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EXPECTATIONS AS A METRIC OF JUSTICE IN JOHN RAWLS'S THEORY

Las expectativas como métrica de la justicia en la teoría de John Rawls

Erwartungen als Maßstab für Gerechtigkeit in der Theorie von John Rawls

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Abstract

The article deals with the reasons for John Rawls to present his conception of justice, justice as fairness, as pure background procedural justice. This characterization makes justice as fairness a conception of justice whose metric is citizens' expectations regarding certain primary goods (rather than those primary goods themselves). As a conception of procedural justice sensitive only to the expectations of citizens regarding the results of social cooperation, justice as fairness is, with regard to the market and contract law, in an intermediate position between (libertarian) conceptions of justice that make use of a metric of rights and results-based conceptions of justice. The central thesis of the article is that the indifference to the results of cooperation and the consequent procedural character of justice as fairness are to be attributed to the very conditions under which, in Rawls's theory, the principles of justice are chosen – more

precisely, to the fact that this is a choice of principles applicable to the social institutions under which citizens cooperate.

Keywords: *Justice metric; Rawls; Justice as fairness; Markets; Private law.*

Resumen

El artículo trata de las razones por las que John Rawls presenta su concepción de la justicia, la justicia como equidad, como una justicia puramente procedimental. Esta caracterización hace de la justicia como equidad una concepción de la justicia cuya métrica son las expectativas de los ciudadanos en relación con determinados bienes primarios (en lugar de esos bienes primarios en sí). Como concepción de la justicia procedimental que responde únicamente a las expectativas de los ciudadanos respecto a los resultados de la cooperación social, la justicia como equidad se sitúa, respecto al mercado y al derecho contractual, en una posición intermedia entre las concepciones (libertarias) de la justicia que hacen uso de una métrica de derechos y las concepciones de la justicia basadas en resultados. La tesis central del artículo es que la indiferencia hacia los resultados de la cooperación y el consiguiente carácter procedimental de la justicia como equidad deben atribuirse a las propias condiciones en las que, en la teoría de Rawls, se eligen los principios de justicia -más precisamente, al hecho de que se trata de una elección de principios aplicables a las instituciones sociales en las que cooperan los ciudadanos.

Palabras clave: *Métrica de la justicia; Rawls; Justicia como equidad; Mercados; Derecho privado.*

Zusammenfassung

Der Artikel befasst sich mit den Gründen, die John Rawls dazu veranlassen, seine Konzeption von Gerechtigkeit, Gerechtigkeit als Fairness, als reine Verfahrensgerechtigkeit darzustellen. Diese Charakterisierung macht Gerechtigkeit als Fairness zu einer Gerechtigkeitskonzeption, deren Maßstab die Erwartungen der Bürger in Bezug auf bestimmte Primärgüter sind (und nicht diese Primärgüter selbst). Als eine Konzeption von Verfahrensgerechtigkeit, die nur auf die Erwartungen der Bürger in Bezug auf die Ergebnisse sozialer Kooperation reagiert, befindet sich Gerechtigkeit als Fairness in Bezug auf den Markt und das Vertragsrecht in einer Zwischenposition zwischen (libertären) Gerechtigkeitskonzeptionen, die sich einer Metrik von Rechten bedienen, und ergebnisorientierten Gerechtigkeitskonzeptionen. Die zentrale These des Artikels ist, dass die Gleichgültigkeit gegenüber den Ergebnissen der Kooperation und der daraus folgende prozedurale Charakter von Gerechtigkeit als Fairness auf die Bedingungen zurückzuführen sind, unter denen in Rawls' Theorie die Prinzipien der Gerechtigkeit gewählt werden - genauer gesagt, auf die Tatsache, dass es sich um eine Wahl von Prinzipien handelt, die für die sozialen Institutionen gelten, in denen die Bürger kooperieren.

Schlüsselwörter: *Gerechtigkeitsmetrik; Rawls; Gerechtigkeit als Fairness; Märkte; Privatrecht.*

Introduction

John Rawls characterizes his conception of justice, justice as fairness, as a pure background procedural conception of justice. Pure background procedural conceptions of justice are conceptions about the justice of social cooperation processes, but indifferent to the results of these processes. If cooperation takes place under just conditions, then its results, whatever they may be, will also be (from the point of view of such a conception) just.

Thus in this kind of procedural justice the correctness of the distribution is founded on the justice of the scheme of cooperation from which it arises and on answering the claims of individuals engaged in it. A distribution cannot be judged in isolation from the system of which it is the outcome or from what individuals have done in good faith in the light of established expectations (Rawls, 1999, p. 76).

A pure background procedural conception of justice can then be negatively defined as a conception incompatible with a certain “metric.” The question of the metric of justice is the question of what a conception of justice is ultimately sensitive to. If our standard of justice is egalitarian, the question of metric is then the question made famous by Amartya Sen (Sen, 1992): equality of what? In pure procedural conceptions of justice, the “what” *does not*, therefore, refer to the results of cooperation. These conceptions of justice may be sensitive to the rights under which citizens cooperate or (as in Rawls’s case) to citizens’ expectations about the results of social cooperation, but not to these results themselves.

In the literature, the debate over the metric of justice generally focuses on the goods with whose distribution justice (ultimately) is concerned. Prominent in this debate are the positions of authors such as Rawls, for whom these goods are resources (or “primary goods” in Rawls’s terminology) and authors such as Sen, who advocate for a metric of capabilities. Capabilities differ from resources because they concern not what you have but what you are able (considering the current conditions of each) to do with what you have. Wheelchair users can earn income comparable to that of non-wheelchair users

and, even so, suffer from a capacity deficit if, for example, the city streets are not suitable for their locomotion.¹

Less prominent in the literature is the fact that, whether the goods are resources or capabilities (or even well-being), a conception of justice can be interested in the distribution of these goods or just in the expectations of citizens regarding their distribution. Rawls is well known as a defender of a conception of justice whose metric are resources (or “primary goods”), but it is not so common to draw attention to the fact that the metric of justice for Rawls is (in part, as we shall see.) a metric of expectations about the distribution of primary goods, rather than outcomes regarding the distribution of these goods (and this despite abundant references to the expectations of citizens as objects of justice abound in Rawls’s *A Theory of Justice*).

