into the list, it's important to highlight that, for Rawls, a well-ordered society is “[...] one structured to promote the good of its members and effectively regulated by a common conception of justice. Thus, it is a society in which everyone accepts and knows that others accept the same principles of justice, and whose basic social institutions satisfy these principles, this fact being publicly recognized [...]” (TJ, §69, p. 504). For the author, the theory of justice as fairness is structured to be in accordance with this idea of society. Furthermore, a well-ordered society is regulated by its public conception of justice, implying that its members have a strong and usually effective desire to act in accordance with the principles of justice. This leads to a conception of justice that is (probably) stable (since it must endure over time), and thus, when institutions are just, the individuals who participate in these organizations acquire a corresponding sense of justice and a desire to do their part to ensure that this structure is maintained.

At this point it is worth highlighting that, between TJ and the works of the later Rawls, the author modifies his idea of a well-ordered society, even stating that the idea imagined in TJ was unrealistic, since the idea of stability would imply a society in which all people (or the majority of them) would need to accept the same conception of the good – of a comprehensive and reasonable doctrine[7]. The author states that, given the free institutions that this very conception recommends, it cannot be assumed that citizens, in general, accept the same particular comprehensive doctrine. Thus, for the later Rawls, the political conception can simply be a part or addendum of the partially comprehensive doctrine, or it can be adopted because it is

[7] Cf.: PL (introduction).

deducible from a perfectly comprehensive and structured doctrine. But people do not need to accept the same conception of the good.

In view of this, it will be up to citizens, individually, to decide for themselves how their common political conception connects to their broader and more comprehensive beliefs. Therefore, a society will be well-ordered by the theory of justice as fairness if (i) citizens who uphold reasonable comprehensive doctrines accept that the theory of justice as fairness provides the content for their political judgments and that (ii) unreasonable comprehensive doctrines cannot obtain sufficient authority to compromise the essential justice of basic institutions. In this way, the author corrects the opinions expressed in TJ, which, according to him, had failed to take into account the conception of pluralism to which its own principles lead, now considered an independent political conception that articulates fundamental political and constitutional values, and accepting it implies much less than what is contained in a comprehensive doctrine.

That being said, the list of equal basic liberties would be expressed as follows: political liberty (the right to vote and hold public office) and liberty of speech and assembly; liberty of conscience and liberty of thought; personal liberty; the right to own personal property and liberty from arbitrary arrest and seizure, as defined by the concept of the rule of law. These liberties must be equally distributed through the first principle of justice and must be incorporated and protected by the constitution. It should be emphasized that in the constitutional convention the objective of the parties (i.e. the constituents who are already under a more opaque, yet still present, veil of ignorance) is to find among the just constitutions (those that satisfy the principle of equal liberty, commonly known as P1) the one that will be most likely to organize a society under just and effective legislation, considering the general facts about the society in question[8].

Rawls (1999a) states that the liberties expressed by P1 have a central scope within which they can only be limited and compromised when they conflict with other basic liberty s. And, since they can be limited, none of them are absolute. Thus, it is possible for an institution or law to restrict or regulate a liberty. The American philosopher cites, as an example, the fact that certain rules are necessary to regulate a debate, because without the acceptance of reasonable procedures for investigation and debate, liberty of expression loses its value. The idea is that

[8] At this point, it should be noted that Rawls (1999a) states that the application of principles occurs in a sequence of four stages, namely, it begins with the original position, moves on to the constituent process, as well as legislative choice and the ordinary administration of societies. The author argues that in the contractualist doctrine – the doctrine to which justice as fairness, with its particularities, belongs – the principles of justice have already been agreed upon and the problem, therefore, is to formulate a scheme that helps in the application of these principles.

the best arrangement of the various liberties depends on the totality of the limitations to which they are subject. Rawls (1999a) states that although equal liberties can be restricted, the limits are subject to certain criteria expressed by the meaning of equal liberty and the serial ordering of the principles of justice, so that the restrictions contained in the principle of justice guarantee all people equal liberty and ensure that their claims will not be neglected or annulled in favor of a greater sum of benefits (even for the whole society).

