

## NOTES FOR AN AESTHETIC THEORY OF JUSTICE

[NOTAS PARA UMA TEORIA ESTÉTICA DA JUSTIÇA]

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**ABSTRACT:** Based on a dialectical analysis of the strengths and weaknesses of Rawls's theory of justice, we propose an Aesthetic Theory of Justice, with a strong civil-republican accent, in which reason and sensibility are articulated to fill the abstract concept of citizenship with the historical content of the real citizen, who bears the pains of the world of life. As a result, the idea of citizenship cannot be sustained without the concrete participation of citizens in the discussion, deliberation and definition of public affairs.

**KEYWORDS:** Theories of justice; Rawls; Citizenship; Critical theory; Aesthetics

**RESUMO:** A partir de uma análise dialética das forças e fraquezas da teoria da justiça de Rawls, propomos uma teoria estética da justiça, de forte acento civil-republicano, na qual razão e sensibilidade se articulam para preencher o conceito abstrato de cidadania com o conteúdo histórico do cidadão real, que carrega as dores do mundo da vida. Como resultado temos que a ideia de cidadania não se sustenta sem a participação concreta do cidadão na discussão, deliberação e definição dos negócios públicos.

**PALAVRAS-CHAVE:** Teorias da justiça; Rawls; Cidadania; Teoria crítica; Estética

*"The possible is the heaviest of the categories".  
(Kierkegaard, 1935: 224)*

### INTRODUCTION

Rawls's theory of justice, despite opposing authoritarian theories of justice, in which the citizen appears only as a passive doer of the dictates of the Rule of Law, delivers to political philosophy an impotent citizen, neutralized by the Administrative State and its networks of political-economic power, generally organized by coalitions of parties, which usually hold public office with agents of their extreme trust (*honoratiore*s). In this essay, we present a proposal to overcome Rawls' abstract citizen, the Euclidean citizen, transvaluing him in the figure of the creative citizen, the

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*homo aestheticus*, in a civil-republican key.

Then, what would be the useful corrective for the *Theory of Justice* to be able to be communicated and practiced in a situation, that is, in the real position? What redress would attract the interest of the citizen with the enthusiasm that has always been promised to him and would prove to be the most intuitive with the necessary strength to motivate him to social cooperation, as well as to face the challenges of building a well-ordered society? Human history has not left us a mechanism that can, under equal conditions, encourage the citizen's interest in establishing a relationship of reciprocity or alliance with his fellowmen and free him from the tedium of participating passively in the project of a fairer society, stimulating him to be fully cooperative for a lifetime?

Could it be possible imagine a counterweight to conventional morality and particular or comprehensive ethical doctrines, compatible with the self-love and driving force of altruism and utopias capable of transforming a disorderly and indecent society into its opposite? We have available a technology of critical exercise of power that would awaken democratic society from its aristocratic slumber, enabling — at once — the transformation of the freedom of some into freedom for all and the conversion of negative freedom into positive freedom, thereby giving it a concrete, living and worldly body, based on obedience to the rules with autonomy and responsibility? Finally, what historical material would fill with the abstract legal form proposed by the *Theory of Justice* with ethical-political content?

## I. CIVIC-REPUBLICAN CORRECTIVE TO THE THEORY OF JUSTICE

### I.1 REPUBLICAN PRINCIPLE

It seems to me that this corrective would be the inclusion in the original position of a procedural principle that would reasonably ensure the division of power among all citizens involved in the production and administration of the material bases of society and in the functioning of the administrative state. I call it *Republican Principle* (RP). According to this principle, all *res* (things, chances, positions, professions, companies, associations, etc.) must be administered by citizens, in an environment of public dialogue; and all this administration must be governed by the five constellations of fundamental rights (see item IV.5, below), which form together the parameters of justice as equity, covering all social, legal, political and economic relations, the supreme *norma agendi* of public international law, whose deontic weight is already historically ensured by overlapping consensus between individuals, groups, classes and peoples.

Therefore, all positions of companies and states, either of leadership or coordination — including those usually placed by the party system — must be occupied by individuals who have passed public competitions, according to rules pre-established by a pure procedural justice, whose rules must persevere unconditionally over time, as explained by Rawls in sections 15.3 and 16.3 of “Justice as Fairness”. These individuals must be chosen by the system of automatic rotation (turnover), for the exercise of a temporary mandate, so that all agents of state institutions — regardless of time, merit or conception of good — have the chance to fully exercise their ability to judge and act, guided by the historical constellations of fundamental rights and guarantees, in equal parts. It remains evident that, as it is a chance, its use is not mandatory for every citizen contemplated with the possibility of realizing their creative potential. Nevertheless, this chance, from a civic-republican perspective, should not be an uncertainty or a lucky

bid. It should also not be made available through a statistical probability, according to the convenience of parties and senior representatives. It must be objective and be at hand in a certain and permanent way. In a word: it is not a liberal chance, in the classic sense of the term, but a republican invitation to exercise popular sovereignty in public administration.

In this sense, if we take into account the reformulation of the two principles of justice that Rawls printed in section 13 of “Justice as Fairness”, the RP extends the first principle, which is restricted only to basic freedoms, by including in it the fundamental right to governance of the political-administrative association, which makes up the fourth constellation of fundamental rights. On the other hand, the RP frees from the second principle the equality of chances in the occupation of public positions and functions, provided by Rawls as a corollary of the principle of difference, that is, as a sort of reparation or compensation to the worst placed on the TJ game board, victims of economic and social inequalities. Thus, with this increase, Rawls' original diction of the first principle is not suppressed, but preserved. The RP only ensures that the exercise of «powers and prerogatives of offices and positions of authority and responsibility» — includes in the list of primary assets, in section 17.2 of “Justice as Fairness” — be a fundamental right, corollary of the principle of popular sovereignty.

However, it is important to insist on this point, this primary good, in a logical and systematic interpretation of Rawls' theory, in both formulations, that of 1971 and that of 2001, is not open effectively to the group of the most disadvantaged, which, due to the absolute lack of material conditions, are absent from the public sphere in at least 2/3 of the world population. From this we can draw that the beneficiaries of the first Rawls principle are well predicted, namely, those coming from a college of notables(honoratores), in Weberian meaning (cf. §3 of section 8 of Economics and Society), that is, from a circle of bureaucrats and officials specialized in the management of the rational state, whose main positions are occupied through plutocratic recruitment, according to the equality of odds arbitrarily controlled by gentlemen appointed by the party system, according to corporate economic interests.