This article turns to the not-so-popular “expectations versus outcomes” debate.² Its main purpose is to gauge why Rawls’s conception of justice, justice as fairness (or, more precisely, parts of that conception, in particular difference principle), is based on a metric of expectations. My central thesis is that the use of such a metric, rather than being peculiar to justice as fairness, is characteristic of any conception of justice that is chosen in Rawls’s original position³ and is therefore due to the very conditions under which the principles are chosen. More precisely, the pure proceduralism of a conception of justice and the rejection of a metric of results are to be attributed to the stipulation that the principles to be chosen in the original position are principles applicable to the institutions under which citizens cooperate – or to what Rawls calls society’s basic structure.

¹ For a sample of the “resources versus capabilities” debate, see the collection of articles gathered in Brighouse and Robeyns (2010).

² As will become clear later, the expectations versus outcomes debate is not to be confused with the “opportunities versus results” debate. Advocates of opportunity metric such as Gerald Cohen (Cohen, 1989), Richard Arneson (Arneson, 1999) and Michael Otsuka (Otsuka, 2003) recognize the importance of outcomes for justice (in the expectations versus outcomes debate, these authors are therefore, on the side of outcomes), but try not to be insensitive to personal responsibility. What comes out of this are opportunity-based conceptions of justice or, as I will call it later, responsibility-sensitive outcomes-based conceptions of justice.

³ The original position is the conditions under which citizens deliberate on principles of justice in Rawls’s theory. Among these conditions is that of the veil of ignorance, that is, that citizens deliberate without knowing their particular characteristics or social position. On the original position, see Rawls (1999, ch. III).

One contribution that the article proposes to make by drawing attention to the particular proceduralism of justice as fairness concerns markets and private law (in particular, contractual law). In contemporary literature on justice and private law, the place reserved for distributive justice is, to say the least, secondary.⁴ One explanation for this may come from the insufficient attention given to the fact that distributive justice can be concerned not with rights or with results, but with expectations.⁵ If, on the one hand, the rights metric puts in the background considerations about the distribution of resources, capabilities or well-being to which egalitarians are sensitive, on the other, results-based conceptions of justice (albeit sensitive to responsibility) seem prone to abolish private law or (which, for many, is the same) to instrumentalize it for the realization of distributive ends.⁶

In relation to markets and contract law, conceptions of distributive justice that make use of a metric of expectations occupy an intermediate position between conceptions of justice based on rights and results. Unlike the former, expectations-sensitive conceptions of justice refuse to treat markets as an unconditionally legitimate exercise of rights and contract law as an institution charged solely with ensuring this exercise. In contrast to the latter, expectation-sensitive conceptions of justice are indifferent to transaction outcomes. What the use of a metric of expectations implies for the market and private law is, therefore, something unique: a design of the rules of the game that

⁴ There are, of course, exceptions, such as Kordana and Tabachnick (2005), Bagchi (2014) and Klijnsma (2015).

⁵ Not, of course, the only explanation. The little attention paid to distributive justice by private law theorists can also be attributed to the popularity of the thesis that distributive justice and the bilaterality of private law are incompatible. For a prominent defense of this thesis, see Weinrib (1995).

⁶ For example, in a recent article on the place of private law in Rawls's theory of justice, Samuel Scheffler (Scheffler, 2015) seems to endorse the idea that subjection to the distributive injunctions of justice as fairness jeopardizes the specificity of private law. Since private law has to meet the principles of justice such as fairness, says Scheffler (2015, p. 229), "[...]it is unclear whether there is room for any values other than distributive values to inform the design of contract law or other areas of private law." One of the purposes of this article is to demonstrate that Scheffler's conclusion is more appropriate for some conceptions of distributive justice than others – and, in particular, that it is a conclusion whose strength is reduced when it comes to conceptions of distributive justice that make use, like justice as fairness, of a metric of expectations. An exception to the tendency among private law theorists to disregard differences between conceptions of distributive justice (in particular, differences in the metric employed) is Perry (2000).

cannot be indifferent to distributive demands, but which is exempt from meeting such demands in relation to its results.⁷

The article is organized as follows. In order to introduce the comparison between three different metrics of justice – rights, expectations and a responsibility-sensitive outcomes metric – section 1 uses the usual scenario of an island recently populated by shipwrecked people. Section 2 presents the three metrics, while section 3 details their implications for markets and contract law. From section 4 onwards, the article turns to justice as fairness as an example of a conception of justice that employs a metric of expectations. The first step, which is the object of section 4, is to present justice as fairness as such a conception. In section 5, I turn to the question of whether the use of a metric of expectations is peculiar to fairness as fairness, in the sense that it is due to the reasons for choosing this particular conception of justice in the original position. An alternative would be to see that, rather than being peculiar to fairness as fairness, attention to expectations (as opposed to results) stems from the conditions of choice in the original position and is therefore a characteristic that would be found in any conception of justice that was chosen in the original position. The conclusions of section 5 favor this alternative, which will be considered in the following sections. Section 6 enunciates and defends the main thesis of the article, according to which it is the fact that the main social institutions (or what Rawls calls the basic structure of society) are treated as the subject of the deliberation of the parties in the original position that imprints on justice as fairness (just as it would impart to any other conception of justice chosen under the conditions of the original position) the character of a conception of procedural justice and defines the preference for a metric of expectations (in detriment of a metric of outcomes). Section 6 also emphasizes, however, that the practical value of the difference between expectations-based and outcome-based conceptions of justice is a function of social institutions – in particular, of how much these institutions

⁷ The idea that the conception of justice defended by Rawls imposes limits on markets *and* contract law contradicts the popular interpretation according to which the distributive injunctions of justice as fairness do not apply to private law, which would therefore be beyond the scope of the institutions of what Rawls designates as the subject of justice, the basic structure of society. As I argued in another article (Zanitelli, 2022), I consider this interpretation to be wrong.

make the outcomes of social cooperation dependent on random factors. Section 7 finally considers and refutes another argument for preferring a metric of expectations to one of outcomes, the simplicity argument.

