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Human societies are not voluntary associations. At least so far as concerns national societies and states, most human beings do not have a choice to which one they will belong, nor what shall be the law and the constitition of that to which they do belong; especially, their belonging to a given state is not conditional upon their assenting to the basic structure of its organization. Someone who is born into a given state has obviously no choice, no opportunity to stipulate conditions upon which he will accept citizenship. Choice can perhaps be exercised later, when one is an adult, when one may find oneself free to depart from one's native state and to take up residence elsewhere with a view to naturalization as a citizen of the state of one's choice. But in that latter situation one is in a weak position to set conditions for one's joining the chosen society. One accepts the constitution and the laws as they are, or one does not acquire citizenship. What is more, somebody who is thinking of changing his citizenship has an appreciably more restricted range of models open to him than someone thinking of changing his car; and by contrast with that situation, he does not have the option of going without if none appeals to him.

That human societies are not voluntary associations is a quite general truth, embracing the most libertarian of democracies and the most oppressive of autocracies, though of course there are marked and significant differences as to the degree to which in the former the individual citizen has the opportunity of securing that account is taken of his wishes and desires in the framing of laws, from the highest reaches of constitutional law to the lowest trivialities of parking regulations. Nobody's original citizenship is acquired by choice; subsequent changes of citizenship are open only to a minority, and even those who might change but deliberately choose not to do so may be moved by considerations other than a conviction

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that their present national society is, or can practically be made to be, a perfectly constituted and wholly ideal form of human community.

Men are not born free; yet they are not everywhere wholly in chains; and thus a capital question for the philosophy of law in its critical, if not its analytical, modes, is that of attempting to settle what are the forms of social organization which deserve approval as just and well-fitted to the human condition and the human situation. To answer the question is to advance a theory of justice.

One approach to answering that question, an approach which is not without a certain obvious attractiveness, an approach which the work of John Rawls[1] has made important for contemporary thought, is to set up a counterfactual hypothesis, to imagine a situation quite different from that which actually obtains anywhere. The supposition is that we should conceive of a situation in which a society is to be formed by free and mutually independent individuals, as equal in rank, in propertylessness, in status and power as men belonging to no organized society must be, yet not ignorant of the advantages which social collaboration may bring upon beings who find themselves in a world with a sufficiency yet no superabundance of natural resources, their physical and mental capabilities being similar though subject to variation, and their collective being vastly greater than their individual ingenuity, resourcefulness and strength. Entertaining that supposition, we then ask: "To what form of coercive social organization would these people in that 'original position'[2] assent?" The answer which we give may then be taken as a blueprint, as a critical scheme for the appraisal of our existing involuntary societies, as a pattern for the amendment of our actual states and their laws so that they shall be worthy of the universal and voluntary assent of citizens equal in freedom and equal in human dignity; *worthy* of such assent from all, even though actual assent may not be always given at all times by all citizens, blinded as they may from time to time be by greed, passion, or self interest.

It is not difficult to conceive of objections to that way of tackling the problem. Suppose that two thirds of the group who come together have white skins and one third have black skins. May the larger group not agree to a form of society permanently

1. J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971) [hereinafter cited as "*T.J.*"].
2. Rawls's expression; see *T.J.* at 17-22.

disadvantageous to the minority? Suppose that there are equal numbers of men and of women, but the men know themselves to be collectively greater in physical strength, as they believe themselves to be in intellectual prowess, than the women. May they not set up a society which permanently favours their interests the more? (Do not our actual societies sadly show forth the intrinsic probability of that?) Suppose that a small group of the most intelligent and articulate succeed in prevailing upon the rest to accept a system which will confer excessive advantages on intelligent and articulate people. It is at least highly questionable whether societies having such characteristics could be approved as just, though there is concrete evidence that they might be viable.

