

Rawls and private law

Rawls e o direito privado

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ABSTRACT:

The paper assesses the place of private law in John Rawls's theory of justice. A considerable part of the literature on that issue tries to ascertain whether private law belongs to the basic structure of society, the set of major social institutions to which Rawls's principles of justice apply. Here it is argued that more important than determining the basic structure's scope is to clarify the role that private law, once conceived as part of that structure, plays in Rawlsian justice. Such role is, in some sense, secondary, which explains why Rawls sometimes suggests, against the most usual broad definition of basic structure, that private law is alien to his principles of justice.

KEYWORDS:

Rawls - Private Law - Basic Structure.

RESUMO:

O artigo trata do lugar do direito privado na teoria da justiça de John Rawls. Parte considerável da literatura sobre o tema se ocupa em determinar se o direito privado pertence à estrutura básica da sociedade, o conjunto de instituições sociais aos quais os princípios de justiça de Rawls se aplicam. Argumenta-se aqui que mais importante do que precisar o âmbito da estrutura básica é esclarecer o papel que o direito privado, uma vez tido como parte dessa estrutura, exerce na justiça rawlsiana. Esse papel é, em certo sentido, secundário, o que explica por que Rawls às vezes sugere, contra a definição usual ampla de estrutura básica, que o direito privado é estranho aos seus princípios de justiça.

PALAVRAS-CHAVE:

Rawls - Direito Privado - Estrutura Básica.

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INTRODUCTION

This paper discusses the role of private law² in Rawls's theory of justice. A commonly debated issue is whether private law belongs to society's basic structure.³ This matters because the basic structure is the subject of Rawls's conception of justice, "justice as fairness" (Rawls 1999, 6). The principles of justice as fairness govern the basic structure, and only it. Hence whether private law is part of the basic structure is essential to determine if Rawls's theory of justice has something to say about that branch of law.

Rawls is seemingly contradictory on the subject. In *A Theory of Justice*, he conceptualizes the basic structure as "*the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation,*" those institutions encompassing "*the political constitution and the principal economic and social arrangements*" (Rawls 1999, 6). A similar definition is found in the first pages of *Justice as Fairness: A Restatement*, where Rawls adds as parts of the basic structure "*the legally recognized forms of property, and the structure of the economy (for example, as a system of competitive markets with private property in the means of production), as well as the family in some form*" (Rawls 2001, 10).

This way of defining basic structure suggests that private law, or at least a good part of it (as the law of property, contract and family law) is among the institutions of the basic structure. That conclusion is further warranted by the fact that Rawls explains his focus on the basic structure since its effects "*are so profound and present from the start*" (Rawls 1999, 7). Private law governs crucial parts of life and is, in a general way, decisive for the way the benefits and burdens of social cooperation are shared. If it is their "profound" effect over social cooperation that qualifies institutions as parts of the basic structure, then private law, with its rules about freedom of contract, acquisition and transfer of property rights and the family, among other issues, has to be included in the basic structure.

That conception of basic structure just mentioned – also called the *broad conception* (Kordana and Tabachnick 2005, 604) – contrasts, however, with another one in which Rawls seems to narrow the basic structure to just a few major social institutions, excluding from them private law (or, at least, the law of contracts). The narrow conception is introduced in a paper entitled *The Basic Structure as a Subject*, published at first separately and later

² For the purposes of the article, private law encompasses traditional branches of law such as property law, contract law, torts, family and inheritance law.

³ See e.g. Kordana and Tabachnick (2005), Klijnsma (2015) and Scheffler (2015).

incorporated with some changes in *Political Liberalism*.⁴ The passage at stake is the following (Rawls 1993, 268-269):

*To conclude: we start with the basic structure and try to see how this structure itself should make the adjustments necessary to preserve background justice. What we look for, in effect, is an institutional division of labor between the basic structure and the rules applying directly to individuals and associations and to be followed by them in particular transactions. If this division can be established, individuals and associations are then left free to advance their ends more effectively within the framework of the basic structure, secure in the knowledge that elsewhere in the social system the corrections necessary to preserve background justice are being made.*⁵

In view of the apparent contradiction, private law scholars worried about the consequences of Rawls's theory of justice have been aiming to ascertain which of the two conceptions of basic structure should be preferred.⁶ Alternatively, as does Scheffler in a recent paper (Scheffler 2015, 221-223), one could try to prove that there is just one conception of basic structure and that the alleged contradiction between the texts before transcribed rests upon a misunderstanding.