It is an assumption of Rawlsian theory that in a well-ordered society there is a variety of communities and associations, and that the members of each of them have their own ideals adequately adjusted to their aspirations and talents. According to Rawls (1999a, §82), it is only when social conditions do not allow the full establishment of the rights of liberty that their restriction can be recognized. The American philosopher states that the effective realization of all liberties, in a well-ordered society, is the long-term tendency of the two principles and rules of priority when they are consistently followed under reasonably favorable conditions. At this point it is worth highlighting that in §39 of TJ Rawls, he states the priority rule of the first principle as follows:

> PRIORITY RULE
>
> The principles of justice must be ranked in lexical order, and therefore liberty can only be restricted in the name of liberty. There are two cases: (a) a less broad liberty must strengthen the total system of liberty shared by all, and (b) a less than equal liberty must be acceptable to citizens with less liberty (Rawls, 1999a, §39, p. 220).

The principle of priority affirms the idea that possible restrictions on liberties do not occur in the name of, for example, a greater sum of societal happiness, but rather aiming at strengthening liberty itself. According to Rawls (1999a), since the principles are organized serially (or lexically), no exchanges are allowed between basic liberties and economic and social gains, except under extenuating circumstances. Thus, liberty in Rawlsian thought can be limited if this is somehow the only way to avoid even greater injustice; however, this restriction only occurs when it can – with it – prevent an even greater loss of liberty . Liberty cannot be restricted through appeals of a broad moral, religious, or philosophical nature.

According to Rawls (1999a), the fact that the principles of justice apply to institutions means that the basic rights and liberties referred to by these principles are those defined by the public rules of the basic structure. Thus, whether people are free (or not) is determined by the rights and duties established by the main institutions of society. Liberty is a certain pattern of social forms. That being said, the first principle requires only that certain types of rules, such as those that define basic liberties, apply to all people equally and allow the broadest liberty compatible with similar liberty for all other people.

Here, it becomes evident that, for the American philosopher, P1 can be read as a principle of equal political participation, about which three aspects need to be analyzed: (i) its meaning; (ii) its extent; and (iii) the measures that guarantee its equitable value. In view of this, based on the meaning of the principle of equal political liberty, the precept of "one voter, one vote," when strictly respected, implies that each vote has the same weight in determining the outcome of elections, requiring that the members of the legislature (with one vote each) represent the same number of voters[9]. Thus, legislative districts must be drawn up under the guidance of certain general rules (which were previously specified in the Constitution) and applied, as far as possible, through an impartial procedure. Furthermore, all citizens must have equal access, at least in a formal sense, to public office; thus, every person is eligible to join political parties, to run for elective office, and to hold positions of authority. Of course, there may be certain disqualifying qualifications, such as age, residence, and so on, but these must be reasonably related to the tasks of the office and the common interest and cannot unfairly discriminate against individuals or groups. The restrictions, therefore, should fall uniformly on everyone in the normal course of human life.

With regard to the extent of equal political participation, Rawls (1999a) maintains that the main variation in the extent of equal political liberty lies in the degree to which the constitution is majoritarian.

Thus, majority rule is employed for all significant political decisions without constitutional restriction, since the constitution itself must take steps to reinforce the fair value of the equal political liberties for all members of society; that is, it must guarantee a fair opportunity to participate in and to influence the political process. Ideally, all persons have the same opportunity to attain positions of political authority, regardless of the economic and social classes to which they belong. According to Rawls, although at the stage of the constitutional convention the parties are committed to the principles of justice, they must nevertheless make certain concessions to one another in order to establish a workable constitutional regime.

According to Rawls (1999a), a constitution can be described as just when it establishes fair conditions of political rivalry for public offices and positions of authority, such that, in

[9] It is important to highlight that, for Rawls (1999a), all adults have the right to participate in political affairs, regarding which the principle of "one voter, one vote" should be honored as far as possible (this principle is also adopted by Cage (2020) and Piketty (2019), for example). Elections, then, are seen as fair and free, and are held regularly, with constitutional protections for political liberties, such as freedom of speech and assembly, and the liberty to form political associations. It is noteworthy that the principle of equal political participation, according to Rawls (1999a), applies to institutions and, therefore, does not define an ideal of citizenship, nor does it establish a duty requiring everyone to actively participate in political discussions. The author acknowledges that even in a well-governed state, only a small fraction of people will want to engage in politics.

