



Report on the European heritage of philosophical theorizing about justice

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Executive Summary (max. 1 page)

This report provides an introduction to the European heritage of philosophical theorizing about justice, including contemporary debates. A 'philosophical' approach to justice is one that takes normative questions seriously (broadly speaking, normative questions are questions about how the world ought to be). Since normative questions cannot be answered simply by collecting empirical evidence, they call for a rigorous approach which differs from that of empirical science. We outline three main methods philosophers have used to approach questions of justice: reflective equilibrium, rational reconstruction and critical interpretation.

We next explain many of the major questions of justice that have occupied philosophers in the European heritage, and outline the major competing answers: What are the grounds of justice? (i.e., how can the existence of claims of justice be explained); What is the shape of justice? (i.e. what are the main concerns of justice, and what kind of principles should regulate these); What is the site of justice? (i.e. is justice a feature of political institutions, personal character and actions, or social relations?); What is the scope of justice? (i.e. who has claims of justice on each other, and are there distinctive claims of global and/or domestic justice); Should we engage in ideal or non-ideal theorizing about justice? (i.e. do we need a theory of justice that abstracts from the particularities and complexities of reality, and sets out a model of perfection, or would we better focus on the realities of what we see and focus on making things a bit better).

In outlining these issues we provide an introduction to redistributive, recognitive and representation-based approaches to justice, and indicate ways in which personal and group identity, citizenship and social relations may bear on claims of justice.

We conclude by turning to the question of justice in Europe, and note an initial difficulty: mainstream philosophical theorizing about justice has almost uniformly approached justice as either a global or a national domestic matter. So an association of states such as the EU raises potentially novel issues. We nonetheless indicate how different philosophical views can ground alternative ways of thinking about justice in Europe. And in particular, we suggest that there are good prospects for a European theory of justice that puts the agency of citizens of a shared political system centre stage.

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I. Introduction

In our work package, we aim to provide ‘philosophical foundations for a European theory of justice and fairness’. In this first report, we summarize the European heritage of philosophical thought about justice. We first briefly sketch what distinguishes a philosophical approach to justice from other possible approaches to justice, by emphasizing the *normative* focus of philosophical theorizing about justice, i.e. a focus on questions not about how things actually *are*, but about how things *ought* to be (section 2). Next, we discuss what sort of methods can be used to justify normative claims about justice (section 3). Following this, we outline some of the major questions about justice that have drawn the attention of philosophers, and indicate how competing conceptions of justice arise from different answers to these questions (section 4). Finally, we reflect on the implications of philosophical theorizing about justice for justice in Europe in particular (section 5).

II. A ‘Philosophical’ Approach to Justice

Philosophical questions are, broadly speaking, the kinds of questions that cannot be answered simply by collecting empirical evidence. They are not questions like the following, primarily empirical, ones: Do women carry out a disproportionate share of childcare duties? Is there widespread support for the death penalty? Do most people believe that non-citizens deserve lesser rights than citizens? Does European law accord substantially different rights to minority religious groups than US law does? We could, at least in principle, answer questions like those by collecting and analysing empirical data: about the physical world, about the law, or about people’s beliefs.

The set of philosophical questions that are most relevant in the context of theorizing about justice are normative questions. The question: “What are individuals due as a matter of justice?” is an example of a normative question. Various empirical facts are certainly relevant to answering this question (facts about the nature of human beings and their basic needs, for example). But empirical facts cannot by themselves answer it. The law might have something to say, but then again, the law might be unjust. The question of what individuals are due as a matter of justice is a question not about how things actually are, but about how things ought to be – and you cannot leap from one to the other. This point is sometimes referred to as the gap between “is” and “ought”, or alternatively as the fact-value distinction, or as Hume’s Law. It is the point that you cannot derive a normative conclusion – a conclusion about how things ought to be – merely from factual claims about how things actually are. To attempt to do so is to commit the so-called “naturalistic fallacy”. If you want to deduce a normative conclusion, you must start with some kind of normative claim as one of the premises of your argument.

Normative claims are claims about things like values, reasons, and what one morally ought to do. Common sense tells us not just that people believe some things to be good, and that people believe some actions in some circumstances to be morally required, but: that some things, such as pleasure, really are good, while other things, like pain, are bad; that it really is wrong to torture children, irrespective of what some people may believe or have done; and that all other things being equal, if we could intervene to save either a smaller or a larger number of

lives, then we have a reason to save the larger number. These are common sense normative claims. But many normative questions cannot be answered simply by appealing to common sense normative claims, and anyway, common sense might be wrong. This is where philosophy enters the picture. If we cannot answer normative questions by appealing to common sense, or by going out and collecting empirical evidence, then we must answer them by philosophical reasoning

III. Methodology

The primary philosophical method is reasoning and critical reflection. But this is rather vague, and encompasses a range of possible approaches. In this section we will give an overview of methods which can be used to justify a normative theory of justice.

A. Reflective Equilibrium

The most dominant method to justify normative claims about justice is the method of reflective equilibrium, which was introduced in ethics and political philosophy by John Rawls (Rawls 1999a; see also Daniels 1979). Reflective equilibrium involves a three step process:

- 1) Begin with one's total set of *considered judgments* relevant to the domain, including intuitions about particular cases, general principles, and theoretical considerations relevant to the choice of principles. (*Considered judgments* are reasonably confident and stable judgments, in part because they have been formed under the sort of conditions that are platitudinously appropriate for the formation of reliable judgments generally – for example, not under the influence of a strong emotion or strong self-interest, and so on).
- 2) Scrutinize and adjust each of our considered judgments in the light of reflection, of each other, and of any new information we can gather, seeking to improve the coherence and plausibility of the set as a whole. Revise general moral principles that conflict with considered judgments about many particular cases and adopt principles that explain many such cases, for example. And vice versa: adjust one's considered judgments about particular cases in the light of one's judgments about general principles.
- 3) Continue working back and forth revising one's set of considered judgments until reaching, in the ideal, a maximally coherent and plausible system of beliefs about justice. The result is the (ideal) state of reflective equilibrium.

The distinctive claim of reflective equilibrium is that justification does not depend on an ultimate foundation of fundamental moral beliefs, but on the coherence between all moral and non-moral considerations that are relevant to the issue at hand. Reflective equilibrium offers a 'non-foundationalist' or 'coherentist' account of moral justification. Reflective equilibrium is non-foundationalist because it claims that there is no moral claim that

has a special justificatory standing independent from engaging in the process of pursuing reflective equilibrium. Reflective equilibrium is a form of coherentism because, according to this methodology, justification, as Rawls famously writes, “is a matter of the mutual support of many considerations, of everything fitting together into one coherent view” (1999a, 507).