1. The island

Three shipwrecked arrive on a desert island. The island has arable areas that, properly exploited, are sufficient to sustain the three. Two of the shipwrecked, *A* and *B*, are fit for manual labor, but their knowledge of agriculture is rudimentary. *C*, the third shipwrecked, is an agronomist who suffers from chronic fatigue. Upon arrival, the shipwrecked are granted property rights over themselves and over the island's resources (it does not matter, for now, according to what criteria these rights are defined). These rights are tradable.

A and *C* reach an agreement whereby *C* is in charge of advising *A*'s work on their lands. Thanks to the partnership, *A* and *C* prosper, while *B* barely manages to pull enough of the land for his livelihood.⁸

The island has robots to assert the rights of shipwrecked, whatever they may be.

2. Three metrics of justice

Does the current difference between *A* and *C*, on the one hand, and *B*, on the other, raise a problem of justice? The answer depends on the metric of justice, that is, on a definition of what justice is ultimately concerned with. If our standard of justice is an

⁸ Would it be unrealistic to assume that *C*'s partnership with *A* is exclusive? Under the circumstances of the island, maybe so. If the gains that the two manual workers obtain from *C*'s advice are marginally diminishing, one might expect *B* to be willing to offer more than *A* so that *C* devotes part of her time to advise *B*. The strength of this assumption depends, however, from a setting, such as the island, in which transaction costs are unusually low. Otherwise, it would not be unrealistic to stipulate that *C* provides its services exclusively to one of the two. Another apparent artificiality of the above narrative concerns the prosperity of *A*. Given that *C* is in the position of monopolist, would it not be the case to assume that he appropriates most of the surplus of his contract with *A*? This suggestion collides with the following alternative: either the transaction costs on the island are really low, and there would be no reason to suppose (against the above statement) that the partnership of *C* with *A* is exclusive, or these transaction costs are considerable, in which case *A* is also monopolistic in relation to *C*. For the purposes of the analysis, we can then stipulate that transaction costs on the island (as in the societies in which we are interested) are not negligible, which justifies stipulating that *C*'s partnership with *A* is exclusive and that the surplus of this partnership is shared equally between *A* and *C*.

egalitarian standard – that is, if, for us, what matters, ultimately, to distribute must be distributed equally – then the question of metric is the famous question of Amartya Sen (SEN, 1992): equality of what? Let's look at three different answers to this question.

a) metric of rights

If the metric of justice is rights, then what matters for justice is how the rights of shipwrecked (over themselves and over the island's resources) are distributed.⁹ Regardless of the pattern of distribution that follows, if that pattern is observed, the only kind of legitimate claim *B* could make about her unfavorable situation is that some of her rights have been infringed. Suppose, however, that the agreement between *A* and *C* involves nothing more than the regular exercise by both of their rights (*A* and *C* own themselves, including their workforce, have freely and knowingly made an agreement to work in the lands that belong to them, etc.). In such a case, there would be no injustice that *B* could claim. On the contrary, any action by robots that attempts against the association between *A* and *C* or expropriates part of the gains of this association to hand it over to *B* would constitute a violation of the rights of *A* and *C* and, indeed, an injustice.

b) metric of expectations

Rather than rights, justice can be sensitive (ultimately) to expectations. As a justice metric, expectations differ from outcomes. For example, if we are interested in income expectations, then what matters is the distribution of expected income at a time t_0 and not the income actually enjoyed at a later time t_1 . For the purposes of the following analysis, let t_0 be the time of arrival of the shipwrecked on the island, and t_1 the current time when *A* and *C* thrive thanks to their partnership. It is not necessary for the present purposes to answer precisely the question “expectations of what” (income, well-being, etc.). It suffices that it is something in relation to which the current situation of *A* and *C*,

⁹ An example of using the rights metric, of course, is that of Robert Nozick (Nozick, 1974). For a conception of justice in which the same metric is combined with an egalitarian standard, see Steiner (1994).

thanks to their agreement, is better than that of *B*. From the point of view of a metric like this, *B* is a victim of injustice?

It is evident that the current comparison (that is, the comparison at t_1) between *A* and *C*, on the one hand, and *B*, on the other, is in itself irrelevant, because it says nothing about the expectations of the shipwrecked upon reaching the island. (ie, at t_0). Suppose that our standard of justice is egalitarian (the same expectations for each), and that, upon arrival on the island, and before the definition of property rights, *C*'s expectations were higher than those of *A* and *B*, but that the expectations of the last two were, on the other hand, equal. This assumption could be justified by *C*'s rare talent (on the island) combined with labor forces (and other attractive traits for *C*) equivalent between *A* and *B*. Under these conditions, a more generous initial distribution of property rights for *A* and *B* (enough to match the expectations of both of them with those of *C*) would be required, and nothing more. Aside from what he would be entitled to as a compensatory measure for the difference between his expectations and those of *C*, *B* would have no legitimate claim to make.¹⁰

c) responsibility-sensitive outcomes metric

Finally, let us consider a responsibility-sensitive outcomes metric. According to this metric, the fact that *A* and *C* (in terms of resources, well-being, etc.) are in a better situation than that of *B* will not constitute an injustice only if and to the extent that *B* can be held responsible for his situation.¹¹ So, assuming that *B* is not responsible for its current disadvantage relative to *A* and *C* – that is, none of the causes of this disadvantage, such as the distribution of talents on the island and the fact that *C* chose *A*, not *B*, to cooperate, can be imputed to *B* – what justice requires is that *B*'s disadvantage be completely eliminated.

