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**JUSTICE: CONTRACTUAL OR PSYCHOLOGICALLY EMBEDDED? TWO
APPROACHES TO THE IDEA OF SOCIAL JUSTICE.**

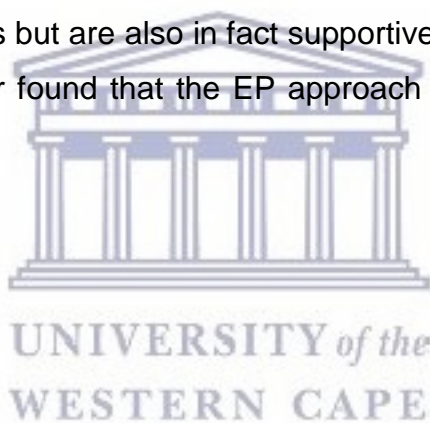


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ABSTRACT

I briefly restate the structure and essential elements of Rawls's theory of justice to facilitate an understanding of its basic narrative, before examining a few of the critiques of his approach to the question of social justice. Then an approach to that question is developed, based on an evolutionary psychology (EP) understanding wherein knowledge and principles from evolutionary biology are used in research on the structure of the human notions of social justice. This leads to an understanding of the basic intuitive grasp humans have of the idea of justice from its role in human evolutionary history, which is then formulated in two principles of social justice. This understanding is thereafter related to the Rawlsian narrative and its critiques in a discussion which indicates divergences but also congruencies between the two approaches. It is also noted that the EP approach offers some insights that are lacking in justice as fairness but are also in fact supportive of some of its conclusions and arguments. It is further found that the EP approach has important implications for public policy.



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JUSTICE: CONTRACTUAL OR PSYCHOLOGICALLY EMBEDDED?

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INTRODUCTION

This project aims to relationally investigate two approaches to the idea of social justice. The first approach is the Rawlsian, contractarian, voluntarist approach of 'justice as fairness,' understood as a modern iteration of Kantian constructivism. The second is to investigate, develop, and advance a preliminary theory of social justice based on the evolutionarily developed, genetically adaptive, and culturally embedded human value notions, as revealed by the research and conclusions of evolutionary psychologists.

This project is less concerned with the principles upon which individuals ought to interact and relate to one another within society, that being the preserve of private and criminal law. Nevertheless, social justice is viewed as one aspect of the general idea of justice. It is justice as applied to the institutional arrangements within the foundational structures of society.

Like justice as fairness, the present project is concerned primarily with the principles of distributive justice as they might be applied to the political constitution of a society. However, it is inevitable that the wider context of the idea of justice also be given some consideration. Social justice is understood in the context of distributive justice: social justice relates generally to just outcomes in a society within the context of principles governing the interaction between society and the individuals comprising it, but distributive justice is primarily concerned with how social rights and duties, including the rewards and burdens of life in society, are distributed by the principles of its foundational institutions among the members. It thus relates to the principles upon which society and the individuals comprising it view and interact with each other. In other words, if the foundational principles of a society produce just distributional outcomes, then the society can be said to be a socially just one.

The justice theories of John Rawls and John Harsanyi are based on rational choice theory, as Rawls writes in *A Theory of Justice* (TOJ): "[the] theory of justice is a part, perhaps the most significant part, of the theory of rational choice" (Rawls 2009, 16). But the evolutionary psychology (EP) approach is based on a naturalistic

view of morality, exemplified by David Hume and Jean-Jacques Rousseau. It poses the question of what the principles of justice might be, such as can be derived from our researched human behaviour connected to our norms of justice.

To formulate such principles, it will be necessary to gain some understanding of the role of our justice notions in human evolutionary history. But more than the question of what the principles are, this project shares the curiosity of Nietzsche concerning the question of what, actually, was the origin of our ideas of “Good” and “Evil” (Nietzsche [1913] 2003, 2), without necessarily adopting his conclusions. Moreover, it is suggested that a clearer understanding of the origin and natural function of these notions will facilitate and guide us in the formulation of a theory of social justice.

The EP view is however, not only predicated on the findings of evolutionary psychologists, but also on game theoretic research (Skyrms 1996), (Binmore 2005), and (Bowles 2011). Brian Skyrms (Skyrms 1996) especially is relevant, since his modeling shows that the two traditions of social contract, namely rational choice and evolutionary dynamics, do not reach the same conclusions as to how the present implicit social contract could have evolved. Although Skyrms finds points of correspondence between the two traditions, he also finds striking differences. However, he contends that the explanatory force of the evolutionary dynamics approach is superior to that of rational choice theory, and thus by implication supports the basic premise of the present project.

Another game theoretician, Ken Binmore (Binmore 2005), adopts a somewhat different game theoretic approach. His idea is to apply Ariel Rubinstein’s theory of rational bargaining to, as Binmore calls it, the negotiation problem created by the Rawlsian veil of ignorance (Binmore 2005, vii). Like Skyrms and myself, following Hume, he sought “naturalistic foundations” for Rawls’s intuitions. and came thereby to support an evolutionary explanation of human norms. But he attempts to apply these insights to “Rawls’s powerful intuitions about the way human fairness norms work” (Binmore 2005, 57).

Unfortunately, I believe he mischaracterises Rawls's original position as a negotiation situation; it is in fact a choice situation wherein each participant makes a choice of the principles of justice. But Binmore further, wrongly, regards the question to be resolved behind the veil of ignorance as the members of a society being asked to "envisage the social contract to which they would agree if their current roles were concealed from them behind a 'veil of ignorance'" (Binmore 2005, 15). In fact of course, agents of the members of a society, placed behind a veil of ignorance, are being asked merely to choose one conception of justice out of a given list of traditional conceptions (TOJ 118).

Although each party in the original position is entitled to make proposals and give reasons, there is no sense of negotiation. The result of the original position is not an agreed, or negotiated social contract, but a set of agreed principles of justice for incorporation into a constitution. But the term "agreed" has a special meaning in justice as fairness, in the sense that it indicates that every party draws the same conclusion and 'chooses' the same conception of justice from the given choices, not that there is a "meeting of the minds" as in contract law. The debate, if it can be called such, takes place internally in the minds of the parties through the process of 'reflective equilibrium' (TOJ 11-12, 20).

Binmore also seems to lose sight of Rawls's statement that he does not contend that the concepts of justice and fairness are the same. Indeed, he disavows any intention of justice as fairness being the application of any general moral conception to the basic structure of society (Rawls 1985, 225). He does not make any philosophical claims such as universal truth, or claims about the fundamental nature of people (Rawls 1985, 223). He makes a point of explaining the propriety of the name "justice as fairness" as follows: "it conveys the idea that the principles of justice are agreed to in an initial situation that is fair" (TOJ 12). The measure of an institution being just (or fair) is thus whether or not it satisfies the two principles of justice chosen in the original position (TOJ 111). It really has nothing to do with general human fairness norms as developed by Binmore. Nevertheless, Binmore then argues tangentially to Rawls, by mathematically modeling the development of

human fairness norms. He never deals with the two principles of justice, or how they might have come about through evolution.

Both Skyrms and Binmore rely on finding equilibria in human interaction, on the basis that evolution would always result in a stable strategy in society, but the EP methodology that I follow argues from the premise that the observed fundamental behaviours of humans must have conferred some competitive advantage on the actors. It is only when the competitive advantage is revealed that we can define the underlying reasons, and hence the deeply structured principles of the norms underlying the demonstrated behaviour and beliefs. That is the essence of the understanding that is attempted by this project.

Binmore's project, like that of Skyrms, is explanatory rather than normative and thus does not take my project any further than agreeing, albeit on a different basis, that human norms of justice and fairness are embedded in our genes and memes through biological and cultural evolution.

In my project, having developed an outline theory of social justice from the EP point of view, I will then analyse it juxtapositionally with Rawls's justice as fairness to relate how the two approaches on the one hand support, and on the other hand diverge from each other. This process of analysis and comparison hopefully exposes the extent to which the EP approach possesses some important explanatory strengths that fill important lacunae in justice as fairness, and whether it additionally may offer valuable new, or further alternative insights into our understanding of social justice.

This project is undertaken in the following way:

Chapter 1: Justice as Fairness: A Social Contract Approach.

Chapter 1 sets out the essential elements of the Rawlsian approach to the idea of social justice. Rawls makes it clear from the start that his theory is "highly Kantian" in nature and one thus should appreciate his project within that context. He also makes it clear that in fact he is concerned primarily with distributive justice as applied to the political constitution of a society.

The chapter starts by discussing the Rawlsian meaning of justice before going on to discuss his criticism of Utilitarianism and its asserted lack of concern for distributional justice, this being one of Rawls's main reasons for rejecting it. Chapter 1 then continues by considering the social contract tradition, orienting Rawls within it and differentiating his views and conclusions from those of a few of the founding philosophers of that tradition, such as Thomas Hobbes, John Locke and J. J. Rousseau.

In examining the fundamental ideas of the Rawlsian approach, the chapter attempts to illuminate Rawls's concept of justice and of the person, traversing the arguments and evidence he uses to support it. The exercise is undertaken by means of a sequential exploration of the basic and essential elements of the original position to create a general understanding and appreciation of the idea of justice as fairness.

This entails a discussion of the two principles of justice as fairness as well as the important processes that lead to the acceptance of these principles in the original position, such as "reflective equilibrium" and the "maximin" rule. It discusses the special meanings of "contract" and "agreement" in the Rawlsian project, as well as those of "rationality," "equality," and "reason" as it applies to the parties in the original position. This leads on to the final discussion in the chapter of what Rawls envisages as a "well-ordered society" in the context of justice as fairness.

Chapter 2: Critiques and Criticisms of Rawls.

In this chapter, a closer look is taken at a few selected objections and critical analyses of the Rawlsian approach, but which still fall into the broad, standard non-evolutionary tradition. Rawls's project is conceived in the Kantian paradigm, but the chapter does not deal with criticism from within that paradigm. The discussed criticisms are limited to external ones as they are the only ones relevant to my present project, which also falls wholly outside the Kantian paradigm. Internal criticism from the Kantian point of view of justice as fairness is irrelevant to my project, because it does not matter for my purposes whether Rawls's project is true

to its Kantian roots or not, it is only important that Rawls sees it as a “highly Kantian” theory in nature.

Although there has been much criticism of Rawls’s project by many authors, only some of the main themes of criticism that seem to go to the essence of the Rawlsian project are traversed in the chapter. This includes critiques of the fact that the theory of justice is developed on a deontological approach, which asserts the priority of right over the good, and the Rawlsian notion of a well-ordered society. The fundamental objection to the idea of distributional social justice, offered by Hayek, is also discussed and assessed, since my project is itself concerned with the principles of distributive justice.

The discussed critiques are all relevant to themes that are discoursed in the process of developing the evolutionary psychology (EP) approach to the idea of distributional social justice, although none is directed at justice as fairness from the evolutionary psychology approach. Nevertheless, they are offered to illustrate some external insights into the Rawlsian project, that become more relevant and useful in Chapter 4.

Chapter 3: The Evolutionary Psychology Approach.

This chapter establishes the central arguments and considerations constituting the EP approach to the question of social justice. Some basic concepts are preliminarily discussed, such as the project’s evolutionary psychology orientation, the concept of gene-culture coevolution, and the applicability of the naturalistic fallacy. The dynamic of the EP view is thereafter discussed as it relates to the evolutionary development of human nature, culture, norms, and values.

The function, dynamic and importance of the development of other regarding characteristics such as altruism, cooperation and reciprocity is investigated alongside self-regarding characteristics, such as greed and selfishness, to identify elements in the human ecology that could give rise to wide-ranging notions of justice. The basic features and evolutionary role of the notions of justice are analysed and discussed.

A hypothesis for an EP theory of justice is put forward, which forms the basis on which the rest of the chapter is constructed. The chapter continues firstly, by discussing an understanding of justice and society as it appears from the EP perspective, before investigating that perspective on the subject of social justice itself. A discussion follows of what the notions of justice might encompass, given the human development experience during especially the Pleistocene period. An important element, that is crucial to the discussion, is the process of gene-culture coevolution and how that leads to some universal as well as culturally particular values, especially due to genetic and epigenetic changes in human populations.

The question is then discussed as to whether it might be said that humans fundamentally have an egalitarian mind and the evidence that suggests such an interpretation is canvassed.

This leads to a preliminary formulation of two principles of distributive social justice from the EP perspective.

Chapter 4: Two approaches: A Relational Analysis

In this chapter, the two approaches are juxtaposed and analysed relationally. The attempt is to relate the philosophical positions of the two approaches to each other from the EP perspective. This entails an external critique of Rawls's project from the non-Kantian, EP point of view, thus accepting that moral values do not transcend experience and that consequently, prehistoric human and proto-human experience, which is known through scientific empirical research, does inform moral values and include notions of justice. Cooperativeness is accordingly understood as a species-specific adaptive psychological orientation and not based conditionally on an *a priori* agreement of the principles of justice.

From this perspective, then, a certain divergence of premises and a departure of aims between the two approaches appear, which aspects are then analysed and discussed. This discussion leads to an assessment, from the EP point of view, of the two resulting concepts of justice wherein the EP concept is viewed as teleologically

related to its biological roots, while justice as fairness remains deontological within its Kantian paradigm.

It appears that intuition plays a major role in both approaches, but intuition from the Kantian perspective is different from the perspective of EP. In the Kantian paradigm, intuition is *a priori*, while the EP approach tries to understand intuition as evolutionarily embedded notions of the human psyche, each with a recognisable *telos*, related to evolutionary selection for survival. This understanding allows for a reasoned development and response to intuitive notions, that place them in the context of having been naturally selected for enhancing human survival.

The chapter continues by analysing how the EP approach gives rise to a multiplicity of possible legislative constructions that allow for different formulations to suit the circumstances and cultural particularities of different societies. However, sample formulations reflecting the essence of two principles from the EP point of view are suggested.

Under the discussion of relating deontology and teleology, it is suggested that, unlike justice as fairness, the EP approach is teleological. Following Sandel's arguments concerning the morally binding force of rights, it is accepted that "rights depend for their justification on the moral importance of the ends they serve." (Sandel 1998, 126) These considerations lead to the conclusion that the EP developed principles of justice are indeed morally binding on society and its members.

Chapter 5: Public Policy Recommendations, General Conclusions and Prospects for Further Research.

The purpose of the project is stated to be the clarification the idea of social justice by exploring the origins and foundations of the idea of justice, not only through the writings of John Rawls, but also through the lens of EP to establish some understanding of the underlying functions and social importance of the idea of justice in society.

The chapter then considers the implications of the EP approach for public policy and distils a number of pertinent issues that relate to actions which would be necessary public policy interventions. Three main implications for the direction of public policy are suggested:

- Achieving egalitarian outcomes, and
- Fostering a culture of pro-social attitudes, and
- Providing sufficient guarantees and sanctions against free riders on the benefits of group living while making little or no contribution themselves.

It is further suggested that a just institutional framework is an essential requirement for just public policies, although many attributes of social justice cannot be accomplished by force of law alone. Public servants must thus cultivate prosocial attitudes to effect social justice.

It is argued that, from an EP point of view, public policy cannot maintain an attitude of neutrality on moral questions, but must engage such questions actively. This is illustrated by the suggested EP policy stance on abortion which is a clear moral argument resting on scientific fact, through employing the societal point of view.

It is also suggested that poverty in the face of affluence is not a natural human condition. Poverty alleviation is thus not an EP policy option, since the root systemic causes of poverty in an affluent society must be removed for such a society to be properly termed just.

This is followed by general conclusions on the project and a discussion on the prospects for further research which include possible research on alternative economic systems of production and distribution. There are also other fields of possible research such as determining to what extent the policies and conditions in the happiest countries in the world approximate the basic tenets of the EP derived principles of a well-ordered society.

There is also scope to discover, through traditional law and social norms, in how far indigenous societies in South Africa had developed as societies in harmony

with the EP approach. Very importantly, there needs to be research on the essentials of democratic government and whether the current representative government models substantially meet those criteria and expectations.



CHAPTER 1

Justice as Fairness: A Social Contract Approach

We have also reason to assume that...the striving for justice and truth is an inherent trend of human nature, although it can be repressed and perverted like the striving for freedom. Erich Fromm (Escape from Freedom)

1. Introduction

John Rawls's *A Theory of Justice* marks a pivotal turning point in the most recent history of practical philosophy, for he restored long-suppressed moral questions to the status of serious objects of philosophical investigation (Finlayson 2012, 25). In this Chapter I propose to examine his model of a social contract based approach to social justice.

There is a plethora of studies of Rawls' approach and I do not intend duplicating any of them, although there will be unavoidable and extensive overlaps. My purpose is a much more restricted one than the usual purpose of reviews of Rawls' project. My ultimate intention is to compare his approach and conclusions to that of a proposed gene-culture evolutionary psychology approach to the question. I will moot this approach based on existing studies of gene-culture coevolution and evolutionary psychology and draw some preliminary conclusions.

In this chapter I propose to discuss justice as fairness from the point of view Rawls sets out as his purpose and aim with the project. The first question I deal with is what Rawls means by the term justice, before I move on to present the arguments that he raises against utilitarianism. Then I attempt to relate justice as fairness to traditional Social Contract Theory.

In justice as fairness the "original position" of equality plays a pivotal role and I discuss this in greater detail to reach some understanding of its precise role in

defining the principles of And those for his point of departure, which is that justice is the first virtue of social institutions, as truth is of systems of thought (Rawls 2009, p. 3) justice as fairness, noting also how it corresponds to the state of nature in the traditional theory of the social contract, which contract in Rawls's project is now explicitly hypothetical.

I then deal with Rawls's idea of a well-ordered society and how it developed from his initial view to the one he finally postulates in political liberalism. It is an essential element of the Rawlsian project and before concluding the chapter, I endeavour to analyse its dynamics as finally set forth in political liberalism.

2. *The Rawlsian Meaning of Justice*

Rawls's point of departure is that justice is the first virtue of social institutions, as truth is of systems of thought (Rawls 2009, 3). Throughout his theory, he considers justice only as a virtue of social institutions, to which he gives the technical term "practices" (Rawls 1958, 164). For the purposes of the theory he disregards the idea of justice insofar as it may be a virtue of particular actions or a virtue of particular persons. He deals with justice only as a virtue of practices that result from a system of rules.

But he also argues that his view on justice must be understood in its customary sense, as being only one of the many possible virtues of social institutions, such as efficiency, preventing harm, and so on. Justice is only part of an all-inclusive vision of a good society; there are many other factors that need to be considered as well (Rawls 1958, 165). Rawls then proposes to focus on what he terms the usual sense of justice: essentially the elimination of arbitrary distinctions between people and the establishment within the fundamental laws of society of a proper balance between competing claims (Rawls 1958, 165).

Rawls thus does not intend to deal with the totality of the set of values we identify with the idea of justice. His primary objective is to formulate the principles of distributive justice. These principles, he argues, should provide a way of assigning the rights and duties of citizens, by being incorporated into the foundational

institutes: the political constitution and the basic economic and social arrangements of society. They should thus not be regarded as add-ons, they should be part of the very essence of social arrangements. Furthermore, they define the “appropriate distribution of the benefits and burdens of social cooperation” (TOJ 4-7).

Even before his seminal work in *A Theory of Justice*, Rawls formulates his two principles in an article:

[First], each person participating in a practice, or affected by it, has an equal right to the most extensive liberty compatible with a like liberty for all; and second, inequalities are arbitrary unless it is reasonable to expect that they will work out for everyone's advantage, and provided the positions and offices to which they attach, or from which they may be gained, are open to all (Rawls 1958, 165).

Although the formulation of these principles is Rawls's own, he argues that they are in no way unique. Importantly for this project, he argues that these principles have three underlying norms: liberty, equality, and reward for services contributing to the common good.

3. The Critique of Utilitarianism

In this section I discuss the view that Rawls takes of Utilitarianism and the reasons for his rejection thereof.

Rawls states his aim in setting out his theory as being that he wishes to present a preferable alternative to the, at the time of his writing in the late 1960's and early 1970's, all pervasive approach of Utilitarianism. He believes that the past critics of Utilitarianism failed to construct a workable and systematic moral conception to oppose it. He says that during much of modern moral philosophy the predominant systematic theory has been some form of utilitarianism, of which there are a number. But his aim is to work out a theory of justice that represents an alternative to utilitarian thought generally, and he includes in his project an alternative to the familiar variants of intuitionism and perfectionism.

As a benchmark understanding of utilitarianism, Rawls adopts Henry Sidgwick's formulation (Sidgwick 1907). According to Sidgwick the main idea of utilitarianism is that society is rightly ordered, and therefore just, when its major institutions are arranged to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it. Utility then is that which gives people satisfaction in their lives; satisfaction of their wants and desires. Utility has also been identified as happiness, that being considered as having the highest utility. Today much research is being done in economics and psychology on the state of happiness in many societies, following the general utilitarian philosophy of modern economics, although the matters of principle that Rawls and many others have raised, remain unresolved.

In the utilitarian view, according to Rawls, an individual person acts quite properly when he acts to advance his own rational ends to achieve his own greatest good. It then asks why a society should not act on the same principle applied to the group. Would not a group act quite properly when it acts to advance its own rational ends to achieve the group's own greatest good? Thus, what is rational for one person can be extended to be rational for a group of persons. And so, Rawls (Rawls 2009, 23-24) argues that in utilitarianism

... one reaches the principle of utility in a natural way: a society is properly arranged when its institutions maximize the net balance of satisfaction. The principle of choice for an association of men is interpreted as an extension of the principle of choice for one man. Social justice is the principle of rational prudence applied to an aggregative conception of the welfare of the group.

Rawls then enjoins one to consider the two main concepts of ethics: the right and the good, from which also the concept of the morally worthy person is derived. Ethical theories, he states, are structured around their definitions of the right and the good and how the two concepts are conjoined in each theory. Teleological theories are generally ethical theories that judge right and wrong based on the 'goodness' of the outcomes of institutions or actions, or more precisely, the view that those

institutions and acts are right, which, of the available alternatives, produce the most good, or at least as much good as any of the other institutions and acts open as real possibilities (Frankena 1963, 13).

These theories thus relate the two notions of right and the good in the simplest way: the good is defined independently from the right, and then the right is defined as that which maximizes the good. Thus, any action, policy, or institution that maximises the good is also 'right'. One can then judge the 'goodness' of things without referencing what is right. This then is the ultimate philosophy of the end justifies the means, since the means will be 'right' or 'just', if the ends are 'good'.

According to Rawls then, teleological theories vary in so far as they differ in their definition of the good. If the good is defined as the realisation of human excellence, we have perfectionism; if as pleasure, hedonism; if as happiness, eudaimonism. Rawls states that he understands the principle of utility in its classical form as defining the good as the satisfaction of rational desire. The problem Rawls has with this view is that there is no independent definition of the right. There is no moral infrastructure that can be referenced to direct one's institutions or actions to be fair and just in the first instance. Rawls rejects utilitarian and other teleological theories because, from his perspective, they lack a moral point of view.

A fundamental concern Rawls has with utilitarianism is that it places no value on the distributive aspects of utility. It does not matter to the utilitarian how the sum of satisfactions is distributed among the individuals in society. It may well be that the vast majority of a population is only somewhat satisfied while most of the satisfaction is enjoyed by a small minority of highly satisfied individuals, as long as the total satisfaction in society is then greater than it would be if depriving the high utility enjoying population of some of their utility would have little effect on the utility enjoyed by the many; total utility in society taken as a whole could therefore be diminished by a more equal, or at least, a less unequal distribution.

For example, the general assumption of standard economics is that income has utility and the greater the income the greater the utility, although it is moot whether the marginal utility of income decreases, remains stable, or actually

increases as income rises – cf. (Bailey 1980), (Friedman 1953), (Easterlin 2005), and (Frey 2008). The moot point is however of no consequence in the following example.

The Gini Coefficient is a measure of the equality of distribution of any element within a population. It can measure the equality of any distribution, whether it be of income, wealth, opportunities or even happiness. It gives a measure of between 0 (perfect equality) and 100 (perfect inequality).

According to the World bank report 2005 to 2009, South Africa had a per capita income of \$10,850 in 2009. This is low compared to, for example, Australia, which had a per capita income of \$35,980 in the same year, no doubt leading utilitarians to conclude that, *ceteris paribus*, Australians are a lot happier than South Africans. But the discrepancy becomes even greater when the distribution of that income is considered. The Gini Coefficient for South Africa in 2009 was 63.1, which was one of the highest inequalities in the world, while Australia had a Gini of only 30.5 in 2006. This translates to a much higher degree of absolute and relative poverty in South Africa than in Australia. In South Africa, the top 20% of the population earned 17.9 times what the lowest 20% earned, while in Australia the factor was only 7 times. The Australian example merely underlines the point that a much more equal distribution of income is possible even within the same economic system.

While certain 'common sense' precepts of justice would clearly judge the South African situation to be unjust both absolutely and comparatively, from the utilitarian point of view the South Africa/Australia comparison could be improved only by increasing South Africa's relative Gross National Income. But if that were achieved without any improvement in the distribution of the income, utilitarians would ignore the distributive inequality and still see only the increase in the relative gross national product as a great improvement in utility and therefore in the relative justness of South African Society compared to the Australian.

The impaired vision of the utilitarian view is due to the fact that the distribution problem falls under the concept of 'right,' as Rawls holds (Rawls 2009, 25). If

distribution were to be claimed as a 'good,' Rawls says that we would no longer have a teleological view in the classical sense. For how would it be possible to maximise a distribution? A distribution is what it is and if a particular distribution was held out to be a good, you could not maximise it, you could only achieve it as near as possible, for overshooting it would not be better (more good). As we saw above, a more equal distribution of the good may in fact diminish the overall good, or be neutral to the total satisfaction in society. It is therefore not an element of concern to the classical teleological view, and specifically not to the utilitarian.

Rawls thus sets up his project to counter the precepts of utilitarianism and teleological theories generally and to account for the common-sense conviction that justice has priority over the desirability of increasing aggregate social welfare. Justice, Rawls consequently maintains, is the first virtue of social institutions, as truth is of systems of thought (Rawls 2009, 3). He argues that:

Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason, justice denies that the loss of freedom for some is made right by a greater good shared by others.

Rawls intends to show that the common-sense judgements concerning the priority of justice is a result of principles which would be chosen in the 'original position,' which is a hypothetical position intended to demonstrate the choice of principles that would be made by rational people, contracting with each other to found a just society, in a position of complete equality and bereft of all personal preferences. The 'original position' is at the heart of Rawls methodology and will be dealt with below.

Utilitarianism therefore lacks moral content in Rawls' view and he sets out to construct a moral deontological alternative. Rawls sees deontological theories defined merely as theories that are not teleological. Justice as fairness is a deontological theory in the sense that it does not interpret the right as maximizing the good (Rawls 2009, 30). Rawls stresses that this does not mean that the theory judges the rightness of institutions and then acts 'right' without considering the

consequences. All ethical doctrines worthy of our attention take consequences into account in judging rightness, he says.

4. Traditional Social Contract Theory

In this section I discuss the traditional social contract theory and how it relates to Rawls's justice as fairness. Traditional social contract theory fell out of general favour especially after the Utilitarianism of Bentham and J. S. Mill. Rawls, in a sense, is trying to revive social contract doctrine by employing a new and more hypothetical approach to the meeting of the minds which traditionally founds society in the contract tradition. How he approached this, and the influence social contract theory has on justice as fairness, is discussed in this section.

To construct such a deontological position as he postulates in (Rawls 2009, 30), Rawls places his project squarely within the Social Contract tradition as represented by Locke, Rousseau, and Kant. He explains that what he has attempted to do is to "generalize and carry to a higher order of abstraction the traditional theory of the social contract." (Rawls 2009, 144)

By doing that he hoped to develop the contract theory to the point where it would no longer be open to the more obvious objections often thought fatal to it. Rawls does not immediately specify what he regards as the obvious objections, but from his project one can infer that he has in mind the objections related, *inter alia*, to the quasi-historicity of the tradition. It is important to underline exactly what Rawls has in mind when adopting the social contract tradition, since this brings into focus many of the aspects that he adopts in his system that are specifically designed to meet these objections.

In Locke (Ashcraft 2009) and Rousseau (Rousseau 2010) the tradition is that there was an imagined time of human existence before society, or at least political society, was founded. People were then supposed to have lived in a 'state of nature' where there was no legal, political, or other authority, no government, no laws and no coercion. Every adult person thus had total freedom and power over himself and in these aspects enjoyed complete equality with every other person.

This situation, the theorists acknowledged, would be rather perilous, as it would be everyone for themselves in a free-for-all melee of living. While Hobbes (Hobbes 2012) characterised it as a situation of war by every man against every man, Locke described it as the 'inconveniences' of the state of nature. To avoid these inconveniences, he argues, which disorder people's property in the state of nature, they unite into societies, the chief purpose of which is to preserve private property,

that they may have the united strength of the whole society to secure and defend their properties, and may have standing rules to bound it, by which everyone may know what is his. (Locke 2011 [1690], 32 and 51)

But Locke agreed that it (the state of nature) would not have lasted very long before political society was formed, which is why, he argued, there was a paucity of historical records of people in the state of nature and the first formation of civil societies. He maintains that

it is not at all to be wondered, that history gives us but a very little account of men, that lived together in the state of nature. The inconveniences of that condition, and the love and want of society, no sooner brought any number of them together, but they presently united and incorporated, if they designed to continue together. (Locke 2011 [1690], 38)

The contract tradition is that people living in the state of nature came together as free, equal and autonomous persons and contracted with each other to form civil society. The contract was fundamentally that each individual gave up part of her freedom to allow a government to make binding laws and each gave up his untrammelled power over himself and pooled it in the government so that it could enforce law and order and so end the inconveniences of the state of nature. Thus, people came out of the state of nature and entered civil society. But the quid pro quo of the agreement was that the government would have to govern in the general interest of all the citizens taken as a whole, and certainly not in the specific and

narrow interests of those who held power. If the government did not hold up its end of the bargain the citizens retained their residual power to enforce the contract, even by rebellion if all else failed (Locke 2011 [1690], 82-85).

In Kant and Rousseau, the contract becomes a mere device. Kant's views are grounded in, and a development of Rousseau's views, especially that for both Rousseau and Kant the idea of the social contract played a similar significant role: as part of their accounts of the General Will; it was, for them, merely a device to demonstrate a point of view legislators should adopt for deciding on laws that achieve justice and the common good of citizens (Freeman 2012, 2). Nevertheless, they both maintain their fiction concerning the state of nature and a social contract to escape from it.

Rousseau reiterates the contract tradition position that people in a theoretical state of nature come together to create a civil state, but he makes it quite clear that he means literally every person is a party to the contract. He states unequivocally that each of us places our person and all our power, in common with everyone else, under the supreme direction of the general will; and as one body we all receive each member as an indivisible part of the whole. From that moment, instead of as many separate persons as there are contracting parties, this act of association produces a moral, collective body composed of as many members as there are votes in the assembly – in fact a single public person. This public person, which is formed by the union of all persons, Rousseau states, formerly took the name of “city,” and now takes that of “republic” or “body politic” (Rousseau 2010, 659-664).

In Charles Frankel's introduction to the 2010 edition of *On the Social Contract*, he reasons that Rousseau used the phrase, “the social contract,” not primarily for purposes of philosophic analysis but as a way of dramatizing the moral situation implicit in the individual's living in society. Set against the backdrop of an imaginary “state of nature,” the distinctive quality of social relations as alone providing the basis for moral action emerges more clearly, and the principles which distinguish a justifiable society—that is, a true society—are highlighted. “The passing from the state of nature to the civil state produces in man a very remarkable change, by

substituting justice for instinct in his conduct, and giving to his actions a moral character which they lacked before” (Rousseau 2010, 294-303).

Frankel continues by saying that the use of the social contract in this way means that it is not really a contract at all. A contract, he correctly maintains, implies mutual promises, and the undertaking by each of the contracting parties of obligations which will satisfy some existing interest of the other party to the contract. Rousseau’s “social contract,” however, is the exchange of a situation in which there is no human morality for one in which there is, and the basis is agreement. It actually creates obligations and interests which did not exist before, and obligates the individual to a social whole, or to his own mandatory general will, against which he has no reciprocal claims.

One objection to social contract theory that Rawls takes very seriously is the idealistic one. In Locke’s doctrine, not all members of society following the social compact have equal political rights on whatever basis. This has important implications for Rawls in that it demonstrates, inter alia, that previous contract theories, such as Locke’s cannot answer the idealist critique levelled at them by, for example, Hegel. Rawls interprets Hegel’s objection to contract theory (Rawls, 2011, 285-286), as being that it confuses society and the state with an association of private persons; that it permits the general form and content of public law to be determined too much by the contingent and specific private interests and personal concerns of individuals; and that it could make no sense of the fact that it is not up to us whether we are born into and belong to our society.

For Hegel, the doctrine of social contract was thus an illegitimate and uncritical extension of ideas that are only at home in and limited to (what he called) “civil society.” Rawls in reply argues that his ‘justice as fairness’ is consciously structured to meet this objection (Rawls 2011, 286). He says he has attempted to reply to the Idealist criticisms, first, by maintaining that the primary subject of justice is the basic structure of society, meaning the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation (Rawls 2009, 7). By major institutions Rawls

understands the political constitution and the principal economic and social arrangements of society. The basic structure then has the fundamental task of establishing what Rawls terms the 'background justice' of society. And, Rawls continues, while this latter contention may initially appear to be a concession, it nevertheless is not: he argues that the original position can still be characterized so that it establishes a fair agreement situation between free and equal moral persons and one in which they can reach a rational agreement.

The basic social contract narrative is clearly not historical and neither Locke nor Rousseau claimed that it was. But neither was it explicitly contended that it was merely hypothetical as is the 'original position' in justice as fairness. Locke especially went out of his way to argue that the narrative is in essence what happened, or what probably happened historically (Locke 2011 [1690], 38-43).

But the motivation of people in the narrative to come out of the state of nature and form civil society undeniably implies an intended historicity, which is clearly false. And therefore, nothing is learned about the motivation for the formation of civil society, while the underlying *ratio*, the whole *raison d'être* of the 'contract' is destroyed. If the state of nature and the formation of civil society bear no relation to each other in any real way, the coming together of all people with an underlying dynamic to enter into an agreement is negated, and there would be no reason to contract at all.

However, to found civil society on a social contract theory is superior, Rawls argues, to the dominant tradition of utilitarianism. He suggests that social contract theory seems to offer an alternative, systematic account of justice that is lacking in the utilitarian view. Of course, Rawls limits the account of justice that he seeks to that of distributive justice, not the whole spectrum of the idea of justice as such. He is interested in the justice of the basic structure of society; to provide a just way of assigning rights and duties through the basic institutions of society and to define the just and appropriate distribution of the benefits and burdens of social cooperation (Rawls 2009, 4). By the 'basic institutions of society' he understands the political constitution and the principal economic and social arrangements (Rawls 2009, 7).

His attraction to the social contract is due to the element of agreement, or voluntarism locked up in the idea of contract. What the actual nature of the agreement is in Rawls' theory is a matter that will be referred to later, although it is not seminal to the present project.

5. *The Original Position*

The original position is the mechanism that Rawls uses as the springboard for people deciding and contracting the principles of social justice. This is the innovation in his thought that distinguishes justice as fairness most sharply from traditional social contract theory. In this section I will analyse and discuss this seminal idea in some detail to be able later to perhaps distinguish it more clearly from the evolutionary psychology approach I develop in Chapter 3.

Rawls's guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. These are supposed to be the principles that free and rational persons, concerned to further their own interests, would accept in an initial position of equality when they are required to define the fundamental terms of their future association (Rawls 2009, 11). These principles, Rawls states, will be the principles that will regulate all further agreements in that society since "...they specify the kinds of social cooperation that can be entered into and the forms of government that can be established" (Rawls 2009, 11). This way of regarding the principles of justice is what Rawls terms 'justice as fairness.'

In justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contract, which is now explicitly hypothetical. The position is essentially that of a great meeting of the representatives of the people who will constitute the society to be founded. This meeting will be presented with a list of conceptions of justice, specified in TOJ by Rawls, from which the representatives will choose the theory they regard as the best to found the principles of justice upon which their society will be built. The original position is not, of course, thought of as an actual historical state of affairs, much less as a primitive

condition of culture. It is understood as a purely hypothetical situation characterized to lead to a certain conception of justice (Rawls 2009, 12).

The principles of justice are chosen behind what Rawls describes as a 'veil of ignorance' in the original position. The essential features of the situation of the people in the original position is that no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. Rawls even assumes that the parties do not know their conceptions of the good or their own special psychological propensities (Rawls 2009, 530) although they are aware of certain general facts about society.

The veil of ignorance, Rawls says, prevents the parties from shaping their moral views to accord with their own particular attachments and interests. They should not look at the social order from their own particular situation but must take up a point of view that everyone can adopt on an equal footing (Rawls 2009, 516). Rawls offers, as a further explanation for these constraints under the veil of ignorance, that as far as possible the choice of a conception of justice should not be affected by accidental contingencies. He argues that the principles adopted should not vary with respect to differences among the parties in these inclinations for the same reason that he wants them to be chosen irrespective of individual preferences and social circumstances (Rawls 2009, 530).

There are however certain matters that are not hidden from the people behind the veil of ignorance. There is no objection to resting the choice of first principles upon the general facts of economics and psychology, for example, that when the veil is lifted, they will have conceptions of the good. Since this knowledge enters the premises of their deliberations, their choice of principles is relative to these facts (Rawls 2009, 158). There is also a general assumption that the persons in the original position are not moved by certain psychological propensities, such as envy, the need to dominate others and to be dominated by others.

It is notable that Rawls uses the terms 'chosen' and 'accepted' in the original position. This indicates a move away from 'agreement' and 'consent' as found in the earlier social contract theories.

The original position is not a bargaining situation where the parties make proposals and counterproposals and negotiate over different principles of justice (Freeman 2012). Nor is it a free ranging discussion where the parties design their own conception of justice. Instead, the parties' deliberations are much more constrained. They are presented with a list of conceptions of justice taken from the tradition of western political philosophy. These include different versions of utilitarianism, perfectionism, and intuitionism (or pluralist views), rational egoism, justice as fairness, and a group of "mixed conceptions" that combine elements of these (Rawls 2009, 124-125). Rawls grants that each of these conceptions presumably has its own assets and liabilities; there are reasons for and against any alternative one selects.

The fact that a conception is open to criticism is not necessarily decisive against it, nor are certain desirable features always conclusive in its favour. Rawls states that the decision of the persons in the original position hinges on a balance of various considerations, although he does not immediately spell out what they are. But one can deduce that it includes considerations such as the merits and demerits of each philosophy based on its appeal to reason, of economics, of facts concerning human society and includes an appeal to intuition.

Very importantly, Rawls states that, in the sense of the above, there is an appeal to intuition at the basis of the theory of justice. Yet when everything is tallied up, it may be perfectly clear where the balance of reason lies in the choice to be made. In other words, the considerations above will create a balance favouring one intuitive choice above others. He argues that the relevant reasons may have been so factored and analysed by the description of the original position, that one conception of justice is distinctly preferable to the others. This is what fundamentally distinguishes justice as fairness from intuitionism, which has no point of reference beyond intuition. This argument is not strictly speaking a proof, he grants; but, in

Mill's phrase, it may present considerations capable of determining the intellect (Rawls 2009, 125).

Freeman argues that the original position is best conceived as a kind of selection process (Freeman 2012) wherein the parties' deliberations are constrained by the background conditions imposed by the original position as well as the list of conceptions of justice provided to them. They are assigned the task of choosing principles for designing the basic structure of a self-contained society under the circumstances of justice, being the circumstances created in the original position.

In making their decision, the parties are motivated only by their own rational interests. They do not take moral considerations of justice into account except in so far as these considerations bear on their achieving their interests. Their interests are narrowed down and are defined in terms of their each wanting to acquire an adequate share of primary social goods (rights and liberties, powers and opportunities, income and wealth, etc.) and achieving the background social conditions enabling them to effectively pursue their conception of the good and realize their higher-order interests in the moral powers.

