
Private Law, Double Distortion Argument, and Property-Owning Democracy**Leandro Martins Zanitelli¹**

Abstract: the article discusses an argument against the use of private law for distributive purposes, Louis Kaplow and Steven Shavell's double distortion argument (Kaplow and Shavell, 1994). It is sought to ascertain whether one of the theses on which this argument rests, the thesis of equivalence, can be confirmed in the light of John Rawls's theory of justice. According to the thesis of equivalence, an arrangement constituted by a private law sensitive to distributive justice can be replaced, without loss to justice, by an arrangement containing an efficient private law and measures of taxation and transfer of income to achieve distributive objectives. The paper tests this thesis against two interpretations of the difference, emphasized by Rawls in late writings, between two types of institutional regime, property-owning democracy and welfare state capitalism. The idea is to verify whether an efficient private law (accompanied by taxation and transfer measures) is compatible with property-owning democracy. It is argued that Rawls's ideas about this type of regime refute the thesis of equivalence, with varying implications depending on how the difference between property-owning democracy and welfare state capitalism is understood.

Keywords: Private Law; Distributive Justice; Double Distortion Argument; Rawls; Property-Owning Democracy

Introduction

What should be the role of private law in a society that meets the exacting standards of John Rawls's conception of justice? In this article, I shall assess the thesis that, even in such a society, private law must be guided exclusively by efficiency. This argument, known as the "double distortion argument," was presented by Louis Kaplow and Steven Shavell (KAPLOW and SHAVELL, 1994) as an argument against the use of private law for distributive purposes, even in societies committed to some egalitarian ideal. As such, it is an argument applicable, *prima facie*, to the case of a society that endorses the conception of justice advocated by Rawls ("justice as fairness").

As the first section explains, the double distortion argument rests on two theses, the theses of equivalence and relative inefficiency. According to the thesis of equivalence, a set of institutions B (arrangement B), which includes a private right blind to distributive justice, can be shaped in such a way as to equate (through taxation and transfer policies), in terms of justice, to an arrangement A,

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in which private law is designed so as to sacrifice efficiency in favor of distributive objectives. The relative inefficiency thesis asserts that if A and B equals in terms of justice, the former will be less efficient than the latter.

The strategy of the paper is to verify whether the thesis of equivalence resists Rawls's considerations about the superiority of a certain ideal type of institutional regime, property-owning democracy (POD), over welfare state capitalism (WSC). If we can demonstrate that POD is not indifferent to arrangements A and B – that it instead rejects B in favor of A –, we have refuted the equivalence thesis and, with it, the double distortion argument.

The article is organized as follows. The first section presents in greater detail the double distortion argument and the two theses that support it. The second section briefly discusses the Rawlsian conception of justice and the contrast, emphasized in Rawls's late writings, between two ideal types of regime, POD and WSC. The third and fourth sections deal with two interpretations of the difference between the two regimes. According to one of these interpretations (section 3), the difference between POD and WSC occurs exclusively within institutions, and consists, in short, of the fact that the first type of regime (but not the second) contains measures of capital dispersion.

Another interpretation (section 4) describes the difference between POD and WSC as a deeper one, which, although it can be observed in the institutions of each regime, relates crucially to the principles that POD and WSC propose to carry out. According to this interpretation, while POD is a regime committed to justice as fairness, WSC is governed by utilitarianism – perhaps by a kind of restricted utilitarianism.

The final section summarizes the conclusions of the article. The first interpretation on the difference between POD and WSC allows (provided that “dispersion of capital” is understood as dispersion of capital control) to reject the thesis of equivalence, but reserves to private law a limited role, restricted to the organization of the company, in the pursuit of distribution goals. On the other hand, the second interpretation, by highlighting the difference between the POD and a regime occupied with maximizing the income of the worst-off citizens, has broader implications and leads to refuting the thesis of equivalence with consequences for private law in general, and not just for company law.

1 Double distortion argument

This section presents the double distortion argument of Louis Kaplow and Steven Shavell (KAPLOW and SHAVELL, 1994). We will see why, according to this argument, any conception of justice that is minimally sensitive to efficiency should favor an institutional arrangement in which

private law responds exclusively to considerations of efficiency. Before we turn to the argument, however, it is convenient to make some conceptual clarifications.

By “private law” is meant below the area of law that deals with property,² contracts, business, torts, family and succession *causa mortis*. Private law rules, in turn, are understood both as legal provisions and as judicial decisions (whether or not such decisions are based on legal provisions). To assert, therefore, that private law should be guided exclusively by efficiency implies not only that statutes should be efficient, but also that judicial decisions – and the way in which statutes are interpreted in those decisions – must be based on efficiency.³

“Efficiency” is the maximization of something. For the purposes of the article, it is irrelevant what – wealth or welfare – is maximized; it is only relevant that, whatever one wants to maximize, efficiency is appealing enough that our conception of justice is minimally sensitive to it, that is, so that everything else being equal, our conception of justice leads us to prefer a more efficient state of affairs to a lesser one.⁴

Let us turn to the argument of double distortion. This argument is intended to compare two distinct institutional arrangements, hereinafter referred to as A and B. Such arrangements are thus characterized:

A: an arrangement in which private law is sensitive to distributive justice. This means that, to some extent, private law is designed in a way that, instead of the goal of efficiency (and contrary to that goal), its norms respond to distributive considerations.