B. Rational Reconstruction

Another influential methodological approach to justice is based in what Jürgen Habermas has labelled the method of ‘rational reconstruction’ (Habermas 1981, 1993). The idea is that the everyday pragmatics of rational social interaction in society can be reconstructed from a special interest in necessary presuppositions of such interaction. So the focus is not on our considered judgements, but on the normative grammar of our interactions. Habermas (1984/7) and his colleague Karl-Otto Apel (1998) have done this through their analysis of the necessary (Habermas) or transcendental (Apel) conditions of rational language use. They argue that as rational and communicative agents, human beings are bound to accept some minimal but pretty unshakeable presuppositions about their ability to make intelligible claims by which they set rules for themselves and others. Basically, the idea is that claims to the truth, correctness, and integrity of a statement which we see being raised in social institutions (including institutions of justice) can be answered with yes-or-no statements, and that in case of disagreement, agents can check the status of such claims by investigating which can best be defended in light of reference to the objective world (truth), the intersubjective world of social norms (correctness), or the subjective world of truthful statements (integrity). Human beings are bound by the counterfactual expectation that they speak the truth, abide by valid norms and are truthful in communicative interaction. This normativity implicit in the pragmatics of everyday rational language use is said to represent an Archimedean point from which we can judge the rational acceptability of all possible claims, including claims with regard to political and social justice.

What follows from this in political theory is a political conception of justice to which discursive rules for political communication or deliberation are central, rather than positive principles of justice. It is not the task of political philosophy to formulate substantive principles for the administration of justice, but to help unearth discursive rules for trustworthy political discourse about justice to which human beings are bound as reasonable and rational subjects (cf. Forst 2011).

Other neo-Kantians use a similar reconstructive approach to explore the necessary presupposition of *action* (versus interaction). For example, Christine Korsgaard (1996) argues that it is a precondition of agency that one treats one’s humanity – and by extension, the humanity of others – as valuable and as a source of reasons. According to Alan Gewirth (1978; 1996), justice consists in respecting the rights of individuals to whatever is necessary to be an agent, which, according to Gewirth, includes both the classical civil and political rights and quite far-reaching socio-economic rights.

An important difference between the method of reflective equilibrium and the method of rational reconstruction is that whereas reflective equilibrium starts with our contingent judgements about justice, the method of rational reconstruction tries to reconstruct the necessary presuppositions of action or interaction as such. The relevance of this distinction is that whereas the conclusions of reflective equilibrium may only have to be accepted by the people who share e.g. Rawls’ intuitions about justice, the conclusions of the method of rational reconstruction ought to be accepted by any possible agent or language user.

C. Interpretative Methods

The method in rational reconstruction is a method of interpretation of the basic normative grammar of our main social institutions and/or our self-understanding as agents. Central to this interpretation is the expectation that there is a rule-governed logic to various kinds of rational (inter)action. But most interpretative methods in political theory are more interested in articulating received normative traditions and their moral sources. Authors such as Charles Taylor (1989), Michael Walzer (1983), and Axel Honneth (1992; 2013) have claimed that practices and theories of justice are derivable neither from a theoretical reflective equilibrium (Rawls), nor from an understanding of rules for rational social interaction that are always already implicit in our language use (Habermas), but from culturally specific standards of practical wisdom embedded in the social and political institutions of given societies. Taylor and Honneth, for instance, have claimed that modern societies are characterized by a limited range of what Taylor calls 'constitutive goods of modernity' (such as the moral autonomy of the individual, the authority of knowledge, the authority of ordinary life, and individual authenticity). These are taken to be the true normative foundations of more formal and seemingly freestanding political conceptions of justice. This approach is central to most communitarian strands in political theory. Constitutive goods are at the heart of our shared moral traditions and practices, and our understandings of agency, ethics, politics and law have been developed in their light. According to this way of thinking, universalism in ethics must come not from transcendental presuppositions of agency proper, but from the gradual expansion of traditions-bound understandings of the good (Taylor 1989; Honneth 2014).

IV. Major Questions of Justice

Having outlined the nature of a philosophical approach to justice, and having said something about the variety of methods used in philosophical theorizing about justice in political philosophy, we now turn to a consideration of some of the broad questions about justice that have been addressed in the philosophical tradition, and some of the main answers that have been proposed and discussed. We'll use diagrams to indicate the major questions and the dominant responses, and then discuss them.

A. Grounds of Justice

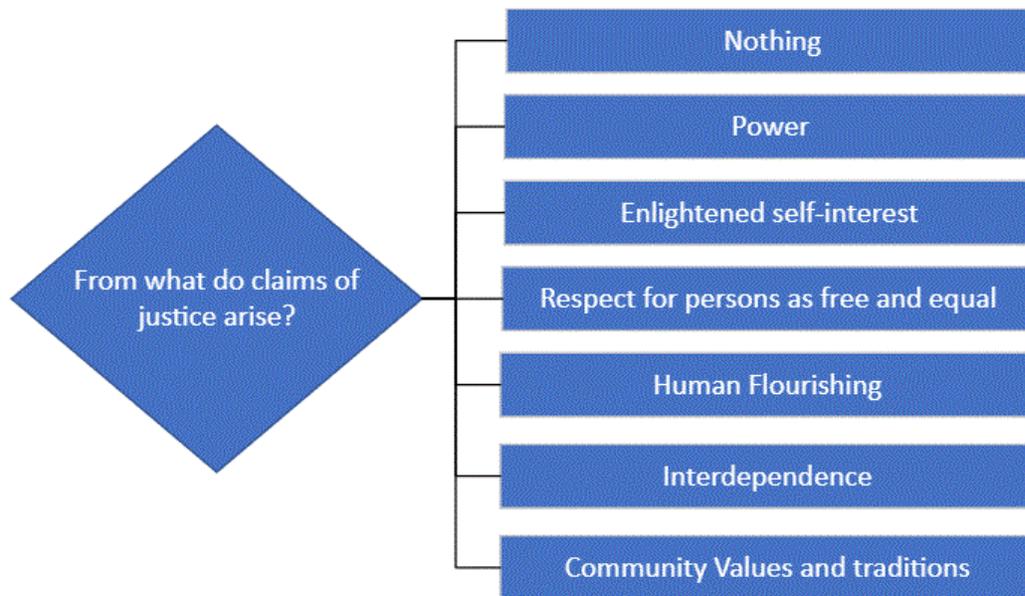


Figure 1: Grounds of justice

As we saw in section 2, a philosophical approach to justice involves consideration of primarily normative questions. Perhaps the most general of these is: What is everyone due? To be “due” something in this sense means to have a legitimate claim on others. This raises the question: where do these claims of justice come from, or in other words, what are the *grounds* of claims of justice?

Discussion of the grounds of justice in philosophy goes back at least as far as Plato’s ancient Greek dialogues, in particular, the *Republic* (1992 [380BC]) and the *Gorgias* (1979 [380BC]). The answer may be important in political terms because it has a bearing on which claims of justice we have, and on whom we have these claims. For example, if we follow Plato’s character Thrasymachus in his skeptical answer, we may decide that there are no legitimate claims of justice at all: “justice” is nothing more than a charade; in reality there is nothing more than the power of the stronger over the weaker. Plato’s character Callicles, who influenced Nietzsche (1990 [1886]), urges that an elite few have a natural right to rule over the many and to appropriate their power and possessions due to their strength and superiority.

