



**REPORT ON A SECOND WORKSHOP ON “JUSTICE AND BELIEFS ABOUT JUSTICE IN EUROPE”: DEMOCRACY,  
STABILITY, AND REFLECTIVE EQUILIBRIUM**

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	CEU	Simon Rippon (coordinator) and Miklos Zala

## Executive Summary

As part of the annual ETHOS conference in Budapest, Hungary, we organized an international philosophy workshop on 'Justice & beliefs about justice' on January 18-19, 2019. The keynote speakers were Alice Baderin (Lecturer in Political Theory, University of Reading), Philippe van Parijs (Special guest professor, University of Louvain and KU Leuven / Robert Schuman Fellow, European University Institute, Florence), Miriam Ronzoni (Reader in Political Theory, University of Manchester) and Andrea Sangiovanni (Chair in Social and Political Theory, European University Institute, Florence). The purpose of the workshop was to discuss how normative theorizing about justice in Europe should (or should not) depend on the beliefs that people have about justice. This question is highly relevant in the context of the ETHOS aim to develop an empirically grounded, European theory of justice. In addition, this question touches upon recent methodological debates in normative political theorizing on the ways in which theorizing about justice should (not) be informed by public opinion. The workshop brought together philosophers who work on these and related issues.

The purpose of this report is twofold. The first goal of the report is to provide an overview of the different ways in which beliefs about justice can and should inform normative theorizing about justice. The goal of this part of the report is not so much to provide an answer to this question, but to provide an overview of the different possible relations between normative political theorizing and public opinion and to offer some considerations for and against different ways in which public opinion can be integrated in normative theorizing. As part of this overview we describe how popular beliefs about justice can and should be integrated in the method of reflective equilibrium, which plays an important role in the ETHOS project as a whole, as a method to integrate the findings from different academic disciplines into an empirically grounded, European theory of justice. This part of the report thus provides one possible methodology to integrate public opinion into a methodology for normative political theorizing, assuming that one accepts the method of reflective equilibrium as the appropriate methodology to do work in normative political theorizing.

On the basis of the findings of the workshop, we also pay special attention to an undertheorized role for public opinion and more specifically the attitudes, beliefs and experiences of marginalized groups in normative political theorizing. Drawing on the attitudes, beliefs and experiences of marginalized groups is crucial in formulating an empirically informed European theory of justice and it explains one important way in which the empirical research in the ETHOS project and the normative can and should be integrated.

The second goal of the report is to present some of the findings of the workshop itself. In addition to the keynotes mentioned above the workshop included talks by 9 other philosophers from 6 different countries. The

contributions to the workshop can be roughly divided into two sets: one set of contributions was mainly methodological, discussing how beliefs about justice are related to normative theorizing about justice. The other contributions can be seen as case studies in empirically informed normative political theorizing. This part of the report briefly summarizes the contributions to the workshop and includes a selection of draft papers.

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## I. Facts, beliefs & experiences about human nature, justice and marginalization

The title of the workshop was 'Justice & beliefs about justice'. The aim of the workshop was to analyze the scope and limits for taking people's attitudes and beliefs about justice into account in formulating a theory of justice. This question about the extent to which theorizing about justice should be sensitive to popular opinions *about justice* should be separated from other questions about the sensitivity of normative political theories to other kinds of beliefs and facts about, for instance, human motivation or the working of society. This section provides a short overview of different kinds of fact and opinion sensitivity of normative political theorizing. In the next section, we zoom in on the role of popular opinion in theorizing about justice and the importance of taking into account the experiences of marginalized groups in society.

There is an extensive debate in normative political theory about whether principles of justice should be 'fact-dependent,' i.e. whether certain facts should be among the grounds for accepting fundamental principles of justice. A recurring example in this debate is the question of whether facts about human motivation should play a role in the selection of principles of justice as John Rawls (1999b) claims as part of his defense of the 'difference principle'. In it, he states that socio-economic inequalities can only be justified if they benefit the worst off members of society. In his defense of the difference principle, Rawls for instance argues that such inequalities are justified, among other reasons, because under socioeconomic institutions in which no inequalities whatsoever are allowed, the 'talented' would not be as productive as they would be under institutions which allow for inequality-generating incentives. In this sense, the difference principle is a fact-dependent principle even if it is not based on public opinion.

G.A. Cohen (2003, 2008) famously argues that so-called fundamental principles of justice should be fact-independent, that is that fundamental principles of justice hold true independent from the state of affairs in the world or the nature of humans (see also Estlund 2011). This fundamental methodological debate, however, can be bracketed in the context of formulating the European theory of justice. The reason for this is that in the context of this project we are not interested in fundamental principles of justice (whatever those might be), but in thinking about justice in this specific socio-historical context and about the design of actually existing political institutions. Neither Cohen nor Estlund deny that for these kinds of action guiding normative questions one should rely on facts about the world and human nature. The reason why we have to rely on social scientific facts in formulating a



European theory of justice is straightforward: without taking into consideration social scientific facts, it is simply impossible to make action-guiding proposals in the real world, not only for feasibility considerations but also in order to provide sufficiently substantive principles, norms and judgements about justice. Fundamental principles of justice alone cannot give us a European theory of justice. A theory about justice in Europe necessarily has to be fact-dependent.

Note, however, that one should be careful in taking social scientific facts as hard constraints on theorizing about justice. As Emily McTernan (forthcoming) argues, the social sciences do not provide us with ‘hard’ facts. It is possible that we think that certain features of our society are more fixed than they actually are, for instance, by taking economic incentives to be essential to human psychology because we live in a capitalist economy. That is, it is difficult to distinguish between hard facts about, for instance, human psychology and facts about how humans tend to act within the specific society in which they live. Political philosophers typically want to distance themselves from the specific society in which they live to think about other possible ways of living together. This is not to say that one should disregard social scientific facts in normative theorizing, but that one should be careful in generalizing from the social sciences to hard facts about human nature.

This fundamental methodological debate about fact-dependency does not, however, determine whether or not a theory of justice should be sensitive to public opinions *about justice*, as several contributors to the workshop argued. It is one thing to claim that a theory of justice has to be fact-dependent with respect to general facts about human beings and the working of society, but another thing to claim that a theory of justice has to take into account people’s beliefs and attitudes about justice itself. In fact, philosophers are typically highly skeptical about relying on (popular) ideas about justice in formulating normative theories of justice. This skepticism was articulated during the workshop by keynote speaker Philippe van Parijs who claimed that we should not let people’s beliefs about justice determine what justice requires. The reason for this is that something can be just even if no one (currently) accepts it as just. As an example, Van Parijs referred to J.S. Mill’s work on universal suffrage. This work diverged radically from the received opinion at his time – most of his contemporaries rejected this position and even thought it to be ridiculous. But things have changed: we now think that there are indeed good reasons to accept universal suffrage. Similar observations could, for instance, be made about the moral permissibility of slavery. And it might be possible that in the (near) future we will think very different about the treatment of animals or our moral duties towards strangers and/future generations. Public opinion can be conservative, biased and incoherent and can therefore not simply be taken to constitute a justified normative claim about justice.

In the next section, we will outline several positive roles for public opinion about justice in formulating a theory of justice. Before doing so, however, it is important to distinguish a third set of (more or less) factual

considerations in relation to theorizing about justice. Next to general facts about humans and the working of society and beliefs about justice, there might also be a role for beliefs, attitudes or experiences which are not *directly* about justice, but which are about (evaluative) concepts that are closely related to justice. Examples are experiences of exclusion or (under)representation of marginalized groups, people's ideas of their vulnerabilities, well-being or basis of self-respect (as Alice Baderin argued in her presentation). As we will argue below, these kinds of beliefs, experiences and attitudes provide crucial material for constructing a theory about justice in Europe even though they do not directly draw on people's beliefs about justice.

## II. The relevance of experience and beliefs about justice to theorizing about justice

Even though popular opinion should not directly determine what justice requires, there might be other roles for public opinion in the formulation of a theory of justice. In a much-cited article Adam Swift (1999), distinguishes three possible ways in which normative theorizing about justice could benefit from research into public opinion. In this section, we will briefly discuss these roles and forward an additional, undertheorized role of public opinion, which shifts the emphasis from beliefs about justice to experiences of exclusion, representation, etc. of marginalized groups in society.

### A. Food for thought

The first role for popular opinion that Swift distinguishes is to provide 'food for thought'. Knowing that others think differently about justice might provide a reason to reconsider one's theory. This cautionary role seems to be uncontroversial. The knowledge that other people think differently about a certain issue is reason for caution, even if it does not necessarily mean that one has to change one's mind (as the Mill example illustrates).

This role is uncontroversial but not trivial. Philosophers sometimes have the tendency to reason from very abstract principles to concrete policy proposals, which can lead to highly counterintuitive policy proposals. Although

being revisionary does not necessarily speak against a philosophical theory<sup>1</sup>, it does require one to be very certain about whatever revisionary proposal one comes up with. Why are the (counterintuitive) proposals by a philosopher more authoritative than the received opinion about a certain matter? So just as we cannot simply take public opinion to constitute a theory of justice, we should also be careful in diverging too radically from public opinion.

## B. Feasibility & Stability

A second role for public opinion has to do with feasibility. Even if the correctness of a philosophical theory about justice might be established independent of popular opinion, this theory can only be action guiding in practice if it is not too distant from public opinion. The reason for this is that, at least in a democracy, what is politically possible depends at least to certain extent on popular opinion. A theory of justice, however correct, will never be politically realizable if popular opinion radically diverges from this theory. Insofar as theories of justice want to make action-guiding recommendations, instead of merely articulating abstract principles of justice, they had better take public opinion into consideration.

At the same time, however, we should be careful in taking public opinion as a given and as a hard feasibility constraint on justice. Public opinion can be changed, and normative political theory can play a role in changing public opinion. Depending on the timeframe of normative proposals, there can therefore be more or less reason to take public opinion into consideration as a feasibility constraint on theorizing about justice.

Leaving the possibility of radical social change open might be important in two different ways. One way is suggested by Michael Walzer (1983). Walzer points out that radical social-institutional changes that had been considered unthinkable might rapidly become a reality, or in his view, a radical change of the meaning of a social good for the public can instantly and unexpectedly happen. His example is the creation of the National Health Service in Great Britain after WWII, that is, the rapid change of the meaning of the social good of health care service (Walzer 193, 319). Thus, “one year doctors were professionals and entrepreneurs; and the next year, they were professionals and public servants” (Walzer 1983, 319). Walzer (1983, 319) contends that “we can’t anticipate the

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<sup>1</sup> In the introduction to *Reasons and Persons* Derek Parfit famously remarked: “Strawson describes two kinds of philosophy, descriptive, and revisionary. Descriptive philosophy gives reasons for what we instinctively assume, and explains and justifies the unchanging central core in our beliefs about ourselves, and the world we inhabit. I have great respect for descriptive philosophy. But, by temperament, I am a revisionist. Except in Chapter 1, where I cannot avoid repeating what has been shown to be true, I try to challenge what we assume. Philosophers should not only interpret our beliefs; when they are false, they should change them.” (Parfit 1984, ix)

deeper change in consciousness, not in our own society, and certainly not in any other. The social world will one day look different from the way it does today, and distributive justice will take on a different character than it has for us". Thus, political philosophy should not exclude the possibility of the immediate radical change of public opinion.

The second way is pointed out by Philippe van Parijs (2016). In a discussion of Hayek's view on a possible European Federation, van Parijs draws the attention to Hayek's view that if we want radical social change, then we should not shy away from proposing brave utopias (see Hayek 1949). Hayek considered the success of early twentieth century socialist and social democratic thought, and the growing interventionist state, exactly as the logical consequence of earlier socialist utopias that had become popular from the 19<sup>th</sup> century. Van Parijs (2016) quotes Hayek at length about how the Austrian economist-philosopher urged the need for radical liberal utopias:

We must make the building of a free society once more an intellectual adventure, a deed of courage. What we lack is a liberal Utopia, [...] a true liberal radicalism which does not spare the susceptibilities of the mighty (including the trade unions), which is not too severely practical and which does not confine itself to what appears today as politically possible. [...] The main lesson which the true liberal must learn from the success of the socialists is that it was their courage to be Utopian which gained them the support of the intellectuals and thereby an influence on public opinion which is daily making possible what only recently seemed utterly remote (Hayek 1949, 432).

Thus, van Parijs (2016) concludes that "[a]rticulating our utopias is not just a way of enabling us to achieve what is possible. It makes possible what is currently impossible. Had Hayek not thought so and not been right in thinking so, his neoliberalism would not be dominating the world half a century later". Van Parijs believes that we have to learn from Hayek what he believed he learned from his socialist predecessors: to think in big, "bold" utopias; he holds that this is necessary for Europeans for thinking about the "destiny" of the EU, "[i]f we don't want to remain forever stuck with neoliberalism or leave the field free for nationalist and jihadist dystopias" (van Parijs 2016).

A slightly different but closely related role has to do with the stability of political and economic institutions. Rawls' project in *Political Liberalism*, for instance, was to investigate how a just and stable society is possible. His concern with the stability of the basic structure of society was an important reason for giving a justificatory role to public opinion (see below). Rawls' basic idea was that given the existence of reasonable pluralism, both about conception of the good but also about fundamental religious and philosophical matters, a conception of justice should be justified by reference to philosophical traditions, e.g. the Kantian tradition of J.S. Mill's idea of liberalism, but on the principles and values that are implicit in democratic practices and institutions. Other justification of justice, which would not in any way be related to public opinion, could never lead to a stable society.