This closing of the doors of the State to the most disadvantaged, not helped by the first principle, nor by the second, which, moreover, puts economic social inequalities as sociological axiom, is not enough to deepen democracy, because by ignoring the social division of labor, both in economic infrastructure and in legal-political superstructure, leaves the citizen unarmed in the face of despotism in business administration and in the administrative state, whose disciplinary power is effective and fast as a guillotine suspended over the neck of the citizen who dares to contest *sine ira et studio* the unfair orders of their bosses.

The principle of Rawls' participation, set out in §36 of the original 1971 edition, if analyzed individually, apart from the Rawlsian system, is perfectly adequate as a basis for the egalitarian occupation of public office. However, if seen in the set of principles of justice, its strength is significantly mitigated by what the veil of ignorance hides and the original position despises: the removal of the citizen from the decision-making processes that define and reproduce the economic sphere, which conditions or determines, in the last instance, the form of the social division of labor and the functioning of the contemporary State, whose administrative structure is already designed to allocate citizens, who hold a public position in subordinate positions. These citizens tend to be subordinate to positions and functions filled by the arbitrary criterion of trust and loyalty to the college of *honoratores*, holders of administrative means. Indeed, according to Weber (1999: 528):

«All state orders can be classified according to the principle that the staff — employees or other people whose obedience the power holder needs to be able to count on — are the owners of administrative means, consisting of money, buildings, material war, cars, horses or whatever, or else on the principle that the administrative staff is “separate” from the administrative means, in the same sense that currently the official and the proletarian in the capitalist enterprise are “separated” from the material means of production (my translation)»<sup>1</sup>.

To this process of administrative alienation of the citizen, demoted to the status of employee, Weber calls spiritual proletarianization: «(...) the direction of political parties by plebiscitary leaders takes away the "soul" of their followers (...). To be useful to the boss (...) followers have to obey him blindly, be a machine in the North American sense(Weber, 1999: 559, my translation)»<sup>2</sup>. In the 2001 recast, precisely in section 52.1, Rawls admits this problem, albeit timidly, when dealing with the criticism of Marxists to his 1971 text:«To the objection against the division of labour into capitalism, we reply that its impoverishing and degrading characteristics must be largely overcome when the institutions of the owners' democracy are in place (Rawls, 2008: 241, my translation)»<sup>3</sup>.

Thus, Rawls' political liberalism, although well intentioned, fails to overcome the figure of the weak and impotent citizen, reduced to the condition of an official of the contemporary administrative state. Constantly harassed by vested interests, this employee-citizen is reduced to the instinct of self-preservation, which, over the years, annihilates and depresses him. The force of the habit of submission prepares in the belly of the legal-political superstructure, albeit involuntarily, but in an objective and persistent way, the transformation of liberal patronage into neo-fascism. In order for a theory of justice to be fair, it is necessary to understand the sources of human suffering in historical times, which include the biological survival risks of the species itself. For this, we cannot ignore what humanity has achieved so far. Rawls' strict doctrine of good, in addition to being abstract, calls upon the neo-contractualist pact uprooted citizens who are ignorant of the real problems of the world system. In that sense, it seems to have lost the tram of social history.

Nevertheless, despite its unsolvable problems — possibly derived from its willingness to break with the economic corollaries of classical liberal individualism, while seeking to reaffirm its assumptions —, the strength of “Justice as Fairness” lies in its bold propositions of a theory of egalitarian justice, whose contradictions can be overcome by its critical update in the form of a civic-republican conception, in which public freedoms cannot be subsumed to community rules, nor can they be placed above them, so that freedom and equality must be codetermined, instead of hierarchizing or excluding themselves. This civic-republican update shows itself as a reasonable way to break with the axioms of Rawls' theory of justice, while preserving and broadening its egalitarian content in a comprehensive way, insofar as it hosts, in a republican key, its interesting proposals for liberal socialism — treated in sections 41 and 42 of “Justice as Fairness”, including pointing, in item 52.3 of section 52, to the possibility of self-management of companies and factories —, in addition to including the whole myriad of fundamental rights, which is the most advanced in terms of utopian strength ever translated into norms of conduct for human civilization.

However, as one might think, the civic republicanism proposed here is not a comprehensive doctrine of the good in general, generated within a specific political philosophy or ideology of the good, but a comprehensive conception of the legal good, already the object of the overlapping consensus, product of the conflict — and not of the Euclidean propositions of a social scientist — between individuals, groups, classes and peoples, waiting for realization in the world of life. Because of this bias, the civic

republicanism suggested here is not a perfectionist, as it does not regard justice as a finished and historical entity, the product of a monocratic and speculative reason. Nor is it a subjective or transcendental republicanism, in the Kantian sense, nor an objective republicanism, in the Hegelian sense of the alienation (*entfremdung*) of the spirit, although these subjective and objective moments of the spirit constitute it.

Away from political science, political sociology and political philosophy, the civic-republican theory of justice is simply legal and its concept is the result of the non-identity relationship between the singular, particular and universal spheres of social and political existence. In other words, averse to the great syntheses of the subject and history, this approach to justice is differential, since the subjective (Kantian) and objective (Hegelian) moments of the legal form are denied under the practical and historical aspects, respectively, and kept under the aesthetic bias. Thus, it denies both the solipsism of Kant's practical reason (1985) and the authoritarianism of Hegel's philosophy of law and philosophy of history (1979; 1987; 1989), to affirm a faculty of judgment based on the critical dialogue between reason and sensitivity, differential judgment of legal forms and contents already constituted and in the process of constitution, whose sources are Kant's Third Critic (2000) — in the political reading of H. Arendt (1991) —, Hegel's Aesthetics (1995) and Adorno's Aesthetic Theory (1995)<sup>4</sup>.

