

## SOCIAL JUSTICE

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This article re-examines the concept of social justice. Some justification may be desirable for writing on a topic which has been so luxuriantly treated in the past. Professor Del Vecchio's work,<sup>1</sup> translated by Professor Campbell, contains a very full account of the history of the literature. A number of reasons may however be adduced for a fresh attempt to analyze this concept.

First, the choice of topic happily coincides with the appointment of F. R. Scott, Dean of the McGill Law School, who has been actively concerned in establishing before the courts the right of citizens to be free from arbitrary restrictions. Secondly, in an issue of the McGill Law Journal concerned with civil rights, it seems not inappropriate that the notion of social justice should have its place. It is true that civil rights are designed to secure interests other than justice, for instance liberty, but in any treatment of civil rights and any consideration of the object of civil rights legislation, justice must have its place.

Thirdly, during the last century the emphasis has shifted from analysis of justice *tout court* to that of social justice. Indeed justice by itself no longer arouses the responses it once did. Perhaps this is because modern social and economic developments have made it clear that individual justice, justice between wrongdoer and victim is only a partial and incomplete form of justice. We find that in this century the notion of social justice has everywhere received attention. For instance, the development of the welfare state is generally thought of as an application of the notion. The interest of the Catholic Church in social justice is born out in many passages of the recent encyclical *Mater et Magistra* of Pope John XXIII.<sup>2</sup> The cry for equality of opportunity for the underprivileged is increasingly heard, and underdeveloped countries are increasingly thought to have claims on more developed economies for the capital and technique necessary to develop them. All these phenomena, it would generally be agreed, illustrate the importance of the notion of social justice in the modern consciousness.<sup>3</sup>

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<sup>1</sup>Del Vecchio, *Justice*, translated by A. H. Campbell (Edinburgh, 1952), to which I am greatly indebted. Cf. Sidgwick, *The Method of Ethics*, ch. 6. Perelman, *De la justice*. Ross, *On Law and Justice*, ch. 12.

<sup>2</sup>*L'encyclique Mater et Magistra*, introduction by C. Ryan (Montreal, 1961) pp. 52, 57, 69, 95.

<sup>3</sup>For the earliest discussions see Romagnosi, *Genesi del diritto penale* V. ii. s. 943, 497, 948. Rosmini, *La Costituzione Secondo la Giustizia Sociale* (1848). Hobhouse, *Elements of Social Justice* (1922); Gillet, *Conscience Chrétienne et Justice Sociale* (1922).

A fourth reason for undertaking the investigation is that, despite these modern developments, much of the literature about justice continues to be influenced by the approach which, from Aristotle's time onwards, has been considered orthodox. By this I mean that approach which looks at justice from the point of view of the just man, the person who is bound to act justly. It would seem more consistent with modern notions, or at any rate more refreshing, to look at the matter rather from the point of view of the citizen to whom just treatment is due. In other words, it may be revealing to consider not primarily the duty to act justly but the demand for just treatment. Again, it may often be more illuminating to ask not what would amount to "just treatment" or "just action" but in what circumstances we would describe treatment or actions as "unjust". In this, as in many spheres, the negative concept is easier to grasp and illustrate than the positive.<sup>4</sup> Finally in the English language the words "just" and "unjust" have a somewhat heavy and even pompous connotation. I have preferred in many places to use the words "fair" and "unfair" instead. These mean the same or very nearly the same as just and unjust.<sup>5</sup> Their connotation is lighter and by the use of them the temperature of the discussion can be lowered.

But the most important reason for reopening old controversies is that I believe that it is possible to make some progress in the inquiry and to reach a conclusion which is not a purely skeptical one.<sup>6</sup> The thesis I shall argue is that the notion of social justice represents something more than merely the opinion of a group as to what demands they think should be conceded. It represents something more than merely a formal notion. It is not merely a question of conforming to the rules whatever they may be. The view I shall advocate is that the principle of social justice consists in two propositions. The first is the contention that *all men considered merely as men and apart from their conduct or choice have a claim to and to an equal share in all those things, here called advantages, which are generally desired and are in fact conducive to their well-being.* By this I mean such things as life, health, food, shelter, clothing, places to move in, opportunities for acquiring knowledge and skill, for sharing in the process of making decisions,<sup>7</sup> for recreation, travel, etc.

Men not only have a claim to these things but to an equal share in them. It would be misleading to advance the first half of this proposition without the second or *vice versa*. If we say that men have a claim to equal shares in all advantages without saying that they have a claim to them irrespective of shares, then this claim might be satisfied by a system which distributed misery equally

<sup>4</sup>On this, see Cahn, *The Sense of Injustice*.

<sup>5</sup>See Hart, *The Concept of Law*, 154.

<sup>6</sup>For a skeptical conclusion, see Vermeyers in *Il XL anniversario della Enciclica "Rerum Novarum"* (1931) p. 556. Hart, *The Concept of Law*, 162-3. *Del Vecchio*, p. 123, No. 2.

<sup>7</sup>Emphasized by Lasswell and McDougal, "Legal Education" (1943) 52 *Yale L.J.* 203 and McDougal, "Comparative Study of Law for Policy Purposes" (1952), 61 *Yale L.J.* 915, with, however, a careful avoidance of the term "Social Justice."

and gave men no share or an infinitesimal share in the advantages generally desired. Conversely if we say that men have a claim to these advantages without adding that their claim is to an equal share, then the proposition might be satisfied by a system which allots or distributes advantages in an arbitrary way. The word "claim" is used rather than the words "opportunity"<sup>8</sup> or "privilege". Following Hohfeld's usage<sup>9</sup> it seems appropriate to use the word "claim"<sup>10</sup> in this context to mark the point that we are here concerned not, as we are in the analysis of liberty, with the question "What are men permitted to do", but with the question "What are men entitled to demand?"

The second proposition that I shall advance is that *there is a limited set of factors which can justify departure from the principle embodied in the first proposition.* This is to say that there are a limited number of *principles of discrimination* and that the claim of men to an equal share in all advantages can fairly be modified, restricted or limited by only two main factors. These are the *choice* of the claimant or the citizen on the one hand and his *conduct* on the other; there are also certain principles of individual justice dealt with under the rubrics of 'the justice of transactions' and of 'special relations'.

From this it will be evident that, while I do not believe that any single formula such as distribution according to desert, or according to need, can adequately express the concept of social justice, I believe it is possible to state the basic principles underlying the concept in a way which makes it more than an empty form. Perhaps the greatest single obstacle to the analysis of the notion of justice is, indeed, the belief that a single formula can and must be found which will express a principle applicable to those various circumstances in which the allocation of advantages is in question. This is an illusion; but the opposite belief, that the various formulae represent nothing more substantial than the preference of those who advocate them, is equally mistaken.

The inquiry will take the following form. The different principles of justice which have been advocated in the past or are generally accepted at the present day will be examined one by one in order to discover which, if any, of them forms a part of the notion of social justice. After they have been dealt with I shall end by considering briefly what, if any, explanation of and justification for the advocacy for social justice can be found.

## THE LEADING PRINCIPLES OF JUSTICE

It would seem that if we are to be guided by ordinary usage, that is by the circumstances in which people commonly complain of being treated unfairly,

<sup>8</sup>On equality of opportunity, see below p. 101. Raphael, 51 P.A.S. 191.

<sup>9</sup>Hohfeld, W. N., *Fundamental Legal Conceptions*, ch. 1.

<sup>10</sup>Also adopted by D. D. Raphael, "Equality and Equity" (1946) 21 *Philosophy* 118, 119-120 and "Justice and Liberty" (1950-1) 51 *Proceedings of the Aristotelian Society* 167, 179.

or put forward a claim to fair treatment, there are at least six principles of justice to be distinguished.

**1. *The Justice of transactions: restoration of the status quo or its equivalent.***

The first type may be called the justice of transactions. This corresponds to some extent with Aristotle's notion of rectificatory justice, but not entirely. Aristotle's rectificatory<sup>11</sup> or diorthotic justice is thought of as a principle by virtue of which matters which are crooked must be put straight. Thus if A lends B a book, the balance is restored if B returns the book to A. This is what rectificatory justice requires. Again, if B steals A's book the balance between A and B is restored when B returns the book to A, and this, again, is what rectificatory justice requires. On the other hand if A sells B a house, this form of justice requires that the equivalent of the value of the house should be paid by way of price. In this case rectificatory justice requires not the return of the identical thing which had previously been transferred but an equivalent. Thus this form of justice may require either restoration *in specie* or alternatively compensation in the form of the giving of an equivalent for what has been received. It covers therefore the notions of *restitution* and *compensation*. I doubt if it is necessary here to discuss the question whether this principle requires restitution or compensation only when a legal wrong has been done, such as a breach of contract, delict, etc., or whether it operates also when a voluntary transaction such as a contract is found to be unfair. On this, the view I have taken elsewhere<sup>12</sup> is that rectificatory justice can apply even when no legal wrong has been committed. Thus if the seller exacts an excessive price the buyer is legally bound to pay it, but from the point of view of rectificatory justice it would seem that the seller ought fairly to return part of it. This view has the merit of agreeing with common sense, for it seems obvious that agreements voluntarily entered into can in some circumstances involve unfairness to one side or the other. Even if this view does not represent Aristotle's accurately, it is here adopted for the purpose of explaining what is meant by the justice of transactions.