That objection is not, however, conclusive. There are two conditions upon which it might be met: first, demand complete unanimity,[3] not mere majority agreement. But that will not be sufficient to prevent the clever from tricking the less clever into unanimous acceptance of a plan disadvantageous to themselves, and small minorities — Celts, perhaps, for the sake of argument — may be sufficiently aware of the advantages of social collaboration to accept a compromise under which they are relatively disadvantaged as a group rather than excluded altogether. Unanimity being therefore insufficient in itself, we must add the second: let us postulate that the parties in this "original position" are in fact unaware of their own specific characteristics — colour, race, sex, religious or political convictions, degree of intelligence and physical strength and so on. They know that they are human beings to whom such characteristics belong, but not what particular characteristics they themselves have, nor in what measure.

At the risk of having moved from an imaginary but imaginable to a fantastic and unimaginable situation, we have met the objection. People forming a society behind a "veil of ignorance"[4] as to their own characteristics as individuals would not know how to favour themselves unfairly at the expense of others. To agree to a system which allowed for wide variations in fortune or social position and power would be to take a great gamble. One might be lucky, and find oneself very well off, or unlucky and find oneself very badly off. Perhaps people might in those circumstances prefer to settle for

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3. As Rawls does; see *T.J.* at 122*ff.*, 139*ff.*

4. Rawls's expression again; the idea behind it is as summarized here; see *T.J.* at 12, 18-19, 136-142.

some system which allows for only small differentials in wealth and power — or for none?

But again, it could be suggested that the risk is not so enormous. For once the society has been formed as agreed, we move out from behind our "veil of ignorance", and can we not then change matters if it turns out that we have agreed to something horribly disadvantageous to ourselves? Once I find that I have the advantage of being of the male sex, can I not get together with other men equally safe in the same knowledge and subject women to conditions which would have been unacceptable to me when I did not know to which sex I belonged?

If we allow that, we are back to the old objection that whatever our imagined convention might secure in the way of viability of social arrangements, it will not necessarily secure justice — not if we let people change the rules as agreed once we let them out from behind the "veil of ignorance". There is a simple answer to that. We are the masters of our own experiment, so we can simply stipulate that there is to be no such changing of the rules, not for the purposes of this experiment. Let it be recalled that the object of the experiment is to find what would be the ordering of a just society, in which case it is quite irrelevant that some men may wilfully depart from justice in bending their own societies to their own advantage. Indeed, that is the very fact which makes it necessary to formulate principles of justice on which to base a permanent and vigilant criticism of the actual practices and institutions of our own societies. Let us therefore stipulate that the parties in the "original position" are to frame fundamental principles for the organization of their society on the footing that they commit themselves to them unanimously and in perpetuity, subject to no amendment once the "veil of ignorance" is removed and an actual society formed.[5] Let these principles be universal in their application and eminently general in their terms, and let it be supposed that there can be no going back on them.

What then would be the relevance of such experimentally, or, to speak more truly, hypothetically derived principles for the actual concrete societies in which we live, which as has been said are by no means voluntary associations formed by agreement among free and equal human beings each unbiassed by considerations of his or her own individual or class advantage? The argument which we

5. See *T.J.* at 136-142.

have to confront is the argument that principles so derived would be principles definitive of a conception of justice worthy of the assent of all human beings as free and rational moral agents, and consistent with the mutual repsect for each other's persons which is incumbent upon such beings. If I do not do him an injustice, the argument as I have sketched it here is in its essentials precisely the argument advanced by John Rawls in *A Theory of Justice*. It is an argument which he rightly acknowledges to be similar in its premises to arguments of Kant and Rousseau, before whom it was prefigured in rather different form in the work of Locke, of Hobbes, of Grotius and of others.

Before turning to assess the argument and its fruits, I must re-emphasize the hypothetical character of the social contract envisaged. Here there is no theory as to the origins of civil society, nor any assertion of political obligation founded upon some contract supposed to have been framed in the past among the founders of a society. The argument is not explanatory nor historical; it is critical and hypothetical. Its conclusions purport to show not how any society was formed but how every society might be reformed. "Justice is the first virtue of social institutions as truth is of systems of thought".[6] Justice requires that like advantages and disadvantages accrue to all who find themselves in like circumstances, and that as between those who are in different circumstances there should be no arbitrary differences in the advantages and disadvantages afforded and allotted by society. But that formal concept requires to be filled out with a substantive conception[7] of justice telling us what are to constitute like circumstances, and when inequalities are to be rejected as arbitrary. To frame such a conception is to formulate principles, critical principles for evaluating and justifying or rejecting the legal and economic frameworks and practices of concrete states and societies. Can we, as Rawls and his lineal ancestors claim, expound such principles convincingly in any possible form?

