

**FREE MARKET JUSTICE:
IS THERE FAIRNESS IN FREE MARKET FAIRNESS**

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Abstract

In this thesis I am examining the free market fairness, a market democratic conception of justice. I am critically examining three claims: (1) that thick economic liberties need to be protected as basic liberties as they are necessary for the development and exercise of the two moral powers of persons; (2) that economic liberties do not need the fair value protection; and (3) that free market institutional solutions fully satisfy the fair equality of opportunity and the difference principle.

I am arguing (1) that economic liberties do not warrant inclusion on the list of basic liberties, (2) if they did, they would require the fair value protection, and (3) that free market fairness cannot realize the fair equality of opportunity and the difference principle even at the level of the ideal theory.

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INTRODUCTION

For the last couple of decades, for the majority of political philosophers the idea that the social justice requires, generally speaking, leftist policies, was taken almost for granted. In this view the state would have an important distributive role. It would provide education, healthcare and a myriad other social services. The most prominent example of this way of reasoning was John Rawls (1971; 2001; 2003; 2005). In his theory the state will engage in numerous economic interventions to achieve background justice. It would limit bequests and heavily tax inheritance, impose progressive taxes, actively seek full employment, ensure an adequate “social minimum,” regulate labor relations, terms and conditions of employment, regulate other markets, encourage widespread ownership of the means of production, and generally take such actions as deemed necessary to prevent concentrations of economic power arising (Arnold 2013, 382). In these theories economic liberties are valued purely instrumentally, market is to be utilized as an allocative device, but its role in distribution could be severely limited.

John Tomasi, in his book *Free Market Fairness* (2012), challenges this view. Drawing on classical liberals (like Hayek and Mises), Tomasi argues that for individuals economic liberties have value which is more than instrumental. He develops a theory that is a hybrid between classical liberalism and (broadly speaking) high or left liberalism. He places his own theory in the Rawlsian framework and argues (1) that economic liberties deserve to be included in the list of basic liberties and (2) that the best way to achieve social justice is through operations of the free market.

After a short overview (Chapter 1) of the two conceptions of justice as fairness (Rawls’ and Tomasi’s), in this thesis I am going to examine Tomasi’s claim that economic liberties should be protected as basic (Chapter 2); and his claim that free market institutions can fulfill the

requirements of social justice as well if not better than “social democratic” regimes (Chapter 3).

I am going to argue that: (1) economic liberties do not warrant inclusion in the list of basic liberties; (2) if they did, they would require the fair value protection; and (3) that free market regimes cannot fulfill the requirements of social justice (in a Rawlsian sense) even on the level of the ideal theory.

CHAPTER 1 – THE TWO VERSIONS OF JUSTICE AS FAIRNESS

In his seminal book “A Theory of Justice” (originally published in 1971) John Rawls aims to determine what moral principles should guide the design of the basic structure of a just society (Kukathas and Pettit 1990, 36), or more specifically “the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation” (Rawls 2003, 6). He considers the basic structure to be the appropriate and primary subject of justice because its effects are so thorough and they affect individuals from the start. His “intuitive notion” is that the basic structure has various social positions and that economic and social circumstances individuals are born into determine different expectations in life. Therefore, social structure and institutions create unequal starting positions in life. These inequalities are deep, pervasive, and they influence initial chances in life, however, they cannot be justified by merit or by desert (Rawls 2003, 7).

In Rawls’s theory of justice as fairness “society is interpreted as a cooperative venture for mutual advantage. The basic structure is a public system of rules defining a scheme of activities that leads men to act together so as to produce a greater sum of benefits and assign to each certain recognized claims to a share in the proceeds.” (Rawls 2003, 73–74).

The principles of justice to guide the constitution of the basic structure in justice as fairness are to be determined using a hypothetical situation of original position, behind the veil of ignorance. This original position is analogous to the state of nature in the traditional social contract theories. It is understood not as a historical state of affairs, but purely as a thought experiment with completely hypothetical situation described in a certain way in order to lead to a certain conception of justice. In this original position, free, equal, rational and mutually disinterested

men¹ determine principles of justice. The parties in the original position have no knowledge about their own situation, about their position in the society, class or social status, natural endowments (e.g. intelligence, strength, talents, etc.), nor do they know their conception of good or their psychological propensities (Rawls 2003, 10–11). Parties do have knowledge about sociological and economic laws. In his view, since nobody knows his position, nobody is able to define principles in such a way as to favor his particular condition. This initial situation is “fair between individuals as moral persons, that is, as rational beings with their own ends and capable [...] of a sense of justice” (Rawls 2003, 11). Fairness of the initial position guarantees that the fundamental agreements reached are fair, thus the name “justice as fairness”.

According to Rawls, parties in the original position would choose the following two principles of justice²:

“a. Each person has an equal right to fully adequate scheme of equal basic liberties which is compatible with similar scheme of liberties for all.

b. Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under considerations of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of the society.” (Rawls 2005, 291)

Two parts of second principle are known as “the difference principle” and “the fair equality of opportunity”, respectively.

¹ Rawls uses the term “men”, even though it is clear that his theory does not exclude women in any way. While presenting his theory, I am (mostly) going to use the same word for simplicity and consistency with quotations.

² As a response to his critics (most notably H. L. A. Hart), the definition of the first principle of justice and the justification for its lexical priority underwent significant changes after the publication of “A Theory of Justice” in 1971. The change in definition consists in replacing the phrase “the most extensive total system” with the phrase “a fully adequate scheme” (Rawls 2005, 291). In subsequent major books and articles (e.g. “Political Liberalism”, “A Theory of Justice, Revisited edition”, and “Justice as Fairness: A Restatement”) Rawls used the definition above and I am going to use this, new, definition (and further specifications and justifications) in this thesis.

The first principle regulates the part of basic structure that define and guarantee equal basic liberties and the second, the part that regulates social and economic inequalities.

These principles are meant to be ranked in lexical order, meaning that the liberty can be constrained only for the sake of liberty and that the second principle takes precedence over considerations of efficiency. Furthermore, the fair equality of opportunity is prior to the difference principle (Kymlicka 2002, 56; Kukathas and Pettit 1990, 44).

Rawls conceives people as having two moral powers: the capacity for a conception of the good and a capacity for justice; and adequate scheme of basic liberties is necessary for development and exercise of these two moral powers. Basic liberties are to be equal and they include: political liberty (the right to vote and to hold public office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law (Rawls 2003, 53).

The fair equality of opportunity stems from the widely held idea that people's success in life should depend on their choices and not their circumstances. The success or failure of personal projects should depend on individual performance, not on sex, race or class. The ability to achieve goals should not depend on the accident of birth, but on choices and effort. All these social conditions are seen as morally arbitrary (Kymlicka 2002, 58). While this view is widely held, there are disagreements on what is needed for the equality of opportunity to be achieved in a meaningful sense. Some believe that simple, formal equality is enough.

While fair equality of opportunity seeks to eliminate the effects of social inequalities, there is another form of inequalities that is just as arbitrary and unearned – the natural talents. Just as no one deserves to be born into a wealthy family, ruling class etc. nobody deserved the natural

talents or intelligence they have been born with. Even if policies designed to achieve the fair equality of opportunity work perfectly and eliminates all socio-economic contingencies, inequalities in income and wealth will still be determined by “natural distribution of talents”. Shares an individual may get will be “decided by the outcome of the natural lottery; and this outcome is arbitrary from a moral perspective” (Rawls 2003, 64).

Even though inequalities arising from different natural endowments are morally arbitrary and undeserved, they do not need to be eliminated. These inequalities are to be allowed inasmuch as they contribute to the betterment of those who lost in the natural lottery and this is what is the essence of the difference principle (Kymlicka 2002, 59; Kukathas and Pettit 1990, 47). As Rawls puts it:

“The difference principle represents, in effect, an agreement to regard the distribution of natural talents as in some respects a common asset and to share in the greater social and economic benefits made possible by the complementarities of this distribution. Those who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out.” (Rawls 2003, 87).

These principles of justice are chosen with the following basic idea in mind. Whatever our goals in life may be, there are certain goods that we would like to have more of. These are so called “primary goods”: the basic liberties; the freedom of movement and the choice of occupation; powers and prerogatives of offices and positions of responsibility; income and wealth; and the social bases of self-respect.

In choosing the principles of justice, parties in the original position, behind the veil of ignorance seek to maximize their access to social primary goods. As they do not know their position this means that they are in fact choosing to maximize everyone’s access to these goods. In order to decide which principles promote my good I have to place myself in the position of every other possible member of the society, as I could be in their position (Kymlicka 2002, 64–65).

Starting from the two (rather abstract) principles of justice, Rawls tries to describe the basic structure in more detail. The institutions Rawls describes are essentially liberal constitutional democracy (Kukathas and Pettit 1990, 48; Rawls 2003, 173).

Just state is the one which upholds the first principle of justice, guaranteeing the equal liberty for all. It does not concern itself, nor does it has a right to, with philosophical or religious doctrines of individuals. It would entail democratic arrangements, with limits to power of the legislature and government (bi-cameral legislature, separation of powers, checks and balances). Furthermore, he argues that it is necessary to ensure the fair value of political liberty. To achieve this he proposes various mechanisms (budget subsidies for political parties, state assistance to ensure wide political debate, etc.), but most importantly, political parties have to be independent from private demands not expressed in a public forum and they must not depend on private funds for their organization and operations (Kukathas and Pettit 1990; Rawls 2003).