According to Aristotle this form of justice can be applied to assess the punishment due when a wrongdoer has committed an offence and not merely the compensation or restitution due in civil transactions. Thus Aristotle draws no distinction between rectificatory justice where private citizens are involved and rectificatory justice between citizen and State.<sup>13</sup> The distinction between

<sup>11</sup>Various translations of "diorthotic" have been proposed. See Del Vecchio, *op. cit.*, 59: e.g. commutative (the commonest suggestion) directive, regulative, corrective, reparative, remedial. Ross' *rectificatory* (used in his translation of the Nicomachean Ethics) is the most satisfactory term so far proposed.

<sup>12</sup>Honoré, *Gaius*, ch. 6 (to be published by O.U.P. 1962). For various opinions see Del Vecchio, *op. cit.*, p. 61.

<sup>13</sup>The contrary view of Hildenbrand, *Geschichte und System*, 299 has not won acceptance, Del Vecchio, *op. cit.*, 65.

crime and delict was not in the fourth century B.C. a very distinct one and in consequence he seems not to have marked it clearly. From a modern point of view it is desirable to make this distinction and accordingly what is here called the justice of transactions is not identical with Aristotle's rectificatory justice, but is confined to those situations where it is fair that one citizen should restore something to another citizen, compensate him for a wrong or pay him for goods or services rendered. This form of justice, unlike justice between citizen and State, presupposes that some transaction has taken place between the claimant and the person against whom the claim or complaint is made. Such a transaction may be a direct one, as when there is a contract between parties, or where the claimant is the victim of a delict committed by the other party, or again when the dealings between the parties have given rise to a claim for unjust enrichment. On the other hand the transaction may be indirect, as in certain cases of contract in favour of or binding third parties, of unjust enrichment by or against third parties and of delicts affecting third parties. This does not affect the description of the form of justice involved, namely the justice of transactions, because the claim is one by an individual citizen against another individual citizen without reference to the remaining members of society, and always arises from a particular transaction.

The object of this form of justice is, then, the restoration of the original position or its equivalent. It seems proper to call this a form of individual, not of social justice,<sup>14</sup> since the claim to which it gives rise is directed solely toward other individual citizens and cannot be conceived as a claim against other members of society as a whole. Nor does it involve a comparison of the treatment received by the claimant with the treatment accorded to others. From a social point of view the restoration of the *status quo* or of a state of affairs that approximates to it, although in itself a fair objective, does not necessarily produce a situation which would be described as a completely fair one.<sup>15</sup> This is because the *status quo* is not necessarily itself regarded as representing a fair allocation of advantages among members of society. This form of justice therefore possesses a conservative tendency<sup>16</sup> and, while it would be unfair not to give effect to it, we cannot conclude that the state of affairs produced, when effect has been given to it, is a fair state of affairs.

## 2. The justice of special relations.

Another individual type of justice is exemplified by the claims which members of the same family and others who stand in some special relation to one another are considered to have against each other. These claims may be

<sup>14</sup>On the definition of Taparelli, *Saggio teoretico di diritto naturale appoggiato sul fatto* I, 158 (Social justice is justice between man and man) this is a form of social justice. See also Michel, A., *La question sociale et les principes théologiques*, 216. Cathrein, *Recht, Naturrecht und positives Recht*, 154. These definitions are too wide to be helpful.

<sup>15</sup>Del Vecchio, *op. cit.*, 67 No. 13.

<sup>16</sup>On "conservative" justice, see Sidgwick, *The Methods of Ethics*, 273, 293.

independent of merit or need; it would be unfair of a father to disinherit his child even if the child was not in need and, conversely, fair to leave him property by will though he had done nothing to earn it, perhaps because his studies had only recently been completed. But this, again, is not a type of social justice because it upholds not the claims of man as man but only of man as standing in a special relation to some particular fellow-man.

### 3. *The justice of conformity to rule.*<sup>17</sup>

The third form of justice here considered is one which is sometimes regarded, but I think mistakenly, as possessing a merely formal character. This is the justice of conformity to rule.<sup>18</sup> Each member of society is thought to have a claim that the rules by which society is regulated, whatever they may be, should be observed. Thus it is unfair to A to apply to him a rule unfavourable to him if this rule is not also applied to B, who is also covered by the conditions prescribed by the rule. Conversely it is unfair to B to refuse to apply to him a rule favourable to him that is applied in the case of A, again on the assumption that the conditions prescribed by the rule apply equally to both. Thus if a rule forbids parking in a certain area it is unfair to A who has parked in that area that he should be fined for doing so, whilst B who has done the same thing, is not prosecuted. Again if a rule prescribes a tax remission for those whose children are under a certain age, it is unfair to B to refuse him the tax remission, when his children are under the stated age, whilst a remission is granted to A who is in the same position. Hence we can state as a general principle that every man has a claim that the rules should be interpreted and adhered to *at least as favourably* in his own case as in the case of his fellow-man, assuming that both fall within the categories prescribed by the rules and conditions mentioned in them.

The notion of conformity to rule can be made to yield the notion that like cases should be treated alike. If we think of those species of rule that prescribe that certain people be treated in a certain way when certain conditions are fulfilled, the demand that such rules should be observed entails the demand that cases falling within the conditions mentioned should be treated in the way prescribed in the rule, that is that people who are alike in the relevant respect should be treated alike. This, then, involves the principle "*treat like cases alike*".<sup>19</sup>

<sup>17</sup>Also called "legal justice" — but this is really a species of the genus "the justice of conformity to rule". On legal justice see Del Vecchio, *op. cit.*, 33-37, 115. Aquinas, *Summa Theol.* 2a 2ae Quaest. 58 art. 5c. Vermeersch, *Quaestiones de iustitia*, p. 35 ff. Prummer, *Manuale Theologiae moralis* (6th ed.) II, 67.

<sup>18</sup>I omit to consider the subsidiary aspects of this principle, such as the rules of "natural justice": these are designed to secure that the rules are in fact impartially and objectively applied. Hart, *The Concept of Law*, 156.

<sup>19</sup>This in turn yields the principle "give each man his due", at least on one interpretation of "due", *viz.* what the rules allot to each man. But it seems that "due" is often interpreted more widely as in the Encyclical *Quadragesimo Anno* of Pius XI (1931): "Sua igitur cuique pars bonorum adtribuenda est, efficiendumque, ut ad boni communis seu socialis iustitiae normas revocetur et conformetur partitio bonorum creatorum." On *sum cuique tribuere*, see Del Vecchio, *op. cit.*, 74, No. 27, 112.

But, so far, this only means that cases alike in the respect prescribed by the rules should be treated alike, not that cases alike in some other respect should be so treated. Thus if the rules prescribe that every adult citizen shall have the right to vote, this means merely that cases alike in that they are cases of adult male citizens shall be treated in that way, namely by being allowed to vote. Where human beings are concerned there are always similarities and differences between any two members of the class in question. The principle of treating like cases alike is therefore an empty, though as we shall see not a merely formal one, until we know in what respect the cases are supposed to be like or unlike. If the rules prescribed that those of a certain height or religious belief should alone be allowed to vote, this would be condemned as constituting an unfair discrimination against those not of the right height or religion. Yet a judge or official, who applied these rules impartially, though he would be discriminating unfairly, from one point of view, against the underprivileged category, would in doing so conform to the rules laid down; and in that case his conduct could not be called unfair or unjust, so far as the principle of conformity to rule is concerned. Thus persons not of the prescribed height or religious belief, who were denied the right to vote, could not complain of unfair treatment *in relation to other persons falling within the same category*.

It is perhaps worth noting that, contrary to what is sometimes asserted,<sup>20</sup> the principle of conformity to rule cannot be made to yield the principle "*treat unlike cases unlike*". Thus if a rule prescribes that adult male citizens shall have the right to vote, this means that those men who are alike in possessing the characteristics of being adult male and citizens should be treated alike in respect of the right to vote. But we cannot conclude, and it may be quite false to assert, that those who do not fall into this category are to be denied the right to vote, for instance that adult women who are citizens have no right to vote. It is a merely contingent matter whether such a rule should be interpreted *e contrario* so as to exclude the right to vote in the case of all those who do not fall into the category mentioned. Nor does the fact that a certain category of men are forbidden to act in a certain way, for instance, hotelkeepers to operate without a liquor license, imply that the conduct in question is permissible in the case of persons not falling within the category mentioned. It does not follow from the fact that hotelkeepers may not operate without a liquor license that all other members of society may do so.