There was one crucial point in the argument in the form in which I put it (whether or not that correctly represents Rawls's own argument need not detain us if the argument is of interest in its own right), a point which almost seemed to reduce the hypothetical

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6. *T.J.* at 3.
7. For this useful distinction of terminology as between "the concept" of justice and particular "conceptions" of justice, see *T.J.* at 5-6.

contract from the realm of the imaginary to the realm of the fantastic, and that point needs further consideration. That was the point at which we considered the possibility of an unfair agreement being made, for example in the interests of men as against women, to exclude which possibility I introduced, using Rawls's words, the idea of a "veil of ignorance" to meet the objection. But even if this is not held to be merely fantastical, does it not involve a fundamental logical fallacy: that of *petitio principii*? The only reason for modifying the "original position" in this way by introducing the "veil of ignorance" is that otherwise the principles derived from the hypothetical contract may allow for, or even foster, obvious unfairness, whether it be in favour of white people over black people, men over women, clever over stupid, strong over weak, healthy over sick, or (in each case) *vice versa*. So it is to obviate obvious unfairness, not on any ground of intrinsic plausibility (far from it) that we introduce the idea of people making a contract to form a society on the basis of total ignorance (experimentally postulated) of their own individual characteristics. Are we not then simply assuming what we set out to prove, namely what constitutes obvious unfairness? If the contractarian argument is implausible without the "veil of ignorance", and question begging with it, what is its worth? We may observe, further, that precisely the same reason justified introducing the stipulation that the agreement must be conceived as yielding general principles of universal application whose acceptance is to be binding in perpetuity. So precisely the same logical criticism may be made of this as of the preceding stipulation.

There is, however, a simple answer to this criticism. It is certainly true that the use of the hypothetical contract must presuppose certain views upon justice. Let me take, for instance, the view that just decisions are dependent upon the impartiality of the decision maker. I am not likely to be a fair judge of the question whether I am the best qualified candidate for a job which I wish to obtain in competition with other people: even less am I likely to be thought so by the other candidates if perchance I should in fact be entrusted with deciding on the appointment. What is needed is somebody who can assess and evaluate the qualifications of each of the competing candidates solely by reference to criteria relevant to the job itself, and who can assess them impartially without favour to any of the candidates based on any grounds other than the criteria provided by the job-description and the functions to be performed

by the person appointed. We may observe that this is a formal requirement understandable by reference to the formal concept of justice, that like cases must be treated alike and any arbitrary differences of treatment rejected, which in turn entails that decisions must be made only in accordance with principles conceived to be of universal application.

I know of no way in which someone who accepts the value of impartiality in decision-making can demonstrate to somebody who rejects it that he is mistaken and ought to change his opinion. Thrasymachus may always remain unmoved by the eloquence and argumentative skill of Socrates. The argument to which I am always driven back is that of Hume,[8] or something like it: if I contemplate the condition of a society in which the principle of impartiality is observed by contrast with one in which it is not, I cannot myself say other than that the former is one which is infinitely more appealing to me, and must be so to anyone whose frame of mind is anything like mine. But that argument falls a long way short of being logically compelling, and it may not even be very persuasive in terms of psychology for all I know. To say that somebody who rejects it has no idea of justice is obviously appealing — but has all the appearance of an attempt to use a stipulative definition to silence an opponent, and why should my opponent accept my definition anymore than the argument whose inconclusiveness led me to assert it?