In face of that discussion, this paper argues for an intermediate position. Although it is here acknowledged that private law must conform to the principles of Rawlsian justice, pertaining, in this sense, to society's basic structure, the article's goal is to demonstrate that the role of private law in such structure is, for Rawls, secondary. Private law is taken to be irrelevant for what Rawls deems to be a crucial function of the basic structure, that of avoiding excessive material inequality. Because private law is thought by him to be inapt to fulfill that goal, Rawls is taken to exclude a central area of private law, contract law, from the basic structure. This occurs in writings where the above mentioned function – prevent great

⁴ References to that article are from the version included in *Political Liberalism* (Rawls 1996).

⁵ It is curious that, in the paragraph following immediately the one above transcribed, Rawls writes as the rules applying to individual transactions were part of the basic structure. As he now says: *“The basic structure comprises first the institutions that define the social background and includes as well those operations that continually adjust and compensate for the inevitable tendencies away from background fairness, for example, such operations as income and inheritance taxation designed to even out the ownership of property. This structure also enforces through the legal system another set of rules that govern the transactions and agreements between individuals and associations (the law of contract, and so on). The rules relating to fraud and duress, and the like, belong to these rules, and satisfy the requirements of simplicity and practicality. They are framed to leave individuals and associations free to act effectively in pursuit of their ends and without excessive constraints”* (Rawls 1996, 268) (emphasis mine).

If “this structure” in the italicized part refers to the basic structure, then this paragraph contradicts the other one transcribed above. For a passage similar to the one reproduced in the text, see Rawls (2001, 53-54).

⁶ Among those advocating for the broad conception are Kordana and Tabachnick (2005; 2006) and Klijnsma (2015). Scheffler (2015) also argues for the broad conception, but denies the existence of more than one meaning for the basic structure in Rawls's writings. In defense of the narrow conception, see Ripstein (2004).

inequalities of income and wealth – is the main concern. In contrast, in other places of Rawls’s work where it is more important to stress the institutional nature of justice as fairness – rather than some particular function social institutions are meant to play – the basic structure is presented in terms broad enough to encompass part, at least, of private law.

The article is organized as follows. Section 2 details the role Rawls assigns to the basic structure in preserving what he calls “background justice.” Section 3 explains why it is plausible that, on Rawls’s view, a crucial part of the institutional work related to background justice cannot be made by private law institutions. Section 4 shows that, in spite of being secondary, in a certain sense, at least part of private law belongs to the basic structure and must conform to the principles of justice as fairness. Section 5 asks, finally, whether private law could perform for a perfectly just society a more detached role than the one Rawls assumes. Section 6 concludes the paper.

2 BASIC STRUCTURE AND BACKGROUND JUSTICE

Rawls explains that the principles of justice as fairness are principles for the institutions of the basic structure. The same principles may not be appropriate for other realms, as e.g. the internal life of families and associations (Rawls 2001, 11).⁷

That social institutions (and not other things) are the subject of justice has two important consequences for our purposes. The first is that citizens’ behavior in a well-ordered society (a perfectly just society in Rawls’s terms) is only indirectly regulated by justice principles. It is the basic structure that must follow, for example, the difference principle. In a well-ordered society, citizens act as institutions prescribe them to do. They are not, regarding what those institutions allow them to do, forced to comply with the difference principle (what would be tantamount to act in whatever way maximizing the advantage of the worst-off citizens) or any other of the principles of justice as fairness.⁸ This is the sense in which justice for Rawls is conceived as background justice: a kind of justice not concerned with individual transactions, but only with the institutional rules under which those transactions take place.⁹

⁷ Nonetheless, principles of justice set constraints on what associations can do to its associates (Rawls 2001, 10-11).

⁸ The application of the difference principle to the productive decisions made by talented citizens is the point of Cohen’s (2008) critique of Rawls.

⁹ “*To elaborate: within the framework of background justice set up by the basic structure, individuals and associations may do as they wish insofar as the rules of institutions permit*” (Rawls 2001, 50).

Another consequence, related to the first one, is that, since the institutions of the basic structure are those required by justice, so will also be the results, whatever they are, obtained under (and in accord with) those institutions. That is now the sense in which Rawls refers to his account of distributive justice as pure procedural justice – rather than as allocative justice (Rawls 1999, 76-77). Under pure procedural justice, distributive results (e.g. a given distribution of well-being) cannot be deemed as just or unjust regardless of the way (in this case, the institutional background) they are produced.¹⁰ Neither does it make sense to ask which of two distributive states, abstractly considered, is fairer.

Nevertheless, the name pure procedural justice may make justice as fairness to appear less concerned with results than it in fact is. Here it is instructive the contrast Rawls draws between his views about justice and libertarianism (Rawls 1993, 262).

Since libertarianism does no more than stipulating conditions for legitimate acquisition and transfer of property rights, it is unable to oppose any distribution resulting from operations attending to those conditions. That sort of *laissez-faire* is at odds with justice as fairness, since the institutions of the latter have the task of avoiding distributive states whose inequality is incompatible with the fair value of political liberties and fair equality of opportunity.