This stability can be achieved, according to Rawls, via the idea of an overlapping consensus. An overlapping consensus is a consensus in which citizens affirm the same basic conception of justice but all for different reasons. For instance, although, for instance, Kant and Mill ultimately have very different ideas about personhood, morality and justice they both agree to the basic idea that all citizens free and equal. The same kind of reasoning can be extended not only to other philosophical doctrines, but also to religious doctrines, or in fact any other comprehensive doctrine.

Rawls contrasts the idea of an overlapping consensus with a mere *modus vivendi* in which there would only be a balance of power. This, according to Rawls, could never lead to a stable society. After all, if the balance of power shifts, stability may be completely lost. In case of an overlapping consensus a society is thus stable for the right kind of reason, because every doctrine actually affirms the conception of justice (for different reasons), whereas in a *modus vivendi* a society is only stable at this specific moment and not for the right reasons. A *modus vivendi* is thus neither a truly stable nor a just society.

Whether or not an overlapping consensus on a conception of justice is actually possible is something which Rawls leaves open. But he is hopeful that it is actually achievable and he sees it as the only way in which a just and stable society might be realizable in light of reasonable pluralism about comprehensive doctrines.

### C. Justification

The third, and final, role that Swift distinguishes is the claim that public opinion should play a role in the justification of principles of justice. There are different versions of this third role. A strong version would claim public opinion itself determines principles of justice. But as both Swift and Van Parijs forcefully argue this strong view should be rejected: this view is too conservative and would strip normative theorizing of its critical potential. There are however several weaker and more interesting versions of the justificatory role of public opinion. Below we briefly discuss several possible more or less indirect justificatory roles for public opinion.

#### 1. The principles implicit in public opinion

A first approach does not take public opinion at face value, but instead tries to articulate the fundamental principles implicit in public opinion. Different variants of this approach are put forward by (the later) John Rawls (Rawls 2005), Michael Walzer (Walzer 1993), and most recently David Miller (2016). What these approaches share is a commitment to giving a justificatory role to public opinion without giving up on the critical potential of theorizing about justice. One example is John Rawls attempt to articulate the fundamental ideas implicit in existing practices

and institutions which can consequently be used to critically evaluate these very same practices and institutions (James 2005; practice dependent theorizing can be seen as a further development of this approach; see Sangiovanni 2008, 2016).

More specifically, Rawls holds that implicit in the practices and institutions of liberal democracies there is a commitment to seeing citizens as free and equal persons. Rawls's theory subsequently tries to articulate the normative implications of this conception of the person; the original position models persons as free and equal and is used to articulate the principles of justice free and equal persons would accept as the appropriate way to distribute the burdens and benefits of social cooperation. So although Rawl's theory departs from (implicit) popular opinion, the resulting theory of justice 'justice as fairness' is also partly revisionary about the specific beliefs about justice that people hold. Rawls explains the relation between popular opinion and normative political theorizing in the following way:

The aim of political philosophy, when it presents itself in the public culture of a democratic society, is to articulate and to make explicit those shared notions and principles thought to be already latent in common sense; or, as is often the case, if common-sense is hesitant and uncertain, and doesn't know what to think, to propose to it certain conceptions and principles congenial to its most essential convictions and historical traditions (Rawls 1999a, 306)

Whether or not one accepts this role for public opinion will depend on one's broader methodological commitments about theorizing about justice. There are, however, certain challenges for these kinds of position. One question is why we should prefer, say, Rawls interpretation of the principles latent in common sense, to an alternative interpretation. Rawls, and others, have often been criticized for failing to show that their interpretations of practices and institutions is unique (James 2005; Taylor 2011). Another challenge is to explain why the implicit, fundamental principles are more authoritative than the specific justice beliefs that people hold (Baderin et al. 2018).

## 2. Public opinion and the method of reflective equilibrium

A second way in which public opinion could play a justificatory role in normative political theorizing relates the method of reflective equilibrium, which is the most dominant method of moral justification in normative political theory. The distinctive claim of reflective equilibrium is that moral justification does not depend on an ultimate moral foundation, but on the coherence between all moral and non-moral considerations that are relevant to the issue at hand. Justification, as Rawls famously writes, "is a matter of the mutual support of many considerations, of everything fitting together into one coherent view" (1999, 507). It is common to make a distinction between

‘narrow reflective equilibrium’ which only includes considered judgments about justice and principles of justice, and ‘wide reflective equilibrium’ which also includes background theories, such as psychological and sociological theories. (Daniels 1979).

On the standard understanding of the method, reflective equilibrium should be pursued by a philosopher. On this understanding of the method, a philosopher starts with his or her own considered judgements about justice and subsequently tries to bring these into coherence with principles and background theories. In recent years, however, several authors have argued that the process of pursuing reflective equilibrium should take into consideration public opinion. There are different variants of the public understanding of reflective equilibrium. On the radical public understanding of reflective equilibrium, both the input and search for coherence should be done by the public. On a more moderate public understanding of reflective equilibrium only the input, i.e. considered judgements, should be provided by the public; the search for reflective equilibrium should be done by philosophers.

The most important reason for including the public in reflective equilibrium is to correct for potential biases that philosophers might have. This is particularly relevant in the selection of considered judgements. Rawls defined considered judgements as follows:

considered judgments [...] enter as those judgments in which our moral capacities are most likely to be displayed without distortion [...] For example, we can discard those judgments made with hesitation, or in which we have little confidence. Similarly, those given when we are upset or frightened, or when we stand to gain one way or the other can be left aside. All these judgments are likely to be erroneous or to be influenced by an excessive attention to our own interests. (Rawls 1999, 42)

In addition, Norman Daniels has argued that considered judgements should be formulated independent from one’s normative theoretical commitments. Taken these two desiderata together suggests that it would be problematic to only include philosophers considered judgements into reflective equilibrium. First, it is not clear why philosophers’ judgements are more reliable than the judgements of the public, especially given the fact that philosophers are typically not a good representation of society. Second, and more fundamentally, it is more likely that philosophers’ judgements are coloured by their theoretical commitments.

If one accepts reflective equilibrium as a method of moral justification, there are therefore good reasons to take on board the considered judgements of non-philosophers. In fact, it seems to be deeply problematic to restrict oneself to the considered judgments of philosophers. This commitment, however, immediately raises

further methodological questions: what should we do when considered judgements conflict, as they will most likely do?

### 3. Public opinion and democratic justification

A third way in which public opinion can play a role in the justification of a theory of justice is related to the idea of democratic justification. An influential approach to justice links the justification of justice to democratic justification, in which public opinion can play an important role. The strongest version of this approach would claim that all substantive questions about justice should be the outcome of democratic deliberation. Jürgen Habermas, for instance, criticizes Rawls for understanding 'justice as fairness' as the outcome of a "theory of justice," which he [Rawls] as an expert is qualified to construct" (Habermas 1990a, 66). Instead, what is needed, according to Habermas, "is a "real" process of argumentation in which the individuals concerned cooperate" (Habermas 1990a, 67).

These so-called dialogical approaches to justice can give different roles to public opinion. For instance, although Habermas claims that all substantive questions of justice should be determined in actual discourse, his discourse ethical conception of democracy denies that public opinion and preferences have a special authority, instead Habermas focusses on reasons and processes of public will formation in which public opinion about justice is not taken for granted but critically reflected upon (see e.g. Habermas 1994).

Another way in which dialogical theorists differ is the extent to which justice is said to depend on democracy. Whereas Habermas claims that all questions of justice should be democratically decided on, others such as Rainer Forst, hold an intermediate position. Forst makes a distinction between *fundamental* or minimal justice and *maximal* justice (Forst 2011, 119). Fundamental justice concerns the conditions under which reasonable deliberation is possible, i.e. the construction of a basic structure of justification. These conditions include rights, liberties and goods that are necessary for each individual to participate in discourse. Spelling out these conditions of fundamental justice is, according to Forst, "the first task of justice" (Forst 2011, 7). Maximal justice, on the other hand, concerns the specific distribution of social and economic goods, and the specific design of social and political institution. Maximal justice thus both concern the concrete specification of (the more abstract) fundamental justice, and the distribution of goods, liberties and opportunities that are not covered by fundamental justice. According to Forst, *only* matters of fundamental justice precede actual deliberation - although even fundamental justice depends on actual practices of deliberation for its concrete specification. The reason for this is that fundamental justice guarantees the condition under which appropriate procedures of justification is to be possible (if these conditions themselves would be the object of deliberation we would land in an infinite regress). Questions of maximal justice, on the other hand, can only be settled in practices of actual discourse. On this model, the theoretical modesty of discourse ethics applies only to questions of maximal justice.

A slightly different approach to this question is Alice Baderin's (2016). The subject of Baderin's analysis is the question of how to take into account of what the citizenry thinks. One possible way to do that is what she labels as the 'democratic restraint model', which holds that political theorists should moderate their principles according to public opinion in order to make their theories more legitimate (Baderin 2016, 212-3). Baderin (2016, 228) rejects



this model because 'it renders political theory vulnerable to the otherwise misdirected charge that it aspires to preempt democratic politics'. Baderin believes that it is misleading to think that it is more democratic if we simply take public opinion as both given and normatively guiding (Baderin 2016, 218-20). She supports this by referring to David Estlund's observation that 'rule by the people is something different from rule in accordance with the people's views' (Estlund, 2008: 76; quoted in Baderin 2016, 219). Clearly we expect that citizens use their agency by deciding about certain political issues vis-à-vis just using the information of what they think about those issues. Governing by simply tailoring political decisions to public opinion data seems to be a travesty of democracy, rather than its realization.

What is the alternative, then? Baderin, following Stuart White and Adam Swift (2008), offers the 'democratic underlabourer' model. 'On this alternative account', Baderin points out, 'the political theorist tries to serve the democratic process in one of two ways: either she defends ideals or proposals that she herself believes to be correct or she seeks to clarify the terms of everyday political debate' (Baderin 2016, 224). Thus, the political theorist as a democratic underlabourer 'speak to and with' their fellow citizens, but they do not 'speak on their behalf' (Baderin 2016, 224).

Thus, the political theorist as a democratic underlabourer:

can offer arguments and justifications of her own, seeking to persuade her readers about which values (or more likely, which conceptions of those values, or which balance between competing values) are the right ones for them to be pursuing in their policy choices. This last role remains underlabouring, despite being substantially normative precisely because the arguments she makes are, indeed, offered. It is for her fellow citizens to decide whether they want to accept them (Swift and White 2008, 54; quoted in Baderin 2016, 224).

In other words, the political theorist offers normative reasons or theoretical tools for citizens to think about certain issues, but the final word is the citizen's, not the political philosopher's. That is, the democratic underlabourer model does not conflate theorizing about politics with trying to create legitimate political outcomes: 'although political theorists might make a useful contribution to democratic politics, legitimate decisions must be produced by the operation of actual democratic processes' (Baderin 2016, 224).

Baderin believes the democratic underlabourer model can be understood in both negative and positive terms. Negatively, the model suggests that political theory does not have priority in the democratic process (Baderin 2016, 225). It can be considered as a consultation with the general public and a recommendation of certain outcomes rather than a command. Positively, this model can usefully contribute to democratic debates as long as it aims to provide accessible theories to democratic citizens (Baderin 2016, 225).

#### **D. Experiences of marginalized groups**

Based on the results of the workshop we would like to emphasize a fourth possible role for beliefs about justice by drawing on the work of Rippon and Zala and Alice Baderin.

In their presentation, Rippon and Zala defended an additional important role for public opinion(s). Drawing on work in standpoint epistemology and hermeneutic injustice, Rippon and Zala argued that taking into consideration the opinions and experiences of marginalized groups is essential for theorizing about justice. Vulnerable groups have a unique insight in the specific injustices they experience which might be overlooked if we do not incorporate these insights into our theorizing about justice.

Rippon and Zala draw attention to the case of disabled toilets by way of example. They ask us to imagine that a new bathroom, which was carefully constructed to satisfy the supposed needs of the disabled, is now open to the public. But soon wheelchair users start repeatedly reporting that it is uncomfortable; the space is simply too narrow. In Rippon and Zala's view, this is a good example of situated knowledge – wheelchair users are in a special, superior epistemic position to judge how comfortable the bathroom is, and we have no right to dismiss their testimony (see also Wasserman et al. 2016).

In Rippon and Zala's view, such kinds of first-hand experience gives philosophers reason to go further than taking lay people's opinion as ground for caution: they give reasons for *recognition* in two different senses as well. The first reason is epistemic: in the situation above, the disabled are simply in a better epistemic position to tell what is a comfortable bathroom. The second reason is moral: victims of injustice have a moral right to be heard, even if their testimony is not necessarily epistemically superior.

Rippon and Zala claim that it amounts to testimonial injustice if potential victims of injustice such as vulnerable minorities are not listened to (cf. Fricker 2007). To buttress this point, they cite a recent debate from the political philosophy of immigration. In his 2016 book, *Strangers in our Midst*, David Miller (2016) denies that refugees have a right to move to third countries once they have arrived in a safe country where they (supposedly) can have a 'decent life'. Sarah Fine (2018), by contrast, believes that Miller makes the fundamental mistake of overlooking the first-hand experience of refugees, such as those who are residents of the 'Jungle' camp in Calais. Their personal testimony does not seem to buttress the view that they have a decent life in France. Rippon and Zala claim that by not listening to these voices and reports, Fine rightly accuses Miller of committing testimonial injustice.

