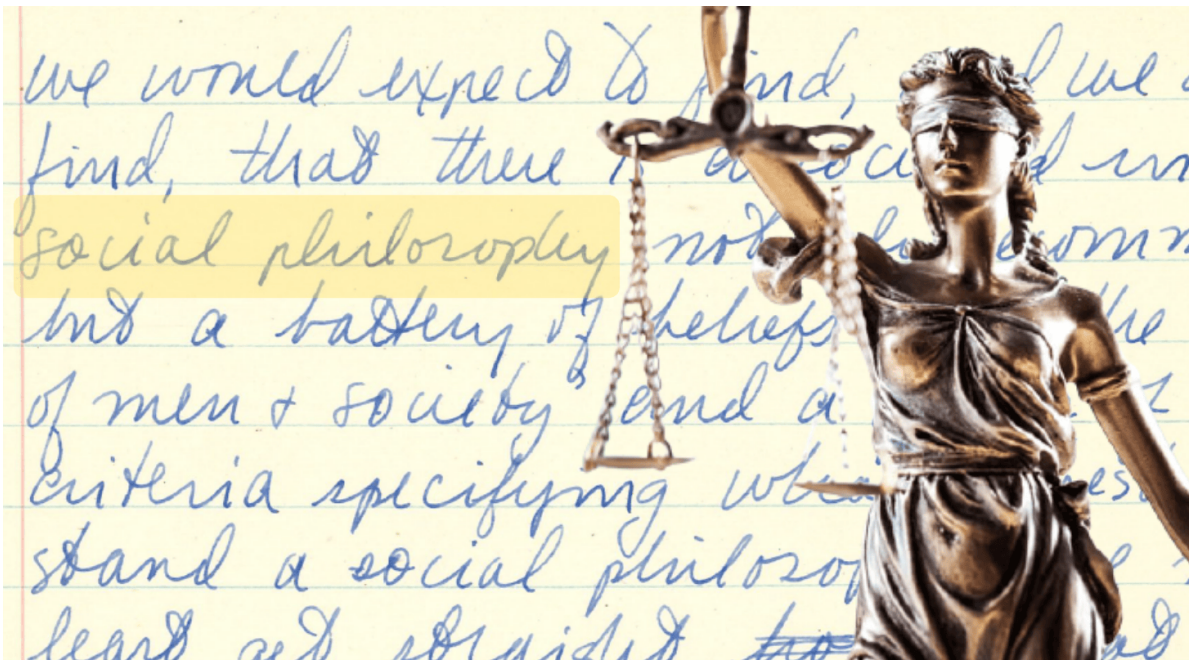
PREVIOUS CONDITIONS

Political Legitimacy as a Circumstance of Justice

Hugo Omar Seleme



Manuscript from the John Rawls Papers (Harvard University Archives). Graphic design: Maria Oliva Campabadal (CETC).

An extended interpretation of Rawls' work is that while, in *A Theory of Justice* Justicehis primary aim is to determine the morally correct principles of justice, in *Political Liberalism*, his main concern is to define the necessary conditions for a legitimate and stable democratic and liberal political system. Thus, for example, Donald Moon maintains that:

> «(p)olitical legitimacy does not figure in Rawls' early work, notably in A Theory of Justice…rather, his main concern is to specify the principles of justice to which the basic structure of society, including the structure of political authority, must conform. Not surprisingly, legitimacy is a major theme of his later work, in which he develops his account of political liberalism».
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> Moon, D. (2015) Legitimacy. In J. Mandle & Sr. A. Reidy (Eds.), The Cambridge Rawls Lexicon (pp. 422–427). Cambridge University

> Press.

Although this interpretation of political legitimacy is correct, I would argue that there is an entirely different reading. The objective of this piece is to prove that from the first presentations of the Rawlsian conception of justice, the existence of a legitimate political community is assumed. Specifically, the hypothesis defended in this article is the following: within the framework of the original version of justice as fairness, as presented in *A Theory of Justice* and subsequent works, including *Political Liberalism*, legitimacy is not explicitly listed as a circumstance of justice. Moreover, where there is no legitimate political community, there is no occasion for the virtue of justice. The hypothesis, therefore, is two-pronged. It maintains, firstly, that there are circumstances of justice that are not included as such in Rawls' account of them. And secondly, that one of the circumstances implicit in his work is the existence of a legitimate political community.

As the two notions that link the hypothesis —circumstances of justice and political legitimacy— can be interpreted in different ways, the first task is one of clarification. To corroborate or rule out the hypothesis, we must first clarify the sense in which both notions are employed. Once we have understood what the circumstances of justice allude to and what is meant by the existence of a legitimate political community, we will be in a position to verify whether, in the theory of justice developed by John Rawls, the second notion can be regarded as one of the first.