Since the parties are ignorant of their particular conceptions of the good and of all other particular facts about their particular society, they are not in a position to engage in bargaining. In effect, they all have the same general information and are motivated to the same extent by the same interests.

Rawls' common theme throughout the original position arguments is that it is more rational for the parties to choose the principles of 'justice as fairness' over any other alternative. He devotes most of his attention to the comparison of 'justice as fairness' with classical and average utilitarianism, with briefer discussions of perfectionism (Rawls 2009, 324-332) and intuitionism. The parties in the original position are assigned the task of agreeing to principles that they can all accept.

5.1. The Two Principles of Justice

Rawls argues that one may regard a theory of justice as describing our sense of justice (Rawls 2009, 46). For by such a description is not meant simply a list of the

judgments on institutions and actions that we are prepared to render, accompanied with supporting reasons when these are offered. Rather, what is required is a formulation of a set of principles which, when conjoined to our beliefs and knowledge of the circumstances, would lead us to make these judgments with their supporting reasons were we to apply these principles conscientiously and intelligently. Rawls stresses that a theory of justice is precisely that, namely, a theory. It is a theory of our moral sentiments that sets out the principles governing our moral powers, or, more specifically, our sense of justice.

Rawls' first tentative exposition of the two principles of justice are first: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others; and

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all. These formulations he develops throughout his work and eventually gives the final formulation of the two principles in *Political Liberalism* (Rawls 2011, 291-293) as follows:

- a. Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.
- b. Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.

However, this formulation of the two principles cannot be fully and properly interpreted out of the context of Rawls' further discussion. He does deal in detail with what is meant, for example, by basic liberties and their special status that gives them priority over considerations of the public good and other social values. As it stands the first principle merely indicates two things: firstly, that the list of liberties should be 'a fully adequate scheme' of 'basic liberties' without defining what 'fully adequate' or

'basic liberty' means. Secondly, whatever liberties may be included in the list, each person in society is equally entitled to each one of those liberties.

It is important to note that the first principle (a) is not intended to indicate a priority for liberty as such. Rawls holds that liberty as such is without content and therefore lacks meaning. What he proposes is that a list of liberties should be included with the 'justice as fairness' option, as part of its specification, given to the people in the original position. He proposes two possible ways of drawing up the list.

Firstly, we can take the historical route: we survey the constitutions of democratic states and put together a list of liberties normally protected, and we examine the role of these liberties in those constitutions which have worked well. The second way is to consider which liberties are essential social conditions for the adequate development and full exercise of the two powers of moral personality over a complete lifetime.

The two powers of moral personality are firstly, the capacity for a sense of justice and secondly, the capacity for a conception of the good (Rawls 2011, 34). Rawls realises that, given the constraints of the parties in the original position, they would be unable to specify the scheme of basic liberties in full detail by the considerations available to them. But he says that it is enough that they can outline the general form and content of the basic liberties and understand the grounds of their priority (Rawls 2011, 298).

The further specification of the liberties he leaves to the constitutional, legislative, and judicial stages of the constructive process. But in outlining this general form and content in the original position the special role and central range of application of the basic liberties must be indicated sufficiently clearly to guide the process of further specification at the later stages. For example, among the basic liberties of the person is the right to hold and to have the exclusive use of personal property. The role of this liberty is to allow a sufficient material basis for each citizen to have a sense of personal independence and self-respect, both of which are essential for the development and exercise of the moral powers of the individual.

But there are different conceptions of the right to property. One conception extends this right to include certain rights of acquisition and bequest, as well as the right to own the means of production and natural resources. On another conception, the right of property includes the equal right to participate in the control of means of production and natural resources, which are to be socially owned. These two divergent conceptions of property rights are not embraced by Rawls in the decisions the parties make in the original position, which is why he specifies it as the right to personal property.

He says he does not use these conceptions of property rights that go beyond personal property because, in his opinion, they cannot be accounted for as necessary for the development and exercise of the moral powers of the individual. The merits of these and other conceptions of property rights should be decided at later stages when much more information about a society's circumstances and historical traditions is available. Unlike Locke, Rawls obviously does not view these and other wider conceptions of property rights as basic; they are intrinsically neither just nor unjust, but either can be accepted based on the culture, history and circumstances of a particular society. Rights that go beyond the rights of the individual personally are thus context dependant in justice as fairness.

We can ask similar questions of other matters of importance to the basic structure, such as the acceptability of slavery, attitudes to women and the limits of punishment. Rawls seems not to wish to answer these concerns directly regarding the two principles. Instead he asks the question: how might political philosophy find a shared basis for settling such a fundamental question as that of the most appropriate family of institutions to secure democratic liberty and equality? To this he replies that perhaps the most that can be done is to narrow the range of disagreement (Rawls 2011, 8).

Very importantly for the present project, he notes that even firmly held convictions gradually change:

religious toleration is now accepted, and arguments for persecution are no longer openly professed; similarly, slavery,

which caused our Civil War, is rejected as inherently unjust, and however much the aftermath of slavery may persist in social policies and unavowed attitudes, no one is willing to defend it. (Rawls 2011, 8)

He then argues that political philosophy must start by looking to the public culture itself as the shared fund of implicitly recognized basic ideas and principles. We hope, he says, to formulate these ideas and principles clearly enough to be combined into a political conception of justice that is not at odds with our most firmly held convictions. A political conception of justice, to be acceptable, thus must accord with people's considered convictions, at all levels of generality, on due reflection, or in what elsewhere Rawls has called "reflective equilibrium" (Rawls 2009, 48-52).

5.2. Reflective Equilibrium

The notion of reflective equilibrium is important in the whole theory of justice as fairness. It embodies the fundamental process of reasoning behind the veil of ignorance and represents the main justification that Rawls gives as to why and how it would come about that the principles of justice as fairness would be chosen above all other alternatives.

There is an underlying hypothesis in the theory that the principles which would be chosen in the original position are identical with those that we would apply in our considered judgements, and consequently, the chosen principles describe our sense of justice (Rawls 2009, 48). But Rawls identifies the problem that our considered judgements are subject to revision depending on circumstances and arguments presented etc. Then we may make considered judgments which seem reasonable under the circumstances, although they do not wholly and properly conform to our original theory (Rawls 2009, 48 ff.).

Rawls accordingly argues that the best account of a person's sense of justice is not the one which fits his judgments prior to his examining any conception of justice, but rather the one which matches his judgments in reflective equilibrium – after examining different conceptions of justice. This state of equilibrium is thus

reached after a person has weighed various proposed conceptions of justice and has either revised his judgments to accord with one of them or held fast to his initial convictions (and the corresponding conception of justice). He is not talking about accepting and conforming to a conception of justice that might already be a close fit to a person's judgments; he is concerned with the case where one is presented with all possible descriptions to which one might plausibly conform one's judgments, together with all relevant philosophical arguments for each of them.

Rawls doubts that one might ever fully reach this state, since it would be impossible to study each and every possible description of justice, even if all such theories were well-defined, which they are not. The best we can do, he says, is to study the conceptions of justice known to us through the tradition of moral philosophy and any further ones that occur to us, and then to consider these. This is what he explains he does in the case of the original position. He presents the persons in the position with specific instances from western philosophy and allow them to study each of those and their implications, thereby to come as close to a state of reflective equilibrium as possible.

Justice as fairness can thus be understood as saying that the two principles of justice as fairness would be chosen in the original position in preference to other traditional conceptions of justice, for example, those of utility and perfection; and that these principles give a better match with our considered judgments on reflection than these recognized alternatives do. In short, Rawls argues that the principles of justice as fairness would be chosen above all others because it most closely conforms to our existing considered judgments concerning social justice.

Recognising that not every individual's considered judgments will be the same as every other's, he takes for granted that the principles would be either approximately the same for persons in a state of reflective equilibrium, or that at least that their judgments will differ mainly along a few of the main lines of thought represented by the family of traditional doctrines he will present.

Rawls wishes us to view his theory of justice as a guiding framework designed to focus our moral sensibilities and to put before our intuitive capacities more limited and manageable questions for judgment (Rawls 2009, 53). Finally, he says:

If the scheme as a whole seems on reflection to clarify and to order our thoughts, and if it tends to reduce disagreements and to bring divergent convictions more in line, then it has done all that one may reasonably ask. Understood as parts of a framework that does indeed seem to help, the numerous simplifications may be regarded as provisionally justified.

5.3. The Moral Point of View

As we saw at the start of this chapter, Rawls' overriding purpose in constructing his theory of justice was to present a moral alternative to the teleological theories in vogue at the time of his writing. The people in the original position are thus placed therein with the specific intent of establishing and promoting the moral character of the project they are embarked upon. Rawls states (Rawls 2009, 19) that the purpose of the special conditions pertaining to the people in the original position is to represent equality between human beings as moral persons, as creatures having a conception of their good and capable of a sense of justice. The basis of equality is taken to be similarity in these two respects.

When parties to the contract are described as 'moral' persons it is not intended to suggest that they are morally good or pure. 'Moral persons' is an 18th century term that means they are capable of being rational in that they have capacities to form, revise and pursue a conception of the good; and also that they are capable of being reasonable in that they have a moral capacity for a sense of justice – to understand, apply and act upon principles of justice and their requirements (Freeman 2012, 4).

But the idea of the moral point of view goes back to Hume's account of the 'judicious spectator.' Hume sought to explain how moral judgments of approval and disapproval are possible given that people normally are focused on achieving their

particular interests. He conjectured that in making moral judgments individuals abstract in imagination from their own particular interests and adopt an impartial point of view from which they assess the effects of others' actions on the interests of everyone affected. Since we all can adopt this perspective in imagination, it accounts for our agreement (when we do) in moral judgments (Rawls 2000, Locations 1223-1236), for they too may be founded not only on moral sentiments we do have (by actually taking up the judicious spectator's point of view), but also on sentiments we know we would have were we to take up that point of view.

Later philosophers took up a similar moral point of view, but used it as a basis from which to assess and justify moral rules rather than mainly trying to explain how they come about. Primary examples of the moral point of view are to be found in Rousseau's general Will, Adam Smith's impartial spectator and Kant's categorical imperative. It finds expression in Rawls as the conditions of the original position.

It is important to consider the major elements of the contract in order to reach a clearer understanding of what it fundamentally involves, but before that can be discussed it will be necessary to interrogate Rawls's reasoning leading to the two principles of justice.

5.4. The Maximin Rule

The purpose of the parties in the original position is to decide the basic principles of justice that is to govern their society in perpetuity. This is not achieved through a debate on all the possible principles of social justice, but on the basis of choosing between certain traditional theories of justice (Rawls 2009, 122 ff.) a list of which are to be presented to the parties. When all parties agree on the principles, the contract can be regarded as concluded.

Rawls proposes that the parties will make their decision by making a series of comparisons in pairs. The two principles would then be accepted once all agree that they are to be chosen over each of the other alternatives. Although he grants that this procedure might not be ideal, Rawls suggests that "as we run through these comparisons, the reasoning of the parties singles out certain features of the basic

structure as desirable, and that these features have natural maximum and minimum properties” (Rawls 2009, 123).

Rawls argues that the parties in the original position start off with the general conception of justice as fairness that all primary social goods be distributed equally unless an unequal distribution would be to everyone’s advantage (Rawls 2009, 150). The parties will thus accept an equal distribution of social goods. But, Rawls argues, if there are inequalities in the basic structure that work to make everyone better off than the benchmark of equality, why should they not be permitted? This, he says, leads to the conclusion that the two principles are at least a plausible conception of justice.

Rawls then embarks on a consideration of how to find decisive arguments in favour of the two principles in the original position, when the circumstance of the veil of secrecy would occlude the knowledge necessary to test them against our considered judgment of justice. In reply to this question, he proposes (Rawls 2009, 152) that “it is useful as a heuristic device to think of the two principles as the maximin solution to the problem of social justice. There is an analogy between the two principles and the maximin rule for choice under uncertainty.”¹

The maximin rule provides that in making decisions, we should rank alternatives by their worst possible outcomes; we should then adopt the alternative of which the worst outcome is superior to the worst outcomes of the other alternatives. This conservative *modus operandi* is justified, Rawls argues, because the parties will surely be considerably risk averse under the uncertainties of the original position and this risk aversion favours the selection of the two principles (Rawls 1974, 143). Although the parties do not work from the assumption that the worst is what will be the outcome, but their risk aversion might force the parties to protect themselves against such a contingency, resulting in the choice of the two principles, and this demonstrates the sense in which this conception of social justice is the maximin solution.

¹ To explain the maximin rule, Rawls refers to the following authorities: (Baumol 1965, Ch. 24), and (Luce 1957, Ch. XIII).

Thus, the two principles will be chosen in the original position because they embody the maximin solution to the choices having to be made. Rawls obviously assumes that the parties know and accept the maximin rule of choice, or that they would intuitively adopt it in choosing between the available alternatives. The original position, Rawls suggests, “has been defined so that it is a situation in which the maximin rule applies” (Rawls 2009, 155).

5.5. The Idea of a Contract

The use of the term ‘contract’ already necessarily implies certain basic concepts related to a moral point of view. It implies the coming together of people, the contractants or parties to the contract, who then reach agreement on, or consent to the subject matter of the agreement, with the purpose of being held bound by the agreed terms and conditions for a particular length of time, which may include an agreement that it lasts for an indefinite period. For a legitimate, binding contract to come into being, there needs to be agreement on all the terms, conditions and elements of the agreement. In civil contract law this condition is described as a ‘meeting of the minds.’ Any confusion, misdirection or ambiguity may thus vitiate a putative agreement on the basis that there was no real meeting of the minds, despite the outward appearance of an agreement.

But historically speaking, the idea of a social contract had a more limited role than Rawls assigns to it. In Hobbes and Locke, the social contract serves as an argument for the legitimacy of political authority. Hobbes argues that in a pre-social state of nature it would be rational for all to agree to authorize one person to exercise the absolute political power needed to enforce norms necessary for social cooperation. Contrariwise, “Locke argued against absolute monarchy by contending that no existing political constitution is legitimate unless it *could* be contracted into without violating any natural rights or duties from a position of equal right and equal political jurisdiction within a (relatively peaceful) state of nature” (Freeman 2012). Rawls on the other hand seeks agreement on the principles of justice originating in a situation that represents the predominantly social bases of justice.

Rawls asserts that whatever our natural or human rights and duties may be, they do not provide an adequate basis for ascertaining the rights and duties of justice that we owe one another as members of the same ongoing political society. It is in large part due to “the profoundly social nature of human relationships” (Rawls 2011, 259) that Rawls sees political and economic justice as grounded in social cooperation and its reciprocity. For this reason, he steers clear of the idea of a state of nature wherein pre-social but fully rational individuals agree to cooperative norms (as in Hobbesian views), or where pre-political persons with antecedent natural rights agree on the form of a political constitution (as in Locke). For Rawls, the state of nature is without moral significance – it is not a state wherein human beings can be contemplated, since humans were social beings before they were human.

5.6. The Parties – Rationality and Reason

It is Locke’s emphasis on the equality of people that attracts Rawls to the Lockean position. He says that:

it is clear that all the transformations from the state of nature to civil society that Locke approves of satisfy this condition of an equality of rights. And they are such that rational men concerned to advance their ends could consent to them in a state of equality. For the role of equal rights in Locke is precisely to ensure that the only permissible departures from the state of nature are those which respect these rights and serve the common interest (Rawls 2009, 33).

But on the related issue of the suffrage in the political society so created, Rawls is critical of Locke. He argues that Locke assumes that not all members of society, following the social compact, have equal political rights: citizens have the right to vote by owning property, so that the propertyless have no vote and no right to exercise political authority (Rawls 2011, 287).

Rawls views this as an inconsistency in Locke, for if the situation of the contracting parties with respect to one another suitably represents their freedom and

equality in the state of nature, and also that (as Locke holds) God has not conferred on anyone the right to exercise political authority, they will presumably acknowledge principles that assure equal basic (including political) rights for all throughout the later historical process (Rawls 2011, 287-289). Thus, according to Rawls, one cannot accept that free and equal people will agree to being less than free and equal in the civil society they are agreeing to set up.

The two closely related philosophies of J. J. Rousseau and Immanuel Kant, bring yet other perspectives to the contract. Kant is especially important in the modern and Rawlsian context. Rawls himself claims that his theory is basically a fleshing out of the philosophy of Kant and states very directly that his theory is highly Kantian in nature (Rawls 2009, 147). Indeed, he disclaims any originality for the views he puts forward, stating that the leading ideas found in his theory are classical and well known.

Kant, for his part (Hassner 2012), repeatedly acknowledges Rousseau's decisive influence on his political and moral doctrines. The priority of the practical over the theoretical, of the moral over the intellectual, the superiority to the scientists or philosophers as such of simple souls obedient to the voice of duty, all proceed from the Rousseau of the First Discourse and of the Profession of Faith of the Savoyard Vicar, just as the notions of liberty as obedience to self-prescribed law and of the generalization of particular desires as guaranteeing their legality are taken ultimately from the teaching of Rousseau in the Social Contract. Finally, Kant's philosophy of history is oriented explicitly upon Rousseau's Discourse on the Origin of Inequality.

Kant encompasses all these traditions. According to Hassner (Hassner 2012, 12094-12098), Kant conceives the constitution of civil society as based on a hypothetical original contract by which individuals join together to establish a collective will to whose representative they delegate their separate powers of mutual constraint. As in Hobbes, only the chief of state may constrain others without being himself subject to constraint; but as in Rousseau, each person, because she is joined to all, obeys only herself: The general will, both source and product of the

original contract, is sole sovereign and legislator, but with the understanding that the body of citizens is itself that sovereign. Consequently, civil society is an embodiment of a general will, which like Rousseau's, is not the same thing as the will of all. There is frequently much difference between the will of all and the general will, Rousseau maintains. The latter regards only the common interest; the former regards private interest, and is indeed but a sum of private wills (Rousseau 2010, 838-839).

Thus, the parties to the contract, hypothetical as it may be, are for Kant as for Rousseau, all the individuals who join the common enterprise of society. This is also the initial position of Rawls when he says that "in choosing between the principles to be adopted, each participant tries as best he can to advance his own interests" (Rawls 2009, 142). However, in a later development of his theory, he regards the people in the original position as trustees, or representatives of other individuals' interests, who seek to do as best they can for the particular individuals that each of them represents. The parties, he argues, are "symmetrically situated in the original position so they are to be seen as representatives of free and equal citizens who are to reach an agreement under conditions that are fair" (Rawls 2011, 24).

Rawls explains that the original position is merely an analytical device used to formulate a conjecture. The conjecture is that when we ask—"What are the most reasonable principles of political justice for a constitutional democracy whose citizens are seen as free and equal, reasonable and rational? — the answer is that these principles are given by a device of representation in which rational parties (as trustees of citizens, one for each) are situated in reasonable conditions and constrained by these conditions absolutely" (Rawls 2011, 381). Thus, free and equal citizens are envisaged as themselves reaching agreement about these political principles under conditions that represent those citizens as both reasonable and rational. He uses the ordinary social definition of 'rational' as a consistent assumption about the parties. Thus in the usual way, a rational person is thought to have a coherent set of preferences between the options open to him. He ranks these options according to how well they further his purposes; he follows the plan which

will satisfy more of his desires rather than less, and which has the greater chance of being successfully executed (Rawls 2009, 143).

But the assumption of rationality that Rawls makes also says that the parties have a capacity for justice. This is meant in a purely formal sense: taking everything relevant into account, including the general facts of moral psychology, the parties will adhere to the principles eventually chosen. They are rational in that they will not enter agreements they know they cannot keep, or can do so only with great difficulty (Rawls 2009, 145). He in effect does away with the 'state of nature' and introduces the hypothetical original position with parties duly circumscribed in its stead.

However, Rawls constrains the rationality of the participants with a special exception to the ordinary meaning of rational. He rules, using a special assumption, that a rational individual does not suffer from envy; he is not willing to accept a loss for himself if only others have less as well. One reason Rawls advances for this special assumption is that envy tends to make everyone worse off. In this sense, it is collectively disadvantageous; it is a disruptive attitude in his view. His assessment is that a true conception of justice will eliminate conditions that give rise to disruptive attitudes. Society and its conception of justice will therefore be inherently stable.

The constraints of the veil of ignorance and rationality can be seen to present a problem for Rawls, since the veil of ignorance is supposed to hide from the parties in the original position their own conception of the good, and the good is the satisfaction of rational desire. It follows that they are each unaware of their rational desires. But Rawls insists that the veil of ignorance allows the participants to know that they actually do have some rational plan of life, they only do not know the plan details, nor the particular ends and interests which the plan is calculated to promote. Rawls anticipates the problem of choice under these circumstances through the introduction of the idea of 'primary social goods.' These are 'goods' like rights and liberties, opportunities and powers, income and wealth (Rawls 2009, 92). His assumption is that these goods are the things which a rational person would always prefer more of rather than less, regardless of what the individual's detailed rational plans may be.

We thus have in Rawls a refined culmination of the contract tradition. Like Hobbes, Rousseau and Kant, he envisages participation by all the persons who will form the society, by representation. The participants are assumed to be rational, free and equal moral persons, capable of a sense of justice, all present at the same time. The idea is to use the original position to model both freedom and equality and restrictions on reasons in such a way that it becomes perfectly evident which agreement would be made by the parties as citizens' representatives (Rawls 2011, 26).

Rawls says that as a device of representation, the idea of the original position serves as a means of public reflection and self-clarification. It helps us work out what we now think, once we can take a clear and uncluttered view of what justice requires when society is conceived as a scheme of cooperation between free and equal citizens from one generation to the next. It is not designed to reflect a bargaining situation or a situation which will give rise to a legally or morally binding agreement between the parties. As Freeman explains (Freeman 2012): "the hypothetical agreement in the original position does not then bind anyone to duties or commitments he/she does not already have." The point rather of conjecturing the outcome of a hypothetical agreement is that, assuming that the premises underlying the original position correctly represent our most deeply held considered moral convictions, then we are committed to endorsing the resulting principles and duties whether or not we actually accept or agree to them. Not to do so implies a failure to live up to the consequences of our own moral convictions about justice.

5.7. Consent, Agreement and Justification

D'Agostina *et al* suggest (D'Agostina 2014) that the traditional social contract views of Hobbes, Locke, and Rousseau crucially rely on the idea of consent and they identify the element of consent as central to the contract tradition. Hobbes and Locke hold that the social contract is binding on each individual because they each consented to it originally. As Hobbes states (Hobbes 2012, 1417-1418): "... when a covenant is made, then to break it is unjust and the definition of injustice is no other than the not performance of covenant. And whatsoever is not unjust is just." Thus, it

is necessarily implied that the parties have the basic normative power to irreversibly bind themselves in contract, and the upshot of the social contract was therefore *obligation* – the obligation to obey the law and the authorities so instituted.

However, according to James Buchanan (Buchanan 1965b), the key development of recent social contract theory has been to distinguish the question of what generates political obligation from the question of what constitutional orders or social institutions are mutually beneficial and stable over time. Rawls states his position as being that even though, in justice as fairness, the principles of natural duty are derived from a contractarian point of view, they do not presuppose an act of consent, express or tacit, or indeed any voluntary act, for them to apply. The principles that hold for individuals, just as the principles for institutions, are those that would be acknowledged in the original position, not those that were in fact acknowledged (Rawls 2009, 115).

These principles are understood as the outcome of a hypothetical agreement. If their formulation shows that no binding action, consensual or otherwise, is a presupposition of their application, then they apply unconditionally. In effect, then, the obligation or duty to abide by the law and the political constitution does not arise from agreement, it arises from natural duty, given a just or reasonably just basic structure. As Rawls concludes, if the basic structure of society is just, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty to do his part in the existing scheme. Each is bound to these institutions independent of his voluntary acts, performative or otherwise. Modern social contract theory has thus moved away from political obligation at centre stage to that of public justification.

This move away from obligation rests on a reinterpretation of the idea of agreement in contract. One can endorse or agree to a principle without that act of endorsement in any way binding one to obey. Social contract theorists as diverse as Freeman and Jan Narveson (Narveson 1988, 148) see the act of agreement as indicating what reasons we have to agree. The “role of unanimous collective agreement” is in showing “what we have reasons to do in our social and political

relations” (Freeman 2007a, 19). If individuals are rational, what they agree to reflects the reasons they have.

In contemporary contract theories, such as Rawls's, the problem of justification, rather than consent, thus takes centre stage. Rawls's revival of social contract theory in *A Theory of Justice* thus did not base obligations on consent, though the apparatus of an “original agreement” persisted. What Rawls says is that one conception of justice can be seen as more reasonable than another, or justifiable with respect to it, if rational persons in the initial situation would choose its principles over those of the other for the role of justice (Rawls 2009, 17). Thus, it means that persons in the original position would be required to justify different conceptions of justice comparatively, and then rank them accordingly. Eventually the question of justification is thus settled by working out a problem of deliberation: we must ascertain which principles it would be rational to adopt given the contractual situation.

Consequently, D'Agostino *et al.*, following Rawls, argue that in contemporary moral and political theory the social contract is an attempt to solve a justificatory problem by converting it to a deliberative problem. At its heart is the “question of justification.” But Rawls, in reply to Habermas, published in Finlayson *et al*, identifies justification to be of three kinds, in the following order: first, *pro tanto* justification of the political conception; second, full justification of that conception by an individual person in society; and, finally, public justification of the political conception by political society. Rawls explains what he means by these justifications by saying:

In public reason the justification of the political conception takes into account only political values, and I assume that a political conception properly laid out is complete (PL 2011, 221, 241). That is, the political values specified by it can be suitably ordered, or balanced, so that those values alone give a reasonable answer by public reason to all, or nearly all, questions concerning constitutional essentials and basic justice. That is the meaning of *pro tanto* justification. But since political justification is *pro tanto*, it

may be overridden by citizens' comprehensive doctrines once all values are tallied up (Finlayson 2012, 56).

In the second case, being that of full justification, Rawls explains that it must be assumed that each citizen has his own political conception of justice and in one way or another embeds its justification into his own comprehensive doctrine as being either true or merely reasonable. Not all citizens are bound to accept the political conception of justice to be fully justified, but he argues that non-endorsement by others is not sufficient to suspend full justification for ourselves.

Consequently, each citizen, individually or with others, must decide how the claims of political justice are to be ordered, or weighed, against non-political values. The political conception itself can give little guidance on such questions, as it does not prescribe how non-political values are to be weighed against political values. In this matter citizens must be guided by the precepts of their own comprehensive doctrines.

Third and last, Rawls explains public justification. That is justification by political society and he holds that it is a basic idea of political liberalism. It works synchronously with three other ideas: that of a reasonable overlapping consensus, social stability and legitimacy.

Public justification happens when all the reasonable members of political society carry out a justification of the shared political conception by embedding it in their several reasonable comprehensive views. This is the basic case of public justification. It is one in which the shared political conception is the common ground of the citizenry and all reasonable citizens taken collectively (but not acting as a corporate body) are in general and wide reflective equilibrium in affirming the political conception based on their several reasonable comprehensive doctrines. Only when there is such a reasonable overlapping consensus can political society's political conception of justice be publicly, though never finally, justified (Finlayson 2012, 56-60).

Thus, without a reasonable overlapping consensus there is no public justification for political society, and such a justification also connects with the ideas of stability for the right reasons as well as of legitimacy. This raises the question of what is meant by an overlapping consensus.

Rawls, in his reply to Habermas, asks us to consider the political sociology of a reasonable overlapping consensus: since there are far fewer doctrines than citizens, the latter may be grouped according to the doctrine they hold. More important than the simplification allowed by this numerical fact, is that citizens are members of various associations into which, in many cases, they are born, and from which they usually, though not always, acquire their comprehensive doctrines. The doctrines that different associations hold and propagate — as examples, think of religious associations of all kinds—play a basic social role in making public justification possible.

As stated earlier, Rawls holds that democratic society is marked by reasonable pluralism. Thus, it is also part of public justification to show that stability for the right reasons is at least possible under this condition. The reason is that when citizens affirm reasonable, though different comprehensive doctrines, seeing whether an overlapping consensus on the political conception is possible is a way of checking whether there are sufficient reasons for proposing justice as fairness (or some other reasonable doctrine) which can be sincerely defended before others without criticizing or rejecting their deepest religious and philosophical commitments.

If we can make the case that there are adequate reasons for diverse reasonable people jointly to affirm justice as fairness as their working political conception, then the conditions for their legitimately exercising coercive political power over one another— something we inevitably do as citizens by voting, if in no other way— are satisfied (cf. Rawls 2011, 136 ff.). The argument, if successful, would show how we can reasonably affirm and appeal to a political conception of justice as citizens' shared basis of reasons, all the while supposing that others, no less reasonable than we, may also affirm and recognize that same basis.

Consequently, it can then be concluded that despite the fact of reasonable pluralism, the conditions for democratic legitimacy are fulfilled.

The legitimacy of a democratic regime can thus be said to be established when there is a publicly shared working political conception, despite the fact that people within that democracy hold different religious and philosophical views. However, this is not to be confused with finding a compromise between people's views so as to establish that conception. For to justify a Kantian conception of justice within a democratic society it is not sufficient merely to reason correctly from given premises, or even from publicly shared and mutually recognized premises (Rawls 1980, 517). The real task is to discover and formulate the deeper bases of agreement which one hopes are embedded in common sense, or even to originate and fashion starting points for common understanding by expressing in a new form the convictions found in the historical traditions by connecting them with a wide range of people's considered convictions: those which stand up to critical reflection.

5.8. A Well-Ordered Society

The idea of a well-ordered society is closely connected to the above discussion; which idea I shall now explore in some greater detail. A well-ordered society is how Rawls views the just society that is founded on the principles of justice as fairness, and it is also part of the notion of procedural justice that underlies his project – the parties are choosing principles of justice for a well-ordered society. It is his development of social contract doctrine to explain the stability of the just society. It starts off as a society built on just institutions, but how do the citizens enforce compliance on a sustainable basis, since the perfect original position does not endure after the first agreement where after normal political and legislative activity commences?

To reiterate: a well-ordered society is one “in which (1) everyone agrees to and accepts the same principles of justice; (2) these principles are generally realized in basic social institutions and are successfully enforced; and (3) all want to comply with their requirements out of their sense of justice (Rawls 2011, 35). Rawls admits

that this is a highly idealised concept. Nevertheless, “one may think of a public conception of justice as constituting the fundamental charter of a well-ordered human association” in perpetuity (Rawls 2009, 5). A well-ordered society is “one that is effectively regulated by a publicly shared conception of justice and there is a public understanding as to what is just and what is unjust” (Rawls 2009, 56). This is the view Rawls argues for in TOJ.

However, in a later development Rawls amends this view. In ‘Political Liberalism’ he says that he has had to reappraise his earlier views as a serious problem became obvious (Rawls 2011, 163). The serious problem he refers to concerned the unrealistic idea of a well-ordered society as it appears in TOJ. Rawls explains that an essential feature of a well-ordered society associated with justice as fairness is that all its citizens endorse this conception on the basis of what he now calls a comprehensive philosophical doctrine. They accept, as rooted in this doctrine, its two principles of justice. Similarly, in the well-ordered society associated with utilitarianism citizens generally endorse that view as a comprehensive philosophical doctrine and they accept the principle of utility on that basis. Although the distinction between a political conception of justice and a comprehensive philosophical doctrine is not discussed in TOJ, once the question is raised, Rawls opines that it is clear “that the text (of TOJ) regards both justice as fairness and utilitarianism as comprehensive, or at least partially comprehensive doctrines” (TOJ 162).

The serious problem thus turns out to be that, in Rawls’s later view,

[a] modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines, but by a pluralism of incompatible yet reasonable comprehensive doctrines. Not one of these doctrines is affirmed by citizens generally. Nor should one expect that in the foreseeable future one of them, or some other reasonable doctrine, will ever be affirmed by all, or nearly all, citizens (PL171).

Consequently, Rawls argues that “the fact of a plurality of reasonable but incompatible comprehensive doctrines—the fact of reasonable pluralism—shows that, as used in TOJ, the idea of a well-ordered society of justice as fairness is unrealistic. This is because it is inconsistent with realizing its own principles under the best of foreseeable conditions” (PL 171-179).

Rawls thus concludes that the account of the stability of a well-ordered society as found in the third part of TOJ, is also unrealistic and must be reconceived. Consequently, justice as fairness is now presented from the outset as a strictly political conception of justice.

Rawls suggests that a political conception of justice differs from many moral doctrines such as Utilitarianism, for most are widely regarded as general and comprehensive views. “By contrast, a political conception tries to elaborate a reasonable conception for the basic structure alone and involves, so far as possible, no wider commitment to any other doctrine” (PL, 13ff.). The point is that the scope of a political conception of justice and other moral conceptions differ. A moral conception is general and comprehensive and includes conceptions of the value of human life, ideals of a personal character, friendship, *et cetera*. Comprehensive doctrines of all kinds—religious, philosophical, and moral, belong to what may be called the “background culture” of civil society. That is the social culture of a society, not the political.

Rawls now saw his project as being limited in scope to the political. He sees the problem of political liberalism as being “to work out a conception of political justice for a constitutional democratic regime that a plurality of reasonable but incompatible comprehensive doctrines—always a feature of the culture of a free democratic regime—might endorse” (PL, 197-205). But, he adds, political liberalism also assumes “that a reasonable comprehensive doctrine does not reject the essentials of a democratic regime” (PL 169). He admits that a society may also contain unreasonable and irrational, and even mad, comprehensive doctrines. In that case the problem is to contain them within society so that they do not undermine its unity and justice.

The meaning of a 'plurality of reasonable doctrines', among others, is also canvassed in the polemic between Rawls and Habermas. The important point noted here is that Rawls acknowledges that in any free, democratic society there will be several different moral and ethical codes that people adhere to – doctrines that prescribe rules, norms and values that comprehensively encompass the totality of people's lives. Such doctrines he refers to as comprehensive ones. He also acknowledges that these doctrinal theories vary from those of different religions to those of other philosophies of life and range from the entirely reasonable to stark raving mad.

He thus concludes that any theory of justice, fit for a free and democratic society, must be able to accommodate the views of any number of reasonable doctrines. This is why he emphasises that his 'justice as fairness' is not a comprehensive theory competing with other comprehensive theories. His theory is limited to the political in a way that would not do violence to any particular reasonable comprehensive doctrine (PL). He then introduces the idea of an overlapping consensus. He argues that to hold out a well-ordered society as a possible social world, he adds to the two existing conceptions of the basic structure and of the original position, the ideas of an overlapping consensus and of a reasonable comprehensive doctrine. A plurality of reasonable comprehensive doctrines as discussed above, amount to what he calls Reasonable pluralism with a society (Rawls 2011, 43). A stable overlapping consensus of reasonable comprehensive doctrines, he holds, gives to social unity its very nature of stability.

In summation Rawls holds that in the ideal case there are three sufficient, although not necessary, conditions for society to be a fair and stable system of cooperation between free and equal citizens who are yet fundamentally divided by the comprehensive, yet reasonable, doctrines they hold.

- first, the basic structure of society is regulated by a political conception of justice;
- second, this political conception is the focus of an overlapping consensus of reasonable comprehensive doctrines; and

- third, public discussion, when constitutional essentials and questions of basic justice are at stake, is conducted in terms of the political conception of justice.

This brief outline fundamentally describes political liberalism and how the ideal of constitutional democracy is understood by it (PL, 44).

6. Conclusions

Rawls's two fundamental works on justice consist of the original 1971 *Theory of Justice* and in 1993 *Political Liberalism* (PL). The two treatises do not give exactly the same account of the conception of justice, although Rawls claims that nothing substantial changed between them. Nevertheless, it is a question whether the later work fundamentally changed the theory expounded in the first.

Patrick Neal (Neal 1990) expresses the perceived change in the narrative in TOJ and Rawls's later works when he writes:

As has often been remarked, *A Theory of Justice* had an impact on the Anglo-Saxon intellectual world far beyond that achieved by most academic books. One (certainly not the only) reason for this was a widespread perception that Rawls was therein attempting a project of heroic proportion and classical scope: articulating a comprehensive and universal theory of justice founded on first principles (Neal 1990, 24).

Although Neal writes before the publication of PL, PL is merely a compendium of lectures and articles (although also including some new material) by Rawls dating from April 1980 to 1989, so that his comments are well informed regarding later developments in Rawls's thought. He writes that the later developments of the theory are seen by many as a retreat from the heroic ambitions of TOJ and settled for "merely" "systematizing and giving expression to the dominant opinions of modern liberal democracy." (Neal 1990, 24)

I am of the opinion, however, that the later works must be distinguished from TOJ by their intent. Having set out his theoretical basis in TOJ, Rawls then turns to a different question, namely how the principles of justice derived as suggested in TOJ, might gain political legitimacy in a modern democracy, which is, by the nature of human reason, beset by a “plurality of reasonable yet incompatible comprehensive doctrines” (PL 173).

This change in intent does not fundamentally change the concept of justice as developed in justice as fairness. The choice made in the original position would not change as a result of the plurality of reasonable yet incompatible doctrines in society, because, in the original position, the parties are unaware of their philosophical and religious attachments. Rawls’s original point, namely that free and equal people unencumbered by the shackles of preconceived ideas, their life goals, personal preferences and such would still choose justice as fairness, remains intact. The three universal values of liberty, equality and reward for services rendered for the good of society, remains unaffected by the “retreat” into merely systematizing and giving expression to the dominant opinions of modern liberal democracy.

Perhaps the most fitting final words on justice as fairness are contained in Rawls’ own summation (Rawls 2011, 9-10), when he states that the aim of justice as fairness is practical: it presents itself as a conception of justice that may be shared by citizens as a basis of a reasoned, informed, and willing political agreement. It expresses their shared and public political reason. But to attain such a shared reason, the conception of justice should be, as far as possible, independent of the opposing and conflicting philosophical and religious doctrines that citizens affirm. In formulating such a conception, political liberalism applies the principle of toleration to philosophy itself.

The social contract tradition as a whole is a move away from the religious doctrines that in previous centuries were the professed basis of society. It represents an early modern secularisation of political philosophy. It is certainly not the only one, since Utilitarianism, Intuitionism and later moral theories also followed the trend of secularisation. What the social contract approach exemplifies in its tradition is a

constant move away from religious doctrine to principles of constitutional government that all citizens, whatever their religious view, can endorse. Despite Locke's religious outlook, his purpose still was to ground civil society on the consent of the governed, not the dictates of the Christian religion he avowed.

Rawls concludes that, given the move to secularisation over time, none of the comprehensive philosophical and moral doctrines can today be endorsed by citizens generally, and thus these doctrines also no longer can, if they ever could, serve as the professed basis of society. Thus, political liberalism looks for a political conception of justice that it hopes can gain the support of an overlapping consensus of reasonable religious, philosophical, and moral doctrines in a society regulated by it.

Of course, the Rawlsian project has elicited much criticism, critique and debate. Not all of what has been said for and against the Rawlsian approach and its conclusions is relevant to my present project. In the following chapter, some of the basic objections and critiques that have been made by prominent theorists will be considered insofar as they may be relevant to the present project and contribute to an understanding of the evolutionary psychology approach, which will be further developed in Chapter 3.

CHAPTER 2

Critiques and Criticisms of Rawls

The just, then, is the lawful and the fair, the unjust the unlawful and the unfair. (Aristotle 2012 [350 BC], 47)

1. Introduction

The idea of justice linked to fairness has ancient roots. But Rawls gave new meaning to, and a new perspective on, the link between the two ideas. It is not surprising that when a major intellectual contribution like justice as fairness is introduced into settled, generally placid academic waters such as those of social justice at the time, it shook the foundations of everybody's comfort zone, and a lot of controversy resulted. So it has been with John Rawls. There is a surfeit of literature on Rawls's work, some supportive and others critical, on virtually every aspect of his project to the extent that a lot more has probably been written about justice as fairness by others than what was actually written by Rawls himself.