presenting conceptions of the public good and policies aimed at advancing social ends, competing parties seek the support of citizens in accordance with fair procedural rules, within a background of freedom of thought and freedom of assembly in which the fair value of the political liberties is secured. It should be recalled that the constitution is regarded as a fair, though imperfect, procedure, belonging to the framework of imperfect procedural justice. Although it may lead to just outcomes, it does not guarantee them by means of a perfectly just procedure. This is because, according to Rawls (1999a), there is no feasible political process capable of ensuring that the laws enacted in accordance with it will be just, since perfect procedural justice cannot be achieved in political matters. Thus, although it is justified that the majority, under certain conditions, has the constitutional authority to enact laws, this does not imply that the laws enacted will necessarily be just.

Accordingly, even under the best conditions, the parties' judgments about justice are subject to disagreement and conflict; therefore, in choosing a constitution, they must adopt some form of majority rule, since they accept the risk of being subject to one another's limitations in knowledge and sense of justice in order to secure the advantages of an effective legislative process. Majority rule is thus adopted, according to Rawls (1999a), as the appropriate decision rule for political processes, since there is no other practicable way to govern a democratic regime. For Rawls, majority rule is a procedural device that serves to achieve political agreement, as it represents the best available means of ensuring legislation that is just, effective, and consistent with equal political liberty, insofar as all citizens have the right to vote and each vote has equal weight. Under majority rule, no individual or group holds arbitrary political power capable of undermining the equal political liberties of others.

A fundamental role of the majority principle is that it must satisfy the conditions of fundamental justice, i.e., the conditions necessary to guarantee political liberty – liberty of expression and assembly, liberty to participate in public affairs and to influence the course of legislation through constitutional means – and the guarantee of the equitable value of these liberties. For the author, the majority rule is within the ideal plane of the theory of justice as fairness; it is a procedural mechanism for reaching a certain consensus. Given the pluralism of opinions, the majority rule is seen as a concrete equitable procedure of public political institutions to resolve social and political conflicts. It is true that this is no guarantee of the elaboration of perfectly just legislation and, sometimes, what a political majority chooses is not necessarily justified for the social body as a whole, since a vote is subject to political principles. Thus, an important aspect of democratic theory appears, namely, the question of legitimacy – and its relation to the majority rule (in the next section, Habermas's critique of this point will be seen). Finally, the

equitable value of political liberties is ensured by liberty of expression and assembly, as well as liberty of thought and conscience, which are not only required given P1, but also – and here Rawls follows Mill – are necessary for political affairs to be conducted rationally. The idea is that all people should be able to make use of the public forum (which should be open to all). They should also have the means to be informed about political issues, being able to assess how proposals affect their well-being and which policies advance their conception of the public good. They are given an equitable opportunity to add alternative proposals to the agenda for political discussion. Thus, it is not only up to citizens to discuss laws and the terms of their associations. Participants in a society are also open to proposing laws and the terms of social cooperation – they are recipients, but also co-authors of law (as Habermas states).

Rawls (1999a) states that the value of equal participation liberty is diminished, however, whenever those with greater private means can use their advantages to control the course of public debate, since income and wealth inequalities allow the better-off to exert greater influence over the development of legislation, over which they are likely to enjoy a preponderant weight (which will be superior to the wishes of those less favored) in resolving social issues, especially in matters related to maintaining – or not – the political and social system with inequalities, making it necessary to institute compensatory measures so that the equitable value of political participation can be preserved.

According to Rawls (1999a), a variety of devices can be used to ensure the effectiveness of P1. For example, in a society that allows private ownership of the means of production, *property* and *wealth* should be widely distributed, and the government should regularly provide money to encourage free public discussion. Political parties need to become independent of private economic interests so that their tax revenues are sufficient for them to fulfill their roles in the constitutional scheme, becoming autonomous from private demands. It should be emphasized that Rawls (1999a) states that political parties in society are not merely interest groups that demand government in their own name. According to the author, to gain sufficient support, as well as to win office, political parties must advance some conception of the public good.

