

Justice and human rights: the possibilities of a reflection sustained on Rawls' ideas

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Abstract: This paper provides a reflection on human rights in the light of John Rawls' ideas on justice. In fact, to speak about human rights inevitably refers to a notion of justice that underlies it. And to speak about justice, inevitably, takes us to Rawls, who shook the philosophical environment in 1971 with his already famous work: A theory of justice. The objective of this paper is to rescue contributions from this author to develop a reading on human rights; especially with regard to the principles of justice as equity and with the possibilities of creating a subject of rights under cover of the moral personality of the human being.

Key words: justice, human rights, justice as equity, subject of rights

Resumen: El presente artículo brinda una reflexión sobre los derechos humanos a la luz del pensamiento de John Rawls y sus planteamientos en torno a la justicia. En efecto, hablar de derechos humanos es hacer referencia indiscutiblemente a una noción de justicia que les subyace. Y hablar de justicia nos remite, indefectiblemente, a Rawls, quien en 1971 estremece el ambiente filosófico con su ya famosa Teoría de la justicia. De ella se intenta rescatar aportes para una lectura de los derechos humanos, especialmente en relación con los principios de una justicia como equidad y con las posibilidades de configurar un sujeto de derechos al amparo de la consideración de la personalidad moral del ser humano.

Palabras clave: justicia, derechos humanos, justicia como equidad, sujeto de derechos.

Preliminary elements

A first approach to Rawls' perspective on justice from a human rights perspective refers at first to a general description; one that has to cover this relationship. One of the most original and strong aspects on Rawls' ideas, and one which justifies reading them, is that he validates again the presence of topics such as just society in the philosophical and public debate; he does this afar from a utopian look or as a part of a discourse with good intentions.

A second encounter point appears spontaneously: the great inequalities (social, economic, political, cultural, etc.), both at world level and at the interior of the countries which are a reality that cannot be disregarded. As a third element, we see that Rawls is against the legitimization of acts of injustice and inequalities that can have its origin in genetical or historical differences; he does this based on the assumption that no person deserves to be poor or miserable on account of these factors. On the contrary, he will assert, inequalities would have to be subject of justification only in a rational and public context.

These three briefly mentioned aspects already make us think that, given the significance of his statements and what they mean for life in society, Rawls' voice is interesting and deserves to be listened to at the moment of reflecting on human rights.

In fact, at the beginning of the *A theory of justice*,¹ the author makes a consistent statement when asserting that:

Each person possesses an inviolability based on justice that cannot even be violated by the well-being of the society as a whole. That is why justice denies the adequacy of someone's loss of freedom on account of a higher good to be shared by the rest. It does not promote the overestimation of the sacrifices imposed on some in favor of the higher number of advantages for others. Hence, in a just society, the freedoms of equality in terms of citizenry are taken as established in a definitive way; the rights assured by justice are neither subject to political bargains nor to the calculations of social interests (Rawls, 1978: 19-20).

Later on, as if he was restating his declaration, he adds that "these propositions seem to express our intuitive conviction on the primacy of justice" (Rawls, 1978: 20). This paragraph seems to summarize in an evident way vital elements in the reflection on human rights, such as: the inviolability of the human person, the primacy of freedom over any subsequent benefit, the rejection to the sacrifice of certain groups in favor of a majority and the nontransferable nature of the rights of the persons which are already assured by justice; by mentioning some.

¹ A work that appeared in 1971.

From this perspective, already at the beginning of *Political liberalism*,² Rawls takes on again his reflection and focuses the question on a conception of justice that enables cooperation between citizens, considering them free and equal, despite their differences in religious, philosophical and moral terms. In fact, the author admits that “the intractable struggles, political liberalism assumes, are confessedly for the sake of the highest things: for religion, for philosophical views of the world, and for different moral conceptions of the good. We should find it remarkable that, so deeply opposed in these ways, just cooperation between free and equal citizens is possible at all” (Rawls, 2005: 4).

The topic (shall I say problem?) of justice will then be a field of permanent reflection for philosophy and especially for human rights. Beyond that, certainly, it has to be a concern for any current democratic society.

Under these starting ideas, the following lines aim at developing a reflection on justice and human rights that will attempt to respond to the question on the possibilities of a reading such as that proposed here, that is, one on human rights in the light of the author's ideas about justice. In second place, assuming such starting question also supposes to develop the configuration of justice which the author elaborates on the topic in order to perform an analysis on its possibilities and limitations so that the aimed task can be carried out.