In this chapter, I will examine some of the more prominent critiques of Rawls's justice as fairness. It is my intention to deal with the critiques on a thematic basis rather than chronologically or in any other order. It is after all the themes that Rawls raises, such as dealing with the priority of the right, the idea of contract, the original position, the veil of ignorance and reflective equilibrium that make his contribution so unique.

As it is impossible to deal comprehensively with any of the issues, I am forced to select the critiques that I view as seminal, given the general purpose and scope of my own project, to focus on such as will allow me to eventually place an evolutionary approach to the question of social justice into some relational perspective to Rawls's theory of justice.

Of all the great number of possible critiques to discuss, I have chosen those of Hayek, Sandel and Habermas. Hayek objects to the very idea of social and

distributive justice. I regard his work as seminal of those opposed to the idea of social justice. I deal with it since, if valid objections exist against the idea of distributive justice, then such objections must be dealt with, or the project abandoned. Hayek, as a very prominent and acclaimed academic of the recent past, is in my view, the most eminent neoliberal, free market detractor of the idea of social justice. We are still living in a neoliberal world where free market ideas seem dominant, therefore I regard his critique as essential to deal with for the purposes of my project.

Michael Sandel is, on the other hand, a supporter of the idea of social justice, but from a different angle to that of Rawls. Sandel critiques Rawls's deontological approach and supports a teleological one. Although I do not find myself in agreement with Sandel's philosophy on the whole, I believe his criticism of Rawls's deontology is seminal, being based on valid arguments and considerations that speak to my project being one based on teleology as well.

Jürgen Habermas's contribution is seminal to the question of Rawls's use of reflective equilibrium in the discussion of a well-ordered society. The EP approach also develops the idea of a well-ordered society, but bereft of any reflective equilibrium. Habermas criticises Rawls's use of reflective equilibrium where he tries to use it as a tool to instil the two principles of justice as fairness into a non-democratic society. Habermas rejects the idea. It is only required because Rawls relies on universal agreement as the basis of his society. The EP approach does not rely on universal agreement, but relies instead, on the understandings of justice embedded in the psyche of the human mind.

2. The Notion of Social Justice

There have been a number of criticisms levelled at the very idea of social justice. Hayek particularly has ridiculed, disdained and vilified it. Strangely enough, he has also expressed some admiration for Rawls. In this section I investigate the critique of Hayek against the idea of social justice to understand what his basic objection might be and how that might impact on Rawls and on my own project.

The Rawlsian project rests completely on the foundation of society being a cooperative system with a primary role for justice in the basic structure of society (Rawls 2009, 3). The principles of social justice, Rawls holds, provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate distribution of the benefits and burdens of social cooperation (Rawls 2009, 4).

Hayek (Hayek 1982) is fundamentally opposed to the very idea of social -- particularly distributary -- justice. He thus seems to place himself thoroughly at odds with the Rawlsian project: Dealing with the very general modern acceptance of the general idea of social justice, he holds forth that the mere fact that the idea of social justice is so widely discussed and accepted obviously does not validate it. Not only does he view the notion of social justice as a quasi-religious superstition, he regards it as a grave threat to the other values of a free civilisation (Hayek, 1982, 230).

The philosophical view Hayek takes of justice is based on the premise that only human conduct can be called just or unjust (Hayek 1982, 198), not a situation that results through no fault of any person or persons. A state of affairs, he thus argues, can only be called just or unjust if we can hold someone responsible for bringing it about or allowing it to come about in contravention of some predefined rule of conduct (Hayek 1982, 199). He maintains that a bare fact, or a state of affairs which nobody can change, may be good or bad, but not just or unjust. Consequently, nature cannot be just or unjust, nor can a "spontaneous order," that is not brought about by design.

His main contention is that the free market system is a spontaneous order, in that nobody designed it, or brought it about in its fullest extent. It was a system, he says, that arose spontaneously among "free [people]" (Hayek 1982, 267- 290) The results of a distribution made by the free market is therefore beyond just or unjust. It cannot be just or unjust; it is entirely impersonal.

Hayek is of course a great proponent and defender of the free market system. His ire is seemingly directed at social justice mainly because he sees it as negating the outcomes of a free market system and equates it fundamentally with socialism,

which he condemns cf. (Hayek 1991). He says that it has been the great merit of the market system over the last two centuries that it has done away with the arbitrary political power of rulers to decide who gets what. This he esteems as the greatest reduction in arbitrary power in modern history.

But now, this greatest triumph of personal freedom, he argues, is at risk to the seduction of “social justice,” which notion again threatens to take that freedom away from us. And, he adds, it will not be long before the holders of the power to enforce ‘social justice’ will entrench themselves in their position by awarding the benefits of ‘social justice’ to those whose efforts resulted in the conferment of that power on them to keep those king makers as a loyal praetorian guard which will make it certain that their view of “social justice” will prevail (Hayek 1982, 260-261).

Despite these dire warnings, Hayek acknowledges Rawls’s theory, and grants that problems of justice do exist in the design of political institutions, although he does not agree that these problems should be classed as problems of social justice. But, referring to Rawls, he says:

I have no basic quarrel with an author who, before he proceeds to that problem [of social justice], acknowledges that the task of selecting specific systems, or distributions of desired things, as just must be ‘abandoned as mistaken in principle, and it is, in any case, not capable of a definite answer (Hayek 1982, 260-261). Rather, the principles of justice define the crucial constraints which institutions and joint activities must satisfy if persons engaging in them are to have no complaints against them. If these constraints are satisfied, the resulting distribution, whatever it is, may be accepted as just (or at least not unjust).’²

Hayek says that this quote from Rawls conveys essentially (more or less) what he is trying to argue. But after careful consideration he decided not to continue with a full scale discussion of Rawls’s *Theory of Justice*, since he had come to the

² He is quoting John Rawls, ‘Constitutional Liberty and the Concept of Justice’, (Rawls 1963, 102), where the passage referred to by Hayek is preceded by Rawls’s statement that “It is the system of institutions which has to be judged and judged from a general point of view.”

conclusion that what he might have to say about it would not assist in the pursuit of his immediate object, because the differences between them seemed to him to be more verbal than substantial and that Rawls and he agree on "the essential point," which appears to be that principles of justice apply to the deliberately designed rules of institutions and social practices (Hayek 1982, 261), but not to distributions of particular things across specific persons – cf. (Hayek 1982, 233) and (Lister 2011, 3)).

Lister (Lister 2011) argues that despite Hayek's vituperative attacks on the idea of social justice, he is in fact a closet Rawlsian/egalitarian liberal who reaches inegalitarian conclusions only via equivocation and implausible empirical claims. This is a surprising, but important argument.

Lister makes the argument that at the normative level, Hayek is in many ways a Rawlsian. It has been noticed in the past that there is an odd proximity between Rawls and Hayek. Hayek has, for example, been attacked from both the left and the right, while in the middle some have held out hope for a 'Rawlseian' synthesis (Lister 2011, 4).

Lister then argues that Hayek's conceptual claims are irrelevant to his conclusions. He says that Hayek's fundamental claim is not conceptual. His fundamental claim is that social justice is trumped by other values. If we understand Hayek's concept of social, or distributive justice, we see that his critique of social or distributive justice has a very narrow target. His claim is that in the spontaneous order of a market society it is impossible to ensure distribution according to any individualistic pattern of merit or deservingness (Hayek 1982, 501 ff). This accords with Rawls's position that distributions ought not to be done on some form of merit (Rawls 2009, 100).

Hayek's attack on the idea of social justice is really no more than a defence of the free market as he sees it – being, for him, the embodiment of all the highest moral norms and values acquired by human beings. Nevertheless, he is not that far removed from the idea of distributive justice since he admits that

There is no reason why in a free society government should not assure to all protection against severe deprivation in the form of an assured minimum income, or a floor below which nobody need to descend. To enter into such an insurance against extreme misfortune may well be in the interest of all; or it may be felt to be a clear moral duty of all to assist, within the organized community, those who cannot help themselves. So long as such a uniform minimum income is provided outside the market to all those who, for any reason, are unable to earn in the market an adequate maintenance, this need not lead to a restriction of freedom, or conflict with the Rule of Law (Hayek 1982, 249).

But to this admission he adds the rider that he is here dealing with the situation that arises only when the remuneration of workers is fixed by authority, and the “impersonal mechanism of the market which guides the direction of individual efforts is thus suspended.”

Implicit in this argument, thus, is that if the market is allowed to act freely, its outcomes will always ensure that there is no deprivation or extreme misfortune to any individual. This is surely a contentious claim, but the admission does allow one to speculate that he is not immune to notions of social justice. Furthermore, he also supports the device of social justice that is government funding for schooling (Hayek 1982, 247).

As far as equality of opportunity is concerned, Hayek makes a further concession to government intervention. He says:

It is of course not to be denied that in the existing market order not only the results but also the initial chances of different individuals are often very different; they are affected by circumstances of their physical and social environment which are beyond their control but in many particular respects might be altered by some governmental action. The demand for equality of opportunity or equal starting conditions (Startgerechtigkeit) appeals to, and has been supported by many who in general favour the free market order.

So far as [equality of opportunity] refers to such facilities and opportunities as are of necessity affected by governmental decisions (such as appointments to public office and the like), the demand was indeed one of the central points of classical liberalism, usually expressed by the French phrase '*la carrière ouverte aux talents*' (Hayek 1982, 246).

These concessions seem to indicate a strong congruence with Rawls, but certainly not an equivalence, since Rawls's difference principle holds (Rawls 2011, 291) that "social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society." Hayek thus seems to agree with the point regarding offices and positions being open to all equally as part of government action to create equality of opportunity. But whether he would agree that all inequality should benefit the least advantaged is doubtful, although the difference principle does not fall foul of Hayek's critique of distribution based on desert, because the difference principle is intended to benefit the least advantaged, not the most deserving.

Despite initial appearances, therefore, Hayek and Rawls appear indeed to agree on many fundamental points regarding social justice. However, these appearances of congruence may be only superficial. Lister (Lister 2011, 12-13) points out that Hayek must admit that there are different ways of designing the rules of the market place that will influence the distributional outcome. For example, the rules of property, contract, and inheritance will have substantial impact on the resultant distribution of wealth and income. Hayek has as yet provided no reason for thinking that the distributive effects of such decisions cannot be judged just or unjust, on the contrary, he seems to be committed to accept such interventions, since he agrees that principles of justice apply to the deliberately designed rules of institutions (op. cit.), which would include property and succession laws.

But Hayek also conceded, that if there was a legitimate need for state action to achieve some legitimate objective (other than reducing inequality) but different ways of achieving the objective, "those that incidentally also reduce inequality may well be preferable (Hayek 1960, 87-88);" he gives the example of different ways of designing the law of intestate succession. What seems odd about this argument is that while he accepts that ways of "incidentally" reducing inequality are preferable, while primarily reducing inequality on purpose is not legitimate. Reducing inequality is therefore seems to be a good thing as long as it is not done as first purpose.

Perhaps the most valuable point that Hayek makes concerns the role of the market. He argues that it allows people with disparate ends to cooperate in the satisfaction of material wants despite their disagreements regarding ends and the way society ought to allocate its resources (Hayek 1982, 171). This partially obviates the Rawlsian problem of how there can be cooperation whilst there exists in society a pluralism of reasonable yet incompatible comprehensive doctrines. It makes cooperation possible at the economic level, but I suggest that at the socio-political level it does not contribute to society as a cooperative venture. Therefore, I submit that Hayek's arguments do not credibly destroy or amend the idea of social, or distributive justice within society.

Hayek also criticises the practical implications of distributive justice in equality of opportunity, for example. He argues that the only way that such a form of distribution can be achieved and maintained is by the government having the power to control virtually every aspect of every person's life (Hayek 1982, 247). His main argument is that the distributive outcomes of the free market are not subject to judgments about justice or injustice, because they are unintended outcomes, facilitated by numerous circumstances which nobody controls directly (Hayek 1982, 226 ff.). But justice as fairness does not require that people's lives be controlled in their finest detail, as Hayek argues would be required to achieve and maintain 'distributive justice.' There are many adjustments that can be made to social institutions as Hayek himself admits, that would result in more equal, or socially just,

distributions. The distributive effects of the markets are the result of man-made laws and institutions and on that point Hayek and Rawls agree.

As far as my own project is concerned, the EP approach would support institutionalised systems that result in more egalitarian, and thus more just, outcomes in terms of its own understanding of what distributions a just society requires. Thus, despite the apparent incompatibility of Hayek and Rawls, the distance between them is not as great as it may at first appear, and they are in fact in agreement on a wide variety of issues.

3. The Priority of Right

The priority of the right over the good is basic to the deontology of Rawls's project. It is therefore my intention in this subsection to investigate the criticisms that have been levelled at it, the most telling of which I regard as that of Michael Sandel (Sandel 1998).

Rawls asserts that the idea of the priority of right is an essential element in what he has called "political liberalism" and it has a central role in justice as fairness as a form of that view (Rawls 2011, p.173). It is a fundamental building block of Rawls's project that justice has priority over other values and ends. It is not just another value among values, it is indeed the value of values. It especially has priority over ends – the ends of people are chosen by them and these choices are constrained by the principles of justice. This is the principle and its detractors that I propose to discuss in this section.

Right at the start of TOJ, (Rawls 2009, 3-4), Rawls broadly spells out what he means by this priority:

Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise, laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason,

justice denies that the loss of freedom for some is made right by a greater good shared by others...in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests...Being first virtues of human activities, truth and justice are uncompromising.

As far as the choosing of ends are concerned, Rawls argues at (Rawls 2009, 563), that the main idea is that, “given the priority of right, the choice of our conception of the good is framed within definite limits. The principles of justice and their realization in social forms define the bounds within which our deliberations take place.” And again, at 564 he says that “while there is no algorithm for settling upon our good, no first-person procedure of choice, the priority of right and justice securely constrains these deliberations³ so that they become more manageable. Since the basic rights and liberties are already firmly established⁴, our choices cannot distort our claims upon one another.” In *Political Liberalism* (PL) he underlines the theme again. He says that “in justice as fairness the priority of right means that the principles of political justice impose limits on permissible ways of life; and hence the claims citizens make to pursue ends that transgress those limits have no weight.” (Rawls 2011, 174)

Although in *TOJ*, Rawls creates the impression that the priority of right is part of a general moral conception, in *PL* he seems to back away from this idea. He says although the idea of a comprehensive philosophical doctrine is not discussed in *TOJ*, it is clear from the text that both justice as fairness and utilitarianism are regarded as comprehensive, or partially comprehensive, doctrines (Rawls 2011, 162). He then argues that the fact that a plurality of reasonable but incompatible comprehensive doctrines will always exist in a democratic society, demonstrates that a well-ordered society as used in *TOJ* is unrealistic. This is due to the fact, he argues, that as a

³ Concerning the choosing of ends.

⁴ Through the deliberations in the original position.

comprehensive doctrine, it is inconsistent with realising its own principles even under the best of foreseeable conditions.

He therefore recasts justice as fairness unambiguously from the outset as a political conception of justice, i.e. not competing with comprehensive doctrines. In fact, he basically defines what a reasonable comprehensive doctrine is by adding the supposition that a reasonable doctrine does not reject the essentials of a democratic regime. This basically sets the stage for the later argument about overlapping consensus, since all reasonable doctrines essentially accept democratic regimes. Since justice as fairness, as a form of political liberalism is now circumscribed by the political, it facilitates the conclusion that all reasonable doctrines would overlap to find the essentially democratic principles of justice as fairness acceptable (Rawls 2011, 162-184).

In *Political Liberalism*, he distinguishes between a political conception of justice and a comprehensive religious, philosophical, or moral doctrine. The features of a political conception of justice, Rawls states, are

first, that it is a moral conception worked out for a specific subject, namely, the basic structure of a constitutional democratic regime; second, that accepting the political conception does not presuppose accepting any particular comprehensive religious, philosophical, or moral doctrine; rather, the political conception presents itself as a reasonable conception for the basic structure alone; and third, that it is not formulated in terms of any comprehensive doctrine but in terms of certain fundamental ideas viewed as latent in the public political culture of a democratic society (Rawls 2011, p.175)

To complete this withdrawal of his originally bold conception behind the redoubt of the political, he now argues that firstly, in its general sense, the priority of right means that the ideas of the good, which are constrained by the principles of the right, being justice, are restricted only to political ideas of the good. Which means, he says, that there is no need for reliance on any comprehensive conceptions of the good, but only on ideas tailored to fit within the political conception. The political

conception, one recalls, is a moral conception for the specific subject of the basic structure of a constitutional democratic regime, and in the final analysis is formulated in terms of certain fundamental ideas that Rawls sees as latent in the public political culture of a democratic society.

But Sandel argues that the scope of the change, referring to the 1993 edition of *Political Liberalism*, is even more fundamental. He (Sandel 1998, 3642) says that for Rawls, the right is prior to the good in two senses and that it is important to distinguish them.

First, the right is prior to the good in the sense that certain individual rights “trump,” or outweigh, considerations of the common good. Second, the right is prior to the good in that the principles of justice that specify our rights do not depend for their justification on any particular conception of the good life.

It is the second of these claims which gave rise to the debate about Rawlsian liberalism under the somewhat misleading label, according to Sandel, of the liberal-communitarian debate. In the 1980s a number of political philosophers took issue with the idea that the consideration of justice can be removed from considerations of the good. The Rawlsian approach became characterised as rights-oriented liberalism and this approach is contested in the writings of Alasdair MacIntyre (MacIntyre 1981), (MacIntyre 1988), Charles Taylor (Taylor 1985), (Taylor 1989), Michael Walzer (Walzer 1983), and Michael Sandel (Sandel 1998). These challenges are sometimes described as the ‘communitarian’ critique of liberalism. In various ways, those who have criticized the priority of right have contested the notion that we can make sense of our moral and political obligations in wholly voluntarist or contractual terms.

In *TOJ* (Rawls 2009, 563), Rawls links the priority of the right to a voluntarist or broadly Kantian notion of the person. He says that the parties in the original position regard moral personality and not the capacity for pleasure and pain as the fundamental aspect of the self. They do not know what final aims persons have, and all dominant-end conceptions are rejected. Thus, according to this conception we are

not simply defined as the sum of our desires, as utilitarians assume, nor are we beings whose perfection consists in realizing certain purposes or ends given by nature, as Aristotle held (Aristotle 2012 [350 BC]). Rather, Rawls says, we are free and independent selves, unbound by antecedent moral ties, capable of choosing our ends for ourselves. As Sandel puts the point:

This is the conception of the person that finds expression in the ideal of the state as a neutral framework. This conception of the person, and its link to the case for the priority of the right, finds expression throughout *A Theory of Justice*. Its most explicit statement comes toward the end of the book, in Rawls's account of the 'good of justice'. There Rawls argues, following Kant, that teleological doctrines are 'radically misconceived' because they relate the right and the good in the wrong way (Sandel 1998, 3675).

Those philosophers who dispute the priority of the right take issue with Rawls's conception of the person as a 'free and independent self, unencumbered by prior moral ties.' They argue that a conception of the self, given prior to its aims and attachments could not explain certain important aspects of our moral and political experience. Certain moral and political obligations that we commonly recognize – obligations of solidarity, for example, or religious duties – may claim us for reasons unrelated to an actual choice freely made.

The full extent of the withdrawal of the claims of the project now becomes more evident. Not only is the priority of the right no longer a general moral norm, it now only applies to questions of the good relating to the 'basic structure,' that being essentially the constitution of a democratic regime. It thus seems the right is prior to the good only for the purposes of the constitution of the just society. In *Political Liberalism*, Rawls now argues that the case for liberalism is political, not philosophical or metaphysical (Rawls 2011, 27). Sandel (Sandel 1998, 3713) argues that this means that the priority of the right over the good is not merely the application to politics of Kantian moral philosophy, but frames a practical response to

the well-known fact that people in modern democratic societies typically disagree about the good. He says that:

Political liberalism assumes that, for political purposes, a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime (Rawls 2011, 172). Since people's moral and religious convictions are unlikely ever to converge, it would thus be more reasonable to seek agreement on principles of justice that are neutral with respect to such controversies.

That is fundamentally the origin of Rawls's revision of *TOJ* in the lectures that comprise *Political Liberalism*. Central to Rawls's revised view is the distinction he now makes between political liberalism and liberalism as part of a comprehensive moral doctrine. Comprehensive liberalism affirms liberal political arrangements in the name of certain moral ideals, such as autonomy, individuality, or self-reliance. Unlike comprehensive liberalism, political liberalism remains neutral in the moral and religious controversies that arise from comprehensive doctrines to maintain impartiality. Political liberalism, for instance, does not take a general position on, what Rawls holds out to be the three basic questions of moral epistemology and psychology (Rawls 2011, 329):

- Is the knowledge or awareness of how we are to act directly accessible only to some, or to a few (the clergy, say), or is it accessible to every person who is normally reasonable and conscientious?
- Again, is the moral order required of us derived from an external source, say from an order of values in God's intellect, or does it arise in some way from human nature itself (either from reason or feeling or from a union of both), together with the requirements of our living together in society?
- Finally, must we be persuaded or compelled to bring ourselves in line with the requirements of our duties and obligations by some external motivation, say, by divine sanctions or by those of the state; or are we

so constituted that we have in our nature sufficient motives to lead us to act as we ought without the need of external threats and inducements?

Rawls states that both Hume and Kant accept the second alternative in each of these three questions, but political liberalism takes no position. This is because it leaves each of the three questions to be answered in their own way by different comprehensive doctrines, and in doing so it brackets out our comprehensive moral and religious ideas from our political ones.

Sandel argues that political liberalism's insistence on bracketing our comprehensive moral and religious ideals for political purposes, and separating our political identities as citizens from our personal identities is not justifiable. Although one may grant the importance of securing social cooperation based on mutual respect, what is to ensure that this interest is always so important as to outweigh any competing interest that could arise from within a comprehensive moral or religious view?

One way, Sandel suggests, of ensuring the priority of the political conception of justice (and hence the priority of the right) is to deny that any of the moral or religious conceptions it brackets could be true. This is a position Rawls disavows throughout, in that he emphasizes that political liberalism does not depend on scepticism about the claims of comprehensive moral and religious doctrines. So, Sandel asks, if we allow that one or some such doctrines could be true, how can we ensure that none will ever generate values sufficiently compelling to morally outweigh the political values of toleration, fairness, and social cooperation based on mutual respect? Thus, Sandel argues that Rawls's rejection of the possibility of founding the right on the good is unjustified.

Rawls (Rawls 2011, 146 & 155) maintains that "political values normally outweigh whatever non-political values conflict with them," but Sandel demonstrates his point convincingly through two real-world examples – the contemporary debate over abortion rights, and the famous historical debate over popular sovereignty and slavery, between Abraham Lincoln and Stephen Douglas.

The debate about abortion rights cannot be merely bracketed out of political life, Sandel says. A political liberal might reply that the political values of toleration and the principle of equal liberty for all are sufficient grounds for concluding that women should be free to choose for themselves whether to have an abortion or not; government should not take sides in the moral and religious controversy over when human life begins.

But if the Catholic Church is right about the moral status of the foetus, and abortion is tantamount to murder, then there is no reason why the other considerations, important as they might be, should prevail. Sandel (Sandel 1998, 3869) argues that the political liberal's case for the priority of political values must then become an instance of just-war theory; he or she would have to show why these values should prevail even at the cost of some 1.5 million civilian deaths each year in the US. There is no real opportunity for neutrality; the comprehensive moral and religious doctrines must be engaged. For if abortion is not outlawed and is legal, then it is not neutral to do nothing – formal neutrality prefers the abortionist case. On the other hand, if abortion is already unlawful, then to do nothing is to prefer the anti-abortion case. Some response to the debate appears to be an inescapable requirement under all circumstances.

Thus, political liberalism finds itself in an impossible position. It cannot remain neutral in the debate and at the same time it cannot take up a position against any one of the comprehensive doctrines, because it defines itself as not being a comprehensive doctrine. Thus, the argument that political liberalism can be confined to the strictly political without engaging in any moral debate that originates elsewhere outside the political appears to be no more than a chimera.

But an even clearer case for the overriding of political values by moral considerations is the 1858 Lincoln-Douglas debate. Sandel relates the debate as follows:

Douglas' argument for the doctrine of popular sovereignty is perhaps the most famous case in American history for bracketing a controversial moral question for the sake of political agreement. Since people were

bound to disagree about the morality of slavery, Douglas argued, national policy should be neutral on that question. (Sandel 1998, 3883).

The doctrine of popular sovereignty Douglas defended did not judge slavery right or wrong, but left the people of each territory free to make their own judgments. The only hope of holding the country together, Douglas argued, was to agree to disagree, thereby bracketing the moral controversy over slavery and respecting “the right of each state and each territory to decide these questions for themselves” (Angle 1958, 374)

Lincoln and the Republican party viewed slavery as morally wrong and insisted that it ‘be treated as a wrong.’ One way of treating it as a wrong was to “make provision that it shall grow no larger” (Ibid 390). The debate between Lincoln and Douglas was primarily not about the morality of slavery, although that was the moral question underlying the debate. But Douglas’ view about slavery as such did not really play a role in the debate. The actual debate was about whether to bracket the moral controversy for the sake of political agreement.

Lincoln’s words (Ibid p.388-9), which are almost as much of a reply to Rawls as they were to Douglas, were: “I say, where is the philosophy or the statesmanship based on the assumption that we are to quit talking about it (the immorality of slavery), and that the public mind is all at once to cease being agitated by it? Yet this is the policy ... that Douglas is advocating – that we are to care nothing about it! I ask you if it is not a false philosophy? Is it not a false statesmanship that undertakes to build up a system of policy upon the basis of caring nothing about the very thing that everybody does care the most about?”

Sandel comments that to the extent that political liberalism refuses to invoke comprehensive moral ideals and relies instead on notions of citizenship implicit in the political culture, it would have had a hard time explaining in 1858 why Lincoln was right and Douglas was wrong (Sandel 1998, Loc. 3938). He says the modern abortion and 1858 Lincoln–Douglas debates illustrate the way that a political conception of justice must presuppose some answer to the moral questions it purports to bracket. I agree with Sandel that in cases such as these, the priority of

the right over the good cannot be sustained, insofar as it requires neutrality on fundamental moral questions.

But Sandel points to a further difficulty. The original reason for asserting the priority of the right over the good is based on the Kantian conception of the person. The right must be prior to the good because the self is prior to its ends. But, for political liberalism, the asymmetry between the right and the good is based not on a Kantian conception of the person but instead on a certain feature of modern democratic societies. Rawls describes this feature as the “fact of reasonable pluralism” (Rawls 2011, 289). For political liberalism, then, the priority of the right is based on the ‘fact of reasonable pluralism’ about the good.

Sandel however argues that this is insufficient to sustain the position. There is no reason in principle why there will not be similar disagreements about justice. The ‘fact of reasonable pluralism’ about morality and religion creates an asymmetry between the right and the good only when coupled with the assumption that there is no comparable ‘fact of reasonable pluralism’ about justice. Yet, as we have seen Sandel argue, there is no basis for such an assumption.

At the heart of political liberalism’s claim for the priority of the right over the good, Sandel argues, is the question that if moral argument or reflection of the kind Rawls deploys enables us to conclude, despite the persistence of conflicting views, that some principles of justice are more reasonable than others, what guarantees that reflection of a similar kind is not possible in the case of moral and religious controversy? If we can reason about controversial principles of distributive justice by seeking a reflective equilibrium, why can we not reason in the same way about conceptions of the good? If it can be shown that some conceptions of the good are more reasonable than others, then the persistence of disagreement would not necessarily amount to a ‘fact of reasonable pluralism’ that requires government to be neutral. If it is possible to reason about the good as well as the right, then Rawlsian political liberalism’s claim for the asymmetry between the right and good is undermined.

In conclusion, it seems that the priority of the right, although it is fundamental to justice as fairness, becomes a problematic issue in political liberalism that detracts from the value of that project as a proper account of social justice. The idea of justice appears inextricably intertwined with that of morality, and morality and politics cannot be separated (Bellah 1995/1996). The whole idea of seeking consensual agreement on justice is beset with complications (Knight 1998).

The EP approach concerned with the morality of justice and does not require neutrality on moral issues in society. It is essentially a teleological theory that does not raise the issue of the priority of the right, although it does deal with how the right and the good are related to each other. It will be argued that it also does not fall foul of Rawls's general criticism of teleological theories, but these are matters that I will deal with in detail in later chapters.

4. *Reflective Equilibrium*

Rawls's idea of a well-ordered society was discussed in Chapter 1. In this section, I shall look at the critique brought against the Rawlsian idea of a well-ordered society, especially as argued by Jürgen Habermas (Habermas 2015).

Habermas takes issue with Rawls on the 'self-stabilisation' (stabilisation based on the socialising force of life under just institutions) of a well-ordered society. He reminds us (Habermas 2015, 1714 ff.) that in section 86 of *TOJ* (Rawls 2009, 567 ff.) Rawls takes pains to demonstrate the "congruence of the right and the good." But we must keep in mind that the parties that agree on "reasonable principles" in the original position are artificial entities, that is, constructs; they must not be identified with flesh-and-blood citizens who would live under the real conditions of a society erected on principles of justice. They also are not identical with the reasonable citizens presupposed in the theory, whom one also expects to act morally and thus to subordinate their personal interests to the obligations of a loyal citizen. While their sense of justice may ground the desire to act justly, this is not, Habermas argues, an automatically effective motivation like, for example, the desire to avoid pain.

Habermas then argues that it is for this reason that Rawls is constrained to rely on a “thin theory of the good”⁵ to show that just institutions would create circumstances under which it would be in each citizen’s well-considered interest to pursue his own freely chosen life plans under the same conditions that allow others to do likewise. This means that, in a well-ordered society, it would always be good for every individual to satisfy the requirements of justice. In Hegel’s words, the individual’s morality (*Moralität*) would find its ethical (*sittliche*) context in the institutions of a just society. Rawls’s theory of the self-stabilization of a well-ordered society is therefore based not on the coercive force of law but on the socializing force of a life under just institutions, for such a life simultaneously develops and reinforces the citizens’ disposition in favour of justice.

Habermas proceeds by saying that there is a contestable assumption underlying the self-stabilisation theory. The underlying assumption of the theory is that the well-ordered society with its just institutions already exists. It is a different matter, he suggests, when one has an imperfect society which you want to transform into a just one. At this second stage, we face “rather the question of how the normative concept of a well-ordered society can be situated in the context of an existing political culture and public sphere in such a way that it will in fact meet with approval on the part of citizens willing to reach an understanding” (Habermas 2015, 1755-1757). In other words, we need to be able to convince citizens that have not been conditioned by living within a just society to accept the precepts of the just society. Habermas states that it is at this point in what he refers to as the “second stage of argumentation” about the theory where Rawls’s concept of “reflective equilibrium” becomes ambiguous.

Reflective equilibrium, he states, designates a method that is already supposed to work at the stage of theory construction. In theory construction, reflective equilibrium works, according to Habermas, as is characteristic of

⁵ In *TOJ* (Rawls 2009, 395) Rawls argues that to establish the principles of the right, it is necessary to rely on some notion of the good, which is a full theory of the good stripped to its bare essentials, which he refers to as the thin theory of the good. The goods in the thin theory would include liberty, opportunity, and a sense of our own worth (p.398).

reconstructive theories in general: “one draws on a sample of exemplary expressions with the purpose of explicating the intuitive knowledge that subjects use to generate these expressions” (Habermas 2015, 1760-1761).⁶

But applying reflective equilibrium in the second stage, as Rawls does, where the theory of justice and the context of the society within which it is to be embedded are reflexively situated, reflective equilibrium assumes a different, and ambiguous role. In this context, its purpose would be to explain how and why the theory’s theoretical propositions merely articulate the normative substance of the most trustworthy intuitions of our everyday political practice, as well as the substance of the best traditions of our political culture, the normative substance of the most trustworthy intuitions of our everyday political practice, as well as the substance of the best traditions of our political culture. Reflective equilibrium is supposed to demonstrate to the citizens of the society to be transformed that the principles of justice as fairness reflect only the most reasonable convictions actually held by the population. This generally accords with what Rawls himself argues when he says that “The aim of political philosophy, when it presents itself in the public culture of a democratic society, is to articulate and to make explicit those shared notions and principles thought to be already latent in common sense; or, as is often the case, if common sense is hesitant and uncertain, to propose to it certain conceptions and principles congenial to its most essential convictions and historical traditions” (Rawls 1980, p.518).

“Reflective equilibrium” is Rawls’s appeal to our best normative intuitions: in the first case, he uses it in the context of justifying his theory before philosophical experts, and in the second case, he uses it in the context of a public defence of, and the political advocacy for, the theory before citizens of an actual community. In the latter context however, if the citizens are already living in a liberal democratic polity, then appealing to the normative substance of the most trustworthy intuitions of their

⁶ Note again throughout what follows, the reliance on intuition, which is an important matter I shall deal with in chapter 3.

everyday political practice, as well as the substance of the best traditions of their political culture, might be sufficiently persuasive to allow them to accept the theory. But this argument lacks any element of universality. It seems merely to underwrite what people in modern democracies already fundamentally embrace, except to say that

In a pluralistic society, the theory of justice can expect to be accepted by citizens only if it limits itself to a conception that is post metaphysical in the strict sense, that is, only if it avoids taking sides in the contest of competing forms of life and worldviews. In many theoretical questions, and all the more so in practical questions, the public use of reason does not lead to a rationally motivated agreement (*Einverständnis*) (Habermas 2015, 1788-1791).

Habermas is really saying that in a society where there is a plurality of mutually incompatible comprehensive doctrines, reflective equilibrium will not achieve universal acceptance unless it remains neutral on moral issues that arise from such incompatible comprehensive doctrines. This obviously parallels the discussion in the previous section, and Habermas appears also to doubt the efficacy of reflective equilibrium as a practical means of achieving a rationally motivated agreement between citizens of an existing democracy.

The ambiguity of the two stages of Rawls's application of reflective equilibrium, namely the process of theory development and that of embedding the theory in a particular society, remains problematic. This leads Ronald Dworkin to search for less contingent ways of embedding normative theories. He wants to avoid having the effectiveness of liberal principles depend on latent potential understandings that can be awakened in people from traditions they just happen to inherit from societies they happen to be born in. He argues that

A political conception of justice, constructed to be independent of and neutral among different ethical positions people in the community hold, is perhaps more likely to prove acceptable to everyone in the community than any conception that is not neutral in this way. If we

were statesmen intent on securing the widest possible agreement for some political theory, which could then serve as the basis of a truly and widely consensual government, we might well champion a political conception for that reason.... But we need more from a theory of justice than consensual promise; we need categorical force. Liberals insist that political decisions be made on liberal principles now, even before liberal principles come to be embraced by everyone, if they ever will be (Dworkin 1990, 17).

The essence of Habermas's criticism comes down to the fact that Rawls tries to justify his theory through agreement rather than some morally powerful necessity, both in the first instance of theory development and in the second instance of embedding it in a specific society.

My own impression is that Rawls relies totally on an underlying latent human intuition that implicitly accords with liberal principles. Nowhere does he discuss or even suggest where this intuition might originate, but he nevertheless employs it both explicitly and by implication.

The EP approach specifically investigates the possible origins and content of normative intuitions. It tries to answer the questions that arise as to how these intuitions might have become embedded in the human psyche and what role they might thus have played in human survival that allowed for the evolutionarily selection of such traits. But Rawls's reliance on some underlying basic human intuition and understanding regarding justice goes deep into his project.

In the original position, according to Rawls, the parties, situated as they are without regard to any personal agendas and so on, unanimously agree on the two principles of justice as fairness. There is a necessary underlying assumption to arrive at such a conclusion; the assumption must be that there is an inherent human understanding of justice that we would all realise if only we were shorn of our personal predilections, ideas of the good life and personal interests. These are what is hidden by the veil of ignorance. Once rid of those notions and distractions, and aided by the process of "reflective equilibrium" we will all discover deep within

ourselves the recognition of the principles of justice for what they are. We will discover that the principles of justice as fairness are in fact those which we already believe in and intuitively know to be true. This unspoken, unexplored supposition is so fundamental to Rawls that it is striking that he in no way enquires into it. This is where I believe the strength of the EP approach will become apparent.

Similarly, when we are faced with embedding the theory of justice in a particular society, Rawls uses the device of reflective equilibrium to get past the specifics of their reasonable pluralism to lay bare the arena of an “overlapping consensus,” which again Rawls must presume to exist, because it is not demonstrated that there will always be such a consensus, even in an existing democratic society, and how great that arena might be. But Rawls accepts it, and can do so only based on a presumption of an underlying human understanding of the basic principles of justice congruent with the two principles of justice as fairness.

Habermas seems to be arguing for a practical and empirical process of constitution making. He argues for a process where a normative theory is enlisted for reconstructing the development of the constitutional state in real societies, which theories can then play a role in the critical description of how actual political processes should be structured. Habermas thus can be said to take a practical route to the possible transformation of a society, while Rawls, despite some claims to the contrary, remains aloof of the actual problems posed by finding agreement in a socially realistic situation.

As also discussed in Chapter 1, Rawls thus uses the device of reflective equilibrium to explain how it comes about that the two principles of justice as fairness are selected by the parties in the original position. Habermas agrees that this a perfectly suitable device for theory building, but it becomes ambiguous when Rawls tries to use it as a way to find acceptance for the two principles in an existing society that is to be transformed. Habermas argues that this has no real prospect of success.

Furthermore, Habermas argues that in order to have some prospect of success, the theory would have to maintain a neutral position regarding the other

moral doctrines in society. This brings us back to the discussion in the previous section to the effect that such neutrality is neither always possible nor always desirable. This is also the essence of Dworkin's critique to the effect that liberalism requires a moral platform to contest social issues.

The EP approach does not rely on convincing parties, or citizens, to come to any agreement. Instead it relies on the notions of justice embedded in the human psyche during the common human experience during the Pleistocene period. In chapters 3 and 4 I will develop this theme more fully, but suffice it to say at this juncture that reflective equilibrium and other devices of gaining public agreement plays no role. It will be attempted to show that despite much human contradictory behaviour, there lies a substrate of commonly understood notions of social justice in each of us. These notions can be appealed to in a society to embed a just institutional order.

5. Conclusion

I am not persuaded by Hayek's argument that the idea of social justice is a dangerous chimera. Although he is hard pressed to find enough words and expressions to totally condemn the idea of social justice, he is not that far removed in fact from the position of Rawls. I am persuaded by Lister's argument that Hayek is in fact a closet Rawlsian/egalitarian liberal, despite his inegalitarian conclusions. There is nothing in his arguments to persuade me that the conclusions I draw from the EP approach are contestable on any grounds that he has presented.

The communitarian debate, as exemplified by Sandel is another matter. I am persuaded by Sandel that to insist upon the right being prior to the good and founding the Liberal state as a morally neutral entity in society cannot be considered desirable. There are undoubtedly moral norms that impact on politics and that makes neutrality sometimes impossible and at other times reprehensible, such as when no action is taken on the grounds of state neutrality on questions as fundamental as slavery, or the treatment of women as prescribed by some comprehensive moral doctrine, or religion.

In my present purpose, then, I shall be inclined to favour the stance of Rorty (Rorty, 1988 – see above) who insists that liberalism should not be committed to a philosophical account of the human self, but only to a historic-sociological description of the way we live now (Ibid. p.265). Rorty endorses a pragmatic approach, and denies that liberal political arrangements require a philosophical justification, or ‘extra-political grounding’ in a theory of the human subject. I can only add that I shall ground my arguments not only on historic-sociological considerations, but primarily on the principles of scientific evolutionary psychological and anthropological findings. Instead of a philosophical account of the human self, I shall attempt to found the theory on an evolutionary science-based account of humans as we find them; humans as they are.

