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Democracy Needs Justice, Not Fairness: The Constitutive Rules of Democratic form of Life as an Answer to the Anomie of Law

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Abstract: Context: The debate on the issue of Justice from the premise of the need for an impartial criteria. Objective: It is intended to demonstrate the social pathologies resulting from the understanding of law and justice as impartial validation criteria established prior to social events that they intend to regulate and legitimize. The article seeks, then, to establish an understanding of democracy as the effectuation of the constitutive rules of the multiple forms of life in a democracy. Method: The bibliographical research and argument confrontation method was used through the conditional inferential logic of the pragmatic theory of language. Relevance/Originality: The article demonstrates how it is possible to broaden the understanding of Law so that it becomes a source of social dynamism, producing justice by avoiding the anomie of understanding Law as a stabilizer of expectations in the dispute between conflicting wills. Results: The article demonstrates the feasibility of understanding Law as a set of constitutive rules of democracy. Such understanding proves to be effective as a theoretical response to the anomies faced by contemporary democracies. Theoretical/Methodological Contributions: The application of the concept of constitutive rules to Law and the use of Robert Brandom's inferential logic in the analysis of democratic issues are innovative elements present in the article. Contributions: The theoretical proposal demonstrates the importance of grounding the Law on the appropriation of legal rules made by the person living in a democracy, especially the person that is in an unfavorable social situation.

Keywords: Brandom, Democracy, Justice, Rawls, Sen

1. Introduction

It is not uncommon for Justice to be wronged identified as the result of a legal action. This conception can be traced back to the Homeric relationship between *dike* and *bias* in which the first represents the just decision of a magistrate (in this case the Greek Public Assembly) while the second is the violence of vigilantism. The impasse between Agamemnon and Achilles is resolved by calling the assembly [*ágora*] to, in accordance with legal precepts [*tyme*] a fair decision [*dike*] nullify the pretension of an unjust [*adikos*] to get what they want through violence [*bias*], as violence is an excess and a vice [*hybris*] that the fair measure seeks to prevent or remedy [12].

The fair measure would be indicated by the identity between the ordering of nature and the harmonious decision of the magistrate. The order [*cosmos*] of nature [*physis*] can be rationally determined [*logos*] and thus the *logos* is established as the way of achieving Justice. *Logos* represents here a criterion for the validation of *veritas*, of formal truth as an adequacy between intellect and thing. In this sense, the *logos* of Justice, according to a tradition that dates back at least to Aristotle, would be "to give each one what is rightfully their". Within this tradition, "doing justice" consists of conferring rights on citizens.

In the modern nation-state these rights can be classified, following Marshall, between "civil", "political" and "social" rights. Habermas claim the following about them:

According to this division, liberal rights of defense protect the subject of private law against illegal interference by the State in life, liberty and property; the rights of political participation enable active citizens to participate in the

democratic process of forming opinion and will; and social participation rights guarantee the welfare State's client social security and a minimum income [11].

The issue to be faced here is the discourse of "rights" which necessarily links law and legality. This type of discourse formalizes social reality by reducing society to Law establishing itself as a social pathology. "In the context of social theory, we can speak of 'social pathology' whenever we relate it to social developments that lead to a notable deterioration in the rational capacities of members of society to participate in social cooperation competently [13]."

The size of the problem can be measured by the strength of a theory like N. Luhmann's systemic functionalism. In such a social theory society functions in systems that are self-produced, formally determined and operatively closed. Being autopoietic, a system is established by the social effectiveness that decides about a binary opposition. In summary, Law is only capable of operating within a discourse that decides between lawful/illicit, Economy between profit/loss, Politics between maintenance of power/opposition to power and so on. In this model, an individual is only able to act by operating a system according to its binary discourse. Individual action is thus determined by the performance of a social role formally linked to a given system.

However, a formally based social analysis is only able to assess structures founded on behavioral regularities, which is quite problematic. The formal foundation allows the system only an inoperative symbolic opening. However, an analysis that recognizes the individual as an agent that converts the symbolic opening of a system into a source of social efficacy allows us to recognize normative anomalies and, based on that, their correction. A normative anomaly consists of a social framework of anomie in which the legitimizing discourse of each institution does not materialize because it does not respect the responsibilities implied in its legitimation. In this way, it is essential, in order to cure the social pathology that modern Law has become, to remember that:

Often, the law had only the function of a later legalization of improvements that had already been achieved through struggle, but this state fixation was occasionally either not possible or unnecessary, and thus the progress made was only reflected in changes in customs and practices. The engine and means of the historical processes for the realization of the principles of institutionalized freedom is not the Law, at least not in the first place, but the social struggles for an adequate understanding of these principles and the resulting changes in behavior. Therefore, the orientation of contemporary theories of justice by the paradigm of Law is also a mistake; it is a case of considering much more, in equal measure, sociology and historiography, since it is inherent to these disciplines to direct their attention to changes in everyday moral behavior [13].

What is proposed in the following pages is that a material rather than a formal conception of justice and law are capable of producing the dynamism that sociology and historiography are capable of identifying. A good place to start is the understanding of justice proposed by Amartya Sen [22].

Sen places the issue of justice in a comparative framework. In *The Idea of Justice* the Indian thinker argues that justice must be approached in terms of *improving* the conditions of human life, rather than seeking a utopian perfection of society. Thus, approaches like Rawls's well-organized society give a lot of weight to the role of institutions, assuming that if institutions are fair, then so will be the citizens. But for human life to be healthy, beautiful and virtuous, as Socrates says in his understanding of justice, fair institutions form only one aspect of the path. Justice cannot be determined by results alone. A holistic and comprehensive understanding, with the differentiation between effective well-being and ability and free well-being and capabilities as Sen understands[1], should give a person the opportunity to even give up their well-being in favor of a life project. And anyone who can make sense of Mohandas Gandhi's fast for political reasons can understand that. A very significant point here is that an individual cannot be "forgotten" within a "good for all" system. The right to well-being cannot be bound by an irrevocable duty that obligate the person to a determined way of life. The potency of justice is a source of dynamism, of freedom. *Justice is the ethical and political manifestation of Good*.

