

CONSTITUTIONAL COURTS, JUSTICIABILITY AND DISTRIBUTIVE JUSTICE

Cortes constitucionais, justiciabilidade e justiça distributiva

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Abstract: Should constitutional social rights be decided upon the basis of what procedure is most likely to give us just policies (ideal social rights) or is there a non-epistemic/ non-instrumental dimension to this question. If libertarians took over and eliminated welfare programs and then constitutionalized the absence of these programs what are the objections that can be made? Here I mean to look at these questions by relying on Rawls's view on *justiciability*, considering that it may help understand the questions raised by social rights litigation in Brazil, the limits and the capacity of constitutional courts. The motivation for considering the Rawlsian framework does not aim at arguing that these practices should be evaluated solely by his theory but it does consider that it can help build stronger arguments to critically evaluate constitutional court decision-making and also can, on the other hand, help elucidate the conditions of considering the constitutionalization of social rights in a non-instrumental way.

Keywords: Justiciability, Distributive Justice, Rawls, Social Rights, Constitutional Courts.

Resumo: a constitucionalização de direitos sociais e econômicos devem ser decididos com base no procedimento que é mais provável de resultar em políticas justas (direitos sociais *ideais*) ou há uma dimensão não-instrumental desta questão? Caso liberais assumissem o governo, eliminassem os programas welfaristas e, então, constitucionalizassem a ausência de tais programas, quais objeções podem ser feitas? Considerando estas questões de fundo, o objetivo neste artigo é o de esclarecer o conceito de *justiciability* na teoria de John Rawls e relacionar o mesmo com as práticas de cortes constitucionais em democracias liberais. Tal conceito possibilita que se pense a problemática da judicialização a partir da teoria de *justiça como equidade* assim como possibilita que se esclareça a esfera de constitucionalização de alguns princípios em detrimento de outros na teoria rawlsiana.

Palavras-chave: Justificabilidade, justiça distributiva, John Rawls, direitos sociais, cortes constitucionais

1. Introduction

Empirical work on legal enforcement of social rights in the past ten years has focused on broad approaches that consider the relations between social rights litigation and advances in social transformation. The results so far haven't been promising. From regarding successful cases in South African legal jurisprudence as exceptions¹ to arguing that judicialization of social economic rights has given more power to judiciaries but not necessarily resulted in social transformations², the question if *constitutional courts have brought about social change* has mostly been answered negatively. More specifically, regarding the effects of such adjudication

¹ GLOPPEN, Siri. "Legal Enforcement of Social Rights: Enabling Conditions and Impact Assessment". In: *Erasmus Law Review*, Vol. 02, Issue 04 (2009), pp. 465-480.

² HIRSCHL, Ran. *Towards Juristocracy: the origins and consequences of the new constitutionalism*. Cambridge: Harvard University Press, 2004.

in Brazil, it has been argued that considering litigation of health rights, legal enforcement has actually harmed the poor and that social rights should be “taken away” from Brazilian courts³.

In this background, the principal aim of the *paper* is to argue that even though the results have been negative regarding the consequences that so far have been shown in regards to the benefits to the poor, this solely cannot support the conclusion that social rights should be excluded from the constitution or from adjudication.

Much attention has been given to the consequences of litigation and little has been given - at least in Brazil - to the quality of the judicial reasoning, the limits it should attend to and the role that it should play in democratic societies. I will argue that the work aimed at on ground *effectiveness* of social rights litigation plays an important role in a critical evaluation of the power of courts in new democracies as it has shown important limitations in its *capacity* to promote *progressive* social changes (changes that are, for example, supported by specific theories of distributive justice) and they point out, as well, that unchecked⁴, courts can actually be harmful. But this is insufficient to provide an answer that demands the non-justiciability of *all social rights*. Such a response can also be harmful as it may “close the door” to important cases that courts actually have the *capacity* to push for progress.

Here I mean to look at these questions by relying on Rawls’s view on justiciability. The motivation for considering the rawlsian framework does not aim at arguing that these practices should be evaluated solely by his theory but it does consider that Rawls’s theory may help build stronger arguments to critically evaluate constitutional court decision-making and also can, on the other hand, help elucidate some contended aspects of the theory of *justice as fairness*.