Rawls is (up to a level) ambiguous about the economic system he prefers, even though he is clear that market mechanism is necessary to provide information (if not for distribution). He says that both capitalist and socialist systems are in principle compatible with second principle of justice and that particular solution has to be determined based on circumstances, history and culture of particular societies, however he seems to favor either property-owning democracy or the market socialism. Furthermore, he is rather uncommitted to growth. He mainly concentrates on the sort of policies the state needs to adopt in order to satisfy the second principle of justice. These would include progressive taxation, subsidized public schooling, preventing monopolies and assuring a social minimum. He envisions three additional branches of government: allocation branch, to keep the price system working and to prevent concentration of market power; stabilization branch, to ensure full employment; and distribution branch, to ensure justice in distributive shares through taxation and adjustments in the rights of property (Kukathas and Pettit 1990; Rawls 2003; Tomasi 2012).

The market democracy theory, proposed by John Tomasi in his book *Free Market Fairness* (2012) seeks to create a hybrid between classical liberalism and high or left liberalism (example of which is Rawls' theory).

Classical liberalism puts strong accent on thick conception of economic liberties. These include the freedom of individuals to negotiate individually their terms of employment, right to engage in economic activities (to start and close a business, individually or in cooperation with others), to own and use productive property, property transactions and the freedom to make use of legitimately acquired resources (Tomasi 2012, 22–23). For classical liberals economic rights serve to protect freedom, and the protection of freedom and economic efficiency go hand in hand. They adhere to the idea of formal equality, and this leads them to reject all forms of legislation that have social justice as a goal. Classical liberals see outcomes as just as long as they are a consequence outcome of free transactions, somewhat in line with Nozick (1999). Unlike Nozick, they allow for some taxation in order to provide a basic safety net to support, the poor, the unemployed and orphans. Furthermore, Hayek support some level of public support for education, but he insists that such programs must not be aimed to benefit individuals (immediate beneficiary), but only society as a whole (Tomasi 2012, 20–22).

Tomasi aims to create a hybrid between classical and high liberalism. He works in Rawlsian framework, but seeks to include thick economic liberties in the category of basic liberties. In his own words, market democracy is inspired by Hayek's premises and the vision for market democracy is basically Hayekian, but those are placed in the Rawlsian framework (Tomasi 2014, 445). On the level of political philosophy, which identifies the fundamental values and principles of justice it can be seen as high liberal, and on the level of political theory, which identifies regime types, it is classical liberal (Anderson 2013; Tomasi 2012).

Tomasi accepts the high liberal principles of social justice, but criticizes that strand of liberal thought for ignoring economic liberties and economic growth. He argues that the economic liberties become more and more important in affluent societies (Tomasi 2012). In his view economic liberties are “first-order requirements of democratic legitimacy” (Tomasi 2012, 107). Tomasi argues that the basis for self-respect is best assured through robust set of economic liberties that are to be elevated to basic rights. These liberties are necessary for the responsible self-authorship of citizens (Rawls’ capacity for a conception of good) (Tomasi 2014, 451; Tomasi 2012, 82, 90). He believes that the universal provision of social goods produces significant moral opportunity costs. By insulating people from economic risks, and by denying the people the opportunity to plan financially, left liberal platforms diminish the capacity of citizens to become fully responsible and independent. In this way moral capacities of people cannot be developed and exercised fully. Furthermore, Tomasi argues that limiting economic freedoms diminishes the self-respect of citizens in two ways. First, providing citizens with material means to pursue their goals means that they cannot consider themselves as the central cause of the life they are leading. Second, the citizens cannot have self-respect if they are not esteemed by their fellow citizens. Tomasi asks how anybody can think that they are esteemed by their fellow citizens, if those citizens impede their autonomous decisions on how many hours to work, how much to save for retirement etc. (Tomasi 2012, 80–84).

Market democracy is committed to respecting the moral powers of citizens and it embraces a substantive conception of equality. Tomasi agrees with the claim that undeserved inequalities raise questions of justice, however, he believes that the society should not seek to prevent these inequalities from arising in the first place. He argues that institutions should be designed in such a way that they reflect a respect to all citizens as valued members of a whole. Furthermore, he embraces (a version of) the difference principle. He believes that all inequalities should be advantageous even to those who have the smallest bundle of goods (Tomasi 2012, 88–89).

When it comes to institutions of market democracy they have a distinctively classical-liberal flavor. The range of self-authorship serves as standard for evaluation. On the one hand, too much state interference robs the citizens of their agency and opportunity to be the authors of their own lives, and on the other, deprivation, poverty and sickness also preclude people from exercising their moral powers. Market democratic regimes would exercise police powers, control poisons and dangerous substances, provide genuinely public goods, such as defense, and perhaps public roads and bridges. However, they would always seek to find a market based solutions before turning to regulation.

Market democracies would also provide for tax-funded safety nets, but the total income of individuals and families would be determined mainly through price system. Furthermore, they may allow for public support for education and healthcare, but the preferred way is, again, market based: through vouchers, tax-breaks and public-private partnerships. The government may pursue some functions in the market, mostly oversight and defense of property rights, as well as setting the monetary policy. However, the idea is to keep these interventions at the minimum.

Work place conditions, mandatory licensing for professions, working hours and minimum wages should not be regulated, except in extreme cases. Furthermore (private) employers could have full freedom to discriminate between workers on any basis (race, sex, etc.). Finally, taxation is to be set only at the levels necessary to perform the functions listed above, not for the purpose of wealth redistribution (Tomasi 2012, 108–12).

Tomasi's preferred version of market democracy is the free market fairness. He believes that this conceptions is morally superior to high-liberal (or social-democratic) conceptions of justice as fairness and that it can satisfy requirements of difference principle, fair equality of opportunity and fair value of political liberties. According to Tomasi free market fairness

employs an indirect strategy of social construction. It aims to maximize the position of the worst-off by creating the conditions for the robust growth of economy and to fulfill the difference principle by maximizing the material holdings of the worst-off. As the total product of the society is not fixed, the growth overall will mean the betterment for the least well-off (Tomasi 2012, 232–34).

The third major component in justice as fairness is the fair value of political liberties. Free market fairness sees the fair value of political liberties as a question of how well the regulations enable citizens to form and pursue their own life plans. Tomasi believes that the very fact that thick economic liberties are to be constitutionally protected and, consequently, the fact that the range of economic issues that are allowed on the political agenda is minimal, reduces the incentives of powerful financial interests to influence the political process. Furthermore, even when decisions have to be made the tradeoffs will be clearly visible (Tomasi 2012, 249–53).

Tomasi insists that his theory should be judged on the level of the ideal theory. In his understanding of the concept, whether a theory satisfies a principle of justice should be judged on two criteria: (1) does it aim to fulfill given principle of justice; and (2) do institutional arrangements whose purpose is to fulfill the principle of justice comply with general laws of political sociology. This means that, when evaluating a theory, we should abstract (most) empirical facts and the probability of it achieving its goals.

CHAPTER 2 – BASIC LIBERTIES

2.1. Rawlsian Argument for Basic Liberties

As mentioned in the previous chapter, in Rawls' conception of justice, the first principle of justice states that: "Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with similar scheme of liberties for all" (Rawls 2005, 291). These liberties have lexical priority over the second principle of justice, i.e. fair equality of opportunity and the difference principle.

Basic liberties are specified by a list of liberties and they are: freedom of thought and liberty of conscience; the political liberties and freedom of association; freedoms specified by the liberty and integrity of the person; and the rights and liberties covered by the rule of law. Rawls denies any preeminent value to broadly conceived freedom or "liberty as such", even though there is a general presumption against imposing legal and other restrictions on liberty without sufficient reason. (Rawls 2005, 291–92; Freeman 2008, 46).

These liberties are seen abstractly and include within themselves a number of more specific rights and liberties. Liberty of conscience includes both freedom to choose one's own religion but also the freedom to reject religion and belief in god(s) altogether. Furthermore, it includes freedom of belief in questions regarding morality, values and purposes in life, metaphysical questions about reality and questions regarding the meaning of life (Freeman 2008, 47).

Freedom of thought is similar and connected to the freedom of conscience and it covers the freedom of belief and the freedom to express belief on political, literary, artistic, philosophical and other issues. It secures the rights to inquiry, discussion and expression on one's views on all subjects (Freeman 2008, 47).

Freedom of association guarantees the liberty to associate with other persons and to create groups of different kinds. This liberty works together and is necessary for the freedom of conscience (Freeman 2008, 48). Of course, just as with other basic liberties the freedom of association is not absolute, and it is limited by other basic liberties. For example, there should be no limit on creating and running a bird-watching club, but there is no right to form a mafia organization, as it may run against the liberty and integrity of the person.

Equal political liberties include the rights to vote and to be elected to a political office, freedom of political speech and discussion, freedom of assembly, right to form and join political parties and the right to criticize the government (Freeman 2008, 46).

Liberty and integrity of the person include protections for the physical and psychological integrity of the person and they prohibit unjustified violence, coercion and enslavement of the person. Furthermore, they provide the freedom of movement, free choice of occupation and the right to hold personal property. Rawls argues that the right to personal property is necessary for personal independence and a sense of self-respect (Freeman 2008, 48).

Finally, the rights and liberties of the rule of law include the regular and impartial application of law, freedom from arbitrary arrest and seizure of property, fair and open trials rational rules of evidence and other due process rights. These rights and liberties are a precondition for enjoying other substantive liberties. In the absence of the rule of law it is impossible to know the limits of liberties and individuals are uncertain when they will interfere with their life-plans and actions (Freeman 2008, 50–51).

In Rawls' theory the basic liberties have a priority, meaning that they have an “absolute weight” when they are conflicting with reasons of public good or perfectionist values. These basic liberties cannot be limited for certain groups for reasons of economic (or other) efficiency, even if the beneficiary of the greater efficiency is the group whose rights are to be limited or denied.