2. Law Produces Justice and Is a Product of It

The anomie generated by a formal conception of justice can be understood when we take the question of Justice as if it were a dilemma. Such dilemma is exposed as follows by MacIntyre:

It should come as no surprise that the answer to the question 'who should govern?' is very different, whether we think in terms of goods of effectiveness or in terms of goods of excellence. For people who pursue one kind of good or another conceive the meaning and purpose of politics and the polis in very different ways. Those who subordinate the goods of excellence to the goods of efficiency, if they are consistent, will understand politics as an arena in which every citizen seeks to achieve what he wants, within the limitations imposed by the various types of political order, and the answer to the question 'who shall govern?' will be: 'whoever has the skill and interest in maintaining or promoting every kind of order'. The kind of order someone promotes will, of course, depend on their own interests. From this point of view, politics as a theoretical study will primarily deal with the extent to which rival interests can be promoted and yet reconciled and contained by a single order. In contrast, for those who fundamentally elect the goods of excellence, politics as a theoretical study will primarily address how respect for properly conceived justice can be

1 See part III of *The Idea of Justice* (SEN, 2011).Check out the memorable interpretation of the Republic, with special attention to the myth of Er in *Plato's Treatment of the Theme of the Good Life and his Criticism of the Spartan Ideal* [15].

promoted, so as to broaden a shared understanding as well as an adherence to the goods of the polis, and only secondarily will address conflicts of interest, especially as they can be destructive of the movement toward such shared understanding and adherence [14].

The proposal that starts from the goods of efficiency, by giving priority to personal interests or those of a specific group, comes close to the notion of *idiot*. An idiot is one who cares only about his own affairs, not being able, or unwilling, to deal with the affairs of the *Polis*. Idiot is, therefore, the opposite of citizen. The parliament that operate in terms of partisanship represent this idiotic type of government that seeks to satisfy the interests of its voters (understanding by voters only those who would have voted for them). They ignore that a law that cannot be totalizing will result in exclusion, so instead of promoting democracy, the legal system would deny its possibility. A legislator has a responsibility to create egalitarian laws, even if it goes against the interests of his "voters". Without responding to this commitment, legislative production has no authority.

This idiotic legislative proposal is based on a conception of Justice like the Heraclitus, which understands that "justice is conflict and that everything comes to be in accordance with the conflict [14]." Justice is then sought in "arenas in which opposing modes of belief, understanding and action are in opposition, enter into discussions, debate and, in extreme cases, war, as Heraclitus rightly noted [14]." The justification for this interpretation is given by the inherent dissent of the Democratic State, after all, a State where there is only one voice is correctly called a Dictatorship. However, the more frequent and radical the legislative practices, the more the force of the legal system will decrease, "since the law does not have the power to compel obedience beyond the force of custom and custom only forms over a long period of time, so that lightly modifying existing laws aiming at new laws only weakens the force of the Law [5]."

"A precondition for adherents of different traditions to understand them as rivals and conflicts is that they are able to understand each other relatively well [14]."This means that the dissent proper to democracy and resulting from different conceptions of the world needs to be recognized and treated as such if one intends to recognize the authority of the various authors in a democratic State. This implies rejecting a widespread notion in the legal sphere that the Law constitutes the mediation of a conflict of wills.

For example, the answer of a libertarian like Nozick and a communist like Marx to the question "who should keep the fruits of their own labor" is phrased in the same terms, namely, each person has the right to own their production. The disparity between the proposals of these two authors is radical enough that it is not necessary to reproduce it here. However, adherents of these two theories often engage in discussions treating each other's discourses as containing the same illocutionary content (keeping the product of one's own work), with divergent perlocutionary effects (the communist sees the libertarian as an owner of oppressive capital, while the libertarian see oppression in a communist state). "The meaning of communication mediated by Law is mistaken due to such unilateralities, as it is no longer seen that only opportunities for temporary refusal of intersubjective duties of action should be guaranteed, but not of alternatives for shaping individual life [13]."

Therefore, if treated in terms of mere conflict mediation, the Law presents itself only as a tool for social domination. This legal notion supports the anomie that permeates the analysis of modern society divided between oppressors who enjoy social benefits, whether the "tyrannical" State or the villainized owner of capital, and the oppressed who only fit into society as mere gears. "Thus, the institutionalized system of legal freedom represents a gateway to such pathologies, as it requires a high degree of abstraction from the participants, which is why errors of interpretation regularly accumulate [13]."

Two trends stand out in analyzes of society carried out over the past two centuries. One understands the social sphere as a conflict between rival groups that is stabilized through relations of domination such as, for example, Law understood as mediation of conflict between antagonistic wills. The other understands society as a functional set of normatively constituted institutions. However, alienating relationships in modernity are no longer based on the mere exercise of physical strength or even in an active coercion in a direct interaction between opressor and opressed[2], but through social pathologies. "Whenever some or all members of society, due to social causes, are no longer in a position to adequately understand the meaning of these practices and norms, we can speak of a 'social pathology' [13]." Hence, anomie and normative anomalies are a common diagnosis as the source of social problems. "An*omie* [consists of] a form of deprivation, of loss of membership in social institutions and modes, in which norms are expressed, including norms of rationality constituted by tradition [14]."

A response to legal anomie was proposed as the evaluative impartiality advocated by political liberalism. The *ex opera operato* legal action of the state vicar would be fair if it met the conditions of a Pure Procedural Justice. Respect the procedure and justice will follow, the argument goes. However, if the just is reduced to procedural "Justice becomes a type of efficiency, unless equality has preference [16]."

Thus, procedural and methodical proposals would not reach Justice, especially in legal practice, because:

The hallmark of imperfect procedural justice is that while there is an independent criterion for the correct result, there is no viable procedure to guarantee that result.