A somewhat less skeptical answer is found in the *contractarian* tradition associated particularly with Thomas Hobbes’ great work *Leviathan* (1994 [1651]). According to contractarians, the claims of justice are a social contract justified by enlightened self-interest. Hobbes imagined a *state of nature* prior to government in which there was no security, since anyone’s life or resources could be taken by anyone else at any time. In such circumstances, pre-emptive attacks on others may be a rational means of defending oneself from potential future attacks, the unfortunate consequence of everyone engaging in these being that life for everyone would be, as Hobbes famously described, “solitary, poor, nasty, brutish and short” (*Leviathan* XIII. 9). Self-interest thus demanded that the individuals in the state of nature formed a mutual contract, and at the same time surrendered their power to an appointed Sovereign who was capable of giving protection and enforcing order and property

rights. While Hobbes himself envisages an inegalitarian and undemocratic state, later contractarians have argued for self-interested foundations for democratic, egalitarian systems of justice (see e.g. Gauthier, 1986).

Another answer, also based in enlightened self-interest, is found in the tradition of republican thought (Machiavelli 1989 [1532]; Pettit 1997; Skinner 1998). According to republicans, the claims of justice are based in a firm legal regime constituted by a citizenry the members of which have a fundamental self-interest in liberty, i.e., in having access to conditions of individual and collective agency that cannot be arbitrarily interfered with by fellow citizens and governments. Self-interest is seen as demanding that individuals become citizens under a firm legal and political system that enables them to build institutions that protect them from arbitrary invasions in their individual liberty. Not the sovereign is responsible for giving protection and enforcing order and property rights; ultimately, the citizens of the republic bear that responsibility, by giving themselves just laws and upholding these, under the leadership of leaders who are bound by and respect republican law.

An importantly different, though related, answer sees justice as a social contract justified not by self-interest, but by fundamental moral respect for others. The liberal contractualist tradition, rooted in the Enlightenment conception of persons as free and equal, as represented most strongly by Immanuel Kant (1785), is particularly associated with the influential work of American philosopher John Rawls, and with T.M. Scanlon (1998). Rawls develops a theory of justice grounded in a moral conception of the person which understands persons, to use Rawls' famous phrase, as "self-authenticating sources of valid claims" (Rawls 2003, 23). His theory claims to be non-perfectionist because it does not specify how persons should live, but only tries to secure the conditions under which persons can lead their lives independently and successfully. Rawls has claimed that the associated understanding of citizenship combines, in Benjamin Constant's famous words, the liberty of the moderns, conceived around an understanding of civil liberties warranted through individual rights, and the liberty of the ancients, participatory liberties in republican institutions (Constant 1988 [1819]; Rawls 1993).

A problematic question for social contract theories is whether the contract in question is supposed to be an actual or hypothetical one (that is, a contract we *would* or *should* have signed if we had been given the opportunity). If the social contract is an actual contract, then it seems plausible to say that we should obey its terms because we have consented to them. But, of course, there was no historical moment when we all explicitly agreed to live under the system of laws that (imperfectly) provides for justice. On the other hand, a merely hypothetical contract is no contract at all – in the words of one critic, G.A. Cohen, "A hypothetical contract, one might say, is not worth the paper it's not written on." So it's not obvious how appeal to a hypothetical contract can ground claims of justice, or a government's claim to political authority. One possible response to these difficulties is to follow a number of philosophers back to Plato, who have argued that we give *tacit* consent to the social contract by living in an ordered state and accepting its benefits. Common-sense moral principles of gratitude (to the state) or fair play (i.e., accepting a share of the burdens of a mutually beneficial system of reciprocal exchange), may support the claim that we have a duty to obey a system of law that is basically just, even when it is not to our personal advantage to do so. A *democratic* political system allows us to express our explicit consent for at least certain aspects of the coercive state structure, such as the empowerment of particular representatives, or enacting certain policies. Indeed, some theorists argue that through their democratic, political liberties, or *public autonomy*, citizens ideally guard and help formulate the laws that set the just terms under which they can exercise their individual liberties, or *private autonomy*. According to this view, which is best placed in the broad republican tradition of political thought, the exercise of active and deliberative citizenship in historically grown

institutions under the rule of law – not the imagined theoretical terms of an original contract – is the ultimate source of claims concerning justice (Habermas 1998).

Still another approach is to ground justice in some essentialist conception of human flourishing. Attempts to ground justice in some idea of flourishing are perfectionist, insofar as they hold that there is a specific way of life which enables humans to flourish. Certain republicans, going back to Aristotle, have argued that being an active citizen in a political community is an essential condition of a flourishing life. In contemporary philosophy, Martha Nussbaum has argued that certain human functional capabilities, such as the capability to live to the end of a natural life, to have good health, to form play and enjoy recreational activities, are essential to a flourishing human life. (Nussbaum 1990) In a less essentialist but still politically perfectionist vein, Joseph Raz has argued that members of modern, liberal societies need to be sufficiently autonomous in order to flourish in their pluralistic social forms (Raz 1986). According to this and similar views, the institutions of a just society would promote autonomy-enhancing social forms, which enable the living of sufficiently autonomous lives by society's members (cf. Honneth 2014). This is different from non-perfectionist Rawlsian liberalism, which finds its normative foundation in a more minimalist conception of fair social cooperation, and which attempts to remain neutral on questions of the good life.

Views such as Raz's and Honneth's are close to the Hegelian argument that our conception of ourselves as free and equal individuals depends on others recognizing us as such (Honneth 1992, 2014). Contemporary theories of recognition that emphasize the need for recognition by others and the harms of non-recognition and misrecognition are developed in the work of theorists such as Charles Taylor (1992), Axel Honneth (1992), and Nancy Fraser (1995). Other theories, in the feminist 'ethics of care' tradition, emphasize familial and other close relationships and their attendant responsibilities, duties and obligations over individual liberal rights (Tong and Williams 2016; for important theorists of the ethics of care see Held 2006; Kittay 1998). Such theories do not mean to normatively tie individuals to just one station in the fabric of social life and its roles. But they do stress that existing inequalities and interdependencies matter in answering questions of justice, politically as well as socially and in the family. Indeed, they have shown that practical and conceptual forms of exclusion from full citizenship based on identity underlie many experiences of injustice. The struggle for overcoming arbitrary exclusion from citizenship is an important ground of justice itself – it concerns respect for persons as free and equal.

Feminist theorists especially have done important work in unearthing shortcomings of theories of justice with regard to the recognition of women as equal members of society. Most importantly, they have criticized the strong division between 'public' and 'private' spheres in both liberal and republican accounts of justice and citizenship. In liberal theory, the private sphere is seen as the site of individual liberty, in which life, liberty, and estate are enjoyed. The public political sphere has instrumental value only; it is the space in which laws are formulated and rights are secured which need to be in place if private life is to flourish. As the head of family, men were understood to represent interests from the private sphere politically. This prevents women from exercising political rights – which has been a political reality in Western societies (Locke 1988 [1689]; Pateman 1989; Okin 1991; Leydet 2017). In classic republican theory, the public, political sphere is not seen as of instrumental value only, but as the realm in which the ethical goods of civic engagement and deliberation are enjoyed. It was conceptualized and practised as a sphere and hence as goods for male full members of the polity,

again resulting in the exclusion of women from debates about justice (Aristotle 1988; Okin 1992; Leydet, 2017). We return to these issues in section C, on the site of justice.