B: an arrangement in which private law only addresses efficiency considerations.

In view of these two arrangements, the double distortion argument is developed on the basis of two theses:

Equivalence thesis: according to the thesis of equivalence, we can arrive in B to at least equivalent results, from the point of view of distributive justice, to those of A.⁵ In favor of this

² As for property, one has in mind the issues with which civil codes usually deal with, such as the difference between ownership and possession, limited real rights, and modes of acquisition, transfer and loss of ownership. The general property regime transcends private law as understood in this article, including administrative provisions, as well as – so as not to fall into the “daily libertarianism” against which Liam Murphy and Thomas Nagel (MURPHY and NAGEL, 2002) warn – fiscal ones.

³ This does not mean that legislators and judges must act motivated by efficiency. Efficiency can be better met indirectly, that is, by decisions motivated by considerations other than efficiency itself.

⁴ It may be that certain conceptions of efficiency fail to meet even this weak condition. For a critique of efficiency as maximization of wealth, see Dworkin (1985, chap. 12).

⁵ Kaplow and Shavell’s (1994, 669) version of the equivalence thesis is actually that B can be Pareto-superior to A: “we show that, even though the income tax distorts work incentives, any regime with an inefficient legal rule can be replaced by a regime with an efficient legal rule and a modified income tax system designed so that every person is made better off.” It is hinted, however, that, because of its Pareto-superiority, B is also at least as good as A in distributive terms, since the issue that Kaplow and Shavell propose to respond negatively is whether private law should pursue distributive goals to the detriment efficiency: “the question therefore arises whether legal rules should be used to (...) promote distributional objectives, even if at a sacrifice to efficiency (KAPLOW and SHAVELL, 1994, p. 669). Part of the criticisms against the double distortion argument (e.g., AVRAHAM *et al.*,

thesis, it is considered that the insensibility of private law to justice distributive in B can be offset by other parts of the arrangement – for example, by progressive taxation.

Relative inefficiency thesis: to arrive at distributively equivalent results to those of B, arrangement A must cause more distortions – to be distributively equivalent to B, A must sacrifice efficiency to a greater extent. The thesis of relative inefficiency is based on the fact that, in B, the desired distributive result can be achieved exclusively through income tax. A, on the other hand, is characterized by the use of other instruments (in our case, private law) to replace or jointly with income taxation.⁶

The remainder of the paper will focus on the equivalence thesis, but in order to conclude the presentation of the double distortion argument, let us look briefly at what the thesis of relative inefficiency is based on. The first consideration in favor of this thesis is that, irrespective of the means employed (for example, income tax or private law), income taxation rules may have the distorting effect known as substitution effect: these rules may cause profitable activities (such as work) to be replaced by unprofitable activities (such as leisure). Note that, for the thesis of relative inefficiency, it is not essential that the substitution effect in fact be verified; essential is that, if it is established, this effect is independent of the instrument used – income tax or other.⁷

The second consideration in favor of the thesis of relative inefficiency is that the substitution effect is the only distorting effect of an income tax. Other means of taxation, such as private law, cause a second distortionary effect, namely the effect of an institutional design that, in order to achieve a certain distributive objective, diverges from efficiency. In the Kaplow and Shavell's (1994, p. 669) example, let us suppose an efficient tort regime X, which induces agents to take precautions against accidents to an optimal extent, and a regime Y that, for reasons of distributive justice, offers incentives for the prevention of accidents other than those of X (in Y, damages vary according to income, so that the rich have more incentive for precaution than poor). Compared to X, Y gives rise to a second distortion (in addition to the substitution effect) – in this case, the precaution at a sub-optimal level.

Once the two theses are confirmed, it must be concluded that any conception of justice that is minimally sensitive to efficiency should prefer arrangement B to arrangement A. After all, if the two arrangements are, for distributive justice, equivalent, but one (B) is more efficient than the other

2004) is addressed to the statement about B's Pareto-superiority over A, which is in some sense bolder than the statement about the distributive equivalence of the two arrangements.

⁶ The double distortion argument applies, therefore, against any arrangement that, like A, uses other instruments than the income tax to deal with distributive issues.

⁷ For this first consideration, see Kaplow e Shavell (1994, pp. 667-668): "using legal rules to redistribute income distorts work incentives fully as much as the income tax system – because the distortion is caused by the redistribution itself".

(A), only a conception of justice indifferent to efficiency could also remain indifferent to the two arrangements. It follows that under certain conditions – including that A and B are achievable⁸ – we must, despite a possible sympathy for distributive justice, prefer a private law oriented exclusively by efficiency.

The double distortion argument attracted an already robust critical literature. Part of the criticism is aimed at the equivalence thesis (AVRAHAM *et al.*, 2004; BLUMKIN and MARGALIOH, 2005; LEWINSOHN-ZAMIR, 2006), part turns against the thesis of relative inefficiency (JOLLS, 1998; SANCHIRICO, 2000; 2001; BLUMKIN and MARGALIOH, 2005), and part questions the viability of an arrangement B distributively equivalent to A (DAGAN, 2014, FENNEL and McADAMS, 2016). This article tests a particular strategy to refute the equivalence thesis. According to this strategy, supporters of John Rawls's conception of justice have distributive justice grounds for preferring arrangement A to B. In other words, it would not be possible, under a Rawlsian conception of justice, to construct an arrangement like B so as to make it distributively equivalent to A. In the following section, the details of that strategy will be presented.