With this dialectic of non-identity, the faculty of judging civic-republican transvalues the Rawls' original position in a *virtual position*<sup>5</sup>, from which people not only have the right to actively participate in the public sphere, to the extent that they wish and are motivated to update in the social entity the rationality of the possible, but the duty to do so critically. In effect, in the virtual position, a public sphere can be considered and redesigned, constructed and deconstructed according to the imperatives of life and freedom available in the rationality of the present. Unlike the original position, the virtual position is therefore in *potentia*, not metaphysical, and overlapping consensus participants are committed to converting the deontic world into an ontic world, based on the constellations of fundamental rights, which are, so to speak, *suprema regula* of democracy and the ethical statute of civil life, ie, a critical map of public morality and the stock of infraconstitutional and constitutional norms. Virtual position can also be understood as *ideal position*, in the sense expressed by Hegel in his "Aesthetics" (1995) — a concrete idea that «(...) brings with it the measure and the principle of its particularization and the way of manifesting itself (Satie, 2009a: 146, my translation)»<sup>6</sup> — and by Marx in the afterword of the second German edition of his "Critique of Political Economy" (2013: 90, my translation): «the ideal [*das Ideelle*] is nothing more than the material transposed and translated into man's head (my emphasis)»<sup>7</sup>.

In this sense, the civic republicanism indicated here is not the application of a pure procedural democracy, rightly criticized by Rawls in section 44 of "Justice as Fairness" as a sort of endogenous assembly, which would make a blank slate of constitutional democracy and — I would complement it — of human rights conventions and treaties, since the constitutions of national states must also be evaluated by conventional norms, the last resort of normative criticism. However, the republican approach rehearsed here is committed to deepening deliberative democracy, as suggested by Rawls himself (2008: 206, my translation): «It is about deepening the conditions of deliberative democracy and preparing the ground for the exercise of public reason, an objective that justice as equity shares with civic republicanism»<sup>8</sup>.

All things considered, with the normative color palette already available, the civic-republican corrective proposed here to "Justice as Fairness" is aesthetic and the idea of sovereignty that comes from it does not stem from politics, but from art, an epistemological territory, in which expressive forms of suffering human are generated

with autonomy, despite the subjective miseries of the artist and the objective miseries of history, as such, nihilistic miseries that are permanent adversaries of the autarchic creative act. Yes, the aesthetic turn of the theory of justice is expressive of human suffering and engaged in diminishing it in the singular, particular and universal spheres of social existence.

## I.2 EQUALITY PRINCIPLE

North American anthropologist George Peter Murdock published between 1962 and 1980 an ethnographic database covering 1167 societies, identified by geographic areas. A summary was published in 1967 containing data from 862 societies (Murdock, 1967). According to Hoebel and Frost (1984: 288), if we consider data from 774 original societies compiled and categorized by Murdock — comprising the main geographic areas, such as Sub-Saharan Africa, the Mediterranean, Eastern Eurasia, Oceania, North America and South America — 68% of them have no classes; 24% have complex stratification — in which classes differ according to occupational status — and only 8% are organized in the form of elite stratification, in which one class has control over resources, especially land — the main means production of these social formations — to the detriment of non-owners, such as serfs and proletarians. If we look by geographic area, the data appears with more emphasis. Classless societies are: 53% of social formations in Eastern Eurasia, approximately 2/3 of communities in sub-Saharan Africa and Oceania and almost 90% of societies in North and South America, the New World. Hoebel and Frost (1984: 289, my translation) conclude, in a polished way: «The class phenomenon takes place in the Old World and is a phenomenon of civilization — at least until the present»<sup>9</sup>.

In original societies, land is the main asset, it is the *conditio sine qua non* of human existence. According to Hoebel and Frost (1984: 264, my translation), in general, «(...) the vast majority of primitive peoples treat their land resources as a common property. In this sense, they are predominantly communists»<sup>10</sup>. Consumer goods in these societies, which are food goods, are of mixed ownership. Common plants and wild animals are common properties, although they can be appropriated individually through the work of transforming prey and plants into food for consumption. This does not mean that these peoples are collectivists. In these social formations, individual and common goods are articulated in an extremely advanced way: «Private property never implies absolute exclusivity and since, among hunters and gatherers, food is taken from common property sources, there is an insistent demand that privately owned foodstuffs are common (Hoebel; Frost, 1984: 265, my translation)»<sup>11</sup>.

Crop products are also of mixed ownership in most of the original peoples, belonging to the harvesters and their relatives, as in Melanesia. However, among the Pueblos Indians of North America «(...) just as rabbit hunting is a common duty, so is planting and cultivating the garden of the chief. The harvest is stored in the chief's house for common use (Hoebel; Frost, 1984: 267, my translation)»<sup>12</sup>. Immaterial goods are also mixed property, being individual or group property, depending on the situation, names, songs, magic objects, rites, dances, charms, myths and legends. Due to its affective and deeply personal character, cattle are generally considered to be privately owned. For this reason, as noted by Hoebel and Frost (1984: 268), the domestication of animals was one of the great incentives for the appearance of private ownership of the means of production. Indeed, wealth appears as a social distinction exactly between pastors, as the Murdock Atlas points out. Working means such as canoes, tools, weapons, and artistic

objects such as ceramic vases, musical instruments are individually owned. However, among the Trobriands, the canoe is jointly owned, as noted by Malinowski (2003: 22-23).

From the point of view of economic relations, which are invariably confused with legal-political relations in original societies, points out Malinowski (2003: 27-28, my translation):«(...) wherever careful research is done, structural symmetry will be found in all savage societies as an indispensable basis for reciprocal obligations»<sup>13</sup>. This symmetrical structure that occurs at all levels of social formation (singular, particular and universal) prevents the appearance of inequalities in relation to material and immaterial goods, such as magical and religious ceremonies:«Most, if not all, economic acts belong to some chain of gifts and reciprocal counterparts, which in the long run are balanced, benefiting both sides equally (Malinowski, 2003: 37, my translation)»<sup>14</sup>.

In short, for the strict Polish anthropologist (2003: 41), reciprocity is the basis of the social structure of the original peoples. However, this is not an abstract basis or a social or legal fiction. These peoples embody the ideas of symmetry, mutuality, cooperation and equality in the world of life, in a territory full of tensions at the individual and collective levels of social existence. Such ideas are principles supported by a complex social engineering, which makes us think that such axiological axes are not only intuitive, but volitional and resulting from a meticulous creative capacity, which includes constant readjustments and adaptations, making their normative force flexible, but insistent: its truth is constantly put to the test, on which the community's own egalitarian survival depends. Schaden demonstrates how, in the middle of the twentieth century, subjected to centuries to a deplorable state of exploitation and acculturation, most of the Guarani villages continue to maintain their remarkable spirit of autonomy and independence (Schaden, 1974: 11, 59-60, 97, 118- 119, 183), in addition to the principle of reciprocity (Schaden, 1974: 37-38, 49, 50, 95) in their social relations, thus distanced from the income principle: «Since the Guarani society does not honor individuals with reference to the material goods they may have, there is no incentive to develop economic productivity, which is not recognized as a factor of social distinction» (Schaden, 1974: 183, my translation)<sup>15</sup>.