Finally, some political theorists reject altogether the attempt to ground justice in some universal 'Archimedean point' outside of any particular, existing community, and its associated set of traditions and values. *Communitarians* have criticized what they see as the liberal picture, in which unencumbered individuals choose their values *ex nihilo*, arguing that there is no such thing as a self apart from its communal attachments, and that the claims of justice cannot be universal, but must be a matter of interpretation of existing social structures, practices, institutions, and beliefs (see Walzer 1983; MacIntyre 1984; Sandel 1990). Certainly, the practice of interpretation of existing communal values has an important place in practical political argument, because an effective way to persuade another of some view is to show how it can be deduced from their existing commitments. But the opponents of communitarians worry that these views commit the naturalistic fallacy, illegitimately deducing how things *ought* to be from what *is* accepted by members of a community. In consequence, communitarians may embrace moral relativism, and may have a tendency to affirm the status quo even when the status quo is oppressive to some; failing to sufficiently question the social practices and systems of value as they exist in particular communities.

Related to the question of the grounds of justice is the question of political authority. States exercise the monopoly of power within their jurisdiction. Thus, they coerce individuals (and other type of entities) to obey their laws, i.e. they have de facto authority over their subjects. Democratic states worthy of the name, however, claim that they have authority in the normative sense as well: their subjects have good normative reasons to accept their de facto authority. These states have legitimate political authority (see Christiano 2013).

Anarchists deny that any morally acceptable state authority is possible and claim that fundamental freedom and equality of persons make legitimate political authority impossible (Wolff 1970). Some who try to defend political authority against the anarchist challenge argue that legitimate political authority is possible based on the (adequately defined) consent of the governed (see e.g. Estlund 2005), or based on the idea of fair play (Klosko 1987). Others argue that certain special relationships exist within a political community that grounds the legitimacy of political authority (Dworkin 2011).

B. The Shape of Justice

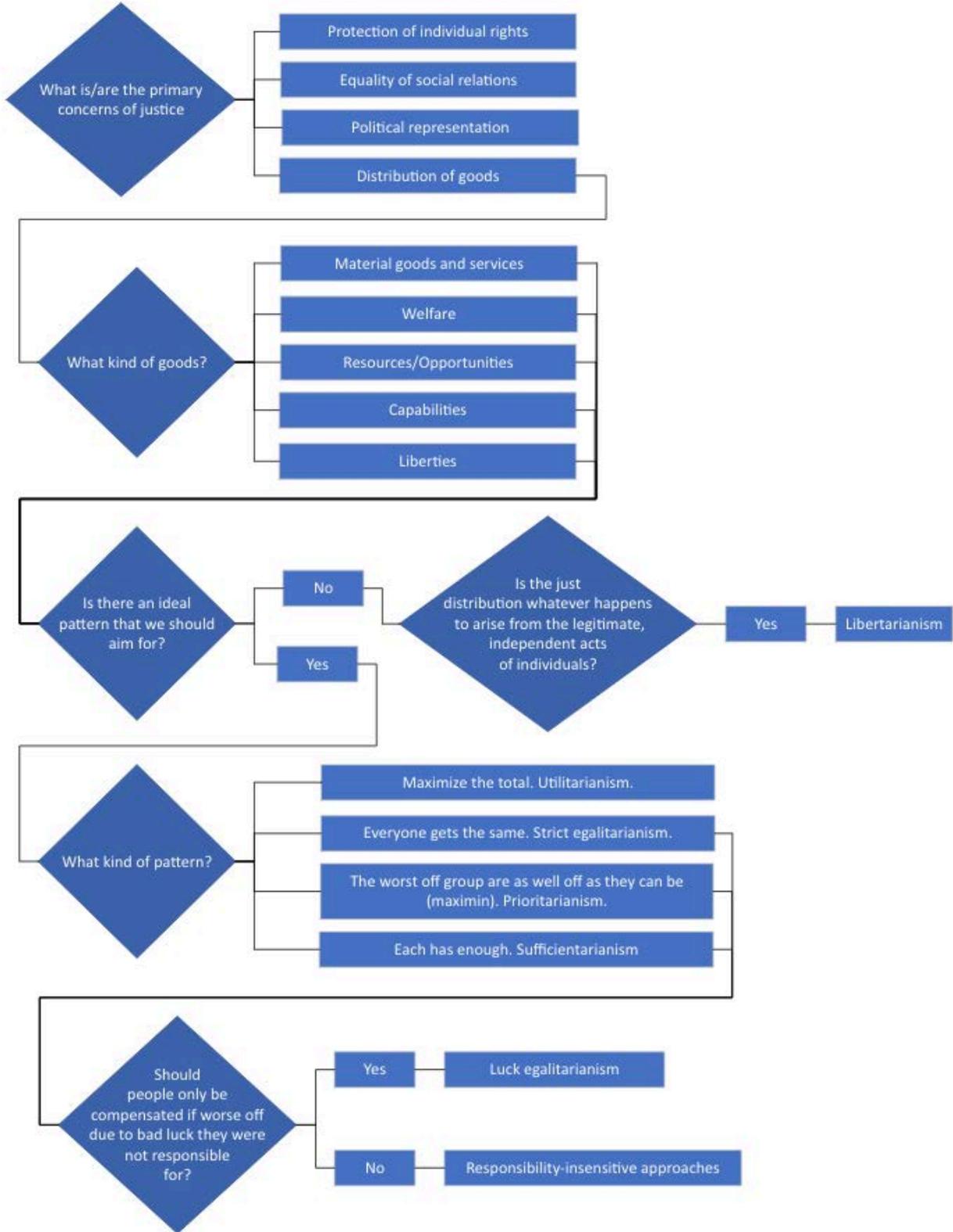


Figure 2: The shape of justice

Now we have described some different views about the *grounds* of justice claims, we turn to the *shape* or *principles* of justice. Just about everyone can agree that political justice is a matter of treating people as equals. The rub comes in working out exactly what it *means* to treat people as equals, in the way that is relevant to justice. Following Rawls, we can here make a distinction between a *concept* and a *conception* of justice. The concept of justice refers to the question that a theory of justice tries to answer – ‘What is everyone due?’ or ‘How should the burdens and benefits of social cooperation be distributed?’ A *conception* of justice gives a specific answer to this question, e.g. in the form of a set of principles of justice, or a normative theory. Most people certainly have a concept of justice, but few have a fully-fledged conception. One of the tasks of political philosophy, as Rawls conceives it, is to work out a plausible conception of justice.

It is important to note that justice in political philosophy is often, but not always, conceived in (purely) distributive terms. Conceived in these terms, an ideally just society would be one in which some set of goods (and perhaps burdens, as well) is distributed in a fair way. To yield a conception of distributive justice, a theory of distributive justice needs to tell us which goods (the metric of justice), should be distributed in what way (i.e., it needs to tell us what are the distributive principles of a just distribution).