¹⁰ Note that the goal of a property rights system that equalizes the castaways' expectations may include some restriction of *C*'s ownership rights over herself, so that any fruits of *C*'s labor are taxable.

¹¹ For a defense of such a metric, see Otsuka (2003).

3. Metric, markets and contract Law

Let's consider the implications of each of the metrics mentioned above for markets and contract law.

a) metric of rights

If justice among the shipwrecked is reduced to a question of rights, then what justice requires is simply that these rights are not infringed. Voluntary transactions, like the one between A and C, are legitimate as long as they don't violate their rights and those of third parties, such as B. The results of these transactions are irrelevant to justice.

With regard to contractual law, a metric of rights does not even require that the legislation recognize the figure of the contract in the traditional molds, that is, as a legally binding act capable of assigning rights *in personam* and distinct, for this reason, from mere acts transfer of rights. What is needed, for based conceptions of justice whose metrics are rights that are tradable, is a system of rules that stipulates the conditions under which rights can be transferred. It is not necessary for this system to include a contract law in the sense just explained, but if it does, the only limit imposed by a metric of rights is that this contract law does not mark acts of threat or violence as legally binding.

b) metric of expectations

The expectations metric is also indifferent to the results of voluntary transactions like the one between A and C, but it is sensitive to variations in the expected gain from market operations. In the narrated case, the expected gain of C is greater than that of A and B.

For a conception of justice, even egalitarian, employing a metric of expectations, abolishing the market is not the only conceivable solution.¹² For transactions like the one between A and C to be legitimate, however, it is necessary that these transactions

¹² If more than one institutional arrangement is adequate to meet what justice prescribes (for example, equal expectations), the choice between these arrangements may be subject to some other criterion, such as efficiency.

take place under institutions that level the expectations of the shipwrecked.¹³ These institutions include not only possible taxation measures, but also the rules on the conditions for the transfer of rights and possibly contract law itself, if the legal system includes an area with the characteristics of contract law.¹⁴

With regard to the last topic, the contrast between the metrics of rights and expectations is sharp. While the limits that a metric of rights imposes on contract law are only negative – it is just a matter of not stamping as legally binding acts of violation of rights – a metric of expectations treats contract law as part of the institutional apparatus in charge of conforming citizens' expectations to a certain distributive pattern. The functions that contract law habitually performs – of stipulating the conditions for contracts to be legally recognized and the criteria for determining the content of those contracts – must remain sensitive to their impact on citizens' expectations.

c) responsibility-sensitive outcomes metric

Of the three metrics considered, the responsibility-sensitive outcomes metric is the only one that raises suspicions about the results of voluntary transactions like the one between *A* and *C*. Although this metric does not imply that such transactions should not occur, the results of any transactions market are subject to the distribution pattern (whatever it may be). Depending on this pattern, it is quite possible that a substantial part of the surplus of the agreement between *A* and *C* will have to belong to *B*.

As with the others, the outcomes metric is compatible with a legal system that defines the conditions for the transfer of rights without resorting to what is traditionally called contract law. Furthermore, both these conditions and an eventual contract law, in a sense, play a less important role than in the case of a metric of expectations. Let's see why.

¹³ Or, if the distribution pattern is not egalitarian, institutions that conform to that other pattern.

¹⁴ Again, if there are different institutional means to meet what justice requires in terms of expectations, the choice may be guided by some other criterion.

The conditions that a property rights system stipulates for the transfer of these rights, as well as the conditions for entering into valid contracts (and the criteria for determining the content of those contracts), are crucial to an expectations metric precisely because they are determinant for these expectations. My expectations are, in part, a function of the conditions to be observed to transfer rights and to contract validly (consider the impact on *C*'s expectations if the island's legal system forbade him to use his expertise as an agronomist in the employ of others or not admitted as valid contracts involving such service). The conditions for the transfer of rights and contract law do not, on the other hand (not, at least, directly) determine the results of market operations. Under no circumstances, therefore, will a responsibility-sensitive outcomes metric be content with a certain design of the transfer conditions and contract law. Whatever this design, the need to test the results of transactions in the light of justice will persist.

4. Metric of expectations in John Rawls's theory of justice

The remainder of this article will be devoted to the topic of the use of a metric of expectations in John Rawls's theory of justice. The first step, which this section will deal with, is to defend the interpretation according to which a metric of expectations is part of the conception of justice, justice as fairness, advocated by Rawls.

Rawls often refers to the metric of primary goods as the metric of justice, but it is not always clear whether what he has in view are outcomes or citizens' expectations with regard to those goods.¹⁵ In *A Theory of Justice*, however, there are numerous mentions of expectations. A particularly enlightening passage is as follows:

[...] the difference principle introduces a simplification for the basis of interpersonal comparisons. These comparisons are made in terms of expectations of primary social goods. In fact, I define these expectations simply as the index of these goods which a representative individual can look forward to (RAWLS, 1999, p. 79).¹⁶

¹⁵ According to Rawls (1996, p. 181), the basic list of primary goods includes the following: "a. basic rights and liberties, also given by a list; b. freedom of movement and free choice of occupation against a background of diverse opportunities; c. powers and prerogatives of offices and positions of responsibility in the political and economic institutions of the basic structure; d. income and wealth; and finally, e. the social bases of self-respect."

¹⁶ Other passages of similar content can be found in Rawls (1999), p. 39 ("Given certain assumptions, economic and social inequalities are to be judged in terms of the long-run expectations of the least

In favor of the interpretation that Rawls has in view the expectations of citizens regarding the distribution of primary goods (and not the current distribution of these goods) is also the fact that he presents justice as fairness as a conception of “pure background procedural justice.”¹⁷ A conception of justice thus characterized is not only a conception of justice occupied with the institutions (or what Rawls calls the basic structure of society) under which citizens cooperate, it is also a conception indifferent to the results of individual actions – as long as they are actions carried out according to the rules of fair institutions.

