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# ***SOCIAL AND POLITICAL PHILOSOPHY***

## **JUSTICE AS FAIR MAXIMAL UTILITY. RATIONALITY VS. REASONABILITY IN THE POLITICAL DEMOCRATIC INSTITUTIONS**

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### *Abstract*

In this paper I intend to analyze the possibility of social justice as fair maximal utility starting from two different perspectives about justice – justice as fairness (J. Rawls) and justice as social choice or mutual advantage (D. Gauthier). The thesis I defend and reconstruct here is that a co-operative solution can be implemented only in a democratic society where a certain kind of justice principles is applied. This solution, however, is not a solution, if we do not really understand the principles which are being involved in it or if we do not use a proper concept of justice. My proposal here could bring some light both upon this issue and on the logical clarification. In order to realize this, I take into account at least two problems: 1) the problem of compatibility between the announced concept and the existence of social inequalities; 2) Nozick's objection concerning the compensation of inequalities involved by this kind of justice. I intend to analyze Rawls' solution of compensatory beneficial in order to test whether it could be considered dangerous for the preservation of equidistance of the rules and, hence, for the justice as impartiality (the procedural justice), as Nozick claims in his work *Anarchy, State and Utopia*, the concept of reasonability which is used here as being complementary to the concept of rationality and useful for this matter.

**Keywords:** principle of justice, justice as fairness, justice as mutual advantage, reasonability, rationality.

### **I. Introduction**

We will start this paper with the assumption that individuals, through their actions, endeavor to satisfy some of their interests in a

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social context. It seems obvious that any individual's relation with her/his society is bi-directional. On the one hand, being within a society he/she is becoming able to pursue a personal interest. On the other hand, a society is for an individual a constraint network or, in other words, a network composed by others interests: the purchase of an interest could be only a path into a vectorial space, where existent interests are viewed as vectors.<sup>2</sup>

Thus, taking into account this force field of interests called into the play by a set of individuals, we can conceive a social structure (organization) as an emergence of one of the possible solutions to the complex problem of bringing into equilibrium those divergent interests and also the actions of purchasing them by many individuals.

According to what was said earlier, we will consider that among the possible solutions for the divergent interests' problem the most desirable (and optimal, too) is one of co-operation type, namely a social organization where relations among individuals are ground on a co-operation principle or, in other words, guided by a cooperation logic. Within a co-operative social organization most of the individuals view the others – their goals and the purchasing of these – as a resource which can be useful for the purchasing of their own goals. This kind of perspective is opposed to that according to which the action of interest purchasing always supposes an action against the others at the same time.<sup>3</sup> It is, also, a coextensive one with the Rawls' perspective which assumes an ontological type of society, namely one viewed as a co-operation system where relations and interrelations between the individual are like family ones<sup>4</sup> at least at a first analysis' level.

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<sup>2</sup> When we are talking about an interest network as a constraint network, we take into account only the social interaction level. Of course, there is also an individual level put in evidence by conflict interests, but this matter regards another issue, which is typically important for choice theory.

<sup>3</sup> Within this last type of social organisation each individual thinks of somebody else's success as implying own failure.

<sup>4</sup> This analogy doesn't take into account all the attributes the family generally involves, but one in particular: *the equality* of all the members in what we might call the importance, the care, the consideration, which every member has within

The thesis we defend and reconstruct here is that a co-operative solution can be implemented only in a democratic society where a certain kind of justice principles is applied. This solution, however, is not a solution, if we do not really understand the principles which are being involved in it or if we do not use a proper concept of justice. The proper concept in my opinion is the *justice as fair maximal utility*. This concept of justice is not in fact another concept than the concept proposed by John Rawls in its deepest and serious understanding, but it is other than the one generally considered as Rawls concept. So I think some clarification is necessary here. And this is necessary for at least two important conjugated or combined reasons: 1) because there is some sort of conceptual confusion (given, for example, by the translation of it in other languages, *e.g.* in Romanian) and 2) because of some sort of logical or definitional confusion. Frequently the understanding (and also the translation) of the term *fairness*, that is in the same time or from time to time dependent on the context, depends by what is the context, both correctitude and impartiality or equidistance. None of them is not complete, in my opinion, because each of them consider only one of the sides of fairness, even if we generally take into account – on the one hand, the neutral or right rules and on the other hand, the procedures involved by the concept of fairness. So, taking this dimension into account (which is also an accepted Romanian version of Rawls' concept), we take into account the *procedural justice*. But fairness, according to Rawls, also means right or correct results, so here we have to deal, it might say, with a some sort of *distributive justice*, although, in my opinion, it is not quite so.

