



THE SENSE OF JUSTICE IN A TIME OF PANDEMIC: A PERSPECTIVE FROM JOHN RAWLS' POLITICAL LIBERALISM

O Senso de Justiça em Tempo de Pandemia: A Perspectiva do Liberalismo Político de John Rawls

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ABSTRACT

The article investigated how the political liberalism of John Rawls can offer reasonable arguments to address the political, economic and social dilemmas caused by the COVID-19 pandemic. Although Rawls' theory applies specifically to well-ordered societies, in §§ 10 and 11 of Conference VIII of *Political Liberalism*, the philosopher discusses how to govern in times of emergency that affect stability institutions of the rule of law. From the differentiation between the types of institutional instability (crisis and apprehension), it is indicated that the situation generated by COVID-19 is similar to the context of tension. Using John Rawls' political liberalism in this context of tension, it is possible to affirm the reasonableness of the argument in favor of restricting the freedom to go and the entrepreneur, in favor of not exposing people to excessive risks of death.

Keywords: Justice. Pandemic. Apprehension. Political Liberalism.

RESUMO

O artigo investigou como o liberalismo político de John Rawls pode oferecer argumentos razoáveis para equacionar os dilemas políticos, econômicos e sociais ocasionados pela pandemia de COVID-19. Apesar de a teoria de Rawls aplicar-se, especificamente, para sociedades bem ordenadas quase-justas, nos §§ 10 e 11 da Conferência VIII do livro *Liberalismo político*, o filósofo discute a forma de se governar em ocasiões de emergência que afetam a estabilidade das instituições do Estado de direito. A partir da diferenciação entre os tipos de instabilidade institucional (crise e tensão), indicou-se que a situação gerada pela COVID-19 assemelha-se ao contexto de tensão. Utilizando o liberalismo político de John Rawls para esse contexto de tensão, é possível afirmar a razoabilidade do argumento favorável a restrições à liberdade de ir e vir e de empreender, em favor da não exposição das pessoas a riscos excessivos de morte.

Palavras-chave: Justiça. Pandemia. Tensão. Liberalismo político.

1. INTRODUCTION.

The feeling of relative security combined with the routine that automates life, postpones or suspends reflection on the complex political, social and economic conflicts of modern society. But the pandemic caused by the coronavirus (COVID-19) put this apparent tranquility in check, because the disease exposes people to a risk of death or sequelae resulting from the disease, which is incalculable. And it is at this moment that fundamental questions of political philosophy return to the order of the day: what is good government? How and why should you act? What is the role



of the institutions of the basic structure of society, in the face of the challenge posed by the pandemic?

These provocations are aimed at all lines of thought in political philosophy, whether those that emphasize conflict as a form of confrontation and government control, or those that presuppose consensus as the foundation of social coexistence. In particular, the latter are challenged to think about a pandemic scenario in which the possibility of consensus becomes increasingly difficult, given the urgency - not to say the oversight - with which government measures are (not) taken.

Despite these difficulties, it proposes to investigate whether John Rawls' political liberalism, which aligns with the consensualist tradition of philosophy, can offer any answer to the political, economic and social challenges that the pandemic has imposed. Initially, the bases on which the American philosopher's theory of justice as fairness is based will be indicated. Then, the institutions' instability scenarios will be presented, in order to indicate to what extent it is possible to use the original position to present reasonable normative propositions for the pandemic situation.

2. NORMATIVE THINKING IN TIMES OF NORMALITY.

John Rawls' theory of justice proposes to order the main institutions of society based on two principles of justice:

- (a) Each person has the same irrevocable right to a fully adequate scheme of equal basic liberties that is compatible with the same scheme of liberties for all; and*
- (b) Social and economic inequalities must satisfy two conditions: first, they must be linked to positions and positions accessible to all under conditions of fair equality of opportunity; and secondly, they must benefit the least advantaged members of society to the fullest (the difference principle).¹*

Such principles aim to guide citizens and authorities on the best way to allocate or distribute the primary goods - basic freedoms, access to relevant opportunities and positions, access to material resources - that are produced by social cooperation. The principles are not intended to regulate the private sphere of individuals' lives, although they are related to it. This means that religious choices and life projects will only suffer some inflection of the principles

¹ RAWLS, John. *Justiça como equidade: Uma reformulação*. Trad. Claudia Berliner. São Paulo: Martins Fontes, 2003, p.60.

when, concretely, they make it impossible for other people, who honor the principles of justice, to be unable to enjoy the aforementioned primary goods.