Be that as it may, even if the value of impartiality is not conclusively demonstrable, it is widely accepted, and there is therefore real value in asking what follows from accepting it; especially is it valuable if we wish to transcend particular examples like that of selection of one out of competing candidates for an attractive job and to proceed to more general and momentous questions about the good and just ordering of societies. If I have understood him correctly, Rawls, in suggesting the use of a hypothetical social contract formed by individuals behind a "veil of ignorance" as a method of formulating principles of justice, is aiming to do no more and no less than to provide a way of working out the requirements which follow from acceptance of such a requirement as that of impartiality. So he does not beg the question. He does not assume the value of impartiality in order to prove it. He

8. Expressed with particular clarity in the *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals* (Oxford: Clarendon Press, 1966).

assumes the value of impartiality and then uses the device of the hypothetical contract in order to test out its implications in the context of an attempt to frame principles for the framing or the criticism of laws and other social and economic institutions. His argument plainly cannot then show us that (or whether) we ought to be impartial; what it can perhaps do is show to what a belief in impartiality would commit us if we really took it seriously in relation to the basic constitution and organization of our societies.

I think it is a correct reading of his work to say that Rawls intends no more than that — Rawls does at one point expressly state that the hypothetical contract is simply an argumentative tool which can be used to "make vivid"[9] what are the implications of the constraints, *e.g.* concerning impartiality, which are commonly accepted in arguments about justice in practical contexts. But whether or not it is correct to impute that view to Rawls, it seems clear from the present argument that the use of a hypothetical social contract as Rawls uses it to elaborate a theory of justice cannot but depend upon presuppositions, including presuppositions about basic requirements of justice, which are not themselves derivable from (because they are logically prior to) the contractarian argument.

Indeed it can well be said, and has been said, that an obvious truth about any contractarian argument is that one can only get out of it the logical consequences of what one has initially put into it[10] in stipulating the circumstances and characteristics of the parties envisaged as making the initial compact to form an entirely new society. The idea, put in broad and crude terms is something like this: a social arrangement would be just if all the parties affected by it have the opportunity of participating in the design of the arrangement, but only if each is impartial in weighing his own interests and the interests of others, and only if some sub groups do not gang up to further their own interest at the expense of the others. Each person, having interests of his own to secure and to pursue, must be given an opportunity to secure and pursue them to the extent that is fair, given the interests which others wish to secure and to pursue, and the one way to settle the problem of fairness and balance is to try to find out a system which all could agree to if each gave due weight to the interest of others. Since, for a variety of

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9. See *T.J.* at 18.
10. This point is essentially derived from B. Barry, *The Liberal Theory of Justice* (Oxford: Clarendon Press, 1973) at 22.

reasons, actual societies have not been and could not be established by such a procedure, we have to resort to intellectual experimentation to find out what would result in ideal conditions from such a negotiation, and by appropriately designing a hypothetical model we can find out what would be the result, writing in such notions as that of the "veil of ignorance" as a proxy for the principle of impartiality. But already we have written in the notion that what is crucial to a just ordering of society is that each person should be free to pursue whatever interests he has, of whatever kind, subject only to constraints agreement to which is required in order that every other person should be free to pursue whatever interests he has, subject only to the like constraint. The use of the model in effect writes this into the initial programme, and must again be reflected in the result — there can here be no discrimination between different objects of human interest in terms of their intrinsic worth[11]; nor can there be any allowance for notions such as the Marxist one of false consciousness in terms of which people may mistake their real interests and pursue false ends by reason of such a mistake. What we are in effect writing in is the classical liberal presumption that people are ordinarily the best judges of their own interests and ought always to be treated as being such.

What is more, because the model postulates hypothetical people making an agreement in circumstances (including the "veil of ignorance") in which no actual human beings can ever be placed, we have to decide what characteristics they are to be deemed as having in order that we may calculate what principles they would choose as the basic principles of social organization. Not merely do we in effect write in certain basic principles such as that of impartiality; we must also ascribe to them general characteristics — such as that of having interests which they desire to pursue, and knowing what their own interests are. We have to ascribe to them some degree of knowledge of the general facts of human nature and the human situation as revealed to us by the natural and social sciences — subject to all the imperfections and controversies of and over contemporary knowledge in those fields. Only by ascribing to them some such knowledge will we be able to reach any conclusions at all as to the agreement our hypothetical people will reach; but to ascribe to them any particular knowledge is to take some position on contentious questions, and the position one takes will in turn, and

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11. *Cf.* Barry, *supra,* note 10 at 20-26.

necessarily, contribute to the result one obtains from the experiment. Not merely must one ascribe to one's hypothetical co-contractors knowledge about the world and the place within it of men as social animals, one must have some view on matters of motivation, and must ascribe some motivational attitudes to the parties — for example, attitudes to taking risks.