In conjunction with this, and although the guiding questions of this text have already been presented in a specific order, there seems to be a problem of precedence to answer them. In order to tackle the first question, we have to previously tackle the second. That is, we have to firstly define Rawls' notion of justice, in order to later on wage its possibilities of being a conceptualization that can be shared in the context of a democratic liberal society as a foundation for a reading on human rights.

What's Rawls' notion of justice?

It will be necessary to first understand the emergence of Rawls' ideas on justice in view of his antecedents. In fact, the author's perspective starts with a questioning on the Utilitarian vision of the society. Why is it so? Because, when accepting that in daily life human beings tend to maximize the profit of their actions and decisions according to the estimation of interests, what is good or what is just ends up being identified with the profit or well-being for the most of people; according to the individual desires or needs. If one takes on the profitability principle to justify the behaviors, in the limit, one could even reach the sacrifice of certain groups of individuals if that enabled the maximization of the global good or what ought be

² A work that appeared in 1996.

understood as good in a specific moment. What is just ends up being endorsed with that which is efficient to achieve the well-being or general profit; an efficacy and efficiency that do not allow moral qualification. Its success is a technical, neutral, instrumental success with regard to life and persons.

In view of the limitations of the Utilitarian stance to provide foundations and sustain a social and political coexistence which relates freedom and equality, as well as the need to found again the inherited notion of social contract, Rawls' work attempts to answer questions on how to reconcile concepts such as plurality, autonomy and social cooperation, or how to organize the social coexistence when there is a great diversity of moral and/or religious convictions.

In an attempt to respond to this, the first thing that comes up is the distinction that the author sets between two aspects: the one regarding what is good, and that of justice. As a liberal, he will sustain the priority of the just over the good, arguing that "this is a problem of political justice; and not a problem about the highest good" (Rawls, 1978: 20).

A second outstanding element is the redefinition of social contract by means of the proposition of certain principles of justice that, in order to be validated, have to be set beyond empirical evidence or beyond a specific cultural context. Such principles would have an *a priori* value and establish the idea of justice as equity (impartiality) inasmuch as they are the basis for a well ordered society. Rawls' thesis is that the society is based on an original agreement between free and rational persons, who are motivated to promote their own interests in such a way that, given the circumstance of initial equality – the so called "original position",³ they will choose certain principles, being this choice an essential point in his theory, since what is central in it is the respect to the rules of the democratic procedure.

The stress on the democratic dimension of his proposal is clear from the beginning, since, from his perspective, "from the traditional points of view, it is this conception the one which best approaches to our meditated judgments on justice and constitutes the most adequate moral base for a democratic society" (Rawls, 1978: 10).

The principles of a theory of justice and the generations of rights

As mentioned above, Rawls wants to start with certain principles of justice with an *a priori value*, as a basis for a new modern social contract. The idea is to establish a set of axioms that help to judge the social order and its most significant institutions (Constitution, political order, and economic order).

³ This concept will be taken again by the end of the text.

However, when speaking about a theory of justice, he does not argue that he wants to respond to the set of problems of justice or inequalities that there can be in any given society. It is not, by the way, an omnicomprehensive theory. In fact, when Rawls speaks of justice and its essential features according to a well ordered society, he always makes reference to justice in the public sphere, that is, to political justice.

From that, and continuing in the attempt to make a reading on human rights, in the light of the theory of justice, the principles of Rawls' theory appear as the first elements helpful to answer to it. In fact, it is possible to create an analogy between these principles and what is known as generations of human rights, whose development is the following:

- First generation: civil and political human rights, which are directed to care for life and freedom of the people in society, as well as to watch after the minimal guarantees for their political expression. It covers rights such as: life, association, freedom of expression, vote, and nomination to public posts, among others.
- Second generation: social, economic and cultural human rights, directed to consider certain living conditions according to human dignity which transcend the political sphere, in order to become necessary requirements towards the enjoyment and exercise of the rights from the first generation. Among them we find: not to be discriminated by being male or female, due to a certain age or ethnical characteristic, work, fair remuneration, education, etc.
- Third generation of human rights: the so called collective rights. Unlike the two previous groups, these do not have individuals as holders; they respond to collective guarantees regarding certain conditions that allow the enforcement of the first and second generation of rights. Among them we find: the right to peace, progress, and a clean environment.

Thus, with regard to the first principle of the theory of justice, it states the following: "Each person will have an equal right to the broadest schema of basic equal freedoms which is compatible with a similar schema of freedoms for the others" (Rawls, 1978: 82).

The second principle states that:

The social and economic inequalities have to be adjusted in such manner that:

- a) It is reasonably expected that they will be favorable for everyone (principle of difference).
- b) Available employments and job positions for everyone are linked (Rawls, 1978: 82).