Different theorists have put forward different proposals for the metric of distributive justice. For utilitarians, the metric is ‘utility’ or welfare (Mill 1861; Bentham, Sidgwick 1874). Other theories mostly consider justice to be primarily concerned not with distribution of outcomes (welfare), but with distribution of opportunities, or the things that give us opportunities. For libertarians or classical liberals, the metric may be negative freedoms or liberties; that is, the absence of constraints, barriers or interference by others (Berlin 1958). John Rawls’s influential liberal theory treats as metrics both basic liberties (freedom of thought, freedom of association, freedom to vote and to hold political office, and so on) and other so-called ‘primary goods’. Primary goods are all purpose means for leading your preferred plan of life, such as basic liberties, opportunities, income and wealth and the social bases of self-respect. In recent years, Amartya Sen and Martha Nussbaum have argued that the metric of justice should neither be welfare, basic liberties or primary goods, but ‘capabilities’: real opportunities to do and be what individuals have reason to value (Sen 1999; Nussbaum 2001). One of the most important arguments for using capabilities instead of resources like primary goods as the metric of justice is that individuals have different abilities to transform resources into things they value in themselves (proponents refer to these different abilities in terms of ‘conversion factors’). For instance, some people need a wheelchair to be able to move around. What is important, according to proponents of the capability approach, is that we have the same capability (in this case mobility) not that we have the same amount of resources (such as money to buy wheelchairs).

The second requirement of a distributive theory of justice is a distributive principle. Since utilitarians believe in a duty to maximize utility, they adopt a maximizing distributive principle: welfare should be distributed in such a way that its sum total is maximized. It is clear that a maximizing distributive rule indeed treats people equally in one way: no unit of welfare counts more or less than any other, no matter whom it belongs to. But we might be doubtful that this is the kind of equal treatment that embodies justice, since it allows for extreme inequalities in welfare. Can it really be a just society if some are left extremely badly off – worse off, perhaps, than they could have been, in order to enable a slightly greater benefit to flow to others who are already extremely well off? Such considerations lead others to adopt different views. One is strict egalitarianism, according to which everyone should get the same amount (Nielsen, 1979). One potential problem with this view is that maintaining it over time

would require constant, coercive interference, since even if you start off with an equal pattern, people are unlikely to want to use their resources in a way that maintains strict equality. Another is that a strictly egalitarian distribution may be inefficient; leaving everyone worse off than they might otherwise be if some inequalities were permitted. (Consider what the effects of a strict egalitarian rule for income might be, for example.) An alternative proposal that may be a bit less susceptible to these objections is prioritarianism, according to which inequalities are permitted, as long as permitting deviation from strict equality serves to benefit the worst off group (Rawls 1999 [1971]; Parfit 1997). Another distributive rule that has often been defended is sufficientarianism, according to which everyone should have *enough*, or sufficient to meet a basic threshold for a good life. According to this view, if everyone were sufficiently well off, inequalities wouldn't matter from the perspective of justice (Nussbaum 2001; Frankfurt 1987; Raz 1986).

A single theory of justice can include more than one of the above distributive principles in combination with different metrics. An interesting example of such a combination is found in John Rawls's influential theory of justice, which gives two basic principles for the regulation of social institutions, in a lexical order (i.e. the first principle is to be prioritized over the second). The first principle states:

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all [the 'principle of equal basic liberties'] (Rawls, 1999 [1971], 266)

The second principle states:

Social and economic inequalities are to be arranged so that they are both:

(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, [the 'difference principle'] and

(b) attached to offices and positions open to all under conditions of fair equality of opportunity [the 'principle of equality of opportunity'] (Rawls, 1999 [1971], 266)

Much of the theorizing about justice in Europe since Rawls's landmark work has been directly or indirectly, in one way or another, a reaction to it. One reaction was that Rawls's theory of justice was supposedly insufficiently sensitive to individual choice or effort, which many people believe makes a difference to how much people deserve. If some people deserve more than others and everyone gets what they deserve, then the fact that there is an inequality between them should not be considered a bad thing, from the perspective of justice. So, an additional concern of many theories of distributive justice is to specify when a departure from the otherwise favoured distributive pattern can be justified.

Luck egalitarians believe that justice requires us to neutralize the effects of bad luck on outcomes, but allows for unequal distributions whenever these result from our choices, or matters over which we had control. Many luck egalitarians also seek to distinguish between the effects of unchosen brute luck, the effects of which they believe should be neutralized, and the results of calculated gambles, or chosen option luck, the effects of which should not. In practice, drawing a line between outcomes that result from bad brute luck and those that do not turns out to be a complex problem. The effects of choice and luck on outcomes are intermingled and, as Rawls noted, one's entire starting point in life, including one's natural capacities, one's environment, even one's propensity to exert effort, seems to be the result of natural and social luck (Lippert-Rasmussen 2014). (For important work in luck

egalitarianism, see Dworkin 1981; Cohen 1989; Arneson 1989; Van Parijs 1995; Williams and Casal 2004; Lippert-Rasmussen 2016.)

In this discussion it has so far been assumed that a distributive principle will favour a particular distributive pattern, such as strict equality or the sufficientarian principle. The libertarian philosopher Robert Nozick notably denied this (Nozick 1974). According to Nozick, the question of whether a distribution of property is just is not to be answered according to whether it represents some favoured pattern, but by determining whether it has the appropriate sort of history. According to Nozick's *entitlement theory*, a distribution of property is just if it is the product of just initial acquisition followed by any number of just transfers. Suppose, for example, that you can justly acquire pieces of previously unowned land by labouring on it, and that you can justly transfer it by voluntary exchange. Then *any* pattern of land distribution of land is just, provided it came about as a result of just initial acquisitions together with any number of voluntary exchanges. Indeed, Nozick argues, it would be unjust for a state or anyone else to come along and forcibly interfere in order to bring about some favoured pattern, since this would violate the entitlements of individuals to property that they have *ex hypothesi* justly acquired. Though Nozick's entitlement theory can be cast as a theory of distributive justice, it may be clearer to view it as a different kind of theory of justice altogether, since it treats justice primarily as a matter of equal protection of individual rights rather than a theory of just distribution. Though Nozick and the majority of libertarian philosophers in recent years have been US Americans, the theory has its roots in the work of the English Enlightenment philosopher John Locke (1690), who considered justice to consist in respect for every person's natural and absolute rights to self-ownership, ownership of private property, and freedom from harm. And even though the nineteenth century English philosopher John Stuart Mill was a utilitarian, he too associated justice with the protection of individual rights, famously arguing for a so-called 'harm principle' that he believed guaranteed liberal rights such as freedom of conscience, freedom of speech, and the right to live the life of one's choice: 'The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.' (1978 [1859], 9).