It is doubtful, however, that the only kind of justice metric incorporated into justice as fairness is the metric of expectations. With regard to some of the primary goods, it seems to be the case that justice as fairness is interested in actual distribution (that is, in outcomes), and not in mere expectations. Consider the case of liberties. Let’s imagine that a law violates the freedom of worship of a certain minority group. The citizens of this group then rebel against the law in question, claiming to be victims of an injustice. Affirming that justice as fairness is a conception of justice sensitive only to expectations (including with regard to freedoms) would imply accepting the following response to the plea of this religious minority as acceptable: “It is true that the contested law infringes one of your basic rights. Our current constitutional system, however, is one under which citizens’ expectations of enjoying equal basic freedoms are the best possible (our best political scientists attest to this). So while we regret that this carefully crafted political system occasionally results in some curtailment of freedom, as seems to have been the case here, we cannot say that you are victims of an injustice.”

This is not an answer Rawls would endorse,¹⁸ which leads to the conclusion that the use of a metric of expectations concerns some primary goods, but not all. As I see it, expectations that matter to justice as fairness concern offices or positions, income and

advantaged social group”) e p. 56 (“Since it applies to institutional forms, the second principle (or rather the first part of it) refers to the expectations of representative individuals”).

¹⁷ For the characterization of justice as fairness as a pure background procedural conception, see Rawls (1999, pp. 75-77; 2001, pp. 50-52).

¹⁸ Rawls (1999, p. 173) treats the political system as a case of imperfect procedural justice. Unlike a conception of pure procedural justice, a conception of imperfect procedural justice has a criterion to assess the correctness of results.

wealth.¹⁹ Regarding offices and positions, what justice as fairness requires is the observance of the principle of fair equality of opportunity.²⁰ The mere mention of opportunities is enough to realize that this principle is not about the distribution of positions per se, but about the expectations of citizens to ascend to those positions. Rawls (1999, p. 76) says that the role of the principle of fair equality of opportunity is “[...] to insure that the system of cooperation is one of pure procedural justice”, which also suggests the irrelevance of the results. As for income and wealth, there is no doubt that justice as fairness is concerned, in general, only with expectations. Rawls often refers to the expectations of citizens when dealing with the difference principle, a principle eminently concerned with income and wealth inequalities. At the very beginning of the section of *A Theory of Justice* dedicated to introducing the difference principle, we find the following definition:

Assuming the framework of institutions required by equal liberty and fair equality of opportunity, the higher expectations of those better situated are just if and only if they work as part of a scheme which improves the expectations of the least advantaged members of society (Rawls, 1999, p. 65).

Finally, in *Justice as Fairness: A Restatement*, the idea of pure background procedural justice is associated with the primary goods of wealth and income:

In a well-ordered society, in which both the equal basic liberties (with their fair value) and fair equality of opportunity are secured, the distribution of income and wealth illustrates what we may call pure background procedural justice (Rawls, 2001, p. 50).

I want to ask from now on into the reasons why a conception of justice should be concerned only with the expectations of citizens regarding the distribution of certain goods. What are Rawls’s reasons for insisting (when it comes to primary goods of offices or positions, income and wealth) on a metric of expectations over a metric of outcomes (albeit sensitive to responsibility)? The first step is to find out whether the use of the

¹⁹ The social bases of self-respect also correspond to certain institutional characteristics – and to the principles that underlie these institutions and are part of public culture – that must actually be present. As with basic freedoms, it is not enough that the political system has only the tendency to exhibit the characteristics on which citizens’ self-respect depends.

²⁰ The principle of fair equality of opportunity requires more than just formal equality of opportunity. According to this principle, the chances of occupying positions should only vary according to innate talents and willingness to cultivate them. “[...] assuming that there is a distribution of natural assets, those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system” (Rawls, 1999, p. 63).

expectations metric is a peculiarity of justice as fairness – that is, the conception of justice that, according to Rawls, would be chosen in the original position – or whether it is a common characteristic of any conception of justice built from the original position.

5. Metric of expectations as a peculiarity of justice as fairness

The question to be faced in this section is whether the use of a metric of expectations (in relation to positions, income and wealth) is peculiar to justice as fairness, as a conception of justice that, according to Rawls, would be chosen in the original position, or if, on the contrary, the use of this metric is part of the conditions of choice, that is, it is among the defining characteristics of the original position and, consequently, would impregnate any conception of justice that we might infer from the original position (including, therefore, conceptions different from justice as fairness). This question is important because it determines the reasons why justice as fairness is an expectation-sensitive conception of justice: whether these are reasons related to the choice of justice as fairness in the original position or whether they are reasons pertaining to the conformation of the original position (ie, reasons for the conditions for choosing principles of justice to be those of Rawls’s original position and not others).

One reason to suggest that the expectations metric is peculiar to justice as fairness (and therefore not a common feature of any conception of justice chosen in the original position) is that, in presenting justice as fairness as a pure background procedural conception of justice, Rawls contrasts it with utilitarianism, which would, in turn, exemplify a conception of allocative justice. A conception of allocative justice is a conception of justice that deals with “[...] how a given bundle of commodities is to be distributed, or allocated, among various individuals whose particular needs, desires, and preferences are known to us, and who have not cooperated in any way to produce those commodities” (Rawls, 2001, p. 50). The utility principle, as found in Bentham and Sidgwick, “[...] can be seen as adapting the idea of allocative justice” (Rawls, 2001, p. 50).

The reason that the mention of utilitarianism as a conception of allocative justice leads to thinking that the use of the expectations metric is proper to justice as fairness

is that a conception of allocative justice is an outcome-sensitive conception of justice. As Rawls defines them, conceptions of allocative justice pay attention to how certain goods are currently distributed. Now, if utilitarianism is such a conception of justice, then allocative conceptions of justice, sensitive to outcomes rather than mere expectations, are available for choice in the original position. Rawls believes, of course, that utilitarianism would not be the conception of justice chosen in the original position, but the fact that *A Theory of Justice* is a book eminently dedicated to defending this thesis attests that utilitarianism is, for Rawls, a conception of justice that competes with justice as fairness (it is, in fact, the main competitor to be beaten) for the preference of the parties in the original position.