2 Rawlsian justice and property-owning democracy

The main theme of Rawls's monumental work on justice (RAWLS, 1999[1971]) are the principles that citizens conceived as free and equal (and who recognize each other as free and equal) would choose as equitable terms of cooperation and, as a consequence, as the basic principles of the institutions of a just and stable society. In the simpler version of Rawls's conception of justice ("justice as fairness"), these principles are two (although the second is referred to as consisting of two parts, or two independent principles): the first principle, or principle of basic liberty, which guarantees to all a scheme of equal liberties adequate for the full development and exercise of two fundamental moral capacities, the capacity for a sense of justice and the capacity for a conception of good;⁹ the second principle dictates that offices and positions are to be held in conditions of fair equality of opportunity, and that inequalities in the distribution of primary goods, such as wealth and income, should be beneficial to the worst-off citizens (the difference principle) (RAWLS, 2001, pp. 42-43).

Although he gives more attention to the justification of principles, Rawls also deals with the institutions through which these principles can be realized. In late writings, he emphasizes the

⁸ Another condition is that there are no other values, besides distributive justice and efficiency, that make us prefer A instead of B.

⁹ The principle of basic freedoms is stated above in the revised version formulated by Rawls after the critiques of the original version by Herbert Hart. For the revised version, see Rawls (2001, pp. 44-45).

differences between two types of institutional regimes, property-owning democracy (POD) and welfare state capitalism (WSC). According to Rawls, only the first of these regimes is suited to the principles of justice as fairness.¹⁰

One strategy to refute the equivalence thesis discussed above is thus the following: let us suppose that Rawls is right about the superiority of POD over WSC. Between these two types of regime, therefore, a conception of distributive justice such as that of Rawls would therefore fall to the former. Suppose, moreover, that of the two institutional arrangements considered in the previous section, A and B, only the first one, which includes a private right sensitive to distributive justice, is part of a POD. This would suggest that arrangement B, in which private law has its content determined solely by efficiency, is incompatible with this type of regime. The thesis of equivalence would thus be called into question: since, in Rawlsian terms, POD and WSC are not equivalent, neither A, which is part of a POD, would be equivalent to B, an arrangement incompatible with this regime.

In order for the strategy just described to be successful, it is therefore necessary to confirm two propositions:

- 1 POD is fairer (in Rawlsian terms) than WSC.
- 2 Between arrangements A and B, only the former is compatible with the POD.¹¹

In subsequent sections, these propositions will be tested in light of two interpretations of the difference between POD and WSC.

3 POD and capital dispersion

What differentiates, after all, POD and WSC? In the literature, two ways of differentiating the two types of regime are found. According to the first, which will be the object of this section, the difference between POD and WSC is an institutional difference; these are types of regimes whose institutions differ, although they are based on the same principles of justice. According to this interpretation, therefore, POD and WSC are regimes that aim to meet the principles of justice as fairness, but do so by different means. In asserting the superiority of POD over the WSC, what

¹⁰ For comparisons between the two types of regime, see Rawls (2001, pp. 139-140).

¹¹ Strictly speaking, in order to refute the equivalence thesis, it must be demonstrated that B is incongruent not only with POD but also with any other type of regime equivalent to POD from the point of view of justice. Rawls cites just one more type of just regime, liberal socialism (RAWLS, 2001, p.138). If B turns out to be in fact incongruent with POD, this is also likely to be true of liberal socialism – which does not mean, however, that there is no third type of regime, other than these two, that is capable of satisfying justice as fairness and of which B can be a part.

we would be asserting, then, is that the former is a more successful attempt than the latter to carry out by institutional means the principles of justice as fairness.

A work representative of this first interpretation as to the difference between POD and WSC is that of Martin O'Neill (O'NEILL, 2012).¹² According to O'Neill (2012, pp. 80-81), a POD is characterized by institutions that fulfill three functions: a) dispersion of capital (human and not human); b) restriction to the intergenerational transmission of wealth; c) restriction to the influence of wealth on politics. Each of these functions, in turn, can be accomplished by a set of measures: the function a) takes place through policies of dispersion of real estate and productive capital, as well as investment in education; b) is realized through the taxation of inheritances and gifts; c), finally, is achieved by the regulation of electoral campaigns and public financing of political parties.¹³

In carrying out the aforementioned functions, the institutions of a POD would prevent such a regime from incurring the three flaws that Rawls (2001, pp. 137-138) attributes to the WSC. Thanks to c), the POD ensures the fair value of political liberties, a part of the first principle (the principle of basic liberties)¹⁴; b) and c), in turn, satisfy the second principle (that is, the principle of fair equality of opportunity and the difference principle) (O'NEILL, 2012, p. 81).