Relational egalitarians have also been critics of a distributive conception of justice, arguing that a 'quantitative,' or 'arithmetic' ideal of equality that focuses on the distribution of certain goods is mistaken, or at least incomplete (Young 1990). According to relational egalitarians, what is fundamental to a just society is not any particular distribution of goods, but an egalitarian character of social relations, i.e. in the way in which individuals relate to one another within a political community. As Elizabeth Anderson (2012) points out, relational egalitarians have criticized three kinds of social hierarchies: 1) hierarchies of domination and command, 2) hierarchies of standing, and 3) hierarchies of esteem. To be dominated by another is to be subject to their arbitrary will. Even if someone is not in fact coercively interfering with my choices, I am under a condition of domination if others *could* do so should they choose, arbitrarily, to do so (paradigmatic examples of such domination would be slaves under the power of a well-disposed master, or colonial subjects lacking democratic rights under the power of a benevolent administrator). Freedom from hierarchies and power relations that permit such domination is a *republican* conception of political liberty (Anderson 2012, 43; Pettit 1997). Egalitarians object to social systems with hierarchies of standing where 'those of higher rank enjoy greater rights, privileges, opportunities, or benefits than their social inferiors' (Anderson 2012, 43). This critique, and rival conception of equality has been put forward and defended by David Miller (1997), Jonathan Wolff (1998), Elizabeth Anderson (1999), and Samuel Scheffler (2003). Equality of esteem requires a society where no individual is assigned to an inferior role based on feelings such as disgust, contempt, and fear, and consequently they are not subject "to

ridicule, shaming, shunning, segregation, discrimination, persecution, and even violence” (Anderson 2012, 43; see also Anderson 2010, Nussbaum 2004; Wolff 1998). Theories in the Hegelian tradition based on *recognition* are also relational egalitarian theories in this sense (Taylor 1992; Honneth 1992; Fraser 1995). Theories of recognition, Honneth’s in particular, have separated principled forms of equal respect in morality and law from a meritocratic conception of esteem as related to the execution of social roles in modern society. This is helpful in developing a framework for the normative evaluation of questions of desert in post-traditional societies (Honneth, 1992; 2014). One reason why people may suffer from lower social standing or face other obstacles is because they belong to minority groups that are ethnic, cultural, linguistic, gendered or religious in nature. *Multiculturalists* argue that to mitigate these problems, states should actively recognize and accommodate such groups, by giving special rights to individual members of these groups (so called “group-differentiated rights”, such as the right of turban-wearing Sikhs in many jurisdictions to exemption from motorcycle helmet laws), or by giving the group as such special rights (“group rights”, such as the rights of indigenous populations to self-governance) (Song 2017; Kymlicka 1995). The notion of group-rights or collective rights is not unproblematic, however, since groups need to be represented in wider social and political institutions. The need for representation creates new hierarchies within groups, which may well be gendered, cultural, linguistic or religious themselves. Here, new questions of relational egalitarianism appear (Barry 2002).

A further fundamental concern for theories of justice outside distributive questions is the question of *representation*. At a fundamental level, there are those who argue that not principles of distribution but principles of political participation and voice are fundamental in thinking about justice. Ultimately, politics – including the politics of distribution – is about power. According to some, the variations of egalitarianism discussed above can only gain trustworthy forms of social and political power through stable politico-legal institutions that lend fair democratic access and voice to the ultimate addressees of questions of justice and injustice: citizens. Authors as diverse as Hannah Arendt (1958), Jürgen Habermas (1998), Claude Lefort (1988), Chantal Mouffe (2000), Philip Pettit (1997) and Quentin Skinner (1998) would accept this primacy of politico-legal institutions and agency. An interesting account is given by Nancy Fraser (2008), who distinguishes three aspects – recognition, redistribution and representation – which she deems equally fundamental to the concept of justice.

With regard to representation, from a more practical point of view, there is the question over whether a just political community should be a direct, or representative democracy. Jean-Jacques Rousseau’s *The Social Contract* is a prime work for the former position, while Edmund Burke (1987 [1790]) and John Stuart Mill (1991 [1861]) famously argued for the latter view. There is also a lively contemporary debate what is the best form of representation within the framework of representative democracy. The three main types of political representation are single member district representation, proportional representation and group representation (Christiano 2015). Charles Beitz (1989) holds that the single member district representation serves the goals of justice best, because of its good consequences, as it results in a two-party system where party programs become more moderate. Proponents of proportional representation think that the system of proportional representation ‘requires that parties be relatively clear and up front about their proposals, so those who believe that democracy is ethically grounded in the appeal to equality tend to favour proportional representation’ (Christiano 2015; see Christiano 1996, chap. 6). Supporters of the group representation system argue that none of these former types of representation is satisfying because both single member district and proportional representation allows the systematic defeat of certain social groups (Young 1990, chap. 6).

C. The Site of Justice

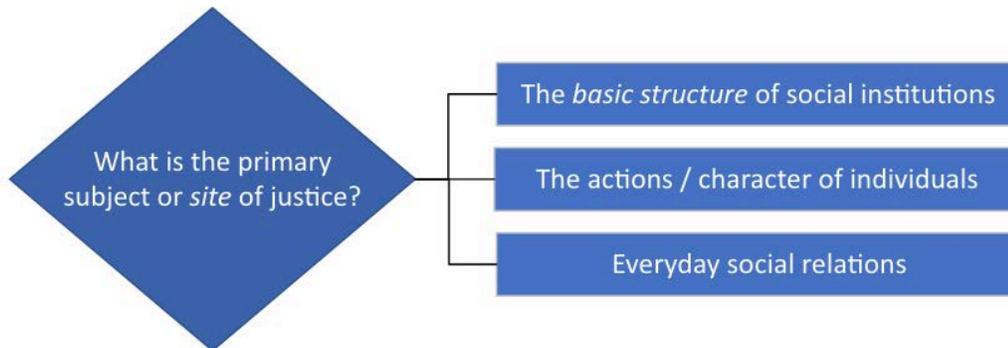


Figure 3: The site of justice

We have now described some different views about the grounds, concerns, principles, and metrics of justice. But we have not yet said anything about *what* kinds of objects (institutions, individual actions, etc.) principles of justice apply to (the *site* of justice), nor *who* are the persons that justice entitles to make claims and have responsibilities to each other (the *scope* of justice). We address these questions in order, in this sub-section and the next.

A main divide over the *site* of justice is between theories that consider it sufficient for the existence of a politically just society if *social institutions* are shaped according to principles of justice, and theories that hold that a politically just society is impossible unless the principles of justice shape private, personal behaviour and actions as well. Rawls' (1999a) theory held that the principles of justice as described above are to be applied only to the design of what he called the *basic structure* of society. The basic structure is the system of the main political and social institutions that determine the fundamental terms of social cooperation, such as the constitution, the system of property rights, the economic structure, and the laws regarding familial rights and obligations. G.A. Cohen (1997) criticized Rawls for ignoring unjust power relations and inequalities that can occur due to people's private choices even within a just basic structure. Cohen argued that a just society requires that people develop an *ethos* of justice that guides their individual choices even within a system of just rules. Liberal perfectionist authors such as Joseph Raz have developed similar arguments (Raz 1986). This is a matter of character: of citizens sharing core ethical dispositions that are geared towards making choices that do not conflict with but will strengthen a just basic structure. The site of justice issue has also been a main concern of feminist critics of mainstream political theory; indeed Cohen himself cites the feminist slogan 'the personal is political' in laying out his own critique of Rawls (Cohen, 1997: 3). Many feminists have argued that by naively focusing on public institutions of politics, society and economics, liberal theories of justice have traditionally neglected structural forms of injustice within the family and so-called private sphere. These have been regarded as placed outside the public domain. (Pateman 1987; Okin 1989; MacKinnon 1987). Theories of recognition and critical social theory have made much the same point; Axel Honneth has recently published contours of a theory of justice for the family embedded in a more fully encompassing theory of freedom and justice (2014).