The principle "*treat unlike cases unlike*" is in fact not part of the notion of justice, or of social justice in particular, and represents rather an inaccurate way of stating the following idea. There are certain principles of discrimination,<sup>21</sup> such as the principle of justice according to desert,<sup>22</sup> of justice according to choice and of justice according to need;<sup>23</sup> and, according to these, it is not

<sup>20</sup>E.g. Hart, *The Concept of Law*, 155.

<sup>21</sup>Below p. 86.

<sup>22</sup>Below p. 93.

<sup>23</sup>Below p. 91.

unfair to treat cases which are dissimilar *in respect of the criteria listed* in a dissimilar way. But this does not carry with it the conclusion that it is fair so to treat them, because the fairness of the treatment depends not merely on the presence or absence of factors justifying discrimination, but on the principles of social justice, of which the demand for conformity to rule is only one. It does not follow from the fact that discrimination is sometimes fair that it is fair whenever the rules happen to prescribe discriminatory treatment.

Furthermore the maxim "*treat unlike cases unlike*", even if it represented the truth, would only apply when the conditions, subject to which the rules prescribed unlike treatment, were actually obtained. In the case of the justice of conformity to rule it must be stressed that the existence of a rule, prescribing certain treatment for persons in a certain category, does not necessarily entail the existence of a rule prescribing different treatment for persons not in that category.

The claim of each man to be treated no less favourably than his fellow-man, if both fall within the category prescribed by the rule and both fulfill the conditions mentioned in it, is not the empty generality which at first sight it appears to be. Thus, it is not confined to cases where the rule involved is a legal one. It would be regarded as unfair for a father, who had a habit of giving his married children \$100 each for Christmas and his unmarried children \$50 each, to abandon this practice or habit without warning and to give his unmarried children \$100 each, his married children \$50 each. The reason why this would be condemned as unfair is that the claim that our fellow-men should conform to rule is not based merely on the fact that the rules under consideration are legally or morally binding, that is, are prescriptive rules. The principle of conformity is not merely regarded as giving each member of society a legal or moral right to equal treatment, but is partly based on the fact that failure to conform to rules, whether binding or not, disappoints expectation reasonably entertained, infringes human dignity and so is unfair from a second point of view. What is involved when rules are jettisoned is not merely discrimination when there is an obligation, moral or legal, not to discriminate; discrimination is objectionable whenever it disappoints or defies expectations reasonably entertained.

The demand for conformity to rule is therefore partly based on a claim for consistent treatment, whether obligatory or not. Nor does it matter whether the course of conduct, which consistency has demanded, is itself rational or not. In the case of the father and the Christmas present, the father has changed from a rational mode of distribution, namely one based on the need of his children, to an irrational mode which disregards their needs. But it would also have been unfair to the unmarried children, if the father had previously given the unmarried children \$100 for Christmas and the married ones \$50, to change without warning and thereafter to give the unmarried children \$50, the married children \$100. This is true despite the fact that the father would then have changed from an irrational mode of distribution to a rational one based on need.



The reason why the change would be unfair is that it would disappoint the expectations which the unmarried children have reasonably formed, and affront their dignity.

The demand for conformity to rule prevails in practice even when the rule in question is a mere habit and not morally or legally binding. Of course it does not operate unless some advantage or disadvantage to the claimant, the individual citizen, is involved. Thus, it may be immaterial to A whether B follows the usual habit of taking off his hat when he meets a lady. A is not entitled to demand conformity to habit or rule in this case, because he derives no advantage from it. But it is otherwise if we consider the point of view of the lady whom we may call C. She has in the past had the advantage of B's courtesy and so is entitled to complain if B without warning abandons his former habit and keeps his hat on when he meets C. What is more, she can complain of unfair treatment if B continues to take off his hat when he meets another lady, E, since this, besides disappointing her expectations, infringes her dignity. The demand for conformity to rule does not therefore essentially depend on the character of the habit or obligation involved, but on the existence of a regular practice which gives rise or may reasonably give rise to an expectation on the part of the citizen affected, whether to his advantage or his disadvantage, that the rule will be adhered to. The citizen is entitled to protection against irregular or unusual discrimination.

Now such a principle cannot be described as one of a merely formal character. The protection of reasonable expectations and of human dignity is the protection of a substantial interest and illustrates a form of social justice. Of course it is not the whole of social justice but it constitutes a necessary element in that notion. It is in fact one part of what man as man is entitled to demand of his fellow man: equal treatment in so far as the fulfillment of reasonable expectations is concerned.

It remains true, however, that the rules to which conformity has been demanded may be of an oppressive or iniquitous sort. They may, for instance, involve unfair discrimination on the basis of race or religion, as in the case of the Nuremberg anti-Jewish laws and the *apartheid* laws in South Africa. The rigorous and impartial enforcement of such laws may well be called, in a certain sense, not unfair. Harsh though they may be, impartial enforcement will be held less unfair to the person against whom they are enforced than if their application was partial or capricious. On the other hand, it would be wrong to describe the rigorous and impartial enforcement of rules or laws which are in themselves unfair as being itself a fair or just action, or as producing a fair result.<sup>24</sup> The way to describe this situation is rather to say that provided the rules are followed, the enforcement of them against A and B indiscriminately is not unfair to either, whereas the enforcement of them in the case of A would

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<sup>24</sup>An extreme form of the view that (legal) rules cannot be unjust is stated by Hobbes, *Leviathan*, ch. 30.

be unfair to A if B, who fell within the same rules, because he fulfilled the conditions laid down for their application, was not treated as prescribed by the rules. Conformity to an unfair rule does not create a fair or just result but rather one which is not unfair relatively to any individual person falling within the rules who receives the treatment prescribed by it. We cannot in fact say of a particular situation such as this that the result is either fair or unfair. The dilemma cannot properly here be imposed. We may conclude that conformity to rule is a necessary element in the notion of social justice but is not conclusive of the fairness of the result produced when it is applied. It is an element in the notion of social justice because it expresses a demand properly voiced by men as members of society against their fellow men: but it is not the whole of what they may properly and fairly demand.

#### 4. *The justice of allocation according to desert (for short: 'justice according to desert')*

The fourth variety of justice corresponds approximately to Aristotle's distributive justice.<sup>25</sup> This rests on the principle that it is fair to reward others according to their merits or deserts. The first thing to ask in this connection is: how is merit to be assessed? A very clear example of reward according to merit would be a case in which payment is made to someone according to the quality or value of the work he has done. In this simple case at least merit depends on performance; in other words, on the claimant's actual conduct.

By a corollary it may be said that desert can equally depend on demerit, on bad conduct, in that the principle of justice according to desert includes also the principle that those who have behaved badly or harmfully should be punished according with the extent and character of their wrongdoing. If this is accepted, the core of the desert principle is the notion that men are responsible for their actions and that it is fair for society to reward them according to their responsibility. It is not unfair to penalize persons in certain circumstances for what they have done, the notion of penalty here straddling civil and criminal law.

If we take these two aspects of the desert principle together, the principle seems to amount to this: that it is fair to reward citizens according to what they have done, the reward being favourable or advantageous if the action is beneficial and disadvantageous if the action is harmful. By a further development of the same principle it is often asserted that the reward should in both cases be *proportional*<sup>26</sup> to the conduct in question. Wages, for instance, should be proportional to the work done and punishment to the seriousness of the

<sup>25</sup>Del Vecchio, *op. cit.*, ch. VI. Aristotle, *Eth. Nic.* V. ii (5) 1130 b 31-33; V. iii (6) 1131a 20-27; V. iii (7) 1131b 11-20. Ross, *Aristotle*, 209 ff. Salomon, *Der Begriff der Gerechtigkeit bei Aristoteles*, 24 ff. Bagolini, *Il problema della giustizia nel pensiero etico-politico di Aristotele*.

<sup>26</sup>On proportion see Del Vecchio, *op. cit.*, 51. Aristotle, *Eth. Nic.* V. iv (7) 1131 b 25, 1132a 10. Bodin, *De la république* VI. vi; *De la justice distributive, commutative et harmonique*, 1013-1060.

offence. A citizen is entitled to more or less according to whether he has made a positive or a negative contribution to the welfare of the community.