I shall say more about this last statement. Before, however, let me summarize what we have seen in this section so far. It was pointed out that justice as fairness is a kind of background justice, since it is concerned with institutional justice rather than with individual behavior. According to that view, once institutions are set fairly, whichever results are produced in conformity with them will be fair too. Just institutions are those complying with the principles of justice as fairness.

Now a little digression becomes necessary. Remember that the difference principle requires maximizing the advantage of the worst-off citizens – such advantage being measured in primary goods like income and wealth. Following that principle, the basic structure assures background justice if, compared with other feasible institutional arrangements, the perspectives of the worst-off citizens regarding the distribution of primary goods are the best they can be. Hence the difference principle is compatible with a variable degree of material inequality – as long as, again, the institutions giving rise to such inequality are, in spite of it, better for the worst-off citizens than any of the alternatives.

¹⁰ “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, 76).

Above some point, however, wealth and income inequalities become a threat to the fair value of political liberties and fair equality of opportunity. Political liberties are protected by Rawls's first principle of justice, the basic liberties principles. Regarding political liberties, the first principle requires more than mere formal assurance of rights (e.g. the rights to participate in election and to run for public office). It further demands that political liberties have a fair value, what can be translated as a political process effectively open to the participation of all citizens. Material inequality must not constrain political participation, but for that, Rawls conjectures, wealth and income differences cannot exceed a certain range (Rawls 1999, 198). Public funds must also subsidize political parties, preventing them to become hostage of rich citizens' interests (Rawls 1999, 198).

Fair equality of opportunity similarly goes beyond merely formal equality of opportunity. This principle now requires that chances of reaching key positions and occupations in general do not end up essentially attached to social contingencies, so that citizens with roughly the same natural talents and willingness to develop them have about the same chances of attaining of succeeding (Rawls 1999, 63). Rawls does not enter in details about the relationship between wealth distribution and equality of opportunity, but states several times that concentration of wealth beyond a certain degree is at odds with equality of opportunity.¹¹

Thus even if the difference principle is understood as only requiring that the worst-off citizens' income and wealth be as great as it may be (without setting any constraint on the extent of inequality between the worst-off group and other citizens), a considerable concentration of wealth in few hands is deemed incompatible with justice as fairness.¹² Also note that as the principles at stake here – the basic liberties and fair equality of opportunity principles – are lexically prior, institutional arrangements to be considered for the sake of the difference principle are only those provided with mechanisms to avoid a level of inequality

¹¹ See Rawls (2001, 51): “background institutions must work to keep property and wealth evenly enough shared over time to preserve the fair value of the political liberties and fair equality of opportunity over generations.” In a similar way, a few pages later (Rawls 2001, 53): “very considerable wealth and property may accumulate in a few hands, and these concentrations are likely to undermine fair equality of opportunity, the fair value of the political liberties, and so on.” Later one, when criticizing welfare capitalism, Rawls says that this regime fails to avoid wealth and capital from being controlled by a small group of citizens. As a consequence, welfare capitalism is accused of rejecting the fair value of political liberties (Rawls 2001, 137-138) and, in spite of showing some concern with equality of opportunity, of lacking the measures necessary to achieve it (Rawls 2001, 138).

¹² Besides the fair value of political liberties and fair equality of opportunity, Rawls relies on the institutions of the basic structure to control material inequality so as not provide circumstances for excusable envy (Rawls 1999, 470). He also conjectures that, beyond a given point, wealth inequalities are a risk to the self-respect of the most disadvantaged citizens (Rawls 1999, 478-479).

threatening to the fair value of political liberties and fair equality of opportunity. Sets of institutions more beneficial to the perspectives of worst-off citizens regarding the primary goods of income and wealth may have to be discarded in face of the inequality they tolerate.

Before concluding this section, it is worth considering the following objection. One may accuse Rawls's views about the relationship between material inequality and opportunity as lying beyond the limits of political philosophy. That inequality beyond a certain point is prone to corrupt politics or to excessively attach opportunities to social contingencies may be uncertain or, if there is indeed a relationship between the two phenomena, that would have to be demonstrated with more than just philosophical arguments – e.g. sociological or psychological arguments – that Rawls anyways fails to provide.

In response, one should begin by admitting that inequalities of wealth and opportunities are indeed conceptually distinct, so that it is an empirical question to ascertain whether one of them is entailed by the other. In view of this, one solution is to take background justice as incompatible with a high degree of material inequality only to the extent that the spheres of wealth and opportunities fail to be properly insulated. Rawls himself refers how insulation could take place in some cases, when discussing constraints to private financing of electoral campaigns (Rawls 2001, 149). Thus, following what has been said so far, a fair basic structure only would have to oppose wealth inequality as long as insulation policies – as those regulating electoral donations – were not enough to assure the fair value of political liberties and fair equality of opportunity.