Rather, purely procedural fairness is achieved when there is no independent criterion for the correct outcome: instead there is a correct or fair procedure such that the outcome is similarly correct or fair, whatever, provided the procedure has been properly followed [16].

If the priority belongs to the goods of excellence, then there is an independent criterion for the solution, but there is

2 See: DAHL, Robert. A Critique of the Ruling Elite Model.The American Political Science Review, v. 52, n. 2, p. 463-469, 1958.

no method that leads to it. If this independent criterion does not exist, the search for Justice will be corrupted in the methodical search for greater efficiency in the pursuit of the idiotic goals of each group.

Decisions taken in view of efficacy goods rely on strategic reasoning of a means/ends relationship in which the foundation is constantly changing, according to the particular end proposed by an agent that has enough strength to determine the choice of means to achieve its purposes. Therefore, a legislative action of this nature takes place as an order imposed by force, not as a rule. The legality conferred to the law does not free it from the stain of not having Justice to legitimize it and, thus, it disallows whoever has the excellence of Justice to apply it. To legislate in this way is to give the force of law to acts that are null from the point of view of Justice.

MacIntyre clarifies that "the words '*dike*' and '*themis*' are nouns derived from two of the most basic verbs in the Greek language: *dike* comes from the *deiknumi* root 'I show' or 'I indicate', *themis* comes from the root of *títhemi*, 'I put' or 'I establish'. *Dike* is what is shown off; *themis* is what settles within [14]." Thus, Justice [*Dike*] is something, in a way, alien to the Law. Indicated outside, it is the objective towards which legal action strive, it is the end towards which the Law strive. It should not be assumed that Justice [*Dike*] antagonizes the order, as it is *Dike* that legitimizes *Themis*. "All practical reasoning arises when someone asks, 'What should I do?' Asking this question only makes sense if some reason was presented or was presented to the agent for him to do something different from what he would do next, in the normal course of things [14]."

However, in the Iliad there are tensions between what efficiency requires and what is required of Justice as *dike* [14]. The *Agon* can be understood as analogous to due legal process. And both in the ancient arena and in the modern courts there is a latent difference between excellence and victory, or put another way, victory is no guarantee of the excellences necessary for Justice. Therefore, Justice can only be achieved when there is recognition that the Law is not simply a set of rules to mediate conflicts. Rather, it is a guarantee that each individual participating in a State will have their rights fully guaranteed. And any attempt to diminish a citizen's right is already corrupting the legal system as a whole, delegitimizing the legal by delegalizing the legitimate.

Thus, *themis* can be understood as the Law and about it (which is the means) one can deliberate. But *dike* is purpose, and "no man deliberates on the very purpose of his activity. They consider the purpose established and seek to know how to achieve it [4]." Thus, the objective of the Law is achieved respecting the concrete case as a specific reason and remembering that "acting from specific reasons is generally exceptional and in normal circumstances it only becomes intelligible in terms of the structures of normality and against the background formed by them [14]."

Justice, as a rational virtue, takes place in the game of giving and asking for reasons, constituting the due legal process. The Magistrate's decision must respect the reasons offered by the parties, but also those explained by the judge himself as an intermediary in the debate and guarantor of the rights of both parties. Procedural decision theories that do not meet this requirement cannot claim validity either. Because it is based on freedom, Justice cannot be identified as the objective achieved by a method. Finally "whatever the term 'justice' names, it is certain that it names a virtue; and, regardless of what more good practical reasoning may require, it is certain that it requires certain virtues from those that exhibit it [14]."

The insufficiency of the procedural proposals to achieve Justice in the Judiciary arises, therefore, from the impossibility of determining a method to achieve such Justice. Thus, the refusal to admit that current theories of Law are questionable represents a desperate attempt to approach the law under paradigms of control and security [*Gestell*]. The more the danger of technique is ignored by jurists, the less the possibility of freedom and weaker the foundation of Justice. And what is left of the Law without Justice, from where its name comes from? Only the instrumentalization of the State force that, devoid of ethical values, serves as a repressive apparatus of a State that pretends to be a Democracy.

In complex societies, the Law is a system that entitles people to certain types of actions and practices. "Often, when a commitment is attributed to an interlocutor, entitlement to it is attributed as well, by default [7]." An agent is responsible for the end established for his action and for the means employed to achieve these ends. The action will be ethical, that is, free from anomie and uniquely attributed to a normatively coherent agent, if the end is supported by a justification that is not reasonably rejected. The agent will be morally reprehensible if the chosen means do not match the ends or if he is shown that other means would be more adequate to the established end. After all, choosing an end for your action is also choosing the means that lead to it.

Understanding the demands of justice is no more solitary exercise than any other human discipline. When we try to conceive of how we should behave, and what types of societies should be understood as patently unfair, we have reason to listen and pay attention to the views and suggestions of others, which may or may not lead us to revise some of ours conclusions [22].

In this way, whenever the Law uses only its own devices, legal action will be reproducing the anomalous situation of a social pathology. The performance of an operator, of someone that only plays a role in a system, is incapable of establishing itself as an ethical action, as it cannot be singled out in its disinterested repetition. And, precisely because it cannot be ethical, such an action will be reprehensible. Acting only according to maxims that can be universalized is not a means capable of generating human good. A *good* action and the *Moral action* are two very different things[3].

3In the Introduction to the Foundation of the Metaphysics of Morals, Kant makes a point of making this point very clear.

It is accepted in the current work the conception that society is organized in a set of institutions and that people are entitled to act in any institutional system of which they belong. “Entitlement is, to begin with, a social status that a performance or commitment has within a community [7].” However, the thesis that institutions manifest themselves as autopoietic systems regulated according to their own operating rules implies social pathologies inherent to these systems. For, “the symptoms in which such social pathologies are reflected do not express themselves in the form of extravagant individual behaviors or character deformations. They are much more expressed as members of certain groups develop tendencies towards rigidity of behavior, inflexibility of their social behavior and self-referral [13].”