Rippon and Zala add that, moreover, knowledge of injustice can be tacit. This is because, as they put it, 'many of the things we know about our social world is a knowledge that we cannot adequately transmit, or theorize' (Rippon and Zala 2019). Just like knowledge of the specific smell of a rotten egg, which cannot be fully communicated to someone who has never smelled it, the knowledge of injustice might not be transmittable. Building further on this claim, Rippon and Zala cite the well-known example of Carmita Wood from the 1970s and the hermeneutic injustice she was subject to as an explanation of why knowledge of injustice may be tacit. Wood

had to leave her workplace for reasons we know call sexual harassment, but at the time she quit this concept did not exist. It was only in trying to understand and make sense of Wood's workplace struggles that her advocates coined the term 'sexual harassment' (cf. Wolff 2018). Rippon and Zala suggest, then, that prior to their doing so, this case of sexual harassment was an example of hermeneutic injustice in which Wood's first-person experience of injustice could only give her tacit knowledge.

Rippon and Zala, however, argue that this observation raises a potential tension between the (dominant) popular opinion and the opinions and experiences of marginalized groups. Given that the knowledge of the social world and of injustice among the latter is often tacit, there is little hope that the majority of the public can be brought to fully understand and appreciate their points of view. If these are in conflict, then, the question is raised which of these two needs to be given priority. This highlights a more general challenge for opinion sensitive political philosophy: whose opinion do we have to take into considerations and what to do when opinions conflict? Rippon and Zala conclude by characterizing this problem as a tragic conflict of values between majority and minorities.

Alice Baderin, like Adam Swift and Philippe van Parijs, denies that public opinion is in any way determinative of justice. She is more generally doubtful about the usefulness, in many cases, of surveying the public's beliefs on philosophical questions about justice – for example, public opinion on whether a fair distribution of material goods will be sensitive to desert, or more radically equal. One reason is that due to differing conceptual frames, it is likely that the lay public would understand such questions in different ways to theorists, meaning that survey answers are likely to be unreliable or misleading. Baderin emphasises, however, that this does not imply that public opinion data is irrelevant to normative theories of justice. Rather than focusing on the public's explicit attitudes on normative questions, Baderin gives reason for thinking that more generally the everyday experiences of the lay public may be enormously relevant to questions of normative justice. In her presentation "Two Case studies in Opinion-Sensitive Political Philosophy", Baderin presented two specific cases in which normative theories of justice could be subjected to empirical testing. The first case was John Tomasi's claim, intended to support his libertarianism, that economic risk is a precondition of the kind of self-respect that is valued by liberals. Baderin noted that whether economic risk supports or undermines self-respect is an empirical claim, and cannot be properly settled by the kind of armchair speculative social psychology Tomasi relies on. In work with Lucy Barnes she tested it by conducting a large-scale survey study (Baderin and Barnes 2018). They found that economic risk has a significant negative impact on self-respect, contradicting Tomasi's claim. Baderin's second case pertained to the question of equality, and of whether theories of justice should be concerned with equality in distributive or relational terms. Relational egalitarians claim that the kind of equality that fundamentally matters is a kind of perception of equal standing in social relations, rather than a particular distribution (See ETHOS deliverable 2.1,

Rippon et al. 2018, pp. 12-18. But they normally also think that large distributive inequalities (e.g., income equality) undermine relational equality. While such a causal link sounds initially plausible, there are grounds for doubting it. The public might have a limited knowledge of the degree of material inequality in their society; or their perceptions might be skewed by comparisons with particular reference groups. And, even if material distribution is an important factor in relational equality, it might not be distributive inequality as such but rather absolute disadvantage or poverty that undermines egalitarian social relations. Therefore, the relation between relational and distributive equality is an empirical question, amenable to scientific investigation. Baderin described her research in this area. In a 31 country study, income inequality measured by Gini was found to be correlated with measures of relational equality such as “feeling looked down on because of job satisfaction or income”, or “feeling that the value of what I do is not recognized by others”. In a further development of this research, building an online survey experiment will provide for opportunities to manipulate perceptions of material inequality and measure the impact on status perceptions.

We draw from Baderin’s work the lesson that there is a need to replace a speculative social psychology with a solidly empirically grounded one in normative theorizing, and to avoid premature generalizations about empirical questions. We should not let our normative theory “filter” our perception of how the world actually is. We need rather, to make allowance for a central role for data not just about the public’s explicit beliefs about justice, but about their experiences of wellbeing and other attitudes that are relevant to our thinking about justice. In developing a European theory of justice, there is a clear need for taking the justice-relevant attitudes of Europeans into account.

Finally, we would like to quickly reflect on the relation of the importance of personal, first-hand experience and Baderin’s democratic underlabourer model discussed in the previous section. At first glance, providing a special normative role to the personal experiences of vulnerable minorities is in contrast with Baderin’s contention that the democratic restraint model qua being a preference-tracking model must be rejected. If personal experience, especially vulnerable minorities’ experience of injustice matters, then sometimes we have reason to give people what they want, a view that is denied by Baderin, holding that political legitimacy is not ‘a matter of doing what people want, because they want it’ (Baderin 2016, 220).

However, we believe that there is no real tension between these views for two reasons. First, we can point out that there is a distinction between legitimacy and justice: an otherwise just outcome might not have democratic legitimacy simply because it is not supported by the majority. Also, Baderin herself points out that ‘the democratic underlabourer model does not preclude a significant place for public opinion in political theory, where this role is justified in non-democratic terms’ (Baderin 2016, 224). So, at least in certain issues, Baderin allows that the value

of listening to public opinion can vary ‘according to the nature of the issue and the segment of the public in question’ (Baderin 2016, 230n25). This allows the possibility that some segment of the population is in a better epistemic position to judge the normative states of affairs of a certain situation.

### III. Conclusion: Links to the broader ETHOS project

The different approaches to the feasibility, stability and justification of principles of justice and the views on the role of public opinion and empirical research thereof explored in the second workshop and introduced above provide clear footholds on how to review ETHOS empirical research in light of the ETHOS project’s overall aims at exploring the bases for an empirically-informed theory of justice in and for Europe. This is not the place for a systematic engagement with the ETHOS empirical work (such integrative, comparative and analytical work is the task of Work Package 7, specifically deliverables D7.2-D7.4), but it is helpful to reflect briefly on the avenues opened by the workshop’s subject matter for such an engagement.

#### A. Stability, practice-dependence and hermeneutic injustice

Rawls’ claimed that justice claims in a democratic society ought to be framed not in terms of specific philosophical or religious traditions but in terms of principles and values inherent to a democratic society’s institutions and practices in order for the resulting principles of justice to be *stable*. If we are to take such a position on board, then ETHOS research can identify opportunities for recasting the justice claims of vulnerable minorities in such ‘public’ terms, where they may currently be framed in terms of vulnerable minorities’ specific ethnic, religious or cultural identities.

A practice-dependent approach to theorizing justice in Europe would lead us to focus on ETHOS research that investigates primarily not what is *said* about justice in Europe by various actors (political, civic, social, etc.) but what is *done* to adjudicate and contest conflicts between justice claims. An important starting point to such an approach could start, for instance, with the reports on the legal work package that examine the institutionalization of justice as representation, recognition and redistribution examined through the lenses of the right to vote, education and housing in six European countries (ETHOS deliverables D3.4, D3.5, and D3.6, forthcoming). To capture the complexity of the European multi-level legal system, these ought to be read in light of (and, where

relevant, contrasted to) the international and European (European Union and Council of Europe) legal frameworks reported in D3.3 (Granger et al. 2018).

A Habermasian or dialogical approach to theorizing justice in Europe would require analysis of political and social discourses on justice claims in Europe precisely of the sort that ETHOS researchers have been developing in work packages four and six. For instance, deliverable D4.2 (Lepianka 2018) contrasts political discourses on representative justice in six European countries, focusing both on debates framed around elections and those surrounding specific political events that brought debates on just representation to the fore. To take another example, deliverable D6.2 gave voice to protest and resistance movements that sought to contest the austerity-driven institutional reactions to the 2008 financial crisis (Meneses et al. 2018). Such empirical research is vital to give content to a dialogical approach to understanding the nature of justice in Europe.

Finally, the view developed by ETHOS researchers Rippon and Zala (2019) on the epistemic priority to first-hand accounts of experiences of justice and injustice in some cases, explored above, and in more detail in the draft paper in the appendix to this report, also gives an important role to ETHOS empirical research in articulating the normative demands of justice in Europe. This comes out in many of the empirical reports, but a particularly poignant and apparent relation would be to the work of work package five ‘Justice as Lived Experience’. For instance, deliverable D5.3 explores the experiences of justice and injustice in elderly and disability care from a starting point of “what people consider to be a life they have reason to value” ( Anderson 2018, p.iii) - precisely the kind of question from which a ‘standpoint sensitive’ theory of justice ought to depart.

## **B. Bridging the workshop findings and ETHOS empirical research**

As we have shown, the interaction between philosophical and theoretical approaches to understanding justice to the ETHOS empirical research on justice in Europe is not one way. While, as the second workshop on ‘Justice and Beliefs about Justice in Europe’ shows, there are many possible fruitful avenues for granting empirical research into, e.g., public opinion a ‘constructive’ role in theorizing the demands of justice, there are other ways to look at the bridges between empirical and normative work. Exploring these different possibilities is vital to bridge the methodological gap between ‘fact’ and ‘value’ described in ETHOS deliverables D2.1 (Rippon et al. 2018) and D2.2 (van den Brink et al 2018) - an unavoidable challenge if the policy recommendations that succeed the empirical research are to be methodologically grounded.

Three alternatives to a ‘constructive’ role for relating ETHOS research to justice theorizing are a focus on ‘manifest injustice, a critical perspective to ideal-typical analyses of justice conceptions, and provisory

recommendations based on such ideal-typical conceptions. Deliverable D2.2, the workshop report on the first workshop on ‘Ideal and Non-ideal Theories of Justice’, highlighted an innovative approach to the ‘bridging’ task that was labelled, borrowing from Jonathan Wolff, ‘Real World Political Philosophy (van den Brink et al 2018 pp. 6-17). This approach seeks to identify cases of ‘manifest injustice’ as bases for reform, grounded on the view that while there is reasonable pluralism about perfect or ‘ideal’ justice, there can be a convergence of philosophical perspectives in light of very severe injustices. Finally, the idea-typical analysis of justice conceptions in the various disciplines that make up the ETHOS research agenda, presented initially in the first reports of Work Packages 2-6 and synthesized in deliverable 2.3 (Knijn, Theuns and Zala 2018) can also be the basis of further reflection in two ways. First, such ideal-types can be *contrasted* with the demands of justice theorized normatively, in what could be called a ‘critical’ perspective. Second, such ideal-types can be the basis of provisory policy recommendations that prescribe certain reforms as the way to pursue more coherent policies in line with a particular ideal-typical approach to understanding justice. All three alternatives to bridging philosophical work on the demands of justice and the other theoretical and empirical ETHOS work on justice in Europe, as well as indeed a further engagement with the possibilities for a ‘constructive’ relation between empirical data on justice in Europe and philosophical theorizing thereof are explored in greater detail in the work of the integrative Work Package 7, specifically in deliverable D7.2 (Knijn et al. forthcoming).

## IV. Workshop proceedings

The papers presented during the workshop can be roughly divided into two sets. One set of papers were methodological in nature and directly addressed the question of how normative theories of justice and popular beliefs about justice are related to each other. The other set of papers addressed this question indirectly by discussing a specific topic such as democracy in Europe, migration or the currency union and by doing so illustrating how normative theorizing and popular beliefs about justice could be integrated. These papers could thus be understood as case-studies of an approach to the relation between justice and beliefs about justice.

### A. Methodological papers

Simon Rippon and Miklos Zala discussed different ways in which political philosophy might take account of public opinion. Drawing on the work of Adam Swift they argued that public opinion cannot constitute what justice requires, but that public opinion is important as a ground for caution, a feasibility considerations and because it can

offer a source of knowledge. Their presentation ended with a tension between the dominant public opinion and the insights offered by marginalized groups: if political philosophy is to draw on public opinion(s) it has to provide a way out of this dilemma.

Keynote Alice Baderin presented two case studies in opinion-sensitive political philosophy in order to develop a methodology for political philosophy which is opinion-sensitive. In some detail she showed how she and a co-author empirically researched a premise underlying John Tomasi's defence of libertarian economic policies, which was shown to be false. This case study illustrated both how normative political theories typically rely on empirical premises, and how these premises might be tested. According to Baderin we should not ask people the same normative philosophical questions as we ask philosophers, but to integrate evidence about everyday experience. For Baderin we should thus focus on justice-relevant beliefs and experiences and not beliefs about justice. These beliefs and experiences should replace the speculative psychology on which philosophers typically rely.

Carlo Cordasco presented an objection to realist approaches of political theory, which deny that legitimacy should be understood as a moral concept. Instead realists try to derive normative standards of politics from an interpretation of what is constitutive of politics Cordasco's objection to realists is that for any realist interpretation of politics one could raise the question of why this should be normative for those who do not share the realist interpretation of politics – analogous to David Enoch's shmagency objection to so called constitutivist theories of normativity which try to derive normativity from what is constitutive of agency. Cordasco's paper thus presented a challenge to attempts to derive normative standards of politics or justice from the constitutive features of already existing practices and institutions.

## B. Case studies

The first keynote by Andre Sangiovanni discussed the question of when and why (if at all) states have a right to exclude potential immigrants from taking up residence? Sangiovanni defended a qualified right to exclude which states that legitimate states have a right to exclude when, but only when, such exclusion could be reasonably justified by reference to either self-determination or its justice-based constitutive ends. According to Sangiovanni, a more closed immigration policy can only be reasonably justified if it is reasonable to believe a more open policy would undermine public order, the provision of social justice, the provision of essential public goods, or so transform the institutional order as to render it equivalent to an annexation. The methodological approach underlying Sangiovanni's paper is the so-called practice dependent approach to justice. According to this approach, normative standards of justice are constituted by the point and purpose of the practice and/or institution to which



they apply. In this specific case, Sangiovanni identified the guarantee of public order, the provision of social justice and the provision of essential public goods as the point and purpose of the state. This point and purpose was consequently used to evaluate the question as to the right to exclude.