I am also persuaded by Habermas that there are serious criticisms to be made of the Rawlsian theory as far as the well-ordered society is concerned, especially after his retreat from universality. It appears that the whole issue of reflective equilibrium is complicated for Rawls by the necessity of achieving consensus in two stages: at the outset in the original position and then later, in seeking to embed his theory in an existing society.

In my project, I intend also to define how a well-ordered society should in essence be structured. In this case it will not be complicated by consensus seeking but will be based on the principles of our evolutionarily embedded principles of justice.

In the next chapter, a start will be attempted on the development of the evolution based theory of justice.

CHAPTER 3

The Evolutionary Psychology Approach

'The hard truth is this: There is no moral meaning hidden in the bowels of the universe. ...'

Bruce Ackerman, 1980

How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it.

Adam Smith, 1759, The Theory of Moral Sentiments.

Introduction

My topic in this chapter is that of social justice, approached from the evolutionary psychology point of view. Evolutionary psychology is an *approach* to psychology, in which knowledge and principles from evolutionary biology are used in research on the structure of the human mind. It is not an area of study, like vision, reasoning, or social behaviour. It is a *way of thinking* about psychology that can be applied to any topic within it (Cosmides 2006, 1).

By social justice I mean justice as embedded within the broadly defined human society and as it is expressed to a greater or lesser extent within civil societies through their institutions. In this chapter I hope to show that the common human evolutionary experience that moulded our norms, our values and our psychological predispositions, offers valuable insights that lead to a theory of distributive social justice and its principles that better explain, accommodate and give effect to the intuitive human understanding of social justice.

Before I can deal with substantially developing the theory, there are some preliminary matters that require attention and some elucidation. I therefore begin by shortly discussing the scientific literature basis of the theory I propose to develop,

before I then deal with the evolutionary psychology approach I take in this study. Thereafter I deal with the idea of gene-culture evolution, which forms an important and fundamental element in the development of my project. Given the nature of the argument I shall put forward, it is necessary for me to deal also with an important possible objection to my project, stemming from the naturalistic fallacy. After dealing with the naturalistic fallacy, I then carry on with the discussion that hopefully leads to a preliminary theory of justice approached from the evolutionary psychology perspective.

I propose to deal with the topic by firstly, setting out the hypothesis that underlies my project. I shall then attempt to break down the broad topic into sub-topics to examine and discuss the concepts and ideas that are indispensable to support or falsify the hypothesis. I therefore propose to look at what precisely the hypothesis implies for a view of justice and society, and, given the hypothesis answer the question of what the subject of justice would be.

After that I propose to discuss, referring to the relevant research and scientific studies, the normative behaviours and beliefs that humans generally accept as being just, specifically regarding distributional justice. This leads on to the question of what the basic human disposition is, whether it is egalitarian, or a socially dominant one, or perhaps some combination of the two, to discover whether humans have an inherent bias to prefer certain kinds of distributions to others, and if so, what. To support these results, I shall examine some of the studies of early humans that might explain why, and how, it came about that we have the preferences that we do.

My ultimate purpose then is to discover and formulate a theory of distributive justice that is grounded on an EP view of the human psyche. On this basis, I then put forward a tentative expression of the principles that derive from this theory.

1. *The Scientific Literature Basis*

The scientific studies that found my hypothesis and the preliminary theory that I present in this chapter are associated with gene-culture coevolution as proposed by Lumsden and Wilson (Lumsden, 1981), which is currently a sub-discipline within the

wider subject of evolutionary biology. Gene-culture coevolution studies the close interaction between genetic evolution and the evolution of culture, and how that complex gives rise to human norms and values.

In the 1970s many early researchers started working on the parallels between genetic and cultural evolution, initiating the mathematical modelling of gene-culture coevolution. I broadly follow the works of, *inter alia*, Edward O. Wilson, Charles Lumsden, Robert Boyd, Peter Richerson, Christopher Boehm, Luigi Cavalli-Sforza and Marcus Feldman and indeed of Charles Darwin himself, all of whom recognise the intimate evolutionary interactions between genes and human culture.

However, all the authors in evolutionary psychology do not necessarily support the concept gene-culture coevolution. Two of these are Richard Dawkins and Steven Pinker. These, and other academics come from a wide variety of disciplines as divergent as biology, anthropology, zoology, ecology, genetics, psychology, economics and mathematics. There is today a plethora of research that has been done on the subject and it is a field of very active research.

I am aware of detractors of the discipline of evolutionary psychology as well, as will more fully appear from the next section.

2. The Evolutionary Psychology Orientation

I find it necessary at the start of this chapter to give a succinct, but hopefully sufficient explanation of what I understand the EP orientation to be and why, given the controversies that have often surrounded it, I have selected it as the basis for the development of a theory of social justice.

The fundamental basis for EP is laid down by Darwin (Darwin 2015 [1859]) in his theory of natural selection, when he suggests that evolutionary theory can be applied to psychology:

In the future I see open fields for far more important researches.
Psychology will be securely based on the foundation already well
laid by Mr. Herbert Spencer, that of the necessary acquirement of

each mental power and capacity by gradation. Much light will be thrown on the origin of man and his history (Darwin 2015 [1859], 8280-8282).

Darwin's basic biological argument is well known, to the effect that if variant traits that aid an organism's survival and reproduction are inherited by offspring from their parents, then such traits would be transmitted to future generations at greater rates than the alternatives. This would result in such traits becoming more numerous, possibly to the point of universality, in the gene pool. The Darwinian model of speciation via natural selection has proved to be the single most powerful conceptual framework in biological sciences (Carey 2011, 98). These principles have historically been applied to anatomy and physiology, but there is now widespread acknowledgement that they are also powerful explicators of the origins of psychological, strategic and behavioural adaptations in non-human animals as well as in humans (Alcock 2005), and (Buss 2005).

From these considerations, a very important EP claim is made: the existence of a universal (species-specific) human nature. This claim is presently under scrutiny from developmental psychologists and neuroscientists who stress the malleability of the human brain, emphasizing how experience tunes and regulates synaptic connectivity, neural circuitry and gene expression, leading to remarkable plasticity in the brain's structural and functional organization (Bolhuis 2011).

Emphasis is being placed on organisms as constructors of their environments. There is thus a complex interaction between genetically inherited information, epigenetic⁷ influences, and learning in response to constructed features of the physical and social environment. Gene-culture coevolution may well turn out to be the characteristic pattern of evolutionary change in humans over recent time spans.

These developments seemingly do not nullify the basis of universality, but allow for an explanatory basis for the great human cultural diversity on top of a universal base. Gene-culture dynamics are typically faster and stronger and operate

⁷ relating to or arising from non-genetic influences on gene expression.

over a broader range of conditions than conventional biological evolutionary dynamics (Bolhuis 2011, 4).

These developments brought evolutionary psychology into contestation with the basic tenets of what is known as the Standard Social Science Model (SSSM). Cosmides and Tooby (Cosmides 2006) describe the SSSM as originating both before and after Darwin. They say that, in terms of that model it was, and still is, a widely-held view among some philosophers and scientists that the human mind resembles a blank slate, virtually free of content until written on by the hand of experience. British Empiricists and their successors produced elaborate theories about how experience, refracted through a small handful of innate mental procedures, inscribed content onto the mental slate.

The SSSM view also seems often to be accompanied by some form of genetic determinism, such as demonstrated by Steven Rose and Stephen Jay Gould - quoted by Radcliffe-Richards (Radcliffe-Richards 2000, 104). Both are said to argue that if we are genetically predisposed to behave in certain ways, then:

- 2.1. It is inescapable for us to end up behaving in the way our genes predispose us to, and
- 2.2. Our predisposition cannot be changed in any way, and
- 2.3. We cannot be blamed for acting the way we do.

These claims are not made by EP. EP's answer to genetic determinism is best given by Richard Dawkins (Dawkins 2006, 5154):

In fact, genes 'determine' behaviour only in a statistical sense (see also pp. 37–40). A good analogy is the widely conceded generalization that 'A red sky at night is the shepherd's delight'. It may be a statistical fact that a good, red sunset portends a fine day on the morrow, but we would not bet a large sum on it.

Just like the weather, people's behaviour is influenced by a multitude of factors which make a prediction of the outcome somewhat problematic. As Dawkins puts it in another work (Dawkins 1982, 9-32), there would be general agreement that

“human nervous systems are so complex that in practice we can forget about determinism and behave as if we had free will” – this is essentially the same conclusion Dennett (Dennett 2003) comes to when he argues that even if our decisions come down to the interactions between highly complex sets of particles, that would not justify us in throwing out the idea of free will.

Radcliffe-Richards summarises the debate within Darwinism as between the SSSM “blank slate” approach and the EP “gene-machine” approach. She contends that the debate is driven by a fear of the real danger, namely that the Darwinian explanation might spread further than biology, beyond the range of organic evolution. Although virtually all scientists today accept that Darwinism can give a complete account of what we are biologically, the disagreement is about the extent to which a Darwinian understanding of our evolution can provide insight into the details of our character, motivations, beliefs, and values, as is claimed by researchers in EP (Radcliffe-Richards 2000, 51).

This debate cannot be resolved in the present project, nor do I intend to attempt it. I do not intend either defending or attempting to develop the discipline of evolutionary psychology. But I do intend to make use of, and base the present project on the generally accepted findings (within the discipline) and arguments of EP. This decision obviously involves me in making a choice between the SSSM blank slate and EP gene-machine versions of Darwinism, in which I choose the latter.

My choice is predicated not merely on an intellectual predilection for understanding the human condition on the EP approach, but rather on the real consideration that if one accepts that human evolutionary history does not provide insight into the details of our character, beliefs and values, then the blank slate, SSSM version does not have any possible insights to offer into our notion of justice.

3. *Gene-Culture Coevolution*

Culture can be understood as non-genetically transferred information, or as Chudek and Henrich define it, information stored in people’s brains, nervous systems

or bodies that affects behaviour and got there through some social learning process, broadly defined (Chudek 2011, 219). The question thus arises whether there is any cross-pollination between culture and genes. For one thing, if the Kantian cognitive framework were to hold to some extent, one would expect to find at least some innate culture-associated capacities; a framework for absorbing, understanding and cultivating culture. Boyd and Richerson (Boyd 2005) contend exactly that.

There is an inevitable feedback, they say, between the nature of human psychology and the kind of social information that this psychology is designed to process. They state that the equipment in human brains, the hormone-producing glands, and the nature of our bodies play a fundamental role in how we learn and why we prefer some ideas to others. They argue that culture-making brains are the product of more than two million years of more or less gradual increases in brain size and mounting cultural complexity (Richerson 2005, 134-194). During this period, evolving culture must have increased the reproductive success of our ancestors; otherwise, the features of our brain that make our highly-developed culture possible would not have evolved.

It thus appears evident that there is an active feedback loop between cultural development and genetic biology in humans. For example, the suggestion by Fredrick Simoons in the late 1960's and early 1970's (Simoons 1969), (Simoons 1973) proposed that that the ability of adult humans to digest lactose evolved in response to a history of dairy farming, was explored by Feldman and Cavalli-Sforza in 1989. They found a clear coevolutionary link between dairy farming and genes for lactose absorption (Feldman 1989). Simoons's hypothesis was controversial at the time, but subsequent genetic data confirm that adult lactose digestion is controlled by a single dominant gene, and careful statistical work indicates that a history of dairying is the best predictor of a high frequency of this gene (Richerson 2005).

One can therefore conclude that culture and genes coevolve. Culture creates long-lasting changes in the living environment of humans. Genes thus evolve in an environment that is culturally constructed, i.e. dairy farming, hunting with projectiles, cooking food, *et cetera*. If this environment is stable for thousands of human

generations, such as in the case of the Human Egalitarian Syndrome (described by Boehm), it generates selection on genes (Boyd 2005, 4), and (Boehm 1997).

Feldman and Cavalli-Sforza began the mathematical modelling of gene-culture interactions as far back as 1981 when they introduced a simple dynamic model of cultural transmission into the nature-nurture debate (Cavalli-Sforza 1981). Although mathematical modelling that explores the relationship between biological and social processes in humans, making predictions about the behaviour of individuals or the patterns of society, typically tended to evoke strong reactions among scientists, not all reactions were negative by any means. Nevertheless, a significant number of the anthropological community were suspicious, and sometimes downright hostile to the idea.

Fundamentally the objections seemed to fall more in the political plane than in the scientific. Although some contend that the subject is too complex for mathematical treatment, the negative impetus came mainly from suspicions of the motives and objectivity of those scientists conducting the modelling: such models may be abused to confirm or hide prejudice; the work may have been conducted without the required scientific rigor, or done in ignorance of valid anthropological data (Laland 1995).

But the scientific method surely allows any methodology to be proven flawed, any theory to be falsified and all results open to review. It is difficult to see under those circumstances why detractors were not able to channel their objections into such avenues. The matter seems to be much less contentious today with modern gene-culture coevolutionary theory using mathematical modelling being generally recognised as a useful and valid tool for the human sciences. Gene-culture coevolution does not, as part of its intrinsic structure, assume that genetic factors determine human behaviour directly (Laland 1995, 22). Dawkins states quite unambiguously that genes in fact 'determine' behaviour only in a statistical sense as quoted above (Dawkins 2006).

Boyd and Richerson make the argument that much of cultural variation can be understood as products of human evolutionary history. It is essential to note that cultural adaptation in humans is cumulative:

Humans learn things from others, improve those things, transmit them to the next generation, where they are improved again, and so on, leading to the rapid cultural evolution of superbly designed adaptations to particular environments (Boyd 2005, 4).

Very importantly, thus, individuals do not merely passively receive their culture, they actively interact with it, amending, changing and developing it. At the same time, this process leaves the door open for the development of maladaptive ideas and practices. All cultural evolution is therefore not prosocial, especially where in hierarchical societies, unequal power relations tend to develop (Narvaez 2014). Maladaptive ideas tend equally to accumulate and can lead to societies where maladaptive ideas and practices, such as slavery, genocidal violence, racial and religious bigotry, prevail.

Although the term “coevolution” was coined to refer to systems in which two species are important parts of each other's environments leading to evolutionary changes in one species inducing evolutionary modifications in the other, the term has been extended by analogy. In the case of human gene-culture coevolution there obviously aren't any two species involved, but the twin pools of cultural and genetic information carried by human populations are intimately connected and involved with each other. The one cannot but affect the other. Genetic evolution created a psychology that allows the cumulative cultural evolution of complex cultural adaptations. In some environments, this process led to the cultural evolution of dairying traditions, which in turn led to the selection of the gene that allows whole-milk lactose consumption by adults, in the example above.

Culture affects the success and survival of individuals and groups; as a result, some cultural variants spread and others diminish, leading to evolutionary processes that are every bit as real and important as those that shape genetic variation. In answering the fundamental questions of how humans came to be the way they are,

culture has to be given its proper role, since “culture is part of human biology” (Boyd 2005, 4).

Richerson and Boyd (Richerson 2005) conclude that culture is neither nature nor nurture, but some of both. It combines inheritance and learning in a way that cannot be parsed into genes or environment, while genetically evolved psychological biases steer cultural evolution in genetic fitness-enhancing directions. Culturally evolved traits, they say, affect the relative fitness of different genotypes in many ways, in support of which they quote three examples:

- Culturally evolved technology can affect the evolution of morphology. For example, modern humans are much less robust than earlier hominid species. Paleoanthropologists have argued that this change was due to the cultural evolution of effective projectile hunting weapons. Before projectile weapons, robust genotypes were favoured because people killed large animals at close range, but once they could be killed at distance, selection favoured a less robust (and less expensive) physique.
- The availability of valuable culturally evolved information may lead to selection for enhanced capacities for acquiring and using that information. Language provides the canonical example. There is no doubt that the human vocal tract and auditory systems have been modified to enhance our ability to produce and decode spoken language, and we seem to have special-purpose psychological machinery for learning the meaning of words and grammatical rules. Selection could not have produced these derived features in an environment without spoken language. The most plausible explanation is that simple culturally transmitted language arose first, and then selection favoured a special-purpose throat morphology to generate speech sounds and a special-purpose psychology for learning, decoding, and producing speech, which in turn gave rise to a richer, more-complex language, and led

to yet more modifications of the traits that allow language acquisition and production.

- Culturally evolved moral norms can affect fitness if norm violators are punished by others. Men who cannot control their antisocial impulses are exiled to the wilderness in small-scale societies and sentenced to prison in contemporary ones. Women who behave inappropriately in social circumstances are unlikely to find or keep husbands. "... we will argue," they say, "that coevolutionary forces have radically reshaped innate features of human social psychology" (Richerson 2005, 2684-2685).

Christopher Boehm proposes a similar hypothesis (Boehm 1997). He argues that the well-documented egalitarian social traditions of human forager groups drastically influenced and modified the Darwinian selection mechanics, at the phenotypical level. He states that these cultural traditions have the effect that the selection effects on individuals are vitiated while group effects are being amplified. Thus, the hypothesis is that the far-reaching political invention of hunter-gatherer egalitarianism fundamentally, and profoundly affected Darwinian selection mechanics (Boehm 1997, S101).

In particular, Boehm identifies three separate selection results on human phenotypes of what he terms the "egalitarian behavioural syndrome:"

- It dampened phenotypic variation of individuals within groups;
- it amplified phenotypic variation between members of groups;
- it enabled a moralistically watchful species to control the antisocial behaviours of individuals who carried genes for free riding.

The syndrome thus consists of three basic, culturally developed behavioural elements, namely the moralistic suppression of status rivalry, morally enforced consensual decision making, and the policing of free riders. These three cultural practices substantially empowered the genetic selection of traits making for altruism and cooperation. Of course, for such cultural practices to affect selection mechanics for the selection of behavioural traits at the level of genes, they would have to be in

place consistently for thousands of generations. This condition is met, since prehistoric humans maintained egalitarian behaviour consistently for many, probably hundreds, of millennia (see Mithen 1990, Knauft 1991, and Boehm 1999).

There is no reason to suppose that there is any difference between the genetic data held by members of the human species at the level of the genotype. But clearly, according to Boehm's analysis, there will be great phenotypical variation between individuals in different groups, but less variation between individuals of the same group. All this results from the political-cultural practice of in-group egalitarianism. This pattern of differentiation probably engendered group identity development that coincides with phenotypical and cultural features, perhaps to some extent explaining between-group antagonism. Chudek and Henrich take the matter even further when they write that

Converging lines of theoretical and empirical research indicate that culture has shaped the human genome by driving the evolution of both our brains and bodies along trajectories not available to less cultural species (Chudek 2011, 218).

The genetically induced conceptual machinery appears to be universal in the human population. But it is a different matter when we approach genetic data at the phenotypical level. Then the differences become obvious, such as the large phenotypical diversity of humankind, related perhaps in one way or another to rich cultural diversity such as the polyglot of languages, religions, customs and beliefs that people harbour. These differences would be the outcome of the different environments, challenges, obstacles and opportunities these groups faced during the long history of the extended groups and how they reacted to and came to terms with these matters.

4. *The Naturalistic Fallacy (NF)*

This refers to the putative rule that one cannot deduce an "ought" from an "is," or that normative and descriptive spheres must remain separated. The ban

essentially prohibits any attempt to deduce an evaluative conclusion from premises that are entirely non-evaluative (Williams 1985).

The term was coined by G. E. Moore, but David Hume is widely regarded as its originator. This understanding of Hume has even on occasion led to its being called “Hume’s Law”, but this may rest on a misinterpretation of Hume (MacIntyre 1959) (Binmore 2005). The value and correctness of NF has been the subject of much debate, and it is no longer met with the wide agreement that it once was (Barrett 1991), (Arnhart 1998), and (Tullberg 2001).

Although there has been much debate about what Hume meant, his main concern seems to be that no statements about plain matters of fact entail any evaluative claims. Could one say, for example, that because people are sometimes selfish, or angry, they ought sometimes to be selfish, or angry? The point is that it would be impossible to derive or justify the “ought” statement from the mere “is” statement about the facts of human selfishness or anger. Of course, the “ought” statement can be justified by expressing an implied evaluative premise to the effect that it is sometimes good to be selfish or to be angry. This premise could in turn be defended by giving reasons why there may be, under certain circumstances, good reasons to be selfish, or angry, for example when someone tries to take advantage of your good nature.⁸

However, in this section I do not want to concern myself with the general applicability or correctness of the fallacy. The issue of the NF only arises from the nature of this present project, which deals with the idea of justice from empirically developed (fact based) social science. The project is really conducted in two phases.

The first phase is that of analysis and discovery, which is the process in Chapter 3 and is directed at proving and analysing the first part of the hypothesis presented. The purpose in this chapter is to discover what the characteristics of

⁸ See the discussion of the is/ought and open question argument by Geoff Sayer-McCord in the Stanford Encyclopedia of Philosophy (McCord 2014, 8).

social behaviour and social conditions are that people desire and would generally describe as just. It is an attempt to assert that “justice” is not only a normative value, but can objectively be seen as a term used to describe a non-discrete set of actions, attitudes and conditions, which constitute facts of which we approve and therefore find desirable, and thus value. Chapter 3 then is an attempt to objectively view that which humans would generally value as “just.”

Consequently, the first part of the project is not one in normative ethics, which concerns questions such as what is good, or what is bad, how ought we to behave, or what the laws are that we ought to have. It is more a study in metaethics since it is concerned with what it means when we say something is socially just and whether such a “claim [corresponds] to facts about the world and how we know or manage to talk or think about such facts” (Schroeder 2015, 1). The resultant theory is thus not a normative theory as defined by Rosalind Hursthouse:

roughly, a normative theory is taken to be a set (possibly one membered in the case of utilitarianism) of general principles which provide a *decision procedure* for all questions about how to act morally (italicisation in the original) (Hursthouse 2013, 650).

Finally, in Chapter 3, I attempt to deductively and inductively distil from the discussion the principles underlying those actions and social conditions we identify as just. Such identified principles are not facts in themselves, but rather form normative statements derived from the facts by a combination of deductive, but mostly, inductive reasoning. Inductive reasoning, according to Brian Arthur, is a process whereby we look for patterns in complicated, or ill-defined, situations. We simplify the problem by constructing “temporary internal models or hypotheses or *schemata* to work with” (Arthur 1994, 406). Deductions are then made from the hypotheses to determine the action required.

The above approximates the process that takes place in this project. Although in Chapter 3, I start with the hypothesis, this is merely for the sake of clarity. The hypothesis results from the considerations in the discussion following it in the chapter. Then the principles themselves are deduced from the hypothesis. The

principles can therefore be said to be merely descriptive of the underlying principles of what humans generally understand under the term “social justice.” They are not prescriptive in themselves, they are descriptive of the normative “ought” rules actually locked up in the complicated psyche of humans. They refer to the first part of the hypothesis.

I therefore argue that this project is, in the first instance, not simply the derivation of an “ought” from an “is.” It is a much more complicated exercise in inductive and deductive reasoning that is not subject to the putative rules of the NF. As Arthur sums up inductive reasoning: “It is not antithetical to “reason,” or to science for that matter. In fact, it is the way science itself operates and progresses” (1994: 407).

But the second phase of the project appears in Chapter 4 and deals with the second part of the hypothesis. The question that there presents itself is whether the principles, discovered in Chapter 3, can indeed be said to be morally binding, and if so, why? The theory that presents itself from the considerations discussed in this project, namely that the human ideas of justice developed from behaviours and conditions that proved themselves to be conducive to human survival for thousands of generations, and that consequently, just laws and just actions can be judged with reference to the derived principles, is clearly teleological in nature as argued in Chapter 4.

The implied normative premise that links the “ought” and the “is” in this case, is that it is good and right to align the fundamental laws and social arrangements of society with the developed psyche of the humans within it, due to the social benefits to be gained. These benefits include stronger social bonding, a more peaceful society, and greater potential health and happiness that can be experienced by every individual.

This conclusion thus relates to the second part of the hypothesis proposed in Chapter 3.

5. The Hypothesis

The theory of social justice that I will outline is based on the hypothesis that:

- 5.1. our notions of right and wrong, justice and injustice, are norms and values instilled into the human psyche during the process of our evolutionary development as modern human beings. Consequently, it is suggested that these norms and values must have added survival value for our ancestors, so that human groups that contain a substantial number of individuals who uphold such values, would outcompete groups that lack them. The hypothesis then is that human beings generally have a psyche attuned to these norms and values, and that the great majority would uphold most of them, and very few would likely find any of them repugnant.
- 5.2. Given these premises, the theory holds that the closer the principles of our founding civil institutions match our evolved notions of justice, the stronger our social bonding, the more peaceful our society, and the greater the potential health and happiness that can be experienced by every individual will be. In other words, the theory suggests that a civil society founded on principles derived from our evolved notions of justice will be a well-ordered society in the grammatical meaning of the phrase.

Following from these hypotheses, and given the evolutionarily developed human disposition that I shall argue for, the derived principles of social justice will likely involve an appositely egalitarian distribution of social goods⁹ among the members of society. The evolved notion of social justice, which I hope to quote persuasive authority for, suggests an egalitarian social structure and distribution of social goods, which include both positive and negative liberty, access to social assets and their produce.

I turn to this argument in the following section.

⁹ Meaning such goods as rights, liberties, duties, physical goods, offices, opportunities, penalties, punishments, privileges, roles, status, and so on – cf. (D'Agostina 2014).

6. *Justice and Society*

Before I can begin my main argument, I find it necessary to define some basic terms. I want to make clear what, for the purposes of my project, I mean by the term 'society' and by the term 'justice'. I will also attempt to make clear how, in my view, they stand in relation to one another.

'Society' has at least two meanings pertinent to this discussion. The first is human society as it exists planet-wide, considering the understanding of society being all of humanity as one great conglomerate of people that share one overarching general attribute – they are all human beings¹⁰. For greater clarity, and to avoid confusion, the greater human society will be referred to as 'Society'.

Secondly, I distinguish civil society that will be referred to as 'society', or 'societies'. I make the distinction because I wish to make the case that Society and societies each have a different role in propagating human norms and values. There are obviously many groupings that can each qualify as a society. Civil society is often understood as referring to states, but this would be too restrictive and thus not always correct. I propose to delineate societies as being sub-formations of humans within Society, with their distinguishing characteristic being that they are each politically organised in one way or another.

Each society thus represents a group of people, a polity, living under some constitutional framework, formal or informal, that organises the collective power of the group internally in a structure of governance, which structure also represents and wields the group's collective power in dealings with other similar groups. This includes the regulation of the principal economic arrangements within the group and in its dealings with others.

These are of course many sub-groupings of Society which overlap with other, differently defined sub-groupings. There are, for example, sub-groupings of people

¹⁰ But that single attribute covers a great deal of essential similarities: not only do we all share the opposing thumb, we are all able to speak complex languages, use complex tools, make music and we all react similarly to danger, joy and pain, to mention but a very few basic attributes. Some further shared human characteristics, essential to the idea of social justice, will be discussed later.

based on culture, which may overlap with sub-groups of civil societies. For my present purposes, I shall refer to groupings based on culture as cultural communities. This can be illustrated by the example of the French cultural community. It is a community comprised of many people spread across the globe, but they do not share one society. Thus, the French cultural community overlaps many civil societies. There are many other similar examples.

By 'Society', then, I mean all of humanity taken together, consisting of the aggregate of all human beings concurrently living at any one point in time, but seen as a current incarnation of a continuing historical evolutionary process. There is an important sense in which it can be seen as prior to the individual. To say that humans are social animals is to say that they depend on others for psychological sustenance, including the formation of their personalities (Selznick 1987, 447).

Because social animals depend for their survival on group living, the survival of the group is as important as the survival of the individual, if not more so, because the human group survives indefinitely whereas the lifetime of the individual is limited. Society thus appears to be, both logically and temporally, a *sine-qua-non* for each individual person ever alive. Without pre-existing society, no individual human being could exist. All language, culture and knowledge is conveyed and inculcated into individuals by a process of social learning (Boyd 1985) (Dawkins 2006), of knowledge available only within Society and effected, for better or worse, through the institutions of societies.

The importance of the group for human survival is demonstrated also by the now generally accepted, but erstwhile contentious¹¹, fact that evolutionary genetic selection takes place at group level¹² as well as at individual level¹³. This means that

¹¹ cf. The discussion by Gintis, Henrich *et al* in "Strong Reciprocity and the Roots of Human Morality" (Gintis 2008, 246-247).

¹² Where the main source of non-random interactions in a population is the reproductive isolation of groups larger than families, and where the main selective pressures operating on individuals are competition for group survival, it is referred to as group selection, or more precisely and less confusingly, multi-level selection (Bowles 2011), (Nowak 2011), (Richerson 2005), and (Boyd 1985). Multi-level selection works because members of predominantly altruistic groups have above-average fitness and thus contribute disproportionately to the next generation.

¹³ Group level selection is, however, always expressed at individual level (Nowak 2011).

a human group of sufficient size will always have a mix of genetic qualities and personality types that, *ceteris paribus*, make survival possible (Wilson 1975), and (Boehm 1997). Every society appears, then, in many ways to be a microcosm of Society. While many societies have failed, and morphed into other societies, or disappeared altogether (Diamond 2013), Society has never failed. If it had, you and I would not be here. But this does not mean that it cannot fail. It is just highly unlikely to fail, due to its wide geographic spread and the evolutionary stable mix of genetic and memetic¹⁴ material that make up Society.

I do not contend that Society is therefore an organic whole separate from, independent of, and greater than the sum of its parts. However, I do suggest that it can be viewed as an organic system composed of the individuals who comprise it. It binds together the individuals within it through the historically shared human condition in an unbroken chain of succession.

Society is not only composed of individuals with a group-level selected mix of human traits; it is also the crucible and tutor of their culture, morals and norms which are carried forward within Society in an evolutionary dynamic (Bowles 2011), (Chudek 2011), (Laland 1995), (Lumsden 1981), (Mesoudi 2008), and (Narvaez 2014). It is dynamic because it is forever adapting to the changing human circumstance so that Society, in all its genetic and cultural diversity, is at any point really the culmination and the outcome of human history. It is also dynamic because individuals are the products of Society as well its producers, for they directly, or indirectly, knowingly, and unknowingly influence and determine its development.

'Justice' on the other hand, is a term less readily defined. There is an extensive body of work on justice apart from John Rawls's justice as fairness, and some important ones that have been used as criticisms of Rawls are discussed in Chapter 2 above. But the question that I will now attempt to deal with is what the subject matter of justice is, particularly for my purposes.

¹⁴ 'Meme,' is the term for an evolutionary replicator, a noun that conveys the idea of a unit of cultural transmission, or a unit of imitation (Dawkins 2006, 192). This is a unit of information that can be conveyed (transmitted) to generation after generation through culture (the process of social learning).

It is as well to remind ourselves now that we are guided by principles of justice in the Rawlsian sense, i.e. principles providing a way of assigning rights and duties in the basic institutions of society and defining the appropriate distribution of the benefits and burdens of social cooperation (Rawls 2009, 4). Consequently, I am drawn to consider Frankena (Frankena 1962, 9) who characterised the idea of justice as follows:

Justice, whether social or not, seems to involve at its centre the notion of an allotment of something to persons – duties, goods, offices, opportunities, penalties, punishments, privileges, roles, status, and so on. Moreover, at least in the case of distributive justice, it seems centrally to involve the notion of comparative allotment.¹⁵

For the purposes of this project, I accept Frankena's characterization of justice. It is a characterisation supported also by Rawls (Rawls 2009, 7). I would only propose that this characterisation, as formulated, lacks the ethical norm of fairness, or at least the perception between the parties that the allotment is morally justified.

Social justice, for my purposes, thus involves the central notion of an allotment of social goods, as per Frankena, in a way that can be morally justified. An allotment will be morally justifiable, in terms of the given hypothesis I suggest, when the reasons for the *allotment* are in accordance with, and match our evolved notions of justice – linking with our intuitive perception of rightness.

7. The Subject of Justice

Social justice, to the extent that it features at all, would be a distinctive feature of societies, not of the individuals within it. Thus, the primary subject for this approach is our evolutionarily developed, gene-culturally, and socially embedded

¹⁵ A notable element of Frankena's characterisation is that it entails relationships between persons. It concerns an allotment made to one or more individuals by one or more individuals, who seemingly have a choice in the matter, or at least choice is not excluded. Thus, it describes relationships between individuals, between an individual and a group of individuals, between groups of individuals and obviously, but not incidentally, Society and the individuals comprising it.

notions of justice, of right and wrong, and more particularly, notions of how social goods ought to be distributed in societies to accord with these embedded notions.

Today, in fact, it is quite widely accepted that evolutionary forces probably underlie all human morals and ethics, including our ideas of justice (Gintis 2008). This is because in recent years there has been an increasing interest in two related fields: “evolutionary ethics” and “moral psychology” (Mesoudi 2008, 229), and (Haidt 2001). The former has its origin primarily in Sociobiology and philosophy, and the latter in psychology (evolutionary, social, and cognitive) and neuroscience. Although comprising a quite diverse range of theoretical positions, all of this recent work is unified by two common themes: (1) an empirical basis, in which data from experimental psychology, neuroscience, primatology and anthropology are used to describe and explain people’s folk theories, intuitions and beliefs regarding what is right and wrong, rather than taking people’s stated beliefs at face value or relying on philosophers’ intuitions, introspection or reasoned arguments regarding those beliefs; and (2) an evolutionary basis, in which evolutionary principles are used to predict and explain why people hold the ethical norms and beliefs that they do.

But, while the notion of justice is ubiquitously expressed in social life, it very often does not concern social justice as understood above, but rather concerns the norms according to which humans interact within Society, within societies, and societies *inter se*.

Justice is a multi-faceted concept. There are facets such as personal justice, penal justice, procedural justice and the like. These facets of justice relate to questions such as how do we do justice to others; to my neighbour; my kin? What would be a just act, given present circumstances? What justice can I expect to be done to me, and how ought I to deal with anti-social people, people who do not adhere to the norms of our society? The notion of justice at this level is aptly captured by the golden rule: do unto others as you would have them do unto you, which is not a fundamental remove from the Kantian imperative of duty, which may be expressed as: “Act as if the maxim of thy action were to become by thy will a universal law of nature” (Kant 2013, 13476-13477).

On the other hand, the notion of social justice is related to another set of questions. It asks how we all, unencumbered by our personal agendas, interests and purposes, taken together as society, should interact with each individual within it. What do we as Society owe to each individual member? What do the individual members of society owe - what do I owe, to all of us together, thus to Society? Approaching the question of social justice from this point of view is what I would call the Societal approach. In fact, evolutionary psychology invites the Societal approach due to the seminal role Society plays in human existence, as discussed above.

There does not appear to be an extant golden rule for guidance to answer these societal questions. I believe that they, however, appear to lend themselves quite well to an evolutionary approach, as I hope to demonstrate in this project.

But it may be asked what is meant by the term 'owe' in these contexts, and why should we owe each other anything? I suggest that 'owe' at the individual level means the reciprocal obligation to consider and regard one another in our communal, cooperative life. Successful cooperation, which can take place only in the context of group living within Society and societies, appears to require and demand communal prosocial values such as reciprocity, empathy, care, and other forms of altruistic behaviour. Being Social animals places us in a context of either cooperating for survival as a group or dying out.

This does not imply that we only have prosocial values and that all individuals always behave cooperatively. Clearly, we have contrary and competing emotions as individuals. As individuals we have self-regarding values, social dominance orientations, inclinations to self-aggrandizement and so on, that may often conflict with our cooperative inclinations, and they often outdo and override our prosocial values.

But the point of the societal argument is to characterise and understand human behaviour in groups and as groups. Despite individual aberrations, exceptions, and variations, humans tend within groups to behave cooperatively. I consequently suggest that cooperativeness is the dominant behavioural norm of individuals that tend to kick-in under social group circumstances. Were it not for

these traits we could never have the pyramids, or Roman roads and aqueducts, nor the Golden Gate Bridge, the Hoover Dam and many other public works marvels created by humans cooperating.

In this context, then, the human species, in tandem with other social species, can be said to be cooperative by nature, only more so. “Cooperation evolves, not because it is “nice” but because it confers survival advantage (Greene 2013, 24). Thus, it is safe to suggest that our inclination to cooperate with each other is due to a predisposition provided by our genes and memes making us to sometimes appear even as super co-operators compared to our hominid cousins (Bowles 2011), (Chudek 2011), (Gintis 2004), (Nowak 2011), and (Richerson 2005).

However, a further argument is made by Joshua Greene (Greene 2013). He argues that human morality developed to avert the tragedy of the commons. It evolved he argues, “to enable cooperation, but this conclusion comes with an important caveat, he warns. Biologically speaking, humans were designed for cooperation, but only with some people. Our moral brains evolved for cooperation within groups, and perhaps only within the context of personal relationships” (Greene 2013, 23). Van Schaik seems to agree with this “tribal” interpretation when he quotes Schaller and Neuburg as authority for the proposition that the most fundamental human psychological predisposition is the in-group/out-group differentiation expressed in a psychological predisposition for easy adoption of intergroup stereotypes, prejudice, and discrimination, while hostility toward strangers is probably ancient, given its presence in most primates (Van Schaik 2016).

Because human groups had to compete with one another for resources, groups developed within group cooperation which bestowed a competitive advantage on the group: it allowed some cooperative groups to outcompete other less cooperative groups. This psychologically embedded moral thinking, he suggests, undermines cooperation between groups in the modern world.

The development of within group morality appears to be the origin of the human “Us” and “Them” antagonism and why we struggle to develop a universal morality that is inclusive of all groups. Nevertheless, Greene also recounts how the

human emotions of empathy, sympathy and caring for complete strangers, without any expectation of reciprocity, are also part and parcel of our evolved human nature. He thus concludes that

we are a caring species, albeit in a limited way, and we probably inherited at least some of our caring capacity from our primate ancestors, if not our more distant ancestors. We care most of all about our relatives and friends, but we also care about acquaintances and strangers. Under ordinary circumstances, we're highly reluctant to harm strangers, so much so that even pretending to do so causes our veins to constrict. We're also willing to help strangers, expecting nothing in return, so long as it's not too costly. Because we care about one another, because our individual payoffs are not the only ones that matter to us, we can more easily get ourselves into the magic corner [of mutually advantageous cooperation]. (Greene 2013, 39)

Thus, humans can be said to have the embedded capacity for humanity-wide cooperation and empathy, although we are in many ways ambivalent and vulnerable to "us" vs. "them" urgings and arguments. Greene argues that we need a metamorality that would be a moral system that can resolve disagreements among groups with different moral ideals. But clearly, such a metamorality must be developed from human beings as they are, with the evolutionarily embedded moralities that they have. Thus, it appears that a good base to proceed from in developing such a metamorality would be the evolutionarily embedded principles of social justice, the understanding of which is the purpose of my present project.

I thus propose to further advance the discussion from a point of view I refer to as the societal approach. The societal approach proceeds from the consideration that there are evolutionary advantages to group living - in Society and in societies. We don't just by happenstance live in close proximity to other human beings; the proximity of other humans is an inextricable part of being human. Group living can provide, *inter alia*, better security from predators and other threats, better

information, better mate choice, and more reliable food, to mention but a few. But there is also a downside, a cost to group living, as Pinker (Pinker 1998) argues: social animals risk theft, cannibalism, cuckoldry, infanticide, extortion and other forms of treachery.

Although the natural advantages of group living outweigh the costs (otherwise there would not be such a variety of highly successful social animals, including humans), I suggest that what societies owe their members is to maximise the advantages, and minimise the costs of group living.¹⁶ Furthermore, Society and societies owe it to their members to distribute, through their institutions, the advantages and the costs of group living among them. I will argue, the details yet to come, that the distribution will be just when it accords with our evolutionarily developed, gene-culturally, and socially embedded notions of justice, and more particularly, our notions of how social goods ought to be distributed in societies in order to accord with these embedded notions

But if the advantages of group living flow naturally from the group situation, and cooperativeness is evolutionarily embedded in us, as the hypothesis suggests, one might wonder why there arises an obligation to act prosocially at all. It could be suggested that if we all just act according to our natural inclinations we will live in a perfectly harmonious, cooperative way with ourselves and within societies.