These confusions are not without echo in what it might be called the logical level (and also the operational level) of the justice. So, and not only in principle but also in practice, what should policy makers do? What should they take into account, when they have to decide on the social justice: the procedures or the results? *Mutatis mutandis*, what should people do? How could they rather be cooperator (*i.e.*, individuals

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its family, formally or normatively speaking (in fact, this is the assumption of the methodological individualism).

who obey the rules regardless of results) than be defectors (*i.e.*, individuals who obey the rules only if the results are better than those obtained when they do not obey)? How could they see and understand the justice or the injustice of the political decision without also taking into account the results?

In order to bring clarification to both difficulties aforementioned we propose to analyze Rawls' conception of justice through the perspective of Gauthier's conception of justice: *justice as fairness* seen through the perspective of *justice as social choice* or *as mutual advantage*.

The level of reconstruction and of defense of our content will be followed by a discussion of the compatibility between justice and existence of inequalities, especially the economical inequalities. Our proposal here could bring some light both upon this issue and upon the logical clarification. Finally, we intend to analyze Rawls' solution about compensatory beneficiaries, in order to test whether it could be considered dangerous for the preservation of the equidistance of rules and, hence, for the justice as impartiality (the procedural justice), as Nozick claims in his work *Anarchy, State and Utopia*, the concepts of reasonability used here as being complementary to the concept of rationality.

## II. Justice as an impartial framework

First of all, we try to figure out what should we understand by justice as fairness in its impartial or correctitude dimension (framework). According to Rawls, in the context of people's relations there is both an "identity of interests" and a "conflict of interests". The absence of an institutional structure as means of balancing these directions of interest, of a structure regulating relations among "unequal people"<sup>5</sup>, could lead

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<sup>5</sup> A term due to J. Buchanan, used in *The Limits of Liberty: Between Anarchy and Leviathan* which mainly refers to the ontological individualism but also to the methodological one. The underlying idea is that each individual is unique and different, by her/his specific desires, interests, needs and so on, and each individual counts as much as any another, nobody having *de iure* no priority over anybody. Here is emphasized, at the same time, both the idea of *inequality* given

to a situation of general and perpetual conflict or creates, in other words, a Hobbesian state.

Rawls' solution to this kind of potential risk is a social framework constituted by *rules* resulting from a "public conception of justice" (Rawls 1971, 4) or a "political conception of justice"<sup>6</sup>. Accordingly, a democratic society or a legitimate status-quo would be justified if the following necessary conditions were fulfilled<sup>7</sup>:

1. Anyone accepts and knows that the others accept the same justice principles.
2. The fundamental social institutions satisfy and have the ability to satisfy these principles.

The rules have to determine the conformation to these conditions.

The existence of the rules set, the same for everybody, is what makes a social framework to be *impartial*. According to Rawls, the social integration could not be obtained only by the purchase of personal utility, even it represents one of the most important criteria for it; a "consciousness of reasonable" is also needed.

But what is the consciousness of reasonable?

"The idea of the reasonable itself is given in part, again for our purposes, by the two aspects of persons' being reasonable: their willingness to propose and abide by fair terms of social cooperation among equals and their recognition of and willingness to accept the consequences of the burdens of judgment." In the following, Rawls sustains that to "add to this the principles of practical reason and the conceptions of society and persons" (Rawls 1996, 94) on which this concept is based, namely the society as a system of cooperation and the

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the ontological individualism assumption and the idea of *equality* given the methodological individualism assumption.

<sup>6</sup> By this, said Rawls, "I mean three things: first, it specifies certain basic rights, liberties, and opportunities (of the kind familiar from constitutional democratic regimes); second, it assigns a special priority to these rights, liberties, and opportunities, especially with the respect to claims of the general good and or perfectionist values; and third, it affirms measures assuring all citizens adequate all-purpose means to make effective use of their basic liberties and opportunities" (Rawls 1996, 223).