Here I touch upon a theme which has been much elaborated by critics of Rawls's work. Among the results which Rawls derives from his own hypothesized contract is that people in the "original position" would of necessity accept that there must be the most complete freedom of religious, moral and political belief and practice as is consistent with each having equal freedom in these matters. His reasoning is that people who know what it is to have, *e.g.* religious convictions, but who do not know what religious convictions they themselves have (because of the "veil of ignorance") would necessarily insist upon a principle of religious freedom and tolerance rather than accept any principle as to the establishment of a single official religion. They would do so because they would be unwilling to risk finding themselves in a persecuted minority if it turned out that their religious group was a minority in the society to which they actually belonged.

Rawls's conclusion that religious tolerance is a requirement of justice is one to which I personally am happy to assent. But what is obvious is that its deduction from the hypothetical contract is entirely dependent on the characteristics ascribed to the hypothetical parties, for example on their attitude to gambling and risk-taking. Ascription of different characteristics would result in different conclusions — it is not inconceivable that we should so adjust the hypothesis that the parties would prefer a principle of establishment of religion under which those whose religious position happened in fact to be orthodox should have the comfort and psychological security of practising their faith in conditions in which dissent was not tolerated while those who held dissenting faiths would have the satisfaction of martyrdom in the cause of the faith held by them in turn. For many who have held firm religious convictions those alternatives have in fact proved more attractive than the liberalism which Rawls deduces from his favoured premises.[12]

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12. On the matters discussed in this and the preceding paragraph, *cf.* Barry, *supra,* note 10 at 121-24. See also N. MacCormick, *Justice According to Rawls* (1973), 89 L.Q. Rev. 393 at 408-12.

As is obvious, this is a vein of argument which one could pursue at very great length. But I think it has now been pursued far enough to enable us to consider whether the resuscitation of the Kantian idea of a hypothetical social contract is of any substantial value in attempting to elucidate principles of social organization definitive of an acceptable conception of social justice.[13] The most recent part of the discussion may prompt the reflection that so far from elucidating debate upon these difficult and fundamental questions, the effect may rather be to obscure points of contention by concealing them within the explicit or implicit premises established by the characterization of the original position and the parties who find themselves in that position and who seek to establish a society by unanimous agreement.

For my own part, that is a criticism of Rawls's attempt to establish his own principles of "justice as fairness" which in reflecting upon *A Theory of Justice* over two years I have been tempted to accept; but for the present at least I have come to reject it. Despite accepting it as indubitably true that the principles derived are entirely determined by the premises one establishes in choosing how to set out the "original position", I find the Rawlsian argumentative procedure an interesting one; indeed I find it so precisely because that is the case. It provides a convenient method for testing the implications of adhering to certain factual views about the essential nature of human beings as social animals and to certain broad principles of formal and procedural justice, together with the ideal that human societies should be such that all their members would be able willingly to consent to their organization as free and rational moral agents. The implications of holding to specified premises of that sort can be tested precisely by considering the substantive principles which would be derived from them in the negotiation of a hypothetical social contract. What is more, one can use the procedure as a way of testing the rival merits of competing social principles, by considering what variations in the premises would lead to acceptance of one or another of rival principles. For example, if utilitarianism is consistent with the possibility of very considerable differentials in the matter of individual wealth or power, one might find it necessary to impute to human beings a very

13. For criticism of the use of this form of argument, as distinct from the principles derived from it, see D. D. Raphael, *The Standard of Morals* (Presidential Address to the Aristotelian Society) *PAS* vol. XCVI (1974-75) at 1. *Cf.* Barry, *supra,* note 10, c. 11.

great readiness to take the risk of extreme wealth or extreme poverty, necessary, that is, in order to be able to derive acceptance of the (or a) utilitarian principle from the negotiations in the "original position". If ascription of such a characteristic is implausible, to that extent doubt is cast upon the acceptability of utilitarianism.