However, we are not solely cooperative by nature and we are not slaves to our genes. The evidence suggests that as individuals we are also endowed with certain anti-social tendencies, such as those towards selfishness, cheating, domineering others, and lying. Just as group living in society requires inter-personal

¹⁶ [Society does not act, and humans seem to be short on instinct,] by dint of which many social animals and insects regulate their communal lives. But William James (James 1890). argued that human behaviour is more flexibly intelligent than that of other animals because we have more instincts than they do, not fewer. We tend to be instinct blind because our instincts work so well we just regard their workings as “normal” (Cosmides 2006, 1) and we take normal for granted. Our communal lives are thus probably also influenced by our complex instincts. Thus, actions within society are taken by people following their instincts, or through the institutionalised powers that be in a society.

pro-social attitudes for the survival of a group, individual survival has in our evolutionary past also demanded that we look after ourselves first. All viable organisms must have a selfish streak; they must be concerned about their own survival and well-being or they will not be leaving many offspring. Human cooperativeness and helpfulness are, as it were, laid on top of this primary, self-interested foundation (Tomasello 2009, 142-143).

Of course, when such anti-social tendencies proliferate they undermine the advantages to be gained from group living and increase the cost, and that would lead to unstable, fissiparous social groupings.

But it might be objected that after such a long evolutionary period, the anti-social tendencies would have been driven out by the growth of pro-social qualities as Darwin proposed. After all, Darwin already saw the limits of selfishness, when he wrote that

selfish and contentious people will not cohere, and without coherence, nothing can be effected. A tribe possessing...a greater number of courageous, sympathetic and faithful members who were always ready to warn each other of danger, to aid and defend each other... would spread and be victorious over other tribes... Thus the social and moral qualities would tend slowly to advance and be diffused throughout the world (Darwin 1998[1873], 134-135).

On the other hand, there is the important consideration that, given these complex tendencies in Society, neither one would likely take over the whole population. Any such takeover would likely be unstable and eventually gravitate back to some equilibrium.¹⁷ Neither always acting anti-socially, nor always acting pro-socially, is an evolutionary stable strategy¹⁸ on their own, because neither strategy is immune to treachery from within (Dawkins 2006, 72). Consequently, we should not

¹⁷ The genetic technical term for this state is stable polymorphism (Dawkins 2006, 73).

¹⁸ An evolutionarily stable strategy or ESS is defined as a strategy which, if most members of a population adopt it, cannot be bettered by an alternative strategy (Dawkins 2006, 69).

expect either of them to evolve into the universal social strategy.¹⁹ Society, and societies, will therefore presumably always contain a mix of pro-social and anti-social actors, since we appear to have both strong prosocial (as social animals) and antisocial (as individuals) proclivities.

This does not necessarily imply that some people are singularly pro-social actors and others singularly anti-social. Society is not a polymorphism in which every individual always displays only one strategy or another. Each individual could display a complex mixture of various pro-social attributes and anti-social ones, depending upon a host of other factors. However, for a multiplicity of reasons, some individuals may display a consistent bias to act either pro- or anti-socially.

This conclusion suggests the likely origin of an enforceable obligation on every individual to act pro-socially (obey the laws, respect each other's persons and property, pay a share of the cost of group living, etc.), since not all individuals will by nature act accordingly all the time. On the other hand, it might then be possible to reach an agreement, cemented in a political constitution, between all the individuals to act pro-socially, because this would ostensibly be to every individual's advantage in the longer term. However, such an agreement would only be possible because every individual uses her conscious foresight, and is able to see that it is in her own long-term interests to obey the rules of the pact

But Dawkins (op. cit.73) points out that in human agreements "there is a constant danger that individuals will stand to gain so much in the short term by breaking the pact that the temptation to do so will be overwhelming." Hence the perpetual need for vigilance and enforcement of the obligation to act pro-socially.

Research also suggests that these prosocial and ant-social proclivities were evolutionarily instilled in our genes through our environmental circumstances during the Pleistocene period and further developed by cultural evolution thereafter (Boehm

¹⁹ The general conclusions which are important are that ESS is will tend to evolve through the interaction of strategies within societies. Any 'conspiracy' of 'good' guys, would not be stable because it would be liable to invasion by 'bad' guys and vice versa. An ESS is not the same as the optimum that could be achieved by a group conspiracy (Dawkins 2006, 75).

1997). The ecological context within which the human collaborative skills and motivations developed was a sort of cooperative foraging. Humans must have been put under some kind of selective pressure to collaborate in their gathering of food — they became obligate collaborators — in a way that their closest primate relatives were not (Tomasello 2009).

Through such selective pressures that enforced cooperation and collaboration for survival, the human notions of right and wrong, justice and injustice, as well as the need to punish recalcitrant members were hardwired into our emotional structure (Pinker 1998). This indicates why we regard non-cooperation and non-reciprocation as cheating and unfair; why we get angry with people who do not reciprocate or who violate the norms of fairness and cooperation. People who refuse to cooperate, collaborate and reciprocate fairly are therefore seen as people who put the survival of the human group at risk.

What we see as unjust therefore angers us. We are primed to react this way because there have always been norm violators in every human society. Steven Pinker argues that

Anger protects a person whose niceness has left her vulnerable to being cheated. When the exploitation is discovered, the person classifies the offending act as unjust and experiences indignation and a desire to respond with moralistic aggression: punishing the cheater by severing the relationship and sometimes hurting him (Pinker 1998, 404).

Emotions vary widely in their functions, origins and neural instantiations. They are automatic processes that promote the achieving of behavioural efficiency (Greene 2013, 134). More specifically, there appear to be strong emotional benefits to acting prosocially and being prosocially inclined (Keltner 2014). Prosocial emotions such as compassion (Frederickson 2001), (Goetz 2010), (McCullough 2004) may give rise to numerous social and personal benefits, including greater social support and purpose in life (Frederickson 2008) and feelings of being close to friends (Waugh 2006). Prosocial behaviour also tends to trigger affective responses,

such as gratitude, that engage neurophysiological processes known to have beneficial regulatory effects on basic systems such as the immune and cortisol systems (Keltner 2014).

There is further evidence that propose that the human notions of justice are biologically based (Copranzano 2011). Research in primatology suggests that the human emotion of disgust in the face of injustice has an evolutionary origin (Folger 2008). This conjecture is seemingly supported by research in neuroscience which focussed on brain functioning. This suggests that human decisions about justice and injustice are made in the same regions of the brain associated with negative emotional responses, such as the insular cortex (Hsu 2008), and (Sanfey 2002). These empirical results thus tend to lend support to the present hypothesis that human beings generally have a psyche attuned to prosocial norms and values such as justice, and that we have emotional responses associated with justice and injustice. Consequently, it is argued that our basic notions of justice and injustice are embedded in our psyche.

Prosocial and anti-social behaviours, together with their associated emotional responses, are thus evidently closely connected to our notions of justice and injustice respectively. The entanglement of our notions of justice and injustice with our emotions suggests why, at a population level, anger at perceived unjust treatment through laws, policies and systems often turn into violent action. The latter apparently reflects a lack of social justice.

Research further suggests that the most parsimonious proximal explanation of human cooperation, which is supported by extensive experimental and other evidence, is that people gain pleasure from, or feel morally obligated to cooperate with like-minded people (Bowles 2011). People also enjoy punishing those who exploit the cooperation of others, or feel morally obligated to punish exploiters. Free-riders frequently feel guilty, and when sanctioned by others, they may experience shame (Bowles 2011). The involvement of emotion with cooperative behaviour and punishment is a clear indication that it all stems from an adaptive genetic-evolutionary prime cause (Pinker 1998), and (Trivers 1971).

Greene argues that “[m]orality evolved as a solution to the problem of cooperation, as a way of averting the Tragedy of the Commons.” It is a set of psychological adaptations, he argues, that allow otherwise selfish individuals to reap the benefits of cooperation (Greene 2013, 23). Although morality is clearly involved with cooperative behaviour, this argument by Green is contentious. Insofar as it suggests that cooperation developed as a way of averting the tragedy of the commons, it is correct that it is a trait that allows us to avoid the tragedy of the commons, but it is not therefore necessarily a driver of the development of cooperation. Cooperativeness is found in many animals (Dugatkin 1997) (Van Schaik 2016), and especially among primates, where it can be found in a bewildering variety of configurations (Van Schaik 2016, 335).

This means that if Greene’s argument is correct, at least all primates have moral values, since they also overcame the challenge of cooperation. This would be in line with the reasoning of Frans de Waal who contends that animals show behaviour that parallels the benevolence as well as the rules and regulations of human moral conduct (De Waal 1996). But the resolution of this question lies outside the scope of this project

Van Schaik says that cooperation in primates is found whenever mechanisms exist that remove the threat that free riders parasitize on the efforts of co-operators. Among non-human primates, he observes, most dyadic cooperation takes place within the framework of friendships or social bonds, which may or may not be based on kinship. Thus, he concludes, kin selection and individual selection suffice to explain the evolution of cooperation among primates.

The discussion thus far suggests that the human notions of justice and injustice are not only evolutionarily embedded, but are accessed intuitively, since emotional responses such as enjoyment, anger, shame, and so on, are instinctive; they are not usually called forth at will. But it also suggests that there may be a psychological need for justice. Humans would not likely respond emotionally to the absence of something like justice, were it not for an underlying psychological need. I thus suggest that justice in society is most likely an evolutionarily embedded

psychological need of humans, an essential requirement of human social life. This proposition then further supports the hypothesis that human beings generally have a psyche attuned to upholding the norms and values associated with right and wrong, justice and injustice, and that the great majority of people consequently would uphold most of them, and very few would likely find any of them repugnant.

However, intuition alone would be a very unreliable, tenuous, and most probably a misleading guide (Kahneman 2011) to the principles of justice, since our intuitive emotional responses can arise from selfish as well as from altruistic feelings. Anger may equally arise from feelings of either real, or imagined personal injustice suffered, or such an injustice to the people I identify with, or a perceived injustice to others, not involving myself, or perhaps merely from my own thwarted expectations. Also, what amounts to injustice for any individual under particular circumstances can often be very subjective. How misleading our intuitive grasp of justice in our social context can be, is illustrated by research done among the broad American population to determine their preference for just distributions of wealth (Norton 2011).

In their research, Norton and Ariely (Norton 2011) found that in a representative sample of the US population, participants greatly underestimated the actual inequality of the wealth distribution in their country. In their estimation wealth was substantially more equally distributed than it actually was at the time of the survey. This attitude held across all demographics. Even more significant, when the authors requested the panellists to construct a distribution over five percentiles of what they would view as the ideal distribution, they gave the top 20% of the population 32% of all the wealth compared to the 84% that they have in reality. The bottom 20% of the population they would ideally give just more than 10% of the wealth as against the 0.01% they actually have. The disparity between perception and reality is thus strikingly disproportionate. I suggest that this also implicitly supports a human psychological bias towards more egalitarian distributions.

By implication this also suggests that a civil society founded on principles derived from our evolved notions of justice will be a well-ordered society. Since the embedded notions of justice seem to constitute a psychological need of humans, it

appears very likely that the closer a society comes to fully meeting that need, the better ordered it will be.

8. *The Notions of Justice*

This raises the question of what exactly the embedded notions of justice might be. If the foregoing discussion is in essence correct, one could already derive some general categories of what humans might commonly experience as just and unjust. These categories would probably bring the prosocial values of cooperative, supportive, empathic, and caring behaviour under the umbrella of just conduct.

Displays of selfishness, lack of empathy, cruelty, egoism, and uncooperative behaviour would likely be experienced as unjust and reprehensible. Behaviour leading to distributions that are experienced as unjust would be met with moralistic sanction and chastisement. I suggest that the discussion indicates that our evolved notions of justice and injustice are essentially related to reinforcing the fabric of Social life; encouraging that which will keep societies living together in peace and harmony, while discouraging actions that, if left unchecked, would be fissiparous for society. This applies to the actions of people within societies, but obviously also to actions of the powers-that-be in societies as they relate to one, some, or all the members of those societies.

But how does all that translate into notions of distributive justice in Society? This question involves a further consideration of our evolutionarily developed human disposition. The theory postulated in this project holds that the derived principles of social justice might be expected to involve an appositely egalitarian distribution of social goods among the members of society. This is because there is some persuasive research suggesting that the fundamental human disposition favours egalitarianism. This I will now attempt to demonstrate, but to deal properly with this fundamental²⁰ consideration it will be necessary to traverse some ground covered by the pro- and anti-egalitarian arguments.

²⁰ Fundamental to the development of this evolutionary theory of social justice. It is fundamental because what will be seen as just from an egalitarian point of view will, at least in

8.1. *An Egalitarian Mind?*

In this section, I shall discuss the possible human disposition as it fundamentally views other human beings. Do humans fundamentally view other humans as equals, or are we by nature inclined to look down on some and up to others? Modern societies are complex societies, which means that they are all highly stratified with levels of dominance, coercion and preferment. This is obviously not a new development: as the European feudal societies and their immediate predecessors were stratified, so modern societies are stratified, but on a different technological and social basis. This leads one to suppose that social stratification with high levels of coercion are the norm for humans, that that is actually the way they are supposed to be. But there is an alternative view that I wish to discuss, namely the possibility that humans actually have an egalitarian mind.

It is true that the idea of egalitarianism is a highly contested one (Nowak 2011, 81-94). However, my interest in the debate between egalitarianism and social hierarchy is focussed not on whether the one is more desirable than the other. My interest is to attempt to determine whether the evolutionarily developed human psyche is more inclined to social egalitarianism or to social dominance, the latter being a driver of stratified, hierarchical societies.

The dominator model of humans (humans over nature and human over human) has captured much imagination in recent centuries and is considered natural, normal, and necessary by many thinkers (Eisler 1988), and (Korten 2007). Social hierarchies are ubiquitous but variable in animal and human societies (Fisher 2013, 1107). Fisher notes that one set of theories suggests that hierarchical organisation provides an evolutionary advantage and increases survival value for

distributive justice, vary greatly from what will be regarded as just from an inegalitarian standpoint. Given the premise of this project that societies should be structured to accord with the human psyche, it would be unjust to impose egalitarian principles on a fundamentally inegalitarian population, and vice versa. Whether the human psyche is fundamentally egalitarian or not is thus a fundamental question.

species, as they allow for more efficient resource extraction (e.g. production of food) through greater specialization of roles.

But anthropologists have also noted that greater complexity in small-scale societies is associated with increases in social inequality and unequal wealth distribution (Borgerhoff Mulder. 2009, 686-687). According to Fisher this strongly suggests that increased social complexity is associated with greater social stratification (hierarchy) and that in the long run more hierarchical groups survive and have access to more resources (Fisher 2013, 1108).

In modern societies, Fisher concludes, there seems to be significant variation in the support and endorsement of hierarchical organisation. Although social dominance and hierarchy values are present in all modern societies, the extent to which groups are socially stratified and group members endorse and support hierarchical values and beliefs differs dramatically around the world. His hypothesis is that there may be a genetic predisposition to the formation of hierarchical societies due to the influence of the short allele of 5-HTT²¹. If a group has a biological vulnerability (higher probability of short-alleles) to react more negatively to environmental threats and stressors, and the environment is likely to trigger these negative clinical symptoms due to greater number of various such threats and stressors, then the group faces a greater risk of becoming dysfunctional and unable to meet survival challenges, unless a strong hierarchy provides an efficient way for organizing social life.

This hypothesis, although unproven, is credible in general outline at least. An apparently compatible argument is made by Joan Chiao *et al*/ when they suggest that a fundamental way that individuals differ is in the degree to which they prefer social dominance hierarchy over egalitarianism as a guiding principle of societal structure, a phenomenon they describe as social dominance orientation (SDO) (Chiao 2009). They argue that SDO is a core value underlying social structure across the animal

²¹ An allele is one of two or more alternative forms of a gene that arise by mutation and are found at the same place on a chromosome. An allele is just the locus on a gene – it can arise due to mutation or due to ordinary reproduction. 5-HTT is the identifier of a gene with a role as a serotonin transporter. The short allele is therefore one particular version of the 5-HTT gene.

kingdom. Across species and human cultures, dominant social groups and individuals within the hierarchy often have primary access to precious resources (e.g., territory, food, mates) relative to those of lower rank. Modern social psychologists, they observe, have discovered that people vary in the degree to which they prefer their own social group to dominate others, which is to say that they vary in their degrees of SDO (Chiao 2009).

But, as Sidanius and Pratto have found, empathic²² concern is an important attenuator of preference for social hierarchy (Pratto 1994). Individuals who exhibit strong empathic concern, a capacity to both share and feel concern for other people's emotion, tend to prefer egalitarian rather than hierarchical social relations between groups (Sidanius 1999). This is not all due to genes; cultures have a great deal to do with the type of moral personality that their members foster (Fry 2006), and (Narvaez 2014). Cultures emphasize and promote different characteristics, like empathy, affecting everything from individual personality to worldview and perspectives on human nature (Narvaez 2014, Loc. 1259-1261). But little is known about the neurobiological mechanisms underlying an individual's preference for social dominance hierarchy versus egalitarianism.

The near omnipresence of social hierarchy across social species in the animal world and in modern human cultures suggests that the ability to successfully navigate hierarchical social interaction arises from adaptive mechanisms in the mind and brain that support the emergence and maintenance of social hierarchies within and across social groups (Chiao 2009, 175), (Boehm 1999). Empathy, on the other hand, is supported by a distinct neural matrix of limbic and paralimbic brain regions, including the anterior insula (AI), the anterior cingulate cortex (ACC), the lateral cerebellum, and the brainstem (Decety 2004), (Hein 2008). AI and ACC are two major regions of the pain matrix thought to code the autonomic and affective

²² Empathy is a term that can refer to several distinct affective and cognitive processes. Here the term 'empathy' is used to refer to individuals' ability to understand another person's feelings, experience, etc.

dimension of pain, and, in particular, the subjective experience of empathy when perceiving pain or distress in others (Decety 2004), (Hein 2008).

In laboratory experiments, Chiao *et al* therefore used functional magnetic resonance imaging (fMRI) to examine the association between SDO and empathic neural responses in humans during perception of pain in others. Their hypothesis was that the degree of preference for social dominance hierarchy would significantly vary as a function of neural responses associated with empathy, when controlled for other known modulatory factors such as gender, age, and disposition. Their results show that insular cortex activity of the brain is associated not only with aversion to inequity during economic exchanges (e.g., whether one accepts a fair or unfair monetary allocation for oneself or another person), as described by Sanfey *et al* (Sanfey 2003), but more generally with an aversion for any kind of group-level social inequality (e.g., whether different social groups should have equal right to vote or equal access to educational opportunities).

Empathy can therefore be said to be a human emotion that stems from neural activity located in the insular cortex, but the same neural activity is associated with feelings of aversion to any social inequality within the responder's group. Empathy, which is seemingly encoded in the insular cortex, is thus strongly associated with egalitarian preferences, which supports the suggestion that these preferences are probably evolutionary adaptations embedded in the human brain through thousands of generations of enforced egalitarianism, which is what would be required for a trait like egalitarianism to be biologically embedded. It further suggests that modern egalitarian behaviour and judgments are not solely due to socialising forces but are part of human biology and are thus genetically transferred from one generation to the next (Boehm 1997).

Although there are some ambiguities in the data, Boehm asserts that there is enough convincing evidence to believe that as of some 40,000 years ago, with anatomically modern humans living in small groups and before plant and animal domestication, all human societies practised deliberate egalitarian behaviour, and that most of the time they did it very successfully (Boehm 1993, 236). Dentan,

reviewing Boehm's article (Boehm 1993, 241), agrees that Boehm's argument suggests that egalitarianism is chronologically prior to stratification - also cf. (Knauff 1991). Boehm's argument is that the genetic basis for the ambivalence we find in human nature was structured long ago, at a time when the egalitarian syndrome reigned universally and therefore cultural conditions were favourable to increased genetic selection of generically altruistic traits.

But other writers, e.g., (Mitchell 1988, 638), (Cohen 1985, 100), (Dumont 1970), and (Sahlins 1959), either imply or state outright that human dispositions that abet hierarchy formation may also be innate (Boehm 1993, 237). Thus, there appears to have been selection forces, acting on individuals, favouring social dominance and social hierarchy formation, while at the same time there were strong egalitarian and dominance aversion forces operating at the group level. According to Boehm (Boehm 1997), this selection scenario remained in place for thousands of generations, and the result was a shift in the balance of power between individual and group selection in favour of selection for group effects. This balance is reflected in the current ambivalent human nature that exhibits substantial altruism in addition to dominance, selfishness and nepotism.

Boehm therefore postulates that human societies are ambivalent to social dominance and we may be better off thinking about coevolved genetic predispositions that go in contradictory directions (Boehm 1993, 238). Boehm says that human nature is structured to be ambivalent. It explains to why humans are attracted to social ideologies that are altruistic – ranging from egalitarian hunter-gatherer codes to modern state welfarism and idealistic communist blueprints - while others can set aside their altruistic preferences to go with the other side of this basic ambivalence: they favour societal blueprints that openly or implicitly espouse individual selfishness (Boehm, 1997, S117) – cf. “The Virtue of Selfishness” (Rand 1964).

If we accept Boehm's postulates, it appears that we cannot characterise the human mind fundamentally either as egalitarian or as socially dominant: it is both. Thus, every human being experiences, to varying degrees, feelings of generic

altruism in addition to feelings of selfishness and nepotism. Every human being then has an ambivalent mind – he has egalitarian as well as social dominance traits. Which of the two traits may be dominant in any particular individual is a complex matter, but probably depends on an interaction between his socialisation (culture) and his individually varying genetic heritage (Boehm 1997, S117). Generally, however, we can accept a human mind being fundamentally ambivalent with regard to an egalitarian or unequal, stratified social structure, but determined by socialisation within the ruling cultural environment.

This suggests many other questions, such as how much stratification and how much social dominance humans can tolerate without social disruption and breakdown ensuing. But those are matters for a different study. For the purposes of this project I suggest that it is sufficient to accept the ambivalence of the human mind and to rather focus on such evidence of structural and distributional preferences as we can discover in the literature.

In the next section, I therefore wish to discuss the research and evidence regarding our distributional preferences. I suggest that the question resolves itself into a question of whether humans prefer an egalitarian distribution of social goods, or a distribution based on *laissez faire*, or on some other principle.

8.2. Our Distributional Preferences

Before discussing the possible human distributive preferences, which amounts to finding what distributions human beings would find to be just, I find it necessary to examine what exactly the term ‘egalitarian’ and ‘egalitarian distribution’ means in the context of the EP approach. The evidence certainly does not seem to suggest that the evolutionarily developed human disposition requires a mathematically equal distribution of goods whereby everybody gets exactly the same amount of everything (Speth 1990), (Kent 1993). Indeed, there seems to be enough evidence on the ethnographic record to indicate that there are degrees of egalitarianism; on the face of it there does not appear to be any absolute preference

of distributary shares (Kent 1993), except to the extent that it takes place within an egalitarian ethos.

Greene (Greene 1998, xxxviii) argues, correctly in my view, that “Equitable or fair treatment ... does not always mean equal treatment – certainly when that means treating people with widely disparate needs in the same way.” This appears to be exactly the same idea that Aristotle (Aristotle 2012 [350 BC], 50) advanced when he wrote that distributional justice is proportional; “the unjust is what violates the proportion.” He makes it clear that he is referring to a geometrical proportion.

Hence, he says, one term of the equation becomes too great, and the other too small, as indeed happens in practice; for the man who acts unjustly, he says, has too much, and the man who is unjustly treated too little, of what is good. Equality as such is thus not denied, but proportional equality is confirmed. Determining the just proportion, and the values to be applied in the determination of a just proportion, I suggest, are thus questions that must be considered within particular cultural contexts.

There is too much paucity of the ethnographic record to allow us to detail specific distributions among, for example, Pleistocene-age foragers, but we can probably derive some broad principles from relevant research that has been done of the ethnographic record and among modern day foraging peoples. There is, for example, a reported pervasiveness and variability of food sharing among hunting and gathering groups and the observation that some resources are shared more than others (Binford 1978), (Bose 1964), (Damas 1975), (Gould 1981), (Lee 1979), and (Marshall 1961). Thus, studies of human foragers should provide some context for isolating a sample of the main factors in the evolutionary development of sharing among humans.

In this section, I wish to discuss the evidence collected and the research that has been done regarding the distribution of resources among early humans, especially during the Pleistocene. During this time our fundamentally egalitarian minds were formed and I shall argue that their distributary practices probably form the foundation of the distributive value system that lurk subliminally in the minds of

latter day humans. This subliminal value system, I suggest, is the default value to which our distributional justice notion defers.

I thus focus on the sharing practices of humans, especially early ones, because sharing is an early system of distribution. It may be the best example we can have of the basis of any inherent human distributive preferences. It appears, as I shall argue below, that through the sharing of food as well as most other life necessities, early humans practised an egalitarian distribution system. Food sharing is ubiquitous in human societies, but I intend to argue that the sharing fundamentally takes place within a cultural context of gift giving. This will appear from the discussion that follows.

The sharing of food, especially meat, is believed by many anthropologists to be so basic a part of the forager way-of-life that archaeological evidence for its apparent emergence more than one-and-a-half to two million years ago in the Plio-Pleistocene has been taken as one of the first clear signs of true “humanness” (Isaac 1978).

Much has been written about human resource sharing and there has been considerable debate about the driving forces that underlie this phenomenon. It has been widely suggested that sharing mitigates variation in meat acquisition in many foraging groups to this day. This is basically an economic explanation, and not the only economically based one that is currently still popular among some anthropologists. (Bird-David 1992), (Cashdan 1985), and (Kaplan 1985).

One corollary of economic explanations is the assumption that because all adult members participate in the sharing network, all must therefore be receiving portions of more or less equivalent nutritional value. Speth (Speth 1990) challenges this assumption. He suggests that the emphasis that anthropologists place on the sharing of food, especially meat, is a perspective that may obscure rather than enhance our understanding of the origins and functioning of foraging (i.e., so-called “band” or “immediate return”) societies. Consequently, they underemphasize, or ignore entirely the fact that foragers actually share a much broader spectrum of social, political, economic, and even sexual rights and privileges. Food and other

material items, in fact, form only a small component within this much larger array of reciprocal exchanges and interactions (Speth 1990, 174). Accepting Speth's critique therefore leads one to conjecture that "sharing" is the important concept, of which the sharing of food is only one part.

The research of Susan Kent (Kent 1993, 498) supports the contention that sharing is a much wider practice in forager societies than merely the sharing of food. She argues that in staunchly egalitarian societies, egalitarian sharing includes their politics, economics, gender relations and social organization - cf. (Lee 1979). The motive for the type and pervasiveness of sharing in the societies on which Kent focusses is a fiercely egalitarian ethic. But she adds that egalitarianism is a continuum, not an absolute value; societies are only more or less egalitarian. Sharing, she observes, is deliberately manipulated to maintain social bonds. The latter finding also supports Boehm's conclusion that political egalitarianism was achieved by deliberate social policy (op. cit.).

Sharing evens out that which is unequal. It equalises those situations that are inherently unequal, such as those related to success and skill in hunting - cf. also (Hill 1989), and (Howell 1986, 164). Sharing maintains and reinforces social relationships. Speth agrees with what he says is the current view in anthropology at the time of his writing, that sharing is a key factor in forming and maintaining social bonds (Speth 1990, 149), and (Richerson 1999). Consequently, sharing nullifies the social and economic significance of variations in hunting skill and success. Kent contends that egalitarianism is necessary for the cohesiveness of these egalitarian societies and sharing is necessary for that egalitarianism.

One must obviously be careful not to generalise too widely from these observations, but a broad outline of human sharing behaviour does seem to be evident. It appears that although sharing does have important economic effects, it is not primarily an economic or a social security driven institution. Kent argues that while social solidarity, underpinned by a culture of sharing, may be necessary for group or social survival, sharing is unnecessary for an individual family's physical

survival. In other words, without sharing, a family can survive and even thrive economically. Clearly then, sharing is not an overtly economic or charitable activity.

Kent reports that sharing still takes place even while there is an abundance of food. It is important to note that sharing is not restricted to “haves” sharing with “have nots”. Everybody shares with everybody else; goodwill is reciprocally demonstrated. Therefore, everyone in the sharing network benefits socially, although not everyone benefits economically (Kent 1993, 493). Rather than seeing these practices as food sharing, one might also see it as reciprocal gift giving on particular occasions, which is a goodwill-inducing human practice to this day.

Although these conclusions relate specifically to what are generally described as egalitarian societies, i.e. societies that practice and enforce egalitarianism as social policy, it must be considered that according to Boehm’s (op. cit.) persuasive study, this was the condition of all human societies during most of our evolutionary past.²³ It was therefore the milieu wherein our human psyche was developed and nurtured for millennia.

In consequence of these considerations, I propose that the following conclusions appropriately recapitulates the essence of the discussion:

- 8.2.1. Sharing is a hallmark of egalitarian societies; and
- 8.2.2. During the Pleistocene era humans universally engaged in sharing practices; and
- 8.2.3. The human mind was shaped during the Pleistocene period to prefer egalitarian distributions.

Consequently, I suggest it would not be inappropriate to propose that a broadly egalitarian distribution of goods will be generally pleasant and acceptable to most humans.

I have already suggested that our evolved notions of justice and injustice are essentially related to behaviours that tend either to reinforce, or alternatively to rend

²³ Since approximately 40,000 years ago until the present, with complex hierarchical societies only beginning to appear from about 10,000 years ago (Boehm, *Hierarchy in the Forest: The Evolution of Egalitarian Behavior* 1999), and (Richerson 1999).

the fabric of Social life; just behaviour most likely encouraging that which will deepen social bonding and keep societies living together in peace and harmony, while discouraging actions that, if left unchecked, would be fissiparous for society. It now appears that the human notion of justice and the sharing of resources serve the same social purpose. Therefore, the two notions must be reasonably closely associated and perhaps intertwined. More egalitarian distributions will thus likely be seen as just and more inegalitarian ones as unjust.

But, as is suggested by the research dealt with above, there does not seem to be any meticulous accounting of the sharing to ensure a total equality of net receipts by all concerned. Sharing, Speth maintains (Speth 1990, 149)²⁴, effects a social and economic levelling, but not necessarily a precise equality of outcomes. Speth questions the assumption that equality in the right to participate in the act of sharing necessarily implies equity in the nutritional benefits that accrue from sharing - see also (Flanagan 1989, 248).

There are several factors that create inequality in some forager communities, such as food taboos and preferential treatment of hunters, but it is still a sharing that reciprocally demonstrates goodwill and inter-personal solidarity, rather than achieving any formulaic equality. Speth's point is that the single term – egalitarian – probably obscures the very observational and behavioural variability and complexity that it is sought to identify and explain, because there is so much variation in the practices between bands that he doubts that the term 'egalitarian' can be indiscriminately applied to all foragers. He maintains that foragers actually share a much broader spectrum of social, political, economic and even sexual rights. He argues that the nutritional impact of food sharing is not necessarily equal between all sharers, but that it must be seen as part of a total culture of sharing (op. cit. p.174). It is crucial, Kent thus argues, to study sharing within the context of the whole culture, including how it articulates with the social, political and economic organization of the

²⁴ Speth questions the assumption that equality in the right to participate in the act of sharing necessarily implies equity in the nutritional benefits that accrue from sharing - see also (Flanagan 1989, 248)

society (Kent 1993, 506). Speth's argument thus supports the contention that although there might be ambivalence in some foraging communities to strict egalitarianism, there is nevertheless important social and economic results from sharing as an apparently psychologically driven behaviour pattern, even though the outcomes are not always strictly egalitarian.

But sharing is also not merely symbolic; it is substantial, with substantial socio-economic effects. It seems unlikely that such sharing societies could ever produce poverty side-by-side with affluence. The practice, despite sometimes having some inegalitarian features, appears probably to reflect some measure of proportionality, "roughly equivalent amounts", in the distribution of especially meat - those with a lot to give giving more than they receive and *vice versa*, but nobody ever receives nothing and never gives anything.

What exactly the basis and measure of such rough proportionality might be, it will be a loose measure, and, I suggest, one that will likely vary from culture to culture and from good to good, as described by Kent and Speth. There is thus not likely a universal human measure of just distributions, except to say that distributions are particularly and fundamentally subject to evaluations based on justness. Just distributions of consumer goods would in any human culture, I suggest, be broadly egalitarian within the parameters of some culturally defined measures of proportionality. But this all relates mostly to the sharing of food, and other consumer goods.

What also appears to be of importance for this project is how humans, during their evolutionarily formative epochs fundamentally distributed other social goods apart from consumer goods. An indication of this might be gleaned from Kent's statement that egalitarian societies are not structured by division into social roles. In highly non-stratified societies, she says, social roles are organized by the absence of rigid status, age, and gender differentiation; that is, by egalitarianism. Egalitarianism

in social relations can be seen in the flexibility of social roles within the society (Kent 1993, 480).²⁵

This seems to indicate the nature of the egalitarian psyche. There are no apparent specially advantaged people, enjoying more rights and privileges than other people. Thus, it appears that as far as rights, liberties and privileges are concerned there is no basis in any of these societies for a stratified differentiation between individuals, or groups of individuals. Therefore, regarding social goods, excluding consumer goods, it seems that strict equality is the likely rule.

I therefore propose that social goods, as opposed to material social goods (consumer goods and services), were distributed on a basis of strict equality during our long forager history wherein our basic egalitarian minds developed. The basic human psyche, I suggest, is structured to accept and prefer an egalitarian distribution of social goods – a distribution thus based on principles of strict equality.

But we do not have to focus only on ancient societies to discern human distributional preferences. In modern societies, certain very egalitarian distributions are also widely accepted and maintained. In this regard we should consider, for example, the modern history of the worldwide expansion of the suffrage after the American and French Revolutions of 1776 and 1789. Although many societies have not yet been so empowered, it is still a demand that exists everywhere, and where it has been achieved, it was done by popular demand and support, to the point of engendering popular revolutions. The very idea that government should be for the benefit of all the people is a further indication of a very wide acceptance of a more egalitarian distribution of social goods.

The political right to participate in, and benefit from the power system of society can be classified as positive liberty (Berlin 1969), and (Constant 2010 [1819]). The history of the spreading enfranchisement of people is thus the history of

²⁵ This quite strongly suggests that all social roles are open to everybody. Any person who takes the lead in, for example, going on a hunt, becomes the leader *pro-tem* if others follow him, or her. I suggest that such will also be the case in, *inter alia*, food preparation, shelter building, and moving on to new locations.

an increasingly egalitarian distribution of positive liberty, and although increasing enfranchisement was bitterly opposed virtually everywhere, once it was achieved there seems to have been no popular reaction to overturn it. At the very least this means that that high SDO individuals in those societies are unable to raise any popular support for a more inegalitarian distribution of these rights.

Kameda *et al* (Kameda 2010) also argue that although income inequality sharply divides industrialised societies all over the world, material egalitarianism²⁶ may even today still operate as a fundamental principle affecting social sharing and exchange under uncertainty in many domains of human activity. They reviewed four sets of empirical and theoretical results with implications for the adaptive bases of material egalitarianism. They presented Japanese students in seven different schools with two sets of a division of material goods: The first division allocated the goods on a basis proportional to individual production levels, while the second division follows an egalitarian rule.

The question asked of the students about their preferences for resource allocation beyond direct self-interest – it sought their preferences for a desirable social state, rather than a desirable personal state. Among a total of 1,322 students who answered the question, 73% chose the egalitarian allocation. The proportion of egalitarian-ideology endorsers differed substantively across the seven schools, ranging from 63% to 83%.

Only one factor was correlated with the differences in the proportion of egalitarian endorsers – the social rank of the university. Students in the less prestigious schools, who tended to be from working-class families, endorsed the egalitarian ideology at higher rates. The authors argue that egalitarian ideology, as endorsed by blue-collar, working-class citizens, may be seen as a collective solution to cope with life uncertainties, when personal solutions (e.g., wealth, education) are unavailable. They also think that this type of collective solution for life uncertainties may have operated in many human societies until quite recently, possibly supporting the evolution of psychological algorithms designed to deal with resource uncertainty

²⁶ Meaning an egalitarian approach to the distribution of material goods.

and sharing. They then continue to develop this argument with several lines of evidence, including ethnographies in anthropology, evolutionary computer simulations, and behavioural experiments.

They then surmise that, given that uncertainty in resource supply was a recurrent adaptive problem in the Environments of Evolutionary Adaptedness (EEA) and that most humans have been unable to solve this problem individually until quite recently, our minds may have been built, by evolution, as egalitarian sharers. An egalitarian psychology could be an evolved adaptation to high uncertainty in the EEA and, if so, should be a panhuman universal. Ethnographies of hunter-gatherer groups, evolutionary game analyses of communal sharing, and the operation of a windfall psychology all support this conjecture.

Eventually they conclude from all the evidence analysed through their research, and importantly for this project, that social justice systems that exist in our modern world may be highly complex and varied, yet they can all be understood as adaptations to respective social and natural ecologies where people live, that is, as adjustments to local ecologies on top of the fundamentally egalitarian mind (Kameda 2010, 19).

But consider also the results of the research of Norton and Ariely among Americans (Norton 2011). Their results suggest that there exists a modern human bias to more egalitarian distributions. The United States is the country in the modern world with a society one would expect to have the highest toleration for the inequality of wealth (Osberg 2006), given their strong cultural meritocratic orientation. The panellists were first asked to indicate their preference for three sets of anonymous wealth distributions: one of strict equality; one reflecting the Swedish distribution and one reflecting the actual US distribution, all unbeknown to them. The panellists preferred the Swedish distribution to the US one by 92% to 8%. But the Swedish distribution to the strictly equal distribution was preferred only by 51% to 49% - a close run thing.

If we consider that the Swedish wealth distribution put to the panellists gives a Gini coefficient²⁷ of 0.225 it is quite enlightening to find that the ideal distribution, as given by the panellists when they were asked to indicate that, gives a Gini of 0.2 – even more egalitarian than Sweden. It suggests that even among Americans, there exists a psychological bias to “more egalitarian” distributions. It also suggests that the reason for their misjudgement of the actual US distribution might be that they were misled by their egalitarian bias to suppose that the reality was more egalitarian by far, than it actually is. It is also significant, from the psychological point of view, that when the panellists were asked to construct an ideal distribution, they universally adopted an even more egalitarian position than the one they wrongly perceived to be the case. Essentially they are saying that they would ideally prefer to live in a society which is more egalitarian by far than even the one they perceive they are living in. This appears to further support the proposition that we have an evolved psychology favouring a more egalitarian environment over a less egalitarian one.²⁸

Consequently, I suggest that the evolutionarily developed human disposition fundamentally favours a more egalitarian distribution of social goods, even under the current very inegalitarian circumstances. It therefore seems suitable to conclude that the principles of social justice derived from an EP perspective will likely involve an appositely egalitarian distribution, understood as proportional equality of material social goods, among the members of a well-ordered society.

²⁷ The Gini Coefficient is the accepted best measurement of the distribution of income within a discrete group, usually, but not always, a society. The lower the Gini, the more equal the distribution. A totally equal distribution would equate to 0.

²⁸ But Norton and Ariely conclude that Americans actually prefer some inequality to perfect equality, which is true, but that conclusion is not the only one supported by the results as reported. What might equally be indicated is that Americans prefer a more proportional equality to a strict, objective equality. Thus the research might be interpreted to mean that their actual preference is for proportional equality, probably based on a proportionality of expended effort, rather than objective equality.

8.3. *Egalitarian or Hierarchical Societies?*

The fact that social dominance and egalitarian social preferences both appear to be evolutionarily embedded in the human brain, begs the question as to what could cause either egalitarian or social dominance behaviour to arise in a group, and for such a hegemony to be sustained in any particular society. Boehm hypothesised, when he undertook his global survey of some 200 politically autonomous societies reported in the ethnographic record, that the primary and most immediate cause of egalitarian behaviour is a moralistic determination on the part of a local group's main political actors that no one of its members should be allowed to dominate the others (Boehm 1993, 228).