Such a situation demands that the individuals that operate the systems report to the cognitive authority of the reasons given and asked by the people affected by the social effectiveness of the system. After all, “actions are to be distinguished from behavioral performance generally by their responsibility to assessment and deliberation concerning the inferentially articulated responsabilities they incur and discharge [7].” Denying this implies assuming that the modern model of social organization is only capable of manifesting itself as social pathology. If a given system or institution is conceived only as a set of anonymous operator behaviors, then there is no possibility of coherent criticism. For “In virtue of one’s capacity to adopt practical deontic attitudes, to take or treat something as having cognitive authority, that one counts as moving in the space of giving and asking for reasons [7].” Therefore, systems such as the Law are regulated through the symbolic opening that requires an institutional agent to appropriate the reasons arising from other systems as premises and intended purpose of its action.

Therefore, only if a system is conceived as constituted by *natural persons* can it have any pretense of being an ethical institution. “Moral criticism apply only to rational creatures, since they are capable of the kind of reflective self-governing in question. Second, it applies to them only in regard to their judgment-sensitive attitudes: that is, those attitudes that, in a rational creature, should be under the control of reason [21].” And in a democracy, no other area demands the control of reason more than legal practice. The claim to legitimize the coercive force that is inherent to it attributes an irrevocable normative obligation to the Law. That the control of reason is a control exercised by rationality, with the demand for reasons that are intersubjectively consistent and that are not reasonably rejectable. After all, objective knowledge requires a variety of opinions. But also a control of reason so that the vicars of the state do not parochially confine themselves to reasons that only they can conceive, since prejudices are found by contrast, not by analysis. The authority given by Law is exercised as a way of life, not as a determining judgment according to a general law. Therefore, the closer to concrete action, the further away from formality, the lesseris the hierarchy, the more real is the Law. Therefore, *the legitimate interpreter of the law in a democracy is any person answering the responsibility arising from the commitment to give and ask for reasons*.

3. There Is No Proper Good in Fairness

Any advocate of an operative closure of the legal system may be asked the question: "There may be a satisfactory understanding of ethics in general and justice in particular that confines its attention to some people and not others, assuming - at least implicitly - that are some people relevant while others aren't? [22]” This is the fundamental question for an effective democracy. Thus, closing the debate to a “closed” impartiality as proposed by Rawls in his original position cannot generate effective justice.

Rawls' reasoning about rational deliberation from the original position demand that interlocutors decide under a “veil of ignorance” so that they do not know what their interests in the debate are.[4] He names a justice arising from debate in the original position Pure Procedural Justice. This proposal points to a representative political organization along the lines in which H. Arendt [3] identifies the problems in “continental” party model in the second part of *Origins of Totalitarianism*, that is, the need of impartial criteria with universal endorsement. The inadequacy of the original position in a *closed* political society, as suggested by Rawls [16], are analogous to the disaster caused by pan-Slavic and pan-German movements in their supra-party discourses. Because, when a public debate - and every legal discourse necessarily takes place as a public debate - requires that the interlocutors ignore their interest and only propose solutions for the common good, that portion of society that is not common to debaters is excluded and treated as not relevant[4]. Without the determined interest of a singular subject, no procedure can lead to an interesting end for the legal action.

The criterion of public rationality is equality in the form of isegory, not just mere impartiality. At least generally, every theory of justice of the last four centuries requires fairness of something. It can be argued that the divergence of these theories lies precisely in the question "Fairness of what?" [6] And John Rawls has an outstanding theory in this regard.

In *A Theory of Justice* [16] Rawls presents a theory in which it is mandatory to recognize that “justice has priority over efficiency and requires some modifications that are not efficient [in the sense of instrumental reason] [17].”Rawls proposes his theory in opposition to his understanding of Utilitarianism. And to support his critique of Utilitarianism he resorts to the Kantian tradition, which understands that the moral value of human action settles downby itself *a priori*, without deep consideration for the pragmatic value of ethical action. Therefore, Justice presented as *Fairness* is for Rawls something that is worth in itself and for its effects on the life of a people [17]. For him *Justice as Fairness* is a requirement for all citizens to enjoy basic goods. Rawls bases his

4 See Chapter 6: Closed and Open Impartiality in Amartya Sen's *The Idea of Justice*. For this topic, especially *Inclusionary Incoherence and Focal Group Platicity* [22].

argument on an “original position”. About this one he writes:

The original position is the proper status quo that ensures that the fundamental consensuses reached are equitable. This fact has the name 'justice as fairness'. It is clear, then, that I mean that one conception of justice is more reasonable than another, or justifiable in respect of it, if rational people in the initial situation would choose these principles over those others for the role of justice. Conceptions of justice will be ranked by their acceptability to affected people [16].

From the original position of *A Theory of Justice,* two principles of Justice are derived in *Political Liberalism*. The first indicates that “each person has an equal right to an adequate full scheme of basic freedoms that is compatible with a similar scheme of freedom for all [19].” The scheme of freedoms for all is organized from a “veil of ignorance”. The Rawlsian proposal of *Justice as Fairness* requires impersonal calculations where those that deliberate do not know their position in the society they organize. Rawls states that “a person's rational plan determines what is good for him [16].” Concluding that “if this plan is rational, then I must say that the person's conception of the good is also rational (...) in this case the real and the apparent good coincide [16].”This reasoning seeks to legitimize the choices of those that deliberate, as they decide rationally and not based on personal desires and preferences. The desired end is a scheme that optimizes the equality of conditions of the members of a society. However, the more equitable the presupposed conditions, the less explanationsare for the differences that actually exist between people; and so still more unequal individuals and groups become.

The error of Rawls' original position, and of any one with the transcendental structure of impersonal procedure, is logical. In these models the reasoning is formal and the atomic concepts are singular terms conceived as a mere content-descriptor, not a conceptual force-indicator. Hence the illusion that it makes no difference which basic goods is assigned to whom, or in what quantity, as long as the distribution is equitable, when in fact it makes all the difference. The individual cannot get lost in a system of universals.