It is not a matter of looking at the experience of the original peoples in an essentialist way, but as an experience that was in force and still remains, despite the constant threats that are still being targeted in the contemporary world. As Godelier(1977: 53, my translation) observes:«An Indian from the Amazon, a victim of genocide and white peace, is no closer to the true essence of man than a Renault worker or a Vietnamese peasant at war against imperialism»<sup>16</sup>. Indeed, going against the «(...) the simplistic and impoverished interpretation of a “primitive communism” where everything would belong to everyone (Godelier, 1977: 173, my translation)»<sup>17</sup>, Godelier saw that in the social cooperation regime of the Mbuti Pygmies, from the Congo equatorial forest: «There is no chief (...); authority is shared between the sexes and the generations. Any individual who seeks to transform his prestige into power is criticized and subjected to ridicule (Godelier, 1977: 323, my translation)»<sup>18</sup>.

All in all, such principles of reciprocity, mutuality, symmetry and cooperation, historically experienced by the original peoples, are components of the principle of equality (EP), constitutive of the civic-republican theory of justice as equity outlined here. EP and RP are, therefore, principles of fair social and economic relations, at the singular, particular and universal levels of the social being. As such, they are intuitive and volitional principles, already tested over the two to three hundred thousand years of history of homo sapiens and based on the practical reason of the original peoples. Thus, experienced by several generations, these axiological guidelines are the most advanced

and intelligent in the history of human cultural evolution. They are not, therefore, lessons from an idyllic past, invented or mythologized, but a record of a past lived, brutally interrupted and, henceforth, a reference for the future for Western society, which reached its 500 years of capitalist existence, unable to realize fundamental rights and guarantees in their most basic material structures, since it is governed by structuring principles of social and economic inequality.

Rawls, however, ignored this evidence. Certainly, because, as he himself explains in section 6.3 of the 2001 reformulation, his formalist posture determines that his original position is merely a mental representation, ie, a hypothetical, deductive and non-historical thought experience (Rawls, 2008: 38). However, this geometric procedure rejects not only real history, but also conjectural history, imprinted on the idea of a state of nature:

«The principles of justice define the form of justice in the social context independent of any particular historical condition. What matters is the current functioning of social institutions, and the benchmark of the state of nature (...) does not play any role. This is a historical myth whose knowledge is impossible and which, if it were, would remain unimportant(Rawls: 2008, 85, my translation)»<sup>19</sup>.

It is not difficult to imagine that this refusal to state of nature, at the end of section 15 of “Justice as Fairness”, also applies to the social experience of the original peoples. We see here clearly the anthropological deficit of Rawls' theory of justice, precisely at a time when the most significant studies of anthropology had already been published, with the 70's of the 20th century being one of the most productive periods of American and Anglo-Saxon anthropology.

Thus, arising from this rationalist framework, Rawls' principle of difference, circumscribed, in fact, to the worldview of American capitalism — after all, what counts is the current functioning of social institutions(Rawls: 2008, 85) —,appears as a justifier for class division and social and economic inequalities. Indeed, equal chances should favor anyone, «(...) whatever their class of origin (Rawls, 2008: 71, my translation)»<sup>20</sup>x. As he himself explains, following up on this argument, at the end of the same section 13.2, in the 2001 reformulation, this equal equality of chances is a liberal equality, in which«The free market must take place within a structure of political and legal institutions that adjust the long-term trend of economic forces, so as to prevent excessive concentrations of property and wealth (Rawls, 2008: 71, my translation)»<sup>21</sup>. In addition, Rawls (2008: 85, my translation) concludes at the beginning of section 16:«(...) any modern society, even when it is well ordered, must rely on certain inequalities to be well designed and organized effectively (...)»<sup>22</sup>.

Thus conceived, *more geometrico*, based on a historical situation in which social and economic inequalities are the biggest problem in contemporary social existence, Rawls' principle of difference is counterintuitive. No one — except those who are partial and interested in the unfair distribution of material resources or who are beneficiaries of class division (free riders) — would accept a theory of justice in which asymmetries are treated as a principle and not as a result of the economic exploitation of victims of capitalism (“underprivileged”, according Rawls). Therefore, in this respect, Rawls' abstraction reveals itself as a construction en porte-à-faux. In fact, as we have already said, seen more closely, with a certain prudence and critical acuity, Rawls' device is, in fact, the mimesis of a particular and dated historical situation, which feeds precisely on economic and social inequalities; at the same time it propagates equal opportunities unattainable for all, without distinction.



Whence, the principle of difference must disappear, because it is anti-intuitive and partial. However, if it is anti-intuitive and partial, ergo it is unfair. If it is unfair, it is not at all a principle: it is only a contingency that leads to the limitation of the play of political forces. Therefore, it must be replaced by the *Equality Principle* (EP), which, to be intuitive, impartial and fair, is quite full of axiological and ethical content.

### 1.3 THE *QUID MALIGNUM* PROBLEM

Once the axiomatization of the principle of difference has been rejected — the axiological generator of negative feelings of destabilization of social cooperation — and the principle of equality is enthroned as a starting point, the civic-republican approach to justice as equity, here suggested, preserves all Rawls's discussion on general moral psychology and its results, set out in chapter VIII, §70-72 and §75-76 of the TJ, in its 1971 formulation, and maintained in the 2001 reformulation, as he explained in note 17 to section 59. Therefore, with the non-preservation of Rawls' second TJ principle, the aggressive psychological tendencies manifested in envy, anger, resentment, pettiness, jealousy, fear of disobeying and taking risks, the will to dominate and submitting, etc., become mere externalities to the civic-republican deontic device.