What seems clear, however, is that since individuals vary in their SDO, it appears likely for an inherent tension to exist within human groups due to the presence of individuals with higher SDO who strongly prefer a dominant hierarchy (in which their group dominates), mixed together with other individuals with a more empathic, egalitarian disposition as Boehm proposes. It also does not follow that there will be only two groupings within one complex social group, which may consist of several bands.

There may be more than one sub-group of high SDO individuals, each group competing to dominate the whole group. This is especially to be expected where the whole group (Richerson 1999) consists of a number of constituent bands. Should no sub-group be able to outcompete the others for domination, it may well be that a more egalitarian social structure results, with the support and assistance of those tribe members with a more empathic, egalitarian bent.

Because humans developed the capacity for systematic moralistic punishment we are all susceptible to moral suasion by others and inclined to punish within-group norm violators (Milgram 1965), and (Nuttin 1975). Punishment can be seen as a public good for which the punished pays the cost and everyone benefits – the so-called second-order problem of altruism (Tomasello 2009, 516). These traits made it possible to sustain a within-group egalitarian structure. Boehm's postulates

support the hypothesis that an egalitarian relation between followers and their leader is deliberately made to happen by collectively assertive followers.

In 1979, Lee (Lee 1979) had already found the strong tendency of followers to restrict the development of personal ascendancy among adult males, including leaders, to be an important levelling mechanism in societies, causing and sustaining the existence of egalitarian socio-political structures. Another significant levelling mechanism is public opinion. It can act as a check on leadership, as in Tikopia (Firth 1949), and at some point always limits autocratic behaviour in any society (Lowie 1940, 284). Other important levelling mechanisms include criticism and ridicule.

Boehm also theorises that the intentional curbing of power abuse may itself be universal (Boehm 1993, 234). It definitely takes place, he says, in societies devoid of egalitarian ideology, as in modern despotic states in the form of revolution (Lopreato 1990) and in highly centralized kingdoms or authoritative chiefdoms cf. (Gluckman 1965). Beattie (Beattie 1967, 364-365), dispelled the myth that African kings or chiefs possessed "absolute power," and outlined several behaviours by which various well-stratified groups controlled the authority of their own legitimately strong rulers.

If one assumes, Boehm argues, that both types of chiefdom and all band and tribal societies designated as "acephalous"²⁹ or "egalitarian" are capable of curbing power abuse and that in every society at least certain individuals at times will try to use power abusively, then it can be argued that some degree of intentional power curbing by coalitions of subordinates regularly takes place, and at times at least occasionally, in every human society. These examples are a further demonstration of an existing human ambivalence concerning social dominance and egalitarianism, and that despite existing social stratification in a society, there are still latent egalitarian preferences at work.

But it seems likely that levelling behaviour also arises from other factors that favour it. It seems possible that the requirements of cooperative behaviour by

²⁹ Groups or societies that lack leaders or chiefs.

themselves favour the development of egalitarian, levelling behaviour. For example, this postulate finds support from three hypotheses according to which monogamy evolved from polygyny as a human mating strategy. Chapais (Chapais 2013, 60) asserts that the three hypotheses are the most parsimonious explanations of the rise of monogamy and are not mutually exclusive. The three hypotheses postulate that the use of weapons that mitigate individual male physical power disparity, a greater reliance on economic, or coalitionary cooperation among males, and an ecology-based increase in the costs of female guarding, may have had a cumulative impact on both the feasibility and profitability of polygyny.

Monogamy, as maximally constrained polygyny, thus resulted. It is noteworthy that Human societies are the only multilevel societies in which reproductive units are entirely, or primarily monogamous, which trait, given the three hypotheses, appears to be directly linked to our highly cooperative nature. The need to reduce costly aggressive competition within Society is a levelling and cooperative driver. Although Chapais deals only with costly competition for females, it is likely that the levelling behaviour would extend outward to all issues that cause costly aggressive competition, such as competition for food, water, territory, as well as political power. These matters would all have been resolved through cooperative aggression-avoiding mechanisms, which in turn, would support egalitarian distributive outcomes.

None of the levelling practices would likely be perfect. So, within the egalitarian structure there would inevitably be some conflict of opinion and of purpose. But this would not easily result in the break-up of such societies, since fortunately, humans are adapted to tolerate a system in which there is conflict among the co-operators. This is evidenced, *inter alia*, by such behaviour as the patient search for consensus in forager communities where both SDO and social dominance aversion (SDA) would most likely have been present, although egalitarian social practices held sway.

“Institutions that minimize the conflict inherent in the gene-culture system will be favoured by the processes of cultural evolution, but these institutions cannot, in the nature of the situation, be perfect” (Richerson 1999, 258). This adaption of

tolerance for conflict makes life in society possible. It is thus suggested that the inclination of egalitarian levelling behaviour is diffused throughout the whole range of human interactions in societies.

Underlining all this is Fry *et al* (Fry 2013), who contend that the vast majority of human societies in the past and present do not display a dominator model. Instead, hunter-gatherer groups, which Narvaez (Narvaez 2014) uses as a baseline for human normality, display traits like “band-wide food sharing; high levels of allomaternal³⁰ child care; daily cooperative food acquisition, construction, and maintenance of living spaces and transportation of children and possessions; and provisioning of public goods on a daily basis” (Hill 2011, 1286).

This combination of traits is not only common among human groups but unique to human beings. Moreover, most people living together in these groups are not related, so genetic consanguinity factors in the usual sense are not the hidden drivers of their cooperation (Narvaez 2014, 5137-5141).

Such a degree of cooperation again indicates a levelling of the social structure where everybody helps and everyone is helped. It appears to be the antithesis of an inequalitarian stratified society where some people are always servants and others are always served. I suggest that the social and material outcomes of such a highly sharing, cooperative society will be largely egalitarian.

Further important considerations are provided by the case made by Boehm that egalitarian behaviour also arises in a group from the dislike of being dominated (Boehm, Egalitarian Society and Reverse Dominance Hierarchy 1993, 236), which can be termed Social Dominance Aversion, or SDA in contradistinction to SDO. Although this aversion would appear at the individual level, Boehm approaches it in terms of group values, or ethos and political coalition formation. He argues that individuals’ dislike of being dominated is reflected in the group ethos, which

³⁰ Also known as non-maternal infant care. It is a social practice where infants are taken care of by anyone who is not their mother. It is a characteristic found in most social animals and all primate societies.

reinforces it, and in small communities it is thereby transformed into what amounts to social policy

Socially egalitarian groups were thus formed and sustained because followers discovered that by forming a single political coalition they could decisively control the domination proclivities of highly assertive individuals, even their chosen leaders. The question then arises as to what factors gave rise to the opposite, namely complex, socially stratified societies, and how could they have dislodged the egalitarian social mindset that sustained the egalitarian policies of the past?

The political direction of egalitarianism was, according to Boehm, somehow reversed after the invention of agriculture, and an "orthodox" version of social dominance hierarchy reappeared. The reversal might be as a result of the suggested consideration that hierarchical organisation presumably provides an evolutionary advantage and increases survival value for species, as argued by Fisher, or alternatively, because communities tied to the land might have been unable to resist strong, dominant groups and impose an egalitarian structure.

Furthermore, Fisher's thesis is largely contradicted by the thousands of generations of enforced human egalitarianism as recorded by Boehm. If there were a evolutionary advantages to stratified societies, the uniformly egalitarian societies would not have survived so successfully for so long.

However, social stratification and hierarchy formation appear to be inevitable in complex societies. Although Society is not complex *per se*, the societies we live in have become complex, probably during the changeover to agriculture that required closer group living. Complex societies, distinguished usually by technological development, dense populations and multi-layered social stratification, only arose over the past 10,000 years out of a probable >40,000 years of modern human expansion.

Societies gradually grew in complexity as technology and productivity fuelled agricultural and industrial production. The advantages offered by societies of expanding complexity that could produce public goods such as better defence and

economic security, as well as intangibles like an interesting lifestyle, were immense. But it also engendered elites, political and economic, out to secure special privileges for themselves (Campbell 1975), (Freud 1930), (Maryanski 1992) and resulted in large underclasses of people.

But we must take serious note of very important elements that are inherent in all human societies and which are especially crucial to complex societies. All the evidence seems to point to the likelihood that dissent and coercion, and consequently punishment, are important elements of all human societies. But in complex societies coercion becomes particularly important.

The institution of government is essentially a coercive institution as Rawls states - “political power is always coercive power” (Rawls 2011, 68 and 136); a sentiment with which I also associate myself. Given the variable importance of coercion and punishment in simpler and in more complex societies, it is not surprising that both the desire for fairness and the reaction of punishment of violators should be stronger in complex societies than in simpler ones.

The correctness of this postulate seems to be borne out by the findings of Joseph Henrich *et al* (Henrich 2010) in their very extensive study using three behavioural experiments administered across 15 diverse populations. They showed that market integration of the population (measured as the percentage of purchased calories in a population) positively covaries with expectations of fairness, while community size positively covaries with a reaction to punish norm violators. Members of complex human societies seem to positively expect and require effective means of coercion to enforce community norms.

This increased expectation of punishment, I suggest, probably arises from the fact that in modern complex societies we are subjected to social systems whose size, frequency of interaction with strangers, degree of status differences, and so on, are very far removed from even the most complex foraging societies. Consequently, it seems that the degree of coercion, division of labour, and requirements for subordination to ensure social order, are so much greater than in the simpler societies in which our fundamental psychology was formed. The consequent social

institutions that developed in complex societies that allow deep social hierarchy, strong leadership, inegalitarian social relations, and an extensive division of labour sit uneasily on top of a social psychology that was originally adapted to a simpler world.

Preliminary Principles

The discussion in this section is intended to put forward some preliminary principles of social justice that could be seen to result from the theory outlined at the start of this chapter. The discussion so far leads to the preliminary conclusion that our notions of right and wrong, justice and injustice, are norms and values evolutionarily instilled into the human psyche during the process of our development as modern human beings, and that they favour egalitarian social structures and equal distributions of social goods. Furthermore, these norms and values have added survival value for our ancestors, since they are the norms and values that facilitate and enhance group living for a sapient, social species such as modern humans.

The importance of identifying the principles of social justice is established by the way they predicate how the political constitution and the principal economic and social arrangements of a society should most satisfactorily³¹ distribute citizens' fundamental rights and duties. Furthermore, they would also define the most acceptable³² division of advantages derived from group living.

I have previously indicated that it would be advantageous to approach this question from the point of view of Society, not that of any of the individual members, which is what I now propose to do. The previously discussed notions of justice with the concomitant egalitarian disposition are evidently genetically and memetically embedded in Society. That is to say, human beings taken together as a population

³¹ In accordance with the idea that the closer the principles of our founding civil institutions match our evolved notions of justice, the greater the satisfaction experienced by citizens will be.

³² A corollary is that the closer a distribution of goods are to our evolved notions of justice, the more acceptable they will be to the great majority of people.

will display these traits; not every human being will. Individuals with these traits will have left, and will still leave more of their genes in the gene pool than those who do not have these traits. The population, constituting all of Society, and displaying these traits will be inclined, *ceteris paribus*, to develop cultures that underwrite, support and strengthen these traits.

By cultural transmission these traits evolve to adapt to environmental changes much faster than genetic evolution could (Dawkins 2006), (Lumsden 1981), (Maryanski 1992), (Boyd 1985), thereby making the survival of the species that more robust. Cultural transmission is analogous to genetic transmission in that, although basically conservative, it can give rise to a form of evolution (Dawkins 2006, 189). Dawkins postulates Memes as cultural ideas that replicate like genes, but through the interaction of humans in Society. Like genes they are also subject to copying errors and other variations, but importantly, they are selected for their fitness to current circumstances. Thus we have cultural development. Nevertheless, there is nothing to prevent, under many circumstances, maladaptations forming within cultures.

The gene pool is thus the long-term environment of the gene, but also the guarantor of human gene survival. Individuals are the mortal 'survival machines' that genes, in cooperation with successive groups of companion genes drawn from the gene pool, build one after another, the more the better to ensure survival (Dawkins 2006, 45). Society, by definition encompasses the gene pool and consequently one can be persuaded to view individuals from the societal perspective as the 'survival machines' of the gene pool. Accordingly, what promotes survival of individuals, promotes the survival of the gene pool in all its genetic diversity. Our developed notions of justice, the previous discussion suggests, have most likely developed precisely to support behaviours that promote Social cohesion and cooperation, and are consequently in harmony with, and supportive of the requirements of the gene pool.

This analysis may sound very cold and dispassionate, almost callous in viewing individuals as machines, but the approach does suggest some conclusions

that resonate with many human passions. It resonates firstly with the passions of liberty and equality. As I shall argue below, the societal perspective places all individuals on an equal footing, and their liberty is a necessary precondition for Society fulfilling its natural functions most effectively and efficiently. Thus, the question that arises in the context of this project, is whether, and to what extent from the societal perspective, social justice demands equality and liberty for the individual.

8.4. *Regarding Liberty and Equality*

The previous discussion has already suggested quite strongly that the human disposition is egalitarian and as far as distributions are concerned, it favours equality. The main rubric suggested by the Societal approach is that of liberty. In this section I shall attempt to discern more clearly the nature of the liberty indicated by the Societal approach and how that liberty ought to be distributed among the members of Society and thus of societies. I shall argue that our evolutionarily embedded pursuit of liberty is founded on evolutionary grounds in our psyche and is fundamental to the fulfilment of the human existential purpose.

Like JS Mill (Mill 2015), I lay claim only to a discussion of the subject of civil, or social liberty: the nature and limits of the power which can be legitimately exercised by Society, and thus a society over the individual. Unlike Mill, however, I approach the question of liberty from the Societal perspective: to discover what the interest of Society is in the liberty or otherwise of the individual. I suggest that Society's limits on its legitimate power over the individual, if any, will coincide with what confers survival advantage, which is all that could constitute its legitimate interest in the matter.

But before discussing the subject of Liberty as such, it is necessary to discuss the question of equality, or the distribution of liberty. The question really is whether from Society's point of view, all individuals would have the same level of liberty, whatever it might be, or whether there would be some basis for giving certain

individuals more liberty than others, so creating stratified classes of people with different degrees of liberty³³.

Given Society's fundamental role of acting as guarantor of human survival, and individuals all being the 'survival machines' of the gene pool, this means, for example, that from the societal perspective all humans are equal, each being of equal value to the gene pool: they are all equally products of the gene pool and carriers of the whole human DNA strand, which is a gene's primary focus. This means all individuals rank equally. As previously argued, there does not appear to be any basis upon which individuals can be ranked *ab initio* in principle.

It also means that Society, the human embodiment of the whole gene pool, should treat each individual as equally valuable. It should thus firstly, allow the full advantages and costs of group living to flow freely and equally to each individual. That seems to ensure as far as possible the realisation of the full benefit of the human genetic endowment, which will, I suggest, be a result most beneficial to society and the gene pool.

To achieve such a result however, Society seems unavoidably to have to foster as much human interaction within itself as possible. It is only through free human interaction in Society that individuals can benefit most from social learning, discover and develop their innate skills and talents, meet up with opportunities, experiment with lifestyles, and generally learn how to successfully deal with life in Society. I suggest that from these considerations it follows that within Society, maximum liberty is advantageous both to individuals and to Society and therefore to the gene pool.

But there are complications here. It might be objected that although individuals all carry the full human DNA strand, each individual's genetic code is uniquely configured to the point where no two individuals have exactly the same genome.³⁴ Each person's genome appears to be unique (Pennisi 2001), (Kruglyak 2001), except perhaps for identical twins. This simply points to the common

³³ Such as existed in Europe in feudal times and still exist in many societies today.

³⁴ The complete set of genes or genetic material present in a cell or organism.

observation that people do not have the same abilities and talents, physically, emotionally, and mentally. Thus, some individuals will be able to make better use of the advantages of group living than others, while some others will again be better capable of absorbing the costs compared to yet others. Consequently, if all are treated equally, there will likely be growing inequality from generation to generation, with possible fissiparous consequences, given the human egalitarian disposition. These considerations appear to argue against the equality contention.

But these considerations do not invalidate or qualify the contention of an equality of liberty. While it is true that every individual's genome is unique, the differences seem to arise from random factors such as copying errors, mutations, and genetic recombination on the DNA strand (Kruglyak 2001). The differences are in fact minute, although clearly the effects can be quite substantial. But being the result of fairly random evolutionary factors, such as mutations, copying errors and the like, there is no way of predicting with any certainty who will have what specific traits beforehand. Nor can we predict what the success ceiling of any individual will be, even if we know a person's full genome at birth. Nothing will tell you whether and to what extent the person will successfully navigate the vagaries of life in Society or any particular society. Consequently, those who gain more from group living and suffer less of the costs can only be known on the basis of self-selection, meaning that it will only become evident who gets what as individuals themselves navigate the shoals and shallows of life in society. In a sense, every person selects for herself the advantages she gains from group living by availing them and in how far she absorbs its costs, by suffering them.

It also therefore seems evident that fair self-selection is only possible under circumstances where the costs and advantages of group living are allowed to flow freely through Society, thus creating as near as possible equal opportunities for every individual to gain maximum advantages and to maximally mitigate the costs of living in Society. It therefore follows that there is no way, and no need, in principle to distinguish between individuals in order to discriminate the liberties available to each. Consequently, maximum liberty must be equally available to all.

Based on the same reasoning of equality of value to the gene pool, it also appears to be necessary to allow each individual maximum positive liberty, being the liberty to participate and contribute. Every person should in principle be allowed and empowered to make as much of a contribution to life in Society as he is capable of. It might be political, academic, scientific, economic or cultural, but from the societal perspective the input and participation of every individual is potentially important in every area of social life, since Society would evidently find all the latent skills, talents, and insights lying available in the gene pool potentially valuable to achieve the latent capability that its group level selection empowers it to achieve. I suggest that this follows logically from the fact that all these skills, talents, and abilities have evolutionarily developed in the gene and meme pool to meet and accommodate ecological and social pressures. None are therefore superfluous and so the exercise of all is important in the constant and continuing enterprise of survival. Participation would thus also seem to be important for Society to remain dynamically adaptive to the natural and social ecology of the day.

Thus, it appears that no individual should in principle be excluded from making whatever contribution she is capable of under her life circumstances, indeed every individual should in principle be empowered to do so. However, who contributes what will again become evident only based on self-selection and therefore every individual should in principle be allowed to contribute to Society without any in principle constraints. The extent to which any particular individual contributes, or not, is clearly a matter of personal ability, preference and circumstances.

The discussion thus far suggests that what is fundamentally just is liberty, distributed equally to every individual. Liberty, both in the sense of negative liberty,³⁵ and of positive liberty,³⁶ as discussed by Isaiah Berlin (Berlin 1969) is thus affirmed

³⁵ Freedom from restraint and the freedom generally to live one's life according to one's own lights, subject to everybody else's right to do the same.

³⁶ Positive liberty is especially important if it is correctly understood as empowerment, and not as coercion to act or believe in any particular way.

by the societal approach. Its equal distribution is because from the societal perspective there does not appear to be any basis upon which any one individual can be preferred above another and thus be entitled to enjoy more liberty and greater empowerment than others. As one might expect, this also appears to be exactly in line with the evolutionarily developed human psyche of equality. Liberty, being a social good, ought thus to be distributed equally to accord with our evolutionarily developed sense of social justice.

But it needs to be said that positive liberty is meaningless without social learning. It is only social learning that can develop an individual to becoming a fully functional member of Society, able to contribute to her potential. This is due to the fact that an individual's genetic inheritance is only a potential until it is actualised through social learning. If the unconstrained possibility of the exercise of each individual's genetically inherited talents and abilities is important for the enterprise of survival of the gene pool, as previously argued, then it follows firstly, that every individual should also have free and equal access to the accumulated intellectual property of Society, and secondly, that social teaching is not only a function of Society, but also its natural duty to each of its members.

It might be objected that so many people don't exercise at least some (and often most) of their genetically inherited talents (for the good of 'Society'), nevertheless the human gene pool has reached extreme numbers. The point of the argument is not that all people should exercise all their talents all the time. There is no pre-determination who will exercise what talents at any time. Therefore, it is important that all people should in principle be enabled to exercise any one, more, or all their talents at any time. There is clearly great redundancy in numbers in the gene-pool, exactly because there are no selection criteria for who will exercise their talents all the time. Some people will exercise some of their talents some of the time. For that to happen all the people need to be enabled to exercise their talents at any time.

People also don't often exercise their talents for the good of Society as such. It is merely advantageous for society to have people exercise and place their

multiplicity of talents into the great enterprise of society. If these talents were not of value to society and the procreation of human beings, they would never have been selected for at all.

Education, which is really institutionalised social learning, thus appears to be, from the societal perspective, a fundamental precondition of liberty. Like all social goods appear to be, education should thus be a good equally distributed and available to all. Self-selection will determine what individuals absorb and to what use the knowledge is put.

But if justice is thus seen to be done by the exercise of those values and actions that tend to foster Social cohesion, as has been argued, then the enforcement of levelling behaviour, or behaviour that promotes social cohesion can be seen as a legitimate power of Society over the individual and a limit for individual liberty. Society's legitimate interest in the liberty of the individual might thus be said to be generally the attainment and promotion of justice. The limits of its legitimate power would then appear to be to such powers as are necessary to promote prosocial values and behaviour as well as those required to limit and discourage anti-social behaviour and values, which obviously places limits on liberty. The concept of liberty in the context of society cannot include the liberty to commit injustice.

Liberty, understood as above, appears to be so central to the human circumstance that it might be argued that it is a condition that cannot be abrogated. I suggest that although that is probably generally true, and it is certainly true of mankind as a whole, liberty for individuals seem to be to some extent conditional. It seems that although liberty cannot be abrogated, it needs, for certain individuals at certain times and under certain circumstances, to be subject to suspension for a determinate period³⁷. This is because of the perceived need to punish offenders against certain norms that are regarded as so fundamental to a society that their contraventions are classed as crimes. Although the ultimate punishment during the

³⁷ Logically, suspension cannot be for an indeterminate period, since that would amount to the abrogation of the liberty of an individual.

Pleistocene and among Holocene hunter gatherers was probably ostracism and even banishment upon pain of death, this is not feasible in highly complex societies, where persons who pose a threat to the lives and property of the members of society, need to be isolated from society. Consequently, the institution of prisons and sentences of detention seems unavoidable in modern complex societies and the fundamental conditionality of the liberty of individuals (personal liberty) also follows. There are many considerations regarding the issues of what actions can justly be regarded as punishable, but those are matters for a different project. For the present project it is only necessary to note that there are such actions that constitute crimes and delicts and that just punishment is a fundamental constraint on the concept of personal liberty.

A just society could almost certainly never exist without a just system of punishment, which means that the threat of punishment for malfeasance, like all social goods, should apply equally to all members of society, but obviously meted out only to those fairly judged to be in need of it.

9. *Tentative Principles of Distributive Justice*

Consequent upon the discussion in this chapter it is possible to suggest some preliminary principles of social justice that result from the evolutionary psychology approach. First, the societal perspective presents itself as a most advantageous point of departure to evaluate the principles, since the human notions of social justice appear to be evolutionary adaptations to meet the survival needs of human beings during the formative era of the Pleistocene and the early part of the Holocene.

It follows, I suggest, that the inculcated notions result not from merely individual selection, but from group level selection, which gives the group the necessary mix of genetic material to promote survival for all. It also means that although the human experience during the formative eras were fairly uniform, the later cultural adaptations to specific circumstances would be culture-specific, and it would be wrong to ascribe exactly the same values to all cultural groups. This

feature appears to be specifically related to the sharing, or distributive practices found in different cultures relating to food and consumer goods.

This principle would make it incumbent upon a society to use and develop a general distribution system of material goods that is premised on achieving reasonable equality, rather than mere want satisfaction. From the discussion, it appears that neither 'need' nor 'want'³⁸ is a distributional requirement of our developed sense of justice. Justice is not needs- or wants-driven; it is driven by the subliminal desire to broadly equalise the outcomes of that what is not equal (Kent 1993), and (Speth 1990). Justice thus appears to demand a broadly proportional equality of goods and services, meaning a distribution that is within the acceptable limits of what each individual could comparatively demand from his fellows within that society. What that measure is, would be subject to cultural variation as anthropology researchers have found.

The same principle would ostensibly then apply also to consumer goods. In the result, the proportional equality principle might be stated as follows:

- The produce³⁹ of society should be distributed throughout a society according to the principle of proportional equality, the proportion dictated by the cultural values of the people, and taking into account the necessities of life based on differing individual requirements and capacities.

To realise this principle in practice would be extremely difficult, but not impossible. I am of course dealing with ideal theory, in the same sense that Rawls does (Rawls 2009, 9), and therefore my conclusions as framed do not necessarily represent pragmatically implementable solutions. Yet they do present a goal of human justice that all could aspire to, and I suggest that their advance ought to be one of the prioritised goals of social development studies and research, for there surely cannot be social development without social justice and its deeper understanding.

³⁸ 'Want' in the economic sense as driving demand, not meaning lack of goods.

³⁹ Including all services, foods, consumables and other consumer goods.

As far as other social goods are concerned, justice requires strict equality, as discussed above. All the various liberties identified under the concept of Liberty, subject only to criminal law, and education, as well as justice itself must be distributed to all members equally. This principle might be framed as follows:

- The most extensive liberty compatible with a similar liberty for all, as well as full access to the intellectual property of Society should be extended to every member of society subject only to temporary suspension under fairly administered laws, in pursuance of which fair adjudication should be open and available to all.

These principles are not intended to supplant or in any way derogate from principles of social justice already identified by other authors. They are not intended as preferred alternatives. Rather, they are intended to serve as supplementary to well-known principles, but they can hopefully add to our understanding of the depth of the human commitment to social justice and the nature of their underlying *ratio*. Furthermore, by giving what is a solid base in human psychology for the origin and social role of justice, they may contribute to the further development and understanding of our notions of justice and act as reference for the development of social policies in future.

10. Conclusion

In conclusion, we can assess whether the hypothesis proposed at the start of the chapter is successfully proven. The result of such an assessment ultimately depends on the degree of proof required. In a project such as the present one, it would be far too much to expect any conclusive proof of this very complex subject. However, I suggest that proof on a balance of probabilities is achievable.

The first part of the hypothesis as set out in heading 5.1 is likely the least problematic. There is a great weight of evidence which indicates that our notions of right and wrong, justice and injustice, are norms and values instilled into the human psyche during the process of our evolutionary development as modern human

beings. It is also a proposition that is met with reasonably wide acceptance within the scientific community.

The second part of the hypothesis, as set out in 5.2, namely that the closer the principles of our founding civil institutions match our evolved notions of justice, the stronger our social bonding, the more peaceful our society, and the greater the potential health and happiness that can be experienced by every individual will be, appears to be supported by uncontroversial evidence and is largely self-evident.

The most controversial, and probably most challenging argument, is that of the supposed fundamental egalitarian preference of humans, argued for in the chapter. A great deal of evidence and arguments were adduced to support the contention that humans are fundamentally egalitarian, and it may be objected that there is a striking neglect of the extensive literature on the breakdown of cooperation resulting from peoples' group orientation and inter-group antagonisms. There is indeed a plethora of studies of in-group, out-group conflict and attitudinal antagonism, many of the studies involving research by Sidanius and Pratto (Sidanius 2000), (Sidanius 1999), (Sidanius 1994), and others (Tajfel 1979), (Tajfel 1982), (Hawley 1999), (Goette 2006). This is understandable, given the modern social problems engendered by racism, misogyny, religious zealotry, class conflict, xenophobia, isolationism, and protectionism in international politics.

The reason for my focus on cooperation, however, is that I believe cooperativeness to be the key to the fundamental nature of humans. This is not to deny all our anti-social and uncooperative inclinations, especially since culture plays a determining role in how people behave (Narvaez 2014), and Narvaez makes a persuasive argument that our modern, neoliberal culture is a severe maladaptation to the human norm.

But cooperation, I suggest, is the fundamental norm. It is a hallmark of successful societies. Cooperation confers survival advantage (Greene 2013, 24). He says that "biologically speaking, humans were designed for cooperation, but only with some people. Our moral brains evolved for cooperation within groups" (Greene 2013, 23). And he adds that we have not evolved for universal cooperation.

Universal cooperation, he holds, would be inconsistent with the principles of evolution by natural selection, although he says that this does not mean we are doomed to not be universally cooperative. He argues that what we lack for universality is a metamorality, although he is not sanguine about that possibility. I am also not convinced that we are yet moving toward a metamorality, although I would not discount it entirely. However, I shall argue that we are moving toward a meta-identity, driven by our fundamental cooperative, egalitarian nature, as revealed by EP.

We know from Boehm's studies (Boehm 1999), and (Boehm 1997) that as of 40,000 years ago all human groups practiced egalitarian behaviour. Boehm postulates that this egalitarian behaviour syndrome over thousands of generations caused selection pressure on genes so that egalitarian preferences in humans became an embedded fundamental psychological characteristic. It therefore seems, on a preponderance of probabilities, that cooperation and egalitarianism are genetically fundamental characteristics of humans, albeit conterminous with certain group identities.

But groups appear to be mutable. Every individual is linked to any number of groups, ranging from the nation state, the language group, the cultural group, the local church, the neighbourhood, the tennis club, and so forth. In prehistory groups were also mutable: they grew larger by absorption, amalgamation, assimilation and incorporation of other groups through conquest, or agreement, or grew smaller through defection, or fissiparousness due to a multitude of factors. Therefore, the human devotion to groups is not such an insurmountable problem to wider cooperation and egalitarianism.

The system of nation states that is prevalent in the modern world only took shape in Europe after 990 A.D. and then began to extend its influence over all of Europe over the next 500 years. Eventually this form of political organisation came to dominate the whole planet (Bowles 2000).

Like all groups are, a nation state is a cultural construct. They were created out of an amalgamation of smaller groups, but identification with and cooperation

within them soon spread to include the larger groupings. According to Bowles, this process was driven by the war-making success of the nation state compared to that of other forms of organisation. However, the emergence and early diffusion of the nation state “may have relied critically on group-advantageous but individually costly norms” (Bowles 2000, 13). The process of nation state formation described by him is akin to a process of cultural evolution due to the selection pressures of war.

This widening of identity groupings is an ongoing process. Nancy Buchan *et al* finds support for the proposition that globalisation strengthens cosmopolitan attitudes and weakens the relevance of ethnicity, locality and nationhood as sources of identification. They find that globalisation extends the boundaries of the groups to which people believe they belong, and this is followed by an increase in individual cooperation at the global compared to that at the local level (Buchan 2009). I would argue that this is a further confirmation of the cooperative nature of human beings at the fundamental psychological level. As soon as circumstances and the ruling culture allow, humans naturally gravitate to greater inclusivity in their cooperativeness.

If cooperativeness and egalitarian preferences go together, as suggested above, it means that if cooperative groups can radiate out to assimilate smaller groups (for which there is sufficient evidence), egalitarian behaviour can follow as well. That this may be so is further evidenced by the studies mentioned in this chapter. The most likely result of 40,000 years of gene-culture coevolution under egalitarianism is a fundamental human predisposition preferring egalitarian social structures and distributions in the identity group.

Already in a 2014 study by the World Economic Forum (WEF 2014), global inequality is identified as the second greatest challenge facing the world community, after the rising societal tensions in the Middle East and North Africa. These tensions themselves are not unrelated to the global inequality of wealth and income.

There is thus sufficient evidence, I suggest, to conclude on a balance of probabilities, that the fundamental human disposition is that of cooperative egalitarianism. From the discussion in this chapter it thus follows that an EP theory of social justice is well-founded on those sentiments.

In the next chapter, the theory developed in this chapter will be relationally compared with, and analysed next to justice as fairness as proposed by John Rawls. This will be attempted to discover and discuss whether the evolutionary psychology approach can comparatively lead to further insights and perhaps a potentially richer understanding of the human value of social justice.



CHAPTER 4

Two Approaches: A Relational Analysis

“SOCRATES...men are only agreed to a certain extent about justice, and then they begin to disagree.” (Plato 2010, 7360)

1. Introduction

Justice as fairness is the result of a lifetime's work by the unique talent of John Rawls. As such it is a mature, well traversed theory that has seen numerous evaluations, revisions and developments over the decades that it has been available and actively studied. Against this, the societal approach to social justice, developed from the EP perspective is no more than a preliminary development of a theory that will require substantial further analysis and reflection to reach comparable maturity.

Nevertheless, at this stage it appears possible to identify and discuss some higher-level congruencies and divergences between the two approaches. To distinguish and discuss them relationally under different rubrics will be attempted in this chapter.

The purpose is to reach some broader understanding of the EP approach while simultaneously exploring how some of its elements relate to different aspects of justice as fairness. In the process, opportunities to further iterate and flesh out some of the perceptions of the EP approach will present themselves.

To achieve these purposes, I propose to discuss the two approaches topically to relate them within the same topical context. It is important to keep in mind that the two approaches are very different, and this not always compatible. Yet there is an important congruence which relates to the role that intuition plays in both. However, I shall take care to avoid begging the question against either approach.

Given the above considerations, it is important to discuss the premises of each approach to discern the fundamental differences that arise between a theory

conceived from within the Kantian paradigm, albeit the Rawlsian interpretation of that paradigm, and one conceived within the EP paradigm.

This discussion is intended to be followed by a closer inspection of the aims of each of the theories. The initial aim of justice as fairness, it will be argued, was different, more universal, from its final aim which is limited to the political, and I will contrast this with the aim of my project.

Following that, I propose to analyse the two conceptions of justice involved in the two approaches. The Rawlsian concept, being founded on universal agreement, eventually ran into difficulties when he seriously considered the implications of people in society having contradictory and incompatible beliefs. I discuss his remedy and contrast it to the fundamentals of the EP approach.

It is clear that in both approaches intuition plays an important role. I discuss the role, the nature and the source of intuition in each, before I turn to a relational analysis of the basic principles of justice that result from each of the approaches.

Rawls states that one of his major purposes in developing his theory was to provide a better alternative to the then generally dominant theories of Utilitarianism and Intuitionism. In fact, he makes a strong argument against teleological theories in principle and proposes his deontological approach to theory as superior. In this chapter I then discuss the teleological nature of the EP approach relationally within that context and attempt also to draw some parallels with Mill's equally teleological Utilitarianism.

The discussion of teleology versus deontology leads into the question of maintaining neutrality on moral questions that arise in a democratic polity. Rawls maintains that the state must remain morally neutral, which is also a result of the disagreement avoiding contractual framework of his agreement-based theory. I contrast this with the EP approach which has no underlying conscious agreement requirement, before discussing some conclusions from this chapter.

In the first section, I shall deal with a divergence of premises between the two approaches.

2. A Divergence of Premises

I will argue that there is a fundamental divergence of the premises of the two approaches. They diverge fundamentally in their respective attitudes to the natural sciences. Whereas Rawls specifically excludes reliance on any empirical research, the EP approach is founded on such research. Thus, justice as fairness is premised upon pure philosophy, while the EP approach is premised on the results of research in a multiplicity of the sciences, natural and social. But despite this divergence they are not completely at odds. The EP approach has a lot more to offer Rawls's project than he allows, as I shall discuss later in this section.

It is therefore not surprising, yet still edifying to note that an EP approach to the question of social justice was not beyond Rawls's contemplation, although he rejected it outright, as I intend to show below. However, I propose to deal specifically with the arguments he does put forward, and to do so I shall consider in some depth what is in fact the fundamental difference between the Rawlsian approach and the approach I adopt in this project, while noting also to what extent the EP approach can in fact serve to vindicate his project.

Rawls (Rawls 2011, 80-87) deals directly with the scientific psychological approach to the question of justice in §7 and §8 of Lecture 2 of Part One of *Political Liberalism: Basic Elements*. He sums up his argument with the general conclusion that political philosophy is autonomous, firstly because its family of "fundamental ideas is not analysable in terms of some natural basis, say the family of psychological and biological concepts, or even in terms of the family of social and economic concepts." This is due to the fact, he says, that the political conception of justice is a normative scheme of thought. The presumption supporting his contention is evidently that normative schemes of thought are not analysable in terms of any natural basis. This is further supported by his later statement on p. 88, that political philosophy is autonomous in that "we need not explain its role and content scientifically, in terms of natural selection, for instance."

At first blush, this may be interpreted as Rawls being mindful of the so-called "naturalistic fallacy" (cf. the discussion in Chapter 3 heading 4, above). But Rawls

does not read Hume to underwrite or invent the NF. Not only does he never mention NF, he reads Hume to say the opposite. In his lectures on Hume, Rawls says:

All along I have interpreted Hume as wanting to show that morality, and our practice of it, is the expression of our nature, given our place in the world and our dependence on society. It is part of Hume's fideism of nature to establish that morality is a natural phenomenon fully continuous with human psychology (Rawls 2003, 978-979).

And again at 1021- 1025:

[Hume] abandons entirely the idea of a theological basis of morality and proceeds to treat the virtues, both natural and artificial, as well as our moral sentiments as natural facts. It is of no concern to him that our moral beliefs should be peculiar to us. He treats our judgments of moral approval and disapproval as part of human psychology, and he observes the similarities between our psychology and that of animals. Why we have a morality, how we acquire it, and the way it works, is one of the moral subjects to which he is applying the experimental method of reasoning.

I therefore suggest that the NF is not the source and cause of Rawls's rejection of science, but it may rather be understood in terms of the Kantian nature of his project. In TOJ he disclaims any originality for his theory on the basis that the result of his account of justice is highly Kantian in nature (Rawls 2009, 146). However, in the Dewey Lectures (DL) (Rawls 1980, 517) he points out that

the adjective 'Kantian' expresses analogy and not identity; it means roughly that a doctrine sufficiently resembles Kant's in enough fundamental respects so that it is far closer to his view than to the other traditional moral conceptions that are appropriate for use as bench-marks of comparison.

Rawls then continues to discuss how Kantian Constructivism informs and influences justice as fairness. He argues that in justice as fairness the first principles of justice depend on such general beliefs about human nature and how society works, as are allowed to the parties in the original position. (Rawls 1980, 565). In justice as fairness, he states, the first principles of justice are not independent of such beliefs, and it follows that as the general beliefs about human nature and the working of society change, the first principles of justice may also change.

But, he argues, these beliefs are distinct elements and enter the discussion at different places. The conception of the person as free and equal, he holds, is a companion moral ideal paired with the ideal of a well-ordered society wherein citizens “affirm their public conception of justice because it matches their considered convictions and coheres with the kind of persons they, on due reflection, want to be” (Rawls 1980, 568). Whether these ideals are feasible, whether they can be realised under normal conditions, is revealed by a theory of human nature and a view of the requirements of social life. Thus, he argues,

Changes in the theory of human nature or in social theory generally which do not affect the feasibility of the ideals of the person and of a well-ordered society do not affect the agreement of the parties in the original position (Rawls 1980, 566).

Rawls adds that it is hard to realistically imagine that there could be any convincing new knowledge that negates the feasibility of these ideals – the relevant information on these matters, he says, probably goes back a long time and is available to inform the common sense of any “thoughtful and reflective person.” Such advances in knowledge, he argues, may rather be used to implement the application of the first principles, and to suggest better designed institutions to realise them in practise.

It seems clear that Rawls regards the relevance of scientific knowledge as relating only to the feasibility of the practical implementation of justice as fairness. It has nothing to do with the ascertainable or even probable truth of the conceptions. The first principles of justice, he states, may be said to be true “in the sense that they

would be agreed to if the parties in the original position were provided with all the relevant true general beliefs” (Rawls 1980, 569). Nevertheless, the notion of truth does have a natural use in moral reasoning, he suggests. In particular cases for example, particular judgments and secondary norms may be considered true when they follow from, or are sound applications of, reasonable first principles.