Rawls claims that his theory is not utopian, but achievable, because it was designed for societies, to some extent well-ordered. A modern well-ordered society is structured in a situation of quasi-justice, under a constitutional rule of law in which the circumstances of justice - moderate scarcity of goods, pluralism and the need for social cooperation - are present.

Living under these circumstances means being under the protection of a State in a situation of institutional stability, that is, that is not being seriously threatened by an internal or external enemy, providing a minimum of peace for most people, since it is possible to distribute their primary assets in a minimal, sustainable and equitable manner. Despite this, because this distribution is not uncontroversial, some conflicts still persist. Not those more radical conflicts that threaten the stability of institutions, but those inherent to societies that have not yet been able to resolve their arbitrary inequalities - arising from the condition of birth or the misfortunes of life - and which still produce negative feelings and effects such as resentment, fraud and violence. The mission of the theory of justice, in this sense, is to improve a quasi-just society, offering arguments that mitigate these negative effects, in order to gradually overcome the most intense conflicts and reach a consensus that produces lasting peace at home. of society.²

In this context, the original position³ it is used by Rawls not only to justify the aforementioned principles of justice, but as a reasonable way of thinking about various concrete situations. The original position is itself the orientation for reflection on the political problems that produce social conflicts.

For example, in the case of an endemic⁴ like dengue⁵, we can ask ourselves whether it would be reasonable to restrict the basic freedoms of all citizens - freedom to come and go, to undertake, to earn income through work - in an intense quarantine that prevents people from leaving their homes, until a cure is found for the disease, or, if it would not be more “reasonable”

² DREBEN, Burton. On Rawls and political liberalism. In *The Cambridge Companion to Rawls*. Cambridge University Press, Cambridge, 2003, p. 316-346.

³ The original position is a thought experiment, similar to the social contract of Locke, Kante and Rousseau, limited by reasons chosen by the people who build it, which aims to help them find a reasonable answer to their controversies when it is not possible to reach them. it through the most direct argumentative clash. It is a procedure that aims to reduce the effects of partiality, emotionality, etc., in the decision-making process.

⁴ Endemic: a disease that constantly exists in a certain place and attacks a greater or lesser number of people.

⁵ COVID-19 has killed more than 605,000 people. <https://covid.saude.gov.br/> (link accessed on 10.23.2021). In Brazil, despite the high rate of infection by dengue, the number of deaths in 2020 was 520 people. <https://www.cnnbrasil.com.br/saude/brasil-tem-quase-1-milhao-de-casos-de-dengue-em-2020-diz-ministerio-da-saude/>. (link accessed on 23.10.2021). The way to face the problem of dengue is not the same for COVID-19. In any case, the purpose of the comparison is to articulate the arguments of the Rawlsian theory, in view of different scenarios, of endemic and pandemic.

to preserve the basic freedoms of all, as long as the less favored - people vulnerable to the disease, both from a physical-biological, geographical and economic point of view - receive some additional contribution from resources that make them less susceptible to it, and provided that everyone is committed to fighting mosquito outbreaks *aedes aegypti*.

If we start to think as if we were the parties in the original position, without knowing if we represent the group of people most susceptible to contagion, if we defend those who need to work to maintain their own livelihood, if we have in view the interests of entrepreneurs, if we represent those who live in regions that are not affected by dengue, if we act for those who will lose their jobs due to a possible quarantine, and if, at the same time, we recognize that dengue is an endemic without a cure, but that, despite this, it is possible to preserve the lives of infected people, despite the discomfort that the disease causes - including for the exercise of these people's basic freedoms -, it seems reasonable to intuit that the parties, in the original position, would not agree with an extremely intense quarantine.