None of the basic liberties are absolute, since they can be (and have to be) limited when they clash with one another. In the finally adjusted scheme of basic liberties, not all liberties have to be provided for equally, but the scheme must be provided equally for all the citizens (Rawls 2005, 294–95). Therefore, it would be unacceptable if it was demanded from, for example, the worst off group to give up their political rights or freedom of religion in order to receive higher social minimum.

Furthermore, being basic also means that these rights and liberties are “inalienable”, meaning that they cannot be given away even voluntarily, they cannot be signed away or sold. So people are not free to sign a contract (or at least such a contract is not enforceable) where they sell themselves to slavery, become permanent members of a religious denomination or a political party (Freeman 2008, 51).

Rawls makes a distinction between regulation and restriction of liberties. In his view, as long as “the central range of application” of the basic liberties is provided, the principles of justice are fulfilled. Social organization, scheduling and generally accepted procedures are necessary for liberties to serve their purpose. For example, it is impossible to have a meaningful debate if everyone is talking at the same time and it is necessary to provide certain rules for the use of public facilities, as they cannot be used at the same time for different purposes. All of this, however, does not allow for restrictions on the content of speech, such as prohibition on discussing and criticizing different doctrines or discussing facts relevant for the assessment of the justice of the basic structure or economic and political institutions (Rawls 2005, 295–96).

As Freeman points out, the idea that there are some liberties that are basic, inalienable and deserve special protection is not new or specifically Rawlsian. Previous liberal thinkers also affirm this idea, although the list of liberties might be different. While Rawls’ list of basic liberties is very similar to J.S. Mill’s, classical liberals would include property rights, and some

authors do not see political rights as basic (Freeman 2008, 51). What is new in Rawls' theory is his answer to the questions concerning the list and further specification of basic liberties: "How are we to decide which liberties are basic or fundamental, and which are not, and how are we to decide conflicts between basic liberties?" (Freeman 2008, 46).

2.1.1 Justification for the Special Status of Basic Liberties

The starting point in Rawls' justification for basic liberties and their priority is the conception of persons as being free and equal and having the two moral powers and a freely adopted conception of good, which is seen as working together with accompanying conception of social cooperation (Freeman 2008, 54; Rawls 2005, 299).

Rawls sees social cooperation as cooperation which is always for mutual benefit, and as such it is more than simply a coordinated social activity, organized and guided by publicly recognized rules. The mutual benefit implies two elements. First, fair terms of cooperation (or the element of social cooperation Rawls calls "the reasonable") express the idea of reciprocity and mutuality, in the sense that all who cooperate must, on the one hand, benefit, and bear their fair share of the burdens, on the other. Second, "the rational", or what individuals as free participants in social cooperation seek to advance (i.e. their different individual goals). While the reasonable is mutual, the rational generally differs among individuals. Rawls assumes that societies are closed and that there is no opportunity for entry and exit (other than birth and death), which means that social cooperation is not voluntary. It may be willing and harmonious, but it is not voluntary in a sense in which the cooperation within different groups or associations within society is voluntary. The only alternatives to social cooperation are either unwilling and resentful compliance or discord, resistance and civil war (Rawls 2005, 300–301).

If persons are seen as capable of being fully cooperating members of society over their entire life, they are assumed to have two powers of moral personality. The first of these moral powers is the capacity to be reasonable, meaning the capacity for a sense of right and justice or, more precisely, the power to understand, apply and cooperate with others on fair terms. It is to be motivated by a desire to act on the principles of justice as fair terms of cooperation, rather than acting simply in accordance with these principles. The second power is the capacity to be rational, which is a capacity for a conception of the good. It includes the power to form, revise, and rationally pursue a coherent conception of the good based on what we regard to be a worthwhile human life (Rawls 2005, 302; Freeman 2008, 54). These moral powers are the necessary and sufficient conditions for the equality of persons in questions of political justice and they are the distinguishing feature of humans which warrants them being treated as equals and respected as subjects of justice (Freeman 2008, 54; Rawls 2005, 302).

Rawls summarizes his conceptions of person and social cooperation and their implications as follows:

[...] fair terms of social cooperation are terms upon which as equal persons we are willing to cooperate in good faith with all members of society over a complete life. To this let us add: to cooperate on a basis of mutual respect. Adding this clause makes explicit that fair terms of cooperation can be acknowledged by everyone without resentment or humiliation (or for that matter bad conscience) when citizens regard themselves and one another as having to the requisite degree the two moral powers which constitute the basis of equal citizenship. Against this background the problem of specifying the basic liberties and grounding their priority can be seen as the problem of determining appropriate fair terms of cooperation on the basis of mutual respect. (Rawls 2005, 303)

Based on this conception of person, for Rawls, basic liberties are those liberties which could be agreed on by the parties in the original position, under the veil of ignorance, as essential conditions for the adequate development and full exercise of the two moral powers over a complete life. Different basic liberties are needed for the development and exercise of the different dimensions of each of the two moral powers.

Freedom of conscience is seen as necessary to develop a conception of good (the second moral power). Without the freedom to examine different religious, philosophical and moral doctrines individuals cannot decide which ways of life are most suited to them (Freeman 2008, 55–56). Rawls offers three grounds for the designation of these liberties as basic. First, if we assume that conceptions of the good are given and firmly rooted, given the fact of the plurality of different conception of goods, parties in the original position would not be willing to risk anything other than the equal liberty of conscience. As parties do not know if their beliefs would be held by the majority or the minority, they cannot allow for lesser liberty of conscience for the minority, because it could happen that they are in minority themselves and would suffer accordingly. Second, conceptions of the good are open to revision and as such, they require the liberty of conscience. The freedom of conscience is needed for each individual to make an informed decision about which conception of the good is right for themselves, through examination of different moral, philosophical or religious principles which provide guidance in forming an informed decision about different ways of life. This includes the liberty to change one's conception of good and to make mistakes along the way. Finally, following Mill, Rawls argues that it is not only important for our beliefs to be true and for actions to be right, it is also important why they are true and right. The freedom of conscience enables us to see ourselves as affirming our ways of life in accordance with the exercise of our moral and intellectual powers. It implies making our conceptions of good our own, not simply taking them as given from society, our peers or family. In this way the capacity for a conception of good is not merely instrumental to, but is also an essential part of the determinate conception of good. The freedom of association is covered under these arguments as well, having in mind that it is necessary for exercise of liberty of conscience (Rawls 2005, 311–15).

The freedom of thought and political liberties are necessary for individuals to develop and exercise the capacity for a sense of right and justice (the first moral power). Freedom to criticize

the government, take a role in political and public life and the ability to discuss moral and political issues freely is needed if persons are to realize their potential for the sense of justice and act accordingly (Freeman 2008, 56). Rawls provides three arguments related to the first moral power, which support his claim that the parties in the original position would adopt principles supporting the special status for basic liberties. The first consists of two parts: (a) whatever one's conception of the good might be, it is to everyone's advantage to have a just and stable scheme of cooperation; and (b) the most stable conception of justice is the one specified by his two principles of justice, and the reason for this is the priority assigned to basic liberties assigned to them by those two principles. He argues that a scheme of just social cooperation is to everyone's benefit, and that a scheme in which stability is assured through the public sense of justice is more desirable and better as a means to stability, than a system which ensures stability through penal sanctions, especially as such a coercive system poses a threat to other basic liberties. In his view, the two principles of justice are most clear and self-evident to reason, compatible and concerned with our good and rooted in affirmation of our person, specifically because the basic liberties are combined in a scheme with fair value of the equal political liberties³ and the difference principle (Rawls 2005, 315–17).

The second argument arises from the fundamental value of self-respect. Self-respect presupposes the development and use of both moral powers and therefore a sense of justice. Self-respect has two elements, the first rests on our self-confidence as equal and fully cooperating members of society, and this self-confidence is based on the development and exercise of two moral powers. The second element is our sense that we can develop and realize a worthwhile plan of life. As Rawls argues, without self-respect, even goals that seem valuable to us may seem as not worth pursuing, therefore the parties in the original position would assign

³ Fair value of basic liberties will be discussed in depth in a separate section

great weight to considerations on how well the principles of justice support self-respect (Rawls 2005, 318–19).

Finally, Rawls bases his third argument on the conception of a well-ordered society as “a social union of social unions”. Drawing on von Humboldt, the basic idea is that citizens of a well-ordered society, based on the two principles of justice, provide for each citizen a much more comprehensive good than the determinate good of individuals left alone or operating in smaller associations. Furthermore, participation in this comprehensive good can enlarge everyone’s determinate good. A social union of social unions is made possible by three aspects of humans’ social nature. The first is the complementarity between different human talents which makes possible many kinds of activities and various forms of organization of those activities. The second is that we have a potential to be and do much more than we can be and do in a lifetime, therefore we depend on others to fulfill what we might have been and done. Finally, there is the capacity for an effective sense of justice which can include amongst its principles an appropriate notion of reciprocity. When those principles are realized through social institutions and publicly recognized, a social union of social unions is realized through the coordination of activities of different social unions. Two principles of justice are the best way to coordinate and combine the many social unions. First, they recognize citizens as free and equal, and second, they include the notion of reciprocity amongst their principles. In other words, they have a purpose of giving justice to each citizen as free and equal on a basis of mutual respect (Rawls 2005, 320–22).

There are two more concepts in Rawls’ conception of basic rights that need to be briefly discussed at this point: the worth of basic liberties; and the fully adequate scheme of basic liberties.