Yet is it really true that one's acceptance of a given conception of justice is best tested by considering its derivability, and the possible modes of its derivation, from some hypothetical contract? I cannot believe that the answer to that question should be "Yes". The ultimate test of any moral theory surely is critical evaluation of the principles which it propounds as substantive principles of conduct, whether principles of distributive justice, or principles relating to some other sector of morality (I take it as true that questions of justice do not exhaust the whole range of possible moral questions). A set of principles of justice is in effect a sort of manual of instructions for shaping the laws and institutions of society, and competing conceptions of justice are thus in effect manuals whose adoption will yield different laws and institutions, different forms of society. By their fruits they shall be known. The ultimate tests by which anyone can evaluate any conception of justice are, I should submit, twofold: first, that of coherence and consistency — are the principles self-consistent and free from contradictions or antinomies internal to themselves, and are they in the same sense consistent with the constellation of other principles to which I subscribe? — and secondly, do I assent to the idea of my society's being reshaped as the "manual" would require it to be reshaped? Would I so assent whatever position I were assigned in that conceived society?

Of course, this too involves an effort of the imagination, to the extent that one's attempt is to visualize the world as it would be if the principles under consideration were put into effect. But the world is such that more practical tests can take place, in so far as there are processes for changing laws and institutions. To be committed to a given conception of justice is to be committed to trying to procure such change; to the extent that change occurs it can be evaluated in concrete and not merely in abstract form. The question shifts from the question "Would I accept this realized form of society for myself and for all my fellow citizens, each of whose humanity I am obliged to respect?" By my view of rationality, rational commitment to any conception of justice requires such continuous revaluation of one's principles to the extent that they are

put into concrete effect. I do not believe in final blueprints, but rather in a permanent effort to articulate the principles by which one conceives oneself to be acting, and in a permanent disposition to criticize them in the light of what results from putting them into effect, and to amend principles and practice in the light of the critique of their effects.[14] Therefore, while defending the value of Rawls's argumentative procedure for some purposes, I nevertheless say of it as of other forms of hypothetical reasoning that the ultimate test is that of criticizing the results derived from it. If a legal model were to be sought for that process, I would look not to the concept of contract, but to the practice of critical reasoning characteristic of the justification of legal decisions.

And so by a long road I come at last to the crucial point; to the point of stating and considering the principles advanced by Rawls. Here I shall confine myself to his "special conception" of justice, which is an elaboration of a more general conception and which he regards as being appropriate only to relatively developed societies, in the economic sense.[15] To state the governing principles of the "special conception", they are as follows:

First Principle. Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.[16] (The basic liberties he lists as including "political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law".)[17]

Second Principle. Social and economic inequalities are to be arranged so that they are both: (a) to the greatest advantage of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under the conditions of fair equality of opportunity.[18]

These two principles are placed by Rawls in what he calls an order of "lexical" priority[19]; by that he means that in any given

14. Barry puts a similar point: *supra,* note 10 at 121, and *cf.* R. M. Hare, *Freedom and Reason* (Oxford: Clarendon Press, 1963).
15. For this distinction, see *T. J.* at 303; discussed in Barry, *supra,* note 10, c. 7.
16. *T. J.* at 302.
17. *T. J.* at 61.
18. *T. J.* at 302.
19. *T. J.* at 42-44; discussed in MacCormick, *supra,* note 12 at 414-5.

situation the requirements of the first must be fully met before the second comes into play — and, in a manner too complex to explain here, a similar priority holds in relation to the internal elements of the second. So, in any conflict between economic efficiency and a claim of liberty justified by the first principle, such a claim of liberty must prevail. Moreover, any increased economic advantage to the worst off groups in society which would conflict with their own, or others', liberty as defined under the first principle would be ruled out even if it would otherwise fit in with the criteria posed in the second principle.