The argument that quarantine should be imposed to protect a small group of people, who can become infected and suffer health disorders that will not cause their death, is not strong enough to impose a restriction on the exercise of basic freedoms for everyone else. - the majority -, because the effects of imposing such a restriction, which will impact the freedom of movement, the reduction of wages and jobs and the production of material goods, are even more deleterious than the opposite option.

However, thinking from the original position as if we were the honest representatives of this minority group, we cannot fail to demand duties from others, in the sense of improving the chances of avoiding contagion, or, if this occurs, of taking the sick person the cure. This means that the majority, who will continue to enjoy basic liberties, have a duty to bear the inherent burdens of providing additional protection to the less fortunate - the numerical minority, in this case.

A reasonable solution, which rejects quarantine, is only acceptable if institutions and civil society commit to taking measures that hinder the spread of the endemic, such as promoting the cleaning of their backyards, under penalty of the State doing so at strength, to provide more financial resources in the places of greatest contagion, especially for populations that cannot afford health care at their own expense. And the allocation of these resources is certainly a priority in relation to other public expenditures that could benefit the majority, for example, such as improving the paving of noble neighborhoods in the city, or the landscaping of public spaces, just to name a few examples.

But Rawls' theory, despite making it possible to think about public health problems, was originally conceived to improve a society that is not radically unjust, but rather that it is in a situation of crisis or serious tension. Rawls developed the principles of justice from the original position by thinking it under certain conditions. In this sense, the reflection that is built from the original position is situated in a certain context, that is, of a well-ordered, quasi-just society. Therefore, it is not possible to state in advance that the theory of justice has anything to say about situations of crisis or tension, which threaten the normal functioning of institutions.⁶

3. PANDEMIC: CRISIS AND TENSION.

The Rawlsian theory establishes some concrete parameters for its applicability, which presupposes, as seen, a situation of relative institutional normality, that is, a situation of peace in which most people do not engage in destructive conflicts that lead to social disintegration. But this situation of normality persists in time of a pandemic⁷? Is it possible to reasonably think about a pandemic that generates crisis or tension, and intensifies political, economic and social conflicts? This is the challenge to which Rawls was not exposed.

First, it is necessary to conceptually situate the distinction between two types of institutional instability: crisis and tension. Only after that is it possible to ascertain to what extent Rawls' political liberalism may (or may not) contribute to the discussion.

According to Reinhart Koselleck,

[...] it belongs to the nature of the crisis that a decision is pending but has not yet been taken. It is also in its nature that the decision to be made remains open. Therefore, the general insecurity of a critical situation is crossed by the certainty that, without knowing for sure when or how, the end of the critical state is approaching. The possible solution remains uncertain, but the end itself, the transformation of prevailing circumstances – threatening, feared or desired – is certain. The crisis invokes the question of the historic future.⁸

The crisis is an exceptional situation of indeterminacy between two concrete situations: that of the rule of law - the legal sphere - and that of anomie.

⁶ MULINARI, Filício. **Ética, justiça social e os desafios impostos pelo COVID – 19**. Voluntas, Santa Maria, v. 11, e 42, p. 1-9, jul. 2020. Disponível em: <https://periodicos.ufsm.br/voluntas/article/view/43948/pdf>, p. 4

⁷ Pandemic: situation in which a disease, which appears quickly in one place and simultaneously affects a large number of people, worsens in a generalized way.

⁸ KOSELLECK, Reinhart. *Crítica e crise: Uma introdução à patogênese do mundo burguês*. Trad. Luciana Villas-Boas Castelo Branco. Rio de Janeiro: EDUERJ: Contraponto, 1999, p. 111.

The situation of institutional normality is inherent to the Rule of Law, in the terms thought by Rawls. In this situation, the state offers minimal protection to individuals and, most of the time, demands obedience from them. The crisis, on the other hand, is the situation of institutional abnormality in which the State - as a public person - has its existence threatened by an internal or external enemy. In this situation of threat, the State, in order to preserve itself, suspends the rules of the Rule of Law and starts to act in an exceptional way - a state of exception. Before protecting individuals, the State demands obedience, without which the State itself could not continue to exist. The critical moment for the State is a transition zone between “legal” and “anomie”. Therefore, anomie occurs when the State ceases to exist and to protect individuals, or, a situation in which the State itself exempts itself from the aforementioned duty of protection, abandoning individuals.