O'Neill himself, however, doubts the superiority of POD over the WSC as regards the fair value of political liberties and fair equality of opportunity. For O'Neill, the crucial difference between the two types of regime lies in the function a), that is, the measures for the dispersion of capital (human and nonhuman) found in the POD but not in the WSC.¹⁵ The arguments for the fair value of political freedoms and fair equality of opportunity (with the exception, in the latter case, of the argument regarding human capital), however, depend only on the functions b) and c), which, because they are not exclusive to POD, can also be found in the WSC. It is compatible with the WSC, so – despite its lacking of capital dispersion measures¹⁶ – the regulation of electoral campaigns and other policies to restrict the influence of wealth on politics (thereby ensuring the fair value of political freedoms), as well as tax policies that considerably inhibit the intergenerational

¹² For a similar interpretation, see Krouse and McPherson (1988).

¹³ This characterization of POD, as well as Rawls's own writings on it, is inspired by the work of the British economist James Meade (MEADE, 1964).

¹⁴ As far as political liberties are concerned, the principle of basic liberties is not satisfied with the formal guarantee; it further requires that the capacity to make use of those freedoms and thereby to deliberate on the application of the principles of justice to the institutions which make up the basic structure of society be approximately the same for all citizens. On the fair value of political liberties, see Rawls (2001, pp. 148-149).

¹⁵ Richard Krouse and Michael McPherson (KROUSE and McPHERSON, 1988) also define POD as a regime that differs from WSC by the dispersion of capital.

¹⁶ Hereinafter, in the absence of notice to the contrary, the term "capital" refers above only to production goods.

transmission of wealth (in accordance with the principle of fair equality of opportunity) (O'NEILL, 2012, p. 85).¹⁷

It should be concluded, therefore, that the superiority of POD over WSC depends on the function a). The question then arises as to whether POD's capital dispersion policies make this type of regime more equitable than the WSC. After all, why is the dispersion of capital especially important for justice? Or, going straight to the point: what is the justice deficit of a society in which production goods are controlled by a small group, but which is advantageous to the general public, including the poorest, in terms of income (considering that it is also a society whose institutions prevent inequality in the ownership of productive assets from corrupting politics and equality of opportunity)?

The answer, according to O'Neill, is that the unequal distribution of capital, even if it does not have a deleterious effect on income, is disadvantageous for the worst-off citizens in power and status. In this regard, O'Neill (2012, pp. 87-88) appeals to reasons why, according to Rawls, inequality of wealth is an evil. One of these reasons is that inequality of wealth engenders the domination of one part of society by the other – that is, inequality of wealth gives way to inequality of power. Another is that the concentration of wealth can give rise to social hierarchy, undermining equal status and self-respect of disadvantaged citizens.¹⁸

The problem of WSC, then, is that this type of regime, by lacking measures for the dispersion of capital, condones inequality of power and status – even though income inequality is considerably mitigated by taxation and transfer policies. The inadequacy of these policies, which O'Neill calls "redistributive" or "*ex post*", is highlighted in the following passage (O'NEILL, 2012, p. 88).

let us assume that society is structured in such a way that all decisions about economic investment and production are made by a small, high-status group who constitute something like a ruling class or economic elite. This dominant class gets to decide to a considerable degree how society is to be structured, and what the variety of jobs and social roles within that society is likely to be. Now, if we enact within this society the kind of "transfer based" *ex post* redistribution associated with many WSC-type mechanisms, we may presumably be able to create a society in which income is equalized (or "maximized") across the dominant and subordinate social classes. But we will nevertheless be completely unable to enact a redistribution of *power*, or of *status*, within this society by any plausible *ex post* mechanism, given that the shape of the society in terms of its productive relations, and the distribution of roles within the economy of that society, will still be a matter of decision by the dominant group. Only *ex ante* mechanisms, which challenged the ruling group's position of dominance by, for example, granting more control over productive capital to others, will be able to head off inequalities of wealth, inequalities of power (thereby preventing relations

¹⁷ Since fair equality of opportunity often requires public investment in education, this principle also depends on measures of dispersion of human capital that are part of the function a) (O'NEILL, 2012, pp. 86-87).

¹⁸ For these reasons, see Rawls (2001, pp. 130-131).

of domination), and their associated inequalities of status (thereby preventing the erosion of self-respect of the subordinate group). Thus, we may plausibly think that a “redistributive” *ex post* realization of the difference principle would fail to address some of the ways in which inequality is bad, because of its inability to address inequalities that result from the way in which social production is organized (rather than merely addressing inequalities that result from the distribution of the social product itself).

Well, let us consider that this argument is correct, and therefore, that POD has an advantage over the WSC in the realization of the difference principle (as a principle regulating inequalities of power and status, and not only of income). We would confirm in this way the first of the propositions enunciated at the end of the previous section, that is, the one about the superiority, in the light of the Rawlsian conception of justice, of POD over WSC.¹⁹ Let us see, then, on the basis of O’Neill’s interpretation of the difference between the two regimes, if it is possible also to chancel the second proposition about the preference of a POD for a private law sensitive to distributive justice. What we have to verify is, in short, whether the dispersion of capital that characterizes POD in the interpretation under consideration requires a private law that, in the name of a distributive objective, sacrifices efficiency (i.e. a private law as in the arrangement A) or whether, on the contrary, it is possible to keep capital sufficiently dispersed in the form of a POD without incurring that sacrifice.