The first principle, the principle of equal liberty, is subject to one qualification not stated by Rawls in the summary which I quoted above. For he states that in one circumstance a scheme of liberties which distributes liberties unequally may be just. That circumstance is if a grant of greater liberty to some group is acceptable to all those who have the lesser liberty as a means of further securing their scheme of liberties (liberty can be restricted only for the sake of liberty).[20] A relevant case is perhaps presented by the immunities and privileges, *e.g.* in relation to defamatory statements, enjoyed by legislators in most democratic legislatures, at any rate so far as concerns their utterances made in the deliberations of the legislature.

When I apply my kind of test, I have no difficulty in accepting this principle as proposed by Rawls, though of course it is very vague and might give rise to much controversy as to its proper application. I accept it if for no other reason than that continuing critical revaluation of social principles requires the greatest possible freedom. There is perhaps a potential criticism that liberty is a value distinct from justice, and that the maximization of liberty, even if it does not conflict with justice, is a policy distinct from the promotion of justice, concerned as that is with the elimination of arbitrary differentials between people. On the other hand, it might be argued that everyone values liberty in some respects, though not each to the same degree nor in the same respects as every other. Therefore any system of laws and institutions which curtails liberty in other ways than are essential to achieve a maximal overall scheme of liberty will in fact bear harder on some than on others, in circumstances where the sole difference is the activities which one rather than another wishes to pursue freely. Thus, justice requires not merely

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20. *T. J.* at 302.

equality in respect of such liberty as is granted, but maximization of the range of the total regime or constellation of liberties, as a measure which practically secures equality between people with differing tastes, interests and desires to pursue.

Some will say that in a society in which there are gross inequalities, mere equality in formal legal liberties, so far from being a requirement of justice, may merely be a mask for real injustices. The poor and the rich alike are permitted to propagate whatever views they wish through publication of newspapers under a guarantee of freedom of the press — but it just so happens that the poor cannot afford to run newspapers to propagate their views. That is an opinion which seems to me to be eminently justified, and of which Rawls takes account in terms of a distinction between the existence of freedom and its *worth*[21] to an individual upon whom some formal freedom of action is conferred. On the ground that the priority of liberty is defensible only when circumstances are such that legal liberties have substantial worth to all citizens, he restricts his "special conception of justice" to societies enjoying advanced economies in which even the worst off are (or can be, given just arrangements) relatively well off.[22]

But that brings us to the question of the acceptability of the second of Rawls's principles stated above. There is on the face of it something odd about a principle of justice which appears to advocate the existence of inequalities, as though the object were to procure rather than to diminish social and economic inequalities. To present it as a requirement of justice that "social and economic inequalities are to be so arranged that they are to the greatest advantage of the least advantaged" is at least to appear to be primarily concerned with the advocacy of inequality. Far preferable from this point of view is Rawls's statement of the "general conception" from which the "special conception" is elaborated, and which he states thus:

> All social primary goods — liberty and opportunity, income and wealth, and the bases of self-respect — all to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favoured.[23]

What that more general formulation makes clear, is that the basic

21. *T. J.* at 204*ff.*
22. *T. J.* at 151-2; Barry makes rather heavy weather of this point in *supra,* note 10, c. 7.
23. *T. J.* at 62.

idea is to secure equality as between all citizens, except where there is some specific justifying reason for so organizing legal and social institutions that inequalities may arise or exist within their framework. What is more, it is clearly stated that there is to be one and only one specific justifying reason for the toleration of inequalities, namely that they maximize the well-being of the least favoured under such arrangements. The Prime Minister of a state has more power than his fellow citizens, but is this inequality of power unjust?[24] By Rawls's thesis, it is unjust unless it can be shown that those who have less power, and especially those who have the least power, are better off under a constitition which confers that degree of power on a head of government than they would be in any possible alternative arrangement. And that argument goes in the same way for other forms of inequality, all of which must be justifiable by that test or rejected as unjust. Thus in economic matters, differences of individual income and wealth must be restricted to that minimum which secures the existence of a system which secures to the poorest members of a community a standard of living better than could be achieved by any alternative scheme of distribution, judged in the long-term.