Dimitrios Efthymiou discussed the question of how we should think about so called unreasonable burdens in the context of EU migration and welfare rights. He argued that EU migrants' immediate access to social assistance benefits does not constitute an unreasonable burden for host member-state. One of the methodological upshots of Efthymiou's paper was that he proposed to make Rawls' original position more sensitive to facts about the world. Whereas Rawls claims the parties behind the veil of ignorance should have general knowledge about human motivation and the working of society, Efthymiou proposed to include more specific facts about human motivation behind the veil ignorance, and in specific facts about the effects of labour migration.

Eszter Kollár also discussed the question of migration, and more specifically the question of what we owe to (temporary) labor migrants. She argued that the opposition of labor migration typically relies on false beliefs about the impact of immigration to society. However, she also argued that large scale low-skilled immigration threatens welfare state capacity to support the native poor. This leads to a dilemma of having to choose between giving priority to the locally worst-off or to the globally worst off. Kollár's way out of this dilemma is to redistribute the overall gains of migration from economic elites to the low/unskilled native workers and to grant equal membership rights to migrant workers in host societies.

The second keynote, Philippe van Parijs also discussed the question of migration. According to Parijs we cannot and should not rely on individual's beliefs about justice when thinking about just migration (for reasons discussed above). At the same time, however, Van Parijs warned against utopian thinking about migration and justice in general. In particular, Van Parijs focused on the fragility of our social and political institutions. Open borders, Van Parijs, argued would undermine our fragile institutions. Just migration would therefore have to find a balance between on the one hand the acknowledgement that it is a matter of brute luck in which place of the world one is born, and the importance of protecting fragile institutions.

Bertjan Wolthuis argued that EU justice is, and ought to be, restricted to internal market justice. The reason for this is that, according to Wolthuis, there can be no justice without law; and that only internal market law is real law and can only be stable EU law, if it is seen as part of a legal system that also consists of member states' law and international law.

The third keynote, Miriam Ronzoni put forward an argument for electing the European Parliament on transnational lists. Ronzoni put forward several arguments for this proposal: Transnational lists could mobilize

citizens around issues of Pan-European interest – austerity, the Eurozone governance, EU solidarity, how to manage the refugee crisis, etc. In addition, transnational lists could stop the rise of populism by creating more effective forms of representation. Interestingly, Ronzoni’s paper was part of the so-called Twelve Stars project. In this project academics posted a proposal for the reform of the EU on the online forum Reddit where it was discussed with the public. Subsequently the proposal was revised on the basis of this discussion and published as a book. The Twelve Stars project in this sense provides a model of how to engage the public in normative theorizing.

Jens van ’t Klooster argued that membership in a currency union is compatible with popular sovereignty, thereby going against the received view that membership in a currency union is incompatible with “populist” conceptions of democracy. The main argument for this claim is that a currency unions allows citizens to reclaim effective authority over money, by collectively setting monetary policy and banking regulation and by increasing national public expenditures through money creation.

Anna Ujlaki applied a Rawlsian framework to migration. Ujlaki started from the observation that Rawls has surprisingly little to say about migration, which can be explained by his assumption in *A Theory of Justice* that he is dealing with a closed society. Ujlaki subsequently argued that given the moral commitments of Rawls, migrant should be included behind the veil of ignorance. Analogous to Efthymiou’s talk, Ujlaki thus applies and extends a Rawlsian framework to consider questions related to European justice, refugees and migrants.

## V. Abstracts of Workshop Papers

Please note that not all of the speakers and keynote speakers have agreed to have their papers included in this report. All the presentation’s abstracts are included in this section, but not all of these abstracts correspond to papers in section VI. This selection was not made on the basis of a qualitative, substantive selection, but on the basis of author’s wishes, some of whom had already committed their papers to other publication projects and some who did not have written drafts they were comfortable sharing at this time.

### A. ETHOS project draft papers

#### 1. Simon Rippon and Miklós Zala: Public Opinions and Political Philosophy

In this paper, we disagree both with the “cultural relativist” view that the demands of justice are relative to the beliefs and practices that are generally accepted in a given society, and with those political philosophers who think, or who very often at least seem to assume, that it is appropriate to develop our normative theories of justice without paying much heed to the views of the ordinary folk. We think that political philosophers need to pay close attention to empirical information about what folk think, and what they experience. More specifically, we think that theorists of justice ought to pay attention not just to what “the public” (as perhaps an imagined, more-or-less homogenous mass) think, but rather to what particular groups of people think and experience. That’s why the title of this paper includes an unusual plural: public opinions rather than public opinion. In this paper, we thus explore the link between, on the one hand, empirical information about what citizens think and experience, and on the other, normative political theory. And we aim to show that political philosophers should take account of empirical information about public opinions. In particular, we argue that political philosophy should take account of empirical information about the opinions and experiences of minority and vulnerable groups. Furthermore, we argue that paying appropriate attention to the opinions of these groups leaves us with both a political and a philosophical challenge.

## 2. Tom Theuns: Responding to European Illiberalism: EU Militant Democracy?

This paper makes two main claims. First, Article 7 of the Treaty on European Union is largely in conflict with democratic legitimacy and ought ideally to be abandoned. Second, expulsion from the EU is a normatively more coherent political sanction for Member States in breach of democratic norms. Article 7 lays out the procedure for sanctioning EU member-states backsliding on fundamental values including democracy, human rights, equality and the rule of law. The ultimate sanction in this procedure is withdrawing a states’ voting rights in the European Council. This paper argues that the Article 7 is itself in conflict with the principle of democratic equality in undermining the principle whereby those subjected to a rule or policy ought to have a formally equal stake in authorizing that rule or policy. However, examining analogous arguments made in the context of justifications for policies of criminal disenfranchisement also gives rise to an argument cutting in the opposite direction: democratically backsliding Member States’ votes may otherwise ‘taint’ the democratic character of Council decision-making. This leads to a paradox whereby both sanctioning *via* removing a backsliding Member States’ right to vote in the Council and permitting that state to vote are both anti-democratic. The last part of the paper considers this paradox in light of the literature on militant democracy, which theorizes the justifiability of acting contrary to democratic values in order to preserve democracy in times of crisis. Yet, the paper concludes that the

appropriate sanction in such extreme circumstances would be expulsion from the EU rather than disenfranchisement in the Council. However, expulsion ought to be kept only as a last result. The paper thus points towards the need to develop a range of lesser sanctions prior to this final step being taken.

## B. External draft papers

### 1. Carlo Ludovico Cordasco: The Shpolitics Question to Political Realism and Practice-Dependent Theory

Political Realist (PR) theorists reject Political Moralism, which identifies approaches to political theory establishing a certain priority of morality over politics. On a similar vein, practice-dependent (PD) theorists reject practice-independent theorizing with respect to justice, which identifies accounts of justice or legitimacy that are insensitive to existing political institutions and practices. In this paper, I suggest that the rejection of Political Moralism and practice-independent (PMPI) theory is motivated by two main aspects. First, there is an epistemological worry -- by virtue of resorting to moral values that lack anchorage to the constitutive features of politics, PMPI approaches tend to develop accounts of justice or legitimacy that cannot consistently apply to actual political orders. Second, there is a meta-ethical worry about arbitrariness, according to which, accounts of justice or legitimacy that start from moral values lacking anchorage to the constitutive features of politics, in a context of widespread moral disagreement, would fail in motivating those who have not internalized the normative relevance of such values. PRPD response is strikingly elegant, as they suggest that by solving the epistemological worry, we also solve the meta-ethical.

However, assume we have agreed on what the constitutive features of politics are, and on what normative requirements ought to be singled out from our shared interpretative understanding: why should we follow those requirements? Why should we engage with politics? Why not Shpolitics? The shpolitics question demands PRPD theorists to provide reasons for why one should engage with the enterprise of politics, in an effort to solve the worry about arbitrariness. In fact, failure to provide them would make PRPD accounts of justice or legitimacy contingently normative on our willingness to engage with politics. However, in order to provide such reasons, theorists must resort to values that are external to the enterprise of politics. In this paper, I lay out two plausible strategies to respond to the shpolitics question: the first is to show that politics is inescapable, in that we cannot but engage with it. The second is to give up on full-blown normativity and limit the normative reach of one's

theorizing to those who are already motivated to engage with the enterprise of politics. Both solutions, I attempt to show, face substantive challenges.

## **2. Dimitrios Efthymiou: EU migration and Welfare Rights: How to think about "unreasonable burdens"**

Defenders of current restrictions on EU nationals' access to welfare rights in host member-states often invoke a principle of reciprocity among member-states to justify these policies. The argument here roughly is that duties of reciprocity characteristic of welfare rights are triggered by membership to a system of social cooperation. Newly arriving EU immigrants who look for work do not meet the relevant criteria of membership, the argument goes, because they have not yet contributed enough to qualify as members on grounds of reciprocity. Therefore, current restrictions on their access to welfare rights are justified. In this article, I challenge this argument by showing how restrictions on EU immigrants' access to welfare rights are inconsistent with duties of international reciprocity. There are different variations of this challenge but my focus here will be on one that uses a veil of ignorance device to support this claim. What matters from a perspective concerned with international reciprocity, I will argue, is what kind of welfare policy EU member-states would choose if they were not to know whether they were net contributors or net beneficiaries to the relevant scheme of international cooperation.

## **3. Eszter Kollar: Temporary Labour Migration and Beliefs about Justice in Immigration**

Beliefs about justice and labour immigration in Europe raise the important normative questions of "social dumping" and "welfare tourism". Migrant advocacy groups, instead, have focused on problems of discrimination/exploitation and demand equal treatment. I argue that the normative assessment of these grievances has a blind spot, and that the joint demand of social and global justice raises a difficult trilemma in the context of temporary labour (im)migration. Three normative criteria are particularly relevant for fairly adjudicating the claims of all affected.

1) Equal treatment: Migrant workers must be treated as equals, having the same rights, obligations, and status as native workers, eventually put on the path to citizenship. The political philosophy of temporary labour migration

has dominantly focused on this first desideratum. The problem is that this solution leads to accepting less migrant workers with more rights, and raises a concern with reduced opportunities and resources for those excluded.

2) Global justice: A commitment to improving the conditions of the globally most vulnerable populations requires that we open borders to promote a better distribution of global wealth. But this solution raises several concerns about its implications for promoting justice within receiving societies. More open borders generate pressures on the local economy and on welfare services, and is thought to come at the expense of the most vulnerable native workers.

3) Domestic social justice requires that we improve the conditions of poor/precarious workers within receiving societies. Reasoning about the trade-off between the openness of a labour migration regime, i.e. the number of migrant workers that should be admitted, and the extensiveness of the package of rights that is owed to them should proceed in light of this trilemma. In the context of the EU where internal labour mobility between relatively well-off but unequal populations is governed by freedom of movement, while strong restrictions apply to global poor workers trying to cross external borders, this trilemma raises particularly difficult normative questions. I argue that in order to promote the equality of all persons worldwide and properly respond to the joint demands of social and global distributive justice, we need to abandon the first horn of the trilemma. Consistent with the equality of all, a more open labour migration regime coupled with highly qualified domain-specific rights differentiation between native and immigrant workers can be justified.

#### 4. Anna Ujlaki: Beliefs About Justice and the Refugee Crisis

The European Refugee Crisis exceptionally challenges our current political ethical assumptions about the political community. A more and more popular idea is that refugees are posing a *threat* on two levels: both on the people and culture of Western societies are at stake according to this framing. Political philosophy must engage in considered arguments about the justifiability of this idea. One might expect a Rawlsian liberal interpretation of regarding refugees and immigrants in a broader sense which is radically different from the rhetoric with the threat-element. However, there is no such answer from Rawls himself, since it seems that the whole problem of migration is left out from both his domestic and international theories. This, what I call the problem of *circularity*, means that while his domestic theory regard society as a closed system, therefore its scope is too narrow to deal with refugeehood as an external problem; his international theory of a realistic Utopia regards the reasons of such a crisis eliminable (in the domestic level). Thus, any political theorist who make an attempt to propose a Rawlsian

solution from Rawls's works, suddenly find themselves among *more than one* possible interpretations. In this paper, I would like to demonstrate the insufficiencies of Rawls's theories of justice to offer prescriptions to this non-ideal phenomenon of our age. Moreover, I show that, paradoxically, some of his obscure suggestions are anti-Rawlsian. I also make an attempt to defend one of the referred interpretations, arguing that there exist three powerful Rawlsian arguments about the fallibility of the idea of regarding refugees as a threat, and these arguments are able to offer some practical ideas to ease the difficulties of the current refugee crisis.

### 5. Bertjan Wolthuis: No Justice Without Law

The problem I address in the presentation is how a theory of justice can respond to what seem to be intractable conflicts between views of EU justice. The answer is that a theory should differentiate between reasonable and unreasonable views of justice, between views of justice and views of other standards, between standards of EU justice and standards of justice related to other subjects, and, finally, between stable and unstable views of EU justice. My conclusion is that, once all these distinctions are drawn, the EU is to be perceived as a subject of internal market justice. If the above distinctions are drawn, the conflicts between views of EU justice turn out to disappear.