The paper will be divided in the following sections: (I) Conceptual clarifications that address the ideas of justiciability, judicialization, judicial review and juristocracy; (II) An example of the scenario of judicialization in Brazil, focusing on health rights litigation; (III) Clarification of the idea of justiciability in a rawlsian framework; (IV) Related considerations regarding the link between political justice and distributive justice.

2. Conceptual Demarcations:

³ FERRAZ, Octavio Luiz Motta. “Harming the Poor through social rights litigation: lessons from Brazil.” In: *Texas Law Review*, 2011, Vol.89 (No.7). pp. 1643-1668.

⁴ How can one “check” constitutional courts? One of the main problems, though, is question how/if constitutional courts should be checked.

There are many different and correlated ideas that concern the matter at hand such as *judicialization*, *judicial review*, *justiciability* and *juristocracy*. All of these terms are connected to the practice of judicialization, which can be loosely defined as *the transfer of power from representative institutions to judiciaries*. Judicialization can also be considered an “umbrella term” that relates to three inter-related processes: judicialization of social relations, judicialization “from below”, with courts contemplating mostly procedural processes, classic liberties; and *juristocracy*, when core political controversies are that divide and define whole politics, it is related to deep, moral, political dilemmas⁵. Whereas judicial review is a legal procure that permits courts to review the constitutional validity of legislative acts. With it (judicial review) comes the *justiciability worry*, which means that one should worry about the suitability of a norm or class of norms for judicial application.

Basically the *justiciability debate* has differentiated two possible spheres of questioning: a) is it appropriate for courts to adjudicate these rights? (*appropriateness*); b) how far should adjudication go? (*scrutiny*). Empirical work looks at a different question: the *efficacy of justiciability*. Regarding social rights in new democracies, the answer seems to point out to the non-efficacy of social rights litigation and (in Brazil) to the harmful aspects that it can have.

How can this empirical work inform the theoretical debate? Should the encouragement of *justiciability* depend on the empirical data? Ferraz (2011) has argued that this is the case since the consequences of justiciability are strongly context-dependent. In this paper, my suggestion is that efficiency does have a role to play as part of the requirement for *political justice*. Casting efficiency in the solely former framing⁶ (that is considering the empirical results, such as the judicialization of health rights) is problematic due to the non-differentiation of which rights should be the object of social right litigation, the lack of this scrutiny can, in fact, also be harmful. The latter, that is, when one considers efficacy as an important aspect of political justice, may provide a strong basis for questioning social rights litigation not only in regards to justiciability but as claims that if unmet provide foundation for questioning the legitimacy of the regime.

3. Where the action is: Judicialization in Brazil

Judicialization in Brazil results from three main reasons: Constitutionalization in 1988, with the inclusion of topics from social rights to environmental guarantees in the Constitution

⁵ HIRSCHL, Ran. *Towards Juristocracy: the origins and consequences of the new constitutionalism*. Cambridge: Harvard University Press, 2004.

⁶ I am referring here specifically to Ferraz’s account as Hirschl does try to trace a more effective differentiation but still relies in a conception of distributive justice to do so.

and the kind of constitutionality control established. Brazil's Constitutional Court (STF) can be described as an "active court", as many political issues are decided on the judicial sphere, such as gay marriage, party fidelity

Recently, Brazilian Constitutional Court (STF) has decided, regarding health rights litigation, which drugs should be provided. This debate was triggered by health rights suits flooding the courts and burdening the Unified Health System with significant costs in the past 15 years. The main problem is that the meaning of "health to right" isn't clear and that States have had - due to judicial decision - to pay many high-cost drugs that haven't been authorized by the National List of Medicines. An aspect of this deliberation that is worth pointing out to is that one conclusion that was reached was that the criteria should be established in two dimensions: high cost and medication outside the official list.