One way to answer this problem is with an inferential holistic logic of material reference. In his analysis of singular terms, Brandom states that “singular terms are substitutable, discriminated, essentially subsentential expressions that play a double role [6].” Syntactically, their structural-substitutive function allows them to be replaced *by.* In other words, a definition can always be made using other words. However, semantically, the determination of the relationship between subject and predicate constitutive of the singular term has a *symmetrical* substitutive-inferential meaning. Possible inferences remain even if the terms of the relationship are replaced. Sayed otherwise, the validation criteria of the original position are respected when adapting the distribution of basic goods to the needs of those entitled to their use.

“Predicates, on the contrary, are syntactic substitutive-structural *frames*. And semantically, their occurrences primarily have *asymmetrical* substitutive-inferential meaning [6].*”* Such asymmetry implies the need to adapt the distribution of basic goods to the needs of the most vulnerable and to the specificities of each specific basic good. The good must be appropriate.

The requirement made by inferential logic could be met by the second principle of justice in *Political Liberalism,* which dictate*:*

Social and economic inequalities must satisfy two conditions. First, they must be linked to positions and positions open to all under fair and equitable conditions of opportunity; and Second, they must be for the greatest benefit of the most disadvantaged members of society [19].

But for this principle to be properly holistic, it must recognize that Good is plurivocal. Rawls almost meets this condition in *FairnesstoGoodness* [18]*,* when he clarifies the meaning of wealth[5] as a basic good. But wealth as a basic good only conceives the *effectiveness* of the analyzed project of a person as a result and not comprehensively guaranteeing *freedom* of the project. The differences between the comprehensive and outcome approach, so dear to Sen, are not considered in Rawls's theory. Thus, “society as an equitable system of cooperation”, *as Rawls formulates*, cannot provide the adequate foundation for a theory of justice.

4. Justice Is a Way of Life That Produces the Good of One Other

For the exercise of freedom in a Democracy, it is crucial that the person be able to dedicate itself to the way of life that their deemed good. The determination of what consist a good way of lifewill certainly vary with each person, but the ability to carry out the search is a necessary element. In the understanding I propose of an ethical question, the possible means of being employed constitute the premise from which ethical responsibility originates. Thus, the agent's way of life conditions how they can, excellently, influence a given situation. Knowing one own capabilities allows one to apply them to situations in which they will be most beneficial.

By this I mean that the ethical agent’s responsibility is not absolute. It is always relative to the agent's capabilities and it is the asymmetry of capabilities that normatively binds an agent to the suppression of injustice. What I seek to emphasize here is that the injustices we are able to suppress do not manifest themselves as atomically identified problems, but as holistically determined paradigms recognizing that something in a state of potency has as much reality as the pure act.

5“This is not an easy concept to define, but I mean to use it roughly in the sense understood by economists. Thus wealth consists of (legal) command over exchangeable means for satisfying human needs and interests. Items that we own, such as food and land, buildings and machines, are wealth; so too are rights to use or to receive or in any way to derive benefit from such items-for example, shares in private or public companies, or rights of access to libraries, museums, and other public facilities, rights to various kinds of personal services, and so on. Mill provisionally defines wealth as signifying not only the sorts of things I have listed, but the whole sum of things possessed by individuals or communities that are means for the attainment of their ends [18].”

There may be some "combination" of disadvantages between different sources of deprivation, and this may be an important critical consideration in understanding poverty and producing public policies to deal with it. […] Thus, actual poverty (in terms of capacity deprivation) can easily be much more intense than can be deduced from the collected data. This can be a crucial interest in the approach of public actions to provide assistance to the elderly and other groups with difficulty in converting assets into capacity in addition to their low income [22].

Thus, the demarcation that justice produces the improvement of the situation and not the perfect condition is of paramount importance for an understanding of justice. Therefore, it is important to point out that justice is not identified with the procedural product of a given social operation, but with the way of life that enables us to achieve excellence that gradually improves society. For, recognizing that something in a state of potency has as much reality as the pure act, the improvement of life, not the perfect society, takes place. Anyway, an understanding of the moral and political demands of disability is important not only because it is such a broad and limiting feature of humanity, but also because many of the tragic consequences of disability can effectively be substantially overcome with determined social help and imaginative intervention. Policies to deal with disabilities can have a wide scope, including improving the effects of disadvantage, on the one hand, and programs to prevent the development of disabilities, on the other. It is extremely important to understand that many disabilities are preventable, and much can be done not only to reduce the *penalties* of disability, but also to reduce its *incidence* [22].

For a theory of Justice it is crucial that a person be able to devote himself to the search for an appropriate good. The determination of this proper good will vary according to each person's interest, but the ability to carry out the search is a necessary element. In this sense, it is important to qualify poverty as a deprivation of capacity [22]. For a conception of justice must provide the means to *improve* people's lives. And if the best life can be conceived as one in which the subject has the capacity to seek his own good, then poverty reduction consists in promoting justice.

It is necessary to recognize that "the identification of poverty with low income is well established, but there is already, at this point, a substantial literature on its inadequacy [22]." Thus, what is sought is to highlight the elements that allow the realization of social freedom. Here, the characteristic promotion of freedom arising from justice is pointed out. In this case, the freedom promoted is one that promotes people's ability to pursue the good that is appropriate to them. Social freedom consists in the enjoyment of authority based on the responsibility to suppress the injustices that have been identified. Responsibility is assigned in relation to the intended end of the action or the means employed to achieve that end. And in case an injustice has been identified, the definition of any end to the action other than the suppression of that injustice may be reasonably rejectable.

Thus, the search for a common good can get lost in determining a general organization that ignores the unique position of individuals. Therefore, justice needs to recognize personal heterogeneities, diversities in the physical and social environment and differences in relational perspectives so that the good promoted is that of the other and not a mere projection of the agent's good that, by chance, coincides with that of the affected by the action [22]. In this sense, "reflected valuation demands reasoning about relative importance and not just accounting. This is an exercise in which we are constantly engaged [22]." Therefore, an evaluative foundationalism makes it difficult to propose ethical questions, as it presents these questions as Moral dilemmas. Thus, just demarcating that justice is doing good to another will not be enough, it is necessary to remember that justice is an excellence. But luckily it is an excellence attainable in several ways.