Another response is to remind that infringements of fair equality of opportunity and particularly to the fair value of political liberties are far easier to prevent than to remedy. Hence even if insulation can be implemented, it is not advisable to count on them to do all the work, since once they fail and opportunities rest attached to wealth, restoring justice becomes very hard. Putting it in a simple way, as justice depends on a clean political process, it is a bad strategy to wait for that process to be jeopardized and only after that to impose the drastic measures that justice requires. This would explain why Rawls insists in assigning to the basic structure the function of keeping wealth dispersed even without ignoring the policies aiming at maintaining the spheres of wealth, politics and opportunities in general separated.¹³

¹³ This refutes one of O'Neill's (2012) criticisms against Rawls's arguments in favor of a property-owning democracy. Rawls argues that a property-owning democracy is a more just regime than welfare capitalism, since the former prevents wealth concentration and consequently assures the fair value of political liberties (Rawls 2001, 137-138). Even if one accepts the way Rawls characterizes the two regimes, O'Neill (2012, 82) observes, welfare capitalism could attend to the fair value of political liberties through insulation policies like the ones Rawls himself alludes when talking about private contributions to political parties. The argument above,

3 FUNCTION OF ADJUSTMENT AND PRIVATE LAW

We saw above that Rawls conceptualizes distributive justice as background justice – and hence pure procedural justice. The aim of justice, so understood, is to set fair institutional bases for social cooperation rather than evaluating distributive states of affairs as just or unjust in themselves. Once the institutional background is fair (i.e. once background justice is obtained), any results produced in accordance with institutional predicaments will also be deemed fair. It is part of background justice as conceived by Rawls, however, that a society’s basic structure be able to prevent differences in income and wealth to reach a degree incompatible with the fair value of political liberties and fair equality of opportunity. Thereinafter, I shall refer to that particular task required for the basic structure as function of adjustment.¹⁴ The goal of this section is to demonstrate that, as Rawls sees it, the function of adjustment is not to be played by the rules of private law, what gives place to what he sometimes calls “institutional division of labor.”¹⁵ That division puts in one side the institutions charged with performing the function of adjustment and in the other, roughly speaking, the private law.

A first step here is to remember justice as fairness’s ambition of setting fair terms for social cooperation through the time, from one generation to the next (Rawls 2001, 4). The institutions that compose the basic structure must, for that end, contravene a tendency of fair conditions to be eroded – this is, in other words, the function of adjustment. What we must see now is the reason why that adjustment is necessary – that is, the reasons for fair conditions to gradually disappear. On this, Rawls argues that the function of adjustment does not presuppose citizens acting unfairly or contrarily to existent laws. Rather the function at issue must be executed even if all citizens behave in an irreproachable way:

The fact that everyone with reason believes that they are acting fairly and scrupulously honoring the norms governing agreements is not sufficient to preserve background justice. (...) to the contrary, the tendency is rather for background justice to be eroded even when individuals act fairly: the overall result of separate and independent transactions is away from and not toward background justice. We might say: in this case the invisible hand guides things in the wrong direction and

explains, however, why there is no necessary contradiction in defending insulation policies of that kind while affirming the incongruence of a regime that fails to avoid wealth concentration (welfare capitalism as conceived by Rawls) with justice.

¹⁴ Rawls (2001, 44): “a free market system must be set within a framework of political and legal institutions that adjust the long-run trend of economic forces so as to prevent excessive concentrations of property and wealth, especially those likely to lead to political domination.”

¹⁵ Besides the passage quoted at the introduction (Rawls 1996, 268-269), see Rawls (2001, 54).

favors an oligopolistic configuration of accumulations that succeeds in maintaining unjustified inequalities and restrictions of fair opportunity (Rawls 1993, 267).

The reason why the function of adjustment becomes necessary is hence a sort of “evil invisible hand,” or the tendency of individual acts and transactions – even committed in accordance with the rules that govern them – to conduct to a level of material inequality at odds with the principles of justice as fairness. In this way, beyond the rules regulating contracts and other individual acts – private law, roughly speaking – we need institutions for doing the function of adjustment. We arrive in this way to the institutional division of labor Rawls mentions: on one side or that division is the law concerning individual behavior – a law that, however perfectly followed, is unable to preserve background justice –, on the other side are the institutions (e.g. the inheritance tax) having the role of cutting the excesses of the invisible hand and maintaining wealth sufficiently dispersed.