<sup>7</sup> See Rawls 1971, 5.

persons who have an intrinsic value and who are considered as full participants in this system of cooperation, “given two moral powers they have: a sense of justice and capacity for a conception of good” (Rawls 1996, 19).

The best co-operative scheme the individual would accept, in these circumstances, is that which promotes his best advantage (the economical rationality) “but a little thought would convince him that the promotion of his best advantage is hardly likely to commend the scheme to those others whose co-operation is required” (Knowles 2001, 219). Only if the rules are generated according to this reasonability, the unfair situations<sup>8</sup> will be prevented, and this could represent an accepted strategy from the point of view of any individual who is seeking rules to govern an optimal co-operative scheme. In this way *the principles of justice are designed to be neutral in relation to specific goals and values shared by any member of society*.

Rawls seems to opt for the priority of a theory of impartiality, to the prejudice of one founded on mutual advantage, where the personal interest is uniquely determinant. Rawls’ perspective could be presented using a competition scenario. Let us imagine a competition whose winners will receive a certain prize. In that case the interest of all participants will be, at least, the advantages of that prize. In order to have a good and correct competition, some rules, the same for all candidates, will be introduced (the presupposition here is that of a Humean world whose resources are scarce and where all the people are formally equally entitled<sup>9</sup>).

This situation incompletely meets Rawls’ criteria of justness. Although there is a competition interests’ purchasing with impartial game rules, it does not hold a relation between each candidate’s investment and what she/he obtains. Therefore, the scenario has to be improved: the competition has to have various prizes. Thus, the participants, respecting a set of equidistant and impartial rules, to one

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<sup>8</sup> We refer to the situations where an individual pretends more than it is reasonable to pretend due to an improper assessment made in respect to her/his resources available for purchasing in her/his interests.

<sup>9</sup> See also Knowles 2001, 215-16.

another, dispute those various prizes, each of them using their own relevant resources<sup>10</sup>.

According to Rawls' theory of justice, this revision would make situation to be just because a framework of regulations, not related to individuals' various interests, has been shaped. This framework is guided only by the principle of that nobody being favored which means, in Gauthier's perspective, that *nobody should take advantage of others*, or in positive terms, by the principle of that everyone being equally favored.

### III. What type of objections do we have with the conception above?

Rawls' solution faces some difficulties when someone tries to analyze it for a social reality. Between the abstract phase – when one settles that this kind of (equidistant) marker is needed in a world of divergent interests and scarce resources – and the phase of properly adequacy of this desideratum of impartiality, the following steps are to be done, in my view:

1. To find a set of principles fulfilling Rawls' idea of justice;
2. To design institutions capable of administrating the application of those rules;
3. To make possible the emergence of a kind of consciousness which determines individuals to believe that the appeal to those rules leads whether to a maximization of their utility or at least not to a change for the worse of their situation.

Although all of them are problematic, we will only discuss here the first.

The Rawls' principles of justice designated as generators of a complete legislation (a set of game rules) are the following:

1. The liberty principle states that each person who takes part to a practice or is affected by it has an equal right to the largest liberty compatible with others' liberty;

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<sup>10</sup> We will come back to this scenario, in order to show that Rawls' proposals could be ameliorated so that the participants have a double-quality: that of being both competitors and collaborators.

2. The difference principle states inequalities are arbitrary, except the case when we can reasonably expect that they lead to a general advantage;
3. The equal chance principle states that social positions and their functions are open for everybody.

Beyond the impression of equidistance in relation to various goals and various actions inspired by these goals, Rawls does not display any argument supporting these principles. Why is it not another set of principles as impartial as these ones? Are these principles the unique possibility for fairness? We think we need further criteria and additional reasons and assumptions for it to preserve precisely these principles.

Another type of objection which needs a specific attention comes from Gauthier perspective. And his question is in connection with the possibility of the impartiality of the principles as Rawls considers: how could a principle be impartial in determining how people are to benefit in interaction, otherwise than, when it might take into account how each the individuals could be advantaged without the interaction taking place?

#### **IV. Talking about the criterion of maximal utility**

What would the further step be, if, from the abstract level, we need rules and from the more concrete level, there is a methodology of choosing rules in order to optimize the social structure (or competition)?

Or to put it differently – it means not to forget our most important target: finding a solution for the divergent interest problem. It is not enough for the principles of justice to regulate the interests' purchasing in a social space for the injustice not to be done to anybody. The theoretical target here is to find *that* set of justice principles leading, optimally, individuals to their interests and their calculus about the satisfaction of these interests.