The difficulty encountered by this argument is that Rawls can simply envision two different versions of utilitarianism by referring to utilitarianism as a conception of allocative justice and as a conception of justice whose choice in the original position is considered. The classical utilitarianism of authors such as Bentham and Sidgwick would be, according to this suggestion, an example of an allocative (results-sensitive) conception of justice that would differ from utilitarianism as a conception of justice candidate for choice in the original position. This second version of utilitarianism could consist of a conception of justice as maximizing expected average (or total) utility – a conception of justice, therefore, sensitive only to citizens' expectations of utility, not actual utility. This is precisely what Rawls suggests when he says that, when applied to the basic structure, utilitarianism “[...] requires us to maximize the algebraic sum of expected utilities taken over all relevant positions” (Rawls, 1999, p. 78).

The fact that the version of utilitarianism that could be chosen in the original position is (as opposed to traditional versions of utilitarianism) a conception of justice sensitive to expected utility suggests that we should look in the original position itself for reasons why justice as fairness is also interested in the expected distribution of certain primary goods. But the greatest difficulty in treating the use of an expectations metric as peculiar to justice as fairness (that is, as characteristic of that particular conception of justice, rather than any conception of justice obtained with the procedure of the original position) is that arguments that, according to Rawls, would lead to the choice of justice

as fairness in the original position, even though they exclude a metric of rights insensitive to both the results of social cooperation and the expectations regarding the distribution of positions, are ecumenical regarding the choice between expectations and outcomes.

A summary analysis of the arguments Rawls compiles in *Justice as Fairness: A Restatement* in favor of the choice of justice as fairness is sufficient to support this conclusion. Rawls separates these arguments into two parts. In the first of these two parts, fairness as fairness is compared with the principle of average utility. Rawls' arguments to justify that justice as fairness is the conception of justice chosen in the original position as an alternative to the principle of average utility are arguments about why, given the conditions of the original position, the risk aversion that characterizes the choice of justice how fairness (at the expense of utilitarianism) would be rational. Among the reasons for preferring fairness as fairness to utilitarianism is that the parties do not have information to allow them to estimate probabilities, that the worst possible outcome under justice as fairness is quite satisfactory, and that, in contrast, the worst possible outcome under the principle of average utility can be disastrous (Rawls, 2001, p. 98). Although they also aim at the second principle (and in particular the difference principle, in which the decision rule Rawls considers rational to follow under the conditions of the original position, the maximin rule, is expressed), the reasons at play in comparisons between justice as fairness and the principle of average utility are eminently reasons for preferring a conception of justice under which certain freedoms, which are means to the realization of fundamental interests of citizens (such as represented in the original position), are guaranteed.

The second part of the argument compares justice as fairness with what Rawls calls the principle of restricted utility. This principle (or conception of justice) differs from justice as fairness only because it replaces the principle of difference with an average utility principle combined with a minimum income guarantee. The arguments of the second comparison are therefore not concerned with basic freedoms or fair equality of opportunity (which are guaranteed by the two conceptions under comparison), but only with the difference principle. Rawls acknowledges that the arguments in favor of justice

as fairness in this second comparison are weaker (Rawls, 2001, p. 133). These arguments are based, above all, on two conditions of the original position, the conditions of publicity and stability. According to the condition of publicity, the parties must limit themselves to principles of justice that they may want as principles that are generally recognized by citizens as the basis of their institutions, principles, therefore, whose effects of their public knowledge are acceptable (Rawls, 1999, p. 115). The condition of stability, in turn, is that the parties assess the propensity of a conception of justice (once recognized by citizens as the basis of the main social institutions, as imposed by the condition of publicity) to be stable thanks to adherence of citizens (Rawls, 1999, p. 398). Given these two conditions, Rawls argues that there are reasons to prefer the difference principle over the restricted utility principle. What differentiates these two principles is the fact that the first incorporates a certain idea of reciprocity – a idea according to which talented citizens only benefit from their talents in a way that is also beneficial to other citizens. Rawls' argument thus appears to be that the parties in the original position are sensitive to the difference in the impact on public culture of a conception of justice in which this idea of reciprocity is expressed. It is also this impact on public culture that makes a conception of justice that includes the difference principle (rather than the restricted utility principle) more prone to stability. The idea of reciprocity that difference principle (as part of a public conception of justice) infuses into public culture is consistent with the conception of citizens as free and equal persons who cooperate for mutual advantage, prevents discontent among talented citizens, and fosters trust among citizens (Rawls, 2001, p. 125-126).

Given the pivotal role of reciprocity in arguing for the difference principle, the question that interests us would be whether the relationship between the difference principle and the idea of reciprocity gives us any reason to interpret the difference principle as a principle occupied with the expectations of citizens regarding the distribution of certain primary goods or the distribution of these goods itself. The difficulty that this suggestion faces is that the difference principle is capable of expressing the idea of reciprocity in any of the interpretations at stake, that is, both as a principle attentive to expectations and as a principle attentive to outcomes. In either

case, what the difference principle requires is an equal distribution or, alternatively, an unequal distribution which, compared to the state of equality, is more advantageous for disadvantaged citizens. What differentiates the two interpretations of the principle is what the distribution refers to: in one interpretation, it is the expectations regarding certain primary goods, while, for the other, the equality (or inequality) that the difference principle has in view concerns the primary goods themselves.

My conclusion is that it is difficult to justify the use of a metric of expectations in justice as fairness given the reasons that lead parties in the original position to choose this conception of justice over others. In the following sections, we will see whether sensitivity to expectations can be seen as a consequence of the characteristics of the original position, that is, of the conditions that Rawls's theory stipulates for deliberating about justice.