The crisis, although temporary, brings with it some certainties. In it, fundamental rights and guarantees are suppressed, in whole or in part, whenever this is necessary for the preservation of the State. In the crisis, the legal concepts of subject of law, individual liberties and principles of justice gradually give way to authoritarian decisions, in order to restore institutional normality.

Tension, on the other hand, is a situation of apprehension/concern, arising from the state of uncertainty that precedes and/or follows the crisis, without being the normal situation or anomie. Although the crisis contains a degree of tension, its tension is distinguished by the intensity of indeterminacy. A crisis points, at the limit, to the sharpening that occurs between the legal and anomie – for example, in an armed conflict. Here, at least, there is the conviction that, at some point, the crisis will come to an end, in the face of the defeat of one of the opponents; in the same way, there is the certainty of the individual's permanent exposure to death until that term is reached. Tension, on the other hand, is not the critical state, but the situation that precedes it - as is the case of pre-war tension, or the situation that precedes a public calamity decree that suspends fundamental rights - or succeeds that state, in the situation of cease fire.

In tension, the distinctions between the normal situation and anomie are blurred, so that the reference for determining whether people are treated with dignity, as subjects of law, in peacetime, or if they have been reduced to mere *zoé*, is lost. that is, as that which is subject to an arbitrary decision, without any kind of consideration and respect⁹.

⁹ AGAMBEN. Giorgio. Estado de exceção. Trad. Iraci D. Poletti. São Paulo: Boitempo, 2004, p. 146.

In the crisis there is a relationship of accentuated enmity and a public enemy, to be fought. The human enemy is public because it threatens the entire political unity of a State. And because it is public, it is known and viewable. Against the public enemy, one's life is committed in favor of the preservation of the State and the overcoming of the crisis.¹⁰

In the case of the current COVID-19 pandemic, there is not an enemy human group, but a virus. The virus is not public, nor does it present itself to the public. What is presented to the public are the biological, social, political and economic consequences of a serious and widespread infection by the virus, which depend on the legal or political choices of people and the State.

This means that the verification of the existence of a pandemic does not necessarily lead to the conclusion that the moment is of crisis and that it is authorized, without further justification¹¹, the suspension of fundamental rights and guarantees, either in the form of an intense quarantine - which would be easily imposed in the state of exception, as a curfew is imposed -, or by imposing everyone to work, under intense risk, to that the level of well-being does not perish due to the negative effects that the pandemic generates.

In other words, what is essential for a reasonable assessment of the effects of a pandemic is to determine if the situation is critical - if there is a real conflict, in which a virus is used as a biological weapon, if there is a civil war because the contagion by the virus has caused an immoderate scarcity of goods – or if the case is one of tension, that is, a situation of indeterminacy in which it is not possible to say if an enemy already exists, if the protection of fundamental rights can still be demanded, or if the individual is at the mercy of the actions (or omissions) of the State¹².

As already stated, Rawls' theory was not exhaustively exposed to the challenge of offering solutions to situations of institutional instability. Despite this, in §§ 10 and 11 of Conference VIII of Political Liberalism, Rawls focuses on some legal-political discussions that have shaken the stability of American institutions, notably in the face of the temptation, on the part of those who

¹⁰ SCHMITT, Carl. O conceito do político. Trad. Alexandre Franco Sá. Lisboa: Edições 70, 2015, p. 75.