2.1.2 Worth and the Central Range of Application of Basic Liberties

It is rather self-evident that having a “liberty to” does not equal being “able to” take full advantage of a said liberty. This is one of the main objections to the Rawls’ theory from the Left, as the fair equality of opportunity and the difference principle may allow for too big inequalities, thus rendering some unable to effectively exercise their (basic) rights and liberties. People can be prevented from exercising their rights and liberties by ignorance, poverty etc. Rawls makes a distinction between the basic liberties and the worth of (basic) liberties. He defines basic liberties as a “framework of legally protected paths and opportunities”. They create a scheme of rights and duties which gives citizens the liberty to do certain things and prevents others from interfering. Lack of material means may prevent people from taking full advantage of these liberties, but Rawls argues that that should not count as a restriction of liberties, but as diminishing the worth of liberties or, in other words, diminishing the usefulness of their liberties to persons (Rawls 2005, 325–26).

He argues that the aim of justice as fairness is to ensure the worth of basic liberties for everyone, and especially the worst off, through distribution of primary goods regulated through the second principle of justice. He contends that the worst off will have more of the all-purpose goods necessary for using their liberties than in any other social system compatible with basic liberty (Freeman 2008, 60–61; Rawls 2005, 326). In Rawls’ words one of the central aims of social and political justice is that “[the] basic structure of society is arranged so that it maximizes the primary goods available to the least advantaged to make use of the equal basic liberties enjoyed by everyone.” (Rawls 2005, 326).

Rawls rejects the notion that the equal worth of liberties is necessary or even possible. The reason for this is that, first, different people assign different value to different basic liberties; and, second, it could be unfair and socially divisive to try and provide the equal worth of all liberties for all, due to different ways in which liberties are practiced which could create great

inequalities in income or wealth. Furthermore, providing for the equal worth of all basic liberties would be prohibitively expensive and it would mean that there are no resources left for the fulfilment of the second principle of justice.

For example, an atheist does not require any material means to make full use of her freedom of religion, but religious people usually require places of prayer which would require that they receive more income to have the same worth of a basic liberty. The one exception are political liberties as they are arguably most affected by the socio-economic status of an individual (Rawls 2005, 326–27; Freeman 2008, 61–63).

In the restatement of the first principle of justice, Rawls replaces “the most extensive scheme” of basic liberties for “a fully adequate scheme” of basic liberties, and while the first phrase implies something similar to Mill’s harm principle, the second allows for much greater restrictions on liberties (Freeman 2008, 79). Indeed, in the *Political Liberalism* (chapter VIII) Rawls states that the design of the scheme of the basic liberties is not meant to maximize anything, but that the liberties and their priority should “guarantee equally for all citizens the social conditions essential for the adequate development and the full and informed exercise of these powers in what I shall call “the two fundamental cases.”” (Rawls 2005, 332). Therefore, a fully adequate scheme of basic liberties allows adequate development and informed exercise of the two moral powers.

Rawls argues that the maximization is not needed when designing the scheme of basic liberties because, first, there is no coherent notion of what is to be maximized, as it is not possible to maximize the development and exercise of both moral powers at once and there is no conception of maximum development of these powers; and, second, aside from the two moral powers, people have a determinate conception of good as well. Therefore, while there is a strong incentive to protect the basic liberties and to develop and exercise moral powers, they should

not be seen as the supreme form of good, but as a condition of good. Following Kant, Rawls claims that the just and honorable actions of citizens make them worthy of happiness and it makes their achievements admirable and their pleasures completely good. However, as he argues, “it would be madness to maximize just and rational actions by maximizing the occasions which require them” (Rawls 2005, 333–34).

Rawls introduces the idea of the “central range of application” of a liberty in an attempt to make clear that not every application of a basic liberty takes precedence over all other social goods. The central range of application is an area of application of a basic liberty that is most essential for the development and exercise of the two moral powers (Freeman 2008, 69). Therefore, there are three ways in which the basic liberties can be limited. They can be limited not only by other liberties, but they can also be self-limiting. In justice as fairness liberties have to be the same for all, so in order to gain greater liberty for ourselves, we would need to provide the same liberty for others. So for example, it is possible to want to have an unimpeded access to public venues and unlimited public funds for free political speech, but providing such access and funds to everyone could be impossible to put in practice, therefore such extensions to the freedom of speech are limited. Finally, an exercise of a basic liberty that falls outside of its central range of application can be restricted or regulated for reasons of the second principle of justice or even based on the arguments from public reason (Rawls 2005, 341–42; Freeman 2008, 69, 78).

To illustrate this idea, the basic liberty of free speech can be used. Political speech on the matters of justice requires almost absolute protection (including advocacy for revolution), with possible exception of speech that could lead to imminent violent action and there are limitations to political advertising to preserve fair value of equal political liberties. The scientific, philosophical and cultural applications of free speech also deserve near absolute protection. The idea is that these types of speech fall into the central range of application of the liberty (Rawls 2005, 341–62). However, commercial free speech may be regulated with regard to its content

and may be even banned altogether. So, for example, advertisements for job openings must conform to the requirements of fair equality of opportunity and advertisement for products may be required to contain certain information needed for the best realization of the difference principle (e.g. nutritional facts, additives etc.). On the other hand, market-maximizing strategies of advertisement, bordering on miss-representation could be banned altogether, as Rawls believes that they do not contribute to the development and exercise of the two moral powers and he considers them socially wasteful (Rawls 2005, 363–65). Finally, the libel and defamation of private persons have no justification, as they do not play any role in the development and exercise of the two moral powers and they can be a reason for civil lawsuit (Freeman 2008, 71).

As we saw, it is necessary to create a *coherent* scheme of basic liberties, where liberties can be limited by themselves, by other liberties, and (if they fall out of the central range of application) by other considerations. This is one of the reasons why Rawls believes that the list of basic liberties should be limited, as including additional liberties on the list risks weakening the essential ones. Additionally, it re-opens the problem of balancing and resolving conflicts between basic liberties. One of liberties not on the list is highly prized by classical liberals: economic liberties or the rights to own productive capital and natural resources. Rawls considers that these liberties are not necessary to develop and exercise the two moral powers, and believes that the decision about property rights (other than in the case of personal property) should not be decided from the original position, but at the later stages when more information about circumstances and traditions of a particular society are known. It is important to have in mind that this does not preclude the capitalist mode of production, nor does it make some form of socialism or property-owning democracy inevitable (Rawls 2005, 298).

2.2 Thick Economic liberties as Basic Liberties

As mentioned in the previous chapter, Tomasi claims that thick economic liberties should be included in the list of basic liberties, in order to protect the two moral powers. Following James Nickel, Tomasi divides these liberties in four broad, and sometimes overlapping, categories. First, there is the economic liberty of labor, a liberty to engage in a productive activity under the conditions one has freely accepted. Second is the liberty of transacting. It allows citizens to participate in economic activity and it includes the liberty to produce things for sale, to trade in the marketplace, and to save and invest. Third, there is the liberty of holding. This group contains the liberties that define the legitimate ways of acquiring and transacting productive property, using it and developing it for commercial and productive purposes. Finally, the fourth category contains the liberties of using, it covers the use of resources for production and consumption and it protects the freedom of individuals to use and consume resources, goods and services, as well as the freedom of commercial entities to make decision regarding production-related consumption (e.g. which parts or materials and from which supplier to use in production). In the Free Market Fairness these are sometimes referred to as liberties of owning and working, for reasons of simplicity (Tomasi 2012, 22–23).

At different places in the Free Market Fairness, Tomasi offers five different arguments to justify the inclusion of thick economic liberties in the list of basic liberties: (1) thick economic liberties protect the sphere of activity that is central to (many) individuals' life – plans; (2) the protection of thick economic liberties is necessary to ensure “broad evaluative horizons” needed to develop two moral powers; (3) Tomasi argues that (economic) obstacles in life could be necessary to develop and exercise the moral powers and thick economic liberties ensure that those obstacles will be present; (4) thick economic liberties are needed to protect other basic liberties; and (5) as self-respect is necessary to develop two moral powers, thick economic

liberties need to be protected as they provide a basis for self-respect (Tomasi 2012; Melenovsky and Bernstein 2015, 49).

The first, and the strongest, of Tomasi's arguments rests on the idea that the actions and ways of life protected by thick economic liberties have great importance to (some) particular individuals. He illustrates it through an example of a college dropout Amy, who works for the pet grooming business and dreams of opening her own. Through hard work and savings Amy builds her credit rating, secures a bank loan and starts her own business: Amy's Pup-in-the-Tub. Through this example we can see how important opening her own business is for Amy. Tomasi invites the reader to imagine what it means for Amy to walk into her own shop each morning and to read her name on the sign at the end of a long day of work (2012, 66). Furthermore, owners of a small business identify with their shop, work and customers (Tomasi 2012, 78). All of this is made possible through thick economic liberties, namely through liberties of holding and transacting. Therefore, thick economic liberties can be seen as necessary for some people to pursue their conception of the good.

Melenovsky and Bernstein argue that this (what they call the Argument from Particular Interests) is not enough to warrant the designation of a set of liberties as basic liberties. They point out that there are other conceptions of good (e.g. the life of hunter-gatherer or a gladiator) that would require certain liberties, but those are not protected as basic liberties. As they put it "The mere fact that a way of life is important to an individual is not sufficient to show that we should protect the liberties that are useful—or even necessary—to pursuing that way of life." (Melenovsky and Bernstein 2015, 53).

Tomasi's answer to this type of critique is that there are other basic liberties that are not important for all people equally or at all. The first example he uses are religious liberties. He argues that the religious liberties are important to certain people but not to others in the same

way as economic liberties are (2012, 81). However, I would argue that this analogy does not really hold. Religious liberties are equally important to all people whether they are believers, agnostics or atheists. Religious freedom means not only that I am free to worship any god, in any way I see fit, but also to not worship or to not believe in one at all. Saudi Arabia presents an excellent example. That country does not have religious freedoms and a person deciding that she is no longer religious or is an atheist and does not really care about religion could face capital punishment. Therefore, it is clear that even those who have no interest in religion as such, have an interest in religious freedom.