From a more social theoretical perspective, what is at stake here are matters of informal status and standing in liberal-democratic societies that increasingly acknowledge the existence and experience of difference in social relations. Much of the agency and character of citizens with regard to matters of justice concerns their reaction to the experience of difference in the social and political world. This is to say that the site of justice question has become deeply politicized by the experience and broad acknowledgement of difference as a subject matter of justice. Furthermore, critics have argued that the modern Western concept of citizenship as defined by an individual's holding of civil, political and social rights has been blind to consequences of this generalized framework for individuals in their situated perspectives (Anderson 1999; Young 1990). Claims for 'differentialist' conceptions of citizenship, which call for a greater acknowledgement of the political relevance of differences with regard to culture, gender, class, and race have sprung from these debates. This has led to a greater recognition of the pluralistic character of the democratic public, and to pleas for differential treatment of specific groups in society, for instance through the granting of minority rights in multicultural societies (Kymlicka 1995; Leydet 2017). Contemporary republican and deliberatively democratic theories may be more open to recognizing these sites of differentialist justice (Fraser 2008; Forst 2011) than liberal theories that may be accused of privatizing matters of difference and identity (Rawls 1993; but cf. Okin 1989).

D. The Scope of Justice

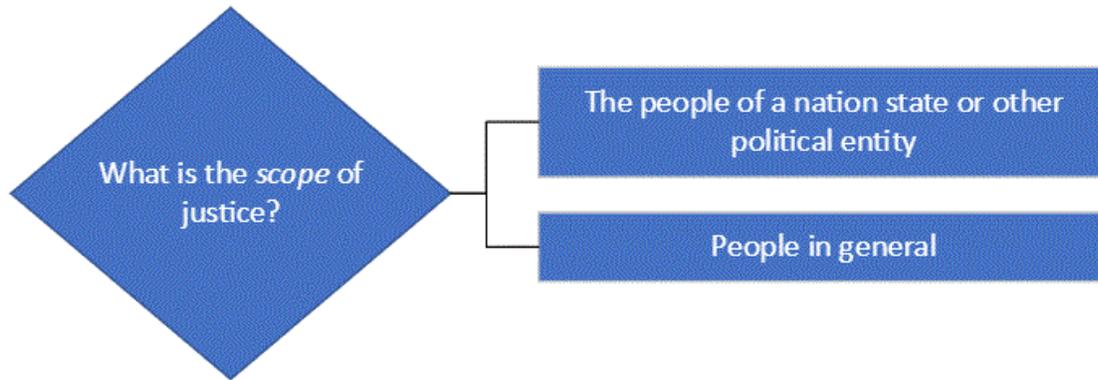


Figure 4: The scope of justice

We now turn to the *scope* of justice. This is the question of *who* the principles of justice apply to. Do principles of justice apply only to fellow citizens of a nation state (or perhaps to an institutionalized system of nation states such as the European Union, an issue we return to in the next section), or do they apply beyond borders to people in general? *Moral cosmopolitans* claim that principles of justice (for example, egalitarian distributive principles) have a global scope, applying to people everywhere. Moral cosmopolitans divide among themselves between *moderate moral cosmopolitans*, who believe our duties to provide assistance to the distant needy are partially mitigated by special duties we have toward our compatriots (e.g. Scheffler 2001), and *strict moral cosmopolitans*, who believe that the principles of justice should make no distinction between our compatriots and everyone else (e.g. O'Neill 2000; Caney 2005). Both these positions contrast with that of *anti-cosmopolitans*; those communitarians who argue that our obligations to our compatriots either 'crowd out' duties toward people with whom we do not share any special relationship, or that there are no obligations whatsoever beyond the realm in which we have communal ties (Kleingeld and Brown 2014; for an important anti-cosmopolitan work, see MacIntyre 1984).

Much of the recent debate concerning cosmopolitanism has arisen in response to Rawls. Rawls himself did not think his second principle of justice, concerning the distribution of primary goods, applied globally, but only to fellow citizens subject to shared institutions within a state. One might wonder how this is consistent with Rawls's liberal assumption of fundamental moral equality between all human beings, but Rawls worked from the simple assumption that principles designed to regulate the basic structure of institutions do not apply beyond their limits. He also had more prudential reasons for not wanting to export his principles of justice to states that cannot be characterized as politically liberal (Rawls, 1999b).

There is, however, a vigorous debate about whether there are in fact global institutions that entail cosmopolitan principles of distributive justice on Rawlsian grounds. *Right institutionalists*, as Michael Blake and Patrick Taylor Smith (2015) label them, deny that such global institutions exist. Consequently, they sharply distinguish between domestic and international justice on Rawlsian grounds, leading them toward an anti-cosmopolitan stance that

severely limits distributive obligations to foreigners (Blake 2001; Nagel 2005; Freeman 2007). *Left institutionalists* agree with right institutionalists that demands of justice are triggered only when we are participants in shared institutions, but argue that the institutions of international politics and trade are sufficient to trigger robust distributive obligations, leading them toward a cosmopolitan stance (e.g. Moellendorf 2011; Cohen and Sabel 2006; Sangiovanni 2007; for an overview of the debate see Blake and Smith 2015).

Within the moral cosmopolitan camp, we turn finally to a debate not about the scope of justice, but about how best to realize it, given that its scope is cosmopolitan. *Institutional* or *political cosmopolitans* claim that justice requires the establishment of global institutions, something like a world government. *Statist cosmopolitans* on the other hand claim that an (adjusted) Westphalian system of states can institutionalize cosmopolitan justice. Most moral cosmopolitans can be located somewhere in between these two extremes (for a good overview see Kleingeld and Brown 2014).

E. Ideal and Non-Ideal Justice

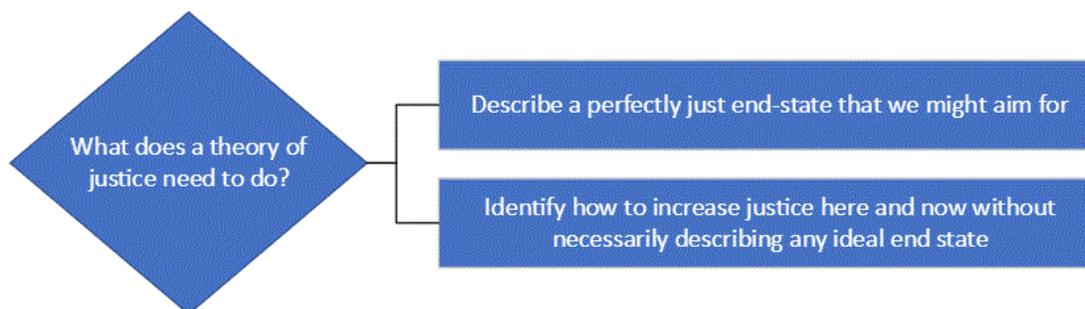


Figure 5: Ideal and non-ideal justice

Finally, we must draw a distinction between *ideal* and *non-ideal* theories of justice. Unfortunately, this terminology is used to draw quite different distinctions, which are not always clearly distinguished by philosophers using the terms (Valentini 2012).