Our claim is that if we were in a position to make an option among various sets of justice principles, equally equidistant, a necessary criterion to be taken into account would be the maximization of utility – the criterion of increasing the rate between the profit and the cost. What we are proposing is not another kind of justice than Rawls'; we only

intend to make it more specific, keeping in mind that justice without utility is ungrounded – justice is nothing else but a means for the achievement of interests, whatever these interests are and whatever they mean. In terms of classical liberalism any discussion about rights or justice has a proper voice only if it takes place through the individual's values or preferences, which are in principle incommensurable or subjective incomparable<sup>11</sup>. The people seeking the optimal rules system are interested both in generating duties and rights to them, but also in the way the supposed advantages in society resulted from co-operation should be allocated. It could be said that the interest in designing a structure of social cooperation or democratic cooperation is twofold, the just allocation of the advantages or disadvantages in the society being as important as (or even more important than) the providing rights and duties.

So if it is to find out a criterion for supporting one or another set of justice principles a good starting point could be just the issues we have been talking earlier. In other words, if we wish that the others accept the principles we propose for all, so even for them, first we have put ourselves into their shoes and see whether they could be accepted or not, taking into account the interests they have, which of course, may be different from ours. This idea contains the universality of the justice principles.

Let us now focus on the notion of interest maximization. This notion entails the idea of optimization of available means for interests' achievement. The whole matter could be summed up under two imperatives, which are almost equivalent:

1. For any given amount a maximum of results or "prizes" could be obtained.
2. For any given amount of obtained results will be given a minimum effort.

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<sup>11</sup> When we are saying that preferences are in principle incommensurable it doesn't mean that certain real preferences cannot be measured, but that any measure we do will be contingent and not a necessary one, so before we measure or compare them with each other we will have to negotiate or deliberate on their meanings (on their contents) and to publicize them (to make them public). This is a necessary condition for all that we call the cooperation solution.

How is that possible? The solution, as we have said from the beginning, is the co-operation (the collaboration) among the individuals.

However, harmonization of individual actions supposes an impartial context: equitable positions are the ground for any co-operation, and the more equitable are social player's positions, the more efficient is their co-operation. It is interesting that once the concept of co-operation is introduced, we can see the change in the competition of interests: from each individual's perspective, her/his competitor is not anymore just another individual but *the general context, i.e. the formal framework of social competition*. What is to be defeated is the context himself. In order to win we need to find *a solution to the collective competition*, which makes the context maximally useful. This solution is a path through the space of constraints that might completely satisfy the players' expectations, taking into account their investments.

At this point one could ask why it would be necessary to claim a connection between the idea of social justice and consequentialist (utilitarian) aspects of a formal impartial social framework. We are, like Rawls is in this aspect, against a unilateral perspective on justice which states that what counts for a competition to be just are only the start and the formal elements of that competition. We think that a right conception about social justice should be moved by the idea that a competition does not represent only its start and its rules, but also its results. Hence, our concept of justice takes into account an analysis of playing the social game and of its outcomes, at the same time. Therefore, a social game is a fair one as far as, under impartial rules, social actors do not fight but cooperate for a *world* where nobody is favored or has an advantage in comparison with others, both before starting and after finishing the game (if this competition scenario leaves the opportunity for the fighting or for the intention to fight in order to change the obtained results of the game, we did not anything else except the losing our time.)

However, this perspective raises some difficulties: if you link the notion of social justice with the criterion of utility maximization, you have to use a calculus criterion, and this calculus is fit only to particular circumstances. So, there is a risk of losing Rawls' desiderata regarding

the reference framework that is the impartiality and the non-relativity in relation to the goals.

That danger can be avoided by giving a general principle of maximal utility, *i.e.*, social choice<sup>12</sup>. This principle of social organization states that, when a social player (*P*) chooses the game strategy *x*, *P* has to keep in mind that any other player has his/her own strategy, as well. If we say about *P* that he designs game strategies, it means to also take into account the other game partners as strategy-makers, so people very similar to *P* as *P*<sub>1</sub>, *P*<sub>2</sub>, ..., *P*<sub>*n*</sub>, from this point of view, make possible the emergence of a social arrangement in which the negotiations take place between equal partners in achieving goals and in which these negotiations define this type of arrangement. This is the maximization of utility that Rawls intends to defend.