Recall that the alternative to arrangement A is an arrangement B in which private law is efficient and any distributively desirable state of affairs is achieved by other instruments – notably through income taxation. Well, at least in view of one of the meanings that can be attributed to the dispersion of capital characteristic of a POD, there is no reason to think that this dispersion cannot be realized with arrangement B. If by “dispersion of capital” we are simply referring to the dispersion of capital income, there can be no doubt that this dispersion can, in theory, occur only through taxation and transfer policies. In such a case, an efficiently designed private law, regulating issues such as property, contracts and torts, would allow considerable concentration of pre-tax capital income – for example, by not imposing limits on real estate property and enforcing unconscionable contracts – but post-fiscal income would remain adequately dispersed thanks to taxation and transfer policies. Once the dispersion of capital is understood as a dispersion of capital income, it makes little sense, therefore, to attribute relevance to the difference between *ex ante* and *ex post* measures. If any regime fails to disperse capital in that sense, it is not because it relies heavily on *ex post* or redistributive measures, but because it does not make sufficient use of such measures.

¹⁹ For opinions to the contrary, see Schefczyk (2013); Vallier (2015).

Against the conclusion just quoted, one could argue that there is a psychological difference – and a consequence for the viability of reforms – between a dispersion of capital income obtained through the regulation of property and contracts and that which takes place through means of taxation – *ex post*, therefore. Redistributive measures, the argument goes, are more likely to be perceived as a violation of rights and to attract opposition (FENNELL and McADAMS, 2016).

If this objection is correct, the dispersion of the capital needed for a POD is likely²⁰ to involve measures other than income taxation. However, there are two caveats. The first is that if there is, in fact, greater difficulty in dispersing capital by one means than by another, this is something to be empirically verified. In principle, we should expect aggressive measures of capital dispersion to face the same opposition in A and B or even greater opposition in the case of the former, since it is less efficient. Another caveat is that the argument in question applies only to non-ideal conditions in which the ideal of justice on which social institutions are based is not endorsed by citizens in general. Only under such conditions could citizens envisage redistributive measures that oppose the results of market transactions as measures that violate rights.²¹

If the dispersion of the capital characteristic of the POD is the dispersion of income from capital, then something is lacking – at least in ideal conditions – in order to demonstrate the superiority of A over B and confirm the second of the propositions necessary to refute the equivalence thesis. As for O’Neill, however, it seems clear that the dispersion of capital should not be understood as a dispersion of capital income. In the passage transcribed above, he refers to the inequality of power found in societies whose capital is concentrated or, more precisely, to the fact that “the terms of productive relations and the distribution of roles in the economy” in such societies are decided by a small group. If POD is distinguished by opposition to this concentration of power, then what it does is to promote the dispersion of control of capital, and not – or not necessarily – of income.

It is known, however, that the dispersion of capital control is not ensured by the mere dispersion of ownership. Given the difficulty of minority shareholders to have a voice, high dispersion of ownership may be accompanied by a very low dispersion of decision-making power over the use of productive resources – that is, capital control. Conceived as the type of regime that disperses this control, POD needs to count on measures that, in fact, increase the participation in decisions about production. We need not go into details of these measures,²² however, to conjecture

²⁰ “Likely,” because we do not know how much the dispersion of the capital needed for a POD would depend on taxation to counteract market results.

²¹ For the difference between Rawls’s conception of justice and conceptions that recognize moral property rights on the basis of voluntary transactions, see Kordana and Tabachnick (2006).

²² Among the possible measures would be the participation of workers in management bodies (as in Germany) and even a mixed regime along the lines advocated by Krouse and McPherson (1986).

that a regime which, for the sake of justice, aims at dispersion of capital control cannot do so only by means of income taxation.

The argument about dispersion of capital control thus confirms the superiority of A over B, even though its result is to subject only a small part of private law to distributive justice. Capital control is not dispersed without a reorganization of the company that assures participation in the decisions to minority shareholders, workers, consumers or other stakeholders. Apart from this, however, the dispersion of capital (understood as a dispersion of its control) would be consistent with a regulation of property, contracts, and torts based exclusively on considerations of efficiency. In other words, a POD that dispels control of capital seems to imply a private law sensitive to justice only peripherally – “from the door in” of enterprises, as it were, but not “from the door out”.²³

4 POD and reciprocity

Another way to differentiate between POD and WSC takes into account the principles that each type of regime proposes to carry out. Further than by the institutions that characterize them, POD and WSC are differentiated, according to this second interpretation, by the ideals of justice upon which they rely. An example of this interpretation is yielded by Samuel Freeman (FREEMAN, 2013). For Freeman, the POD is a type of regime that conforms to the principles of justice as fairness. In this, the POD would differ from the WSC, a regime based on utilitarianism.