This clearly indicates that for Rawls, neither science, nor truth are considered to play any role in the construction of first principles. Indeed, Rawls clearly says that first principles can be said to be “reasonable” or “unreasonable,” rather than “true” or “false,” because they are constructed via the constructivist procedure of the original position. First principles, he holds, are not to be derived “from the truths of science and adjusted in accordance advances in human psychology.” (Rawls 1980, 569,567, & 568)

This view that Rawls takes is clearly derived from the Kantian view which is that the fundamental philosophical issues must be addressed *a priori*, without drawing on observations of human beings and their behaviour (Johnson 2014). Kant’s argument seems to be that moral requirements present themselves as being *absolutely necessary* (Kant 2013, 1251). But an *a posteriori* method seems ill-suited to discovering and establishing what we *must* do; surely it will only tell us what we *actually* do. So, an *a posteriori* method of seeking out and establishing the principle that generates such requirements will not support the presentation of moral ‘ought’s’ as necessities (Johnson 2014).

According to Johnson, Kant’s argument seems to be that once we “seek out and establish” the fundamental principle of morality *a priori*, then we may consult facts drawn from experience, thus empirical facts, in order to determine how best to apply this principle to human beings and generate particular conclusions about how we ought to act. This seems to be precisely the reading Rawls gives Kant and is an argument on all fours with his application of empirical facts in justice as fairness, as discussed above.

However, Rawls's does seemingly try to justify his rejection of empirical input also on non-Kantian considerations. He argues that "human nature and its natural psychology are permissive: they may limit the viable conceptions of persons and ideals of citizenship, and the moral psychologies that may support them, but do not dictate the ones we must adopt." What he seems to be arguing is that human nature, being whatever it may be, may constrain the possible accurate conceptions of "the person", the concomitant "ideals of citizenship" and the moral psychologies that support them, in that it leaves, by implication, per Rawls, a constrained pool of possible conceptions of the person, of ideals of citizenship and of supporting moral psychologies one may adopt.

This argument is echoed by Ken Binmore when he says that any decision problem can be divided into two parts:

One first determines what is feasible, and then chooses the optimal alternative from the set of feasible possibilities. Feasibility is a scientific question that can be settled independently of our cultural biases if we try sufficiently hard. It is only when we get to choosing an optimal social contract from those that are feasible that science ceases to guide our path. (Binmore 2005, 52)

But, Rawls seems to argue, given this pool of concepts, human nature, as understood in psychology, would still not tell you which specific one(s) ought to be adopted. One would still require some form of moral guidance to adopt the truly moral one. It appears that what he is saying is that the natural psychology understanding of human nature includes a wide range of possible conceptions of the person; it may support a wide array of possible ideals of citizenship and supporting moral psychologies, but human nature as such has no real moral content, no moral compass.

The natural psychology of human nature, Rawls appears to say, will not guide you to adopt any particular one of these conceptions as the uniquely moral one. It is with this second part of the Rawlsian argument, seemingly supported by Binmore, that I take issue in this project. My point is that there will probably not be a unique

single moral conception of the person, but probably numerous moral conceptions, each one being appropriate, depending upon how it fits with the culture of the people adopting it. However, if we understand the role of moral beliefs and behaviour in the evolutionary process, there will be a similarity in the deep structure of all the truly moral conceptions. Science therefore still guides our path even after we discover feasibility.

How Rawls comes to his conclusion is not directly made apparent in *TOJ* or in *Political Liberalism*, but given the Kantian context of justice as fairness, Rawls's position is that moral guidance must come from *a priori* first principles, not from empirical experience.

But as far as Binmore is concerned one must keep in mind that his definition of a social contract is quite far removed from Rawls's understanding of the contract: being the institutional embodiment of the agreed principles of justice, incorporated into the basic structure of society. According to Binmore a "social contract is the set of common understandings that allow the citizens of a society to coordinate their efforts" (Binmore 2005, 3).

But accepting, for the sake of argument, the correctness of Rawls's argument, it still raises the following question: If we do not investigate what limits human nature and its natural psychology place on the viable conceptions of persons, the ideals of citizenship, and their supporting moral psychologies, how can we be sure, acting in ignorance, that the conceptions and ideals we do adopt are viable ones? There is no real reply to such questions in justice as fairness. Rather the reply would seem to be locked in the Kantian logic that moral principles draw on knowledge that transcends the limits of experience and therefore cannot be contested by the criterion of experience.

I therefore suggest that to the extent that Rawls tries to justify his rejection of scientific input by non-Kantian arguments, it is unsuccessful. It seems to indicate that Rawls never seriously considered the objections to his theory to the effect, as he puts it, "that our account is unscientific," (Rawls 2011, 86) for he does not meet the objections head-on. Rawls cannot accept scientific facts into his project without

destroying its Kantian roots. To do so would undermine the whole structure of the original position and the status of its results.

Justice as fairness is meant to be a real-world solution to a real-world problem of a lack of social justice. It therefore must deal with real world persons. An idealised conception of the person, idealized without reference to any scientifically valid considerations, can surely never found a valid theory of how people would react to, for example, the veil of ignorance, or to the presentation of justice as fairness in that situation of the original position. A proper conception of the person, I suggest, should be founded on scientifically valid considerations, if we are to conceive of real world persons.

There is nothing in Rawls's argument that convincingly puts philosophical theory beyond the reach of scientific input, unless one accepts a Kantian moral position *ab initio*. From the EP point of view there does not appear to be any valid considerations to reject its scientific foundation in favour of philosophic argument in principle. As is argued below, there has always been a virtuous dynamic between philosophic insights and scientific discovery. I therefore suggest that Rawls's rejection of scientific input is unfounded and unfortunate, but seemingly unavoidable because of its philosophic roots. His project might otherwise have gained much from accepting scientific input. This argument will be further developed in §5 below.

The EP view, however, is better presented in the words of Edward O. Wilson, who pinpointed the biological foundation of ethical intuitions:

These centres [the hypothalamus and limbic system] flood our consciousness with all the emotions - hate, love, guilt, fear, and others - that are consulted by ethical philosophers who wish to intuit the standards of good and evil. What, we are then compelled to ask, made the hypothalamus and limbic system? They evolved by natural selection. That simple biological statement must be pursued to explain ethics and ethical philosophers.... (Wilson 1975)

As will be argued later in more detail, there is a clear implication in Rawls's theory and his arguments that there exists some common human understanding, perhaps intuition, of justice. He struggles to put his finger on exactly how this deeper understanding might be accessed and realised, but that is because he does not incorporate psychology into his theory.

The deep recesses of the human mind can be understood only based on natural psychology, and justice as fairness could have gained much from introducing that knowledge into the project. EP provides even more. It could have provided Rawls with an understanding of how it comes about that people have similar notions of justice embedded in their psyche and how that might explain the agreement that he wanted to achieve through the mechanism of the original position.

Rawls's relatively easy dismissal of scientific investigation seems to place him at one end of a spectrum of academic opinion that finds the likes of Stephen Hawking and others at the other end. Hawking and Mlodinow hold that philosophy is dead (Hawking 2010, 13). It has not kept up, they say, with modern developments in science, particularly physics. They maintain that scientists have consequently become the bearers of the torch of discovery in the human quest for knowledge.

I think there are grounds for accepting a position in the middle-ground between Rawls and Hawking - a position wherein the relative merits of scientific rigour and philosophic insight both come into their own in mutually supportive roles. Philosophical insights can be, and are regularly, derived from science and *vice versa*.

The interaction between philosophy and real-world experience has been acknowledged for many years by different schools of thought. American pragmatism and German hermeneutics, for example, share an important assumption that I also adopt, namely that philosophy must find its home in, and preserve its link with, everyday life. Philosophical theories and concepts must pay their way by making a difference to the lives and the experience of real people in the actual world (Finlayson 2005, 18). Empirical science plays a similar role in the real world, so that the most efficient outcome would generally be when the one discipline feeds off the

other. I therefore argue that there can be a virtuous cycle of interaction between philosophy and natural science, particularly so in the instance of my project.

Thus, to put the divergence of the premises of justice as fairness and the EP approach more plainly, one could state that whereas Rawls ignores and rejects the value and importance of the sciences for his political conceptualisation of justice, the EP approach accepts the contributions of the sciences as foundational for its theory development.

It attempts to make use of such multiple premises about human understanding and behaviour that science and research can provide, to inform us about the human psyche, how it was formed, and its role and functions in the modern world. This puts us in a position where we can reason deductively and inductively about the most likely concepts, or understandings of social justice that would be most widely found to be generally amenable to human beings in the social context. The EP approach tries to understand the evolutionarily developed human psyche and provide a scheme of precepts for social justice, taking account of human beings as they are, rather than as we would have them be.

In the following section, I shall attempt to deal with some of the divergences and congruencies that arise between justice as fairness and the evolutionary approach from the distinct aims of the two projects.

3. *A Departure on Aims*

The aim of Rawls's project changed over time until it reached its final status of being limited to a political conception of justice, which it was not at the outset. His aim is in general to articulate our considered principles of justice, while the general aim of my project is articulate the principles of justice as they have been embedded in the human psyche through the process of evolution. I try to understand as well as articulate the human notion of justice, rather than to define precise principles. In this section, I try to evaluate the difference this departure on aims makes to the respective final results.

Rawls (Rawls, 1987) states that the aims of political philosophy depend on the society it addresses. In his essay on *Kantian Constructivism* he makes clear what society he is addressing in justice as fairness:

... we are not trying to find a conception of justice suitable for all societies regardless of their particular social or historical circumstances. We want to settle a fundamental disagreement over the just form of basic institutions within a democratic society under modern conditions (Rawls 1980, 518).

A constitutional democracy, he contends, needs a regulative conception of justice that can articulate and order in a principled way the political ideals and values of a democratic regime, thereby specifying the aims the constitution is meant to achieve and the limits it must respect. It is in this context, I suggest, that justice as fairness must be seen and evaluated. Justice as fairness is evidently addressed to the citizens of a constitutional democracy.

In his reply to Alexander and Musgrave (Rawls, 1974) Rawls formulates the aim of justice as fairness as being to clarify and organize our considered judgments about the justice and injustice of social forms. Thus, any account of these judgments, when fully presented, expresses an underlying conception of human society, that is, a conception of the person, of the relations between persons, and of the general structure and ends of social cooperation.⁴⁰

Relatively late in the project's development, Rawls reiterates the aim of his project as follows:

The aim of justice as fairness, then, is practical: it presents itself as a conception of justice that may be shared by citizens as a basis of a reasoned, informed, and willing political agreement. It

⁴⁰ In fact, according to Samuel (Freeman 2007a), the justificatory force of social contract views depends only in part on the idea of agreement; even more essential is the conception of the person and the conception of practical reason that are built into particular views. Rawls's idea of agreement, he says, is closely tied to his conceptions of public reason, justification, and autonomy – p.p.122-123.

expresses their shared and public political reason (Rawls 2011, 9).

To clarify the essence of what Rawls is saying one might suggest that he argues first that a constitutional democracy needs a regulative conception of justice, that is, a conception of justice, to be provided by political philosophy, that will in practice act as an enforced, binding regulator of political life through its incorporation into a constitution. It thus appears to be a prescriptive conception of justice that he is aiming for.⁴¹ Second, the specific aim of justice as fairness is to clearly formulate that conception of justice to capture our considered judgment resulting from reflective equilibrium. However, he says this conception of justice may be shared by citizens as a basis of the constitution.

Rawls's aim seems not to be to determine what is just and unjust in any objective sense, his aim is to gain a consensus judgment in a modern democratic society on the subject of social justice from the people involved. Only after agreement on the principles do they become prescriptive. They are prescriptive because it is what would have been agreed to in the original position.

If people in a society should all agree, then the agreement reflects a proper conception of justice on which to base their constitution.⁴² But, while discussing the concept of reflective equilibrium (Rawls 2009, 50), Rawls says that for the purposes of his (TOJ) book, "the views of the reader and the author are the only ones that count." In the view of R. M. Hare (Hare 1973) Rawls, is "here advocating a kind of subjectivism, in the narrowest and most old-fashioned sense. He is making the answer to the question "Am I right in what I say about moral questions?" depend on the answer to the question "Do you, the reader, and I agree in what I say?" In doing

⁴¹ Rawls says: "By way of general comment, these principles primarily apply, as I have said, to the basic structure of society (the constitution). They are *to govern* the *assignment* of rights and duties and *to regulate* the distribution of social and economic advantages (Rawls 2009, 61) (my bold Italics).

⁴² Rawls contends that "the institutions of the basic structure are just provided they satisfy the principles that free and equal moral persons, in a situation that is fair between them, would adopt for the purpose of regulating that structure (Rawls 2011, 271)."

this, Hare argues, Rawls makes the truth of the theory depend on agreement with people's opinions.

Rawls would inevitably defend against Hare's claim by arguing that despite the concept of justice reflecting our independently, but subjectively considered, judgment in equilibrium, the principles so agreed to will be objective. Our moral principles and convictions will be objective because "they have been arrived at and tested by assuming this [appropriate] general standpoint [as prescribed for the original position] and by assessing the arguments for them by the restrictions expressed by the conception of the original position" (Rawls 2009, 517).

The EP approach, because of its incorporation of scientific principles, requires no subjective agreement at all.⁴³ Its applicability is also not restricted to modern democratic societies, but may lay claim to more universal applicability. This is because it does not seek agreement from people based on their already socialised understanding of democratic values. Its principles are thus objective in the sense that they are not based on the opinion of any participants or members of society, but on the scientifically observed natural functioning of their psyche. The principles are embedded in the human psyche, and EP's aim is to understand and isolate them objectively as functional elements of human behaviour.

The aims of the two approaches are thus distinguishable by the difference in the fundamental veracities they each seek. But despite this difference, the EP approach does appear to support some of the Rawlsian argument. In justice as fairness Rawls argues that the principles of justice are revealed, fixed and validated by agreement between the parties. In a certain sense the EP approach supports the idea of principles based on general agreement, but the agreement emanates from the evolutionarily embedded notions of justice in the human psyche, not from

⁴³ This is where the EP approach fundamentally departs from social contract views and liberal intuition: social contract views work from the intuitive idea of agreement. There is a basic liberal idea that cooperation ought to be based in the individual's consent and ought to be for their mutual benefit. EP for its part asserts that willing cooperation within society is spontaneous, being part of human nature and it redounds to the benefit of group living.

reliance on the supposed agreement of various parties which may or may not actually obtain.

4. *Two Conceptions of Justice and Society*

In this section, I analyse the conception of justice that Rawls puts forward; I raise a number of objections and identify some weaknesses in his conjectures from the EP point of view. I compare the contractually constrained conception of justice with the idea of justice as naturally perceived by human beings based on notions embedded in their psyche. I investigate what is fundamentally the difference between a constructed conception versus a discovered conception of social justice.

Evidently there do appear to be areas of congruence between justice as fairness and the evolutionary approach. Both have the aim of being practically implementable, and to be just in execution. Although justice as fairness relies for its efficacy on a political agreement, understood as shared public reason, both approaches propose its principles to present a publicly shared conception of justice. In justice as fairness it comes about through the device of the original position, in EP the shared conception comes about because of the evolutionarily developed common human psyche. But whereas justice as fairness has the explicit aim of formulating principles to form the basis of a political constitution, the EP approach tries to reach an understanding of the human notion of social justice that can be used in a wide array of social purposes and policy formation, including the possible drawing of a political constitution.

Rawls doubts that there exist many conceptions of justice and human society such as would serve his purposes, and insofar as they do exist, he argues that they are so disparate as to be basically irreconcilable (Rawls 2009, 633). Thus, he proposes to start afresh by specifying an underlying conception of society upon which he would build and formulate a theory of justice. According to Rawls, the result of this exercise is his notion of a well-ordered society. He then continues to define a well-ordered society as one that is, among other features, effectively regulated by a

public conception of justice (Rawls 2009, 634). By a society effectively regulated by a public conception of justice he means a society in which:

1. Everyone accepts, and knows that others accept, the same principles (has the same conception) of justice.
2. Basic social institutions and their arrangement into one scheme (the basic structure of society) satisfy, and are with reason believed by everyone to satisfy, these principles.⁴⁴
3. The public conception of justice is founded on reasonable beliefs that have been established by generally accepted methods of enquiry.

The value of this notion, he argues, and therefore the persuasive power of the arguments that build upon it, depends on the assumption that those who appear to hold incompatible conceptions of justice will nevertheless find at least the fundamental features he proposes for a well-ordered society congenial to their moral convictions, or would do so after due consideration.

A difficulty with this argument is that the fundamental features of a well-ordered society, include, by Rawls's own admission, features 1 to 3 above. This means that although those people who "appear to hold incompatible conceptions of justice" might accept propositions 1 to 3 above, they could only do so on the basis that everyone accepts their particular conception. Thus, if people with "incompatible conceptions of justice" all find themselves living within the same civil society, conditions 1 to 3 can never be satisfied.

This might be one of the reasons why Rawls eventually re-evaluated the idea of a well-ordered society. In *Political Liberalism*, he admits that his original idea of a well-ordered society is unrealistic since, he argues, it is inconsistent with realizing its

⁴⁴ Rawls is really saying that the political constitution satisfies, and is with reason publicly acknowledged to satisfy the principles of justice referred to in (1). A well-ordered society is thus a constitutional polity – cf. (Rawls 2009, 7-8). He seems to leave open the question whether a society could be well-ordered even if it does not have a constitution with "its institutions all arranged into one scheme," i.e. a written, single document constitution, like the UK.

own principles even under the best of foreseeable conditions. He accordingly developed the notion of an overlapping consensus (Rawls 2011, 177). He argues that he has thereby removed the ambiguity of *TOJ* and now presents justice as fairness from the outset as a political conception of justice, as opposed to a comprehensive doctrine or part thereof.

The problem Rawls faces, given his premise that every element of the basic structure of society must be consensual, is how it could be “possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines” (Rawls 2011, 191). He postulates that a political conception of justice, to be acceptable, must accord with our considered convictions, at all levels of generality, on due reflection, or in what he has called elsewhere “reflective equilibrium” (Rawls 2011, 4-8).

The EP approach, as proposed in Chapter 3, avoids the inevitable complications of obtaining a conscious, overtly expressed consensus on the principles of justice, the nature of society, or the terms of social cooperation among millions of people. This reading of Rawls may not accord completely with the predominant reading of Rawls being that justice as fairness relies on a hypothetical agreement (i.e. not overtly expressed) amongst idealised parties.

I do not disagree with this reading, but I stress that the outcome of the hypothetical agreement is not hypothetical. It is a concrete outcome that is encapsulated in the formulation of the two principles of justice. It seems to follow that justice as fairness requires a conscious, overtly expressed consensus by the citizens of a well-ordered society, from Rawls’s definition of a public conception of justice in a well-ordered society: “being a society in which everyone accepts, ***and knows that others accept*** the same conception of justice (my bold italics).” (Rawls 2009, 634) – cf. also (Rawls 2009, 16).

Thus, in society at large, there must be an express public consensus about the conception of justice by all parties. This reading is further supported by the condition of publicity for principles of justice, which Rawls states is connoted by the phraseology of the contract. Rawls concludes that “if these principles are the

outcome of an agreement, citizens have a knowledge of the principles that others follow. It is characteristic of contract theories to stress the public nature of political principles.” (Rawls 2009, 16 and cf. also 56 and 84).

The EP approach, by contrast, argues that the conditions of social cooperation and the principles of justice are part of the human psyche and people are inclined to intuitively react favourably to measures they perceive as just and unfavourably to those they perceive as unjust, in terms of whether, in their perception, the measures contribute to social cohesion or not. As discussed in Chapter 3 section 5, EP holds that people do share, without overt, or even conscious agreement, and despite variously founded disagreements, a broad notion of justice and an inclination for social cooperation that is ingrained in their psyche due to the common human experience during especially the Pleistocene, but also thereafter by cultural evolution through social learning.

Rawls’s exclusion of natural science from his theory forces him to seek agreement among people without any scientific understanding of human motivation in coming to agreement. More specifically, he can therefore not take account of the psychological elements of agreement seeking, yet in many ways he strives to plumb the depths of the psyche through the process of finding an overlapping consensus through reflective equilibrium. It is as if he intuitively knows there must be some fundamental area of agreement among humans, but he cannot really identify it. He therefore seeks it in the merely rational procedure of reflective equilibrium.

However, a fundamental and necessary implication of his argument is that we all actually know what justice is, despite our plurality of comprehensive doctrines. If only we can put to one side our own interests and agendas, our own beliefs and inclinations, he argues, we will all come to the same conception of justice; in fact, his presumption is that we all already hold the same conception of justice latently, specifically the justice conception embodied in his justice as fairness. This becomes abundantly clear when Rawls argues that basic agreements are made when the parties already know their social positions, their relative bargaining strengths, abilities and preferences (Rawls 2009, 141).

These contingencies and knowledge of them, he argues, cumulatively distort the social system. Rawls then argues that contract theory introduces the notion of the original position in an attempt to remedy this distorting situation, namely by introducing the veil of ignorance (Rawls 2009, 141). Thus, the weight of his argument is that we can only become aware of a true conception of justice under the strictures and constraints of the original position.

However, because Rawls eschews the scientific approach he is unable to motivate or demonstrate how it comes about that we in fact all have the same conception of justice buried deep in the recesses of our minds. And if it could be demonstrated that we all do have the same conception of justice, why would it particularly be his conception of justice as fairness that is embedded in human beings? The EP approach, on the contrary, holds the promise to tell us exactly why people would tend to share a common conception of justice and why, through a process of gene-culture co-evolution, these conceptions would tend to be similar, but not necessarily identical. This again, is further support Rawls's general argument potentially receives from the EP approach, although it does not support the *ipsissima verba* of his justice as fairness formulations.

His purely rational approach puts these questions beyond reach of scientific analysis, but he does attempt to explain and justify the choice of justice as fairness by the parties in the original position, by reference to the rationale of the maximin criterion. He states that one can, as a heuristic device, think of the two principles of justice as the maximin rule for choice under conditions of uncertainty – cf. also the discussion of the maximin criterion in Chapter 1. However, in a later article (Rawls 1974, 141) Rawls distinguishes the maximin equity criterion from the “so-called maximin rule for choice under uncertainty.” He states that they are two very different things, and then signals his intent to go on to formulate the reasons for the equity criterion so that they are independent from the rule.

His argument thereafter in the article appears to depart from the argument in *TOJ* that uses the accepted mathematical basis for choice under conditions of uncertainty, but this is not specifically spelt out. Nevertheless, he maintains that the

original position pushes us toward maximin (Rawls 1974, 143). What the argument appears to be is that the difference principle is in fact the maximin equity criterion as formulated. This supposition is strengthened by Rawls's response to Harsanyi (see below) in *Political Liberalism* (Rawls 2011, 260 note 297). Rawls states that the maximin principle, in the form of the difference principle, is merely one principle constrained by others. It is uncertain where that leaves the maximin argument as utilised in *TOJ*.

This seems rather out of place in a decision-making process relating to normative judgements, such as would be the case in the original position. The maximin principle is actually a statistical decision function (Wald 1950), (Savage 1951), and cannot be said, therefore, to necessarily be a natural human decision making function. It is a function calculating the most advantageous worst case outcome of a number of given scenarios. It has however been adopted by economists for economic problems such as taxation to avoid the possibility of extremely negative taxation consequences (Phelps 1973), (Cooter 1974). Its use in *TOJ* tends to devalue the force of Rawls's argument in justifying the choice of justice as fairness in the original position.

John Harsanyi (Harsanyi 1975, 596) demonstrated that the maximin principle as used in *TOJ* often leads to highly irrational decisions, and in conjunction with the difference principle, morally questionable ones. He says that the rule ignores probability judgments by the decision maker, leading to possible absurd results. Therefore, it seems, Rawls is at pains to explain that a calculation of likelihoods in the original position is not really necessary or feasible (Rawls 2009, 155). He says that the rule is, in context, really a maxim and a rule of thumb

that comes into its own in special circumstances. Its application depends upon the qualitative structure of the possible gains and losses in relation to one's conception of the good, all this against a background in which it is reasonable to discount conjectural estimates of likelihoods.

The maximin rule, Rawls argues (Rawls 1974, 142), is a macro-principle, not a micro one and it is not a criterion meant to apply to small-scale situations. This latter argument, Rawls maintains, affects the force of Harsanyi's above quoted critique.

In *TOJ* Rawls admits that the maximin rule is not of general application, and adds that "Now, as I have suggested, the original position has been defined so that it is a situation in which the maximin rule applies" (Rawls 2009 155). This, I suggest, must be read in conjunction with Rawls's claim that the maximin rule is not of general application and can only be used in special circumstances, while he simultaneously argues that the original position is just such a circumstance by design. Thus, in reading Rawls one must be careful not to generalize the maximin rule, as according to the argument in *TOJ*, it seems to be only applicable to the decisions made in the original position. But later it appears that the difference principle is itself a formulation of the maximin principle, not as a decision-making rule, but as the embodiment of the maximin equity principle.

Within the context of a purpose-made situation, the maximin decision rule is probably sufficient to substantiate Rawls's assertion that the two principles of justice as fairness would be chosen, but in fact the maximin rule, together with much of the rational choice, rational actor theory of economics on which the rule is based, have long been empirically discounted (Bowles 1993), (Rabin 1998), (Gintis 2000), (Thaler 2000), and (Henrich 2001). There is thus no way in which Rawls can guarantee that the parties to the original position will select justice as fairness from among the possible choices presented to them.

The EP approach avoids such theories of rules of choice, since there is no original position and choice does not come into the understanding of the principles of justice. Regarding the formulation of the difference principle, the EP approach views it as a public policy principle that is discussed in Chapter 5.

The EP approach, by contrast, has the aim firstly, of identifying whether there are principles of social justice that could be universally applicable to human beings. Secondly, if there are such principles, what are they, and what was their role in

human evolution, if any? It aims to explain why we have notions of justice and why they would be any particular ones. To these questions the EP approach replies that there are indeed universal human principles of justice. They are universal because they developed as behavioural traits during the common human experience in the Pleistocene era.

EP recognises that the Pleistocene presented the human population with common challenges to survival and it therefore elicited similar unsuccessful and successful responses from human groups. Groups with unsuccessful responses disappeared. Groups with the best mix of survival behaviours survived better than groups with less successful behaviours and therefore the most successful ones left more of their genes in the gene pool. Those behaviours most conducive to survival and that were experienced as essential for survival became more common in the human gene pool. These genetically evolved behaviours are associated with the idea of justice because ideas of right and wrong became naturally associated with behaviour that promote society versus those that threaten social cohesion; as social animals, we are already inherently biased to preserving human Society. Like all social animals, humans cannot exist outside, or without Society – cf. the discussion in Chapter 3 heading 3. Thus, what promotes the stability of Society promotes the stability of the existence of humans and to preserve humans in society is what is psychologically experienced as just without conscious intellectualisation.

At a general level, cooperation within society is probably the most basic condition for human survival. Certain behaviours are so fundamental to the coherence and survival of human society that in our psyche they have become interwoven with our emotions so that we have emotional responses to justice: satisfaction at justice done, anger at injustice done and pleasure from doing what is seen as just. And these emotions are altruistic responses, they are not only responses to what is done to, or by us, or our kin – cf. the discussion in Chapter 3 (Bowles 2011), (Gintis 2000), and (Gintis 2008).

We can thus postulate that notions of justice are related to survival strategies, both group and individual. When in conflict though, group survival seems to trump

individual survival; uncooperative, self-serving, selfish and egotistical behaviour will generally be seen as unjust, especially if it weighs against group interests, while self-sacrifice for the general good is lauded.⁴⁵ On this basis EP can thus give an apparently cohesive account of and explain why we share common ideas and intuitions of justice and why they are regarded as so fundamentally important - cf. also the discussion in Chapter 3, heading 5.

The EP approach also proposes that people will, if allowed to freely express themselves, cooperate willingly while chastising and punishing those individuals who persist in uncooperative and unjust behaviour. Putting this in contractual terms, if needs must, it might be said that the terms of the social agreement need not actually or even notionally⁴⁶ be agreed to.

Of course it could be argued, as I have indicated above, that these latent terms in fact amount to agreed terms, inasmuch as everybody then has intuitive reasons to assert them. They may reflect the reasons people have intuitively, but Rawls seems to imply that for justice as fairness, our exercise of political power is proper only when "we sincerely believe that the reasons we offer for our political action may reasonably be accepted by other citizens as a justification of those actions" (Rawls 2011,569).

The evolutionary approach holds that people do not have to explicitly or even impliedly agree on the terms of their cooperation within Society; one might say they already have a general generic agreement regarding justice, being the terms of their cooperation, embedded in their psyche. People find themselves in a largely cooperative group since birth. What appears to be required is that under particular circumstances people need to agree on the terms of their governance. For example, when different cooperating groups of people come together voluntarily to form one larger society, I suggest they need to agree on the terms by which the conglomerate will be governed. The terms agreed to, I further suggest, will not, and need not specify the principles of justice; they will be agreed to by each group only on the

⁴⁵ Cf. the broad basis of the popularity of Christian belief.

⁴⁶ Notional agreement meaning implicit or implied agreement indicated by compliant behaviour.

basis that the terms are in accord with, or do not violate the precepts of the people's intuitive sense and notion of justice, which will be broadly similar.

I therefore contend that any inability to agree will therefore not likely be based on disagreement on the principles of justice, but probably on people's respective notions of the good. This means that for groups to join up, agreement will need to be reached on matters such as where people will be allowed to live, what the hunting areas are to be and similar matters of governance. Clearly, the groups would have to consider the terms to be fair and not to disadvantage one group over the other, for agreement to ensue.

I argue therefore that the EP approach allows that people from various cultural backgrounds, adhering to different and even incompatible comprehensive doctrines can reach such a political agreement, not based on an overlapping consensus of their comprehensive doctrines, but based on a broadly shared human embedded sense of cooperation and justice.

But purely as intuition, EP also acknowledges that the notion of justice is extremely vulnerable to misapplication and misdirection, as argued in Chapter 3. Thus, within a society the evolutionarily developed principles of social justice, understood as proposed in Chapter 3, ought to be effected patently in its policy executions as reflected in its culture and institutions, and reasoned through the organisations of society. Consequently, the better a society's institutions reflect in practice the broadly shared human intuitive sense of justice, fostering them through social learning while also taking account of the cultural notions of the society they are designed for, the more well-ordered the society will be. The perfectly just society, from the EP approach thus, is a well-ordered⁴⁷ society where the society's social institutions perfectly and patently reflect in practice the people's intuitively grounded, but thoroughly reasoned notions of social justice as discussed in Chapter 3.

Although the Evolutionary approach does not pretend to be a comprehensive doctrine, or even necessarily even part of one, unlike justice as fairness, it does not

⁴⁷ Well-ordered in the ordinary grammatical sense.

offer to be limited to merely a political conception of justice either. Its notional grounding in the human psyche linked to our emotional response mechanism, arguably makes it a value notion possibly of far wider social applicability than merely that of politics.

5. The Role of Intuition

Both approaches deal with the role of intuition in the understanding of social justice. Both recognise that intuition plays a major role in deciding what is just and unjust. But in this section I distinguish the role of intuition in each of the approaches, and I argue that in fact the role in each approach is fundamentally different: and that its role in the evolutionary approach is less problematic, as discussed in Chapter 3.

I begin by noting that in fact Rawls's proposition goes much further than merely the founding terms of civil government. He says he is intent upon working out which traditional conception of justice specifies the most appropriate principles for realising liberty and equality once society is viewed as a fair system of cooperation between free and equal citizens (Rawls 2011, 21). Rawls, like Kant, assumes *a priori* that human liberty and equality are just. There is thus no room for presenting any argument or adducing any evidence as to why this would be so. As discussed in Chapter 3, under the heading of Preliminary Principles, the EP approach gives a fair account of why both liberty and equality are the preferred human conditions from the societal point of view and from the interests of the genepool.

Rawls might reply that human intuition suggests that both liberty and equality are presumed to be just, but that would still not explain why intuition presumes them to be just. Rawls maintains,

in addressing the priority problem [of intuition derived principles] the task is that of reducing and not of eliminating entirely the reliance on intuitive judgments. There is no reason to suppose that we can avoid all appeals to intuition, of whatever kind, or that we should try to (Rawls 1974, 44). Furthermore, Rawls argues that his objective is to formulate a conception of justice which,

“however much it may call upon intuition, whether ethical or prudential, tends to make our considered judgments of justice converge [with that of all other individuals]” (Rawls 2009, 45).

There is thus doubtless a strong element of reliance on intuition in justice as fairness. Although Rawls does not call himself an intuitionist, he in fact sets out through *TOJ* specifically to disprove intuitionism, he apparently reserves the name ‘intuitionist’ only for those who advocate a plurality of moral principles, each established by intuition, unrelated to each other in an ordered structure, with conflicting ones weighed against each other intuitively (Hare 1973, 146).

Hare suggests that Rawls’s theory is no more firmly grounded than the intuitionists’: Rawls relies on “scores” of intuitions, he says (Hare 1973, 146). Hare states that he counted between pages *TOJ* 18 and 20, no less than thirty expressions implying a reliance on intuitions. In fact, intuition fulfils a fundamental role in Rawls’s whole theory.⁴⁸ But Rawls does not offer any argument in support of whence intuition is derived, or what reliance one can place on it, and why. Thus, his argument raises, but does not answer important questions such as where our intuition comes from, how reliable and authoritative it can be, whether intuitions differ by culture or can be expected to be universal across all humans, and if so, why.

The EP approach to justice, I contend, does go some way in answering these questions and tends to put the claim for liberty and equality on a much more secure and scientific footing. Liberty and equality, per the evolutionary approach, are notions embedded in the human psyche through our evolutionarily developed values of social justice since they encourage behaviour that contributes survival benefits to humans; they were further developed through levelling practices in early human societies. They allow humans to fully develop their genetic and memetic inheritance to the greater advantage of the gene pool and, the egalitarian ethos being embedded

⁴⁸ In *TOJ* (Rawls 2009, 21-22) Rawls specifically states that the conception of the original position is also an intuitive notion that suggests its own elaboration, so that led on by it we are drawn to define more clearly the standpoint from which we can best interpret moral relationships. We need a conception, he argues, that enables us to envision our objective from afar: the intuitive notion of the original position is to do this for us.

within the human psyche, both individuals and society can thereupon be allowed to attain their functional potential more fully when these two fundamentals are better realised.

6. A Multiplicity of Principles

In this section I discuss the derivation of Rawls's principles and note certain fundamental problems with his different formulations, especially when viewed from the EP perspective. These give rise to anomalies and uncertainties which I highlight to bring the two approaches into better relational focus.

We end up with a multiplicity of principles that are not particularly consistent within justice as fairness. But the differences with respect to the two approaches' principles are more fundamental. In this section, after investigating some aspects of Rawls's approach, I discuss the EP approach to the question of 'principles' of social justice and their conformity to the embedded human notions of justice.

Given the aim of formulating principles for incorporation into a democratic constitution, justice as fairness in its later formulation (Rawls 2011, 5-6) results in two principles, presented as they might be for inclusion in a constitution:

- a. Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.
- b. Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society.

However, later, in PL (Rawls 2011, 271), Rawls restates the principles with a somewhat different formulation:

- a. Each person has an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for all.
- b. Social and economic inequalities are permissible provided that they are:
 - i. to the greatest expected benefit of the least advantaged; and
 - ii. attached to positions and offices open to all under conditions of fair equality of opportunity.

There is a substantial difference between the two formulations, specifically regarding the first principle. The real change is that in the first formulation principle a) is formulated as “a fully adequate scheme of equal basic rights and liberties”, while it becomes “the most extensive scheme of equal basic liberties”, in the second formulation. Whether the later formulation extends the list of possible liberties compared to the older one is moot. It could be argued that “fully adequate” is subject to debate about what may constitute “adequate” liberties as against what might be the “most extensive” scheme of liberties. But what I suggest is most remarkable about the reformulation is that in the first formulation every person has a claim to equal rights and liberties, whereas in the second formulation every person seems to have only one equal right, not rights (plural): namely the right to equal liberties.

That change in wording appears, on reflection, to have a substantial impact on the sort of society Rawls envisages. Taking equal rights (plural) out of the equation almost destroys the liberal agenda, because rights and liberties are not the same thing. Some rights may be equated to liberties, such as the right to vote, which can be interpreted as the liberty to vote, although even that has different connotations. But one would be hard put to define, for example the right to life, the right to education, the right to health, and the right to shelter, as *liberties*.

As against that problem, the EP approach does not strictly differentiate rights and liberties, since it focuses on the outcomes. Whether the outcomes are obtained through the working of rights, or liberties, or a combination for both, I suggest, is not

important for the formulation of the principles at this stage. The approach is rather one of identifying in a general way those actions and outcomes that are required to fully realise the human potential within society, which may variously be called rights, duties and liberties.

The derived principles are thus intended to be descriptive of a society that is just in terms of our evolutionarily developed psyche. It is not prescriptive of how things ought to be, but descriptive of how things would be in a just society as defined by the EP approach. Thus, although there is nothing particularly objectionable in the formulation of the liberties in justice as fairness, in EP terms it would be more accurate to state that humans have all the rights, duties, and liberties necessary to enable each to be a fully functional member of Society, thereby achieving for each the full benefit of group living.⁴⁹

Of course, if a particular society would wish to transform, or maintain itself as a just society, it would have to formulate policies and institutions designed to achieve that end, based on an approach to the outcomes required by the EP approach. Those institutions and policies would then be prescriptive and legally binding on that society and its members. The question as to whether or not these principles are universally morally binding will be dealt with later on.

As a result, the EP approach naturally lends itself to accommodate a multiplicity of legislative formulations, each with the same object, namely of allowing and empowering each member of society to attain full socio-economic functionality while garnering the full benefit of group living, but each formulation framed to suit the circumstances and cultural particularities of the society it is designed for. But I

⁴⁹ What full functionality means must to a large extent depend on the society in question, and therefore the notion has a cultural perspective as well as a technological one, but the ideal is that we are all fully functional members of a global Society. It is only when every individual is allowed and empowered to be fully functional in his society, that the genetic and memetic endowment of the whole gene pool can come to fruition and the full benefits of group living become actual for the members of that society.

suggest that the generic formulation of the liberty principle from the EP approach, for guidance for social and political policy purposes, might be as follows:⁵⁰

1. There exists the most extensive individual liberty compatible with a similar liberty for all, including the liberty and concomitant rights of full and equal adult political and social participation, as well as full and free access to, and instruction in the intellectual property of Society. These social goods are extended to every member of society, subject only to temporary suspension for malevolent individuals convicted under fairly administered laws, in pursuance of which fair adjudication of all disputes are free, open and equally available to all.⁵¹

As appears from the above, this formulation does not recognise a strict differentiation between rights and liberties: they are both subsumed under one descriptive formulation. The description also acknowledges the need for law enforcement and fair adjudication as part of a just social structure. EP does not allow us to suffer from the illusion that any human society will ever consist of people who act lawfully and prosocially all the time;⁵² in fact EP affirms that there will always be anti-social behaviour – it is part of our developed psyche. That is why to chastise perpetrators is part of our embedded nature. The EP approach is not the first or only one to raise punishment as a principle of justice. That this is a more general conclusion is illustrated by J S Mill.⁵³

⁵⁰ What follows is a further iteration of a formulation found in Chapter 3.

⁵¹ The idea of punishment is also central to Mill's notion of justice:

the idea of justice supposes two things; a rule of conduct, and a sentiment which sanctions the rule. The first must be supposed common to all mankind, and intended for their good. The other (the sentiment) is a desire that punishment may be suffered by those who infringe the rule (Mill 1879, 59).

⁵² Cf. the discussion in Chapter 3 under "Justice and Society," "The Subject of Justice," "An Egalitarian Mind" and "Regarding Liberty and Equality."