In addition, if we are to take into account that not every time we are sure that we are going to obtain what we intend to obtain, the arrangement most acceptable for us, rationally and reasonably speaking, would be one of that kind, in which to lose everything does not mean losing all the options or alternatives in order to modify this situation. According to this conception the best social arrangement for everyone is one in which everyone, including the losers, could obtain something, that something which could be obtained in the worst situation, which is nothing else than to have the possibility of changing the present predicament. This does not mean that the state of injustice for an individual is given by what the individuals do or do not have at one moment or another (injustice in terms of quantitative results) but rather by what the individual could be at one moment or another (injustice in terms of qualitative results).

What we also have to understand from this conception is that any bargaining position to negotiate a social arrangement must be, first of all, a

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<sup>12</sup> The proposal of this principle is inspired by David Gauthier's conception about justice as social choice. According to Gauthier, justice in a society is determined by a double-choice made by individuals: besides the choice of maximisation of personal interest, which is the rational choice, they make also a social choice, that which is to take into account the others as rational choice makers, too (see Gauthier 1984).

non-coercive one (Gauthier 1986, 200). In other words, the terms of a full cooperation include the requirement that each individual's endowment, affording him a base utility not included in the co-operative surplus, must be considered to have been initially acquired by him without taking advantage of any other person – or, more precisely, of any other co-operator (Gauthier 1986, 201). If the things would not be like the description that has been made before, then the endowment would play the role of the entitlements to the goods the others cannot reach or afford and this situation means that a better endowed person will take advantage of another, less endowed than he/she is. But this kind of situation is a power situation which would legitimate the might over the right. The right as it is invoked, considers Gauthier (1986, 191), is an impostor, unable to pass the scrutiny of utility maximization rationality and, let's say, even of the reasonability. Given the difficulty above a demonstration is necessary in order to show that not taking advantage of others or not making coercive bargaining is both a rational and a moral requirement.

The demonstration made by Gauthier puts into evidence two fundamental things about the conception of rational or co-operative interaction:

1. the necessity of some limits and constraints on exclusive rights of individuals to objects and power, which means that everyone could afford a sphere of exclusive control by forbidding others from interfering with some of his activities; these limits and constraints are preconditions of any agreement and of any form of co-operation that we can conceive;
2. the insufficiency of the rights and constraints which implies the necessity of a complementary principle of approximate evaluating – *the minimax relative concession* – the fundamental indicator for the co-operative interaction between **A** and **B**, both utility maximizers, being that of the non-worsening one to another situation, which means that any expected utility from the cooperation will be better than any other utility which would be obtained if no one cooperates.

To sum up these ideas means to conclude that the rational individual will cooperate not only for the strict egoistic reasons guided by the utility calculus (or in accord with Rawls' maximin principle) but

also for the *reasonable* reasons guided by some co-operation models (or in accord with Gauthier's minimax relative concession) which the individual is disposed to follow. What does count appears to be not the expected utility or profit but rather the disposition for cooperation (Iliescu 2007, 132-33). In other words, it is not reasonable to take advantages of others if they are co-operating people, even if that kind of action could be qualified as irrational. The disposition to narrow compliance includes the disposition to not take advantage of others (or to accept the Lockean proviso<sup>13</sup> as constraining natural interaction), in so far as one has the expectation of entering into society, into market and co-operative practices (Gauthier 1986, 226). This kind of disposition is a contextual one depending on individual appreciation about the potential partners for the cooperation: if the potential partners are appreciated as egoistic ones, then the strategy chosen is egoistic, too; if the potential partners are appreciated as co-operative partners, then the strategy will be co-operative even if obtained results are not those expected.

Given this conception of justice some scholars "consider that the scope of Rawls' theory of justice is almost platonic. The justice in a society, for Rawls, is not a distributive justice, one which would state who is entitled to what in the way of property, it is a virtue of a well-ordered state and comprises all aspects of its ethical well-being" (Knowles 2001, 215). So the solution of proper justice, first of all, is not to give something quantitative, the solution is to give something qualitative, meaning to create condition for the preservation of the good condition of everyone and not for the distribution or the preservation of the economical welfare.