I redefine these aggressive psychological tendencies, mentioned by Rawls, with the concept of *quid malignum*, which are the affections of the spirit caused by the lack of recognition or by the economic, social, political and cultural helplessness, ie, by the state of deprivation to which a large part of the world population is subjected, victimized by the principle of income, “spell” typical of the society managed by the production and consumption of goods. The term is used by the anthropologist Egon Schaden, based on ethnographic studies by the South American Indians, and, in particular, by the Guarani Indians, to refer to the spell introduced into the body of another, in order to cause him illness, which can, in a short time, «(...) cause considerable social consequences, generate mistrust, disunity or even enmity and open struggles within the local group, putting into action disruptive forces of social life existing in a latent state (Schaden, 1974: 124, my translation)»<sup>23</sup>.

Rawls's response to such psychic tendencies is not satisfactory because of a problem inherent in his public conception of justice: the axiologization of formal public freedoms, alongside the axiologization of social and economic inequalities, based on the principle of difference. Better: the formal affirmation of public freedoms in the same step as the material confirmation of the conditions that prevent them from being exercised by the great majority of the world population, since such inequalities are not merely contingent, but constitute a reproductive factor of the current economic system, founded on non-social cooperation and structural asymmetry. This fundamental contradiction of Rawls' public conception of justice is the discouraging core of acquiring a sense of justice and a moral principle: «Why are political or formal ‘equality’ admitted and at the same time is proposed social and *economic* ‘inequality’? Shouldn't social and *economic* equality be formulated, at least in principle, as a starting point? (Dussel, 2007: 178, my translation)»<sup>24</sup>.

The average citizen could also ask, with Dussel (2007: 179, my translation): if social and economic inequalities are undeserved, as Rawls admits in §17 of the TJ, «Why doesn't Rawls explain that they are unfair?»<sup>25</sup>. This fundamental contradiction carries to the heart of the construction of Rawls, *ab ovo*, the principle of reality, which generates manifestations of death drive and aggressive feelings. Indeed, who would not be indignant with the following statement by Rawls, in §17 of the TJ (1997: 133, my

translation): «The natural distribution is neither unfair nor fair; it is also not unfair that some are born in certain particular social positions. These are only natural facts»<sup>26</sup>? It seems that:

«Rawls has a special blindness in understanding that a) one aspect is the 'luck' of being born into a more or less fortunate family (this is pure chance), but b) another, that there are historical (unnatural) and social structures in which we must be born, perfectly analyzable, determinable by the *critical* social sciences (Dussel, 2007: 179, my translation)»<sup>27</sup>.

This naturalization of social and economic violence in the public sphere attracts the tendency to psychologize the resistance of the victims, considering their behaviors as private addictions to be treated at the three levels of moral learning proposed by Rawls in the TJ, namely, moral of authority (§70), moral of group (§71) and moral of principles (§72). However, this therapy cannot be successful, except in a civic-republican scenario in which citizens, educated at the three levels of the political association — ie, singular (family), particular (group) and universal (institutional) levels —, will feel motivated to rely on the normative strength of the virtual position. This position, so to speak, functions as an *imago* or monad that photosynthesizes the republican principle — which guarantees the responsible exercise of creative power —, of the principle of equality — which guarantees the break with a economic system producer and reproducer of disadvantaged classes — and of the five constellations of fundamental rights, seat to the positivation of these principles (RP and EP) and the formulation of all other ethical guidelines in the world of life, as we will see below. In short, due to the axiological density of the virtual position, participants in the overlapping consensus are encouraged to tear the veil of ignorance to know who are the victims of an economic social system that subjects nature and individuals to the principle of income. As a result, this civic-republican approach to justice rescues much of Rawls's formulation — as a regulatory idea — and denies everything that prevents it from materializing and becoming effective in the social entity.

## I.4 IDEAL TYPES

### I.4.1 Flat man

By *flat man* — or *esplanade man* — I mean the synthesis, in the public sphere, between *homo hierarchicus* and *homo economicus*. It is the one that has not gone from the morals of civil servants or lords to the morals of principles, behaving in the public sphere as a thing when employed and as a manipulator when a boss. He sees who gives him an order like the projection of his authoritarian father, whom he obeys blindly, without critically examining his injunctions, as he must do in the light of moral principles, in the terms explained by Rawls. On the contrary, he does everything to ignore the ends of the public affairs, using it only as a means of self-preservation and as a source of its prebends and sinecures. A mere fillerer of the workday, his greatest ideal is the enjoyment of vacations and his greatest planning is to divide it so that the total calculation is always greater than the legal 30 days. He is usually subservient and flatterer, not necessarily in that order.

*Flat man* is capable of obeying any type of command from the chiefs, from scheduling their hairdressers and dentists, to transporting their relatives and things

during work hours. As an inanimate machine, with a coagulated spirit (Weber, 1999: 541), he specializes in reproducing servitude, when he obeys or when he commands. He is a mere adherent of the camarilla of notables and an offender of republican virtues. However, this man is no exception, he is an exception man; that is, he is the rule in public institutional apparatus, just as the corrupt politician is the rule in party politics. One is a clone of the other, in their respective niches. How Weber teaches (1999: 529, my translation):

«In the same way that the so-called progress towards capitalism, since the Middle Ages, is the unique criterion of the modernization of the economy, the progress towards bureaucratic functionalism, based on contract, salary, pension, career, specialized training and division of labor, fixed competences, documentation and hierarchical order, is the equally unequivocal criterion of the modernization of the State, both monarchical and democratic»<sup>28</sup>.

*Esplanade man* is also a court man. He is a keeper of rites and gestures, which are classified according to two decisive categories: the category of trust and the category of suspicion. In the public sphere, anyone who is not trustworthy is suspect. And to be object of suspicious, just do not slavishly participate in the collection of gestures and rites administered by the college of gentlemen, either on the occasion of a birthday party or during the narration of a misogynistic, racist or merely dull joke. The category of suspicion has the annihilating power of all the chances and opportunities that arise in the clientelist and patrimonial market of state functions and positions. To a suspect server, the functional death; to a trusted servant, all the merits and medals, regardless of the good civic qualities of the first and the public vices of the second. *Esplanade man* is therefore a keeper of flocks on the one hand and a keeper of princes on the other. In this democracy of courtiers, as in the time of Louis XIV:

«(...) the ceremony obeys a very precise purpose. The king does not simply stick to the hierarchical order transmitted by his predecessors. Etiquette gives him some leeway, so he uses it to determine everyone's prestige, even in matters of little importance. It takes advantage of psychological accommodations that reflect the hierarchical and aristocratic structures of society; he takes advantage of the rivalry of courtiers, always in search of prestige and favors, to modify, thanks to the skilful dosage of his marks of favors, the rank and the consideration of the members of the court society according to the needs of its power, to create internal tensions and move the centers of balance at will (Elias: 1985: 77-78, my translation)»<sup>29</sup>.