At first glance, Freeman’s interpretation of the difference between the two regimes subverts the exercise proposed by Rawls when comparing types of institutional arrangements. After all, what would be the purpose of comparing regimes as to their suitability for a certain conception of justice – justice as fairness – if any of these regimes, by definition, does not even attempt to realize the conception in question? Freeman’s interpretation is, however, consistent with Rawls’s assertion that the comparison of regimes is made under ideal conditions of “good functioning,” that is, under conditions under which a regime operates according to its principles and objectives. “Here we assume,” Rawls says, “that if a regime does not aim at certain political values, and has no arrangements intended to provide for them, then those values will not be realized” (RAWLS, 2001,

²³ An alternative to the scenario of democratically managed firms subject to an efficiently regulated market is Hussain’s (2012) “democratic corporatism,” in which market operations are partly supplanted by associative decisions. This model leads to a considerable dispersion of control over production, but through external, rather than internal constraints, to hierarchical management. It should be noted that, in Hussain’s case, democratic corporatism is defended for reasons of stability (and not, therefore, as a direct instrument for the achievement of distributive objectives) and would take place in the context of a society whose background conditions already meet the principles of Rawls’s conception of justice.

p. 137).²⁴ True or not to what Rawls intended when differentiating between POD and WSC, Freeman's interpretation is interesting in itself and will therefore be the object of this section. Let us go into its details.

According to Freeman (2013, p.17), WSC institutions are based on either utilitarianism or, perhaps, a "restricted utilitarianism," in which utility maximization is tempered by respect for basic freedoms and prioritarianism – that is, in the latter case, by a differential weight attributed to the well-being of disadvantaged citizens. Even if the WSC can, as O'Neill asserts, institutionally resemble a POD – with measures to inhibit the influence of wealth on politics and public investment in education for the dispersion of human capital – what guides these measures, in the case of CBE, is the promotion of well-being or a "liberalism of happiness."

POD, on the other hand, is seen by Freeman as a regime aimed at achieving the principles of justice as fairness. The differences in relation to CBE are manifested in two of these principles, the principle of fair equality of opportunity and the difference principle. While the WSC merely ensures a certain "social minimum," the POD meets the difference principle by regulating production processes in such a way that the resulting inequalities are beneficial to the worst-off. With the difference principle, POD moves away from an eminently compensatory conception of justice (concerned with compensating for welfare deficits) to endorse an ideal of reciprocity (which Freeman calls "democratic reciprocity"), the ideal of social cooperation in which the most fortunate citizens – advantaged by natural talents and other contingencies – benefit from their good fortune only on terms that are also advantageous to others (FREEMAN, 2013, pp. 19-22). In responding to the difference principle and to the ideal of reciprocity underlying it, POD is a regime "stable for the right reasons,"²⁵ that is, for reasons that reasonable citizens cannot reject (FREEMAN, 2013, p. 24), and promotes the self-respect of the worst-off citizens (FREEMAN, 2013, pp. 26-27).

POD also differs from WSC by asserting a certain interpretation of the principle of fair equality of opportunity. Here the difference is once again the difference between a kind of regime imbued with an ideal of reciprocal social cooperation (POD) and another (though moderately) utilitarian (WSC). In a POD, instead of privileging the naturally best endowed, resources in education are employed so that everyone can develop their skills (FREEMAN, 2013, p. 29). A POD also rejects, finally, that the income of the less talented workers be maximized at the expense of the participation of these workers in the decisions about the production. In this respect, Freeman (2013,

²⁴ The passage continues: "but while a regime may include institutions explicitly designed to realize certain values, it still may fail to do so. Its basic structure may generate social interests that make it work very differently than its ideal description." The question is whether, for Rawls, WSC is a type of regime whose institutions do not even seek to realize justice as fairness, as Freeman interprets, or whether, despite being driven by this ambition, WSC is a regime that is made to act contrary to its objectives in view of the motivations it engenders.

²⁵ The expression is Rawls's (2005, p. xli).

pp. 31-33) argues in favor of a particularly robust version of fair equality of opportunity, according to which the principle in question requires continuous opportunities for occupying posts and positions, in opposition, therefore, to hierarchical workplaces.

The interpretation of POD and WSC as regime types guided by different principles of justice shortens one of the steps for refutation of the equivalence thesis. Accepting Freeman's interpretation, it is inferred, without further ado, the superiority in Rawlsian terms of POD over the "utilitarian" WSC (proposition 1). Our task is now again to inquire about the validity of proposition 2, this time in the light of a different characterization of POD. Conceived as a regime that departs from the WSC by attending to the difference principle (which in turn is understood as an expression of an ideal of reciprocity) and fair equality of opportunity (in a particularly robust version), does POD express some preference between arrangements A and B?

Something to notice here is that, with regard to fair equality of opportunity, Freeman's version of POD does not differ substantially from that of O'Neill – not, at least, if we interpret the latter as a regime characterized by the dispersion of control of the capital. The same comments made in the previous section would thus hold: a type of regime that ensures the participation of workers in the management of companies is a type of regime in which private law is peripherally sensitive to distributive justice, but no more than that.

What remains to be examined, then, is whether the interpretation of the difference principle in which, according to Freeman, the institutions of a POD are based is compatible with a private law that is minimally sensitive (i.e., sensitive only regarding the control of the means of production) to distributive justice, or whether, on the contrary, a private law in accordance with the difference principle (in the present version) must be a private law as a whole (or considerable part) attentive to distributive considerations.