6. Basic structure and expectations metric

In Rawls's original position, the parties ask themselves about the principles to be applied to the basic structure of society, which Rawls defines as “[...] the way in which the major social institutions fit together into one system, and how they assign fundamental duties and shape the division of advantages that arises through social cooperation” (Rawls, 1996, p. 258).

That the principles of justice chosen in the original position are principles for the basic structure of society is therefore not a consequence, but rather a starting point for the deliberation of the parties in the original position, a starting point that Rawls dedicates one of the chapters of *Political Liberalism* (ch. 7) to justify.

The reason for associating the basic structure as the subject of justice and a conception of justice to which citizens' expectations regarding the distribution of certain goods (rather than the distribution itself) matter may lie in the fact that the institutions of the basic structure are insufficient to ensure certain distributive outcomes. All these institutions are capable of making certain distributive outcomes more (or less) likely. In other words: social institutions (the subject of justice in Rawls's original position) are determinant for citizens' expectations regarding the distribution of certain goods, but

not for the distribution of those goods themselves. I will designate this thesis as the inadequacy thesis (IT).

IT: If the object of a conception of justice is the basic structure of society, then it is inappropriate for this conception to deal with results of social cooperation that are not directly attributable to that structure.

The underlying premise of IT is that if we want to assess the fairness of something (in this case, the institutions of the basic structure) based on its consequences, it is inappropriate to stick to consequences other than those that flow directly from the object in question. Although indirect consequences may be important, taking them into account would imply subjecting our judgment to the arbitrary influence of circumstances that determine such indirect consequences and are not part of the subject of our analysis.

A sign that Rawls may have something like IT in mind can be found in his argument for rejecting allocative conceptions of justice (and for justice as fairness to be understood as a pure background procedural conception of justice). According to Rawls, the problem with which allocative conceptions of justice are concerned is the “[...] problem of how a given bundle of commodities is to be distributed, or allocated, among various individuals whose particular needs, desires, and preferences are known to us, and who have not cooperated in any way to produce those commodities” (2001, p. 50). Allocative conceptions of justice are, therefore, “[...] incompatible with the fundamental idea by which justice as fairness is organized: the idea of society as a fair system of social cooperation over time. Citizens are seen as cooperating to produce the social resources on which their claims are made” (Rawls, 2001, p. 50).

Note that a conception of allocative justice would be appropriate if we were dealing with manna from heaven and considerations relevant to distribution (such as citizens' preferences) were given, since, in such a case, the distribution rule would be the only relevant variable. This way of describing the problem of justice is incompatible, however, with the idea of “society as a fair system of cooperation” that Rawls incorporates into the original position (Rawls, 2001, pp. 5-8). Treating society as a fair system of cooperation involves treating social institutions as institutions under which

cooperation takes place, rather than institutions merely in charge of the distribution of goods. The idea of society as a fair system of cooperation implies considering, therefore, another important variable for the results of cooperation beyond the institutions that are the object of justice, namely, the actions of citizens who cooperate according to established rules.

The idea that it is only possible to gauge the fairness of the basic structure of a society on the basis of what is directly affected by that structure is appealing. Applied to the problem of metric, it explains why a conception of justice whose subject is the institutions of the basic structure is sensitive only to citizens' expectations regarding the occupation of positions, income and wealth. It is these expectations, and not the occupation of positions and the distribution of income and wealth itself, that are directly impacted by institutions.

That the IT justifies, after all, the use of a metric of expectations for justice as fairness (as well as for any other conception of justice chosen under the conditions of the original position) does not, however, prevent us from verifying that relevance of this thesis depends on the character of the institutions – and, in particular, on how mediated is the relationship, shaped by the institutions in question, between expectations regarding the distribution of certain goods and the distribution of those goods itself. Let me explain.

If the basic structure of a society recognizes individual property rights (including over production goods) that are tradable, the relationship between expectations about the occupation of positions, wealth and income, on the one hand, and outcomes, on the other, is widened. Expectations are defined by institutions, but the realization of these expectations is largely at the mercy of individual choices that are not institutionally predetermined: choices about what, how much and how it is produced, about what is transacted and for how much, etc.

Returning to the island, suppose, differently from what was stipulated above, that the productive resources of the island belong to the shipwrecked collectively, that the use to be made of these resources is therefore collectively decided, and that productive results are distributed among the shipwrecked according to the number of hours worked. There is nothing in these new circumstances that leads to refuting IT, that is: if

the object of justice is the island's institutions, it remains the case that we should pay attention to what these institutions directly determine, and not to the states of affairs that are just an indirect consequence of institutions. It is easy to see, however, how in the scenario just described the results of cooperation depend to a much lesser extent on luck, such that the difference between a metric of expectations (sensitive to the expected benefits and burdens of social cooperation) and a responsibility-sensitive outcomes metric loses importance. Assuming that each shipwrecked is responsible for the number of hours worked, two shipwrecked whose expectations are the same will also get equal results – equal, at least, in the sense that it is relevant for a responsibility-sensitive outcomes metric.

My conclusion is, therefore, that IT is correct, but that its importance as a thesis according to which it is appropriate that certain conceptions of justice are indifferent to the results of social cooperation depends on the very way in which institutions are designed and, in particular, it depends on how much these institutions are determined by factors other than these institutions themselves. Given individual ownership of the means of production and markets, the difference between the implications of an expectations metric and an outcomes metric is likely to be considerably greater than under alternative institutional arrangements.

Finally, note that it is not incompatible with IT for institutions to be assessed as fair or unfair depending on the degree of randomness that these institutions confer on the results of social cooperation, because this degree of randomness is (as the examples demonstrate) an effect directly from the institutions themselves. Justice as fairness is arguably a conception of justice compatible with institutions under which the results of cooperation are to a considerable extent random, but if that is so, this is one of the things we should keep in mind when comparing the merits of justice as fairness with those of alternative conceptions of justice.