## VI. Selected Workshop Papers

### A. Overview of selected workshop papers

#### 1. ETHOS project draft papers

- Rippon, Simon and Miklos Zala, 'Public Opinions and Political Philosophy', p. 24
- Theuns, Tom 'Responding to European Illiberalism: EU Militant Democracy?' p. 35

*These two draft research papers are by members of the WP3 team and constitute early formulations of ongoing research in the context of the ETHOS project's engagement with bridging empirical and normative theories of justice. However, these papers reflect the views only of the named authors. Please do not cite.*

## 2. External draft papers

- Cordasco, Carlo 'The Shpolitics Question to Political Realism and Practice-Dependent Theory' p. 54
- Efthymiou, Dimitrios 'Why Current Restrictions on EU immigrants; Access to Welfare Rights should be Lifted: An Argument from International Reciprocity' p. 73
- Eszter Kollar: 'Temporary Labour Migration and Beliefs about Justice in Immigration' p. 83
- Ujlaki, Anna 'Refugees: A Threat? The Possibilities and Problems of a Rawlsian Interpretation' p. 92
- Wolthuis, Bertjan 'No Justice Without Law' p. 114

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## B. ETHOS project draft papers

### 1. Rippon and Zala, Public Opinions and Political Philosophy

#### *Introduction*

If asked what morality and justice consist in, many (perhaps most) non-academics, as well as many academics particularly in fields other than philosophy, think it natural and appropriate to survey public opinion. According to a widespread “cultural relativist” view of justice, the demands of justice are relative to the beliefs and practices that are generally accepted in a given society. This view implies that understanding what justice demands in a given society is a matter of understanding, at bottom, what people actually think, and what people actually do. This paper is written as a contribution to the ETHOS (towards a European theory of justice and fairness) project, which responds to a Horizon 2020 call for research issued by the European Commission.<sup>2</sup> The call includes the following wording:

*The specific challenge is to formulate a theory of justice and fairness which is normatively sound, reflective of European values and at the same time rests on solid empirical ground with regard to citizens' attitudes and views.*

How *can* a normative theory of justice find a “solid empirical ground” in “citizens’ attitudes and views”? Does acceptance of the European Commission’s challenge presuppose a cultural relativist view of justice? We think not. And, as contributors to the ETHOS project, we are glad of that, because, like the majority of political philosophers, we do not find a cultural relativist view of justice attractive. We will say more about that later (see section 1.1). For now, we set aside our disagreement with cultural relativists, and note a disagreement with a different group. This disagreement is with those political philosophers who think, or who very often at least seem to assume, that it is appropriate develop our normative theories of justice without paying heed to the views of the ordinary folk. We think that political philosophers *do* need to pay attention to empirical information about what folk think, and what they experience. More specifically, we think theorists of justice ought to pay attention not just to what “the public” as perhaps an imagined, vaguely homogenous mass think, but rather to what *particular groups* of people think and experience. That’s why the title of this paper includes an unusual plural: public *opinions* rather than public opinion. In this paper, we thus explore the link between, on the one hand, empirical information about what citizens think and experience, and on the other, normative political theory. And we aim to show that political philosophy should seek and should take account of empirical information about public opinions.

The paper proceeds as follows. In Section 1, we describe Adam Swift’s account of five ways public opinion can be taken into account by a theory of justice. In Subsection 1.1, we discuss two of Swift’s versions of public opinion being constitutive to the demands of justice: rejecting the stronger but false one, and accepting but setting aside the correct but uninteresting one. In Section 2 reconsiders the three remaining possible ways (two non-

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<sup>2</sup> European Commission Programme REV-INEQUAL-01-2016 - An empirically informed European theory of justice and fairness

constitutive and a constitutive one) how public opinion can be important for political philosophy. In section 3 we further develop the analysis by explaining how the first-person experiences of vulnerable minorities can be constitutive of justice. Subsection 3.1 we highlight the importance of tacit knowledge and the phenomenon of hermeneutic injustice, which compounds the problem of tacit knowledge. The final section concludes by examining a tragic conflict between the first-person experiences of vulnerable groups and the wider citizenry.

### 1. *Public Opinion and Political Philosophy: Adam Swift's Five Ways*

We begin with a survey of possible grounds for political philosophy to take account of public opinion about justice, as described by Adam Swift (1999) – we will call these Swift's "Five Ways" (Swift identifies them all, though he does not endorse all of them as good grounds). Swift divides the Five Ways into two classes: according to the first two Ways, public opinion is considered as something external to justice that is nevertheless useful to consider when thinking about justice. According to the last three Ways, public opinion is considered to play a constitutive role in determining what justice demands.

The First Way Swift identifies in which lay beliefs about justice might be important is that they give philosophers food for thought, or *grounds for caution*. Suppose that I have come to hold some belief, and I then learn that many others hold a different view that conflicts with mine. Suppose also that I think that others are about as likely as I am to get things right as me with respect to this issue, because they have access to similar quality evidence, possess equally good reasoning ability, and so on. That is, suppose I think that others are my *epistemic peers* with respect to this issue. In that case, learning that they hold a different view gives me reason to think that I might have made a mistake. I should at the very least check my intuitions and arguments that led me to hold the view I hold. Perhaps I should reduce my confidence in it, or even abandon it altogether. Swift cites as an example John Rawls's claim that a "maximin" or "difference" principle that ensures the worst off are made as well off as possible is the just principle of distribution, reasoning that it would be chosen from behind the "veil of ignorance" (i.e., under conditions of uncertainty in which people are asked to choose a principle for organizing society, but do not know what their future place in society would be). Frohlich and Oppenheimer (1992) challenged this claim experimentally. They found that in conditions simulating the veil of ignorance, participants overwhelmingly chose a different, "truncated utilitarian" principle, that is, a principle that maximises total welfare subject to a minimum level for the worst off. Swift agrees with John Elster (1995, 94-95) that Frohlich and Oppenheimer's finding that this is the principle most people actually chose in a simulated veil of ignorance situation gives philosophers reason to give it careful consideration as the correct principle of just distribution – even if they come on reflection to reject it. (Swift 1999, 349).

The Second Way that public opinion about justice might be taken into account is that it sets limits on what is feasible (Swift 1999, 349-50). A philosophical conception of justice that is far removed from ordinary thinking is unlikely to be a real world political possibility, even if the arguments for it are entirely sound in philosophical terms. (Examples might be radical egalitarianism, or the cosmopolitan view that borders between nations should be abolished, since they make arbitrary and unjust distinctions). As Swift notes, we need not think that justice is limited to what is politically possible. Thus, in cases like this, we may be regretful that justice is unattainable given where popular opinion stands. Feasibility, on this view, is an external constraint on the realization of justice, rather than

constitutive of what justice is for us. But if we want to derive prescriptions for here and now, it is incumbent on us to take feasibility into account. Understanding public opinion will be an essential part of that.

We now move to survey the terrain in which popular beliefs about justice might be said to be internally related to justice in the society in question: that is, they might play some kind of constitutive role in determining what justice consists in. Swift calls his Third Way the “weak and unobjectionable” version of the constitutive claim (Swift 1999, 350). According to the Third Way, a philosopher giving a theory of justice needs to make sure that he is talking about the conventional referent of the word “justice” and not, for example, about trees, or chess, or etiquette, or charity. We determine this by attention to how the term is used, and to the platitudes or commonplaces that are associated with justice by ordinary language users (for example, that justice has something to do with what we owe to each other). Since these platitudes are themselves widespread opinions about justice, this Third Way gives popular opinion a constitutive role in determining what justice is. But Swift regards this as a weak and unobjectionable constitutive claim, because radically different theories of justice are compatible with these platitudes that constitute the “grammar” of justice.

The Fourth Way is described by Swift as a “substantial and interesting” version of the constitutive claim. According to this view, the principles of justice might “give some weight” to what people think is just, even while these principles are themselves justified in a way that is independent of public opinion. Swift offers as an example of this the plausible claim that people’s legitimate expectations of reward (given the social norms under which those beliefs were formed) should carry some weight in deciding which distributive outcomes are just, even if the fundamental truth is that conventional desert claims are mistaken. In cases such as this, public opinion is significant because there is an independently justified principle of justice that gives weight to what people think (Swift 1999, 351).

The Fifth Way, described by Swift as the “strong and mistaken” version of the constitutive claim, goes further. This view claims that what people believe to be just is directly constitutive of what justice is. That is, it gives popular opinion a role in determining the content of principles of justice themselves. This is the claim that part of the answer to the question of what principles should govern the distribution of goods in a society is to be found by looking at the way that ordinary people think that they ought to be distributed (Swift 1999, 351).

In other words, according to the Fifth Way, lay people’s beliefs about justice are not merely grounds for caution, or feasibility constraints, or relevant to deciding what “justice” conventionally refers to, or something that independently justified principles give some weight to, but rather determine the content and shape the principles of justice. In its boldest form, the Fifth Way is just the relativist view that justice is what the people think it is.

Having briefly surveyed Swift’s Five Ways, we may now proceed with two questions in mind. First, was Swift correct in his assessment of the Five Ways: was he correct in describing the Fifth Way as “mistaken”, and the Third Way as “weak”? Second, are Swift’s Five Ways complete: do they cover all the meaningful ways in which political philosophy should take account of the opinions of the folk? In the next section, we argue that the answer to the first question is “yes”, providing additional arguments that supplement Swift’s own. Following that, we shall argue that the answer to the second question is “no”.

### 1.1 Public Opinion as Constitutive of Justice: Against the False Strong and the Correct but Boring Versions

We now examine more closely and set aside the two of Swift's Five Ways that we regard as least fruitful. We start with the Fifth Way, the "strong and mistaken" version of the constitutive claim. The work of Michael Walzer (1983) and John Rawls (1993) are often thought to offer examples of this approach, but Swift argues that "neither gives any genuinely constitutive role to popular beliefs about distributive justice" (Swift 1999, 351). So perhaps it would be best to point out the difficulties for the Fifth Way in the abstract, without accusing any particular theorist of endorsing it.

Here is an initial motivation for the boldest version of the Fifth Way: if justice is constituted by public opinion about justice, then justice *is* nothing more than a particular set of beliefs held in a given society. This view appears to have both metaphysical and epistemological advantages: it can avoid positing any mysterious Platonic truths that determine the nature of justice, and it need not explain how we come to have epistemic access to such truths.

But, for all its apparent advantages, the bold view (that justice in a given society is just what public opinion says is just) has problems. A first problem of a view like this is incoherence in public opinion: people may believe P and people may also believe Q, where P is inconsistent with Q. An example might be that most people support equal opportunity, that is, they think that people should have equal life chances from birth, but they reject the idea of an inheritance tax, which is a necessary means to realizing equal opportunity. When the public hold incoherent views like that, it is not straightforward how to understand what justice requires – does it require an inheritance tax? Or does it require equal opportunity from birth? Does it, somehow, require both inheritance tax and its abolition, and equal opportunity and its absence?

A second problem of the bold view is that public opinion is often abhorrent. Public opinion supported such things in the past as slavery or, in some places in the world still, caste systems, or reprehensible forms of discrimination. Can we swallow the claim, implied by the bold view, that justice (not what people believe about justice, but *justice*) requires those things in those societies?

A third problem of the bold view is related to the second: if justice is what public opinion says it is, we do not have grounds for criticizing public opinion. That is, a critical approach is incompatible with this view. If we criticized the caste society which lives up to the standards of its public opinion, we would be making a mistake.

A defender of the Fifth Way might want to refine the view to try to avoid such objections. It might be claimed, then, that we should not say that justice public opinion just as it is, but rather a kind of *idealization* of the public opinion. Perhaps we should say not that justice is what people actually believe it is, as the bold view says, but rather that justice is what people *would* believe it is if they were, as a public, more coherent, fully informed, sensitive, and so on. Call this the idealized view.

The problem with the idealized view, as Alice Baderin (2018) persuasively points out, drawing on David Enoch's (2005) work, is that it calls for an answer to the question: Why idealize? Suppose for a moment that we are members of the very public whose idealized opinions are said, on this view, to constitute justice. Suppose that we come to wonder whether justice demands a certain distributive principle. The idealized view asserts that the principle is just if and only if it would be present in the idealized version of public opinion. But why shouldn't we act

on what we actually think, rather than on what we would think in circumstances that are non-actual? The idealized view says we should revise what we actually think to match whatever we would think in the idealized circumstances, and act on that. But what standard requires us to do this, and where does it come from? If there is such a standard, it seems it cannot come from actual public opinion. But if it cannot come from actual public opinion, then it must be an external standard. And now we seem to have come right back to the sort of mysterious Platonic truths that the view was designed to avoid.

Let us now return to the Third Way. Swift describes it as the “weak and unobjectionable” version of the constitutive claim. We would describe it as legitimate but *boring* from the perspective of the present work. It is true that a theory of justice had better talk about what the word “justice” in English refers to, rather than another thing. And it is true that empirical facts about conventions of language pick out the subject matter of what the word “justice” refers to. But these empirical facts are necessarily uninformative, to a large degree, about what justice consists in. We know this because we know that we can disagree about what is just. But in order to have a (genuine) disagreement, and an argument about what is just, we have to be speaking the same language. We have to understand each other, and we have to be talking about the same thing. If when I say “justice requires X” and you say “justice requires Y”, we refer to different things by the word “justice”, then we cannot have a genuine disagreement. The reference fixing established by our linguistic conventions do not resolve disagreements about justice, then, but rather make it possible. It is true that empirical facts help to determine what justice is, but in this weakest version, only in a very narrow, grammatical sense.

## 2. *Grounds for Caution, Feasibility, and Giving Weight*

We are left with three promising ways from Swift’s five regarding how public opinion can be of interest for political philosophy: the First, Second, and Fourth. We attend to these further in this section.