The formulation of the first part of the second principle, with regard to the reasonable expectation of advantages for everyone, is similar to a principle of difference, considering the inequalities that the author recognizes in society.

To this understanding, which could scare those who see in equality a nontransferable principle, by apparently leaving an open door to the legitimization of the social inequalities –an intention which the author does not seem to have; he instead starts with a verification of reality–, adds to the statement developed from the sphere of human rights, on the redefinition of a formal conception of equality which only proposed equality in the eyes of the law, when relating equality with other principles such as no discrimination, and to demonstrate that certain differences between humans do not justify unequal treatment, despite the fact that other differences do become significant and result in a differentiating treatment.

Now then, as previously mentioned, an analogy could be established between the principles that have been indicated and the generations of human rights, so that:

- a) The first principle of the theory of justice would be similar to the first generation of human rights, which points out – as it was mentioned above – towards the consideration of civil and political privileges.
- b) The second principle of the theory of justice would be similar –in its initial enunciation, especially– to the second generation of human rights, called economic, social and cultural, which would be reinforced with the consideration contained in the second principle (called of difference), in the sense that it acknowledges that certain specific groups (ethnic, women, children, women, etc.) are located in conditions of higher inequality with regard to the possibilities of finally exercising and/or enjoying their human rights.

In this case, then, one recognizes that Rawls' principle of considering the social and economic inequalities as the second generation of human rights stresses two specific aspects:

- First, the inescapable acknowledgement of the differences existing between human beings, which have given cause for unequal treatments in terms of distribution of justice and of exercise of rights.
- Second, in the necessary reflection about those situations of inequality as limitations for the full exercise of the rights from the first generation, as well as – we have to mention it – to achieve the real validity of the first principle of the theory of justice.

Hence, in specific terms, where is the problematic knot for an harmonious connection between both principles and its expression by means of the achievement and exercise of rights on the side of the persons? A first answer to this can point out to the fact that the civil rights of the citizens, understood as freedoms and political rights, can receive a precise legal form, that is, they are formal rights,

for instance in the constitutional right. A significant consequence is to see them as “opposed” rights, in the sense that if there is a transgression, it is possible to introduce a complaint against a specific person, an institution (for instance, a school which practices racial segregation) or against the State itself.

What happens in the case of the economic, social and cultural rights or those from the second generation? It seems as if a social right was neither easily transferable in the positive law nor opposed to any of them. Sometimes they are seen as rights of credit kind, in the sense that they relate a citizen demand with a State that has to respond to them, and hopefully guarantee the rights, a situation that does not bring about few obstacles; among them:

- 1) The difficulty involved in an agreement on a definition on a specific social right, in the sense of looking for a correspondence between such definition and its content. A good example of this is found in the case of the right to health: is it the right to make use of all doctors available? Is it the right to have a perfect health? Etc.
- 2) The evidence that it is almost impossible to fully meet all the social rights at all time and place. That occurs even taking into account the responsibility of the States of attempting to do so, at least, but also considering the emergence of events that prevent their achievement: natural phenomena, wars, etc.
- 3) Based on this, the real general difficulties to make the experience of human rights a reality, either from the first or second generation, as well as the impossibility of satisfactorily tackling the latter to guarantee the former, inherent to the citizen condition of the persons.

How to understand, then, the principle of the difference with regard to the achievement of the first principle, especially when it is expected that the conformation of the social and economic inequalities has to be favorable for everyone? And furthermore, how to do it if it has to be “reasonably” favorable? Is it possible to expect a “reasonable” expression of justice starting from a context in which inequalities abound and whose result does not generally show shared advantages?

It is clear that it is not Rawls' intention to deny the profoundly unjust nature of the current distribution of wealth. However, he states his priorities. The author sustains the existence of a third principle, called of lexicographic order, which determines the order of priority in which such principles have to be understood. Thus, he points out that:

These principles will have to be set in a serial order giving priority to the first principle over the second. This order means that the violations of the basic freedoms equally protected by the first principle can neither be justified nor compensated by higher social or economic advantages. These freedoms have a central sphere of application in which they can be subject of limits and compromises only when they are in conflict with other basic freedoms. [...] Finally, with regard to the second principle, the distribution of wealth and income and the access to the authority and responsibility positions, will have to be according, both to the basic freedoms and to the equality of opportunities (Rawls, 1978: 83-84).