An interpretation of the DCP in non-utilitarian terms runs counter to an argument for preferring arrangement B to A, namely that B is the most efficient between the two. This, however, is not enough, and for two reasons. First, because refuting the thesis of equivalence requires that we demonstrate the superiority of A over B, and in dismissing the utilitarian argument in favor of B, we are still far from concluding that B is not better than A (there may be other arguments that lead to this conclusion) and farther still to conclude that A is better than B.

The second reason is that the difference principle is often understood as the principle of maximizing the income of the worst-off citizens. This maximization goal is at least as well served by B as by A, with the advantage, in the case of B, of the latter's higher efficiency. If part of the resources saved in B is used to increase the income of the worst-off citizens, then B will be preferable to A.

To insist on an interpretation of the difference principle as a principle of maximizing the income of the worst-off citizens, however, is to insist on a utilitarian interpretation of this principle. Let us take the famous graphic in which Rawls (2001, p. 62) represents the situation of two groups of citizens, the more advantaged (MAG) and the less advantaged group (LAG):

paste graphic here

In treating the difference principle as an expression of an ideal of reciprocity, Rawls praises the role of this principle for self-respect: institutions publicly regulated by the difference principle communicate to disadvantaged citizens that their interests are as important as those of others, as those favored by the “natural lottery” and by other contingencies only take advantage of their good fortune in terms that also benefit the worst-off group.²⁶ For the ideal of reciprocity as well as for its role in promoting self-respect, however, it is enough that society remain on the ascending part of the OP curve.²⁷ At any point on the ascending part of OP inequality benefits the two groups of citizens; only after point D does one group of citizens begin to benefit at the expense of the other one. Of course, the more a society moves up the curve toward D, the greater its aggregate advantage, but as far as reciprocity (and the self-respect it helps to promote) is concerned, it is tantamount where, between O and D, this society lies.

This interpretation of the difference principle as an expression of an ideal of reciprocity is important because it discards, as already noted, a possible argument for the superiority of arrangement B over A in terms of justice. If we start from a scenario in which the situation of the disadvantaged citizens is the same in A and B and use the additional resources available in B (thanks to its superior efficiency) to further improve the situation of this group of citizens, the result is that, between A and B, it is in the latter that the advantage of the worst-off citizens is maximized. But once the interpretation of the difference principle as a principle of maximization is abandoned, this argument loses its force.

We still lack, however, an argument in favor of the superiority of A over B in terms of justice. I think this argument can be obtained (such as the very defense of the ideal of reciprocity) from the idea of self-respect. To see how, consider the hypothesis that A and B meet the difference principle in terms of wealth and income inequalities. In A and B, therefore, these inequalities are such that if we reduce the advantage of the group of better-off citizens, the other group, of the worst-

²⁶ Rawls (1999[1971], p. 157): “If the parties wish to express this notion visibly in the basic structure of their society in order to secure each man’s rational interest in his self-respect, which principles should they choose? Now it seems that the two principles of justice achieve this aim: for all have equal basic liberties and the difference principle interprets the distinction between treating men as a means only and treating them also as ends in themselves. To regard persons as ends in themselves in the basic design of society is to agree to forgo those gains which do not contribute to everyone’s expectations.”

²⁷ For an interpretation of the difference principle in this sense, see Rawls (2001, pp. 63-64).

off citizens, would also lose out (A and B represent, thus, societies in the ascending part of the graph above). In A, however, private law relations are regulated – albeit with some sacrifice of efficiency – in a manner more suited to the promotion of self-respect.

Detailing the above argument would require a more precise treatment of the relationship between justice and self-respect – a theme dear to the Rawlsian tradition – and of the different ways in which private law institutions can influence self-respect. Giving account of both tasks goes beyond the scope of this article, but it is possible to make some brief remarks. Private law requires some consideration of the interests of the parties involved – for example, in tort law, when defining which risk activities should be tolerated, as well as the victims’ right to compensation if the risk materializes, some consideration is given to the interests both of agents and of potential victims. The problem with a private law such as that of B is that, in the name of efficiency, some of these interests may be set aside – for example, it is quite possible that a tort regime guided exclusively by the objective of efficiency gives far more attention to the interests of agents of potentially dangerous activities than to those of potential victims.

It is clear that people whose immediate interests are neglected by a private law designed in the terms of B have their interests indirectly satisfied – B is, after all, an arrangement in which taxation and transfer policies offer generous compensation to the “victims” of an efficient private law. Such a compensatory strategy may, however, be insufficient; to some extent, at least, it is plausible that citizens’ self-respect depend on their participating in certain relationships as equals, and a defensible interpretation of what it means to participate in a relationship as equals is to participate in a relationship in which the interests of the parties specific to the relationship in question are properly considered. If a private law in the form of B is less consonant with the self-respect of citizens whose interests are, in the aforementioned terms, neglected, the difference principle, as a principle sensitive to self-respect (and not only to the distribution of wealth and income) would prefer arrangement A to B.