As we have seen, Swift’s First Way is that public opinion provides grounds for caution, insofar as we think of lay individuals as epistemic peers – i.e. I have no reason to think that my judgment can be more reliable than that of the public. And if the public and I are epistemic peers, then when the public comes to a different conclusion than I do, then I have reason to rethink my calculation; I have reason to question whether I got it right.

Can we go even further than that? According to an interesting line of research, we can: lay individuals can be considered as epistemic *superiors* to philosophers when it comes to making particular case based judgments about justice. Alice Baderin’s (2017) recent work is an important contribution to the topic that makes this seemingly surprising argument. Her starting point is the Rawlsian method of reflective equilibrium, a frequently used method in political philosophy. The method of reflective equilibrium can be understood as a method of increasing coherence between one’s considered judgments about particular cases, and one’s judgments about the principles of justice.

The important question here is of whose intuitions we should use for reaching such an equilibrium. Should we use the intuitions of philosophers, or those of lay persons instead? Baderin meticulously maps how different philosophers aim to channel lay beliefs/opinions into their theory, or on the contrary, how some philosophers reject the introduction of lay individual judgements into their philosophical theories. Her analysis identifies “three dimensions across which [reflective equilibrium] might be understood in individual or public terms” (Baderin 2017,

6). By individual terms, Baderin understands the individual philosopher, whereas by public she understands the larger political community or society, the sum of the average citizens. These three dimensions consist in two kinds of inputs (intuitions and principles), whereas the third refers to “who is [going to] carry out the process of revising and reconciling” the different elements of the theory (Baderin 2017, 6). Thus, the question is of whose judgements or beliefs count and who is going to work out the theory from the given inputs.

Baderin then surveys and categorizes several theorists’ position on this issue, providing a matrix. A fully individual view is represented by Normal Daniels, Michael DePaul and Tim Scanlon, who all hold that it is *the individual philosopher’s* task to provide the inputs (considered judgments and principles) for the theory and also to carry out the whole process of working out the different elements into a coherent whole (Baderin 2017, 5). By contrast, Jonathan Wolff and Avner de-Shalit (2007) proposes a “strongly public” approach to reflective equilibrium, as they believe it is *the joint task of philosophers and lay people* to provide inputs for the theory (it is less clear on their account, Baderin points out, whether the process should also be carried out jointly) (Baderin 2017, 5).

A *moderately public* conception of reflective equilibrium is represented by David Miller, who believes that while lay individuals are not apt in making particular moral judgments, the role of the philosopher is to crystallize from her own considered judgments the principles latent in average individuals’ thinking (Baderin 2017, 8). Baderin identifies another possible version of the moderately public reflective equilibrium in the work of the early Rawls, who holds that the philosopher should use the considered judgments of the public and work them out combined with the principles she or he identifies into a coherent whole (Baderin 2017, 5).

Against these views, Baderin puts forward her own position, strongly drawing on results in experimental philosophy, and her approach can also be described as a moderately public view. She argues persuasively that the considered judgments/intuitions of philosophers are tainted with “principle-bias”, i.e. they no longer have raw intuitions about particular cases (their judgments about concrete cases are not independent of the given philosophical theory they already hold) (Baderin 2017, 17). But there is also ample evidence from experimental philosophy that lay people are not skilled at identifying, clarifying and coherently thinking about principles (Baderin 2017, 10-3). Thus, Baderin makes a strong case for the plausibility of the early Rawlsian view about philosophical methodology.

What about the Second Way, namely that public opinion sets limits on what is politically feasible? Obviously, when we are doing political philosophy, we are interested in the real world, but we also want to convince lay people that we got it right and have an impact, changing the world as we find it. We want to make it more just. Maybe there are two different things here. There is justice and there is political feasibility as an external constraint on justice. This is how Swift understands feasibility: if justice requires X, but only something vaguely like X is politically feasible, then we have an argument for adopting that other policy even though it is not just. This separation between what is just (but not feasible) and what we should do, which is feasible, is supported by Philippe van Parijs’s contention that philosophers articulating conceptions of justice should help broaden the possibilities of what is currently feasible in a given society. In his words, “[a]rticulating our utopias is not just a way of enabling us to achieve what is possible. It makes possible what is currently impossible” (van Parijs 2016).

On an alternative approach, we might understand feasibility as a necessary condition of what *non-ideal* justice demands from us. On this view, feasibility is partially constitutive of non-ideal justice rather than an external constraint on it. This idea rests on the distinction between ideal and non-ideal theory, so we can say even though



ideal justice would be far away and not politically practical, non-ideal justice demands of us something else. It demands of us something we can best do *in the circumstances we are faced with*. So we can consider political feasibility as a necessary condition of non-ideal justice in that sense.

Finally, the Fourth Way: consider the case of the Brexit referendum, which is arguably a good example of a policy that might be substantively mistaken, or that might not be the best policy in fact for the country, or which might be unjust in various ways (to European citizens, or to the worst-off citizens of the UK). But it seems like the policy has gained *legitimacy* through being endorsed by a democratic vote. And now we might make a distinction between *procedural* and *substantive* justice. We might say, even if substantive justice requires that we do not do unreasonable things like Brexit, that both potentially harm the residents of the UK and European citizens, procedural justice might require that we follow through of the results of a democratic referendum. That is a way in which justice might actually give weight to public opinion.

In addition, if justice gives weight to public opinion, it might have the advantage of *publicity*. Justice plausibly requires the government's acting on public reasons – reasons that anyone can accept as reasons for themselves in principle. What counts as a reason, given that publicity condition, might depend on what public opinion actually is. Being able to justify policies to individuals – in terms of reasons they can accept as reasons – might enhance their sense of *feeling at home* and lessen their sense of alienation from the government's policies. That in turn, might lead to a democratic society that is more stable than it would be if we were to follow policies which would harm people's feeling of at-homeness, or would not be publicly justified.

The fact that all these things are valuable suggests that principles of justice should take them into account; principles of justice should give weight to public opinion. To take stock: political philosophy should take into account public opinion because we public opinion provides grounds for caution (the First Way); public opinion sets limits to what is politically feasible (the Second Way); and that true principles of justice give weight to public opinion for reasons of publicity, the feeling of at-homeness, alienation and stability (the Fourth Way).

Swift has provided us with a good basis for understanding how empirical information about public opinion can contribute to political philosophy. But we think there is yet scope for extending the account. In the next section, we argue that as political philosophers, we should pay attention not just to what “the public” thinks, but to what particular groups of people think and experience. We will argue that attitudes and first-hand experience of injustice and of matters relevant to justice, especially the experiences of vulnerable and marginalized groups, can play an important role in formulating philosophical theories of justice.

### 3. From Public Opinion to Public Opinions, and Experiences

Baderin's analysis importantly broadens the path Swift laid. One crucial aspect of Baderin's argument is that the *standpoint* of lay individuals makes them more reliable in making raw judgments about concrete cases. But philosophers' standpoint, as trained experts of normative thinking, make them more reliable than others in working out theories of justice (preferably using the raw intuitions of lay people). At this point, we would like to broaden the research of Swift and Baderin by adding more considerations from standpoint theory. Namely, we will

emphasize how personal experience can shape what we think about justice, especially if the experience is related to injustice.

We begin with the concept of situated knowledge. Consider the following case. Imagine that we have just constructed a toilet for disabled persons to use. How did we design it? Suppose that, not being wheelchair users ourselves, we carefully measured wheelchairs and projected the space a wheelchair needs to be able to turn around and move in the room, designing and building the room accordingly. Then, suppose that once wheelchair users start to use the toilet, they repeatedly report that it is uncomfortable; the space is simply too narrow. This is a prime example of situated knowledge – the disabled wheelchair users are in a special, superior epistemic position (see Wasserman et al. 2016). We certainly should not argue in this situation with the wheelchair users, citing our careful calculations.

Such personal experiences give us reasons to go further than grounds for caution, these experiences also give situated knowers, in this case, the disabled, a special claim to *recognition*, in two senses. The first sense is *epistemic*: as situated knowers, we had better listen to their first-hand knowledge because if we do not, we would commit a *testimonial injustice*, failing to respect their epistemic standing (Wasserman et al. 2016; cf. Fricker 2007). But they also have a claim for recognition in a *moralized* sense (even if we have an abstract reason to believe them to be wrong, or not completely correct), merely based on a moral consideration that victims of injustice have a right to be heard, even if justice could be perfectly done without their testimony (Wasserman et al 2016).

We can illustrate this point further by reviewing a recent philosophical debate about immigration and refugees, namely Sarah Fine's (2018) critique of David Miller's book *Strangers in our Midst* (2016). Toward the end of the book, Miller (2016, 166-73) briefly discusses the 2015 Syrian refugee crisis, by exclusively focusing on the perspective and fears of ordinary citizens of expected host countries. Miller believes that there is a justification for limiting the intake of refugees, for he believes that once refugees reached a safe country, they have a chance to have a decent life, so they do not have a valid claim towards third countries to be let in and granted with asylum. As long as they can live a decent human life in a safe country, they do not have a right to go further.

Fine, by contrast starts off from the first-person experiences of refugees stuck in the "Jungle" camp in Calais, France, waiting and hoping for entry to the UK. Whereas Miller primarily emphasises the security related aspects of immigration from the point of view of the citizens of host countries, Fine suggests that consulting refugees on their individual experiences is indispensable for understanding the idea of a "decent human life" as applied to them (Fine 2018, 12).

As Fine points out,

it seems reasonable to suppose that refugees, other migrants, and displaced people—from different parts of the world; with different languages, cultural practices, educational backgrounds, and religions; who have been compelled to leave their countries, towns, homes, families, familiar environments; who have, in many cases, experienced unimaginable human suffering—are in a prime position to offer evidence and guidance on the conditions necessary for living a decent human life. Engaging with refugees, other migrants, and displaced people, and trying to hear what they say about why they are or are not moving, what they need and desire, may provide an impeccable basis for trying to make universal prescriptions about such things as 'a global minimum that people everywhere, regardless of societal membership or cultural affiliation, are owed as a matter of justice' [quoting David Miller's work]. It may be that existing ideas about human rights



and capabilities ought to be modified to accommodate, for example, what refugees report about the special form of suffering involved in a life in enforced limbo (Fine 2018, 19).

Thus, Fine's point about refugee experience shows that personal experience may be more than a mere feasibility constraint on a theory of justice, or a mere ground for caution. Engaging with refugees' own accounts of their suffering and hardships might reveal to the theorist matters that are integral to their theory. Fine mentions Martha Nussbaum's list of "Central Human Functional Capabilities", which contains such items as "life", "bodily health", or "control over one's environment" (Fine 2018, 18). As Fine points out, "Listening to the words of refugees and other migrants, there can be no doubting the profound importance of 'control over environment'" (Fine 2018, 19). That is, refugee experience can give shape and content to the somewhat abstract idea of "control over the environment", or any other capabilities. This kind of contribution of human experience to a normative theory goes beyond Swift's First Way because what justice demands is not independent of people's first-person experiences, but is rather partially constituted by them. By failing to attend to the first-person accounts of refugees, Miller may not only have overlooked an important aspect of what constitutes the theory of justice he propounds, but also committed a significant testimonial injustice against refugees by failing to listen to what they take to be a decent life.

### 3.1 The Case of Tacit Knowledge and Hermeneutical Injustice

There are at least two additional reasons for giving weight to first-hand experiences and opinion, and in particular the experiences and opinions about justice of marginalized groups. The first is that they can involve *tacit knowledge*. Consider the following example: could you explain to a person how a rotten egg smells if that person has never smelled one, in such a way that they gain knowledge of the smell? We could try to help situate her by trying to point out that it is a bad smell, quite far away from a smell of a rose. But this knowledge is *tacit*. It cannot be put into words and transmitted by testimony.

But this is not true only of our natural world: we have plenty tacit knowledge about our social world as well. Vulnerable groups can have tacit knowledge about injustice, for example. These "lived experiences" of injustice may be narrated, but they cannot be wholly transmitted. It may amount to testimonial injustice if we ignore them.

The second reason is that *hermeneutic injustice* may make it impossible to conceptualize the kind of injustices one is subject to as a member of a marginalized group. A good example is the case of Carmita Wood. In the 1970s, Wood had to leave her workplace due to suffering what we now know as sexual harassment – a concept that did not exist at the time. Wood was barred from claim unemployment benefits because, according to the account of her bosses, she left her job "freely". Being unable to conceptualize the kind of injustice she suffered because of conceptual deprivation was an example of hermeneutical injustice. Trying to understand and conceptualize Wood's struggles in her workplace, her advocates coined the term sexual harassment (cf. Wolff 2018).

Hermeneutic injustice compounds the problem of tacit knowledge. Hermeneutic injustice implies that there are no "collective interpretative resources required for a group to understand (and express) significant aspects of their social experience" (Grasswick 2018). In other words, victims of injustice are not even able to easily explain,

express and transmit their experiences because they are deprived of the necessary conceptual terrain. And this further exacerbates the problem of tacit knowledge.

Standpoint theory, together with the problem of tacit knowledge, reinforced by hermeneutical injustice, means that we have special reason in political philosophy to pay attention to the experiences and views about justice of vulnerable and marginalized groups. Members of these groups may not be able to transmit to us the tacit knowledge that grounds their views, but that doesn't mean we shouldn't give their views a very significant weight in our reasoning. And that, of course, requires careful empirical study of them.