It must be conceded that this principle represents an important part of the notion of justice. In a sense one might say that it forms part of the notion of social justice, because it represents a claim made by the citizen on his fellow men as a whole, and not one merely made on those with whom he has entered into a particular transaction. But though in a broad sense the principle of desert is a principle of social justice, in a narrower and more precise sense it is not. The reason is that it does not provide any answer to the question, "What is it that men are entitled to demand of their fellow men considered simply as such and irrespective of their conduct?" It is a principle that allocates advantages and disadvantages to men according to the particular conduct of each and not according to their mere character as human beings. An example will make this clear. Suppose that A has done twice as much work as B, but both receive the same wage. A is entitled to complain that he has been unfairly treated in comparison with B. This unfairness disappears if A is paid twice as much as B. But this is not the only type of problem that can arise when men are allocating advantages. Suppose that the problem is whether a surplus of production should be distributed or dumped in the sea. On the principles of distributive justice here considered—distribution according to desert—B has no right to complain if the latter solution is adopted and neither has A. Of course the principle of distribution according to need may be prayed in aid, if B is in fact in need. But this, as we shall see,<sup>27</sup> is a part of the notion of social justice itself. If B is not actually in need, there is so far no principle by virtue of which either he or A can complain of the dumping of the surplus in the sea, unless we can discover a principle of justice independent of the particular conduct or choice of the individual. It would seem, therefore, that the principle of justice according to desert explains only how the fair demands of men as men on their fellow men may be modified by their conduct, not what those demands are apart from their conduct.

There are several points in the principle of justice according to desert which need to be elucidated. The first concerns the notion of desert or merit itself. So far it has been assumed that the criterion of desert is conduct, that is what the citizen who claims to be treated according to desert has actually done. But in fact this is only part of the notion of desert. Thus it would be fair to appoint to a vacant post the person best qualified for it, even if the assumption of the claimant's qualifications was based not on his past performance but on his ability and promise. The candidate who failed to secure the appointment could not complain of unfair treatment in such a case, and the best qualified candidate would properly be said to deserve the appointment. It seems clear however that where, as here, performance is not the basis of desert, potential

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<sup>27</sup>Below p. 91.

performance is.<sup>28</sup> The reason why it is fair to appoint the best qualified, *i.e.* the most promising candidate is that, although this cannot be regarded as a reward for past work, it can be based on the promise of future work. A, who is likely to achieve more than the other candidate B, is therefore the right person to appoint. It seems then that the principle of desert can be applied either when advantages or disadvantages are allotted according to actual performance or when they are allotted on the basis of potential performance.

Similarly, it may sometimes be fair to punish an offender who is potentially very dangerous more severely than one who is less dangerous, though their past conduct has been similar; so that in this type of case too, potential performance may be taken into account. The principle however is one to be applied with caution: potential performance is a criterion of desert primarily when there is no adequate evidence of actual performance.

A second point requiring elucidation is this. The principle of distribution according to desert seems to depend on the notion of proportion.<sup>29</sup> According to some, this is a key notion in the analysis of the concept of justice as a whole. But it seems that the notion of proportion, though important, can easily be overstressed. For one thing, there are situations where this notion does not apply, even when the principle of justice according to desert is in question. Suppose that one theatre ticket or one school place is available for distribution. A and B are the claimants. A distribution proportional to desert or proportional to any other factor, such as need, is here impossible, since the ticket or school place is indivisible. What is here regarded as fair is that priority should be assigned to the claimant with the greatest merit or desert, not that the thing available for distribution should be distributed in proportion to the merits of the various claimants. The notion of proportion therefore must be supplemented by that of priority, in order to cater to those cases in which the distribution of indivisible advantages is in question. The citizen with the greater desert has the *prior and greater claim*, not just the greater claim to those goods which are to be allocated.

Thirdly, the notion of distribution can itself be criticised as apt to mislead in some contexts. The picture apt to be conjured up by it is that of material goods being allocated to different members of society. No rational distinction however can be drawn between the following categories of 'advantage', using that word in a wide sense: (A) material goods, (B) incorporeal things such as copyrights, contractual rights, etc., (C) interests which are not legally regarded as property but which are legally protected, such as life, health, honour, reputation, and (D) opportunities or facilities such as the right to vote, to

<sup>28</sup>Alternatively, allocation according to capacity might be regarded as a separate principle of (discriminatory) justice. Hart, *op. cit.*, 159. Raphael, *op. cit.*, 21 Philosophy 125 ff. Although the latter plausibly argues that allocation on the basis of capacity does not involve inequality, though it does involve differentiation, I think it safer to assume that it does or may involve inequality sometimes.

<sup>29</sup>Aristotle, *Nicomachean Ethics*, Book 5, ch. 1-3.

have free education, to leave property by will, travel, etc. These latter are not protected primarily by legal claims but involve the exercise of legal powers coupled with privileges. It seems that interests such as life, health, etc., can with difficulty be thought of as *distributed* by society to its members. We can all agree that, if it were necessary to choose between saving the life of A or B, it would be proper to consider the merits or deserts of them both before making a decision. It would not be unfair to select the more deserving, if such a painful choice had to be made. Similarly as regards health, if there were time and opportunity to operate on one of two persons A and B in order to save his eyesight, it would not be unfair to select the more deserving of the two. But it would not be natural to speak of such a choice as involving the 'distribution' of life or health between the two. It is for this reason that the terminology of Aristotle, namely that of distributive justice, hardly seems adequate to express the principle of justice according to desert.<sup>30</sup> It is more accurate to think of this form of justice as one according to which claims, whether to property in the legal sense or not, are to depend upon the relative merits of the claimants.

Finally there is the question whether, as I have so far assumed, punishment is rightly thought of as illustrating a form of justice according to desert. Clearly there is no complete parallel between reward according to desert and punishment according to desert. This is best seen by considering the claim of the citizen who is entitled to demand fair treatment and complain of unfair treatment. The citizen who deserves a greater reward is entitled to claim it and to complain if he does not receive it. But the citizen who deserves a greater punishment is not entitled to nor would he in fact claim it. No unfairness to him is involved in failing to assign to him the appropriate or indeed any punishment. The failure to see this stems from a failure to think of justice as involving claims.<sup>31</sup>

Nevertheless a person who has committed a wrong may be unfairly treated by being punished in circumstances such as the following. Suppose that A and B have each committed a crime of similar magnitude and type, for instance, that each has stolen an automobile. *Prima facie* it is unfair to B to punish him by sentencing him to a year's imprisonment for a crime similar to that for which A receives only six months' imprisonment.<sup>32</sup> That is to say, B has a claim not to be punished more severely than a person who has committed a crime similar in

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<sup>30</sup>Aristotle's position could however be improved by adding to the notion of distributive justice that of *redistributive justice*. But even this is not quite adequate for cases such as those mentioned in the text.

<sup>31</sup>Claims are psychologically primary, as Rousseau noted: "le premier sentiment de la justice ne nous vient pas de celle que nous devons, mais de celle que nous est due". Emile II, 87.

<sup>32</sup>As I am concerned to analyse the modern concept of justice it seems immaterial that Aristotle thought it unjust that a free man and a slave should be punished equally for the same offence. See *Magna Moralia* i XXXIV 1194a 31. Usually such discrimination is nowadays openly based on utility, not justice, or on the spurious reasoning that some persons, e.g. negroes, are less sensitive to suffering than others.

magnitude and type. In the same way when rewards are being considered, a person who has done the same amount and quality of work as another has a claim not to be rewarded less than the other. This does not entail that a person punished no more severely than a person who has committed an equally serious offence has been fairly punished. It means only that he is not unfairly punished so far as his relation with the other offender is concerned.<sup>33</sup> In order that he should be said to be fairly punished, it would be necessary to show that the level of punishment is itself fair, a point to which I advert later. It would also be necessary to show that the rule for the breach of which he has been punished is itself a fair one. Even then, it is necessary to point out that justice and fairness are not the only factors involved in punishment and indeed, on one view, ought not to be taken into consideration at all. Regard for the protection of society and for the perfection of the individual also have their necessary and perhaps predominant place among the objectives that those who legislate or judge should bear in mind.

There is another respect in which the parallel between earning a reward and earning a punishment breaks down. We have seen that besides the question of allocation of rewards in a certain proportion and according to a certain priority, there is or may be a residuary problem about the allocation of surpluses, that is, of benefits surplus to those which the principle of justice based upon desert requires to be allocated. But there is no similar question whether the whole of all possible or available punishments should be allocated to wrongdoers, that is to say there is no question about the distribution of surplus disadvantages. It is immaterial from the point of view of justice whether prisons are kept full and hangmen busy. Indeed no one would think of arguing that this is the case, while on the other hand an argument that it is fair to distribute all available advantages to the members of society is certainly a plausible one.