All this is, as the "second principle" quoted makes clear, subject of two qualifications. The first arises from the obligation of any given generation to successor generations in the matter of conservation of resources and investment for the future. One way to make the present generation immediately better off is to give them the seed-corn to eat, but the consequences of doing so are catastrophic for successor generations. To cover this risk Rawls advocates a just savings principle, under which investment is to be pursued to the extent acceptable to the least fortunate of the present generation in view of the advantages which it will confer on the least fortunate of the next. That should be taken as meaning that no generation has a right so to consume resources that their successors are put in a worse position, and that each has a duty to make some provision towards improving their successors' lot, the extent of the duty being determined by the degree of "slack" which the poorest of the present generation could be reasonably expected to allow for their own children and grandchildren.[25]

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24. For a rather different illustrative example worked out at greater length, see MacCormick, *supra,* note 12 at 401-2.

25. On "just savings" see *T. J.* at 284-293; contrary to Rawls's view, I see no reason to think that justice in matters of conservation and investment is

The second qualification is that concerning "fair equality of opportunity". While inequalities are not unjust if they arise from schemes which confer the greatest available advantage on the least favoured, they become unjust if unequally favoured positions are the closed preserve of a restricted group, class, caste or whatever identified by criteria other than their specific fitness for the social tasks to which the advantages in question accrue. The system must make such positions open to all simply on the basis of talent, ability and fitness for the job; and must do so in conditions of fairness to all, which means that educational and other provision must be made to secure that every person is given the best possible chance of developing his or her talents, gifts and abilities to the full.

That gives the clue to the grounds for Rawls's belief that inequalities can sometimes be justified as being in the best interests of those least favoured by the regime allowing for inequality. Society being a collaborative enterprise capable of securing for all advantages which none could secure alone, division of functions and division of labour increases the capacity of a society to confer benefits on its members. The more it can be secured that people are called to the functions which their native abilities best fit them to perform (and fit them to perform best), the greater the general advantage. But such advantages are not worth pursuing at the price of great inequalities and the best equilibrium is when only such inequalities are permitted as are either intrinsic to the performance of a function (Prime Ministerial powers) or essential as incentives to secure the attraction of individuals to those jobs which they are best fitted to perform (high pay for the doctors might be an example), in circumstances in which the performance of those tasks at all, and their performance by the best qualified people, secures the greatest possible benefits to those who benefit least from the overall scheme.[26]

How inegalitarian a society does this envisage? That seems to me to depend essentially on questions of fact. In a society whose members were imbued with a sense of justice and a common acceptance of principles like Rawls's as defining the content of that sense of justice, and in which a conscious effort was made to reduce inequalities to such a point of equilibrium as that envisaged,

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forward-looking only — see MacCormick, *supra,* note 12 at 405.

26. Barry (*supra,* note 10 at 51) refers to Rawls as favouring meritocracy; but Rawls denies this, in my opinion with justification — see MacCormick, *supra,* note 12 at 406-8.

differentials, and especially differential incomes provided as incentive payments, might well be quite small. Especially would this be so if, as he claims, such a society would embody the idea of fraternalism in a common sense that everybody's abilities were being consciously used with a view to furthering the advantage of all.

There are certainly formidable difficulties in calculating how to apply the principle, as perhaps the last paragraph indicates; and Dr. Barry has shown that powerful criticisms may be made of Rawls's own suggestions about practical methods of applying it.[27] But subject to all such difficulties in trying to imagine its application, I am bound to say that I find myself in substantial assent to the proposition that we should so adjust our legal, economic and social systems as to secure that they allow for no inequalities save those which advance best the lot of those who enjoy the lower positions on the existing scales of inequality. If in the end that should lead us to discover their total eliminability, I should be none the sadder for that.

As I said at the outset, human societies are not voluntary associations, and can never be entirely so. I suggest to you for consideration the view that if they were developed along the lines suggested by Rawls on the basis of this hypothetical social contract, they would become more and more worthy of the consent of all their members, and thus approximate more and more to being voluntary associations. I do not say so with the certainty of absolute conviction but I do think the proposition is worth considering.

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27. *Supra*, note 10, c. 5. See at 50: "Surely not since Locke's theory of property have such potentially radical premises been used as the foundation for something so little disturbing to the *status quo*!" But the premises are certainly open to a more radical reading, which is what I have given them here.