If the analogy proposed above was to be kept on the generations of rights and the principles of justice, we would have to say that human rights from the first generation – that is, those referring to the basic civil and political freedoms – have certain preeminence or preponderance over those from the second generation – economic, social and cultural rights. In spite of this, to sustain that seems more a silly thing to say and does not represent the sense with which the generations of rights have been incorporated to that first group which declared the civil and political rights. Furthermore, to sustain the priority of freedom over the rights supposes an empty conception of it, above all when it faces situations of misery in which out-and-out freedom does not seem to find its exact sense.

Understanding the declarations of human rights as an attempt to defend and favor human fulfillment, both in the individual and the social spheres, human rights are stated as an indivisible whole. That is why one speaks of “generations” and not of “categories” of rights, a term – the latter – which would give room to a hierarchical organization of human rights. In the opposite way, the three groups of rights have the same objective, although they are different with regard to the way in which they are enforced and their practical effectiveness. An instance is that explained in the *International Covenant on Civil and Political Rights* (1966), which stipulates that: “any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”

With regard to the privileges of the second generation, certainly do social rights appear as an extension of the basic individual rights (first generation). Thus, for instance, the right to life cannot be understood only in the sense of maintaining our purely biological existence, it also has to include a level of life that is adequate for human dignity. Based on that, it is that one can state, for instance, that poverty is an offence to human rights. In fact, the *International Covenant on Economic, Social and Cultural Rights* (1966),⁴ state, in its preamble, that “in accordance with the

⁴ Known as Pacto de San José de Costa Rica.

Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and poverty can only be achieved if conditions are created whereby everyone may enjoy their economic, social and cultural rights, as well as their civil and political rights”.

Now well, up to this point, we have referred to the statements that Rawls' tackles mainly in *A theory of justice*. However, the reflection is enriched from a set of new ideas that will be expressed in 1999, by means of the publishing of *The law of peoples*,⁵ a piece of work in which the author will expressly devote some pages to the topic of human rights.

What is tackled there allows taking on again the reflection proposed here, in order to complete it with new elements. That has to be made taking into account, mainly, certain clear emphatic ideas. Among them, the purpose of the work, which provides a context to the ideas contained there: “The law of the people's hopes to say how a world Society of liberal and decent Peoples might be possible” (Rawls, 2002: 6). Immediately after, he acknowledges that such task can be seen as impossible due to the fact that “that utopian elements may be a serious defect in a society's political culture” (Rawls, 2002: 6). In spite of this, his response will be to reaffirm the presence of the idea of a realist utopia. Why does he persist on this? He will respond to this with two assertions with regard to the motivations that will guide the mentioned work, which, by the way, will start to shed light on the reflection about human rights that leads this text. That is:

- a) First, “that the great evils of human history – unjust war and oppression, religious persecution and denial of liberty of conscience, starvation and poverty, not to mention genocide and mass murder – follow from the political injustice and from its cruelties and callousness” (Rawls, 2002: 6).
- b) Second, and with regard to the preceding point, that “once political injustice has been eliminated by following just (or at least decent) social policies and establishing just (or at least decent) basic institutions, these great evils will eventually disappear” (Rawls, 2002: 126).

Both points refer to certain obligations or duties that it is necessary to assume as part of the development of reasonable liberal societies⁶ and of decent hierarchical

⁵ With this concept the author will refer to “an specific political conception of equity and justice that is applied to the principles and norms of the international law and its practice” (Rawls, 2001: 13), given the fact that with this “there is an allusion to the laws that all peoples have in common” (Rawls, 2001: 13). From an etymological perspective, such term finds two sources: first, the notion of *jus gentium*, then, in that of *jus gentium intra* (Rawls, 2001).

⁶ Understood as liberal constitutional regimes.

societies,⁷ as the author calls them.⁸ And this emphasis is not causal. Rawls will clearly express that “In the law of the people’s [...] human rights express a special class of urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide. The violation of this class of rights is equally condemned by both reasonable liberal peoples and decent hierarchical peoples” (Rawls, 2002: 79).

From this, one shall understand the definition that the author states on a specific function of human rights in the context of ‘The law of the people’s, which points out that they “restrict the justifying reasons for war and its conduct and they specify limits to a regime’s internal autonomy” (Rawls, 2002: 79).

By reason of this, it is possible to establish an even more specific relation between human rights and Rawls’ ideas; this in view of visualizing again the relation between the latter and the idea of generation of rights. That occurs, now, from the consideration of the so-called third generation of human rights, which refers to prerogatives which do not have private individuals as holders, but which define a set of conditions that affect humanity as a whole and which are known as collective rights. Among them one finds the right to development, the right to progress and the right to peace.