#### 1.4.2 *Homo aestheticus*

The civic-republican theory of justice as equity cannot be sustained without a change in the quality of judgment. This movement occurs through the dialectical transition from *sensus privatus* to *sensus communis*, ie, by opening the faculty of judgment to the different, the multiple and the multidimensional. This process of broadening the judgment takes place under the three forms of morality, as presented by Rawls, that is, as a sense of justice — which encompasses moral of authority, moral of group and moral of principles —, as love for humanity and as self-control. I call *aesthetic ethos* the synthesis between these three great forms of morality and I consider *homo aestheticus* everyone who conducts himself or herself in being-there through this ethos, whose color palettes are available and consolidated in the five constellations of human rights.

The sense of justice is acquired in three moments. The first (moral of authority) is developed in the context of early childhood education. At this stage, the family must educate their offspring, ultimately being guided by laws, constitutional provisions and international child protection conventions. In the second (moral of group), the social insertion of the pre-adolescent and the adolescent is fundamental for them to live with differences, in an environment of plurality, and to develop the capacity for self-esteem and recognition of the diversity of personal styles of existence, in accordance with the human rights constellations related to this stage. The third moment (moral of principles) prepares adults for the exercise of civic virtues in public institutions, dialogically oriented by the rational justification of principles, in accordance with the normative force of 1) democratic constitutions; 2) Global System for the Protection of Human Rights; 3) Regional Systems for the Protection of Human Rights, such as the African, European and Inter-American systems; 4) International Humanitarian Law and 5) International Refugee Law.

But if, until now, *homo aestheticus* has in his favor the fact of living in a well-ordered society — which is that«(...) where everyone accepts and knows that others accept the same principles of justice and where basic institutions respect, and are known to respect, these principles (Rawls, 1997: 496, §69, my translation)»<sup>30</sup> —, how would he behave in the face of a despotic and corrupt political-economic association, where the idea of cooperation and mutuality or a public conception of justice does not prevail? In this case, the *aesthetic ethos* that guides his faculty of judgment and his practical reason could be expressed in the form of love for humanity, «(...) by acts in favor of the common good which go well beyond our obligations and our natural duties (Rawls, 1997: 519, §72, my translation)»<sup>31</sup>.

In such political-administrative associations, *homo aestheticus* is constantly challenged to realize the values of the just and of justice, in a situation of extreme risk to his biological and social life. It is then that the *aesthetic ethos* acquires the moral format of self-control «which surpasses what duty and obligation demand (Rawls, 1997: 519, §72, my translation)»<sup>32</sup>. In view of the extreme risk to its self-preservation, *homo aestheticus* would have Alain's wise words in mind, remembered by Comte-Sponville (2010: 69): «Justice belongs to the order of things that must be done precisely because they do not exist (...). Justice will exist if we do it. This is the human problem (Alain, 1912: 280, my translation)»<sup>33</sup>. The republican citizen knows that the practice of the act of love for humanity, in a despotic political association, requires courage and that «(...) it only becomes a virtue when in the service of others or a general and generous cause (Comte-Sponville, 2010: 55, my translation)»<sup>34</sup>.

## 1.5 CONSTELLATIONS OF HUMAN RIGHTS

The fundamental rights can be systematized from Karel Vasak's Theory of Generations of Rights (1980), well elucidated by Bobbio (1990: 1-10). However, it must be considered that the meaning 'generation' charges the mental representation of the image of a diachronic legal form; which is why I prefer the term *constellations of fundamental rights* to refer to all this myriad of norms in motion, interrelation, mutation and evolution. Indeed, these constellations of rights participate substantially, as much in the infinity of the human spirit as in the finitude of the non-human world, or even the *physis*, by revealing the idea of synchronicity and coexistence of rights, products of conflict in the ontic basis of social formation.

The first constellation of fundamental rights is individual, civil and political

rights: freedom rights (v.g. Declaration of Human and Civic Rights of 08/26/1789; Convention on Women's Political Rights of 03/31/1953; International Covenant on Civil and Political Rights of 12/06/1966).

The second constellation includes economic, social and cultural rights: equality rights (see Universal Declaration of Human Rights of 12/10/1948; ILO Conventions of 1930-1999; International Covenant on Economic, Social and Cultural Rights of 12/16/1966; International Convention on the Rights of the Child of 11/20/1989; International Convention on the Elimination of All Forms of Racial Discrimination, adopted on 12/21/1965).

The third constellation is made up of fraternity and solidarity rights (v.g. Geneva Convention IV, 08/12/1949; Refugee Status, 07/28/1951; Caracas Convention, 03/28/1954).

The fourth constellation plays on governance rights (v.g. American Convention on Human Rights, of 11/22/1969; Chapultepec Declaration, 03/11/1994; United Nations Charter, 06/26/1945; ILO Convention n° 169 on Indigenous and Tribal Peoples, 06/27/1989; Ushuaia Protocol on the Democratic Compromise of Mercosul, 07/24/1998).

The fifth constellation highlights the rights of nature (v.g. Convention on Biological Diversity, 05/22/1992; Vienna Convention for the Protection of the Ozone Layer, 03/22/1985; United Nations Framework Convention on Climate Change, 05/09/1992; Convention for the Protection of Human Rights and Human Dignity with regard to the Applications of Biology and Medicine, 04/04/1997).

## FINAL CONSIDERATIONS

What does this improvement? This means that the idea of negative freedom must give way to that of positive freedom, and that the *Theory of Justice* henceforward must align with a civic-republican approach to justice, where the will for creative power is circumscribed by the lines of the fields of force formed by ideas of freedom, equality, brotherhood, solidarity, governance and nature. This will, inherent in the human being and gradually repressed by the elitist structures of representative democracy, is absent from the categorical device of the *Theory of Justice*, which makes it breathless, cumbersome and anti-intuitive.