Following a rule is freely putting it to use. The letter of the law is not able to provide the basis for strong material inferences. In this way a rule is not merely a repetition in the form of a law, but, as it *regulates*, it forms the very way of life guided by the rule. Thus, a rule is a objective element that give meaning to the action of the agent. The demand to *freely* put the rule to use recognizes the insight that we are bound not by rules but by our conception of rules. Because "semantics responds to pragmatics and content attributions to explanations of use [6]", since "the notion of formally valid inferences is defined in a natural way from those that are materially correct, while there is no reverse route [7]."

Thus, we can freely follow the conception of a rule, questioning inconsistencies that such subjection may produce in certain concrete cases, or behave according to a moral doctrine that requires that the Law do not be questioned. The function of material inferences is to provide an *expressive* rationality in which it is made *explicit*, in a way that one can think or say, which is *implicit* in what is done. After all, with the use of terms and expressions conditioning the meaning of these terms and expressions, pragmatics prevails over syntax in determining semantics. Consequently, through the material inferences of expressive logic, Law can be expanded so that it relates to society when it uses it to suppress injustices. Conceptual contents are determined by inferences and expressively explicit inferences are what allow us to express any conceptual content whatsoever. Because saying what the content of a law is means saying how this content will be used as a premise in the agent's inferences and actions.

5. The Moral Dilemma of Following Rules and Choosing an Ethical Way of Life

It is argued that democracy realize itself as a way of life free from anomie due to the normative coherence dependent on the attitude of the subject that is a member of a society. The proposal is grounded on the inversion of the classical formulation of contractualism [21]. Rather than being

obligated to act only in a way that can be universally endorsed, in a society the individual is entitled to act in any way that is not reasonablyrefectable. This inversion is a product of the Ethical debate in a context in which the Moral discourse was emptied precisely because it was unable to sustain itself. For the Moral discourse demands an adjustment between the action and the determined substantive values of a given community or tradition and the demand for this adjustment with a previously established standard creates a situation of anomie through the exclusion of those that have moral values different from the community standard. The Ethical discourse, on the other hand, needs to be validated in each case in its uniqueness, presenting reasons specific to each agent. While Moral pleads transcendental validation[6], Ethics is constituted through the intersubjective relationship between interested people. The Moral value must be a common value that the person assumes as "our community value", whereas the ethical value demands an appropriate foundation and, therefore, it can only be given as a specific, present and intersubjective value.

The emptying of the moral discourse also affected the Law and, through it, acquired coercive force, converting the democratic promise into a device of domination. The main cause of the problem lies in the classical conception of truth by correspondence that seeks atomic and representational validation of true expressions in normative language and this provides the situation of deontic dilemmas. Because the Law is established as a parameter of social and political life, deontic dilemmas in the legal system constitute social pathologies. "In the context of social theory, we can speak of 'social pathology' whenever we relate it to social developments that lead to a notable deterioration in the rational capacities of members of society to participate in social cooperation competently [13]."

There are numerous theories of Law that feed this pathology by determining legality as a standard of sufficient correction for legal validation. Such foundation degenerates democracy by weakening institutional reserve. Institutional reserve can be understood as the act of avoiding actions that, although respecting the Positive Law, violate the commitments of justice inherent to the legitimacy of the constitutional order. In this way, deontic dilemmas make it impossible for the individual that use a right to know the limits and scope of his freedom. For if the validation of the Law identifies itself with the correct and the correct presents itself as positive and negative at the same time, the Law becomes a source of anomie.

For Ethics and political philosophy in general and Law in particular, it is not enough to treat truth as a descriptive content of nature, as Law does not seek to *describe* society, but to *regulate it*. And "in order to appreciate the importance of the phenomenalist strategy of pragmatism, one must first consider the development of the fundamental idea that locutions of truth are force-indicators, rather than content-specifiers [7]." Thus, legal truth has a normative character and its content has inferential normative force. This is the difference between reacting to the statement "the signal is red" by stating that the light emitted by the traffic light has a given wave frequency that corresponds to what has metalinguistically determined as "red" and reacting to the same statement by braking and stopping the car that one is conducting because one knows that "red signal" implies the command "stop the car".

This difference stems from the fundamental premise of inferentialist semantics, in which a reaction that has *conceptual* content is a reaction that plays a role in the *inferential* game of making claims, give and ask for reasons [6]. This is because "inferentialist semantics is resolutely *holistic*. In an inferential approach to conceptual content, someone cannot have *any* concept unless he has *many*concepts [6]." In an understanding of truth as normative force of the given reasons, a agent knows what it *means for* the signal to be red because of knowing the normative inferential *function* of having to react by stopping the car. To the descriptive representation of reality is added the expressive indicative of the normative force of the conceptual content.

The authority of the claimer is attributed to the conceptual content of an assertion, which allows its interlocutors to assume commitments corresponding to the assertion and use it as a premise in their own reasoning. Therefore, a fundamental aspect of this model of discursive practice is *communication*, which consists of the "interpersonal and intra-content heritage of entitlement to commitments [6]." The claimer, when performing a speech act, necessarily assumes a *responsibility – to* justify the claim if properly questioned and, therefore, redeem the entitlement to the commitment recognized by the claim. "So, another essential aspect of this model of discursive practice is *justification*: the intrapersonal and inter-content heritage of the entitlement to commitments [6]."