This perhaps teaches us something about the scope of the principle of justice according to desert. As already mentioned, this principle involves the notion of proportion and priority, of greater or lesser rewards or punishments. But these are relative notions, and there remains a further problem, namely a problem of the *level of rewards and punishments*. How are we to fix the appropriate level of each? It seems natural to say that the levels of rewards and punishments should be fixed in such a way as to maximize rewards for advantages and to minimize punishments or disadvantages. In other words the level of rewards, should be as high as possible, or at any rate should be at the highest level compatible with the demands of other values such as preservation of society and individual liberty. Again the level of punishment should be as low as possible, that is to say should be set at the lowest level compatible with the protection of society from the depredations of wrongdoers. But neither of these principles bearing on the level of reward and punishment can be derived from the principle of justice according to desert, unless we say, what is highly im-

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<sup>33</sup>"The idea of demerit . . . signifies the removal of a claim normally present . . . justice stands aside, for it is satisfied that its claims raise no obstruction". Raphael, 51 P.A.S. 178.

plausible, that everyone deserves as much advantage and as little disadvantage as can be safely managed. I do not think this will be seriously maintained. The principle of justice according to desert therefore seems to require to be completed by some further principle which will enable us to determine the fair claims of men as men, that is, as members of society.

The principle of justice according to desert also raises certain residual questions as to the way in which merit or demerit is to be assessed. Apart from what has already been said about the relation between human conduct and merit or demerit, it seems that this question can fairly be left outside the scope of the present inquiry. For our purposes it may be assumed that there is some way of measuring the relative merit or demerit of people's conduct.

##### **5. *The justice of allocation according to need (for short, 'justice according to need')***

The principle here involved is one by which it is fair to allocate advantages, and to recognize the claims of citizens according to their needs.<sup>31</sup> The notion of need is here to be taken in an objective not a subjective sense. That is to say the criterion of need is taken to be not whether the citizen thinks he needs something but whether in fact he does so. For it would be extravagant to argue that every person has a proportional or prior claim to all those things which he thinks he needs. The concept of need is a somewhat complex one. What it presupposes is that there are certain advantages such that, if they are not satisfied, no existence at all or at any rate no decent or complete existence is possible. Without life no existence at all is possible and without adequate food, shelter and clothing no decent existence is possible. Nor is this the limit of the advantages which people may be said to need. The boundaries of need shift from time to time with changes in the social and economic conditions of society and in the exigencies which a decent or complete existence is thought to postulate. What is at one time a luxury becomes at another time a necessity and need.

It is clear that the needs of different people vary and this might be thought to entail that the principle of justice according to need is not part of the concept of social justice. But this would be a mistake. The principle of social justice as formulated earlier lays down that men have a claim to advantages and not merely to an equal share in advantages. From the point of view of this principle, those who are in need are entitled to point to the fact that they lack advantages which the principle of social justice entitles them. Therefore the principle of justice according to need may be regarded as one aspect, or one corollary, of the principle of social justice.<sup>35</sup> The fact that men's needs vary does not mean

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<sup>31</sup>Cf. Hart, *op. cit.*, 159. Del Vecchio, *op. cit.*, 142, 147. L. Blanc, *Organisation du travail* (9th ed. 1950 p. 72). Picard, *Le droit pur*, 329.

<sup>35</sup>Raphael, *op. cit.*, 51 P.A.S. 189: "thus the basis of the claim of social need is really a recognition of the claim to equality". This is so despite the fact that men's needs differ in detail; all need health equally, but some need more sleep.

that the satisfaction of needs is not something which they are entitled to claim as members of society rather than by virtue of their choice of conduct.

The principle of justice according to need is one which would generally be recognized at least in appropriate cases. Thus if a gift of \$100 is to be distributed between A and B, the fact that A's need is greater than B's would be a factor fairly taken into consideration and would justify giving A a greater share. Nor is the notion confined to the distribution of gifts. A person in need, for instance, a person who is unemployed or ill, is regarded as having a claim, derived from his need, to a contribution by his fellow men, to help to relieve his lack of earnings and his ill health respectively.<sup>36</sup> In fixing salaries and wages the need of citizens is often taken into account. Thus where one employee is married and has a family he is often awarded more than an employee doing similar work who is unmarried. A comparable principle is often observed in the imposition of burdens. Thus progressive taxation according to income or, in the case of estate duties, to capital rests on the principle that the need of those who have a higher income or have greater capital assets is less than that of the persons who have a lower income or capital assets. The need principle like the merit principle therefore applies not merely to the allocation of advantages but to the allocation of disadvantages. Again however the parallel is not complete, since it would be wrong to assert that the person whose need is less, because he is wealthy, has a claim to be taxed more heavily than a person whose need is greater. The position would be more correctly stated if we said that a person whose need is less is not unfairly treated in relation to other taxpayers if he is taxed more than a person whose need is greater. But it is not true to say that the tax imposed on him is necessarily fair since this in turn is dependent upon whether the total level of taxation is itself fair.

It is plain that the principles of justice according to desert and justice according to need can and often do conflict.<sup>37</sup> The analysis of these notions does not in itself enable us to say how such conflicts are to be resolved. Nevertheless there would I think be agreement on a general approach to the resolution of these conflicts. The different advantages which citizens claim and of the deprivation of which they complain may be arranged in an order of importance. Thus life may be regarded as more important than health, health than recreation and so on, although all three are properly described as needs and as advantages which men generally desire. The order of importance depends partly on the choice which most men would make if confronted with the alternative of selecting one or the other. The hierarchy of importance will depend, then, partly on the extent which the advantages in question are in fact desired, and partly on the extent which they actually conduce to well-being, that is to a happy and complete existence.

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<sup>36</sup>"So distribution should undo excess, And each man have enough". (Shakespeare, *King Lear* Act IV sc. 1: cited by Del Vecchio, *op. cit.*, 148.)

<sup>37</sup>Del Vecchio, *loc. cit.* Aramburo, *Filosofia del derecho* 1 388.



Now the natural solution of the problem that arises when there is a conflict between the principles of justice according to need and justice according to desert will be somewhat as follows: the more important the advantage in question the more weight will be given to the principle of justice according to need. Conversely the less important the advantage in question the less weight will be given to the principle of justice according to need and the greater weight to the principle of justice according to desert. Thus if A's life is in danger his need would generally be held to prevail over his lack of desert, no matter how extreme. It would be thought that he had a claim to be rescued or to receive the appropriate medical treatment even if he had done nothing especially deserving during his life or had been guilty of serious misconduct. It is of course a matter of controversy where the point comes at which demerit outweighs the claim to life which every member of society normally is thought to possess. The controversy about capital punishment illustrates this very clearly. On the other hand if the question was whether an opportunity of recreation, such as a place on a football team, should be afforded to A or B, and A was a better footballer than B, A's deserts would normally be held to outweigh the greater need which B could adduce on the ground that he had fewer opportunities for recreation. This is because recreation is a less important need than health or life. There will be intermediate cases where the weight of the conflicting principles is more nearly equal and then it will be a delicate question to strike a balance.

If this analysis is correct, the principle of justice according to need is regarded, at least by our modern consciousness, as a more fundamental one than the principle of justice according to desert. It is more fundamental in the sense that it is held to outweigh the latter principle when those advantages which are of fundamental importance, that is, those which are most generally esteemed and are most conducive to a full existence, are concerned. However, just as in the case of justice according to desert, it would be found that there are problems falling outside its scope: for instance the problem of the relative claims of those citizens whose needs have been satisfied. Such cases might be covered by the desert principle but, again, we have seen that this has itself a limited scope and in principle does not solve the problem of the appropriate level of reward and punishment.

#### ***6. The justice of allocation according to choice (for short: 'justice according to choice')***

This principle of justice is perhaps so obvious that it is generally overlooked. Once we recognize that the notion of justice involves the notion of a fair claim, it will be seen that, since no one is bound to make a claim on his own behalf, and men sometimes choose to forego their claims, the fairness of a certain allocation of advantages may be affected by the choice of the citizen. This principle is mirrored also in the case of the infliction of punishment or penalties.

Just as it is a necessary condition of the judgment that it is fair to allocate advantages to someone that he should claim the advantage, so it is a necessary condition of the judgment that it is fair to punish someone that he should have had an opportunity to choose the course of conduct which entails the punishment in question. Furthermore, in general such a choice is only to be deemed a fair one if made with knowledge of the fact that the conduct in question is forbidden and that a punishment is prescribed for it. It is unfair to inflict a punishment on someone for breaking a law of which he did not or could not know or, if he did know of it, had no chance to obey; or to inflict a punishment the existence of which he had no notice or means of knowledge. It is unfair to punish a person at all when he did not choose to perform the act for which he is being punished but did it involuntarily or in ignorance.