7. Expectations metric and simplicity

Let us consider a final argument for a conception of justice being a pure background procedural conception of justice, sensitive, as such, to citizens' expectations about the

results of cooperation, but not to these results themselves. One of the roles Rawls assigns to a conception of justice is that of providing starting points for at least certain questions of justice to be settled without excessive controversy.²¹ Rawls resorts, therefore, to certain simplifications in order to turn justice as fairness into a conception of justice capable of fulfilling the aforementioned role. Among these simplifications is that of treating justice as fairness as a pure procedural conception.

Now the practical advantage of pure procedural justice is that it is no longer necessary to keep track of the endless variety of circumstances and the changing relative positions of particular persons. One avoids the problem of defining principles to cope with the enormous complexities which would arise if such details were relevant. It is a mistake to focus attention on the varying relative positions of individuals and to require that every change, considered as a single transaction viewed in isolation, be in itself just. It is the arrangement of the basic structure which is to be judged, and judged from a general point of view (Rawls, 1999, p. 76).

The contrast Rawls makes in this passage between pure procedural conceptions of justice and other conceptions (the alternative that Rawls envisages is, as usual, utilitarianism understood as a conception of allocative justice) is the contrast between conceptions of justice (the former) that lend themselves to adjudicate claims for justice taking into account only the structural characteristics of a system of social cooperation and conceptions of justice that, in contrast, are sensitive to an “infinite variety of circumstances”, including the situation of each citizen in particular. What we have to ask is whether this contrast is in fact necessary, that is, whether the application of the principles of an allocative conception of justice indeed requires much more detailed information and is therefore more difficult to execute than the application of principles of pure procedural justice.

Let us once again consider a version of the difference principle that is sensitive to outcomes. For simplicity's sake, I will again treat this principle as a principle pertaining only to income. In this version, the difference principle is, therefore, a principle according to which income inequalities (rather than inequalities in income expectations)

²¹ Rawls (1999, pp. 77-78): “It is too much to suppose that there exists for all or even most moral problems a reasonable solution. Perhaps only a few can be satisfactorily answered. In any case social wisdom consists in framing institutions so that intractable difficulties do not often arise and in accepting the need for clear and simple principles.”

are only justified if they are advantageous to the worst-off citizens (in this case, the citizens with less income).

This example highlights the difficulty with Rawls's contrast between the application judgments of pure procedural conceptions of justice and of allocative justice conceptions. As just reformulated, the difference principle is a principle of allocative justice, sensitive to the results of social cooperation (in this case, regarding the distribution of income) and not to expectations. Well, it seems clear that safe judgments (as safe as one would reasonably expect, given the difficulty of applying the difference principle in any of its versions) about this principle can be made on the basis of general information about the distribution of income and on the expected effects of reform proposals on inequality and the income of the poorest (in the version we have here in view, the difference principle would demand that these reforms take place if they prove capable of reducing inequality without worsening the income of the worst-off citizens). There is nothing mysterious about comparing the current general state of income distribution in a society with that of alternative scenarios. In particular, there seems to be no reason why a bona fide application of the difference principle (as the principle of allocative justice) should depend on anything other than this general comparison – that it depends, for example, on our taking into account the expected effects of certain policies on the income of each individual citizen.²²

An advocate of pure procedural conceptions of justice might raise the following objection. “It is true that judgments about outcomes can be as simple – and, however simple, practically relevant – as judgments about expectations. The fact that our analysis relies on results rather than expectations does not, however, prevent us from conceiving

²² An objection here could be that, when comparing the current income distribution with what would take place under alternative scenarios (for example, after the implementation of certain institutional reforms), what we have in view are expectations. After all, the question to ask about a reform proposal is the question about the impact of that reform on citizens' income expectations. That's correct – after all, the only question we can answer about a future scenario is about expectations for that scenario. It does not follow, however, that we have to abandon an outcomes metric in favor of an expectations metric. First, the comparison remains between the expected distribution under an alternative scenario and the current income distribution (rather than current expectations about income distribution). Second, once some reform is implemented, we will be able to compare the current distribution of income in the new circumstances with that which existed before the reform in question.

justice as procedural justice. As long as we are interested in general results and not the results of one or another particular citizen, our conception of justice will retain such character. Consider, for example, a reform proposal capable of increasing the income of the poorest by twenty percent without significantly reducing the total amount of income. As long as our conception of justice allows us to conclude that this reform (compared to the status quo) is desirable regardless of who the affected citizens turn out to be, it will still be a pure procedural conception of justice.”

The issue raised by this objection is eminently semantic. Pure procedural conceptions of justice are only conceptions of justice indifferent to the outcomes of social cooperation, or also conceptions that, although not indifferent to these outcomes, are interested in outcomes in general and not in outcomes obtained by one or another citizen in particular? If the expression is understood in this second, broader sense, then the critic is right, but the simplicity alleged as an advantage no longer defines anything about the use of an outcomes metric, because pure procedural conceptions of background justice may or may not make use of this metric.

Conclusion

Although the reasons offered by Rawls' theory of justice for rejecting libertarian conceptions of justice occupied solely with the distribution of rights are among the reasons (in particular, reasons of risk aversion) that lead the parties in the original position to choose justice as fairness, the procedural character of this conception of justice and its consequent indifference to the results of cooperation is based on the very conditions under which the deliberation in the original position takes place – in particular, in the fact that it is a deliberation on principles to be applied to major social institutions (ie., the basic structure of society). A conception of justice concerning social institutions must be limited to expectations because it is expectations about the results of cooperation, and not those results themselves, that are directly affected by the design of the institutions.

The procedural nature and attention to the expectations of citizens regarding the results of social cooperation give justice as fairness a *sui generis* position with regard to

the market and contractual law. Justice as fairness is a conception of distributive justice that, as such, is neither indifferent to the conditions under which citizens transact (such as rights-based conceptions of justice), nor does it require that the results of these transactions conform to a certain distributive pattern (such as outcomes-based conceptions of justice).

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