To call something good is to declare that this thing has other properties (different in each case) that provide such reasons. To claim a good requires some knowledge about the idea of *better*. Human action is based precisely on appropriating the truth that there is no better option than the one my interest produces[7]. This truth is given as an utterance whose conceptual content consists of a holistically consistent paradigm and the commitment of the one thatclaim the good in question must be such that it serves as a sufficient reason for the social efficacy desired by the author of the utterance and as premises in material inferences from their interlocutors. The position defended takes judgments of right and wrong as statements about

6In Scholastics the term Transcendental means that which applies to all cases, regardless of circumstances and contingencies. Kant, on the other hand, in the *Critique of Pure Reason*, declares that he understands by Transcendental knowledge that is not so concerned with the content, but rather, with the ways of knowing and whether this is possible *a priori.* I assume the premise that a transcendental reasoning, in either sense, prevents an ethical question from being coherently conceived.

7*Inter-esse*being in the middle, *pro-ducere*bring forth. With this I want to avoid the interpretation that "my interest produces" means merely a self-projection of a agent determining the value of the good by himself and without referring to the object in question.

reasons – more specifically about the adequacy of reasons for accepting or rejecting principles under certain conditions. If the promotion of the common good is proposed as a necessary condition for democracy, the question arises as to whom would be able to benefit *properly* from this good. After all, only a good that belongs to someone can be said to be an *appropriate* good.

A proper good can only be some good taken as such by a naturalperson. And because of that, the demand for universal acceptance is extremely coercive in determining moral judgment as a syllogism whose main premise is a community value. Ethical reasoning, on the other hand, is modal and attitude-dependent. Therefore, in the way of grounding the proposed ethical action, what is not reasonably reprehensible and for which responsibility is assumed is allowed. And the distinguishing element of a democracy is that every citizen is entitled, for the simple fact of being a person living in a democracy, to demand reasons that meet the assumed responsibility.

Thus, discourse that allows for what cannot be reasonably rejected demands that the group respect the person's reasons. This type of discourse allows the promotion of freedom, since starting from the reasons appropriate to the agent, the possibilities of using democratic freedom are expanded. On the other hand, acting for community duty hinders the possibilities of determining one's way of life, as it already establishes the criterion of correction before the action. Following Brandom, we respect Frege's semantic principle that good inferences never lead from true premises to untrue conclusions. And qualifying what we can *say*, *think* and *believe* as the appropriation of rules normatively preserved by good inferences, it is possible to determine a way of life free from anomies due to the normative coherence dependent on the attitude of the democratic person.

6. Constitutive Rules of Democracy

In the first part of this text, the premise that deontologically based Modern Law is established as a social pathology, an activity that generates institutional dysfunction in a democracy, instead of fulfilling its promise of improving people's lives. The reason for this characteristic of Law is the normative anomaly of treating Ethical issues as mere Moral dilemmas. Ethical issues being conceived as the issue of living by rules. And since the civil state is the interdependent relationship between the political and legal spheres*, it* can be assumed that the relationship is essentially normative, produced by constitutive rules[8]. It is decisive that the civil state is life within a community and the role of rules must be situated in this context.

When proposing civil state as a set of constitutive rules, one must not forget Wittgenstein's observation that it is not possible to follow a rule privately, because referring to a rule necessarily implies a community and a habitual use. The principle according to which it is not possible for a single man to have followed a rule once is also valid for the potential citizen. Following a rule, making a communication, giving an order, playing a game of chess are habits (uses, institutions). Furthermore, "thepractical performance that are assessing cannot be just the same performances that are assessed. […] treating a performance as correct cannot be identified with producing it [7]."

Thus, it is impossible to follow a rule solipsistically and change it each time. Following a rule consists in establishing criteria so that another subject can understand your action when referring to the rule in question. In this way, following a rule is an activity carried out intersubjectively. An individual that does not recognize the otherness of the other subjectivities in the middle of which they find itself corrupts reality by reducing it to his own projections.

And without an alterity to recognize it, a subjectivity is incapable of determining an identity to itself and, therefore, constituting itself as a subjectivity that acts in the world. For it is not so much the common life that is born of the rule, but the rule that is born of the common life and in its birth gives form to it. It is not merely from the granting of natural right that civil state is born, but life in the civil state which gives form by acting as guided by one mind [*unavelutimente*]. By the way, the very idea of a constitutive rule implies that the current representation according to which the problem of the rule would consist simply in the application of a general principle to a particular case, that is, according to the Kantian model of the determining judgment, in a merely operation, is neutralized logic. The cenobitic project [of common life], shifting the ethical problem from the plane of the relationship between norm and action to that of the form of life, seems to question again the very dichotomies between rule and life, universal and particular, necessity and freedom, by the which we are used to understanding ethics [2].

It is proposed that dilemmas result from the ethical narrowing of a Moral doctrine, product of the notion of aggregation of people in a community. However, if the question of the best way to follow a rule is proposed by Ethics, then there is no possibility of a dilemma. There are Moral dilemmas, but Ethical issues. Because a *Community* is linked to the moral values shared between the members of the group and the morality of a group already offers the answer in advance about what is the right thing to do. But in a *Society* – and a democracy can only be the result of an association of people – there is no need for universal endorsement of moral values, among partners, ethical respect for what is not reasonablyrejectable is sufficient.

As a totalizing set of constitutive rules, Law determines the normativity of the civil state as an ethical issue, without eliminating the possibility of making an error in the rule and returning to the scope of the natural state. The constitutive rules "do not prescribe a specific act nor regulate a pre-existing state of affairs, but make that act or state of affairs themselves exist [1]." Thus, being part of a society constitutes a democratic way of life linked to the Law. "A form of life

8Wittgenstein's example is that of the game of chess, which do not exist prior to the game, but are constituted by the rules of the game. "The bishop is the sum of the rules by which he is moved [1]"

would, therefore, be the set of constitutive rules that define it. [But] couldn't it be said, and with the same truth, that it is the [citizen's] way of life that creates its rules? [1]"

Law, therefore, converts communities into a society precisely by giving the fragmented diversity of individual life projects a democratic form. Only a life that participates in the idea of freedom and that freely determines its most proper good can be qualified as democratic. "This is not so much to impose a form (or standard) to life, but *vivere*according to that form, that is, of a life that, in the following act itself becomes form, coincides with the form [1]."