Certainly does the limitation of a restrictive function for human rights in virtue of problems such as war or the limitation of the internal autonomy of the governments, locates the reflection in the field of the shared demands that have to be guaranteed as a necessary condition for the achievement of human rights; this occurs beyond the efforts of the reasonable or hierarchical decent societies. In this regard, then, human rights become deposits of three specific functions, given that:

- a) “Their fulfillment is a necessary condition for the defense of the political institutions and the legal order of a society” (Rawls, 2001: 94).
- b) “Their fulfillment is enough to exclude the justified intervention of other peoples by means of the diplomatic and economic sanctions” (Rawls, 2001: 94).
- c) “They set a limit to the pluralism of the peoples” (Rawls, 2001: 94).

⁷ The concept “decent” will be understood, following Rawls, as that which describes societies “that are not liberal whose basic institutions fulfill specific conditions of political equity and justice (including the right of the citizens to have an essential role, by means of the groups and associations, in the adoptions of political decisions) and lead their citizens to fulfill a reasonable just right of the society of the peoples” (Rawls, 2001: 13).

⁸ It is worth highlighting that to these two kinds of societies the author will add other three, that is: banned States, States affected by unfavorable conditions and benign absolutisms (p.14). However, with regard to these last three, he does not locate the same demands and tasks with regard to the two referred in the text.

In this direction points out, for instance, the *Declaration on the Right of Peoples to Peace* (1984), which “Solemnly proclaims that the peoples of our planet have a sacred right to peace”; along with pointing out that in order to guarantee such privilege, “the policies of States be [shall be] directed towards the elimination of the threat of war, particularly nuclear war”.

A similar perspective arose, in 1986, in the *Declaration on the Right to Development*, which deals with the dispositions on the “integral development of the human being, economic and social progress and development of all peoples, including those instruments concerning decolonization, the prevention of discrimination, respect for and observance of, human rights and fundamental freedoms, the maintenance of international peace and security and the further promotion of friendly relations and co-operation among States”. This, from the concern on the existence of “serious obstacles to development, as well as to the complete fulfillment of human beings and of peoples”.

Emergence of a subject of rights in Rawls' sense

Now well, how does the subject of human rights is shaped on account of Rawls' ideas? It certainly acquires a specific characterization whose main features are:

- Autonomy: Rawls' work reflect its modern nature in the vision of a subject who – in Kant's path – provides sense to its life from itself, denying a space to anything external that provides that sense. This way, “to act in an autonomous way is to act from principles in which we agree as rational, free and equal beings, and that we have to understand in that way” (Rawls, 1978: 570). As well as this, one shall consider the expression of such autonomy as related to the notion of objectivity, in the sense that such principles are those “that we wish everyone (including ourselves) followed, even if we followed them only to have a common general adequate point of view” (Rawls, 1978: 570-571).⁹
- Freedom and equality: both are inherent to the human person. In fact, this bet of the author in favor of freedom and rationality of human being is the central element of his specific conception of a “moral personality”, which underlies the notion of justice as equity. To say that human beings are free supposes to assume such a condition at three specific levels. First, they have the moral power to embrace a specific notion of good, which, from the political point

⁹ One notes here one more time Kant's mark, especially with regard to the question to which the author invites to ask: What would happen if my maxim became universal law?”. To such question he will answer with the classical statement of the “categorical imperative”, which states: “act in such a way that you can will that your act should be a universal law” (Kant, 1980: 48).

of view, is stated as an option and not as an inevitable task; moreover, given this moral power “to form, revise and rationally pursue a conception of good, their public identity as free persons is not affected by changes follow over time in their determinate conception of it” (Rawls, 2005: 30). Secondly, they conceive themselves as enabled to state certain demands according to their specific conceptions of good, such demands shall respond to a criterion of validity in the sense that said conceptions “fall within the range permitted by the public conception of justice” (Rawls: 2005: 32).

From this perspective, “conceptions of the good and the moral doctrines citizens affirm are compatible with the public conception of justice, these duties and obligations are self-authenticating from a political point of view” (Rawls, 2005: 33). Thirdly, the freedom of human beings is also expressed in their power to be responsible for the objectives that they pursue, especially with regard to the demands that they set, whose weight “is not given by the strength and psychological intensity of their wants and desires” (Rawls, 2005: 34); it instead departs from considering that citizens can “adjust their ends so that those ends can be pursued by the means they can reasonably expect to acquire in return for what they can reasonably expect to contribute” (Rawls, 2005: 34). In this regard the visualization of human beings as morally equal is sustained, inasmuch as they have the power to understand the public conception of justice and to collaborate in it.