> Within the framework of justice as fairness, legitimacy is not explicitly listed as a circumstance of justice

The text begins with two sections dedicated to explaining, respectively, the notions of circumstances of justice and political legitimacy. Next, an argument is offered in defence of the proposed hypothesis, based on an interpretation of the original position.

The Circumstances of Justice

Rawls offers two definitions of the circumstances. One is generic and maintains that they are conditions without which there would be «[…] no occasion for the virtue of justice […]» [1]. Another is more specific and maintains that they are conditions under which «[…] human cooperation is both possible and necessary […]» These, in turn, coincide with the conditions identified and classified by David Hume and as *objective* and *subjective*. Among the objective conditions are: a) that individuals share the same geographical space, b) have approximately equal physical and mental faculties, c) are vulnerable to the action of others, and d) live in conditions of moderate scarcity. Among the subjective are: a) that people have similar or complementary interests, b) that they have life plans or conceptions of good on the basis of which they make conflicting claims on natural and social resources, c) that

although they have the capacity to judge and reason, it is distorted by factors such as anxiety and biases, which can be consequences of moral defects such as selfishness or negligence but can also be the result of the natural situation in which human beings find themselves, d) that they have different life plans and accept a plurality of philosophical, religious, political and social theories.

The problem lies in that even if these conditions are what make «human cooperation both possible and necessary», they do not seem to cover all the conditions without which «there would be no occasion for the virtue of justice», in the sense that this virtue is understood in Rawls' theory. The first paragraph of *A Theory of Justice* makes clarifies that the principles of justice apply to the basic structure of society [2]. Without the existence of political, economic and social institutions, justice has no purpose. Put another way, if social cooperation is not regulated by these types of institutional rules, which are applied to individuals from birth and have a profound effect on their life expectations, character, preferences, etc. [3], there is no occasion for the virtue of justice. Yet, despite being an important condition for the virtue of justice to be exercised, it is not explicitly included by Rawls as one of the circumstances of justice.

I believe this seemingly paradoxical situation means there are at least three different virtues of justice, or in other words, three spheres where the virtue of justice can be exercised: individual justice, social justice and, within the latter, structural justice. First and foremost, Rawls is concerned with the virtue of social justice. In other words, how the fruits of social cooperation are distributed equitably. He leaves to one side, then, the virtue of individual justice relating to individual actions, judgements, allegations, personal character traits and people themselves [4]. Thus, the problem of social justice fits perfectly within the explicitly stated "circumstances of justice", where social cooperation is both possible and necessary. However, Rawls is concerned only with a specific type of social justice. The virtue of justice to which his theory tries to give content is not that pertaining to «[…] social institutions and practices in general […]», which would include the voluntary associations of a reduced set of individuals [5], but the one that refers explicitly to the political constitution and the economic and social institutions that apply to all those who inhabit a territory, irrespective of their will, and determine their life expectations, character traits, tastes, preferences, etc. Therefore, the virtue of justice with which Rawls is concerned is not only social but structural. It is the political virtue of justice.

> One of these circumstances os structural justice, as the hypothesis of this text maintains, is the existence of a legitimate political community

If this is the case, and the political virtue of justice is a more specific instance of the virtue of social justice, the "circumstances of social justice" that Rawls explicitly lists do not include all conditions without which there can be no occasion for the political virtue of justice to be exercised. Indeed, for this to be the case, it would require, in addition, that the

"circumstances of structural justice" be satisfied. And while not explicitly alluded to, these circumstances of structural justice are implicit in Rawls' theory. One of these circumstances, as the hypothesis of this text maintains, is the existence of a legitimate political community.

Political Legitimacy

In justice as fairness, there are at least two levels of political legitimacy: the first is the existence of a political community, or a "we", to whom the fundamental institutions and the collective power exercised through them belong. The second refers to the correct way to exercise that collective political power. Both types of legitimacy are present, albeit with differing emphasis, in both *A Theory of Justice* and *Political Liberalism*, as well as his later writings.

Both understandings of legitimacy are more evident in *Political Liberalism*, in which Rawls refers to the existence of a power whose authorship is attributed to all citizens, stating that «[…] political power is ultimately the power of the people[…]» [6]. For this to be the case, there must first be a legitimate people or political community to whom that power is attributed. Once this collective power exists, it's logical to question the correct way to exercise it. This gives rise to the second interpretation of legitimacy, which refers to the «[…] legitimacy of the authority structure and is linked to the idea of public reason[…]» [7]. The principle of legitimacy articulated in that work is the answer to the question of how best to exercise a power that belongs to all members of a political community [8].