¹¹ BRASIL. Supremo Tribunal Federal (Tribunal Pleno). ADI 6362 MC. Requerente: Confederação Nacional de Saúde – Hospitais, Estabelecimentos e Serviços – CNS. Requerido: Presidente da República. Relator: Ricardo Lewandowski. Julgamento: 02-09-2020. Publicação: 09-12-2020. Disponível em: https://jurisprudencia.stf.jus.br/pages/search?classeNumeroIncidente=%22ADI%206362%22&base=acordaos&sinonimo=true&plural=true&page=1&pageSize=10&sort=_score&sortBy=desc&isAdvanced=true. p. 9-10

¹² SOUZA, Gabriel Scudeller de; RIGOLDI, Viviane. **Covid-19 desnuda as contradições da República Federativa Brasileira: A dificuldade de legitimar a tomada de decisão e a proposta da Instituição do Comum**. Revista Prim@ Facie, v. 20, n.º 43, 2021.

occupy institutional positions of power, of impose restrictions on the fundamental rights and freedoms of individuals in situations of tension¹³. According to Rawls:

What is required is a stricter specification of the type of situation that can justify the restriction of freedom of political expression. Brandeis refers to “protecting the State from destruction” and from “serious harm, political, economic or moral”. These phrases are too vague and cover too much ground. Let's see how Brandeis' vision could be crafted to accord with the priority of freedom. The essential thing is to recognize the difference between what I will call 'a constitutional crisis of the necessary kind' and an emergency in which there is a present or foreseeable threat of serious political, economic and moral harm, or even destruction of the state.¹⁴

When discussing these cases, Rawls indicates that the experiment of the original position can be reproduced in other bases, in view of the situations of instability that can give rise to the restriction of basic liberties. In this case, the original position is adapted so that the - hypothetical - representatives of the real people are situated on an equal footing to make the rational interests of the represented present, recognizing that none is better able to find a solution to institutional instability based on their point of view. The parties do not know exactly who they are representing in real life, but they are aware that the distribution of primary goods may be restricted, depending on the degree of intensity of the instability, as priorities or even restrictions on the distribution of these goods may be imposed. And it is along with these adaptations of the original position that Rawls proposes a solution for cases of tension, establishing some beacons to sacrifice access to primary goods:

[...] In terms of a constitutional doctrine, the priority of liberty implies that free political expression cannot be restricted unless it can reasonably be argued, from the specific nature of the present situation, that there is a constitutional crisis in which democratic institutions cannot are in a position to operate effectively, and where their procedures for dealing with emergencies do not work.¹⁵

In this passage, Rawls makes it clear that a severe crisis can lead to restriction of access to primary goods. But such restriction must be carefully evaluated. This means that: a) the original

¹³ The cases analyzed by Rawls refer to the discussion about the possibility of restricting the political freedom of individuals considered dangerous to the State. The citation refers to Judge Brandeis, who reviewed the Whitney case, 274 US 357 at 373. In 1919, Whitney was charged with violating the California Criminal Union Act for having helped organize a group seeking to effect economic and political change. through the illegal use of violence. In her defense, she argued that the exercise of her political freedom, in the sense of criticizing the economic system, would not characterize any concrete violent act and could not lead to the restriction of her political freedom.

¹⁴ RAWLS, John. O liberalismo político. 2ª ed. Trad. Dinah de Abreu Azevedo. São Paulo: Editora Ática, 2000, p. 411.

¹⁵ RAWLS, John. O liberalismo político. 2ª ed. Trad. Dinah de Abreu Azevedo. São Paulo: Editora Ática, 2000, p. 412.

position can be used to guide not only regulation - in the normal situation, within the legal scope - but also the gradual restriction of the principles of justice in institutions that are in a situation of instability; b) it is essential to verify the type of instability (crisis or tension) and the more or less intense degree of inability of institutions to preserve themselves without risk of destruction/dissolution of political unity; c) a reasonable criterion of intensity must be used to determine the necessity and the extension of the restriction of the principles of justice in situations of crisis, in order to resume its fullness as soon as it is overcome.

Based on these premises, it will be investigated how the political liberalism of John Rawls can offer reasonable arguments to equate the political, economic and social dilemmas caused by the COVID-19 pandemic.