This can be seen, also, through the notion of reciprocity, from the perspective that “the political forms requested by the principle of equal freedom are the institutional incarnation of the collective decision of expressing the reciprocal recognition of men as rational, free and equal persons” (Wolf, 1981: 108).

- Its moral nature: in conjunction with this, the author states a moral comprehension of the human beings as free and equal persons, conditions that provide them two specific moral powers; that is:

- i. That they are able to have (and supposedly to acquire) a sense of their good expressed in a rational project of life. That would be the rational dimension of the human being.

The fact of being able to conceive and follow a conception of good life also appears as a typically modern feature. It is the critical and reflexive capacity of evaluating the elements of their own life, the values, what has and does not have sense. Therefore, not only does that imply to choose, but also to follow their own conception of good or that of good life. That means that the values and visions of the world cannot be imposed from outside.

ii. That they are able to have (and supposedly to acquire) a sense of justice, a normally efficient desire of applying and acting according to principles of justice, at least up to a certain minimal degree. This would correspond to the reasonable dimension of human being.

Rawls does not argue here that citizens have the sense of justice as equity, but the general capacity to distinguish between what is just and unjust (that is, to have any sense, for instance, an utilitarian or neoliberal conception in that respect). For the author, this sense of justice is enough to construct an argumentation, a reasoning which will take to the principles of justice as equity.

This minimal capacity of a sense of justice is the one which will take us to the consideration of equal rights for everyone, in the sense of “a radical equity for human beings” (Martínez, 1985: 30). As it is acknowledged, “We all wonder about justice, we are constantly evaluating in an intuitive way. We have a perception of what is just, almost certainly a perception of unfairness, which hurt us and moves us” (Martínez, 1985: 30).

The two moral powers are not an ideal description of the man, but a description of the individuals, probably the more “educated” in modern democracies. It can also be seen as a hypothetical description, which can be debated and contrasted.

The statement of the value of equality is again clear when the author adds that “the power of moral personality is a sufficient condition to have right to an equal justice. It does not require more than the minimum essential. If the moral personality also constitutes a necessary condition is something that I will put aside. I assume that the capacity of a sense of justice is owned by the overwhelming majority of humanity, and, therefore, this question does not state a serious practical problem. The essential thing is that the moral personality shall be enough to turn the individual into a subject of rights” (Rawls, 1978: 558). That occurs, even when recognizing that “it would be a serious mistake to suppose that the sufficient condition is always met. Although power is necessary, it would be an imprudence, in practice, to reduce justice to that base. The risk for just institutions would be too high” (Rawls, 1978: 558).

In this same sense, Rawls will later add that the capacity of moral personality is not essential, given that “when somebody lacks the required potential, either by birth or accident, it is considered as a defect or as a privation” (Rawls, 1978: 559), and it shall be always seen as part of the specific or exceptional cases, given that “there has been neither known a race nor a group of human beings which lack this characteristic. Only disperse individuals lack this capacity, or from its achievement in a minimal degree, and the impossibility of achieving it is the consequence of social unjust or deteriorated circumstances or of accidental contingencies” (Rawls, 1978: 559).

This notion of equality which guarantees similar justice, as well as the rejection to a limitation of liberty by application of the principle of difference, seems to aim at justly enforcing this minimal and inalienable freedom inherent to any human being inasmuch as it is endowed with a moral character, and it does not seem to justify inequalities under its protection. Nevertheless, the higher or lower possession of a sense of justice will mean, consequently, also higher or lower freedoms, but always within a framework of minimal freedoms for everyone. As Rawls well recognizes, “a higher power of a sense of justice, as the one that is shown, for instance, in a higher disposition and easiness in the application of the principles of justice and in the collection of arguments in the specific cases, is a natural power, as any other skill”, and in view of it:

The special benefits that a person receives from its achievement have to be ruled by the principle of the difference. Thus, if someone has, in a preeminent degree, the legal virtues of impartiality and integrity that are necessary in specific situations, he or she can, truly, obtain any benefits inherent to the development of that function. But the application of the principle of equal freedom is not affected by those differences. It is sometimes believed that the essential rights and freedoms shall change according to the capacity, but justice as impartiality denies it: inasmuch as the minimal range of moral personality is reached, a person has the right to all the guarantees of justice” (Rawls, 1978: 559).

Corollary

Certainly, as stated in the starting lines, it is an all fruitful exercise approaching to the statements of a contemporary author such as Rawls. Furthermore, the attempt to find in them new perspectives of reflection about significant topics for life in society, such as human rights, seem to open new paths to continue working in as as single thought and an unavoidable voice if the idea is to speak on justice.