It is noteworthy that, according to Rawls (1999a), in order to guarantee the equitable value of the basic liberties of each citizen in a well-ordered society, election financing must be public, with restrictions on campaign contributions; and more equitable access to public media must be guaranteed, based on certain regulations on liberty of expression and of the press (but without restrictions affecting speech). Rawls also states that (i) each person is assured, as a citizen, fair and approximately equal access to the use of public resources designed to serve a

defined political purpose, i.e., the public resource specified by the constitutional rules and procedures governing the political process and controlling access to positions of political authority, aiming to produce just legislation, on which the claims of citizens are kept within certain standard limits, through the idea of equitable and equal access to the political process as a public resource; (ii) Public resources have limited scope and lack a guarantee of equitable equality of political liberties, since those with greater means can group together and exclude those with fewer. The difference principle is insufficient to prevent this problem, as the limited scope of the public political forum means that the utility of political liberties is much more subject to the social position and economic means of citizens than to the utility of other fundamental liberties. This is why the theory of justice as fairness includes the equitable value of political liberties.

It is worth emphasizing that, although Rawls (1999a) acknowledges that poverty and ignorance, for example, can become obstacles to people enjoying equal liberty, rights, and opportunities arising from the first principle, the author argues that the problem is that they affect the *value* of liberty (and not liberty itself), i.e., these problems affect the value that individuals place on the rights defined by the first principle, but not the rights themselves.

> [...] Thus, liberty and the value of liberty are differentiated as follows: liberty is represented by the complete system of equal citizenship liberties, while the value of liberty for individuals and groups depends on their ability to promote their ends within the framework that the system defines [...] (Rawls, 1999a, §32, p. 179).

According to Rawlsian thought, therefore, equal liberty is the same for all people, and the question of lesser liberty for one person (or group of people) does not arise. However, the value of liberty will not be the same for all those involved in a system of social cooperation, and some people may have more authority and wealth, as well as better means to achieve their goals. But, according to the differentiation between liberties and their values, the lesser value of liberty is compensated for by the fact that the capacity of less favored people, in the pursuit of their goals, would be even less if they did not accept the existing inequalities whenever the difference principle is satisfied. Rawls (1999a) argues that compensating for the lesser value of liberty should not be confused with compensating for unequal liberty.

Rawls and Habermas: two sides of the same coin?

At this point, we wish to delve into Habermas's critiques of Rawls's thought. Habermas fundamentally presents three criticisms of Rawls's thought, namely, (i) that the design of the original position fails to explain and ensure the point of view of the impartial evaluation of principles of justice understood in a deontological way; (ii) that political liberties in Rawls's

thought play merely an instrumental role; (iii) that Rawls's theory of justice anticipates democratic deliberations by choosing substantive distributive principles, as in the case of the difference principle (i.e. Habermas believes that normative theory should refrain from advancing substantive principles and criteria, thus maintaining only the form of pure procedural justice).

From here on, we will analyze, in more detail, Habermas's first critique regarding the separation of justification from legitimation. Habermas (2018) argues that the parties, in the original position, are incapable (because they possess a rational egoism) of reciprocally assuming the same perspectives that the citizens (whom they represent) subsequently assume in a well-ordered society. According to the German author, it is necessary to attribute cognitive competences that go beyond the capacities with which the parties need to arrange themselves to decide rationally. Habermas (2018) then questions whether the original position would not lose its strategic purpose, since it destroys the division of labor between the subjective rationality of choice and the objective constraints. Rawls would not separate, in a truly rigorous way, the questions of justification from the questions of acceptance. For Habermas, Rawls' theory of justice is 'political' in the sense of being, on the one hand, *freestanding*, that is, not relying on any comprehensive conception of the good, but on a particular ideal of public culture such as that of liberal democracies; On the one hand, it has the capacity to find support for different conceptions of the good through overlapping consensus. The problem for Habermas is that Rawls relied too heavily on the idea of overlapping consensus to justify his conception of justice, thus confusing the question of foundation with the question of acceptance.