4. POLITICAL LIBERALISM PROPOSITIONS FOR A TIME OF TENSION.

That in a real society the basic structure of society is not capable of preventing people's early death is a fact. People can die before the middle term of the age of their generation due to several factors, some involuntary - congenital diseases, accidents, etc. - others, to some extent, voluntary - bad habits, carelessness with health, reckless actions, etc. But a society, despite its difficulties, must build mechanisms to avoid exposing its members to excessive risks that threaten their lives beyond a reasonable limit. This limit must be evaluated in view of the concrete circumstances - eg level of possible well-being - of each society. In any case, it seems a valid argument, from the point of view of the people deliberating in the original position, that it is not acceptable for some people to be more exposed to excessive risk than others. A number of other factors should also be considered to determine what these excessive risks are, given that some people are older than others, more access to health care than others, and so on.¹⁶ Despite all these details, the initial intuition that exposing people to excessive risk is not justified, after considering the life expectancy of each one, seems to be a reasonable premise from which it is possible to think about the problem.

But the assessment of the application of this premise depends, above all, on a factual basis. In other words, it is the concrete situation of the institutions that determines the possibility of

¹⁶ DWORKIN, Ronald. *A virtude soberana: A teoria e a prática da igualdade*. Trad. Jussara Simões. São Paulo: Martins Fontes, 2005, p. 148.

promoting normative weighting.¹⁷ And, as for the COVID-19 pandemic, there are some limits, since, so far, it is not known, exactly, if: a) the disease has a fully effective cure for all variants; b) if its lethality rate is higher than that of other known diseases. Such limits make the discussion very difficult. And it is this concrete scenario of uncertainty that remains as a possibility for thought.

So, the question can be formulated as follows: given the uncertainty about exposure to excessive risks regarding the possibility of death of individuals, and not knowing whether the parties in the original position - ourselves thinking as if we were the parties in the original position - represent the more or less vulnerable, what kind of distribution or restriction of access and enjoyment of primary goods would be legitimate?

The question itself offers the parties in the original position the knowledge that society finds itself in a situation in which it is not possible to know if its members are exposed to an excessive risk of death, but there is, in fact, this fear. This adjustment in the knowledge structure of the parties, in the original position, is necessary because a proposal that disregards the concrete situation will either not lead to a satisfactory answer or will have nothing to present. If traditional normative thinking is followed, admitting that institutions are in a situation of relative normality, then the answer will be: basic freedoms must be preserved, with minimal restrictions, although economic resources must be used to care for the sick and to educate people to adopt preventive measures against the disease, as is the case, for example, with the case of dengue.

However, the argument presented here is that, by delimiting the type of institutional instability (crisis or tension) to which people are exposed, it is possible to guide practical thinking from a normative perspective such as the Rawlsian one. In other words, the first determining factor for analysis is the indication of the type of instability that affects the institutions, that is, the degree of weakening of the protection of the individual, which the State must provide to legitimize the requirement of the duty of obedience to the institutions. To the maximum degree, in a situation of lack of protection that drives people to despair, it is not surprising that institutionalized rights are not respected and violent acts are practiced in order to gain access to primary goods, as is the case with looting of supermarkets and in pharmacies in times of serious food and medicine supply crisis.

¹⁷ KENNEDY, Ellen. Carl Schmit em la República de Weimar: La quebra de uma constituição. Trad. Pedro Lomba Falcón. Madrid: Tecnos, 2012, p. 264.

So, the question that arises in the face of the current pandemic is to know, first of all, whether we are in a situation of tension or crisis. If we start from the premise that we are in a crisis situation, typical of the state of exception, and we inform the parties in the original position, then the deliberation will take place through the recognition that the scarcity of goods is no longer moderate, because our resources materials would have been drained to the point where the fair distribution of food, medicine and health care, for example, can no longer be offered to people. In a situation like this, in which the State, in order to preserve its remaining authority, uses restrictive means to various primary goods, including basic liberties, the Rawlsian proposal finds its factual limit and, perhaps, there is nothing left of the to agree with some pragmatic applications¹⁸, or, for example, to verify that, faced with the impossibility of minimum protection guaranteed by the State, the parties are released from the duty of obedience, a situation in which the political unit itself is dissolving.