The second example Tomasi uses in the same way, the example of political liberties, may look stronger. However, actions in the political arena have an impact on all the citizens, regardless of their interest in the politics and they have to have the opportunity to get involved if they wish so. Rawls himself, recognizes that some liberals do not consider political liberties as having the same intrinsic value like the freedom of consciousness and civil liberties generally. It is a fact that the size of contemporary societies makes the impact of a single vote extremely small, and that political liberties take less important place in the conception of good for most people. It could be argued that they are purely instrumental in preserving other liberties, but even that is enough for them to warrant the protection as basic liberties (2005, 299). Furthermore, equal political liberties have a symbolic value as well, as they affirm the status of citizens as free and equal.

Additionally, Melenovsky and Bernstein argue that these liberties are “necessary for *everyone* to exercise and develop a sense of justice” (2015, 54). The same cannot be said of running a business, as there does not seem to be a connection between such an activity and the first moral power. The fact that certain people have a particular interest in certain domain does not warrant inclusion of a certain right in the list of basic liberties, as such interest is seen as a specific

conception of the good. The grounds for special protection of basic liberties is that it guarantees the conditions necessary for the development of the two moral powers (2015, 54).

Furthermore, whatever the value of starting and owning a business may be, it remains unclear why Amy could not start her own business in property-owning democracy or in a contemporary system of welfare capitalism (also strongly opposed by Tomasi), i.e. why is it necessary to have thick economic liberties protected as basic liberties. Moreover, Tomasi would need to show that thick economic liberties play the same role in development and exercise of the two moral powers for the losers in the free-market competition. The nature of competitive markets guarantees that there will be losers, and their loss might not be their fault.

The Amy's example and other examples Tomasi uses throughout the book (farmer and his field, for example) are a bit misleading. While they may identify with their (small) business, customers, or with their farm, the principles Tomasi proposes would apply equally to Amy's Pup-in-the-Tub and to Walmart, to a small farmer and to Monsanto. It is rather obvious that the same sense of attachment and connection to customers or to a field does not exist in the case of big corporations.

Or we can consider an example of a so-called venture capitalist. In essence, it is a person who provides capital to small businesses (start-ups) in the hope of big returns on their investment. Venture capitalists get a stake in the company in exchange for their investment, basically hoping that they will invest in the new Facebook, Twitter or Google. Now, having in mind the argument Tomasi makes here, there is no difference between the venture capitalist and somebody gambling on football matches (they may be a difference in the outcomes for the wider society, but that is not an argument here). They both use their knowledge of the field to try and get a high return on their investment and they can take pride in their achievement (if successful). Now, the question is whether the work of venture capitalist (or a gambler) deserves the

protection designated for the basic rights, if he would want to argue that they do, Tomasi would have to show how they are necessary for the development and exercise of the two moral powers, and why all different ways of life deserve to be protected in such a way.

The second argument – that thick economic liberties broaden evaluative horizons – is problematic as well. Tomasi argues that thick economic liberties “of working and of private ownership are affirmed as requirements of citizens exercising and developing their evaluative horizons.” (Tomasi 2012, 236). Tomasi does not specify what he means under “the evaluative horizons”. If broad evaluative horizons are understood as diversity of conceptions of good that citizens may affirm (and this seems to be what Tomasi has in mind), at least two possible answers arise. First, in the same way that the lack of thick economic liberties may curtail evaluative horizons and stunt the ability of citizens to develop their moral powers, lack of democratic control over workplace, or lack of social ownership over the means of production would produce the same outcome. Second, as Melenovsky and Bernstein point out, while it is true that broad evaluative horizons are valuable for development of moral powers, it does not follow that those horizons are adequately broad only if thick economic liberties and free-market rights are protected (2015, 55). The liberal societies, through freedom of thought, conscience, political freedoms, etc., provide sufficiently broad evaluative horizons to enable development of moral powers. Furthermore, even citizens of liberal societies which do not embrace market democracy can seek to read, understand and discuss thick economic liberties and broaden their evaluative horizon.

The third argument Tomasi provides for thick economic liberties as basic liberties centers on the development of moral powers as well. He argues that the obstacles in life (and overcoming them) are needed in order for citizens to become responsible self-authors, i.e. to develop their moral powers. Some of these obstacles “can only be found in independent economic activity: confronting challenges, overcoming obstacles, making one’s way in life to support oneself and

those one loves.” (Tomasi 2012, 183). It might be accepted that obstacles and difficulties in life are needed for the development of moral powers. However, it is not by any means clear that those must be the ones that are a result of a free-market economy. Whatever persons’ plan in life might be, she is sure to encounter obstacles and difficult choices along the way and those will have to be resolved and overcome. She would still have to make many decisions regarding education, career paths or getting married and starting a family. Each of these decisions includes certain opportunity costs in a way that is similar to decision made in economic sphere.

Furthermore, if free-market obstacles were needed, that would provide a reason to maximize taxes, not only on inheritance, but also on the income of high-earners. After all, they should also be afforded a chance to develop their moral powers. Now, Tomasi could argue that well off people have to plan and overcome obstacles in managing their wealth, but it simply means that same applies to those of more modest means, they will just have to make one sort of economic or financial decisions rather than the other. Unless a society reaches the state of abundance there will always be difficult decisions to make. However, state of abundance would remove one of the circumstances (or conditions) of justice – relative scarcity.

Finally, even if we concede Tomasi’s point, as Penny (2015) argues, importance of obstacles for the development of moral powers would mean that the economic growth is self-defeating, as it would provide security and remove obstacles from the economic sphere of life. This would provide a major problem for the market democracy as it is strongly committed to growth.

The fourth argument Tomasi offers for thick economic liberties as basic liberties is that they are necessary to protect other basic liberties. This line of argument could be in line with Rawls’ reasoning for including the rule of law and freedom of person in the list of basic liberties as they properly guarantee other basic liberties (Melenovsky and Bernstein 2015, 58–59). Tomasi bases his argument on the James Nickel’s article *Economic Liberties* (2000), in which Nickel

argues that blocking economic liberties also blocks parts of other basic liberties as they are linked to freedom of religion, communication, association, and political liberty. Nickel argues that the property rights are necessary as a safeguard from government that might be blocking or unjustly limiting other basic liberties, they also might be needed in the case of civil discord or war, and finally, they are needed to provide material means for full exercise of other basic liberties. First two lines of argument are not available to Tomasi, as he argues on the level of ideal theory. As for the third, as Melenovsky and Bernstein point out, blocking of economic liberties does not, in fact, block other basic liberties, it just may decrease their worth (2015, 59).

As we saw, Rawls makes a distinction between blocking and the different worth of liberties, and starts from the assumption that liberties have a higher worth for persons who have the means to take advantage of them while pursuing their goals, and while worth of basic liberties is important it is covered by the difference principle which seeks to provide all citizens with sufficient resources to take full advantage of their liberties and develop the two moral powers.

The final argument Tomasi provides for thick economic liberties as basic is that they are necessary to protect self-respect which is necessary to protect other basic liberties. Tomasi believes that individuals cannot have self-respect if they are using the force of law to prevent them to freely decide for themselves how much to work, for what salary and under what conditions, how much to save for retirement or what parameters of medical care should be available to them (Tomasi 2012, 83–84). However, this argument seems to be overly ambitious. As Melenovsky and Bernstein point out it would mean that most individuals in contemporary developed societies lack self-respect. Additionally, it is not very likely that any infringement on thick economic liberties decreases self-respect (2015, 60–61). If we imagine, for example, that top-earners have to pay high marginal taxes (as was the case even in the US in the period between the World War II and late 1970's) it is hard to argue that their self-respect is undermined. Similarly, access to high-quality healthcare in the time of need, without fear that

they will go bankrupt, or the chance to have a secure job that enables an individual to earn enough to lead a decent life (without having to work 12 hours), with guaranteed and paid vacation time and sick-days, in a safe environment seem to increase the self-respect of individuals, not decrease it.

All of the arguments provided by Tomasi for the inclusion of thick economic liberties into the list of basic liberties face a similar problem: either thick economic liberties are not *necessary* for the development and exercise of two moral powers, or vast majority of citizens in contemporary democracies are in fact unable to develop and exercise two moral powers. If they are not necessary they cannot rightfully be included on the list of basic liberties. If they are, this leads us to an implausible conclusion that the majority of citizens of developed Western countries (including Tomasi, probably) cannot develop and exercise their moral powers.

If we imagine, for example, two workers: John, from the country A, has a legally guaranteed minimum wage, sufficient for a decent life, works in a safe environment, has a right to paid days off, healthcare that is free at the point of use, his children have free education, but all of those benefits have been gained through unionizing of workers and through collective bargaining. Jack from the country B, on the other hand, works 10 hours a day and has to have additional, side job on the weekends in order to provide for his family. Jack constantly has to make difficult decisions and has to overcome financial obstacles in life. He has to decide whether to take days off or sick days, unpaid as his freely negotiated contract stipulates, fully knowing that it will make a hole in his budget. He always has to have significant savings to be able to pay for some unexpected serious illness, or a work-related injury (he was not able to negotiate high safety standards on his workplace) and has to decide whether to build separate rooms for his children or try and save for better college education. Tomasi's arguments would lead us to conclude that John is unable to develop and exercise the two moral powers. Obstacles (as Tomasi understands them) have been removed from his life; as the labor relations are

regulated by the state, he has no self-respect and his evaluative horizons have been narrowed. Furthermore, as his economic liberties are blocked so are his freedom of religion, movement, communication etc. Jack, on the other hand, faces no such limits and is able to fully develop and exercise the two moral powers. Now, while this conclusion is fully consistent with Tomasi's argument, it seems counter-intuitive and implausible.