In *A Theory of Justice*, several clues point to the assumed existence of a collective subject or political community to which the basic structure belongs [9]. The first is found in the contractual theory employed by Rawls. According to the author, there are two objectives that the contract does not seek to achieve. Firstly, it does not seek to «[…] establish a particular form of government[…]» because this will arise from the application of the principles of justice chosen in the contractual circumstances. Secondly, and more relevantly for the purposes of this work, the original contract is not used to «[…] enter a particular society […]» because it is assumed the people deliberating it already form part of a society or political community [10]. In other words, the contract is used as a resource to identify which principles of justice the members of a political community would choose to evaluate the basic structure, including the governance structure, that belongs to said community and is applied to them coercively.

Another indication that Rawls presupposes the existence of a "we" or a political community is the analogy used to explain how the principles of justice are chosen. He asks us to imagine «[…] that those who engage in social cooperation[…]» [11] —choose together, in one joint act, the principles that will govern it—. Drawing a parallel between the individual agent and the collective, he adds, «[…] just as each person must decide by rational reflection what constitutes his good […] so a group of persons must decide once and for all what is to count among them as just and unjust» [12]. For the analogy to be valid, as the individual exists before choosing what constitutes his good, the group or political

community must exist before deciding what constitutes its justice.

The third indication that the theory assumes the existence of a political community can be found in the passage where he alludes to how the symmetry of everyone's relations to each other may work. Rawls asserts that «[…] they can say to one another that they are cooperating on terms to which they would have agreed […]» [13]. But, why should what citizens tell each other about their terms of cooperation be relevant? Because when a political community exists, its members must be able to explain, to one another, the principles they use to evaluate the basic structure that organises their cooperation. The different principles of justice, including those proposed by Rawls, are the different responses to this need for the members of a political community to provide reciprocally acceptable justifications.

The second understanding of legitimacy, referring to the correct way to exercise the collective political power present in all political communities, is also set out in *A Theory of Justice*. Political power is legitimately exercised when done in accordance with the principle of "equal political participation" chosen in the original position, in the first stage of lifting the veil of ignorance. Given that the power being exercised belongs to everyone, the right thing is to ensure that everyone can exercise it. [14].

> Without the existence of a 'we' or a legitimate political community, political or structural justice has no occasion to be exercised

With these distinctions at hand, we can clarify the hypothesis that legitimacy is a circumstance of structural justice. Without the existence of a "we" or a legitimate political community to whom the institutions that make up the basic structure belong, political or structural justice has no occasion to be exercised. The principles of justice are the answer to the responsibility that weighs on all members of the community to justify the pattern of distribution generated by the institutions to which they all belong. If there is no political community, this need for reciprocal justification does not exist, and the principles of justice have no place [15].

The Legitimate Community Modelled in the Original Position

As the circumstances of justice are those conditions that make it worthwhile behaving in accordance with the demands of justice, questioning these circumstances is the same as examining the conditions that must be present in a given situation for the principles of justice to be applicable. Where the demands of justice are present because the principles of justice apply, satisfying them is valuable.

It's worth mentioning that the Rawlsian principles of justice are justified in a normative conception of person and society. If we can identify the circumstances that make it valuable for a group of citizens to treat each other as free and equal citizens, members of a mutually

beneficial cooperative company whose terms of cooperation are accepted by all and commonly known, we will have identified the circumstances that must be present for the principles of justice to be applicable. That is, we will know what the circumstances of justice are.

Therefore, an ideal paradigm to identify these circumstances is the original position. In the original position, the normative conception of person and society is modelled, and the circumstances in which it is valuable to treat ourselves as prescribed by these normative conceptions are incorporated into its design. This dual justification of the features of the original position derives from the Rawlsian idea that applying an evaluative principle to an object depends on the characteristics of the object to evaluate [16].

Every feature of the original position carries this double normative and empirical justification. The veil of ignorance, for example, provides the conception of a free and equal citizen. But it also dictates that the object to be evaluated by the principles obtained behind it is a basic structure that has had profound effects on the personal configuration, life expectations, tastes and preferences of the individuals on whom it is imposed. Thus, analysing the empirical justification for the veil of ignorance reveals a circumstance of justice not included by Rawls: the existence of a basic structure with the aforementioned characteristics.