This republican perspective, however, as an application of aesthetic judgment, is not based on political theory, but on the aesthetic theory of law, whether from a philosophical, methodological or analytical point of view. In a tight synthesis, this theory conceives political association as a condensation of power relations, in which the singular, particular and universal dimensions of social existence are in dramatic dialogue, in whose web the aesthetic faculty of judging appears as a vector of the sublation (*Aufhebung*) of monocratic reason, in a scenario of diversity and plurality, in which individual and cultural differences are in constant tension with the annihilating tendencies of the society managed by *homo economicus* and directed by *homo hierarchicus*.

When Rawls (2008: 65) asks what are the principles that are best suited to a democratic society, he presupposes that we are already in a democratic society. Thus, his principles of justice do not have the operational strength to deepen this democracy, once they are best suited to an existing structure. That is why Rawls is only interested in primary goods and the basic structures of society, in a constitutional democracy. On the other hand, for the civic-republican theory of justice, what best fits a democratic society

is the sharing of political power by all citizens at the singular, particular and universal levels of the public sphere, placing them in equal conditions of to lead civil and administrative existence, under the guidance of the most advanced constellations of rights already condensed as the most current content of the contemporary legal form, which is the result of conflicts between individuals, groups, classes and peoples throughout social history.

This conception correctly assumes that the desire to exercise creative power is irrefutable, inalienable and irrepressible, because it is inherent to the human being, and must therefore gain a consistent form of expression in political association. However, the exercise of this creative power must be ensured by public procedures governed by the constellations of fundamental rights and guarantees. From this outlook, as it is anchored in sharing the faculty of judging between reason and sensitivity, the best way to control this creative *energeia* is to allow its non-repressive sublimation instead of organizing the institutions to promote its suppression.

Each person has the objective right to act thoughtfully, to match the activities assigned by the universal level of the political community, with a view to their development. Furthermore, all power must be exercised for the benefit of the fulfillment of the fundamental rights of all, according to the parameters of the most advanced legal forms. Since democratic culture cannot evolve by disdaining the *vis* creative of individuals, the principles of justice must be applied to all social institutions, not just to basic institutions. This force must be encouraged *ad vitam aeternam* by the political society, even when its fruits cannot be harvested immediately. However, this encouragement must remain educational and not repressive. Republican ethics require a long-term commitment to the collective formation of the virtues necessary for the cooperative society, whether in the public or private domain.

Moreover, in the society of creative cooperation, the idea of discipline plays with that of freedom, not with the obligation to obey the rules of *homo hierarchicus*. In this sense, coercion is not a corollary of disobedience, because transgression is freedom itself in action. And, because it always comes after the error, coercion is external to political justice, so that it adds nothing to the cooperative activity. It only confirms the authority of the *homohierarchicus*, nothing more. As soon as the hierarchy is incompatible with the civic-republican theory of justice, coercion loses all its coercive nature. Besides, evil can come either from disobedience or from obedience to the rules; in any case, it indicates a lack of prevention or acuity in the management of the goals of fair society. Thus, in a democratic society, coercion must be converted into criticism, or even public recognition of errors, whose justification and evaluation have the function of perfecting the system of cooperation or improving procedures prevention and production of control rules. To explain more clearly, the chain of political obligation/discipline/coercion of repressive society can be completely broken by the critical and creative exercise of positive freedom, which at the same time includes the right to error and the responsibility for its correction.

In total, in post-industrial society, discipline is only a way of exercising freedom, of mastering with competence the spontaneous activity of creative social work, or, if one wishes, of sublimating the will to power in the will of political art, with these three components, namely: willingness to appear, willingness to act and willingness to recognize or be recognized (appetite of recognition). Thus, in the regime of positive freedom, put into practice by this aesthetic approach to justice, coercion would only be a gross interruption of the blossoming of the mind in these three dimensions. As soon as life is there, the will to live bursts into all its glory. It necessarily radiates in all beings, although aristocratic liberalism seems to consider that only a few should have

exclusivity, whether by luck (equal opportunity) or/and by the trick of the fittest (meritocracy).

The liberal fascination for freedom and authority, for contract and subordination, for justice and punishment opens up an aporetic set that reveals its truth content, namely that its plea for freedom is inseparable from the justification of violence, in order to maintain the privileges. To advance this liberalism and deepen its beginnings, it takes courage; that is, it is necessary to extend its capacity for judgment so that it is able to better express both the need to liberate freedom and the need to democratize democracy.