One thing, however, is to affirm that private law alone is unable to assure background fairness; another is to deliver that function entirely to other institutions – thus dispensing private law of doing any adjustment. For Rawls, the reason why private law should be completely excluded from the adjustment function is simplicity. It might as well be possible to design private law rules for preventing wealth to become too concentrated – probably with help of other institutions. Yet assigning private law with the function of adjustment would be incompatible with the simplicity that the rules of that branch of law must present in order to be followed by citizens in their day-to-day transactions.¹⁶ It is for the sake of such simplicity that a strict institutional division of work is argued for, with the consequence of attributing all function of adjustment to institutions not belonging to the realm of private law.

To summarize, one starts with the assumption that private law, even if strictly followed, is not enough to avoid that, as the cumulated result of individual operations, a level

¹⁶ Rawls (1996, 267): “*There are no feasible and practicable rules that is sensible to impose on individuals that can prevent the erosion of background justice. This is because the rules governing agreements and individual transactions cannot be too complex, or require too much information to be correctly applied*”.

A few paragraphs later, Rawls (1996: 267) also conjectures that the exercise of the adjustment function through private law would entail an obligation of doing business with many scattered parties (likely in order to disperse the gains resulting from transactions), which would be excessively costly. Then he turns back to the problem of simplicity: “*The rules applying to agreements are, after all, practical and public directives, and not mathematical functions which may be as complicated as one can imagine. Thus any sensible scheme of rules will not exceed the capacity of individuals to grasp and follow them with sufficient ease, nor will it burden citizens with requirements of knowledge and foresight that they cannot normally meet. Individuals and associations cannot comprehend the ramifications of their particular actions viewed collectively, nor can they be expected to foresee future circumstances that shape and transform present tendencies*” (Rawls 1996, 267-268).

of material inequality at odds with the fair value of political liberties and fair equality of opportunity takes place. Private law is further deemed unable (rather than just insufficient) to the adjustment function in view of a requirement of simplicity its rules must attend to. That inability to perform the function of adjustment is what Rawls has in view when he talks of an institutional division of labor and, together with it, a basic structure narrowly constructed. The basic structure is constituted, in that setting, only by the institutions performing the adjustment function.

On this last point, it should be noted that the institutional division of labor is alluded in a passage where Rawls is interested in a contrast between justice as fairness and libertarianism.¹⁷ As both are purely procedural conceptions of justice, the difference between them lies, according to Rawls, in that libertarianism knows of no special principle for the basic structure. Libertarian principles of legitimate acquisition and transfer apply indistinctively to individual transactions and to the state, which is, from a libertarian standpoint, nothing else than one among many associations whose creation follows the same requisites of voluntariness that an agreement between private agents (Rawls 1993, 263-265). For justice as fairness, in contrast, unfairness can take place even when resources are acquired and transferred according to the rules governing individual transactions. The difference between Rawls's conception and libertarianism lies therefore in that the former includes principles that constrain the basic structure to intervene in the result of individual transactions so as to preserve background justice – that is, in the adjustment function.

4 PRIVATE LAW: WITHOUT FUNCTION OF ADJUSTMENT, BUT STILL IN THE BASIC STRUCTURE

Granting that private law is unable to play the adjustment function, does it entail that we should take it to be alien to the basic structure? Well, no, unless we want to assume the above premise as true and also to restrain the basic structure to the sole function of adjustment, what Rawls seems to be doing in some places. There is a good reason, however – beyond that of being loyal to the several passages where Rawls defines basic structure in a broad way – for rejecting that narrow view of the basic structure as the only one. It is that,

¹⁷ In *The basis structure as subject* (Rawls 1996: 257 e s.), the institutional division of labor is mentioned in §4 (“*The importance of background justice*”), soon after the exposition on libertarianism taking place in §3 (“*Libertarianism has no special role for the basic structure*”). Similarly, in *Justice as Fairness: a Restatement*, Rawls introduces the idea of an institutional division of labor in the sequence of a critique of Locke's conception of justice as an ideal historical process (Rawls 2001, 52-54).

provided that the principles of justice as fairness demand more than just the adjustment function, it is incoherent to circumscribe the basic structure to the institutions to which that function is assigned.

Further than preventing wealth from being too concentrated, the basic structure has the missions of assuring the liberties covered by the first principle (there including the fair value of political liberties, which does not depend solely on material equality), fair equality of opportunity (also not prone to be satisfied only through measures regarding the distribution of wealth) and a distribution of benefits and burdens of social cooperation in accordance with a principle of reciprocity (the difference principle or something next to it). Once we take into account all the functions the basic structure is called to perform, it becomes highly implausible to completely exclude private law from that structure.

There is textual evidence of Rawls wanting to subject part, at least, of private law to the demands (broadly conceived) of justice as fairness. He asserts that institutions of the basic structure must declare void agreements where the parties give up to some of the liberties encompassed by the first principle (Rawls 1993, 365) and that employment discrimination violates fair equality of opportunity (Rawls 1993, 363-364). Hence at least parts of contract law – those dealing with agreements involving basic liberties and discriminatory practices – belong to the basic structure. We also find, further, allusions to property (“*the legally recognized forms of property*”) and to the family (Rawls 2001, 10) as components of the basic structure.