2.2.1 Fair Value of Economic Liberties

Even if we accept Tomasi's claim that thick economic liberties warrant inclusion to the list of basic liberties it is necessary to see if they require special protection or "fair value" of liberty.

As we have seen earlier, Rawls argues that it is not feasible or necessary to equalize the worth of basic liberties for all individuals. Such attempts could prove practically impossible, prohibitively expensive or socially divisive. However, there is one liberty, from the list of basic liberties, which requires (approximate) equal worth or fair value: equal political liberties⁴. The fair value of political liberties "means that the worth of political liberties to all citizens, whatever their social or economic position, must be approximately equal, or at least sufficiently equal, in the sense that everybody has a fair opportunity to hold public office and to influence the outcome of political decisions." (Rawls 2005, 327).

Rawls believes that it is hard, if not impossible, to achieve the standard of equal citizenship required by justice, if the approximately equal worth of political liberties is not guaranteed. Unless citizens are afforded the fair value of political liberties, it is unlikely that just institutions will be preserved or even established in the first place (Rawls 2005, 327–28; Freeman 2008, 63). Justification for this special status of political liberties is not in their greater importance (compared to other basic liberties), but in the fact that the worth of political liberties is most

⁴ Some authors, like Wall (2006) do not consider political liberties to be basic, however, as Tomasi accepts, both, their status as basic and the fair value protection I am not going to discuss this issue.

heavily influenced by social and economic status of citizens (Rawls 2005, 330; Layman 2015, 417). Furthermore, the political liberties differ from other basic liberties inasmuch that they have some zero-sum characteristics, in the sense that the greater worth of political liberties for some mean lesser worth of political liberties for others. Additionally, decisions reached through the exercise of political liberties may be enforced through the coercive apparatus of the state (Tomasi 2012, 248).

Tomasi does not envision the fair value protection of economic liberties. However, if they are indeed basic, and necessary for the development and exercise of the two moral powers we need to consider whether they warrant the fair value protection and what would be the implications of such protection for redistribution and the second principle of justice.

As we have seen in the case of political liberties they qualify for the fair value protection for (at least) two reasons: the worth of those liberties is heavily influenced by the relative economic power of individuals; and they have certain zero-sum characteristics. Now, if we consider economic liberties it is rather obvious that their worth to individuals is dependent on their relative economic power. Also, it is in one sense a zero-sum game. While society might prosper and have high rates of economic growth as a consequence of market competition, individual firms and entrepreneurs are engaged in, an essentially, zero-sum game. The worth of having a liberty to start and run a (successful) business depends not only on having material resources to do so, but also on how much resources other participants (or competitors) have as well. Previous example of Amy's Pup-in-a-Tub can be changed and expanded to illustrate the need for the fair value of economic liberties.

Let us assume that Amy comes from lower-middle class and has to work and save in order to have sufficient funds to start her business (as in Tomasi's original example), Andy, coming from a very rich family, has same talent, drive and work ethics, but he also has significant

inherited wealth worth several millions. So while Amy is working, saving and building her credit rating, Andy is able to open a chain of pet-grooming salons. These quickly corner the market, and by the time Amy has sufficient funds to open her own, market is already saturated and she finds it much harder to open her own salon and pursue her conception of the good. In this case formal economic liberties are the same for Amy and Andy, but due to their unequal economic power the worth of liberty is much greater for Andy. Furthermore, low value of Amy's liberty is a direct consequence of high value of Andy's liberty (Layman 2015, 421).

This example shows that greater value of economic liberties for one comes at the expense of lower value of same liberties for others and in that regard economic liberties are more similar to political than to other basic liberties and thus deserve the fair value protection. This conclusion would have significant consequences on the type of economic regime and economic system. If economic liberties are basic and if they are to be provided fair value protection it would require a system of (relatively) aggressive redistribution to achieve a wide dispersion of wealth, therefore it would (at least institutionally) be more akin to property-owning democracy than to classical liberal system envisioned by Tomasi.

Even if a growing free-market society produced a significant growth, and if the worse off gained enough means to assure an *adequate* worth of their economic liberties great inequalities and competitive nature of market would mean that they still depend on preferences and actions of those on the top of economic distribution as they try to pursue their conception of good. To return to the previous example, even if Amy had sufficient means to start her own business immediately, her prospects would still depend on Andy's actions and on his willingness (or lack of) to use his much greater resources to stunt her project (Layman 2015, 425).

Inclusion of economic liberties in the list of basic liberties has implications for the second principles of justice as well. If economic liberties are indeed basic, they cannot be limited in

order to satisfy the requirements of the second principle. This leads to de facto joining of the two principles into one, in the sense that the second principle becomes redundant. If the free market produces the outcomes that are in line with the second principle of justice then the difference principle, for example, is satisfied through the first principle, if it does not, there is nothing to be done, as basic liberties have lexical priority over fair equality of opportunity and the difference principle. As Layman argues, fair value provision for economic (and political) liberties would ensure that the second principle of justice is satisfied at least as well as in a system guided by the second principle of justice (Layman 2015, 427–28). This would, however, create a regime institutionally very similar (if not identical) to that of property-owning democracy, which is diametrically opposite to regimes proposed by Tomasi.

2.2.2 Economic Liberties and the Fair Value of Political Liberties

As mentioned in the previous section, worth of political liberties is highly dependent on the socio-economic position of individuals and in many areas of political life it can be seen as a zero-sum game – if one policy proposal wins, the other loses. Thus, this is a basic liberty that is most obviously in conflict with economic liberties and inequalities they produce and free market fairness embraces. Rawls argues that political liberties deserve a fair value protection in order to achieve (approximately) equal worth of political liberties for all. While he does not propose detailed solutions, Rawls argues that it is necessary to make sure that political parties are independent of private social and economic power and that society must bear at least the greater part of the costs of organizing and carrying out the political process (Rawls 2005, 328). Other than public financing of campaigns some of the measures might include limitations on donations to political parties, limitations on private political advertisement paid for by private interest groups, ensuring fair access to media, etc. Even though, Rawls does not envision equalization of wealth, it seems that, if necessary, the protection of fair value of political

liberties might allow (or even demand) redistribution far beyond requirements of the difference principle (Freeman 2008, 63).

Free market fairness seeks to resolve the problem of the fair value of political liberties in a different way. Tomasi argues that even if inequalities were limited, there would still be a large number of questions about taxation, social protection and distribution to be decided in the political arena and that would leave citizens open to the danger of political domination. Market democracy, on the other hand, will resolve the problem of economic influence in politics by providing economic rights the constitutional protection, thereby removing them from the political arena. As a result, there will be much less incentives for financially powerful to influence the political process. Tomasi recognizes that there is still a number of issues that concern economy and will still be decided on through the political process, however, he argues that the quality of political discussion will be improved and more responsible “because the economic trade-offs are kept visible”. (Tomasi 2012, 253).

His argument, however, fails on several accounts. First, even though it is true that large number of issues regarding the taxation and redistribution would be decided through political process in left-liberal regimes, the fair value protections envisioned by Rawls would ensure that every citizen has an approximately equal opportunity to influence the outcome, as socio-economic inequalities would not be allowed to play a role. Therefore, there is no danger of domination (or at least not significant) in any conventional sense. Second, even if taxation and redistribution were “off the table” there is still a number of issues that would have to be resolved, issues with arguably just as big economic impact. For example, there is no market based solution for the question of intellectual property or patents: how long are they going to last, what counts as an infringement, etc. Pollution, and emissions of carbon-dioxide present similar problem: what is the acceptable level, how is it going to be priced, etc. These questions have to be resolved through political process. Therefore, economic incentives are present and they are significant.

Now, it could be argued that, in order to secure fair value of political liberties, it is sufficient to ban or limit political donations and advertisements. However, there are at least three ways (other than campaign donations and paid private political advertisement) in which economic power can provide political influence. First, large economic players can exert influence on media through the commercial advertisement⁵. An implied threat that a media outlet will be denied advertisement income can have significant influence on the editorial policy. For example, recently, a cartoonist in the US has been informed by a newspaper company that they will no longer publish his work after he criticized large agricultural companies in one of his caricatures⁶.

Secondly, companies and individuals may fund seemingly independent institutes and think-tanks to provide biased analysis. Now we know that the oil industry has been funding a number of institutes in order to create uncertainty about the climate change (is it happening, and is it man-made, caused by CO2 emissions), even though they were long aware that it is real and man-made⁷.

Third, the great wealth makes it possible to try and ruin offending media. An interesting case in the US illustrates this point. A Silicon Valley billionaire is pursuing, what can only be called, a personal vendetta against media company Gawker. It has come out that he spent up to ten million dollars to find and fund potential lawsuits against the company, hoping that the weight of the lawsuits (and potential damages they will have to pay to claimants) will bankrupt

⁵ See for example Chomsky and Herman (1988)

⁶ Christine Hauser, Cartoonist Fired From Farm News for Pro-Farmer Cartoon, New York Times 05.05.2016. <http://www.nytimes.com/2016/05/06/business/media/cartoonist-fired-from-farm-news.html> (accessed 06.06.16.)

⁷ Justin Gillis and Clifford Krauss, Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General, New York Times 05.11.2015, <http://www.nytimes.com/2015/11/06/science/exxon-mobil-under-investigation-in-new-york-over-climate-statements.html> (accessed 05.06.16.)

Gawker⁸. While it could be argued that the Gawker does not represent a paragon of journalism and that their work does not fall under the central range of application of the freedom of speech, it is not hard to imagine a similar strategy being employed against a “respected” media establishment in order to ensure favorable coverage or mute criticism. Additionally, the large business always has an extra trump card, especially in laissez-faire economy. They can always threaten (and have been known to) to close the factory or move it abroad, thus simultaneously increasing unemployment and decreasing tax income for the state.