#### 4. Conclusion: A Tragic Conflict

Above, we explained why political philosophy should take into account public opinion and reasons why political philosophy should take into account public opinions (in the plural) and experiences. Now we want to point out a problem that we call the *tragic conflict*. The tragic conflict is between the different opinions that matter. So take just the problem of hermeneutical injustice seriously, that there is the problem of tacit knowledge, and there is the problem of failing to listen to vulnerable and marginalized groups. Recognition and avoiding testimonial injustice requires to take into account of the opinions and experiences of vulnerable and marginalized groups – the combination of the first way (grounds for caution) and the fourth way (reason for taking these experiences into account).

But this is in conflict with standard reasons to take into account public opinion with respect to the majority. Above, we outlined the virtue of publicity, the idea that you can justify public policies to everyone in terms of considerations that they can take as reasons. But the public in general may not understand the considerations of marginalized and vulnerable groups as reasons. They may not be able to partly because marginalized and vulnerable groups have tacit knowledge that they cannot express and transmit. The public at large may be unconvinced about the considerations that motivate the opinions of marginalized and vulnerable groups. If we were to adopt policies based on those minority considerations the majority might lose their sense of at-homeness and they might develop a sense of alienation towards the government's policies. And that in turn might undermine the democratic stability of the society. This is the tragic conflict between public opinion, and public opinions.

We think this phenomenon explains not just conflicts between political philosophers, like David Miller and Sarah Fine, but conflicts that loom large in everyday politics, like the conflict between the populist right and those who wish to protect the interests of minority groups. We think there are compelling reasons, including reasons of publicity and stability, for taking into account public opinion, and compelling reasons, including reasons of testimonial justice, for taking into account public opinions. But we cannot always do both.

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## 2. Theuns, Responding to European Illiberalism: EU Militant Democracy?

### *Introduction*

Over the last four or five years, discussions over what reaction the EU ought to have to its Member States backsliding on core democratic and rule of law commitments - variously called 'democratic backsliding', 'democratic regression' or 'democratic decay' have taken an increasingly urgent tone (e.g. Kelemen 2017, Kochenov 2015, Kochenov and EPch 2016, Laurent & Scheppele 2017, Niklewicz 2017, Oliver & Stefanelli 2016, Pech *et al.* 2016). The legal form that these responses take are defined in Article 7 of the Treaty on European Union ('Article 7').

This paper makes two main related claims.

1. Article 7 is largely in conflict with democratic legitimacy and ought ideally to be abandoned.
2. Expulsion from the Union is a normatively more coherent political sanction for Member States in breach of the values referred to in Article 2 of the Treaty on European Union (Article 2).

The two states most often in discussion in relation to Article 7 are Hungary and Poland, and, indeed, at the time of writing in January 2019, so-called 'rule of law proceedings' are underway against these two states for violating EU fundamental values. Much has been written on the particular trajectories of Polish and Hungarian democratic backsliding, and this is not the place for a review of the events and controversies surrounding, *inter alia*, judicial independence, freedom of the press, and political corruption in these countries. Instead, let us use as a shorthand the ratings that Hungary and Poland have received in the annual Freedom in the World ratings to get an overview of recent developments.

Hungary recently became the first EU Member State not to be awarded the classification 'Free' in the most recent 2019 Freedom in the World Index (over 2018 data).<sup>3</sup> The relevant categories for the freedom classification are those comprising what the Index calls 'Political Rights' and 'Civil Liberties'.<sup>4</sup> Hungary's score for 'electoral

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<sup>3</sup> The Index and all historical data are available online: <https://freedomhouse.org/report/freedom-world/freedom-world-2019>

<sup>4</sup> I do not mean to endorse the Index's methodology wholesale, but it is a useful, reliable and fairly complete study that allows comparisons of a country's performance on relevant democratic and rule of law indicators over several years. Details of the Index's method can be found here: <https://freedomhouse.org/report/methodology-freedom-world-2019>

process' went down from 12/12 in 2014 to 9/12 in 2019 (higher is better). In the same period, the score for 'political pluralism and participation' went down from 15/16 to 11/16. The score for 'functioning of government' is down from 9/12 to 7/12. Similarly, the 'freedom of expression and belief' score is down from 15/16 to 10/16. 'Associational and organizational rights' are down from 12/12 to 10/12. The score for the 'rule of law' is down from 11/16 to 10/16. Finally, Hungary's 'personal autonomy and individual rights' score went down from 14/16 to 13/16. The most recent aggregate score for Hungary in the 2019 index is 70/100, down from 88/100 in 2014. This puts it on a par with Timor-Leste (although Timor-Leste outperforms Hungary in the categories of Political Rights and Civil Liberties, and is thus categorized as 'free'). The 'Freedom rating' for Hungary is down from 1 (lower is better) to 3,<sup>5</sup> which, given the threshold for 'Free' is 2.5, resulted in Hungary's recent reclassification.

Since Poland was the first country against whom Article 7 proceedings were opened, it may come as a surprise that Polish democratic backsliding is rather more moderate than Hungarian backsliding in the same period. Nevertheless, the trend is one wherein democratic and rule of law indicators are steadily negative. The Polish score for 'electoral process' dropped from the highest (best) possible score of 12/12 in 2014 to 11/4 in the most recent Index for 2019. 'Functioning of government' dropped from 10/12 in 2014 to 8/12 in the same period. Reflecting a similar trend, the score for 'freedom of expression and belief' went down from 16/16 to 14/16. 'Associational and organizational rights', in turn, are down from 12/12 to 10/12, while the 'rule of law' rating dropped from 13/16 to 11/16. The aggregate score has gone down from 93/100 to 84/100, which puts Poland on a par with Antigua & Barbuda, Argentina, and Panama. Poland's 'freedom rating' is down from the best possible score of 1, to 2.0.<sup>6</sup>

In response to these developments, Article 7 proceedings have been started against both Hungary and Poland. However, both countries have indicated that they would support the other in these proceedings, so it seems unlikely that they will result in sanctions, given the unanimity requirements stipulated in Article 7.2 ascertaining the existence of a serious and persistent breach of the Article 2 values (Niklewicz 2017, Pech *et al.* 2016, cf. Kochenov 2017). Unsurprisingly, this has resulted in much criticism of Article 7. Commentators have focused much of their ire on the unanimity requirement of Article 7.2, but have also criticized the very slow speed of the proceedings, and the politicized nature of them (Kochenov 2015, Kochenov and Pech 2016, Niklewicz 2017, cf.

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<sup>5</sup> There are 18 countries with the same 'freedom rating' in the 2019 Index. These are: Albania, Bolivia, Columbia, the Dominican Republic, Ecuador, Fiji, Georgia, Indonesia, Lesotho, Liberia, Malawi, Mexico, Paraguay, the Philippines, Serbia, Seychelles, and Sierra Leone.

<sup>6</sup> 18 other countries have the same 'freedom rating' as Poland in the 2019 Index. These are: Antigua & Barbuda, Argentina, Benin, Brazil, Bulgaria, Jamaica, Latvia, Monaco, Nauru, Romania, Samoa, São Tomé and Príncipe, the Solomon Islands, South Africa, South Korea, Tonga, Trinidad & Tobago, and Vanuatu.

Sedelmeier 2017). For instance, while concerns with Hungarian democratic backsliding have been around since Fidesz was first elected in 2010, and intensified progressively soon after their reelection in 2014 (Oliver & Stefanelli 2016), the first concrete steps towards rule of law proceedings against Hungary under Article 7 were made in the Autumn of 2018. Procedures against Poland were quicker to start following the constitutional crisis of 2015, but despite extensive ‘dialogue’, proceedings have not resulted in substantial changes. Indeed, the interventions of the PiS party in the Polish Constitutional Court have intensified since dialogue with the European Commission on their anti-democratic nature started. Regarding the politicization of the proceedings, it has been noted that Fidesz, still an EPP member at the time of writing (although perhaps not for long) has been protected at the EU level by this membership given the EPP majority in the Council and in Parliament. This is one of the reasons proceedings against Poland, whose ruling PiS party is a member of the marginal ACRE group in the EP, have been somewhat faster.

Alongside criticisms of the unanimity requirement of Article 7.2, and the general slow speed and politicized nature of Article 7 procedures, commentators have also criticized the sanctions formalized in Article 7.3, mainly by charging that since stripping a Member State’s votes in the Council is a very weighty sanction, it is also unlikely ever to be used (Oliver & Stefanelli 2016, Pech *et al.* 2016 p.37, cf. Kochenov 2017). Proposals for alternative sanctions-mechanisms abound (indeed, this paper is in part a contribution to this literature), and tend to focus on swifter, milder political sanctions, on depoliticizing the procedure by giving a stronger place to the Courts, and by complementing political with economic sanctions (Laurent and Scheppele 2017, Kochenov 2015, Kochenov and Pech 2016).

The paper is structured as follows: in a first part, Article 7 and Article 2 are briefly presented and evaluated to highlight those characteristics particularly relevant for the argument of this paper, and to specify how the articles are interpreted for the purposes of the paper. In part 2, it is argued that the Article 7 is in conflict with the principle of democratic equality, using an ‘immanent’ method of argumentation where a particular political or legal practice is held up to internal standards of consistency. In part 3 it is considered whether the mere fact that a Member State is determined to be in serious and pervasive breach of the fundamental values of the European Union is necessary or sufficient to justify stripping them of a right to vote in the Council based on analogous arguments made in the context of justifications for policies of criminal disenfranchisement; particularly, the idea that backsliding Member States’ votes may otherwise ‘taint’ the democratic character of Council decision-making is evaluated. I conclude that there does seem to be an all-things-considered case for the sanctions described in Article 7, despite the argument forwarded in part 2. In part 4 I consider this paradox in light of the classical literature on militant democracy, which theorizes the justifiability of acting contrary to democratic values in order to preserve democracy in times of crisis. Yet, I conclude that the appropriate sanction in such extreme circumstances would be expulsion

from the Union rather than disenfranchisement in the Council. Expulsion ought clearly to be kept only as a last result, and it seems prudent that there would be a range of lesser procedures and sanctions prior to this final step being taken. The conclusion briefly considers what principle ought to drive an alternative economic sanctions procedure for violations of Article 2 values that does not suffer from the flaws of Article 7.

### *1. The Rule of Law Procedure in Article 7: Politics all the Way Down*

This paper engages with Article 7 in detail, so it is worth from the outset quoting the article in full. Passages that are particularly relevant to the argument of this paper have been italicized:

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, *acting by a majority of four fifths* of its members after obtaining the consent of the European Parliament, may determine that there is a *clear risk of a serious breach* by a Member State of the *values referred to in Article 2*. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, *acting by unanimity* on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the *existence of a serious and persistent breach* by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, *acting by a qualified majority*, may decide to *suspend certain of the rights* deriving from the application of the Treaties to the Member State in question, *including the voting rights* of the representative of the government of that Member State

*in the Council.* In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

*The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.*

4. The Council, *acting by a qualified majority*, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

As the argument of the paper develops, different elements of Article 7 will come into view. For the time being it is worth noting that the different ‘stages’ of the procedure described in Article 7 have different decision thresholds. Stages 1 (determining a ‘clear risk of a serious breach’ of Article 2 values) and 2 (determining the ‘existence of a serious and persistent breach’) both require the consent of the European Parliament (by simple majority), but have different voting thresholds in the Council and the European Council: 4/5ths and unanimity respectively. The sanctions step described in 7.3 does not require the consent of the European Parliament, and requires a ‘qualified majority’. This is essentially a double supermajority, requiring 55% of Member States’ votes which together represent at least 65% of the population of the EU (although a supermajority of Member States comprising all-but-three Member States cannot be blocked by the remaining, opposing Member States, even when the population criterion is not met). That qualified majority is also required for the revocation of any sanctions decided imposed under Article 7.4. The second aspect of Article 7 it is interesting to note is that at *every* stage the modality ‘may’ is invoked. This is unsurprising for Article 7.1 and 7.2, as it merely indicates and emphasized the (controversial and criticized) political nature of the proceedings (Oliver and Stefanelli 2016, Pech *et al.* 2016). That is, the implication is that even when there *is* a ‘clear risk of a serious breach’ or even the ‘existence of a serious and persistent breach’, it remains in the prerogative of the Council *not* to ‘determine’ such a breach. Such a determination is thus inherently *political*. The use of the qualifier ‘may’ is more interesting in the case of 7.3 and 7.4. In the first case, it guarantees a margin of maneuver *even once the Council has determined a serious and persistent breach*. There is no legal ‘duty’ for Member States to sanction a backsliding state. In the second, more curiously still, *once* sanctions have been



imposed there is no legal duty to revoke them even when there have been ‘changes in the situation which led to their being imposed’. In other words, it’s politics ‘all the way down’.

From the outset, it is clear that Article 2 is central to Article 7. In both mentions of Article 2 in Article 7 the language is of a ‘breach... of the values referred to in Article 2’. Article 2 reads:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

The values listed are thus: human dignity, freedom, democracy, equality, the rule of law and respect for human rights. It seems as if ‘the rights of persons belonging to minorities’ is intended as a subset of ‘human rights’. Rather than referring to a specific set of group-differentiated rights, the intention seems to be insist on the *importance* of respecting the human rights of minorities, presumably given their vulnerable social position *qua* minorities. But this may be a matter of interpretation. Less clearly stated, but plausibly, ‘values referred to in Article 2’ ought to be extended to ‘pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men’ - these are clearly values, and are in Article 2, though they are not explicitly listed *as* values in Article 2.

It is also not immediately clear if there are any restrictions on how these values are to be interpreted. Perhaps the qualifier ‘reasoned’ in Article 7.1 opens the door for a juridical understanding of Article 2 values, where the Courts could demand an interpretative function in ascertaining their scope. It is not clearly the case though, and while the ECJ has ruled on cases adjacent to the rule of law proceedings, it has not had a determinate role in Article 7 proceedings thus far (to the consternation, perhaps unsurprisingly, of some legal scholars).