In one sense, the distinction between ideal and non-ideal theories can be understood as the difference between *end-state* and *transitional* theories, as shown in the diagram above (Valentini 2012). Rawls's (1999a) theory is an end-state theory in this sense, since it sets out to describe a *fair* and *well-ordered* society, in which not only is the basic structure just, but citizens accept the principles of justice and the justice of basic structure, and recognize that their fellow-citizens accept it too. The problem with end-state theories is that they don't directly tell us much about what we ought to do in the here-and-now, in societies which are far from the ideal. Other theorists have argued for *transitional* theories that lay more emphasis on how we can identify and correct glaring injustices. Some theorists claim that for this purpose, we do not need to know what an ideal society would look like (Young 1990; Mills 2005; Sen 2009; Wolff 2015).

A second way of understanding the distinction between ideal and non-ideal theories is as a distinction between theories that assume that all agents comply with the demands of justice (*full compliance*), and those that assume only *partial compliance* (Valentini 2012). The obvious attraction of idealization in this sense is that it makes

analysis more tractable. The risk is that it takes us too far from where we stand for the theory to provide useful guidance. For example, in a full compliance condition, we would only need to do our fair share to prevent injustices. But what should we do when compliance is only partial? For example, what are our duties with respect to global warming when others do nothing? Should we then do more than, less than, or just what would be our fair share in a full compliance condition? The answer seems to hinge on contingencies of the particular problem at stake (Valentini 2012, 655; Miller 2011).

Finally, we can understand the distinction between ideal and non-ideal theories as one between *utopian* and *realist* theories (Valentini 2012). The most prominent example of a utopian theory is that of G. A. Cohen (2008). Utopian theories treat justice as a timeless value that is not bound by substantial concessions to contingent facts on the ground, such as observations about human nature, real world political disagreements, and so forth. This means they do not so much tell us what we should *do* in the world we live in, as how to *think* about what kind of world would be ideal. Rawls describes his own theory as ideal insofar as it assumes full compliance, and that natural and historical circumstances are favourable, including the stipulation that society is developed enough economically and socially for justice to be achievable (Rawls 1999b: 8). But Rawls' theory is designed in a realist way insofar as it assumes the facts about moderate scarcity, limited altruism, and the conflicts that arise between individuals with differing goals and values. Rawls's principles are thus designed for "beings like us, in circumstances similar enough to those in which we live" (Valentini 2012: 658). Cohen critiqued Rawls' theory for being too fact-dependent, and hence not utopian enough. Other critics have targeted Rawls from the opposite side: arguing that his theory of justice is not realist enough, because it fails to take seriously what they regard as relevant facts about real world politics, such reasonable disagreement about justice (Waldron, 1999), or existing power-structures, accepted practices and beliefs, and facts about the shortcomings of human nature (Williams, 2005; Galston, 2010; Geuss, 2008).

V. Justice in Europe

Most existing theories of justice are either theories of domestic justice, placed in a paradigm of liberal nationalism, or postnational theories of global justice and citizenship (Leydet 2017). That is, most theories either claim that justice is a relation that can only hold between fellow-nationals of a liberal-democratic state (domestic justice), or they claim that relations of justice can hold between all human beings (global justice). In recent years, there has been a growing interest in the question of justice in Europe among political philosophers, which has resulted in a debate between these two major positions. We will give a brief overview of this literature.

Liberal nationalists argue that in today's complex and diverse societies, the institutions and shared political practices of a nation state are a necessary condition of the level of social integration that democratic citizenship requires. As experiences with the rapid diversification of contemporary societies and problems of social integration of 'new' citizens have shown, shared languages, civic codes and traditions, and political history have been important elements of the levels of civic solidarity in liberal-democratic societies since the Enlightenment. Liberal nationalists claim that, now more than ever, a continued care for this social fabric of liberal-democratic citizenship within the borders of a national state is important (Miller 1995; Kymlicka 2001). This argument, which integrates communitarian thought in the liberal account of the nation-state, does not in itself stand in the way of

the existence of a European Union, but conceptualizes it as a loose union of sovereign, justly ordered nation-states that seek cooperation on the international level.

For postnational theorists, justice at a European level would be a (first) necessary step towards cosmopolitan justice at a global level (Cabrera 2005). Postnationalists hold that the link between the nation-state on the one hand and a just constitution and a shared civic identity on the other hand is a contingent rather than a necessary one. Postnationalists focus on legal and political institutions of democratic citizenship. They argue that it is exactly because we can no longer count on taken-for-granted shared languages, civic codes and traditions and a shared political history, that the old nationalist assumptions of civic integration no longer work (Habermas 2012). Indeed, the argument is that the way forward is a focus on a shared morality of human dignity and human rights rather than on historically grown national traditions. According to Habermas, the *only seemingly necessary link* between liberal-democratic institutions and national identity stands in the way of finding satisfactory answers to challenges of justice and citizenship in Europe today. Once the normative core of liberal-democratic institutions is linked not to national identity but to a shared morality of human dignity, a postnational account of European justice and citizenship becomes visible (Habermas 2012).

Another influential approach is the *institutionalist* approach to justice according to which obligations of social justice are only triggered in the presence of relevant forms of social interaction, as discussed above (section IV. D.). This approach is influenced by Rawls' idea that justice concerns arise only in situations in which individuals cooperate for mutual benefit – and that principles of justice apply only to the basic structure under which this cooperation takes place. This Rawlsian approach is applied to justice in Europe by Andrea Sangiovanni (2013). According to Sangiovanni, the EU is “an attempt to support the interests of each of its member states in enhancing both growth and internal problem-solving capacity (including the capacity to act on domestic commitments to national solidarity) against a background of regional stability” (Sangiovanni 2013, 16). Because some member states gain more than others from integration, Sangiovanni tries to spell out which principles should regulate this specific kind of interaction. In contrast to the more principled liberal nationalist and postnationalist positions, for Sangiovanni the content of fundamental principles of social justice varies with the type and extent of social interaction involved, meaning that the content of justice in Europe will not be the same as that of domestic justice, nor that of global justice.

VI. Conclusion

We have given a sampling of some of the different views that have arisen in the history of philosophical theorizing about justice in Europe and beyond; needless to say, vigorous debates about many of these issues continue. The astute reader may conclude that philosophical reasoning about justice leaves us with more questions than answers.

But that may be exactly the point. If we want to think about a theory of justice for Europe, then the past and present of political philosophy leaves us with us a wealth of conceptions of justice that may help us think about the future. One fundamental issue that we have encountered throughout this article is that the past and present of philosophical thought about justice has been primarily concerned with questions of the (re)distribution of primary social goods. The liberal contractualist tradition still affirms that paradigm today. Traditionally, the liberal

mainstream has been countered by a conservative and communitarian camp, according to which claims of justice should be founded not in abstract understandings of the rational subject, but in concrete understandings of rich moral-political traditions. In contrast, republican and deliberatively democratic political theories neither put the individual rational subject nor the embedded community member on centre stage; for them *political justice* is the grounding concept, where this is understood as the just ordering of politico-legal institutions that enable citizens to effectively claim civil, political and social rights in diverse societies. Although that same argument can probably be made from within John Rawls' doctrine of political liberalism, there is an important difference in focus between liberal theories that put individual liberties, including political ones, centre stage in thinking through matters of justice, and those that put the agency of citizens of a shared political system centre stage. The mainstream of philosophical reasoning has focused on the former; the problems of trans-border European integration may demand a stronger focus on the latter.

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