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<sup>13</sup> According to Locke one acquires an exclusive title to what with which one mixes one's labor, provided one uses, or at least does not waste, what one so acquires, and provided also that "enough, and as good" is left, "more than the yet unprovided use". We consider, for a better understanding, what Nozick considers as being a Lockean proviso: somebody can appropriate and uses some goods, not being possessed before by anyone, only if it is left enough and as good, in common, for others. What is meant, in other words, is to ensure that the situation of others is not worsened. The Lockean proviso forbids worsening the situation of others.

## V. Justice and social non-equality

Nevertheless, the individuals not only find themselves as members in a society (more or less voluntarily), but also they discover that the manner the democratic governance takes place influences their prospects for what they consider a life for them, and this kind of influences almost all the time have costs for individuals, some time prohibitive or difficult to bear. The explanation is, like Hume said, that people generally live in a world marked by a scarcity of resources and their equal or not entirely established claims to them bring the individuals in conflict situations which are not always reconciled, even if the democratic governance supposes that.

In the proposed solution, social agents are determined in their actions by a range of social and political circumstances. These circumstances are not the same for all of them. This leads inevitably to an inequality among the members of society. The question in charge is how the idea of justice deals with that of social non-equality.

In the competition scenario, social non-equalities are exactly the prizes obtained by the players. The answer to the previous problem is that the competition would not be less fair if a player obtained a smaller prize than another player, because the prizes are not the only things that count. What would have been invested for their winning also counts. Competition rules are just the framework allowing game participation and evolution, but they are not profit recipes. According to Rawls' justice solution, all we can ask is to not invest without "any profit" in this common enterprise. Refining his solution, we can ask, additionally, for a given maximization of what one obtains given one's investment, at least in the first instance.

Thus, any reconsideration of rules has to follow two commandments:

1. A rule or a set of rules has to suffer reconsideration when it systematically makes any social enterprise a bankruptcy one;
2. A set of rules is better than other if it brings a better harmonization among individual interests and among individual actions.

These commandments refer to the questions *what* or *when*, but not *how*. For this latter aspect a set of meta-rules would be necessary. Their role would be to achieve a framework which regulates the way the

modification of rules has to be made. On this aspect we manage to say just that any meta-framework would be chosen, it has to create a feedback mechanism, *i.e.* a double communication between the pole that generates legislation and the pole that applies that legislation<sup>14</sup>.

## VI. Against the solution of stimulants

According to Rawls, there is no conflict between inequality and social justice. Moreover, they support each other and, at the same time, the efficiency problem on the organization level is solved when the aforementioned condition is fulfilled. Inequalities, says Rawls, “are correct only if they have as result compensatory beneficial for anybody, and especially for those least advantaged members of society”, and “the distribution of advantages has to be made so that it entails the volunteer co-operation of anybody, including those who are in a position not very good” (Rawls 1971, 14-15). About this perspective, Nozick notes that the institutional structure has to be conceived so that “the less favored group is at least in a situation as good as the most unprivileged group would be in any other alternative institutional structure” (Nozick 2013, 240).

Although the presence of inequalities cannot be avoided, Rawls proposes finding an optimal minimum (of those). This is an option for *the best possible world where inequalities exist, i.e.* even though not all the members of a society benefit in the same extent (*quantitative inequality*), they all benefit in a way or another, they all have something to get (*qualitative equality*). In other words, the inequalities are not unfair as far as they are not qualitative inequalities, *i.e.* they operate effectively in a society.

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<sup>14</sup> See Pătrunsu 2013, 159-166. The democracy has to be conceived in the horizon of the imperfection, as an imperfect political system. Nowadays it is a problem to conceive this, given the mentality. So, not only how to create the feedback mechanism is a problem. For example, in Rawls' conception, civil disobedience would be a feedback mechanism very similar with that we proposed above. See J. Rawls, “On Civil Disobedience” in *A Theory of Justice*. Rawls believes that civil disobedience as feedback mechanism is the only test that a democracy is supposed to face in order to be called a democracy.