Just as in the case of justice according to desert and justice according to need, so here we may speak, to a limited extent, of degrees of choice which justify greater or lesser severity of punishment. That is to say, 'reward' is to some extent proportionate to the degree of choice involved. A fair choice or fair opportunity of avoiding the conduct in question only exists when the citizen was free from psychological compulsions and there may be a whole gamut of possibilities between a fair opportunity of choice at one end of the scale and a complete absence of choice at the other. Once again however, there is no complete analogy between choosing to claim a benefit or to follow a course of conduct which entitles one to a benefit and choosing to do an act that justifies punishment. The person who does a criminal act freely and with knowledge of the possible consequences does not claim to be punished but rather debar himself from criticising such punishment as unfair should it be inflicted on him by his fellow men. Nor is the existence of the choice in question conclusive of the fairness of the punishment. Despite the fact that the offender has chosen to act as he did, the infliction of punishment may not be fair because the rule prescribing the punishment may itself not be fair, or because in the infliction of punishment there is some discrimination between the offender's case and that of another offender who has broken the same rule. The most we can say is that the offender who has had a fair choice is not entitled to criticise the punishment as unfair so far as he personally is concerned. Once again the absence of unfairness, so far as he personally is concerned, does not necessarily imply that the result produced is itself fair *vis-à-vis* others.

### 7. *The principle of social justice.*<sup>38</sup>

We are now in a better position to elucidate the notion of social justice. We have to ask, first, whether there is such a principle; that is, whether,

<sup>38</sup>Del Vecchio, *op. cit.*, p. 37. The identification of social justice with the pursuit of the common good hardly advances the inquiry because the 'common good' (a) is a vague conception (b) on one interpretation at least comprises values other than justice e.g. the preservation of society. See Michel, S., *La notion thomiste du bien commun* (1931). Gonella, *La nozione di bene comune* (1938). Encyclical *Divini Redemptoris* (19.3.1937) "Socialis justitiae est id omne ab singulis exigere, quod ad commune bonum necessarium sit."

men are entitled merely as members of society and apart from their choice or conduct to claim any advantages from their fellow men. If they are so entitled, what is it which they are entitled to claim?

It is already clear that men are entitled merely as such to claim something from their fellow men, namely conformity to rules whatever they may be. This claim is based in part on the notion that reasonable expectations should not be disappointed, in part on the notion that that form of discrimination is objectionable, as an affront to B's dignity, which fulfills the expectations of A but disappoints those of B. This, as we have seen, is a form of social justice because it expresses a claim that belongs to man as man apart from his conduct or choice. Again, we have seen that, when the notion of justice according to need was examined, another form of social justice emerged, namely that according to which men have a claim as men to those advantages which are necessary in order that a decent and full life may be made possible.

It would be surprising if the principle of social justice<sup>39</sup> protected the single types of interest already examined, namely the interest in conformity to rule and the interest of those who are in need, and not other human interests. Once it is admitted, indeed, that reasonable expectations are the subject of fair claims by men as men, there seems no principle by which we can deny the existence of similar claims, not only in the case of bodily health, shelter, food, clothing and other advantages which would rank as necessities, but also of recreation, travel, opportunities for amusement and education and those other advantages which might not be classified, at least in all societies, as human needs.

Again, it would be surprising if one particular form of discrimination, namely discrimination between persons in respect of their reasonable expectations, were regarded as objectionable and other forms of discrimination regarded as acceptable. Can any rational distinction be drawn between discrimination in respect of reasonable expectations and discrimination in respect of other interests whether falling within the notion of necessary advantages or not? Clearly a wider principle is involved and we must ask in what this principle consists.

A number of arguments tend to show that the wider principle of social justice consists simply in the claims of all men to all advantages and to an equal share in all advantages which are commonly regarded as desirable and which are in fact conducive to human well-being. The first is an argument based on the analogy of the principle of the justice of conformity to rules. The principle of conformity to rule involves not merely that discrimination is objectionable but that any failure to conform to rule which disappoints reasonable expectations can be criticised as unfair. Thus, if the principle that all men

<sup>39</sup>For further discussions of the principle see Schrattenholzer, *Soziale Gerechtigkeit* (1934); Höffner, *Soziale Gerechtigkeit und Soziale Liebe* (1935); Schuster, *Das Verhältnis von justitia legalis und distributiva zur justitia socialis in 'Quaest. an.'*: Scholastik XI 225-242; Bruculeri, *La giustizia sociale* (3rd ed. 1942). Montano, *Justicia social y reforma constitucional* (1948).

have a right that their reasonable expectations should not be disappointed is extended to other advantages, we arrive at the proposition that all men have a claim to an equal share in all such advantages, and this is the principle of social justice for which I am contending.

The second argument is of an empirical character. We observe in practice that the claim to equal treatment naturally commends itself at least at the present day to most people. In fact children begin from an early age to advance this claim *vis-à-vis* other members of the family. Parents notice that the basic demand made by their children is for equal treatment in all respects; the exceptions which are made to this on the ground of desert or choice are of a sophisticated character and come to be accepted only when children attain a certain degree of understanding. They are modifications of the basic demand for equal treatment in all respects.

This demand is not confined to food, toys or material things but extends to opportunities for entertainment, recreation, education, travel, etc., and is indeed of a quite general character. The family being the basic unit of society or at least the unit to which we are all introduced first, it seems likely that the demand voiced by adults for equal treatment is modeled perhaps unconsciously on the habits they have acquired as children of demanding equal treatment from their parents. In other words the demand for fair treatment which children formulate as children in respect of their parents becomes the demand which adults formulate as members of society in respect of their fellow men. It is true that the demand for equal treatment is not identical with the equal claim of all men to all advantages and to an equal share in all advantages. 'Treatment' covers a wide spectrum but not the whole field of vision. However the step by which this becomes generalized to cover those advantages which do not strictly speaking consist in treatment by our fellow men is a natural one.

A third argument is as follows: there exists a general conviction in modern society that all unjustifiable or irrational discrimination is objectionable. This is not a mere formulation of the demand for consistency which forms an important element in the notion of conformity to rule. Irrational or inconsistent behaviour is open to criticism even when human beings are not involved or affected by it. Thus a person who gives one rose bush twice as much water as another apparently similar bush may readily be called upon to explain his action and to justify it, though he cannot be accused of unfairness.

It is arguable that our judgment would be different even when a non-human but conscious being such as an animal is involved.<sup>40</sup> Thus if a man gives one cat twice as much milk as a cat of a similar size and appetite, it will be thought that his conduct not merely calls for explanation and justification, but is open to criticism that he is acting unfairly toward the cat who receives less. This

<sup>40</sup>On justice among animals see Del Vecchio, *op. cit.*, 99 ff. Salt, *Les droits de l'animal considérés dans leur rapport avec le progrès social* (1900); Goretti, *L'animale quale soggetto di diritto*, Riv. di filosofia XIX No. 4, pp. 343-369.

criticism clearly depends upon the assumption that the less-privileged cat is capable of knowing that he is receiving less than his fellow. The notion involved seems to be that the consciousness that a rational creature is subject to discrimination is itself an evil or disadvantage to be avoided as far as possible. This is true in particular if the notions of justice according to merit or need do not modify our assessment of the situation. Thus suppose two cats are equally deserving and suppose that neither needs more milk in order to live happily. It still remains true that it is objectionable to discriminate between them.

The point can be made more forcibly in relation to children, of whose consciousness of discrimination we are in no doubt. When adult human beings are in question, the discrimination is still more keenly felt to be unfair, since they have a fuller appreciation than children of what it involves. It is true that discrimination appears objectionable chiefly to those who think of themselves as belonging to the same category as those against whom the discrimination operates, (cats, children in the same family) or as belonging to a superior category, namely one which in the opinion of the person in question is entitled to more than the category against which discrimination operates. Thus if white men think that white men belong to a category superior to negroes they will not find discrimination against negroes and in favour of white men objectionable though they will find discrimination of the opposite type objectionable. But such belief in superior and inferior categories is not innate; it has to be learned. We naturally and unreflectively think of ourselves as belonging to the same category as our fellow men. A child does not naturally entertain notions of separate social, racial, religious or economic categories, but has to be taught them.

It is perhaps not easy at first sight to state what exactly the notion of discrimination means.<sup>41</sup> Discrimination must mean discrimination between classes which have something in common, in this case between human beings who clearly have many characteristics in common. It most naturally applies to the denial of opportunities to A which are accorded to B, e.g. opportunities of education, travel, using public transport, etc. Similarly the refusal to distribute to A goods that are distributed to B would be regarded as a form of discrimination. But are we to describe as discrimination the inaction of a person or government who does not intervene in the affairs of society, for instance, does not provide free education for anyone and leaves each family to fend for itself so far as education is concerned. Strictly speaking it would seem that no discrimination is involved in such conduct or inaction. All that is done is to give effect to the liberal notions of the last century that each person should fend for himself and that the State should refrain from interfering in the affairs of its

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<sup>41</sup>In one sense 'discrimination' is consistent with equal treatment. Thus, if A likes whisky and B likes beer, it is consistent with the principle of equal claims to give each what he likes; yet, in a certain sense to do so is to discriminate *i.e.* to differentiate between the two. But 'discrimination' is here used of those differentiations which produce unequal satisfactions.

citizens. If this distinction between discrimination and non-intervention is made, then the principle of non-discrimination *viz.* that discrimination between human beings is objectionable in the absence of some rational justification, is not formally equivalent to the principle of social justice but corresponds only to a limited part of it, namely that part which consists in a demand for equal treatment. However, it is easy to see that the demand for non-discrimination and the demand for intervention in order to secure equal advantages are related rather closely. The former principle, though directed towards securing what is fair, is at the same time directed towards the maintenance of the *status quo* or its equivalent. In other words the non-discrimination principle seeks to retain for the various members of society the resources and assets which they already possess and to equalize opportunities and the distribution of advantages thereafter. Thus while discrimination is certainly open to objection as unfair in the absence of special circumstances non-discrimination does not necessarily produce a fair result or a just society, but only does so if the initial distribution of resources and assets was itself fair.