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## NOTAS

- 1 «Todas as ordens estatais podem ser classificadas segundo se fundamentem no princípio de que aquele quadro de pessoas — funcionários ou outro tipo de pessoas com cuja obediência precisa poder contar o detentor do poder — são *proprietários* dos meios administrativos, consistam estes em dinheiro, prédios, material bélico, carros, cavalos ou outras coisas quaisquer, ou então no princípio de que o quadro administrativo está “separado” dos meios administrativos, no mesmo sentido que atualmente o funcionário e o proletário na empresa capitalista estão “separados” dos meios de produção materiais (Weber, 1999: 559)».
- 2 «(...) a direção dos partidos por chefes plebiscitários tira a “alma” ao séquito (...). Para ser útil ao chefe (...) o séquito tem que obedecer cegamente, ser uma máquina no sentido norte-americano (Weber, 1999: 559)».
- 3 «À l’objection contre la division du travail dans le capitalisme, nos répondons que ses caracteres appauvrissants et dégradants doivent être largement surmontés lorsque les institutions de la démocratie des propriétaires sont en place (Rawls, 2008: 241)».
- 4 Conditions of possibility of an aesthetic approach to law have been investigated in Satie (2009a; 2009b; 2010; 2016; 2019).
- 5 Here I use Marcuse's concept of virtuality (MARCUSE, 1968: 227-248).
- 6 «(...) traz em si a medida e o princípio de sua particularização e do modo de se manifestar (Satie, 2009a: 146)».
- 7 «(...) o ideal não é mais do que o material transposto e traduzido na cabeça do homem (Marx, 2013: 90)».
- 8 «Il s’agit de d’approfondir les conditions de la démocratie délibérative et de préparer le terrain pour l’exercice de raison publique, objectif que la justice comme équité partage avec le républicanisme civique (Rawls, 2008: 206)».
- 9 «O fenômeno de classe dá-se no Velho Mundo e é um fenômeno da civilização — pelo menos até o presente (Hoebel; Frost, 1984: 289)».
- 10 «(...) os povos primitivos na sua grande maioria tratam seus recursos de terra como uma propriedade comum. Nesse sentido, são preponderantemente comunistas (Hoebel; Frost, 1984: 289)».
- 11 «A propriedade particular nunca implica exclusividade absoluta e como entre os caçadores e coletores o alimento é tirado de fontes de propriedade comum, é insistente a reivindicação de que sejam comuns os gêneros alimentícios de propriedade particular (Hoebel; Frost, 1984: 265)».
- 12 «(...) assim como a caça ao coelho é dever comum, assim também é o plantio e o cultivo da horta do cacique ou chefe. A colheita é armazenada na casa do cacique para uso comum (Hoebel; Frost, 1984: 267)».
- 13 «(...) onde quer que se faça uma pesquisa cuidadosa, a simetria estrutural será encontrada em todas as sociedades selvagens como base indispensável das obrigações recíprocas (Malinovski, 2003: 27-28)».
- 14 «A maioria dos atos econômicos, se não todos, pertence a alguma cadeia de presentes e contrapresentes recíprocos, que, a longo prazo se equilibram, beneficiando igualmente ambos os lados (Malinovski, 2003: 37)».
- 15 «De vez que a sociedade Guarani não prestigia os indivíduos com referência aos bens materiais que porventura possuam, não há estímulo para se desenvolver a produtividade econômica, não reconhecida como fator de distinção social» (Schaden, 1974, 183).
- 16 «Um índio da Amazônia, vítima do genocídio e da paz branca, não está mais perto da verdadeira essência do homem que um trabalhador da Renault ou um camponês vietnamita em Guerra contra o imperialismo (Godelier, 1977: 53)».
- 17 «(...) interpretação simplista e empobrecida de um “comunismo primitivo” em que tudo seria pertença de todos» (Godelier, 1977: 173)».
- 18 «Não existe (...) qualquer chefe; a autoridade é partilhada entre os sexos e as gerações. Qualquer indivíduo que procure transformar o seu prestígio em poder é criticado e sujeita-se ao ridículo (Godelier, 1977: 323)».



- 19 «Les principes de justice définissent la forme de la justice du contexte social indépendamment de toute condition historique particulière. Ce qui compte est le fonctionnement actuel des institutions sociales, et le repère de l'état de nature (...) ne joue aucun rôle. Il s'agit d'un mythe historique dont la connaissance est impossible et qui, si elle l'était, resterait sans importance (Rawls: 2008, 85)».
- 20 «(...) quelque que soit leur classe d'origine (Rawls, 2008: 71)».
- 21 «Le marché libre doit prendre place au sein d'une structure d'institutions politiques et légales qui ajustent la tendance de long terme des forces économiques, de manière à prévenir les concentrations excessives de propriété et de richesse (Rawls, 2008: 71)».
- 22 «(...) toute société moderne, même lorsqu'elle est bien ordonnée, doit compter sur certaines inégalités pour être bien conçue et organisée efficacement (Rawls, 2008: 85)».
- 23 «(...) acarretar consideráveis consequências sociais, gerar a desconfiança, a desunião ou até inimizades e lutas abertas no seio do grupo local, pondo em ação forças disruptivas da vida social existentes em estado de latência (Schaden, 1974: 124)».
- 24 «Por que se admitem 'igualdades' políticas ou formais e se propõem ao mesmo tempo 'desigualdades' sociais e econômicas? Não se deveria formular, ao menos em princípio, uma igualdade social e econômica como ponto de partida? (Dussel, 2007: 178)».
- 25 «Porque Rawls não chega a explicitar que são *injustas*? (Dussel, 2007: 179)».
- 26 «La répartition naturelle n'est ni injuste ni juste ; il n'est pas non plus injuste que certains naissent dans certaines positions sociales particulières. Il s'agit seulement de faits naturels (Rawls, 1997: 133)».
- 27 «Rawls tem uma cegueira especial em compreender que a) um aspecto é a 'sorte' de nascer em uma família mais ou menos afortunada (isto é pura casualidade), mas b) outro, que haja estruturas históricas (não naturais) e sociais em que nos cabe nascer, perfeitamente analisáveis, determináveis pelas ciências sociais *críticas* (Dussel, 2007: 179)».
- 28 «Do mesmo modo que o chamado progresso em direção ao capitalismo, desde a Idade Média, é o critério unívoco da modernização da economia, o progresso em direção ao funcionalismo burocrático, baseado em contrato, salário, pensão, carreira, treinamento especializado e divisão de trabalho, competências fixas, documentação e ordem hierárquica, é o critério igualmente unívoco da modernização do Estado, tanto do monárquico quanto do democrático (Weber, 1999: 529)».
- 29 «(...) l'étiquette obéit à une finalité très précise. Le roi ne s'en tient pas simplement à l'ordre hiérarchique transmi par ses prédécesseurs. L'étiquette lui laisse une certaine marge de manoeuvre, don't il se sert pour déterminer la part de prestige de chacun, même dans les affaires de peu d'importance. Il tire profit des aménagements psychologiques qui reflètent les structures hiérarchiques et aristocratiques de la société; il tire profit de la rivalité des hommes de cour, toujours en quête de prestige et de faveurs, pour modifier, grâce au dosage savant de ses marques de faveurs, le rang et la considération des membres de la société de cour en fonction des nécessités de son pouvoir, pour créer des tensions internes et déplacer à son gré les centres d'équilibre (Elias: 1985: 77-78)».
- 30 «(...) où chacun accepte et sait que les autres acceptent les mêmes principes de la justice et où les institutions de base respectent, et sont connues pour respecter, ces principes (Rawls, 1997: 496, §69)».
- 31 «(...) par des actes en faveur du bien commun qui vont bien au-delà de nos obligations et de nos devoirs naturels (Rawls, 1997: 519, §72)».
- 32 «(...) qui surpasse ce que demandent le devoir et l'obligation (Rawls, 1997: 519, §72)».
- 33 «A justiça pertence à ordem das coisas que se devem fazer justamente porque não existem (...). A justiça existirá se a fizermos. Eis o problema humano (Alain,

1912: 280)».

34«(...) só se torna uma virtude quando a serviço de outrem ou de uma causa geral e generosa (Comte-Sponville, 2010: 55)».