⁵³ J. S. Mill (Mill 1879, 57) argues that the two essential ingredients in the sentiment of justice are, the desire to punish a person who has done harm, and the knowledge or belief that there is some definite individual or individuals to whom harm has been done.

But, to be fair, Rawls recognised that there may well be people who do not have the same sense of justice as the rest of society and who therefore act unjustly. This ties into his partial compliance theory, when he argues that even in a just society there must be certain constraining arrangement to ensure compliance.

The main point then is that to justify a conception of justice we do not have to contend that everyone, whatever his capacities and desires, has a sufficient reason (as defined by the thin theory) to preserve his sense of justice. For our good depends upon the sorts of persons we are, the kinds of wants and aspirations we have and are capable of. It can even happen that there are many who do not find a sense of justice for their good; but if so, the forces making for stability are weaker. Under such conditions penal devices will play a much larger role in the social system (Rawls 2009, 576).

However, Rawls goes on to argue that the main purpose of the penal devices is to underwrite citizen's trust in one another. The mechanisms, he says, will be seldom invoked and will comprise only a minor part of the social scheme.

It is unfortunate that Rawls does not consider human nature as understood in psychology in any of these arguments, although his allowance for there being non-compliant individuals does go some way toward acknowledging it. Nevertheless, Rawls's concession falls far short of the EP approach which recognises the urge to punish offenders as fundamental to a cooperative, just society, and therefore punishment itself as an integral part of and a principle of justice.

Despite the sentiment of punishment being part of the notion of social justice, I agree with Rawls that in a well-ordered society, also as envisaged by the EP approach, where the just institutions of society are tempered and supported by a pro-social cultural endowment, anti-social behaviour might very well be kept to a minimum and then only at a much lower gravity of transgression. But this would be the promise of aligning the institutions and cultures of societies with the evolutionary

developed human notions of justice, and not the result of a shared public conception of justice through an overlapping consensus.

When it comes to social and economic inequalities to which Rawls's principle b) relates, there appears to be an implication of inequality in society that requires adjustment. Justice as fairness is an egalitarian conception of justice (Rawls 2011, 6), and therefore the society that results from the original position, I would argue, can rightfully be expected to be egalitarian *ab initio*. The difference principle would then be a principle of public policy to maintain equality. It can be seen to be a principle introducing levelling behaviour, through public policy, into a modern society.

From the discussion of levelling behaviour in Chapter 3, paragraph 5, it seems inevitable that an egalitarian society must be deliberately kept egalitarian by levelling behaviour. An *ab initio* egalitarian constituted society would become less egalitarian over time due to several factors, including the behaviour of SDO groups and individuals, as well as continuing natural contingencies, such as accidents of birth or other physical and mental impairments through happenstance. The difference principle, which is predicated on rectifying inequality, is therefore a principle of public policy to achieve justice (equality), rather than a principle of justice *per se*. Rawls himself suggests that this is a correct understanding of the difference principle. He says (Rawls 2011, Loc 603) that

- a. [he] would simply be unreasonable if [he] denied that there were other reasonable conceptions satisfying that definition, for example, one that substitutes for the difference principle, a principle to improve social well-being subject to a constraint guaranteeing for everyone a sufficient level of adequate all-purpose means.

EP on the other hand, does not prescribe any socio-economic policy, but it does also require the maintenance of egalitarianism through levelling behaviour, constituted by a combination of levelling institutions and the development of egalitarian cultural values through formal education and social learning. Additionally, the economic distribution system is so designed that it has a proportionately equal

result for every member of society. The following formulation of the distributive requirement is again descriptive, rather than prescriptive, of the conditions within a just society, and the generic formulation might be as follows:

2. The product⁵⁴ of society is distributed throughout society according to the principle of proportional equality, the proportion being dictated by the cultural values of the people, but taking into account the necessities of individual life based on differing individual circumstances, requirements and capacities.⁵⁵

This formulation is based on the fundamentals of systems of distribution of such goods as have been observed in studies and is supported by much research, as discussed in Chapter 3, paragraph 6. It appears also, despite possible inferences from anecdotal data to the contrary, that even modern first world people prefer more, arguably proportional, egalitarian distributions of wealth rather than lesser ones – cf. for example Norton (2011). The above tenets of social justice induced from EP are thus descriptions of how a just society functions, or would function with its institutions more perfectly aligned with the developed human psyche, and not of how it could and ought to be achieved in any given society. The latter question is more readily and effectively addressed from the point of view of the culture and starting socio-economic conditions of a particular society.

But such functional descriptions of a just society do not address the moral issue. Can the citizens of a society claim from the collective the rights required to make the society into a just society? Conversely, is Society morally bound to effect a just society? Although I suggest that what the human psyche would recognise and likely prefer as a just state of affairs has in broad outline been established, and although the cause and role of notions of justice in human affairs have been generally identified, it must still be in doubt how all this can lead to rights for citizens and obligations for Society, or societies. Even if it can be shown unequivocally that what I have described as the functioning of a just society is correct, does it make the

⁵⁴ Including all consumer services, health goods and services, foods, consumables and other consumer goods.

⁵⁵ This is a further iteration of the principle found in Chapter 3 under "Conclusions."

just society anything more than a preferred society – a nice to have? The question could thus be resolved into one which asks what the difference might be between the just and the merely expedient. On what basis might coercion be justified to enforce compliance with the principles of justice as suggested by the EP approach?

I shall attempt to deal with these questions in the following section.

7. *Deontological or Teleological*

In this section, I investigate the nature of the principles of justice derived from the EP approach, after canvassing the issues raised by Rawlsian deontology, Sandel's criticisms, and Mill's teleological views. I then attempt to distinguish Rawls's criticisms of teleological theories from the principles derived from the EP approach.

Rawls hold that the two main concepts of ethics are those of the right and of the good (Rawls 2009, 24). He states that the structure of an ethical theory is largely determined by how it defines and connects the two basic notions. He defines teleological theories as those theories that define the good (utility) independently from the right, and then go on to define the right as that which maximises the good. He says further (at 25) that he understands the principle of utility as defining the good as the satisfaction of rational desire.

He argues, that by definition, justice as fairness is a deontological theory. It is so, because deontological theories are those that either do not specify the good independently from the right, or does not interpret the right as maximizing the good (Rawls 2009, 30). Rawls then carries on and defines deontological theories as being non-teleological ones.

Sandel (Sandel 1998), on the other hand, argues that that Rawls, like Kant, is a deontological liberal since Rawls takes, what Sandel describes as the main thesis of the deontological ethic, as his central claim, which is the claim that justice is the first virtue of social institutions, as truth is to systems of thought. This claim thus asserts the priority of right, as against the claims of the good.

Rawls, for his part, argues that the priority of right is founded based on human nature. He contends that the desire to express our nature as “free and equal”⁵⁶ rational beings can be fulfilled only by acting on the principles of right and justice as having first priority. “. . . It is acting from this precedence that expresses our freedom from contingency and happenstance. Therefore, in order to realize our nature, we have no alternative but to plan to preserve our sense of justice as governing our other aims” (Rawls 2009, 574).

But Sandel argues that there are two different senses of deontology:

In its moral sense, deontology opposes *consequentialism*⁵⁷; it describes a first-order ethic containing certain categorical duties and prohibitions which take unqualified precedence over other moral and practical concerns. In its foundational sense, deontology opposes teleology; it describes a form of justification in which first principles are derived in a way that does not presuppose any final human purposes or ends, nor any determinate conception of the human good (Sandel 1998, 3).

Opposed to this deontological view is the teleological view, which Sandel holds as preferable. He challenges the priority of right to the extent that Rawls argues that the principles of justice that specify our rights “do not depend for their justification on any particular conception of the good life or, as Rawls has put it more recently, on any ‘comprehensive’ moral or religious conception” (Sandel 1998, 96).

Sandel argues that justice is relative to the good and not independent of it. He argues that one way of linking justice with conceptions of the good holds that

⁵⁶ It must be noted that the phrase “free and equal” has a special Kantian connotation per Rawls. He argues that Kantian doctrine joins the content of justice with a certain conception of the person; and this conception regards persons as both free and equal, as capable of acting both reasonably and rationally, and therefore as capable of taking part in social cooperation among persons so conceived. (Rawls, 1980 p.518)

⁵⁷ The idea that actions should be judged solely by their consequences. The classic argument for the end justifies the means.

principles of justice depend for their justification on the moral worth or intrinsic good of the ends they serve. He states that this view is teleological since it “rests the case for rights on the moral importance of the purposes or the ends that rights promote” (Sandel 1998, 113). He summarises this as the more plausible in his view, being that “rights depend for their justification on the moral importance of the ends they serve.”

But I suggest that it is not only the deontological view that holds justice in the highest regard, above the standing of other moral rules. For example, Mill, who holds a teleological utilitarian view, called justice “the chief part, and incomparably the most sacred and binding part, of all morality” (Mill 1879, 465), but he reserved that distinction for justice grounded on utility. However, how he grounds justice on utility is interesting.

When Mill sets about to argue for justice having a higher standing than other moral ideas, he says that there is both a rational and an animal element to the sentiment of justice. It derives its intensity as well as its moral justification from the extraordinarily important and impressive kind of utility which is concerned. That utility he argues, is the utility of security, which is the most vital of all interests. Nearly all other earthly benefits, he says,

are needed by one person, not needed by another; and many of them can, if necessary, be cheerfully foregone, or replaced by something else; but security no human being can possibly do without; on it we depend for all our immunity from evil, and for the whole value of all and every good, beyond the passing moment” (Mill 1879, 71).

In this argument, he is supported by Hume who argues that

The safety of the people is the supreme law: All other particular laws are subordinate to it, and dependent on it: And if, in the COMMON course of things, they be followed and regarded; it is only because the public safety and interest COMMONLY demand so equal and impartial an administration (Hume 1912 [1777], 16).

Our notion of justice, Mill suggests, is a claim on our fellows to join in making our existence safe, creates feelings so much more intense than other feelings concerned with any of the more common cases of utility, that the difference in degree becomes a difference in kind. There is quite evidently some common ground between Mill's teleology and the EP approach, since to make our existence safe is conceptually very close to the idea of securing human survival.

Based on Sandel and Mill's exposition of teleology, it seems evident that the EP approach should likewise be regarded as a teleological one and which therefore places it at a distance from Rawls's deontology. Social justice, as understood by the EP approach, has as its fundamental purpose, or *telos*, being the facilitation and promotion of the indefinite existence and survival of human beings as a social species. As argued in Chapter 3, this includes the survival of each individual human, since there is no basis upon which individuals can be differentiated in principle. Survival of the species is therefore predicated on the maximal survival of every individual, not only for procreative purposes, but because of the equally important purpose of cultural development and social learning, which are *sine qua non* for human survival.

Despite the teleology of the EP approach I submit that it is in essence not wholly incompatible with Rawls's deontology. To argue this, I find it necessary to distinguish the EP's teleology from Rawls's general critique of teleological theories. Rawls starts off by stating that the two main concepts of ethics are the right and the good (Rawls 2009, 23). And, he says, the simplest way of relating these two concepts is the way teleological theories do: the good is defined independently from the right, and then the right is defined as that which maximises the good.

He argues that this hypothesis, namely that of defining the right as maximising the good, allows one to judge the goodness of things without referring to what is the right. Rawls goes further and says he understands the principle of utility in its classical form as defining the good as the satisfaction of rational desire (Rawls 2009, 30). This means, Rawls argues (at 26), that it leads to a situation where "society must allocate its means of satisfaction whatever these are, rights and duties,

opportunities and privileges, and various forms of wealth, to achieve this maximum, if it can.”

Rawls then shows how this view can lead on to unacceptable situations, because the idea of justice, being derived from the end of attaining the greatest balance of satisfaction, means that “there is no reason in principle why the greater gains of some should not compensate for the lesser losses of others; or more importantly, why the violation of the liberty of a few might not be made right by the greater good shared by many” (Rawls 2009, 26). This effect is due to another facet of what Rawls holds as a principle of utilitarian theories, namely that the right maximises the good aggregately, over society as a whole. It is thus the total sum of satisfaction in society that is of importance. Rawls specifically makes the point, on the same page, that:

the striking feature of the utilitarian view of justice is that it does not matter, except indirectly, how this sum of satisfactions is distributed among individuals any more than it matters, except indirectly, how one man distributes his satisfactions over time. The correct distribution in either case is that which yields the maximum fulfilment.

This contrasts, per Rawls, with the “convictions of common sense” that as a matter of principle we should distinguish between the claims of liberty and right on the one hand and increasing the aggregate social welfare on the other (Rawls 2009, 27). “Justice,” Rawls says, “denies that the loss of freedom for some is made right by a greater good shared by others.” According to Rawls then, teleological theories relate the right and the good in the wrong way:

...the self is prior to the ends which are affirmed by it; even a dominant end must be chosen from among numerous possibilities. We should therefore reverse the relation between the right and the good proposed by teleological doctrines and view the right as prior (Rawls 2009, 560).

However, the theory of social justice suggested by the EP approach can be distinguished from what Rawls is dealing with and does not appear to fall prey to these objections. Upon reflection, the problem that Rawls has with teleological theories does not really seem to be what he suggests it is: how they relate the good and the right. It appears to fundamentally concern more the content of the good, how it is defined, coupled with the teleological hypothesis (on his interpretation) that the right is merely a maximisation of the good (meaning the satisfaction of rational desire), measured in aggregate over the population.

Although this characterisation of teleological theories by Rawls may be true of some of them, I cannot find any evidence, or argument, to give support to the contention that such a view is either a necessary, or an inherent element of any teleological view.

Taking Mill as an example, there is no evidence in his writing that he views justice, namely the bringing of security, in any other sense than bringing it to every individual equally. There is nothing which leads one to suppose that he is arguing that security should be maximised in aggregate over the population as a whole. On the contrary, he explicitly states (cf. quote above) that security (and by necessary inference justice) is the “one thing that no human being can do without.” (Mill 1879, 61). Justice is thus a life ingredient for every single individual.

Although one might argue that “security” is part of rational desire, it does not constitute “rational desire” generally and the extension of maximum security to every single individual cannot be said to be merely the maximisation of the satisfaction of rational desire. Thus, although justice may satisfy the rational desire for security, it does not do so in aggregate over the population as a whole, it is intended to maximise security for every individual equally, but subject to adequate measures to combat free-riding.

Similarly, the EP approach holds that the derived ultimate “purpose” of our developed values of justice is the survival of humans. This is not an end that can be maximised in aggregate over a population. The discussion in Chapter 3 already suggests that on the societal view all individuals are equal, and equally important to

the genepool as a whole. Therefore, the *telos* of justice applies to all individuals equally, since there is no basis upon which some can in principle be preferred to others in the survival stakes. In this case, the good is defined independently from the right, but the good in this case has nothing to do with the satisfaction of rational desire generally. The right does not merely maximise the good, it secures, facilitates and achieves it.

It is true that one might argue that although the ultimate *telos* of justice is survival, it promotes that purpose, *inter alia*, through the maximisation of social harmony and cohesion. It might then be argued that social harmony, unlike survival, is subject to maximisation. Theoretically at least, social cohesion and harmony might perhaps be maximised by the denial of certain goods to some members, or the systemisation of certain inequalities in society.

This possibility is more apparent than real, for it is difficult to see how social cohesion and harmony can be advanced in its totality through discriminatory practices. Not only will the justice notions of those discriminated against be violated and the social cohesion of that group be thus jeopardised, but the empathic and altruistic instincts of many of the advantaged will be aroused, thus further disturbing social harmony and cohesion.

But the true answer to the question is that any discriminatory practices and social inequalities in Society, which are not founded on the principle of due proportionality, will be a violation of the principle of egalitarianism, which is fundamental to the EP approach.

Unlike the manifold possibilities included in rational desire, as criticised by Rawls, the *telos* of survival cannot be said to be a purpose that is subject to circumstance or happenstance, it is evidently an unrelinquishable fundamental purpose, dictated by the laws of nature that, for their part, seem predisposed to allow existing things to carry on existing if they are viable and adaptive within the larger ecosystem. The principles of justice so understood, should consequently rank higher in the moral hierarchy than any other moral principles, for it is difficult to conceive of

any moral principles that would surpass justice in serving the highest human good, or purpose.

Furthermore, justice is also not a fickle end, that is dependent upon every individual's life-plan, as Rawls criticises for its multifarious contingencies, that is thus endlessly variable like rational desire is in the utilitarian view. It is also not an end that is extinguished by its realisation; it has been realised for countless millennia and is still being realised at every moment (which is of course no guarantee that it will keep on being realised indefinitely).

Our ability to self-destruct human society should not be underestimated. The EP approach accepts that maladjustment is as much part of nature as is balanced adjustment and therefore there are no guarantees that Society will always exist. It depends on multiple factors, manmade and natural, including perhaps the possibility of another extended volcanic winter sometime in the future.

I therefore suggest that the EP approach is not vulnerable to Rawls's criticism that only a deontological theory "expresses our freedom from contingency and happenstance" (Rawls 2009, 574). Rawls argues further that to realize our nature we have no alternative but to plan to preserve our sense of justice as governing our other aims, *i.e.* give priority to justice, as deontology demands. The EP purpose of keeping human society in existence, promoting and enhancing its binding fabric cannot be said to be subject to contingency and happenstance. The values that sustain it, I suggest, should be regarded as evolutionary imperatives of such a high order that one can hardly foresee that there may be cases "in which some other social duty is so important as to overrule any one of the general maxims of justice" (Mill 1879, 70). Consequently, the teleology of the EP approach appears to be compatible with the requirements of justice as is argued by Rawls to be the sole preserve of deontological theories.

Further we should consider that there is also a sense in which the EP derived principles of social justice (taken as "the right") might be seen as being prior to the good, in that no other good could ever negate or override the purpose of social

justice. Social justice can consequently be said to represent and encompass the fundamental, or ultimate human social good.

On the EP approach, the end that justice serves is thus prior to any other end, and justice therefore defines and regulates the parameters of other ends that people can choose. The ends of justice will, I suggest, always outweigh any other contrary moral or religious duty.

But Mill (Mill 1879, 71) argues that particular cases may occur in which some other social duty is so important, as to overrule any one of the general maxims of justice. Thus, to save a life, he says, "it may not only be allowable, but a duty, to steal, or take by force, the necessary food or medicine, or to kidnap, and compel to officiate, the only qualified medical practitioner."

Although I do not discount Mills's own answer to this problem, I do submit that the conundrum itself suggests its resolution. If the saving of a life is a moral duty as the conundrum suggests and I affirm, then it is not the duty only of one person, but the duty of all who can assist. Thus, it would be the duty also of the person whose property is taken, and of the qualified medical practitioner. Taking 'the necessary food or medicine' from a person who has a duty to give it, and forcing a person to assist who is under a duty to assist, cannot be an injustice to those individuals. On the contrary, I suggest that to do so would be an enforcement of the requirements of justice.

Thus, the answer to the questions posed at the start of this section is that the principles of justice implied in the EP description of the just society are peremptory and morally binding on Society as well as on its members. Given the arguably existential importance of a just Society and therefore of just societies, it is not merely a question of citizens being able to rightfully claim the rights and liberties implicit in a just society; Society itself is morally obligated and should in fact be leading the way.

Just as citizens have a moral right against societies to claim to live under just institutions, so societies have the moral obligation to ensure that their citizens live in just societies. This is a duty owed by Society to every member thereof, thus a duty

owed by all of us together to each of us. Society, and by necessary implication thus every society, should evidently itself be championing those actions, attitudes and behaviours that are just and consequently support the ultimate human end of cohesive, peaceful existence indeterminately into the future.

But it appears that the debate about the priority of the right over the good or *vice versa*, is of more than academic interest; it also has public policy implications. This comes about since, according to Sandel's analysis (Sandel 1998, 3715), Rawls's argument concerning the priority of the right over the good is

...not the application to politics of Kantian moral philosophy, but a practical response to the familiar fact that people in modern democratic societies typically disagree about the good. Since people's moral and religious convictions are unlikely to converge, it is more reasonable to seek agreement on principles of justice that are neutral with respect to those controversies.

Political liberalism thus also necessitates a politically neutral policy stance regarding the moral controversies that arise in a democratic society due to the existence of multiple, mutually incompatible comprehensive theories. This is essentially a question of public policy and whether the EP approach requires such a policy of neutrality will be discussed in the next chapter.

8. Conclusion

I suggest that the EP approach to the question of social justice has all the potential to present a fully, or partially comprehensive theory, in the Rawlsian sense, of social justice, at least as much as any contract based theory does. Although by itself the EP approach tends to exclude a contractual, or consensual basis, for the justice notion in society, it is compatible with Rawls's approach in several ways. It is compatible at least because it does, like justice as fairness, imply a mutual "meeting of the minds" regarding justice between members of a society, although that "meeting" happens under vastly different circumstances.

The EP approach also obviates several complications that exist in justice as fairness, such as how the multiplicity of reasonable yet incompatible beliefs to be found in society is overcome by the fact of the shared human psyche. I therefore suggest that the EP approach can supplement the Rawlsian approach in many important ways by placing it on a more scientifically robust footing, as indicated in this chapter.

Rawls's approach as it stands does seem to suffer from a few fundamental objections when viewed from a scientific perspective. While Rawls relies heavily on intuition, he is silent on how that intuition comes about. He does not even try to explain why we would all have the same intuitions concerning justice which his theory requires. Against this the EP approach does explain the origins of our intuition and why there would be a general generic human intuition concerning the nature of justice.

The evolutionary approach may even have more to offer, since it tries to deal with ideas of human motivation on a scientifically established basis, as well as with psychologically embedded and culturally evolved notions of right and wrong. This approach thus leads on to an understanding of the origins and socio-biological purposes of the notions of justice and injustice. Its scientific approach serves to deal with fundamental questions, such as the origins and survival role of intuition, which also helps to explain the often contradictory and unreliable nature of intuition. Contract based theories simply cannot do this and they are usually silent upon the nature and role of intuition, except to the extent that intuition is actually employed by them.

In the next and final chapter, I shall attempt to synthesise the developed theory to reach some general conclusions about the possible socio-economic public policy implications of this theoretical understanding of the Justice idea, including the prospects for further study of the approach.

CHAPTER 5

Public Policy Recommendations, General Conclusions and Prospects for Further Research.

4.112 Philosophy aims at the logical clarification of thoughts. Philosophy is not a body of doctrine but an activity. Without philosophy thoughts are, as it were, cloudy and indistinct: its task is to make them clear and to give them sharp boundaries. (Wittgenstein 2012, 602-607)

1. Introduction

My purpose in this project is, *inter alia*, to clarify and understand the idea of social justice. In the 20th century no theory of justice was held in higher regard than that of John Rawls. It is for that reason that I chose to investigate to what extent it clarified the idea of social justice: not only as to its substance, but especially as to the justice idea's origins and foundations.

However, extant explanations of social justice, including that of John Rawls, always seemed to me to lack an answer to the question *why* – why do all of us humans seem to have notions of social justice in the first place, notions of right and wrong, and what could be their derivation, origin and social roles – and just as importantly, are the universal human values or are they wholly culture-dependant? I was sure that these notions could not exist in a cosmic vacuum of 'just being there' without cause or reason. To the extent that I may have contributed to clarifying and delineating these thoughts, to that extent this project could be deemed to have served its purpose.

In this chapter, I shall consider the general implications of the evolutionary psychology approach to social justice and make some recommendations for public policy, before I draw some general conclusions from the discussions in this project. Thereafter I mention some issues of the theory that remain to be developed as well

as a few questions that are suggested to present good prospects for further research.

2. Recommendations for Public Policy

The evolutionary psychology approach to social justice does not result in any *a priori*, detailed public policy prescriptions. Public policy must, after all, be framed to suit particular circumstances for certain social purposes in particular societies. However, the approach does suggest certain attitudes that public policy makers should assume regarding social questions. There are consequently a great number of potential policy issues that can be informed by the evolutionary psychology approach, and in this section I will deal only with what I believe is the more general, overall approach to questions of public policy as is required by social justice.

I will argue that all public policy programmes must be developed with social justice clearly in mind – either to be in sync with its requirements, or to promote it, or to achieve it, as the case may be. As discussions in the course of this project have suggested, human beings appear to have a psychological need for justice. It is a requirement of not only personal relationships, but also of group relationships; an essential in the very structure of people's social lives. It is in regards to the building of a just social infrastructure that public policy is most important. Even though the fundamental institutions of a society might be just, this does not automatically make the society just, it will still require just public policies on a continuing basis.

Dealing with the project of transforming an existing society into a just society stands a great body of research and academic work, which it seems unnecessary to go into here. But the outcomes of this project suggest that, given the human psychological need for justice, there can hardly be any real social development without social justice; lacking social justice, a society will most likely be maladjusted in one or more ways, in which event society is then experienced more as an imposition and a burden for most, if not all, of its members, rather than as the essential human life facilitator that it is supposed to be.

Public policy ought therefore to be directed by three main considerations:

- Achieving egalitarian outcomes,⁵⁸ and
- Fostering a culture of pro-social attitudes, and
- Providing sufficient guarantees and sanctions against free riders on the benefits of group living while making little or no contribution.

Policy makers, it is accordingly suggested, in considering and framing socio-political and economic policies, should consistently and unerringly keep in mind that one of the primary functions of Society is to equitably distribute the advantages of group living, being in the main security, access to food, shelter, clothing, health, knowledge and human interaction. Those are some of the most vital natural advantages that we get from being social animals living in a society. But ultimately Society is a function of the genepool that ensures the indefinite existence of human beings, therefore any strengthening of the fabric of Society amounts to the better securing of human life on earth. Given that the securing of human life is a social good, any and all public policy-making bodies should always be ready to answer the question of how any particular policy is designed to generally and particularly advance the benefits of group living to every person in society, and equally, how that purpose is, or will be made publicly manifest within society.

But just public policies cannot be framed and executed unless there is a just institutional framework to support and enforce it (Dunn 1981). Many of the attributes of social justice cannot be accomplished by force of law and institutions alone. For that reason, all public representatives, decision makers, and all civil servants should be acutely aware of the importance and requirements of social justice. Although the judiciary is supposed only to speak the law and not make it, they too should take cognisance of the moral structure of the requirements of social justice.

Public policy thus ought to be directed at fostering a culture of accepting the moral precepts of a just society, of expecting and doing justice; this being the required culture of all those who stand in the service of the public, whether as government employees or as service providers in the private sector. This means that

⁵⁸ This could give rise to a type of Rawlsian difference principle.

public policy should be so designed as to foster among the citizenry moral values and attitudes of egalitarianism, tolerance, cooperation, mutual empathy, making them secure in the knowledge of belonging to a society that is founded on moral principles, while it cares, nurtures and encourages each of its members to achieve their full human potential. Reform with the intention of enhancing equity requires macro action framed in terms of creating the appropriate micro environments in which the egalitarian instinct can best be gratified (Charlton 1997, p. 423-424).

Such attitudes are suggested to be conducive to achieving social cohesion, growth and development and will consequently be experienced as just, on condition that there are also sufficiently credible guarantees and sanctions against free riding and due penalties in place for non-compliance and anti-social activities. Without these latter elements, social justice will not be secure in the public mind and the other objectives of public policy might therefore be problematic to attain.

The discussion thus far seems to suggest that a just society, based on a moral understanding of justice, would not be able to justify a public policy attitude of neutrality on moral questions arising from the incompatible comprehensive doctrines present in society.⁵⁹ As an example one can examine the issue of abortion. Justice as fairness requires more than merely a policy of neutrality, it requires us to abstain from using arguments based on comprehensive doctrines, as well as certain disputed economic precepts in political discussions. Rawls writes extensively about public reason and eventually says that it means

...that in discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious and philosophical doctrines—to what we as individuals or members of associations see as the whole truth—nor to elaborate economic theories of general equilibrium, say, if these are in dispute. As far as possible, the knowledge and ways of reasoning that ground our affirming the principles of justice and their application to

⁵⁹ Cf. the discussion of a public policy of neutrality on moral questions in Chapter 2 under the heading “Priority of Right.”

constitutional essentials and basic justice are to rest on the plain truths now widely accepted, or available, to citizens generally. Otherwise, the political conception would not provide a public basis of justification (Rawls 2011, 224).

Thus it happens that justice as fairness faces a dilemma on, for example, abortion, such as is discussed in Chapter 2.

I suggest that one of the problems that Rawls's political liberalism faces in this context, is that it does not ground its values of toleration and equal citizenship, upon which it founds its approach to such moral questions, on anything more than agreement, albeit supposedly universal agreement. It means that in any case where there is a lack of agreement resulting from principles of incompatible comprehensive doctrines, such as happens in the abortion debate, "the political conception [of justice as fairness] would not provide a public basis of justification." (Rawls 2011, 224). Thus the supposed political consensus breaks down in the face of a serious challenge by comprehensive theories.

The pertinent question for this project then arises as to what policy stance, if any, the evolutionary psychology approach might recommend. There does not seem to be a reason why it should follow a policy of neutrality, but the question is whether the morality of its principles as discussed in Chapters 3 and 4, and mindful of the discussion on the so-called "naturalistic fallacy", would be robust enough to give a firm, defensible judgment on, for example, the abortion question, in the face of challenges by comprehensive doctrines. It therefore seems necessary to examine the moral arguments that might be raised from the evolutionary psychology perspective on this question.

At first glance one might assume that the evolutionary psychology approach would at all costs favour the maintenance of whatever life comes into being, as this amounts to an expansion of the genepool. Abortion would then be an injustice against the foetus and the interests of society. But such an assumption would be wrong in the light of what is observed in nature.

Observing the natural cycle of hominid procreation in nature is only enlightening up to a point. This is because the intentional abortion of a foetus is not a truly viable option in nature, although an attack on a pregnant female may be fierce enough to cause the foetus to abort of its own accord. Thus, one is forced to look for examples of the evolutionary perspective on, for example, infanticide. Infanticide is described as the killing of dependent offspring, or more formally, to “any behaviour that makes a direct and significant contribution to the immediate death of an embryo or newly hatched or born member of the perpetrator’s own species” (Hrdy 1984). These authors also state that reviews of infanticide make it clear that it occurs across a wide variety of taxonomic groups and is regular and normal behaviour in many species, including that of humans, past and present – cf. also (Van Schaik 2000), (Trumbo 1990), (Williamson 1978), and (Wilson 1975).

I make this point without intending in the least to argue that infanticide is therefore morally acceptable, but only to show that there is no natural or evolutionary prohibition on infanticidal behaviour. In fact, there may be some evolutionary advantages to this behaviour. But that does not indicate that a moral species ought to behave in such a manner. As discussed in Chapter 4, the “is” of science is highly relevant to the “ought” of ethics, but the translation of one into the other is subject to reason. The moral question must thus be approached not merely from the “is” of infanticide, but from the perspective of the reasoned moral principles of justice derived from the evolutionary psychology approach, which is what I propose to demonstrate in what follows.

Throughout the discussion on policy, it must be kept in mind that the derivation of the principles of social justice is the evolutionary advantages implicit in them. The derivation of the policy prescriptions, on the other hand, are the principles of justice. Policy prescriptions are thus not directly related to evolutionarily selective advantages, but are derived from the principles of justice, which are directly so derived from evolutionary selective survival advantages.

The moral principles of evolutionary psychology thus hold that Society should grant every individual equal liberty and equal rights to the greatest extent possible

and allow every individual to live his life as he pleases, subject only to the equal right of everyone else to do the same (cf. Chapters 3 and 4). Since all people are equal from the societal point of view, it follows necessarily that no person or group of persons can have the right to decree the use, or in any way control the body of any person without that person's consent. Although society does have an interest in the health of every individual, it does not seem to follow that society even has the right to prescribe or impose its views on health on anyone. It has the power of education and persuasion only. This means that every person has sovereign rights over her own body and that that sovereignty ranks alongside and equal to everyone else's right to their own bodies.

However, the relationship between the mother and a foetus is more complicated, because suddenly, the mother's body, her exclusive preserve, is being invaded by a second body. The second body is still only a potential human being, as against her fully developed⁶⁰ humanity. I suggest that a full human being must be understood as an individual that is biologically developed to the point where he is biologically independent of the body of another person. It thus seems that a foetus, that is still in the process of biologically developing to the point of biological independence, is, although human, still only a potential fully human being.

If the invasion of the mother's body is welcome, then all is good and well, but still there is a physical and psychological price to pay by the mother – cf. Suzanne Sadedin's Essay "War in the womb" (Sadedin 2014). Part of this problem is the "battle of the sexes" that takes place in the womb. There is a struggle between the genome donated by the father and the one donated by the mother – each is competing to gain the upper hand. The paternal genome wishes to use as much of the mother's resources as possible to grow the foetus, to create an as large as possible birthling thereby maximally ensuring its survival to spread the father's genes, while the maternal genome wishes to restrict use of her resources to protect her body for maximum further pregnancies. Both parents want to spread their respective genes as far as possible. The male strategy is to impregnate as many

⁶⁰ At least biologically and physically.

wombs as possible, while the female strategy is to realise as many as possible pregnancies from the same womb. This struggle has reached an evolutionary Mexican stand-off, per Carey (Carey 2011, 131).

The human mother does not necessarily share the imprimatur of her genes consciously, and if she pays the physical and emotional price for this struggle willingly, even eagerly, then it must be her choice freely made; it is a choice only she can make. But if she does not, or no longer wishes to subject her body to that “war” and its aftermath, then surely it can be her sole choice also. If we do not wish to accept this argument, we would have to argue that the foetus, which is only a partly formed human being, has rights that take precedence over the rights of the mother. It is true that the foetus is human, but it is a human *foetus*, not yet a full human, who demands the right to use someone else’s body, someone who is only 50% genetically related to it, to launch its own independent life, without regard to whatever the consequences might be for the body it has commandeered.

I suggest that there is no, and can be no basis upon which such a “better” right can be founded. The moral rights of the mother to her own body, as prior being, must enjoy priority over any rights of an incipient human being. I suggest that this amounts to a strong and defensible moral basis from which to assert the justifiable right to abortion.

Consequently, it is arguably correct to say that from the moral point of view of the evolutionary psychology approach, it would be able to engage any incompatible comprehensive doctrines and rely on its own moral principles, such as discussed in this project. It is therefore indicated, I suggest, that the evolutionary psychology approach has the potential to deal on its own terms with challenges by comprehensive theories, although much development of the theory obviously still needs to be done.

However, public policy must also be framed to maintain social justice where it has been achieved and achieve it where it has not. Thus, it must prevent socially disruptive behaviour and eliminate socially unacceptable conditions. But much of these objectives cannot be met in the face of poverty.

The evolutionary psychology approach to social justice suggests that relative poverty is an unnatural human condition. It certainly seems not to have existed during the 40,000 years of prehistory when egalitarianism and a culture of sharing was most likely the common human experience (see discussion in Chapter 3 under “The Gift Givers”). The human psyche is consequently ill adapted to deal with the privations of relative poverty. Poverty in the face of prosperity itself is an injustice and is most probably always the result of some systemic injustice in a society. Public policy must be aimed particularly at removing any such systemic injustices.

The implications for public policy are furthermore that poverty alleviation is not a policy option, other than as a temporary palliative. Public policy needs to be directed at tackling poverty at its root causes and eradicating it. In doing away with systemic injustice and creating more egalitarian outcomes, one can do worse than to look at the public policy prescriptions followed over the years by the Nordic countries.

The basic point of departure for public policy is therefore suggested to be to achieve congruence with the embedded values of justice in the human psyche. But the latter was formed to maximise human reproduction in an ancestral society; applying these insights under modern conditions will be difficult and complex. But, as Charlton states

(t)he scope for success is necessarily partial; nonetheless, the best results are likely to come from acknowledging the strengths and limitations of human psychology, and from trying to frame social and political policy that cuts with the grain of evolved instincts, rather than ignoring human nature or deliberately thwarting it. (Charlton 1997, 424)

3. General Conclusions

The evolutionary psychology approach is not based on a surfeit of assumptions about human nature, the concept of the person, of society, the desirability of liberty and equality *et cetera*, as is many other theories, including justice as fairness. Through the evolutionary approach we can explain why liberty

and equality are important in society and why they are aims worthy of being striven for. It explains, for example, that the notions of liberty and equality are in complete accord with the ideal requirements of the genepool when viewed from the societal perspective. It can thus be said to offer a more parsimonious theory of social justice than is presented by justice as fairness.

Moreover, the societal perspective in conjunction with the socio-biological understanding of social justice, suggests a basis for adjudicating between contrary and conflicting judgements of justice, whence also a multiplicity of social relationship questions can be deduced and reconcilable and justifiable answers produced. I therefore contend that the societal perspective, which is a direct consequence of the evolutionary psychology approach, is an advance in the understanding of some of the natural necessities of social development and cohesion. The societal perspective, I suggest, may thus serve as a basis for better understanding certain intuitions and as a guide for developing feasible social policies and institutions that might resonate more readily with the human spirit.

4. Prospects for Further Research

In this section, I will point to some matters and issues that arise from the evolutionary psychology approach and will require and merit research on their own at a later stage. There are firstly further essentials of the theory that should be researched and developed, such as its constitutional implications, implications for property law, for administrative law, health care, and education.

A major project would be to research options for alternative economic systems of production and distribution, resulting in outcomes that would be more in accordance with the egalitarian predispositions of human beings, than the capitalist free market system, especially the current neo-liberal version of the system. Much modern research has already been done in respect of such possible egalitarian alternatives and it would probably be possible and advisable to build further on those – cf. (Sah 1986), (Pollin 1995), (Hall 2001), (Charlton 1997), and (Asutay 2007).

Considering the hypothesis of the EP approach, namely that the closer the principles of our founding civil institutions match our evolved notions of justice, the stronger our social bonding, the more peaceful our society, and the greater the potential health and happiness that can be experienced by every individual will be (Chapter 3 heading 2), some further study to validate or falsify that hypothesis could be undertaken. In order to reasonably test its validity, at least to some degree, research into the extent to which the institutions, laws and culture of the internationally recognised three or four happiest societies are in harmony with, depart from, or contradict the guidelines produced by the evolutionary psychology approach can be undertaken. Such a study could, within reasonable limits, falsify or validate the basic tenets of the theory, especially in so far as it attempts to define a well-ordered society, understood in the evolutionary psychology sense as described in Chapter 3.

A particular subject that I suggest is also of importance in the light of the principles of the evolutionary psychology approach is that of penal law and penal policies and practices. According to Kent (Kent 1993) the role of punishment in egalitarian societies is strictly penal and not necessarily, or at least not intentionally calculated to alter behaviour or to rehabilitate offenders: it is essentially punitive in nature. This psychological tendency seems to be supported by some modern studies that discuss “moral outrage” and “just deserts” as major motivating factors that drive the psychological urge to punish offenders (Carlsmith 2002). These discussions countervail against both the Kantian and the Benthamite view on punishment. It may well be that the societal approach casts a different and perhaps a revitalizing light on the question.

A further area of interest would be to discover to what extent indigenous societies had developed norms of social justice in harmony with the evolutionary psychology approach. In this respect the normative legal rules of indigenous South African peoples would probably form a very strong base for such research, but it would also have to include the normative rules of other indigenous peoples.

It would also be very interesting to reconsider the essentials of the democratic ideal in the light of the societal approach. Such a reconsideration needs to deal with questions such as what can be regarded as the essential elements of a truly democratic system, what the purposes and outcomes of such a democratic system should be, and whether current representative government models really meet these criteria and expectations cf. – (Rosanvallon 2013), (Manin 1997) and (Przeworski 1999). The parallel question to this avenue of inquiry would be whether there are, or may be alternative systems of government, such as proposals for deliberative democracy (Bouricius 2013), (Dowlen 2008), (Manin 1997), that could be considered an improvement on present democratic systems based on representative government, in that they might align closer with the values of the evolved human psyche. As Mill reminds us, “[t]o inquire into the best form of government in the abstract (as it is called) is not a chimerical, but a highly practical employment of scientific intellect.” (Mill 2004).

There are undoubtedly further areas of possible research, but I leave them for consideration at some future time.



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