It looks therefore as if the principle of non-discrimination, like the principle of conformity to rule and the principle of justice according to need, forms part, but not the whole of the notion of social justice. To put the matter differently, there is a residuary question whether the initial distribution of skills, resources and assets can itself be regarded as fair or discriminatory. Before we tackle the latter question it will be as well to deal with some objections to the view that the principle that there should be no discrimination between human beings, except on rational grounds, is a part of the notion of social justice. It may be said 1) that in many or most societies discrimination has been accepted in certain cases 2) that even if the general principle of non-discrimination is accepted the wide scope of the factors which rationally justify departures from that principle is such as to empty it of content.

As to the first objections, it is certainly true that discrimination, often on grounds other than those of desert or choice, is accepted in most societies. Discrimination on grounds of the existence of factors such as choice, desert, need and conformity to rule is everywhere admitted and practised. But it does not follow from this that irrational discrimination, not based on one of the factors listed, is accepted as justifiable. On the contrary it is noticeable that those who seek to justify discrimination which is in fact irrational seek to show that one of the factors listed above which justify departures from the principle of equal claims applies to the form of discrimination which they have in mind.<sup>42</sup>

Thus if racial discrimination is sought to be justified, it will be either on the ground that it is a regular and habitual practice, that it has existed in the past and that members of different races have come to expect it, or that members of different races voluntarily choose to observe it and that the discriminatory

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<sup>42</sup>*Cf.*, Hart, *op. cit.*, 158. We must add to the factors listed discrimination on the basis of individual justice (above p. 94).

laws merely give effect to this choice, or that members of one race have less urgent and compelling needs than those of another; or finally that members of one race are less deserving and meritorious or 'capable' than another. The latter argument was the one which Aristotle adopted in his attempt to justify discrimination between free and slave, Greek and barbarian.<sup>43</sup> He asserted that in principle the capacity, that is to say, the potential achievement of slave and barbarian was different. It will be seen that the flaw in this argument resides partly in errors of fact, for instance in a false belief in the different capacities of different races, where this is not borne out by the evidence, or in a belief that people prefer discrimination when in fact they do not. Partly the flaw lies in a failure to recognize that these justifications are exceptions to the general principle of equal claims.

Secondly, it may be argued that the list of exceptions is so long and vague as to empty the general principle of any real content. But it would seem that the exceptions are in fact limited to those listed. An apparent further exception occurs in the case of those incapacities which the law imposes on those incapable of managing their own affairs, such as minors and prodigals.

The desirability of imposing these restrictions rests on the fact that, if they are not imposed, the interests of the person concerned may be harmed; but this is not in itself a fair reason for intervening, otherwise one might fairly intervene in the affairs of another in a manner involving discrimination against him whenever it was in his interests to do so. This would certainly not be an acceptable principle.

The restrictions in question rest partly on the principle of justice according to need, partly on that of justice according to choice.<sup>44</sup> Since there is a hierarchy of advantages, it may be fair to restrict or refuse a lesser advantage in order to preserve one of which the person concerned has a greater need. Hence a minor may be prevented from alienating immovables in order to preserve the greater advantage of his claim to a home and shelter which is more important than the power of alienating property.

But the restrictions rest in part on the principle of justice according to choice, since a minor along with other categories of persons under disability is thought of as incapable of making a free and considered choice. Just as by the principle of justice according to choice those who choose to forego their claims are entitled to nothing, so those who choose to claim benefits but whose choice is imperfect are entitled to less in certain cases. In some such instances, but not all, the principle of justice according to desert also plays a part.

It has not been shown therefore that any principles of discrimination other than those listed are in fact accepted as forming part of the notion of justice. Although these principles cover a wide field, they are not all of equal

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<sup>43</sup>*Politics* i, ch. ii, 3-22.

<sup>44</sup>And, still more, on social utility; but the latter is not a principle of justice or equity; it is a political and legal value which often conflicts with justice. Raphael, *op. cit.*, 21 Philosophy 131.

importance. Thus, the justice of conformity to rule being based on the idea of protecting reasonable expectations, is consistent with change, since when reasonable notice of changes in rules or habits has been given, then the unfairness of departing from rules previously accepted disappears. Indeed even without such notice, the principle of conformity to rule is, according to the notion of *equity*, subject to some limited modifications in the interest of justice according to merit and need. The notion of equity is not however accepted everywhere. In a conflict between the principles of justice according to choice and the other principles of discrimination the former will prevail, since a citizen may voluntarily forego that which his desert or need or expectation reasonably entitles him to demand. When there is a conflict between the principles of justice according to desert and justice according to need we have seen that the latter prevails when the more fundamental advantages such as life and health are in jeopardy. From this we can draw a conclusion of some importance for the analysis of social justice.

If we say that the need principle has precedence so far as these fundamental advantages are concerned, and that discrimination is justified in such cases (the man who is most seriously ill is entitled to the one vacant hospital bed, the man with the largest family to the one vacant house in the district) we have in fact discovered a further part of the principle of social justice. For if certain needs are regarded as having priority and as justifying discrimination, this means that a certain principle of redistribution or equalization is regarded as forming part of the notion of social justice. Thus if A is in good health, B in bad health, B's claim to medical treatment based on need prevails over his lack of desert and justifies discrimination in his favour.

The theory underlying this must be that B and A should be placed in the same position, so far as health is concerned, before the principles of non-discrimination and of justice according to desert are applied to both of them. To put the matter slightly differently, each man as man has a prior claim to at least certain essential advantages and this will involve a redistribution or equalization of at least certain such advantages. The word "redistribution" is perhaps inadequate to describe a claim to preserve one's life or health; it applies more appropriately to those advantages which fall within the legal notion of property; but it is here used in the absence of a better term. Now this claim for equalization or redistribution is something which belongs to man as a member of society and is therefore part of the notion of social justice.

It may be objected that such claims belong to men only by virtue of their particular circumstances, and not as members of society. Thus it may be said that A's prior claim to health arises from the special circumstance that he is ill. But though it is true that the fact that particular circumstances are taken into account distinguishes this type of claim from the claim that rules should be observed or from the principle of non-discrimination, the objects to which the claim is directed, life, health, etc., are not variable and do not depend on



individual circumstances. The truth is merely that in many or most cases the demand has already been satisfied and it is not necessary or sensible to voice it.

If however we recognize that such basic claims are entitled to prevail when the most important advantages are in question, are we not bound to say that similar claims exist in relation to other advantages, but may be overridden by principles of discrimination such as the principle of justice according to desert? For on what principle could it be said that justice demands that equal claims be recognized in regard to the most important advantages but not in regard to the less important? Surely such claims must form part of the notion of social justice and must be entitled to prevail in the absence of countervailing factors such as desert. These in turn will explain and justify what was noted in the discussion of justice according to desert, that we naturally think that the level of claims as opposed to their distribution should be maximized. This cannot be explained on the desert principle, but is explained on the view that social justice requires that all men have a claim to and to an equal share in all, not merely the more important advantages.

So far a number of arguments have been adduced to show that the principle of social justice requires that all men have an equal claim to an equal share in all advantages, and that the principles of non-discrimination and conformity to rule are merely subordinate aspects of this basic principle. This is to say that they are subordinate principles applying directly to the principle of social justice in order to preserve particular advantages, namely the fulfillment of reasonable expectations and the preservation of human dignity, which requires equal respect for all and is inconsistent with discrimination. Two objections may now be considered: 1) Is this principle restricted to advantages or does it also extend to disadvantages? 2) Does the principle of social justice consist in equal claims or rather in *equality of opportunity*?

1. It seems clear that the principle of social justice is confined to goods and does not extend to disadvantages. The even spread of misery over the face of society is regarded as neither fair or desirable. Otherwise social justice might consist in imprisoning all members of society except the jailors. As we have seen before no man has a claim to disadvantageous treatment; at most the infliction of such treatment on him may not be unfair to him in certain circumstances, for instance, when he has chosen to commit a criminal act.

2. On the second point an argument might be adduced as follows. Equality of opportunity is the essence of social justice, because we mostly believe, not that all advantages should be equally distributed to all men, but rather that, provided that all men have equal opportunities, distribution should be made according to desert.<sup>45</sup> Thus we do not generally think that social justice requires that the income of all should be equal. The formula of equal claims should on this view be abandoned in favour of the principle of equal opportunities.