The main argument, however, for including private law in the basic structure concerns the impact of its rules for the division of benefits and burdens of social cooperation. We must distinguish two versions of the argument about that impact, one of them is flawed. The wrong version of the argument states that, since the difference principle requires maximizing the prospects of the worst-off citizens (i.e. that the prospects of those citizens regarding the distribution of primary goods – particularly income and wealth – be as good as it can be) and since there are private law rules influencing those prospects, the difference principle forces us to design private law in the way most beneficial to the worst-off group (Kordana and Tabacknick 2005, 614-620). What we have in this case is an argument that not only affirms private law to be part of the basic structure as also prescribes to it a given content – namely the most favorable to the disadvantaged citizens. As the only caveat, taking into account the lexical order between the principles, that recommendation would be valid only to

the extent that maximizing the prospects of the worst-off citizens does not run against the basic liberties or fair equality of opportunity.

The above argument, however, begs the question. As it may be clear, the assertion that private law must be delineated so as to maximize the benefits of the worst-off citizens is only warranted if we start from the premise that private law is subjected to the difference principle. But that premise is precisely what has to be proved in an inquiry about the limits of the basic structure. Surely different conformations of private law may affect differently the prospects of the worst-off citizens. Such impact will be nevertheless immaterial for justice as fairness unless the parts of law causing them belong to the basic structure and therefore are required to abide by the prescriptions of that conception of justice.

A distinct version of the argument appeals to the fact that the impact of private law is too significant to be ignored. When discussing the boundaries of the basic structure, we should keep in mind that the aim of justice for Rawls is to define fair terms of social cooperation. That role would be unsatisfactorily executed if, in spite of its importance for the division of benefits and burdens of social cooperation – certain institutions were arbitrarily removed from the basic structure and, as a consequence, from the ambit of justice. Rawls endorses that sort of influence criterion for the basic structure when he affirms that “*the basic structure is the primary subject of justice because its effects are so profound and present from the start*” (Rawls 1999, 7).¹⁸ Hence considering that to some good extent the results of social cooperation hang on the way private law ascribe rights on property, contract, torts, family law and inheritance, one is forced to conclude that private law belongs to the basic structure.

This does not entail, however, that all private law is within the basic structure or that the only goal of private law institutions (with the caveats flowing from the lexical order between justice principles) is to maximize the advantage of the worst-off citizens. One reason why that is not the case is that some private law domains – e.g. liability for accidents involving domestic animals – do not seem to have any substantial impact on the division of benefits and burdens of social cooperation.¹⁹ Further reasons to limit the reach of the basic structure are presented by Rawls in the following passage:

¹⁸ For a similar passage, see Rawls (2001, 10): “*the effects of the basic structure (...) are pervasive and present from the beginning of life*”.

¹⁹ It could be argued that, while a single tort rule (as the rule about harms caused by domestic animals) may have no noticeable influence over the worst-off citizens prospects, the aggregate effect of many such rules could be nonetheless relevant. Hence if, together with other rules of the same kind, the rule about torts involving animals is set in a way that fails to improve the prospects of the most disadvantaged citizens, that could not be ignored by a conception of justice like Rawls’s. This may be true, but does not provide us with a reason to subject every

Note that our characterization of the basic structure does not provide a sharp definition, or criterion, from which we can tell what social arrangements, or aspects thereof, belong to it. Rather, we start with a loose characterization of what is initially a rough idea. As indicated above, we must specify the idea more exactly as seems best after considering a variety of particular questions. With this done, we then check how the more definite characterization coheres with our considered convictions on due reflection.

(...) Finally, to anticipate, since justice as fairness presents itself as a possible focus of a reasonable overlapping consensus (§11), and since the basic structure is the primary subject of justice, the boundaries and aspects of this structure must eventually be drawn and specified in ways that, if possible, at least permit, if not encourage, such a consensus. So generally stated, it is not evident what this condition requires; but these matters we try to answer as we take up a wider range of questions (Rawls 2001: 12).