Apart from the particularities that arise from such case, such as the idea of a mandatory familiar solidarity in case of high cost medicines⁷, it has been shown that litigation of health rights in Brazil has not benefitted the poor due to the difficulty in access to the judicial system and, therefore, has not guaranteed a minimum to the poor but a maximum to the well-off in a pattern that has been described as "maximum health attention"⁸. Reasons that support, in this case, the non-judiciability claim are based on the argument that the only thing that can effectively bring about social transformation would be a strong *egalitarian ethos*, courts being incapable of eradicating inequalities and poverty. In this argument, we recognize the claim that can be defined as a less justice, that is, the idea that courts are likely to make mistakes, leaving us with less justice rather than more, and idea that will be clarified in the next section.

4. Rawls's view of justiciability

Justiciability of social rights, therefore, can be considered in three dimensions: appropriateness (which rights be constitutionalized?); scrutiny (strong/weak judicial review); effectiveness (is it working?). Considering Rawls's theory, it has been argued⁹ that justiciability

⁷ See leading case with justice Marco Aurélio de Mello's vote on REs 566471 e 657718 <http://stf.jus.br/portal/jurisprudenciarepercussao/verAndamentoProcesso.asp?incidente=2565078&numeroProcesso=566471&classeProcesso=RE&numeroTema=6> Last access on 12/20/2018

⁸ FERRAZ, Octavio Luiz Motta. "Harming the Poor through social rights litigation: lessons from Brazil." In: *Texas Law Review*, 2011, Vol.89 (No.7). pp. 1643-1668.

⁹ See: MICHAELMAN, Frank I. "Justice as Fairness, Legitimacy and the Question of Judicial Review: A comment", 71, in: *Fordham Law Review*, 407 (2004); SAGER, Lawrence G., "The why of Constitutional Essentials", 71, *Fordham Law Review*, 407, 2004

makes a difference that counts in deciding which requirements of justice as fairness should and which should not be classified as constitutional essentials.

It is well known that in Rawls's theory not all *requirements of justice*, that is, the substantial demands of the two principles of justice, belong in constitutional law. Only *constitutional essentials*, which exclude distributional norms of the second principle of justice but should still be considered requirements of justice.

Therefore, there is a legitimacy/justice gap that can be noted¹⁰. This is due to the fact that legitimacy regards the justification of the coercive exercise of democratic political power, which can be morally justified only as long as it conforms to a proper set of constitutional essentials. Whereas the second principle's distributional demands regard the norms that political practice must strive in order to satisfy justice. According to Rawls¹¹:

Whether the constitutional essentials covering the basic freedoms are satisfied is more or less visible on the face of constitutional arrangements and how these can be seen to work in practice. But whether the aims of the principles covering social and economic inequalities are realized is far more difficult to ascertain. *These matters are nearly always open to wide differences of reasonable opinion; they rest on complicated inferences and intuitive judgments that require us to assess complex social and economic information about topics poorly understood.* Thus, we can expect more agreement about whether the principles for the basic rights and liberties are realized than about whether the principles for social and economic justice are realized. This is not a difference about what are the correct principles but simply a difference in the difficulty of seeing whether the principles are achieved.

Yet, it should be noted that "Fair Value" and "Social Minimum" are part of the constitutional essentials. "Fair value" of the political liberties means that everyone, regardless of social or economic position, has a "fair opportunity to hold public office and to influence the outcome of political decisions," whereas "social minimum" means providing for satisfaction of citizens' "basic" material needs insofar as required to enable them to take effective part in political and social life¹². Frank Michaelman has addressed the question if they also don't suffer the same obscurity, that is, if, similarly to the difference principle, fair value and the social minimum also are the object of complicated inferences and intuitive judgments and suggests

¹⁰ MICHAELMAN, Frank I. "Justice as Fairness, Legitimacy and the Question of Judicial Review: A comment", 71, in: Fordham Law Review, 407 (2004)

¹¹ RAWLS, John *Political Liberalism*. Expanded E. Cambridge, MA: Columbia University Press, 2005. p.229

¹² MICHAELMAN, Frank I. "Justice as Fairness, Legitimacy and the Question of Judicial Review: A comment", 71, in: Fordham Law Review, 407 (2004)

that there is an “urgency factor”, which is unrelated to justiciability can help understand why fair value and distributional assurances are part of the constitutional essentials:

Urgency in relation to liberal legitimacy. In Rawls's view, a graphic guarantee that everyone shall enjoy the fair value of the political liberties is, in fact, urgently required for the legitimacy of any system for the exercise of political power, and likewise, apparently, for the assurance that everyone's basic material needs are met. The urgency factor that applies to assurances regarding the basic liberties also applies to these two distributional assurances. That observation argues for giving both of them some expression in constitutional law, even if at the cost of involving courts in decisions of a kind for which they are not especially well suited.¹³

In this reading, the constitutional essentials bear the full weight of legitimacy, which means that its features have to be relatively ascertainable to enable some kind of “compliance check” by reasonable and rational people. There are two things going on Rawls’s discussion of constitutional essentials – this idea plays two roles: on one hand, which parts of constitutional law have to meet Rawls’s normative standard in order to be legitimate. On the other hand, assuming that the judiciary will be charged with overturning constitutional law, it determines the principles of justice that get written in the constitution for courts to enforce¹⁴. If one is worried with the competency of the judiciary to make complex social scientific judgments, the difference principle is not constitutional because courts are likely to make mistakes leaving us with less justice rather than more; that is, Ferraz’s worry: Less Justice

On the other hand, taking the difference principle as a constitutional essential, one can recognize that citizens disagree in big ways on what it takes to satisfy this principle. This disagreement is on the legitimacy of the law, on what can be considered a Less Perceived Legitimacy – not related to judicial review.

It is crucial to distinguish more sharply these two dimensions: what the standard of legitimacy is and whether courts should be the ones to overrule unconstitutional law. For example, one can think that the difference principle is part of the legitimacy standard but that courts should not be enforcing it or that it should not be part of the constitutional essentials, but courts should enforce it. In this case, one could think of a weak standard of legitimacy that doesn’t include the difference principle, but courts should enforce it.

¹³ MICHAELMAN, Frank I. “Justice as Fairness, Legitimacy and the Question of Judicial Review: A comment”, 71, in: *Fordham Law Review*, 407 (2004), p. 1418.

¹⁴ I would like to thank Andrew Lister for pointing out to this issue in a previous discussion of this paper.

It has been by deepening the context of less perceived legitimacy that a group of interpreters of Rawls (the third generation of interpreters, such as Gerald Gaus and Jonathan Quong) have made a case for the need to uncouple distributive justice from political justice by claiming that the tie between political and specific accounts of distributive justice under contemporary conditions of moral disagreement must be uncoupled from one's conviction about the best account of distributive justice¹⁵ based on Rawls's concerns on legitimacy on his later writings. Such questioning of particular conceptions of distributive justice as an indispensable part of political justice may have fueled sufficientarian accounts of justice and their focus on the need to guarantee that individuals have enough¹⁶

5. Rawlsian distributive justice: going beyond the difference principle.

Sufficiency principles do not favor the elimination of inequality (as egalitarian principles, benefitting the less well off as more important than the better off), instead insist that when evaluating different distributions, it is important to see if people have enough. The problem of threshold is one of the difficulties of this account, yet recent work on Rawls's theory has reached the conclusion that Rawls provides a sufficientarian account of justice in the requirements that should be conjoined with the difference principle. In this vein, Paula Casal¹⁷ argues that Rawls's account has: a guaranteed social minimum that supplements the difference principle; the just savings principle, that requires that earlier generations have to conserve enough material resources for future generations to be able to enjoy liberal institutions and also the idea that the liberty principle in Rawls's later work becomes a principle of "sufficient and not maximum liberty" leaving room for implementing other principles even when it takes priority over them. The difference principle is also conjoined with further requirements (civil liberties, social minimum and sustainability of liberal institutions). Regarding the development of Rawls's economic justice, from *Theory of Justice* to *Political Liberalism*, it is also possible to identify in his later work a more radical insight than the earlier. In earlier work, Rawls tends to separate questions of liberty from economic questions (the idea of lexical priority), but in *Political Liberalism* Rawls recognizes that liberty may have economic prerequisites¹⁸. (Nussbaum, 2015); Furthermore, along with the difference principle, principles such as fair value (already noted)

¹⁵ See SCHOELANDT, Chad Van; GAUS, Gerald, "Political and Distributive Justice" (*forthcoming*) <http://www.gaus.biz/PoliticalJustice.pdf> Last access on 12/30/2019.