Thus, we can see that free market fairness does not decrease incentives for influence in politics, nor does it necessarily make trade-offs more visible and realization of fair value of political liberties may require a significant redistribution, and this is indeed one of the reasons why Rawls favored property-owning democracy over free-market regimes and even welfare capitalism.

⁸ Alex Hern, PayPal co-founder Peter Thiel admits to bankrolling Hulk Hogan's Gawker lawsuit, The Guardian 26.05.2016. <http://www.theguardian.com/media/2016/may/26/paypal-co-founder-peter-thiel-admits-bankrolling-hulk-hogan-gawker-lawsuit> (accessed 26.05.2016.)

CHAPTER 3 – FREE MARKET FAIRNESS AND THE SECOND PRINCIPLE OF JUSTICE

Rawls' second principle of justice states that:

“Social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under considerations of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of the society.”

(Rawls 2005, 291)

These principles are known as fair equality of opportunity (FEO) and the difference principle (DP) respectively, with fair equality of opportunity being lexically prior to the difference principle⁹.

Traditionally, liberals embraced (some version of) equal opportunity (open positions or careers open to talent), but they could disagree on what it entails. Some authors consider that it is sufficient to remove legal barriers for individuals to enter certain positions, while the others believe in a more substantive conception which requires removal of social and conventional barriers. To achieve this more substantive conception, laws might be made to prohibit discrimination in private employment. The basic idea was that, when competing for positions, only thing that matters are qualifications relevant for the given positions, while ethnicity, race, gender or social position should not play a role. Rawls' idea of fair equality of opportunity goes beyond both of these and, in addition to open positions, it seeks to correct for social disadvantages (Freeman 2008, 88–89). Rawls states that:

[...] those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system. In all sectors of society there should be roughly equal prospects of culture and achievement for everyone similarly motivated and endowed. The expectations of those

⁹ Some authors argue that the parties in the original position would not assign any priority to the FEO (e.g. Arneson 1999; cf. Freeman 2008, 92–96), however Tomasi does not argue against the lexical priority of the FEO, therefore I will not discuss this issue in any detail.

with the same abilities and aspirations should not be affected by their social class. (Rawls 2005, 63).

In order to achieve the objectives of fair equality of opportunity Rawls believes that at least three institutional solutions are necessary (apart from requirements of non-discrimination): preventing large accumulation of wealth, providing equal educational opportunities for all, and high quality affordable health care for all citizens.

There are three main reasons for fair equality of opportunity. First, it is integral to the equal status of free and equal citizens. FEO, like basic liberties provides the social basis for self-respect. Second, people denied fair opportunity lack cannot experience the realization of self. FEO is essential for development of our “higher capacities” (in Mill’s terms). Finally, it complements the difference principle, as only the two, working together can establish a just distribution of income and wealth (Freeman 2008, 91–92).

It is important to have in mind that Rawls did not believe that it is possible to achieve perfect equality of opportunity. Factors like family, for example, make it practically impossible. What Rawls had in mind is more modest. He seeks to minimize the impact of social factors on prospects in one’s life.

The difference principle regulates economic and legal institutions, such as market mechanism, property rules, contract, inheritance, and so on, in order to create a system of economic and legal institutions which makes the least advantaged better off than they would be in any other regime. The difference principle does not regulate only the distribution of wealth and income, but also the distribution of other primary goods: powers and prerogatives of offices and positions of authority and responsibility and the social bases of self-respect. It does not apply directly to individuals but to institutions. Individuals are impacted only indirectly through rules and regulations created in accordance with the difference principle. By least advantaged, in Rawls’ theory, we have in mind (as a proxy) least advantaged working person, those who earn

the least and whose skills are least in demand. This is a consequence of his conception of society as cooperative, productive and mutually beneficial, with the idea of reciprocity on fair terms. That is sometimes criticized as leaving the disabled out of the scope of justice, however, for Rawls, disabled persons fall under the scope of remedial justice and not distributive justice. The final feature of the difference principle is that it does not require infinite growth and continuous improvement of the material position of the least well off. As difference principle is the criterion for the distribution of other primary goods as well, the expectations of the least well off can be improved by increasing their share of other primary goods (Freeman 2008, 102–12).

3.1 Free Market Fairness and Fair Equality of Opportunity

Free market fairness embraces the idea of fair equality of opportunity, although it seeks to provide it through, mainly, market mechanisms. As far as careers open to talents are concerned, Tomasi conceives a range of different market democratic regimes ranging from those who outright ban discrimination in hiring and promotion of workers to those who would leave the option to (private) employers to freely hire, promote and fire workers on any basis they want, be that race, gender, religious belief, or person's looks. As employment is a matter of contract the freedom to hire or promote workers falls under basic economic liberties, and any limit would have to pass high judicial scrutiny (Tomasi 2012, 241). Tomasi seems to believe that discrimination will not be an issue and this is based on the belief that the market will punish businesses which take into account anything else than qualifications for the job. However, this is highly unlikely in cases where there is a group (of any sort) which is discriminated by almost everyone (black citizens of the US, women, Roma). Furthermore, it is difficult to see how citizens could regard themselves as free and equal if they are denied a fair opportunity to compete for a position on the basis of race or gender, for example.

Unpaid internships, another feature of contemporary labor market, make achievement of the fair equality of opportunity impossible, if the economic liberties are protected as basic. Entry into many socially desirable careers presupposes a period of unpaid internship (from six months up to two years). Having in mind that they cannot be banned if the freedom of contract is basic freedom, these unpaid internships create a clear and significant disadvantage for the worse off when they try to pursue prestigious careers.

Tomasi claims that market democratic regimes seek to provide everybody with high quality education and healthcare. A market democratic regime would rely on de-centralized market-based provision of education and healthcare. Schools might have to be required to satisfy some minimal standards in literacy and numeracy, as well as to teach children their rights and obligations as citizens, but little more than that. Education could be financed by public, through vouchers, tax breaks, or even left to a “vibrant civil society”. It would put the decision on how much to spend on education and where in the hands of the family, especially so in the higher education. The market competition would lead to falling prices and increased choice and quality of education and healthcare (Tomasi 2012, 241–43).

However, as Arnold (2014) argues, market democracy cannot achieve the goal of fair equality of opportunity in education. First problem is that market democracies seek to provide *high quality* education, that, however, is not the same as *equal* education. Even if they do succeed in providing high quality education for all, this does not fulfil the purpose of FEO. Equal education is an egalitarian goal while high quality fulfills sufficientarian objective. Problem with sufficientarian approach in education is that education is a positional good and the value of a positional good depends on how much of it one has compared to others. So, high quality education is not enough to achieve the fair equality of opportunity if others have even better education. The structure of market democracies and the position of economic liberties as basic, prevents redistribution and cannot stop well off parents from paying for expensive education

for their own children, thus entrenching exactly those social circumstances FEO seeks to eliminate.

Additional problem is with the accent Tomasi puts on families, especially when it comes to higher education. Families are to choose where and how much to spend for education. However, this means that a prospective student will depend on her family's good will and ability to finance the higher education. Even if we imagine that the family can afford the costs of high quality education, they may decide not to for different reasons. Perhaps they do not value higher education, or they do not believe that girls should go to university, or perhaps that their child should study only a particular subject and are not willing to finance anything else. It could be argued that students can take loans in order to pay for their studies (if their family is unwilling or unable), but that would again put the worse off in an unequal position, as, unlike the wealthy, they would have to accrue high debts in order to finish their education and that would undoubtedly impact their prospects and achievements in life. Now, Rawls recognized that family plays a role (negative) for FEO, however the marked democracies would magnify the problem instead of minimizing it.

When it comes to FEO, there is at least one more fundamental problem with the inclusion of thick economic liberties in the list of basic liberties. Market democracy, according to Tomasi, affirms (a version) of fair equality of opportunity through guaranteeing access to high quality education and healthcare to all of its citizens. In order to finance those programs market democracy would have to resort to taxation (one way or the other). However, having in mind that thick economic liberties are basic liberties and the lexical priority these liberties have over the second principle of justice, they can not to be curtailed in order to satisfy any social goal. This creates an internal contradiction for market democracy, as it seems impossible to finance such programs without violating a basic liberty. In response to this sort of objection, Tomasi argues that this is not a problem for his theory, as in it property rights are not absolute (2014,

447). However, this does not seem to be a satisfactory answer. Other basic liberties are not absolute either, but they can be limited only in order to protect other basic liberties or a fully adequate scheme of basic liberties.

3.2 Free Market Fairness and the Difference Principle

Free market fairness endorses a version of the difference principle as well. Tomasi's theory aims to satisfy the difference principle by maximizing the absolute share of wealth and income for the worse off. This is to be achieved through "a strategy of wide private economic liberty, limited government, rapid economic growth, and by guarding the space within which a vibrant civil society might develop and grow." (Tomasi 2012, 230). This strategy will, according to Tomasi, "create an environment in which human industry, creativity and ambition can be unleashed in a way that is beneficial to all" (2012, 230). His focus on income and wealth is due to the weight Tomasi assigns to agency. By providing the worst off with maximum material means, it gives them fuel to pursue their own valuable plans and conceptions of good life. He claims that, not only market democratic regimes satisfy the difference principle, but they are morally superior to different social democratic regimes, as the best way to respect the freedom and equality of citizens is to maximize their personal wealth and income (Tomasi 2012, 237).

Before we proceed with the examination of Tomasi's claims an empirical detour is necessary. As we have seen before, Tomasi seeks to remove practical and empirical considerations from the process of the evaluation of market democracy. Never the less, he does have an empirical starting point which enables him to draw certain conclusions later, conclusions which I find problematic.