It should be noted that, for Habermas (1996), the sense of justice presupposed by Rawls can ground the desire to act justly, but this is not an automatically effective motivation like, for example, the desire to avoid pain. For this reason, according to the German philosopher, Rawls relies on a “restricted theory of the good” to show that just institutions would create circumstances in which each person would have a well-considered interest in pursuing their own freely chosen life plans, under the same conditions. Thus, based on the restricted theory of the good, all people would be allowed to pursue their life plans. In a well-ordered society, it would also always be good for a person to satisfy the demands of justice. According to Habermas (1996), the self-stabilization of a well-ordered society is based on the socializing force of life under just institutions, since such life simultaneously develops and reinforces citizens' dispositions towards justice. This would be the first level of justification. There would be a second level of justification, where one is not dealing with the problem of applying a theory presupposed as valid.

Habermas (1996) states that, at the second level, the question arises of how the normative concept of a well-ordered society can be situated within the context of an existing political culture and public sphere, in such a way that it will, in fact, find approval from citizens willing to reach an understanding. In this context, Habermas (1996) continues, the concept of reflective equilibrium assumes an ambiguous role, and Rawls himself did not differentiate it sufficiently[10]. Thus, the objective is to explain how and why his theoretical propositions merely articulate the normative substance of the most reliable intuitions of daily political practice, as well as the substance of the best traditions of political culture.

According to Habermas (1996), therefore, by demonstrating that the principles of justice reflect only the most reasonable convictions actually held by the population, the theory of justice must find its "seat" in political life. According to Habermas (1996), the concept of overlapping consensus was also initially afflicted by a similar ambiguity; however, Rawls later had to recognize that he had to more clearly separate the first stage of philosophical justification from the second stage, which concerns the question of the acceptance of principles.

According to Maffettone (2010), Habermas believes that either overlapping consensus has an independent normative force, or it cannot solve this problem. This is because, in the second option (which, according to Habermas, Rawls would be closer to), overlapping consensus would not be a way of establishing the acceptability of the theory, but rather an instrument to control its already achieved acceptance. Maffettone (2010) points out that Rawls attempts to address Habermas's objection to overlapping consensus with a special interest argument, in which he formulates his threefold thesis on justification, separating two different types of consensus and linking the whole to the notion of "liberal legitimacy." Habermas, however, is not convinced and judges that Rawls fails to present the "true" together with the reasonable, where the true, according to the German thinker, would correspond to cognitive validity and

[10] According to Habermas (1996), the term "reflexive equilibrium" designates a method that should already be functioning in the theoretical construction phase, referring to the characteristic procedure of reconstructive theories in general, so that the rational reconstruction procedure assumes a different role in the second stage, where the theory of justice reflexively refers to the context in which it must be inserted. For Rawls (1996, cf. IV), when an overlapping consensus supports the political conception, this conception is not seen as incompatible with basic religious, philosophical, and moral values. Thus, people do not need to consider the claims of political justice against the claims of this or that overarching view; nor do they need to say that political values are intrinsically more important than other values and, therefore, that the latter are prioritized. The American philosopher emphasizes that the overlapping consensus achieves its fulfillment through an agreement between the political conception and global viewpoints, along with the public recognition of the great values of political virtues. In this way, in order to reach a consensus, political philosophy must be, as far as possible, adequately independent of other branches of philosophy.

the reasonable to ethical-political validity. Habermas's idea is that, in Rawls's PL, individual rights would triumph over democratic practice.

Habermas states that the question of legitimacy in Rawls is related to the fact that, contrary to what Rawls desires, justice as fairness is a substantive theory of justice, and not a procedural one. In this critique, made by Habermas in his text "*Reconciliation through the public use of reason: remarks on John Rawls's political liberalism*," is included the idea that the original position served the purpose of presenting beforehand a theory of justice that is 'correct' for the parties, as well as a conception of good assumed by justice as fairness. In an attempt to respond to this objection, Rawls, in his text "*Reply to Habermas*," first presents the distinction between procedural justice and substantive justice, and subsequently argues that there is not such a great differentiation between the terms – and that Habermas's critique does not substantially affect his theory. That said, for Rawls, the distinction between substantive and procedural justice concerns the distinction between, respectively, the justice (or fairness) of a procedure and the justice (or fairness) of its result.