¹⁶ FRANKFURT, Harry. *On Inequality*. Princeton: Princeton University Press, 2015. See *Preface*.

¹⁷ CASAL, Paula. "Why Sufficiency is not Enough", *Ethics*, *Ethics* 117, no. 2 (January 2007): 296-326.

¹⁸ NUSSBAUM, Martha, *Introduction*. In: Nussbaum, Martha; Brooks, Thom; (Eds). *Rawls's Political Liberalism*. Columbia University Press, 2015.

and fair equality of opportunities also are constitutive of Rawls's conception of distributive justice. These are principles that may be threatened by too much inequality¹⁹

The complex design of the conception of distributive justice goes beyond the difference principle and shows an overlap of a political conception with aspects of distributive justice above mentioned, which points out the problematic answer that third generation interpreters of Rawls's work provide of "uncoupling" between both. One has to wonder what the political conception of justice gets left with when such parts get left behind.

Therefore, the claim for *taking social rights away from courts* (Ferraz) which articulates the "less justice dimension" as well as the claim of *uncoupling distributive justice from political justice* "the less legitimacy/perceived legitimacy dimension" have a common diagnosis the lack of an *egalitarian ethos* (Ferraz) or an identification of it with a conception of good (Gaus). Both interpretations seem one-sided in the consideration of the possibility of constitutional courts in adjudicating on matters of social justice specifically and, more generally, how to situate demands of distributive justice in regards to political justice.

One could find some middle ground in articulating the double role that constitutional essentials play: the normative standard and the role of courts (its competence in "producing justice"): legitimacy and justice. Rawls's theory of justice, as this paper aims to have shown, can lead an understanding on how to construct such a path.

6. Final Remarks

Should constitutional social rights be decided upon the basis of what procedure is most likely to give us just policies? If libertarians took over and eliminated welfare programs and then constitutionalized the absence of these programs what are the objections that can be made? Are there non-instrumental objections that can be made?

French philosopher Cecile Fabre in *Social Rights Under the Constitution* recalls the following assumptions that are shared by democratic and distributive justice theorists:

1. We have a fundamental interest in having a decent life;
2. Autonomy and well-being are two privileged conditions for having a decent life, and are important interests of ours;

¹⁹ GREEN, Jeffrey Edward Green. "Rawls and the Forgotten Figure of the Most Advantaged In Defense of Reasonable Envy toward the Superrich". *American Political Science Review*, 107(1), 123-138. (2013).

3. Our interest in having a decent life and our interests in autonomy and well-being matter as much as other peoples;
4. We have moral equal rights against others that they respect these interests.

To respect such assumptions one must be committed to the following claims: (a) *individuals have social rights to an adequate minimum and (b) those rights must be entrenched in the constitution of a democratic state, that is, democratic majorities should not be able to repeal them*²⁰.

To defend the non-instrumentality of social rights entrenchment, Fabre will consider that “social rights to adequate minimum income, housing and health care are not part of the “concept” of democracy, so that constitutionalizing them amounts to upholding social rights at the expense of democracy; that they are, in a limited number of cases, necessary conditions for democracy’s function and survival, and that in those cases constitutionalizing them *is true to the value of democracy* even though it constrains the democratic majority; that the right to education is a defining feature of the concept of democracy and a necessary condition for its function and survival”²¹

To do so, she will distinguish between democratic rights and undemocratic rights, those rights that are not necessary for the function of democracy. The premises that Fabre holds are shared by both democratic and distributive justice theories. Nevertheless, even if we assume this understanding the question of instrumentality still remains, now in relation to democracy.