But the current moment does not seem to adapt to this intense type of crisis. That is, although the situation is not normal, since society has been affected by a pandemic whose degree of lethality can be excessive, on the other hand, there is no situation of unreasonable scarcity of goods. It seems that the concrete situation is one of tension.

And this situation of tension, which is measured by degrees of intensity - of greater or lesser scarcity, greater or lesser possibility of exercising freedom - is situated between the rule of law - the situation of normality/institutional stability, in which the relationship of protection and obedience occurs more intimately - and the state of exception - the situation of instability, in which the level of protection of the individual is reduced, due to the need for greater protection by the State itself. At least for now, it seems reasonable to offer such information to the parties in the original position, given that it will affect the final deliberation on what is more or less (un)fair, even if such deliberation requires revisions if the factual situation changes. over time.

Thus, the premise is assumed that the parties in the original position are informed that they are facing a situation of tension, that is, they are aware that it is not possible to protect all basic freedoms as if they were in a situation of normality, and that the financial contributions of the State destined to assist the sick will affect the exercise of economic activities. This does not mean that the State has no alternative but to impose severe restrictions on basic freedoms, as occurs in a stricter quarantine.

¹⁸ The intelligence of a government in a crisis situation depends on the type of situation that generated it. If there is a food crisis due to an external war, it is likely that the government will prioritize feeding its soldiers healthy - to the detriment of the civilian population and sick combatants - in order to resume food supplies as soon as possible. Rawls' theory was not conceived for these situations of serious exceptionality.

In view of these circumstances and information, it seems reasonable to infer that the parties in the original position, aiming to restore the situation of institutional normality in the shortest possible time, so that it is possible to promote the achievement of the original project of effecting a well-ordered society, but , also not to expose their constituents to an excessive risk of death, would decide to accept some restrictions on access to primary goods.¹⁹

This means that, in the same way that the Government - notably the Executive Branch - cannot adopt authoritarian measures such as the closing of Congress or the Judiciary on the grounds that such measures are more effective to operationalize actions to combat the pandemic - because they are not it deals with a situation of accentuated scarcity that justifies the decree of the state of exception to preserve the last vestige of legal order – it cannot, equally, interfere unreasonably with individual freedoms. Therefore, the solution to the tension involves both cooperation between institutions – even though the Executive has some powers to adopt exceptional measures – and also through a cautious restriction of individual freedoms and other primary goods.

Based on this formatting of the original position, it is possible to argue that, in order to prevent the pandemic from spreading, it is reasonable to restrict the freedom to come and go, requiring that people who are not linked to essential activities, to the production and distribution of essential goods for the guarantee of an existential minimum, remain in their homes, even at the cost of economic prosperity. This also means that the parties must be prepared to allocate material resources to those who, because they are not linked to the aforementioned essential activities, have no other way of maintaining a minimum of dignity²⁰. These people constitute the group of the least favored, as well as those who, despite having some more favorable economic conditions, do not have access to health treatments that can only be offered at a high cost, such as machinery and specialized medical treatments.

Here, there is a clash between the type of priority to be established among the less favored. Those whose exposure to the risk of death is more intense will certainly be prioritized, even if, as mentioned above, they are not the least fortunate financially and provided that their resources are not sufficient to acquire the medical treatment necessary to restore their health. This same logic, which seems reasonable from the point of view of the parties in the original position, can be repeated to analyze which of the less favored people should be prioritized in this tense situation.

¹⁹ CAMPOS, Juliana Rose Ishikawa da Silva; FREITAS, Marcelo Barbosa de. **Decisões políticas justas em tempos de pandemia: um diálogo com John Rawls e Martha Nussbaum**, Revista Páginas de Filosofia, v. 9, n. 2, p. 53-67, jul.-dez. 2020 • Edição Especial, p. 65.

²⁰ ROSAS, João Cardoso. **Filosofia e pandemia: uma lista de problemas**. Revistas Reflexões, Universidade do Minho, Portugal, 2020, p. 98.