According to Rawls (1996, cf. IX), both types of justice exemplify certain values, procedural and consequential, and both values affirm that the justice of a procedure always depends either on the justice of the probable outcome or on substantive justice. Thus, for the author, substantive justice and procedural justice are connected and not separate. They allow equitable procedures to have intrinsic values, such as, for example, a procedure that has the value of impartiality because it gives everyone an equal opportunity to present their case. Rawls acknowledges that a debate can arise between 'majoritarians' and 'constitutionalists' regarding rights and liberties that are not part of the recognized government procedure. This occurs because these groups differ on the interpretation of the definition of majority rule.

The problem between them is whether the rule provides an equitable procedure and protects other rights and liberties, because for majoritarians the majority rule is just and includes all the rights necessary for just legislation and reasonable outcomes. Constitutional scholars argue that majority rule is unacceptable unless constitutional restrictions on majority legislation and other elements are recognized, as basic and other liberties would not be adequately protected. It can be said, then, that majoritarians believe that constitutional restrictions on majority legislation are unnecessary, while constitutional scholars believe that without these restrictions, liberties and rights will not be guaranteed, and democracy is not secure – and will not be able to reach the necessary consensus.

In *Reply to Habermas*, Rawls states that both majoritarians and constitutional scholars can agree that the debate moves towards the question of whether majority democracy is just in its outcomes, or substantially just. Thus, the former do not say that democracy is purely procedural; the dispute revolves around fundamental questions about how the effects of political institutions work – and not about whether a procedural democracy can truly guarantee the same liberties and rights to everyone equally. Thus, according to Rawls, when seeking to establish political institutions, the aim is to establish them legitimately, and both the political decisions taken and the laws passed through these institutions are also affirmed as legitimate.

Thus, the idea of legitimacy, and not justice, is placed at the center of the democratic discussion. For the American philosopher, thinking that the legitimate and the just are the same thing leads people to make mistakes; however, a little reflection can show the differences between just and legitimate. Therefore, according to the author, for example, legitimate laws can be approved by solid majorities, yet many may protest and judge them, correctly, as unjust – or in some way erroneous. In this way, legitimacy is seen, in Rawlsian thought, as a weaker idea than justice. Thus, it also imposes weaker restrictions than the idea of justice. This occurs, according to Rawls (1996, cf. IX), because legitimacy is a constitutional idea; however, there is an essential connection with justice, since democratic decisions and laws are legitimate not because they are just, but because they were legitimately approved, according to a legitimately accepted democratic procedure. Thus, it is important that the constitution, which specifies the procedure, be sufficiently fair, within the possible limits.

According to Rawls (1996, cf. IX), the idea of legitimacy is related to the idea of justice. The special role of legitimacy in democratic institutions is noteworthy, as it is responsible for authorizing an appropriate procedure for making decisions when conflicts and disagreements in political life arise and it is impossible to reach unanimity – for example, the use of majority rule. Therefore, according to the author, there are many different forms of procedures, with different pluralities, that generate legitimate decisions, depending on the case. A legitimate procedure is one that all those involved can reasonably accept, as free and equal persons, when they have to make collective decisions and there is a lack of consensus (this justifies, for example, the majority rule in the legislative stage).

At this point, it should be emphasized that Rawls (1996, conf. IX) states that one cannot present a true political theory, because if that were the case, the fact of pluralism would not be taken into account. Rawls (1996, conf. IX) believes that, by associating public justification with the ideas of a reasonable overlapping consensus, stability for the right reasons, and legitimacy, he

manages to answer the Habermasian question. For the American philosopher, "public justification occurs when all reasonable members of the political society carry out a justification of the shared political conception, incorporating it into their various reasonable and comprehensive points of view" (Rawls, Conf. IX, §2, p. 387). Through overlapping consensus, it is up to each person individually or in association with others to say how claims to political justice should be ordered, or weighed, in relation to non-political values. In this case, Rawls (1996, cf. IX) states that the political conception does not provide any guidance on such matters, since it is not its role to dictate how non-political values should be ordered. This guidance belongs to the comprehensive doctrines of citizens.