Now well, taking into account this, and in order to finish this text, there arises a question on the possibility to rescue the notion of diversity, which has been considered by human rights throughout its historical development, in view of the consideration of an “original position”,¹⁰ whose objective is “to eliminate

¹⁰ The “original position”, in Rawls words, “is the right initial *status quo* which assures that the essential reached agreements will be impartial” (Rawls, 1978: 35). This way, the agreement in the original position attempts to reproduce the ideal conditions of impartiality in the argumentation. In fact, initially “everyone has the same rights in the procedure to choose principles; each one can make suggestions, submit reasons for its acceptance, etc. The purpose of these conditions is obviously to represent the equality between human beings as moral persons, as creatures that have a conception of what is good for them and who are able to have a sense of justice” (Rawls, 1978: 37).

those principles that would be rational to propose for their acceptance, even when considering the low possibilities of success that they might have, if we knew certain things that are inadmissible from the point of view of justice” (Rawls, 1978: 31); this is an issue that has also been called “a kind of limit situation of hypothetical nature” (Martínez, 1985: 193). To that concept, one shall add that of “veil of ignorance”,¹¹ which points out to covering all previous and particular knowledge of the subjects, both with regard to themselves and the others, in the previously referred position. This last concept has also been called “literary resource aimed at providing origin to a logical aim” (Wolf, 1981: 112). What is that aim?, “it simply is that in our thinking on moral and social issues, we can choose to practice the same abstraction of the specific characteristics that we have learned to use in our mathematical thinking, for instance” (Wolf, 1981: 112).

However, it is worth wondering how it is possible to rationally follow own interests ignoring one's self and the circumstances that constitute a single person. Moreover, how to develop a coexistence with others from whom I ignore also constitutive aspects? How to develop, then, the human diversity, when the veil of ignorance seems to cover a lot? As proviso, Rawls will argue that subjects are aware that they have their own plans of life, and that “their society is subject to the circumstances of justice, with all its implications. It is hence taken for granted, however, that they know the general facts about human society. They understand the political matters and the principles of the economic theory; they know the bases of social organization and the laws of human psychology” (Rawls, 1978: 164).¹² But, is this enough to respond the question on how to organize a society that encloses in itself diversity as an element that one cannot dispense with (and on the contrary, enriches)? In fact, under the veil of ignorance also membership disappears, for instance, a specific genre.

¹¹ From the notion of “original position”, Rawls sustains the need of a veil of ignorance as guarantee for the free and rational election of certain alternatives which are stated to the human beings in the starting position. “It is supposed, then, that the parts do not know certain kinds of specific facts. Above all, nobody knows their place in society, their position or social class; the parts do not know either their luck in terms of distribution of natural talents and capacities, their intelligence and their strength, etc. In the same way, nobody knows its conception of good, neither the details of their rational plan of life” (Rawls, 1978: 163).

¹² On the notion of “veil of ignorance”, there are questions about the epistemological feasibility for its achievement, from the information that one has in the original position. On this, see Robert Wolf (1981).

The author is clear when not justifying discriminations of any kind; it seems as if, in Rawls' context, when among those less favored there are women – for instance, according to the principle of difference – one has to consider his perspectives, but not because being women, but because they belong to the less favored.

Would for instance, the so called actions of positive discrimination¹³ remain in debate in favor of women? taking into account that they would allow women to have an advantageous starting position in comparison to men, with the objective of taking care of their access to benefits that they would probably not achieve without these measures.

Rawls will respond to this by stating a leading principle of the distribution of primary goods, which points out the following: “All primary social goods – freedom, equality of opportunities, rent, wealth and the bases of the mutual respect, have to be distributed in an equal way, unless an unequal distribution of one or all these goods result in benefit of the least advanced” (Rawls, 1978: 341).

For the moment, this can help as satisfactory response. However, it is worth wondering if it will be that way in any order of similar situations. A good example of this is the case of a legislation that benefits working women in terms of motherly rights. An initiative of this kind will undoubtedly be cheered by a part of the population (in general, those affected), but it can be different for employers. Maybe it is not even necessary to imagine a fictitious situation. Reality demonstrates us that women continue being object of discrimination in the labor sphere, when the idea is to meet the current requirements of the legislation. A situation as common as this makes us wonder on the value or feasibility of the veil of ignorance. To which extent is it valid, and successful, to consider that what is favored or not is located in a specific group in a society, at the moment of the distribution, disregarding the specific features that make it as specific human group in a specific time and space?