Such a proposition rejects a strictly utilitarian solution, according to which the need for immediate economic recovery can bargain with excessive risks of death for some group of people. On the other hand, it is also reasonable to accept a slower economic recovery, with all the consequences that this brings, notably in terms of anxiety about getting rid of the tense situation. That is, the parties in the original position would accept as reasonable a longer time to face the pandemic, and, during that time, less access to primary goods, in favor of not exposing people to an excessive risk of death.

This tension also brings with it the economic and social consequences of a less intense economic recovery, meaning that reasonable people, at least from a Rawlsian point of view, should accept the change in lifestyle, at least in the period of tension.

It is also possible to support the reasonableness of this argument when considering that the parties, in the original position, do not know whether they are representing the family members of people from risk groups, that is, those most susceptible to the risk of death, or of sequelae if they survive the contagion by the virus. The parties preserve the information that, in general, they want the good of their closest ones, as it is assumed that they have a sense of good. And if the parties do not know whether they represent family groups with more or less people from the risk group, it is not possible to measure which ones will suffer from grief or the consequences of sequelae. Considering that such loss represents an undesirable suffering, it is reasonable to conclude that the parties, in the original position, would opt for a solution that would mitigate the loss of life and suffering, even if their economic condition will not be as prosperous again in a shorter period of time. In this sense, the option for everyone to resume the normal activities of life - going to the street, going back to school, to work, going to the movies, etc. -, and, with that, recovering the economic power they had before the pandemic, does not seem a justifiable option, at least while uncertainty about the cure and the degree of lethality of the virus persists. In turn, as long as vaccination proves to be effective and capable of containing the spread of disease variants, it is possible to restore the fullness of basic freedoms, gradually and prudently.

These examples, in scenarios different from those for which Rawls' theory of justice was originally designed, show that the original position, despite some limitations, is an intellectual instrument that helps in the philosophical reflection on situations of institutional instability (tension), such as generated by the current pandemic. Such considerations, however, are always subject to revision - in a reflective balance, to use a Rawlsian category -, insofar as the situation of the pandemic can change, either due to the discovery of a definitive cure, or due to the worsening of the public health situation - in the event that new variants of the disease immune to the vaccine

emerge -, either as a result of the deterioration of the economic situation and the internal conflicts that this can generate, or of other factors that may either lead to a situation of normality, or to a deep crisis.

5. CONCLUSION.

The COVID-19 pandemic has accentuated political, social and economic differences, making it difficult to produce a reasonable consensus on how to govern well at this time of serious social tension. In an attempt to overcome this challenge, it was investigated to what extent John Rawls' political liberalism can contribute to the debate.

Rawls' theory was built for well-ordered, quasi-just societies, which are in a situation of relative institutional normality, where scarcity of goods is moderate, pluralism is accepted as a fact, and social cooperation is somehow , stimulated. This means that Rawls answers the fundamental questions of political philosophy - what is good government? how and why should you act? – from a specific context, which does not take into account the severity of a pandemic. In other words, Rawls did not directly address the question: what is the role of institutions in the basic structure of society, in the face of the challenge posed by a pandemic, which generates scarcity of resources and leads governments to restrict basic freedoms?

Rawls did not develop a specific argument about how the original position could help people think about reasonable measures to take in a pandemic situation. Despite this, it was found that Rawls, in §§ 10 and 11 of Conference VIII of the book *Political Liberalism*, discusses the possibility of a serious emergency affecting the stability of the institutions of the rule of law; and, under these circumstances, the author suggests some guidelines on how to govern in a moment of instability.

Institutional instability, which affects the political relationship between protection and obedience, can be presented as: a) a “crisis”, that is, a situation of exception, situated between the rule of law and anomie, in which the State, to continue to exist, it exposes individuals to a greater risk of death; or, b) a “tension”, a dubious situation that precedes or follows the crisis, and that brings people closer/distances from the normal situation of the Rule of Law.

It was argued that the pandemic is more similar to a situation of tension, in that there is a gradual departure from the normality of the rule of law towards the critical situation of the state of exception. And it was from this scenario of tension, generated by the COVID-19 pandemic, that

John Rawls' political liberalism was used to affirm the reasonableness of the argument in favor of restrictions on freedom to come and go and to undertake, in favor of not exposing people to excessive risk of death.

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