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<sup>45</sup>Raphael, *op. cit.* 90, puts the problem thus: have men a claim to equal happiness or only to an equal chance of pursuing happiness?

But what exactly is meant by equal opportunities? Those who argue along these lines probably have in mind such facilities as schools, hospitals, etc., that is the provision of opportunities for acquiring knowledge, skill, health etc. which will conduce to good work and to the enjoyment of life. The equality of opportunity envisaged is an equality of opportunities for acquiring that bodily and mental equipment which, so far as the citizen is capable of acquiring it, will enable him to compete fairly with his fellow-man. But fair competition and fair opportunities in this context can only exist if each citizen has an equal claim to those sources of opportunity, such as instruction, books, medical attention, sport, space, radio and television facilities, etc., which will put him on an equal footing with his fellow-men, so far as he is capable of profiting from them. There is therefore no inconsistency between the assertion that each man has an equal claim to all advantages, subject to discrimination on the basis of desert, and the principle of equality of opportunity, if it is interpreted in the way suggested.

The principle of equality of opportunity is however, on another interpretation, rather wider than this. On this second interpretation it is not necessarily confined to opportunities of acquiring capital, human or inanimate, in order to work and earn and so, if the citizen works better than his fellows, to become entitled to better treatment than they. Equality of opportunity may be taken to apply also to equality of opportunities for enjoyment, that is, for the enjoyment of literature, art, music, sport, recreation, the countryside, and all those other advantages which are not directly relevant to an increase in the quality or quantity of one's work. Now if these opportunities are to be provided the citizen has a corresponding claim to those things which are necessary in order that he may profit from them, such as access to amusements, parks, concerts, playing grounds, television facilities, etc. Whether therefore we take opportunity as meaning opportunities for earnings or opportunities for enjoyment, the idea of equality of opportunity implies the existence of equal claims for all men to the means and facilities necessary in order to seize the opportunities listed. Of course it is senseless to speak of a claim to enjoy something which the citizen is incapable of enjoying or to do work which he is incapable of doing. In this sense the formula of equality of opportunity serves to mark the point that no amount of social justice will do more than extend and develop the capacities of citizens to their limit, whatever those limits may turn out to be. But properly understood equality of opportunity is not inconsistent with, but on the contrary presupposes the notion of equal claims.

It will be as well to summarize our conclusions on the notion of social justice. The principle of social justice resides in the idea that all men have equal claims<sup>46</sup> to all advantages which are generally desired and which are in

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<sup>46</sup>I have not explicitly dealt with the relation between justice and equality; but it is obvious that on the analysis here suggested equality is the fundamental notion, whilst inequality, though sometimes fair, is a subsidiary one. On equality see Del Vecchio, *op. cit.*, ch. V. Aristotle, *Magna Mor.* i I 1182a 14; *Metaphysica* I V. 985 b 29. XIII IV 1078 b 23

fact conducive to human perfection and human happiness. This has two main aspects: first, the equalization of the human condition as far as capital assets, human and inanimate, that is, the prerequisites of a good life are concerned. This involves equal claims to the necessities of life, to life itself, health, food, shelter, etc., and also equality of opportunity for both work and enjoyment. The second aspect of the principle of social justice consists in the principles of non-discrimination and conformity to rule. These ensure that what has been accorded under the first heading will not be taken away subsequently. There are some exceptions to the principle of social justice, in particular to the principle of non-discrimination. These exceptions fall under subordinate principles of justice such as the justice of transactions, justice according to desert, justice according to choice and justice according to need. There are no further exceptions to be found.

It would be wrong to seek to disguise the radical character of the principle I have attempted to describe.<sup>47</sup> According to it, there can be no difference in principle between such generally accepted ideas as that there should be universal free education for all children and other ideas which are not necessarily accepted by everyone: for instance the claim for free medical treatment for all, the claim that victims of road accidents should be indemnified by society irrespective of fault, and the claim that the surface of the earth should be redistributed in proportion to the population of different regions, or that natural resources should be redistributed proportionately to population. It would be easy to multiply the radical conclusions which would follow from the acceptance of the notion of social justice as I have outlined it.

Of course it is true that justice is not the only political, moral or legal value. Liberty is equally important and its demands frequently conflict with those of justice. The preservation of society and of the individual is still more important and may conflict with both. But on a long view, we have every reason to foresee that the consequences inherent in the notion of social justice, as it has been elucidated, will be clearer and will be voiced more widely and more persistently as time goes by. They are indeed beginning to be voiced already: thus the demand for aid for underdeveloped countries is part of the demand of social justice on a world-wide scale. But the full implications of the principle have, I am convinced, by no means yet penetrated the consciousness of our society. Many sober citizens will be startled when they do.

### EXPLANATION AND JUSTIFICATION OF THE NOTION OF SOCIAL JUSTICE

Even supposing I have depicted this notion correctly it does not follow that anyone should adopt it or propagate it. I have merely attempted to show that this is a notion which many or perhaps most people give their unconscious

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<sup>47</sup>For a modern conservative interpretation of justice as 'maintaining or restoring a balance or proportion' see Hart, *op. cit.*, 155, 162-3.

suffrage when they approve of such institutions as free universal education, perhaps without realizing what they are doing.

But it can be shown, I think, that the equal claim doctrine is at least a natural one for human beings to hold. If we assume with Hobbes<sup>48</sup> that there is a rough though not precise equality<sup>49</sup> among men in their physical and mental powers, it will be natural for man to hold the equal claims doctrine. Thus A will not be satisfied to claim less than B with whom he is roughly equal in physical and mental strength. On the other hand B for the same reason will not be satisfied to claim less than A with whom he in turn is roughly equal in strength, and A will fear that, unless he concedes equality to B, B will attack him.<sup>50</sup> The equal claim formula will therefore be the only one which in practice has a reasonable chance of securing general acceptance, reconciling the conflicting claims of A and B and thereby producing a stable order of society, acceptable to both and to all. In practice no doubt human equality is far from exact and in some cases human variation and inequality seems the more striking phenomenon.<sup>51</sup> To assert that the equal claims principle is a natural one is to assert that on the whole and over a greater area of human experience, the similarity of human powers, mental and physical, is a more obvious and striking phenomenon than any variations that may exist: or, to put it another way, that natural inequalities are not great enough to make it sensible to abandon the formula which is most likely to win general acceptance.

The notion of 'nature' is, of course, one which notoriously straddles explanation and justification. In saying that the equal claims principle is a natural one, I do not think it possible to distinguish between its power to explain and its power to justify. If this thought is inadequate, and some further justification is sought for the principle of social justice, we will be compelled to analyse the notion of human brotherhood, a notion the empirical and logical status of which lies beyond the limits of this article.<sup>52</sup>

<sup>48</sup>Followed e.g. by Hume, *An inquiry concerning the Principles of Morals*, sect. iii and appx. iii.

<sup>49</sup>Equality of personality, emphasized by Del Vecchio, *op. cit.*, 150 No. 5, is inadequate as a justification of the idea of justice. Why should we respect the personality of others, except that we fear their claims?

<sup>50</sup>The idea is expressed by Sully-Prudhomme, *La Justice*, in *Oeuvres* vol. IV, cited by Del Vecchio, *op. cit.*, 96, as follows:

L'égoïsme entre égaux veille à la paix commune:  
L'être le plus féroce épargne alors autrui,  
Parce qu'il reconnaît sa propre vie en lui,  
Et fait sur lui l'essai de sa propre fortune.

<sup>51</sup>Del Vecchio, *op. cit.*, 96 Brown, W. J., *The Underlying Principles of Modern Legislation*, 226.

<sup>52</sup>I am indebted to D. D. Raphael, whose articles, cited above, foreshadow the ideas here developed, and to Professor R. I. Cheffins, who has given me the benefit of his advice, and, on certain points, dissent.

**SUMMARY**

1. The principle of social justice requires that all men should have a claim to and to an equal share in all those advantages which are commonly desired and which conduce to human well-being.
2. This principle is not identical with the demand for equal treatment for all men; it rather requires preferential treatment for the underprivileged, who lack advantages possessed by others.
3. The principle of allocation according to need is a subordinate aspect of social justice.
4. The principle of conformity to rule is also a subordinate aspect of social justice. This principle is designed to secure to all men two advantages: that their reasonable expectations will be fulfilled and their dignity respected.
5. Discrimination is justified only: (1) to give effect to the principle stated in 2 above; (2) on the basis of the conduct, actual or potential or choice of the person to be subjected to discrimination; (3) so far as the justice of transactions and special relations requires it.
6. It is arguable that, given the rough equality of human beings, the equal claim principle is the only principle likely in the long run to lead to social stability.