A second reason for excluding institutions from the basic structure lies thus in the inappropriateness of justice as fairness to deal with certain kinds of relationships. Rawls implicitly appeals to the idea of reflexive equilibrium, which involves the need of adjusting a theory of justice in order to accommodate some of our considered judgments. In the case now discussed, the required adjustments are not related to the principles of justice themselves, but to their scope. For example, we may refuse to include parts of tort law under the basic structure (thus exonerating tort rules from satisfying the difference principle) given the incompatibility between the distributive demands of justice as fairness and the ideal of corrective justice that, according to our view, must govern the relationship between agents and victims.²⁰

There is also in the passage transcribed above an advertence against conceptualizing the basic structure in ways that render justice as fairness less susceptible to obtain the “overlapping consensus” ambitioned by Rawls’s political approach to matters of social justice. That consensus – a consensus regarding justice principles reached among citizens adhering to different comprehensive doctrines – may be impeded by a basic structure constructed too broadly, one whose implication is to subject to the distributive principles of justice as fairness matters that some comprehensive doctrines repute particularly sensible. For example, a conception of justice aspiring at an overlapping consensus may prefer to leave out

single rule to the difference principle. We could instead apply that principle in order to compare distinct conformations of entire fields of law (for example, to compare a traditional tort law system and a New Zealand’s type of public insurance), thus avoiding the inconvenience of attaching every rule individually to the maximizing goal the difference principle imposes.

²⁰ See e.g. Weinrib (1995).

of its reach issues like the limits to commodification of the human body or discrimination in health insurance.²¹

To summarize, there are good arguments for taking private law to belong to the basic structure although without exerting the function of adjustment that structure is charged with in Rawls's account of justice. As the adjustment function is not the only function ascribed to the basic structure, there is no reason to exclude from it all institutions falling to perform that function. There are also textual evidence that Rawls did not intend to immunize the totality of private law from the prescriptions of justice as fairness. Finally, for someone who, like Rawls, conceives of as the aim of justice to establish fair terms of social cooperation, it would be odd to leave out of the domain of justice an entire branch of law as private law, whose impact on the division of benefits and burdens of cooperation is considerable.

From this it does not follow, however, that all parts of private law should be taken as belonging to the basic structure. Some private law rules may fail to have a significant impact on the overall results of social, so that a reason to force them to comply with the principles of a conception of justice such as justice as fairness is lacking. Furthermore, the entire submission of certain areas of private law to distributive principles like the difference principle may give rise to counterintuitive results and conspire against justice as fairness's aim at an overlapping consensus.

5 THE FUNCTION OF ADJUSTMENT AGAIN: SOMETHING MORE TO HOPE FOR PRIVATE LAW?

If the above account is correct, Rawls's writings referring to an institutional division of work are inspired by a particular function ascribed to the basic structure, namely the adjustment function. In those writings, private law appears as something strange to the basic structure in face of its incapacity to perform the function at stake.

²¹ In contrast, Scheffler (2015) seems to envisage the relationship between private law and the basic structure as an all-or-nothing issue. He rejects the narrow account of basic structure, but expresses concern with the fact that including private law in the basic structure entails subordinating that entire part of law to a principle of distributive justice like the difference principle. Instead, however, of advocating for an intermediate position (of accepting only part of private law within the basic structure), Scheffler thinks of expanding justice as fairness with additional (and non-distributive) principles more adequate to the private law realm. Such solution would preserve the broad conception of basic structure without menacing private law with an excessive distributivism. It doubtful, however, that Scheffler's proposal may prosper in the boundaries of a strictly political conception of justice as the one defended by Rawls in his later work.

Is Rawls right in that respect? Is private law indeed not able to realize even partially the function of adjustment? A first critical remark to be made against Rawls on that issue is that the main argument to exclude private law from the adjustment function – the argument from simplicity – proves too much. It is true that private law rules must be simple enough to be understood and followed by citizens, but that also happens to be the case – to a similar degree – of rules from institutions that are undoubtedly asked to execute the function of adjustment, such as the rules of income and inheritance tax. Behind Rawls's allusion to an institutional division of work there seems to lie a wrong assumption about both how simple private law rules can be (as can be judged by our experience) and how sophisticated other rules – the rules charged with the adjustment function – can tolerably be. Neither it is thinkable that citizens could dispense altogether with the assistance of experts in what comes to grasping the content of private law, nor it is the case that rules performing the adjustment function, like those of tax law, are allowed to be so hard to understand that, even with the help of experts, citizens would have no clue about what to do. In sum, simplicity seems not to be a peculiar mark of private law, either in fact or normatively speaking.²²

But the most important complain against the exclusion of private law from the adjustment function is that, in the absence of any principled reason, performance of that function should not be discarded in theory. What institutions are best suited to make the necessary adjustments is an issue to be dealt with at the legislative stage, on the basis of information unknown by the parties in the original position and also, in general, by philosophers. Assume, for instance, that some versions of contract law are much more susceptible than others to avoid wealth concentration. Assume further that in none of those versions contract law happens to be particularly hard to grasp, attempts against some basic liberty, leads to clearly counterintuitive or unacceptable (by some reasonable comprehensive doctrine) results. Once all those conditions are met, what would be the reason to ignore contract law's influence on wealth distribution and to assign the adjustment function exclusively to other institutions?²³ This is not to argue that there are familiar variations of contract law both attending to the stipulated conditions and differing in their inclination to allow for an exaggerated concentration of wealth, but the point here is precisely that, while we

²² For a similar criticism, see Scheffler (2015, 220).