According to Rawls (1996, cf. IX), through public reason, the justification of a political conception takes into account only political values, and when properly delineated, it is complete. This means that its specified political values can be adequately ordered, or balanced, so that these values, by themselves, provide a reasonable answer to all, or almost all, questions relating to constitutional essentials and basic justice. It is worth highlighting here that in *The Idea of Public Reason Revisited*, Rawls (1996b) states that the idea of public reason belongs to a conception of a well-ordered constitutional democratic society. According to Rawls (1996b), the idea of public reason has five different aspects: (1) the fundamental political questions to which it applies; (2) the people to whom it applies (government officials and candidates for public office); (3) its content as given by a family of reasonable political conceptions of justice; (4) the application of these concepts in discussions of coercive norms to be enacted in the form of legitimate law for a democratic people; and (5) the verification by citizens that the principles derived from their conceptions of justice satisfy the criterion of reciprocity.

> Furthermore, such reason is public in three ways: as the reason of free and equal citizens, it is the reason of the public; its subject matter is the public good with respect to questions of fundamental political justice, which questions are of two kinds, essential constitutional elements and questions of basic justice; and its nature and content are public, being expressed in public reasoning by a family of reasonable conceptions of political justice – reason reasonably conceived to satisfy the criterion of reciprocity (Rawls, 1996b, p. 442).

It is noteworthy that public reason is restricted to constitutional essentials and questions of basic justice. With this, Rawls, for example, removes discussions about taxation and taxes from discussions of public reason, as well as the functioning of his difference principle, since it is very difficult to reach an overlapping consensus on economic principles. For Rawls (1996, cf. VI, §5, p. 230)

> [...] there are four reasons to distinguish the constitutional essentials specified by fundamental liberties from the principles governing social and economic inequalities. A) The two types of principles specify different roles for the basic structure. B) It is

> more urgent to resolve the essential aspects relating to fundamental liberties. C) It is much easier to say whether these essential elements have actually been realized. D) It is much easier to reach an agreement on what fundamental rights and liberties should be, not in all the details, obviously, but on the broad outlines.

Thus, according to Rawls (1996, cf. VI; 2001, chap. 4), while liberty of movement, free choice of profession, and a social minimum that covers the basic needs of citizens count as essential constitutional elements, the principle of fair equality of opportunity and the difference principle do not. The content of public reason, according to Rawls (1996, cf. VI), specifies certain basic rights, liberties, and opportunities; assigns special priority to these rights, liberties, and opportunities, especially with regard to claims of the common good and perfectionist values; and affirms measures that ensure all citizens have adequate means to make effective use of their basic liberties and opportunities. Rawls (1996, cf. VI) states that an ideal of public reason is a suitable complement to a constitutional democracy, whose culture is marked by a plurality of reasonable comprehensive doctrines. And "[...] the content of public reason is not given by political morality as such, but only by a political conception appropriate to a constitutional regime [...]" (Rawls, 1996, cf. VI, §8, p. 254).

Thus, public reason only enters into discussions within the public political forum, which can be divided into three parts: the discourse of judges in their decisions, especially those of a supreme court; the discourse of government officials, particularly chief executives and legislators; and finally, the discourse of candidates for public office and their campaign managers, mainly in their public speeches, party platforms, and political statements. Rawls (1996b) emphasizes that the idea of public reason does not apply to background culture, with its many forms of non-public reason, nor to the media of any kind. The idea of public reason arises from a conception of democratic citizenship in a constitutional democracy, and its content is given by the principles and values of the family of liberal political conceptions of justice. The author states that engaging in public reason means appealing to one of these political conceptions – to its ideals and principles, norms and values – when discussing fundamental political issues.

As verified, political values are not moral doctrines. They are specified by liberal political conceptions of justice and fall into the category of political. According to Rawls (1996b), these political conceptions have three characteristics, namely, (i) their principles apply to basic political and social institutions (the basic structure of society); (ii) they can be presented independently of overarching doctrines of any kind; and (iii) they can be worked from fundamental ideas seen as implicit in the public political culture of a constitutional regime (such as the conceptions of citizens as free and equal persons; and of society as an equitable system of cooperation). It is noteworthy that, for Rawls (1996b), a value is properly political only when

the social form itself is political, that is, when it is realized in parts of the basic structure and its political and social institutions.

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