The example of the veil of ignorance shows that the circumstances of justice have been modelled in the original position in two different ways. The “circumstances of social justice”, which make cooperation possible and necessary, are incorporated into the situation of choice through the knowledge available to the parties and coincide with those identified by Hume. The “circumstances of structural social justice”, which must be present for the political virtue of justice to have occasion to be exercised, emanate from the features that define the situation of choice, such as the veil of ignorance itself.

Unanimous agreement is one aspect of the situation of choice that models a “circumstance of structural social justice”. From the normative point of view, it conforms to the Rawlsian conception of a well-ordered society as one in which all citizens accept the same principles of justice, and that acceptance is public knowledge. But, what characteristic of the object to be evaluated configures this feature? Or, to put it another way, what circumstance of the political virtue of justice is behind the unanimous agreement? I believe the answer to that question is the existence of a legitimate political community whose members must offer reciprocal justifications for the way in which their public institutions are designed. The principles of justice that will serve to evaluate the basic structure must be unanimously accepted by all its members because they form part of a collective subject, a community, a political “we”.

> Unanimous agreement conforms to the Rawlsian conception of a well-ordered society as one in which all citizens accept the same principles of justice, and that acceptance is public knowledge

The fact that the principles are unanimously accepted ensures they can be the answer that citizens offer each other in response to the question of how the institutions that make up the basic structure should be designed. Every citizen, in turn, has the right to ask that question because they are all part of a group, a collective subject, a political community. The existence of a political community responsible for configuring the basic structure through cross-justification between citizens regarding the distribution pattern that it should entail is due to the premises of the original position requiring unanimous consent.

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REFERENCES

1 — Rawls, J. (1971) *A theory of justice* (Revised Ed). The Belknap Press of Harvard University Press, 110.
2 — Ibídem, 3.
3 — Ibídem, 6.
4 — Ibídem.
5 — Ibídem, 7.
6 — Rawls, J. (1993) *Political Liberalism* (Expanded Ed). Columbia University Press, 136.
7 — Ibídem.
8 — Faviola Rivera points out that, in *Political Liberalism*, Rawls limits the objective of his search, concentrating on the principles of justice suitable for a democratic society. It does not necessarily follow that the circumstances of justice cannot be present in undemocratic societies, although, she adds in *Circumstances of Justice*, Rawls has not developed this point. If the argument developed in this text is correct, in both *A Theory of Justice* and *Political Liberalism*, the existence of a legitimate political community is a circumstance of justice. However, if we expand the analysis to include what Rawls maintains in *The Law of Peoples*, where he recognises the existence of decent peoples who do not have a democratic government, I think there are reasons to affirm that legitimate undemocratic political communities can exist.
9 — Rawls presupposes the existence of a political community on several occasions. He says that the parties must choose which principles best represent freedom «in their community». Although he presupposes the existence of a community, he does not want to «rely on an undefined concept of community» or suppose that it is an organic whole with a life of its own distinct from its members. When speaking about civil disobedience, the only example of non-ideal theory he analyses, he describes it as an appeal to the «political convictions of the community».
10 — Rawls, J. (1971) *A theory of justice* (Revised Ed). The Belknap Press of Harvard University Press, 10.

11 — Ibídem.
12 — This idea of principles of justice chosen by a group, society or community —present from the beginning of *A Theory of Justice*— contradicts the Kantian interpretation that Rawls himself later offers, where the principles are presented as those that would be chosen by a universally ethical community
13 — Rawls, J. (1971) *A theory of justice* (Revised Ed). The Belknap Press of Harvard University Press, 12.
14 — Ibídem, secs. 36–37.
15 — If this hypothesis is correct, the process of the construction or emergence of a legitimate political community cannot be evaluated in terms of justice. Of course, such a process can be evaluated in terms of moral standards, but these are not the two Rawlsian principles of justice, nor the above mentioned derived principles relating to how political power should be legitimately exercised. My thanks to Jahel Queralt for pointing out the need for this clarification.
16 — Rawls, J. (1971) *A theory of justice* (Revised Ed). The Belknap Press of Harvard University Press, p. 25.



Hugo Omar Seleme
Hugo Omar Seleme holds a PhD in Law and Social Sciences. He is an independent researcher at the National Council for Scientific and Technical Research in Argentina (CONICET). He is a Professor of Ethics at the Faculty of Law of the National University of Córdoba (Argentina) and a professor at the Heidelberg Center for Latin America. He is also the director of the Master's Degree in Law and Argumentation of the Faculty of Law at the National University of Córdoba. Morover, he is the author of the book *Neutralidad y justicia: en torno al liberalismo político de John Rawls* (2004), among other publications.