²³ Against the idea that an efficient contract law maximizes the prospects of the worst-off citizens, remember that the function of adjustment is imposed by parts of justice as fairness that are lexically prior to the difference principle. Hence if the fair value of political liberties and fair equality of opportunity demand private law to perform part of the adjustment function, an appeal to the interests of the worst-off citizens does not suffice to indicate otherwise.

are not convinced that different contents of contract law rules may affect wealth distribution in the manner just described, it is not advisable to exclude contract law for the purposes of the adjustment function.

The truth is that we seem to be far to completely understand the forces leading to material inequality in the long-run. Piketty's (2014) work is a valuable contribution on that respect, but one focusing more on a "natural" tendency to increasing inequality than on the institutional causes of that phenomenon. Hacker and Pierson (2010), in contrast, is an attempt to demonstrate the role of government and public policy in the growing of inequality in US since the 1970 decade. Like Hacker, Pierson and others (Hsu 2014; Anderson 2015) stress, the institutional factors behind greater inequality may go far beyond an insufficiently progressive tax system, also including feeble antitrust policies and financial and work deregulation, among other items.

It is against the unreasoned idea of giving taxation the exclusive function of avoiding excessive inequality that we can put into question the secondary role Rawls ascribes to private law in his writings about the basic structure. Even that, on certain conditions, taxation happens to be a superior mechanism for redistributing wealth (Kaplow and Shavell 1994), a well-ordered society in Rawls's sense must be equipped with enough institutional safeguards to maintain wealth dispersed in a way compatible with the fair value of political liberties and fair equality of opportunity. In order not to incur in excessive idealization, we must acknowledge that taxation alone as a safeguard does not suffice and that other institutions – private law among them – must be called to intervene.²⁴

6 CONCLUSION

This article has attempted to explain Rawls's dubious treatment of private law. It is argued that the so called "institutional division of labor" – a division that seems to exclude private law from the basic structure and hence from the reach of the principles of justice as fairness – refers to a particular function Rawls ascribes to the basic structure in order to

²⁴ It may be unrealistic to hope that a principle of justice can take place in citizens' deliberations and be confined to certain issues in spite of its potential for expanding, as in the case where we considered the fair value of political liberties and fair equality of opportunity in order to decide about tax issues and public expenditure, while ignoring those principles when it comes to private law. This is not to imply that the same principles must govern or take place in every public deliberation, but that there is some implausibility in conceding a privileged status to some principle or goal in some instances (as that of avoiding wealth concentration) and hoping citizens to simply forget it in other cases.

preserve background justice. That function, referred to above as function of adjustment, is that of avoiding wealth inequality as the accumulated effect of individual transactions. The function of adjustment is required because, above some degree, differences in income and wealth are threatening to the fair value of political liberties and fair equality of opportunity. What Rawls envisages is that adjustment function being performed by other institutions than those governing individual transactions, which should remain simple in order to be followed by citizens in their day-to-day affairs. It is in that sense that private law is kept apart from the basic structure – it is kept apart, in more precise terms, from a crucial rule assigned to that structure, one that differentiates Rawls's account of justice from libertarianism.

The scenario changes, however, when we think on the whole task of the basic structure – not only on the special adjustment task. In that case, the basic structure must be conceived as encompassing not just the institutions aimed at correcting the results of individual transactions. The basic structure in this last sense is the whole set of institutions governed by the principles of a conception whose goal is to define fair terms of social cooperation – the institutions, therefore, that decisively determine the division of burdens and benefits flowing from that cooperation. On Rawls's view, those institutions must provide for basic liberties (not just the fair value of political liberties) and fair equality of opportunity (by all necessary means, not just through wealth dispersion). They must subject social cooperation to a principle of reciprocity (the difference principle or something near to it). Private law's alleged inability to perform the adjustment function is hence not a reason to exclude that entire part of law from a basic structure whose goals are so broadly defined. This does not entail, however, that every single part of private law belongs to the basic structure, nor that, in order to reach some of its domains, we are allowed to extend the boundaries of the basic structure against our considered judgments about values governing private transactions or in a way hardly compatible with a political conception of justice as Rawls's.

The paper's last section invites to reconsider the institutional division of labor even in what concerns the adjustment function. It stresses our imperfect knowledge about the institutional determinants of inequality, which advises against confining the adjustment function to only a sector of society's major institutions, like the tax system.

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Submetido em: 06/11/2018

Aceito em: 19/02/2019