Imagine, for example, the case of a contract in which one party, Anne, was a victim of coercion by the other, Elizabeth. The law applying to this contract is efficient, which implies, suppose, that the contract between Anne and Elizabeth is, despite the coercion, valid and enforceable. We can also assume that a special version of arrangement B exists by virtue of which, thanks to taxation and transfer policies, people who are victims of contractual coercion, such as Anne, are prospectively at least as well as they would be in an arrangement A under which contracts like the one made by Anne and Elizabeth are void. Still, it seems correct to say that something does not go well with Anne under arrangement B; although B’s efficient private law regime indirectly benefits her, it remains the case that Anne’s interests in the interaction with Elizabeth are

disregarded. There is an interest that can be reasonably attributed to Anne in her deal with Elizabeth – the interest in contracting free of coercion – which is set aside by the law applicable in B.²⁸

Direito privado, argumento de dupla distorção e democracia de propriedade

Resumo: o artigo versa sobre um argumento contra o uso do direito privado para fins distributivos, o argumento da dupla distorção, de Louis Kaplow e Steven Shavell (Kaplow e Shavell, 1994). Procura-se averiguar se uma das teses nas quais esse argumento se apoia, a tese da equivalência, pode ser confirmada à luz da teoria da justiça de John Rawls. Segundo a tese da equivalência, um arranjo constituído por um direito privado sensível à justiça distributiva pode ser substituído, sem perda para a justiça, por um arranjo contendo um direito privado eficiente e medidas de tributação e transferência de renda para a realização de objetivos distributivos. O artigo testa essa tese frente a duas interpretações acerca da diferença, ressaltada por Rawls em escritos tardios, entre dois tipos de regime institucional, a democracia de cidadãos proprietários e o capitalismo de bem-estar. A ideia é verificar se um direito privado eficiente (acompanhado de medidas de tributação e transferência) é compatível com a democracia de cidadãos proprietários. Argumenta-se que as ideias de Rawls sobre esse tipo de regime refutam a tese da equivalência, com implicações diversas a depender de como a diferença entre democracia de cidadãos proprietários e capitalismo de bem-estar é entendida.

Palavras-chave: Direito Privado; Justiça Distributiva; Argumento da Dupla Distorção; Rawls; Democracia de Cidadãos Proprietários

Conclusion

This article assessed the resources available to a Rawlsian theory of justice to refute one of the theses underlying Kaplow and Shavell's (1994) double distortion argument. Such thesis is that an institutional arrangement B, in which the insensitivity of private law to distributive justice is offset by policies of taxation and transfer, can at least equate, as far as justice is concerned, an arrangement A in which, with some sacrifice of efficiency, private law rules are guided by distributive objectives.

To test the equivalence thesis, two interpretations of the difference between property-owning democracy (POD) – an ideal type of regime that Rawls considers fit to satisfy the principles of his conception of justice, justice as fairness – and welfare state capitalism (WSC) were considered. According to one of these interpretations (O'NEILL, 2012), the crucial difference between POD and WSC lies in the fact that the former includes measures for capital dispersion. On

²⁸ What is stated, notice, is not that the interest in contracting free from coercion is essential, and that therefore a legal system in which that interest is deprived by a (non-essential) interest in income fails to promote the good of Luisa (for an argument along these lines, see LEWINSOHN-ZAMIR, 2006). My claim is rather that, by making them interact in terms inappropriately attentive to interests that citizens can reasonably recognize as their own, an efficient private law suffers from a deficit in the promotion of self-respect.

this interpretation, it is concluded that the thesis of equivalence is refuted – provided, at least, that what is meant by capital dispersion is dispersion of capital control. Even so, the interpretation in question would favor a private law sensitive to distributive justice only locally – namely, only in that part of private law part, company law, from which the dispersion of control of capital depends.

A second interpretation, on the other hand, differentiates POD and WSC based on the principles that each type of regime intends to carry out. As proposed by Freeman (2013), POD is conceived as a type of regime based on the principles of justice as fairness, among them the principle of fair equality of opportunity and the difference principle (the latter understood as an expression of an ideal of reciprocity). The WSC, by contrast, is an ideal type of regime (albeit moderately) utilitarian.

This second interpretation of the difference between POD and WSC is full of implications for private law – and therefore for the equivalence thesis. First, in the robust version advocated by Freeman (2013, pp. 31-33), the principle of fair equality of opportunity implies a reorganization of the company for the dispersion of control over capital – in a way similar to the previous interpretation. Second, in drawing attention to the contrast between utilitarian and Rawlsian interpretations of the difference principle, Freeman emphasizes the relation between this principle and the idea of reciprocity, as well as the role of the difference principle – as an expression of the idea of reciprocity – for self-respect. This leads to the conclusion that difference principle should not be understood as a principle that requires the maximization of the advantage of the worst-off citizens (as it would be claimed under a utilitarian interpretation) – nor, therefore, as a principle which, in the name of this maximization, prefers arrangement B to A.

An argument for the superiority of arrangement A over B – and thus against the thesis of equivalence – can be deduced from the importance of self-respect in the Rawlsian interpretation of the difference principle. Understood as a principle attentive to self-respect (and not just to the distribution of wealth and income), the difference principle rejects arrangement B in view of the fact that the private law contained in this arrangement neglect due consideration of the interests of the parties in the interactions it regulates, thus preventing them from relating as equals.

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Trabalho enviado em 23 de janeiro de 2019

Aceito em 17 de março de 2019