What could be a real problem concerning the introduction of these compensatory benefits (beneficials), after the rules of the game were accepted, is that the allocation or distribution of some rights resulting through this correction of the way the game takes place not only would modify the expected outcomes in an unpredictable or arbitrary manner of what is called the social efficiency, but also opportunities would be created for an increased intervention from the part of the state and its political organizations reordering the individual interest or equalizing the individuals advantages, states of affairs which would be in a deep contradiction with individualist principles of democracy. Are these possible dangers implied by what Rawls calls compensatory beneficials? For instance, March and Olsen (1989, 130) consider that compensatory beneficials would rather include “attempts to educate people in order to give them a better chance in the job market, to provide legal help in order to strengthen their position in courts, to help the unorganized to organize in order to give them representation in public policy making, to give financial support to political groups in order to make political competition more equal, and to support newspapers in order to provide a more balanced information market”.

Nozick, instead, challenges Rawls’ proposal claiming that inequalities originate in the necessity of giving to people *stimulants* or “compensatory beneficials” for their activities. Nozick’s question is how it is possible to know whether these stimulants will be efficient or not<sup>15</sup>. Nozick’s objection is that the solution of stimulants puts in danger the justness of social competition. It proves to be unfair just for those who obtained their prizes obeying the competition rules and trying to maximize their profit. The injustice would be done by introduction of *post factum* derogation from the rules. If one would respond that those are just another rules, one could be replied to that the whole set of gathered rules is not anymore an equidistant one and, hence, it is not equitable anymore.

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<sup>15</sup> See Nozick 2013, 238. The question assumes that “the marginal productivity theory is reasonably applied”, *i.e.* people will receive “their marginal products”, after some “volunteer transfers” of their goods or services on the free market.

The compensation rules would operate non-equidistantly because they would operate according to a resultant between the general rules and the particular aspects of investment. This would mean an interference with different particular aspects in the dynamics of investment profitability, which would be opposed to the fair idea of assuring the general framework.

Even if the Nozick's reply is a plausible one and the objections to compensatory beneficial raises some interesting aspects, none of them takes into account the whole assumptions of Rawlsian conception which defines the problem of social optimization he attempts to answer. If we have in intention to save the spirit of the Rawlsian proposal and, also, the justification behind it, we have to admit that, according to him, the reason for which the most disadvantaged people in society would benefit from those more fortunate than themselves, is not founded on a meritocratic logic of justice, but rather on a prudential logic which minimizes the probability of some conflicts which could disturb even that position considered stable and indestructible – the riches' position. Definitely, Rawls does not sustain that the compensatory beneficial implies an increase in equity just for the reason that the poor have some kind of merit for being poor and in consequence that they deserve help for this. In the case of Rawls, the logic which stays on the basis of equity of compensations is one of preservation of the equilibrium in society; the compensations being for the both sides: the poor get something in order to compensate his less favored situation, the rich gives something in order to preserve a situation he positively evaluates and which is obtained from cooperation with others, including the poor. If the successful persons had not participate to the diminishing of differences between them and the persons which are less successful, then the differences would increase and would obstruct the social game, situation from which all of them lose something, even those considered the most successful or the most entitled or the most meritorious.

Moreover, if that interference on rules generates other results or the opposed results for the best situated people, then these changes should be a supplementary reason in the favor of intervention because the change for the worse of the best situations shows that rules are not so general as they are considered, because it was proved that they

advantage some individuals and disadvantage others. The revision of the rules cannot take place into an *in vitro* environment. So we have to start from somewhere, and the unsatisfactory results are a good start, because all we have to do in order to improve the system of rules is to intervene after the game took place, namely only *post factum*.

Otherwise we have to admit two presuppositions: either the existent rules are always the best rules (we refer here to the content of them) and it is not any reason to change them or that in any game only the rules count and not the results of the game (or in the best case the results count only for the winners). Both presuppositions are false. So, if we have to assume something *a priori* then we have to assume the contingency and the fallibilism both of the rules and of the results of any social game.

In other words, we must admit that the different social positions depend not only on the different natural endowments or disabilities the persons generally have, but also on differences in the opportunities they have, which are not entirely natural even if they are considered as if they were. In most cases they are the effects of some rational, intentional actions, which either modify the state of others in an unproductive manner, or also provide sufficient space for demanding and claims<sup>16</sup>, conflict and finally costs including for those superior situated.

The positions in society and also the rights the individuals rely on are circumstantial and not something necessary, not being furnished by some intrinsic efforts or qualities of those who use or hold them, but rather are due to the scarcity of resources and the market's discrepancies which are imposed by the demand and the supply of the scarce goods<sup>17</sup>.