Rawls will suggest a path to the solution starting with the recognition that:

It seems impossible to avoid certain arbitrariness at the moment of effectively identifying the least favored group. A possibility is choosing a specific social position, let us say that of the non-qualified workers, and then to have as least favored those people who have the approximate income and wealth of those who are in this position, or even less. Another criterion would be in terms of the income and wealth related, without making reference to the social positions. [...] It would seem as if any of these criteria cover the less favored by the different contingencies, providing a base to determine at which level it would be reasonable to set a social minimum from which, along with other measures, the society could proceed to meet the principle

¹³ They will later on be called simply positive actions in favor of women, in the electoral sphere.

of the difference. To some extent, any procedure has necessarily to be made *ad hoc*. Even in that case, we have to right to argue, at a moment or another, practical considerations, given the fact that the capacity of the philosophical arguments, or of any other kind, to set more defined discriminations will deplete sooner or later. I suppose that people who are in an original position understand these matters and, therefore, they will judge the principle of the difference in comparison to other alternatives (Rawls, 1978: 120-121).

Next, as if attempting to state clear the scope of his theory, he will add that:

Justice as impartiality judges then the social system, as much as possible, from the position of equality in the citizenry and from the different levels of income and wealth. However, it can also be sometimes necessary to take into account other stances. If, for instance, there are unequal basic rights founded in fixed natural characteristics, these inequalities will determine significant unequal positions. Since these characteristics cannot be modified, the positions that they define will be starting places in the basic structure. The distinctions based on gender are of this kind, as well as those which depend on race and culture. Thus, if for instance men are favored in the allotment of basic rights, this inequality would be justified by the principle of the difference (in its general interpretation) only if it was in favor of women and acceptable from their point of view. Analogous considerations apply for the justification of the system of castes or in that of ethnical and racial inequalities” (Rawls, 1978: 121).

In view of which the author will end up recognizing that “rarely do these inequalities produce advantages, if they do so any time in favor of the least favored, and hence, in a just society, it will normally be enough with the lower number of significant positions” (Rawls, 1978: 121).

So that we could think that the author would make us return to his idea on equality, from the power of moral personality that it is possible to recognize in most human beings, and which provides them with form as subjects of rights. A matter that is complicated and impossible to respond in these few lines. However, it remains there as part of a reflection on human rights, especially if one aspires, later on, to the transit from that reflection towards the specific life of people. The evolution of human rights and the development of their generations by means of time, go beyond the presence of this debate. In fact, from the first declarations of human rights, one could establish a profile of the subject of human rights that covered little, and which responds to the following features: man, adult, heterosexual, western and owner of a patrimony.

Later formulations of rights collected human diversity, so that they could tell about it, maintaining the aspiration of equality beyond the real differences of the subjects.

Finally, the reflection here exposed cannot leave aside the recognition of two new contributions of Rawls statements, according to certain aspirations that constitute features of human rights. In first place, the notion of universality, given the fact that despite recognizing natural privileges to each individual by the fact of belonging to human species, they also emphasize the idea that “when they are respected by the liberal and hierarchical regimes, they have to be considered as universal human rights in the following sense: they are intrinsic to the right of persons and have a political and moral effect despite not being fulfilled in every place. In other words, their political and moral strength spreads to all societies and obliges all persons, including criminal or banned States (Rawls, 2001: 95).¹⁴

In second place, with regard to that which from the sphere of the human rights is called a culture of them, it is possible to see in Rawls a concern on the need to legitimize the institutions that guarantee the conditions of permanent justice on the side of their citizens, which can even transcend them. In fact, he will argue:

If we grow up within the framework of some social reasonable and just political and social institutions, we will sustain such institutions when we grow older, and they will prevail. In this context, to say that the human nature is good equals to say that the citizens grow under reasonable and just institutions, which meet any of the reasonable political liberal conceptions of justice, they will sustain such institutions and will act so that their social world lasts (Rawls, 2001: 17).

In this sense one understands his statement on the utopian nature – but realist, in his point of view, of his political proposal, from the recognition that:

The political philosophy is a utopia in a realist way when it deploys what we ordinarily think on the limits of the practical political possibility. Our hope in the future of our society lies in the belief that the nature of the social world allows reasonably just constitutional democracies to exist as members of the society of the peoples. In a world like this, liberal and decent peoples would achieve peace and justice inside and outside of their territories (Rawls, 2001: 15).

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¹⁴ As the author well recognizes with regard to this kind of States, they can be considered and sanctioned and, even, intervened.

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