An interesting position on the non-instrumentality of democracy has been held by Elizabeth Anderson²² who has argued that noninstrumental values can be conditional on instrumental. For example, democratic participation would make no sense if it didn’t achieve the ends for which it was instituted. Yet in virtue of its instrumental value, it acquires noninstrumental value – at least as something that many citizens rightly value of the life they value noninstrumentally. Even if a dictatorship gives people what they want, democratic citizens prefer to govern themselves. Anderson aligns her claims with the democratic thinking of John Stuart Mill and Dewey, who hold democracy as a way of life defined by membership, reciprocal cooperation, mutual respect and sympathy located in civic society.

²⁰ She recognizes that the second claim is controversial and recalls that Nagel, to whom constitutional social rights are desirable but does not explain why, Rawls on social minimum, Dworkin who “never addresses such issue” and Raz.

²¹FABRE, Cecile *Social Rights Under the Constitution*. Oxford. Oxford University Press, 2004.

²² ANDERSON, Elizabeth *Democracy: Instrumental vs. Non-Instrumental Value*. Christman, John (Eds). *Contemporary Debates in Political Philosophy*. Wiley-Blackwell, 2009.

In this vein, it is also noteworthy to point out that Gaus²³ in a paper aimed at showing the convergence of Rights between Mill and Rawls argues for a common psychology shared by both authors, affirming a “democratic personality”, something like a “natural sentiment of unity and fellow feeling”, with social relations being considered a good (not merely instrumental), as expressions of a deep psychological craving for intercourse with fellows, a “fellow feeling”. The defense of non-instrumental reasons for social rights entrenchment seems as a possibility by following this path.

But even if it this isn't the case, Van Parijs²⁴ offers a compelling *instrumental* view of the difference principle as incorporated in a comprehensive moral doctrine by recalling notwithstanding its focus on institutions, these institutions are a powerful influence on individual motivation. The difference principle permits the design of institutions that that foster an ethos of solidarity, work and patriotism, not because of the intrinsic goodness of this life inspired by such ethos but because of its instrumental value in the service of boosting the lifelong prospects of the incumbents of society's worst position.

The instrumentality or non-instrumentality of social rights entrenchment may seem to some a secondary issue of the question regarding the role of constitutional courts in advancing social and economic rights. After all, what is the problem of instrumentality, if this idea is seen as something as a means of fostering an ethos of solidarity? If such procedure is the most likely to give us the best policies? Nevertheless, one of the aims of this paper was to address a possible scenario of not only taking these rights away from courts but also a possible scenario of these rights being “taken away” from constitutions. What can be said? To conclude, I will recap some of the main ideas that can help support a defense not only of the importance of the constitutional entrenchment of social and economic rights but also its litigation by constitutional courts by taking onto account Rawls's view of justiciability.

A possible reply to Ferraz's point, that is, that such rights should be taken away from the courts, can be based on the idea that his reading is limited by the “less justice” account. And, as this paper shows “less justice” is just part of the answer to the question of the importance of social and economic rights in the constitution. Regarding aspect of the *perceived legitimacy*, one could say that a criteria such as an account of the *social minimum* still has to be the object of

²³ GAUS, Gerald , *The Convergence of Rights and Utility: The Case of Rawls and Mill*. *Ethics* 1981 92:1, 57-72

²⁴ VAN PARIJS Philippe. “Difference Principles”. In: *The Cambridge Companion to John Rawls*, Samuel Freeman ed., Cambridge University Press, 2003, pp. 200-240.

litigation due to the fact that these claims are conditions of a decent life and may provide a threshold to avoid the unwanted consequence of “maximum attention to the well-off”.

On the other hand, but still on the *perceived justice* account, the claim that political justice has to be uncoupled from specific conceptions of distributive justice, the challenge seems to be harder to meet. A Rawlsian account of distributive justice is complex and has different accounts on the local (fair value, difference principle, fair equality of opportunities) and international sphere (principle of assistance). Yet, what is non-negotiable from a Rawlsian perspective is that basic needs have to be met in constitutional liberal democracies. The attempt to take these rights away from the constitution seems to be a grave attempt on the democratic ideals, such as equal respect and the recognition that the lives of other people matter as much as our own lives. Such rights are necessary to the function of democracy, one cannot defend the latter without upholding the former.

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