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<sup>16</sup> Usually, economical theory names these kinds of illegitimate effects externalities, meaning the effects of any voluntary exchange action which affect involuntary actions of any other person which is not involved in that exchange. The process of taking in account these unintended consequences is called the internalization of the externalities. See in this order M. Olson, T. Sowell, T. Eggertsson, D. North, R. Hardin etc.

<sup>17</sup> See also Iliescu 2007, 232-33.

So, one can say that the property rights, as other individual rights could not be treated as something isolated from the rest of the rights which are indirectly represented by the quality of being a member of a society.

This happened for the reason that the ownership institution implies at least two important aspects which make possible the acceptance of the above thesis. When we are talking about the property rights we are assuming not only a special relation between individuals and the worlds of the goods, but also a "relation which represents something more than a static legal relation" in the same time more than a "dyadic relation" as that property-owner stipulates (Hyland 1995, 221). To hold something in private property reflects a complex of rights and the rights represent *authorizations* to act in different manners. In the second place, the stake involved by property rights is not only to specify the corresponding activities of the owner over the goods he holds, but rather to differentiate and delimit between what the owners can do (the powers of the owners) with what they hold and what the non-owners do (the powers of non-owners) in that framework. We can conclude, as Hyland does (1995, 221), that "the relation of property is a triadic one – between owners, the goods they hold and non-owners".

Complementarily, any property right is an *exclusive* right: to say that A holds the good X means that A has a right to exclude any other individual B from holding X and also a right to forbid any other to use this good. But this also means that the non-owners should recognize the legitimacy and the indefeasibility of these rights, otherwise the interdiction would not be a functional one. In this order, any kind of property right is an *inclusive* right, too.

A possible condition for this kind of functionalism would be the legitimacy of the powers of the owners on and against the non-owners. But in the practice of the daily life it turns to be some questionable legitimacy, not only because of the way these powers are understood, but also because of the manner these powers are used, which in general, or historically speaking, were used discriminatory, arbitrary and seldom tyrannically. To loose from sight that a property right involved both recognition and power, means not taking into account the disaster possibilities of the individual interactions which could generate the cancellation of some sort of rights considered inviolable and the failure

of some orders considered indestructible. The power of non-owners is not a less power than the power of the owners (the dictatorial regimes, as communism, unfortunately showed us this.)

The claims of the poor to share the economic returns or assets of those who are relatively rich people would be justified not on the basis of overriding ethical norms, but indirectly, on the basis of commonly held membership in collectively organized community under specified cooperation contract, which in principle allocates rights to everyone (Buchanan 1999, 114), even to those having any good in their property. Analogously, the claims of the rich people that their property rights have to be respected and honored, and violations of these rights enforced, will be legitimately justified only “as a component part of the more inclusive contractual arrangement which predictably requires that they pay differentially higher shares in those goods and services provided jointly for the whole community” (Buchanan 1999, 114).

The proposal we do here is to choose those rules of the game which are expected to provide the best profitability from the framework they could possibly do. Acting like this does not preclude some unequal results, but assures the continuing process to be an equitable one so far as some equilibrium is searched between gain and contribution – the contribution should not jeopardize the legitimacy of the gain and the gain should not exceed the contribution. A good start in order to obtain some kind of optimality of the political framework would be that of the correct investment: the fiscal duties and taxes should be collected in a way that any payer of taxes would not be in a posture of an exceeding payer: the resulting inequalities being at all a vote consequences but a contribution consequences, they gain something because they pay for it, independent of how they vote.

## **VII. Conclusion**

In this paper we have tried to show that a criterion which could ground a choice between two or more sets of justice principles is a criterion of fair maximal utility. This is intended to be a further step for a theory of justice, an additional development of the claim that that

neutral rules are only a necessary condition for a social competition justice, for neutral does not mean fair enough. Moreover, it was proved that the criterion of fair maximal utility also offers a good guide for a revision of the existing rules, and it is an alternative to Rawls' solution, meant to solve the problem of compatibility between inequalities and justice. Understanding justice as a fair maximal utility is to think the competition rules as means for maximizing profitability, for fairly connecting the investments with the results (prizes), where investments and results are more complex than the materialistic or quantitative perspective could offer. Our proposal could be viewed as an option for *the most efficient and reasonable of the equitable worlds*.

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