The empirical starting point is what he calls "The Great Fact: Economic Growth". Tomasi observes that, in the last (more-or less) 200 years, liberal democracies experienced growth rates

unprecedented in the history of humankind. Up until the XVII century there was no growth to speak of, but since 1820 growth of GDP per capita in the US has been 2% annually. Contemporary Americans are eight times wealthier than their ancestors at the beginning of the XX century were. The number is even higher if we move from simple measurement of inflation adjusted GDP per capita and factor in technological advancements and falling prices of some goods and services (Tomasi 2012, 58–60). Secondly, as Tomasi observes, in most developed societies (most of all in the US and the UK), the willingness to pay taxes in order to finance social programs is declining and the membership in trade unions is ever-smaller. Now, Tomasi admits that political philosophy is normative, and not “conducted by the opinion poll”, but he believes that might give enough reason to philosophers to “go back and check their moral premises” (2012, 67). Finally, Tomasi observes that the technological advancements changed the workplace. Gone is the hierarchical structure of industrial capitalism. New economy puts accent on personal services and consumer goods and new forms of organization are set-up in a way to encourage creativity and innovation. In new economy value is produced through innovation driven by creative individuals, as opposed to industrial economy where output was product of machines and unskilled labor backed by capital (Tomasi 2012, 63–65).

All of these observations may be factually true, but Tomasi fails to “look deeper” into the reality beyond simple numbers and visible phenomena. First, it is true that in the last one or two centuries we witnessed unprecedented growth in GDP per capita, but it is also true that the share of the richest part of society, whether it is top 10%, 1% or 0,1%, grew much more than everybody else’s. It is probably not a coincidence that the top earners saw their income skyrocket, while the average workers income stagnates, since the 1970’s. Exactly at the time when Tomasi might have observed the beginning of the fall in union membership and general liberalization of the economy. GDP per capita by itself does not tell us much about how the increased “cake” is divided. The fact Tomasi ignores is that even in 2015 in the US, one of the

wealthiest societies in history, over 45 million people receive food-stamps, which is a 16-fold increase since 1969.¹⁰ Out of this number, 14%¹¹ (over 6 million people) are employed and 58% of households receiving food stamps have at least one employed member.¹²

Meaning of the second of Tomasi's facts is not clear either. The opposition to taxation, minimum wage laws etc. is significantly stronger in the US than it is in other developed liberal democracies. This can mean two things: either there is something essentially different about the Americans as compared to French, for example; or the different socio-political systems produce citizens with different world-views and ideals. (As a side-note, younger Americans may still be warming to European-style social-democracy if the success of Bernie Sanders among young voters is anything to judge by.)

Finally, his third point, about changing economy does not produce clear-cut conclusions either. It is true that creativity and knowledge of new technologies bring serious premiums in the modern economy, but on the other hand those jobs are limited to the select few (relatively speaking). One of the features of modern companies is that they need to employ significantly less workers (by couple orders of magnitude) in order to produce same GDP per capita as traditional companies. Where these companies still employ lower-skilled workers they do not enjoy same salaries, perks and benefits as the innovative-creative elite. Recent expose of working conditions in Sport Direct warehouses¹³ illustrates that point. Furthermore, as value is

¹⁰ HNGN, 14.07.2015 <http://www.hngn.com/articles/109231/20150714/number-of-americans-on-food-stamps-exceeds-45-million-for-four-straight-years.htm> (accessed 05.05.2016.)

¹¹ CBPP, Chart Book: SNAP Helps Struggling Families Put Food on the Table <http://www.cbpp.org/research/food-assistance/chart-book-snap-helps-struggling-families-put-food-on-the-table#part5> (accessed 05.05.2016.)

¹² CBPP, The Relationship Between SNAP and Work Among Low-Income Households <http://www.cbpp.org/research/the-relationship-between-snap-and-work-among-low-income-households> (accessed 05.05.2016.)

¹³ Hazel Sheffield, The Independent, Sports Direct's 'Dickensian' working practices will spread exploitation in the UK, Unite says, 07.06.2016. <http://www.independent.co.uk/news/business/news/sports-directs-dickensian-working-practices-will-spread-exploitation-in-the-uk-unite-says-a7068766.html> (accessed 07.06.2016.)

created through creativity and innovation all the benefits (financial and otherwise) go to the small percent of people who hold creative and innovative positions. Additionally, Tomasi ignores the fact that big part of the growth of the GDP per capita, as well as changes in economy occurred in, what might be called, welfare-capitalist systems, which do not qualify as market democracies.

Now, Tomasi's argumentation for his opposition to any form of collective bargaining, minimum wages regulations and (most of) workplace regulations seems to hinge on the empirical premises discussed above. Furthermore, he assumes that the market-democratic regimes produce higher rates of growth than left-liberal regimes. He argues that in affluent societies, workers will have power over working conditions, they will be able to negotiate conditions of employment or find another, better job. Even Tomasi recognizes such outcome is highly unlikely and institutions of market democracy do not provide any guarantees that the newly-created wealth will end up in the hands of the poor. Here he resorts to the defense that his is an ideal theory and that it should be evaluated as such (Tomasi 2012, 190–95). There are at least three problems with his argument.

The first problem is that, in this case, his theory does not satisfy even the requirements of ideal theory. Namely, the sole mission of a business is to create maximal returns to investors (i.e. profit). High salaries, benefits and safe work conditions are all costs, and higher the costs are, the lower the profit will be. Therefore, employers will try to keep these costs (just as any other) on the minimum. The only way to create a situation in which workers, especially low skilled ones, who are supposed to benefit from market democracy, can demand better overall conditions (if they are to be determined through free market) is in the conditions of (near) zero unemployment. The United States have very low rate of unemployment (less than 5% in

2016)¹⁴, yet as we saw, that is not enough for lowest paid workers to negotiate decent conditions for themselves.

Now, Tomasi might say that, on ideal theory level, there is no reason why such rate of unemployment cannot be achieved. However, market democracy's commitment to free migration, free movement of goods and capital (possibility of outsourcing) and the fact of machine learning and automatization means that there will always be enough immigrants, possibilities to move production to another place or a possibility to replace (especially low skilled) workers with robots, to create a "reserve pool of labor", and keep salaries and working conditions low. I believe that his theory, in this case, does not comply with the basic law of economy: law of supply and demand. This law states that, in a free market, the prices (in this case of labor) are formed depending on the supply and demand. As there is practically unlimited supply of labor, wages cannot rise in the free market economy. Therefore, his theory fails to satisfy even the conditions of ideal theory on this account.

Second, even though market democratic regimes have a basic social safety net, they are opposed to redistribution through taxation (it is not even possible in such regimes due to the priority of economic liberties). They seek to accomplish the difference principle and improve economic situation of the worst off through indirect means, by the way of the operation of market. However, market democracies do not have any plan on how to deal with the unemployed, and we saw previously that some level of unemployment is inevitable. They are the worst off in the society, but they are not part of market distribution, which means that they can expect only the social minimum. Therefore, even if the theory works as it is supposed to work, the actual worst off (unemployed) are not part of the theory and there is no way to maximize their holdings of wealth and income (Arnold 2013, 397). Now, it could be objected that Rawlsian or (broadly

¹⁴ Bureau of Labor Statistics, <http://data.bls.gov/timeseries/LNS14000000> (accessed 07.06.2016.)

speaking) social democratic regimes also consider lowest paid workers to be the worst off and therefore ignore the unemployed. However, this is not entirely true. In Rawls' conception, the state apparatus would take measures to help unemployed to find a job, through education and retraining or perhaps through public works.

Third, as Arnold (2013) points out, if we do argue at the level of ideal theory, abstracting all questions of probability away, there is no reason to assume that, for example, property-owning democracy will perform any worse in terms of growth than market democracy. In that case, market democracy presents inferior version of justice, as property-owning democracy would provide the worst off with other basic goods, on top of the same amount of material wealth.

Tomasi's argument from agency can also be rejected on the basis of its focus on material means as a fuel for pursuit of plans and goals. While money is indeed necessary for the pursuit of various goals, it is not sufficient. What is needed for full agency is not only material means, but also skills, capabilities and attitudes relevant to agency, as well as social condition that include as little obstacles to the goal as possible (Arnold 2013, 402). Even if we accept that market democracies provide least well off with more all-purpose material means they are inferior when it comes to the provision of two other conditions for the exercise of autonomy.

Finally, even if we assume that free market fairness succeeds in achieving its goal of providing the worse off with greater material means, it does not mean that they will be able to pursue their goals as free and equal members of society. Tomasi says that he wants to provide the worst off with the opportunity to travel the world, develop themselves culturally, or "walk into the Ritz and order tea" (2012, 190). However, the special protection he designates for freedom of contract might make this impossible. As any market transaction is (in essence) a contract, and contract is free, therefore the management of the Ritz might decide that it will not serve certain racial, ethnic or religious groups. Worse off might have the opportunity to travel the world, but

they might be (justly) required to sit at the end of the bus. We might recall that Muhammad Ali was not allowed in a diner in his hometown because he was black, even though he was an Olympic champion and had sufficient material means to pay for his dinner. Same as with employment, freedom of contract impacts individuals as consumers. If a group is widely discriminated against, there is no guarantee that individuals belonging to that group will be able to pursue their ends even if they have sufficient material means.

CONCLUSION

In this thesis I have shown that: (1) thick economic liberties do not warrant the status of basic liberties; (2) even if they do, they would require the fair value protection; and (3) free market regimes cannot fulfill the requirements of free equality of opportunity and the difference principle even at the level of ideal theory.

Free market fairness faces a dilemma. The first option is to considerably limit the freedom of contract to prevent discrimination, and provide for the fair value protection of economic liberties, which implies a significant redistribution. This would, however, put it firmly in the left liberal camp.

The second option is to preserve thick formal economic liberties, but as we saw it would create a (almost) libertarian society, where any attractive conception of social justice cannot be achieved.

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