The validation of democratic constitutive rules is made explicit through the expressive logic and inferentialist semantics, as this logic is based on the link between authority and responsibility through the *entlitement*/*commitment* relationship. It is understood that a pragmatic epistemology is capable of offering a solution to the presented anomies. Pragmatic truth derives from the normative status of the subject that entitles him to act in the social and political sphere. Such entitlement is based, above all else, on *responsibility dependent on attitude.*

In order to understand the legitimation of normative status, it will be useful to dissolve the tension generated by an ambiguity between autonomy and the *attitude dependence of normative status*, which can be done by asking "*whose* attitudes? The [insufficient] autonomy model takes a clear stance here: it is the attitude of those who are responsible, that is, those over whom authority is exercised [8]." Therefore, the autonomy model presents the problematic premise of the necessary *obedience* to authority, of the subject's submission to the impersonal law as a solution to a Moral dilemma.

Thus, resorting to the argument in which, through their etymus, author and authority identify themselves, it is possible to understand how the political agent is capable of *using* democratic freedom. Acting intentionally is about producing and acquiescing in a practical commitment to a performance. Such performance can be accomplished *with* reasons, that is, being entitled because of an inferential link between the agent's behavior and the reason for such behavior. But it can also be carried out *for* reasons, which is the case in which the legitimacy of the practical commitment is caused by a reasoning appropriate to the responsibility attributed to the agent by his interlocutors [6].

An individual claims his normative status as not only an autonomous but *political persons* "one recognizes the attitude dependence of normative status, but insists that it is the attitude of those *exercising* authority, the superiors, rather than the attitudes of those *over whom* it is exercised, the subordinates, which is the source of the normative bond [8]." For, being free in the democratic socio-political sphere requires being responsible for not allowing the anomie that your freedom became a source of domination of others.

7. Conclusion

The democratic use of rights is achievable when an individual can trust that the Law, not war, can correct a socially unjust situation in which he finds himself. For rights are not something you have, but something you use. Because if treated as owed or property, rights are reduced to citizen predicates and liable to be denied to any person who is considered unworthy of these rights by the state agents. However, understood as an element of use, rights are instituted as the means of action of the person in democratic life, rather than just a desired result that does not materialize in social life. This is the distinction between comprehensive assessment of social action outcomes as opposed to culmination assessment [22].

The use of rights, as the basis of a *democratic* state*,* demands that the Justice be grounded on Freedom and Liberty, rather than Law and Order. Freedom is a plurivocal term with a multitude of theories that seek to conceptualize it. However, there is no embarrassment to accommodate several distinct features within the idea of democratic freedom, focusing respectively on capacity, lack of dependence and lack of interference as constitutive elements of the use of rights. After all, the variety of conceptions about the good is a sign of human freedom, not error.

Therefore, being free from needs can antagonize being free to pursue political projects, as the example of Gandhi's hunger strikes for political purposes shows us. After all, an individual has little use for a notion of well-being that refrains from ethical considerations. This is because something essential for us, namely being free, gives us license to avoid what is essential. Without wisdom there would be no way for us to determine the good to be sought and if you do not know where you are going, no path can lead to your destination, so freedom would be constituted in an empty and meaningless form. For practical intelligence is the mind at the service of our desire that the *being be other,* that we ourselves be other. And the possibility of being always better than we are - therefore being other than we are now - is the constitutive character of freedom.

Thus, the thesis in which only when I recognize in the other a citizen with democratic social authority can I also claim this democratic authority, is manifested quite clearly. For the social subject, the stronger the impression that his goals are supported and even assumed by those with whom he interacts frequently, the more likely he is to perceive his environment as a space for expanding his own personality. For beings dependent on interactions with their peers, the experience of such non-coercive interaction between the person and their intersubjective environment represents the standard of all individual freedom [13].

Social freedom constitutes the individual's ability to determine himself as a subjectivity. For an individual is defined as the smallest part of a given set and, therefore, even someone who only makes up a population mass without an active voice can be taken as an individual. However, a subjectivity can only be constituted by positioning oneself as a social actor and agent. In this way, if Law and Policy direct their attention only to the effective well-being and the perlocutions generated by effective agency, the freedom

inherent to subjectivity is suppressed and persons are reduced to mere individuals, numbers in a given population. But if the importance of human lives lies not merely in our standard of living and attention to needs, but also in the freedom we enjoy, then the idea of promoting social welfare must be reformulated accordingly. After all, the perspective of the capabilities approach points to the central relevance of inequalities of capabilities in the assessment of social disparities, but does not, by itself, propose any specific formula for decisions on legal demands or public policies.

The proposed argument treats Law as a source of social efficacy to which a subject can resort, to the detriment of violence, to correct an injustice. Resorting to the Law, therefore, demands reasons, which only a subjectivity is capable of offering. After all, it is by assuming the position of subject that one can give life to a language. In this way, according to Law, a *person*can claim to live in a certain way in a democracy. "Living according to a form undoubtedly implies, according to a frequent meaning of the term *form* in medieval Latin, an exemplary relationship with others and, even so, it is not simply synonymous with *exemplum* [1]." It is important that a way of life is not merely an *example.* For, an *exemplum* is closer to an alleged solution to a Moral dilemma than a proposal for an ethical life. "But it is crucial that the way of life coincides neither with a normative system nor with a *corpus* of doctrines. It is a third party between doctrine and law, between rule and dogma, and it is only from the awareness of this specificity that its definition can become possible [1]."

In the context of a democratic Law, this third party manifests itself in the freedom that conditions us to *understand* a rule. For the appropriation of the rule, a product of this understanding, takes place as the realization of a common life. "The Franciscan syntagm *regula et vitae* does not mean a confusion between rule and life, but the neutralization and transformation of both into a *form of life* [1]." Here, one looks at the reflected life that is worth living and that takes place as the exercise of social freedom. The very formation of subjectivity demands life in common with other subjectivities that are recognized as people and not just as individuals.

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