## *2. A Different Line of Critique: Article 7 at Mixed Purposes*

Focusing on the procedural requirements, slow speed, severity, and type of sanction currently juridified in Article 7 is important, but misses another line of critical reflection that looks at the normative coherence of the rule of law procedure. One question that could serve as a starting point for such a reflection is as follows: is the sanctions mechanism that Article 7 describes for EU Member States in breach of fundamental values described in Article 2

itself in line with those values? The hypothesis explored here is that it is not: stripping a Member State of their votes in the Council is a violation of the principle of democratic equality, a central element in plausible interpretations of the Article 2 value of democracy.

One approach to determining such a violation of the principle of democratic equality is to interrogate whether the procedure is normatively suspect *qua* internally inconsistent. This line of reasoning follows a method of ‘immanent critique’ whereby a minimal normative standard of a political practice is that it does not violate its own normative premises. The value of democratic equality is supposed to require that all those that are subject to a politically authoritative decision ought to have a say in making it. That constitutes a democratically legitimate decision or rule to which participants in such a procedure are supposed to have independent reasons to comply with (following an understanding of the legitimate authority of decisions or rules in a Razian sense as providing content-independent reasons for compliance). Stripping an EU Member State of its vote in the Council, while still holding them to be subjects to such votes (given Article 7.3, which determines that ‘The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State’), seems to be a violation of this principle of democratic legitimacy.

There are two elements to such an immanent critique: first, one must isolate the evaluative standards from the practice. In this case that means to justify why the notion of democratic equality requires the procedural inclusion of all those subject to a rule or decision procedure. The second step is to argue for the claim that depriving a backsliding Member State of their vote in the Council violates such a principle.

The immanent critique attempted here is, importantly, ‘tentative’. A full immanent critique would require a critical engagement with the relevant legislative and political discourse surrounding the definition of EU fundamental values, especially the value of democracy as identified in Article 2. Only if that notion was shown to require equal participation by those subject to authoritative rules can a critique on the consistency of the practice (in this case exclusion of a Member States voting rights in the Council) be charged to be in contradiction with Article 2 in an immanent fashion. The intention here, however, is to take a slightly different approach, and to engage briefly different versions of the democratic legitimacy principle in democratic theory. Once the standard at work here - that it is a demand of democratic equality that all those subjected to an authoritative decision or rule have an equal

stake in determining the content of this rule - has been contrasted with alternatives, the critique will proceed on the presumption that it is the standard best encapsulated in the current EU legal and political framework.<sup>7</sup>

There are various standards in democratic theory that seek to theorize which agents ought to be included in democratic procedures. Some have argued (e.g. Dahl 1970, Shapiro 1999, Goodin 2007) that all-those-affected by a decision ought to be included in the deciding. This principle has some intuitive appeal, as it explains why we may think that cross-border negotiations and procedures are appropriate to deal with cross-border issues such as pollution; a maritime state refusing to consider the interests of a nearby bordering island on issues of water contamination may be thought to be acting inappropriately for failing to live up to this sort of standard. However, operationalizing this principle, elegant in the abstract, raises many difficulties. Part of the problem is that it is very difficult to determine when someone is affected by something (a technical problem), while a second problem is that such a determination will often be political. How should such matters be dealt with? Who should decide? Determining the appropriate procedures is, in turn, *again* a political problem, and certainly 'affects-all'. Thus, to avoid a *reductio ad absurdum*, the 'all affected interests' principle is sometimes taken to imply that, in fact, all putative members (all those being considered possible members) of a decision or law ought to be seen as 'affected' by it (Goodin 2007). The all-affected-interests principle seems in other words to lend itself to an inflationary logic. While a more robust principle theoretically, we seem hereby to lose much of what was intuitively attractive with it to begin with. Notwithstanding these theoretical considerations, what is abundantly clear is that the Council does not function in this way. The decisions and rules decided at the level of the Council are not sensitive to interests being affected. There is no prior test on whether or not a Member State is affected by a decision for them to have a say on it.

Other democratic theorists have argued that the appropriate standard for inclusion into a democratic decision-making procedure is that 'all-those-coerced' by a decision or law ought to have a stake in its creation (e.g.

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<sup>7</sup> I do think that this conception of democratic legitimacy is the one that best captures the democratic ideal in EU law and politics, but the argument by its very nature is slippery: it is unsurprising that different ideas of democratic legitimacy find their expression in different loci in European law and politics. Identifying a particular conception as the dominant one in a particular body of discourse requires some 'idealization' (in the Weberian, not the normative sense), else it would be nonsensical to charge particular legal or political activities with failing to live up to that standard. This is the classic tension between a 'realistic' and an 'idealistic' approach to law and politics; if ideals and ideal standards are too utopian they risk being detached from legal and political realities and thus risk having little bearing on them. If, on the other hand, ideals and ideal standards are too 'realistic', they become mere descriptions of legal and political reality, again with costs at the level of their prescriptivity or 'action-guidingness'. This controversy will not be addressed further here, nor will I attempt the painstaking task of a discursive demonstration of the claim that EU law and politics operates generally with the democratic legitimacy standard of 'all-those-subjected' in this paper.

Lopez-Guerra 2005, Abizadeh 2008). Theorists defending this view have used this principle, for instance, to argue for the inclusion of refugees and other vulnerable would-be migrants into decision-making procedures determining the border policies of the territories they are trying to enter (*ibid.*). This is not the right forum to attempt to engage this ideal at a substantive level (from ‘first principles’). Rather, note that the difficulties raised vis-a-vis the all-affected-interest principles are replicated here. It will be a technically difficult and politically controversial task to determine which agents are coerced by particular decisions or rules. It is not clear which agents ought to be authorized to determine when such a standard has been met (and, consequently, to determine the appropriate ‘demos’ of persons or representatives authorized to vote in a particular procedure. Similar too is the observation that whatever the appeal (or not) of such a principle in normative democratic theory, it is very far from the practices of European democracies. Neither individual Member States, nor the various voting bodies of the European institutions (the European Parliament, the Council of Ministers, the European Council, etc.) incorporate a ‘coercion test’ in the procedure determining who is to vote.

The third principle, that all agents ‘permanently subjected’ to a rule or decision ought to be included in the procedures determining the content of that rule or decision is sometimes cast in territorial terms. The idea is that it is necessary and sufficient to be a subject of a particular rule in order to be authorized to have a democratic stake in its formulation (typically a vote for a representative of the legislative body). It is enough, under such a principle, to be *bound in principle* by a rule or decision, even if - and here the rule or decision departs from the two previous - one is not otherwise affected by that rule of decision. So, for instance, childless retired persons’ judgements over appropriate standards for governing child-care can still in principle be incorporated legitimately under such a principle. As will the judgements of blind persons on the appropriate limits to roadside advertising.<sup>8</sup> While I am partisan to a version of the ‘permanently subjected’ principle (although it cannot and does not solve all problems - recall the earlier example of cross border pollution), the task here is not to defend it. Rather, as is more appropriate to the ‘immanent’ method, it is sufficient for our purposes to note two things. First, this approach does not raise the same issues as the previous two standards: it is usually rather clear which persons or agents are and which are not legally subject to a certain rule or decision, even if boundary problems remain in hard cases (for example on determining when the ‘permanently’ standard is met). Once jurisdictional boundaries have been drawn, as they have in the EU, it will not usually be a technically complex or politically controversial decision to determine the appropriate ‘demos’. This is especially true of Council decisions: all Member States are subject to the rules and

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<sup>8</sup> I say in principle because in most democratic systems, and indeed all EU Member States, democratic procedures are centrally the election of representatives to legislative bodies that then deliberate and determine the content of laws, rather than a directly democratic system whereby persons vote on policies or laws in a piecemeal fashion.

decisions made by the Council, within the boundaries of the scope of its authority and prerogative as stipulated in the Treaty on European Union.

### 3. Do Votes by States in Serious and Persistent Breach of Democracy Corrupt EC Decision-Making?

One way to illustrate the argument in section 2 is by virtue of an analogy: stripping EU Member States of their right to vote in the Council might be considered analogous to stripping criminals of their right to vote as an additional sanction alongside other, more standard penalties in criminal law such as imprisonment or fines. Though the analogy must not be stretched too far, the logic seems similar: voting rights are suspending as a consequence to behaviour deemed beyond the pale.

Attempts to justify criminal disenfranchisement take different forms. One version argues that criminals by virtue of their criminal acts break a social compact and are thus not entitled to the political rights associated, in this account, with upstanding citizenship (e.g. Ewald 2002). Another emphasizes the deterrent function of penal sanctions in general, and criminal disenfranchisement specifically (e.g. Cholbi 2002, Bennett 2016). A third type of argument, sometimes called the ‘republican’ argument, holds that there is a need to keep electoral politics ‘pure’; on this version, allowing criminals, and especially serious felons, to vote would ‘pollute’ the vote with their malevolent views and interests (e.g. Manfredi 1998, Clegg 2001). The question arises to what extent these arguments are convincing, and if analogous arguments can be made to support the disenfranchisement of EU Member States backsliding on EU fundamental values.

In the context of democratic theory, the above strategies for justifying criminal disenfranchisement are fairly marginal and have attracted widespread criticism. In response to the ‘social compact’ argument, critics have pointed out that criminals remain subject to the laws and decisions of their state, so any social compact they have supposedly violated remains in place after that act of violation - indeed it is on that very logic that their penal sanctions are justified (e.g. Schall 2006, Beckman 2009). Given that Article 7.3 also explicitly notes that sanctioned Member States obligations under the Treaty of European Union ‘shall in any case continue to be binding on that State’ (i.e. irrespective of any sanctions under the rule of law procedure, including their vote being stripped in the Council), it seems that an analogous argument justifying stripping that Member States’ right to vote in the Council on a ‘social compact’ argument would fail for the same reason. Regarding the second type of instrumental justification of criminal disenfranchisement, focusing on its deterrent effect, critics have pointed out that there is no convincing evidence that the empirical assumptions undergirding this logic are correct (e.g. Lopez-Guerra 2014).

In other words, there is no measurable drop in crime rates corresponding to the installation of criminal disenfranchisement policies, nor a rise in crime rates associated with such policies being abandoned. While it would take careful empirical research to secure the same conclusion in the context of EU Member State backsliding on fundamental values, the mere fact that there have been high profile cases of backsliding on the values of democracy and the rule of law (canvassed in the introduction) suggest that the deterrent function of Article 7 is weak despite its supposedly powerful sanction of stripping a Member States' voting rights in the Council (sometimes referred to as the 'nuclear option').

The last, 'republican', justificatory strategy for criminal disenfranchisement is more interesting for our purposes. That is not to say that it is a tempting strategy in the context of criminal disenfranchisement itself. As critics have pointed out, it rests on speculative and empirically unwarranted assumptions about criminals' voting behaviour - presuming that criminals would (be more likely to) vote along some nefarious motivations, rather in line with their perfectly legitimate interests and judgements as citizens like any other (Reiman 2005, Sigler 2014, Lopez-Guerra 2014). Furthermore, it is often argued in this context that criminals individually have very little voting power (indeed, like all citizens taken individually), and must generally vote (again, like other citizens), in parliamentary, executive and ballot votes, along a predefined set of voting options, thus reducing the empirical likelihood of their 'corrupting' the results, even accepting the (dubious) claim that a significant proportion of them would vote 'malevolently' if they could. Yet, these rebuttals of the justificatory strategy of criminal disenfranchisement based on the purity of the ballot box seem to have less purchase on an analogous justificatory strategy of stripping backsliding Member States' votes in the Council grounded on inoculating Council decisions from their anti-democratic influence.

The (failing) strategy for justifying criminal disenfranchisement based on felons' votes being corrupted by their criminal characters proceeds charges criminals with a) voting in way that track their motivations for their criminal acts and b) thus having a negative impact on the electoral process. These arguments fail as criminals have a) not been shown to vote subversively and b) because prison inmates very rarely have the power collectively to swing elections along their supposedly corrupt preferences. But voting in the Council is different. First, Member States potentially facing sanctions under Article 7 have been found to be in *serious and persistent breach* of Article 2 fundamental values such as democracy, human rights, human dignity, freedom, equality, and the rule of law. It is not a stretch to imagine that an EU Member State willing to undermine, for instance, judicial and/or academic independence, or flaunt the basic human rights of refugees and/or ethnic minorities (to cite charges against Poland and Hungary) at the level of national law and government policy would seek also to undermine these self-same values at the supranational, European level. Part of the disanalogy then to the criminal disenfranchisement case is

that state ministers vote directly in the Council, without going through a further representative layer as in elections for members of a legislative body. Another part is that their actions held to be in serious and persistent breach of fundamental values are already squarely in the realm of law and politics, unlike most criminal acts which often have little if anything directly to do with the criminals' political or ideological orientation.

Also in the supposed lack of electoral power there is an important disanalogy to the claim that disenfranchised criminals would have little effect on electoral outcomes, and certainly no plausible 'nefarious' effect, given their low number *via-a-vis* the general population. The Council has 28 voting Members at the time of writing (although this will likely soon be 27 consequent to Great Britain's departure). Many votes are taken by consensus, and even when the voting procedure does not mandate consensus decision-making (for instance demanding decisions to be taken by qualified majority, described in section 1.) there is a fairly strong norm towards seeking consensus regardless, very much unlike what is usually the case in most democratic parliaments. In sum, neither of the objections made to the republican justification for criminal disenfranchisement seem to stick against an analogous argument for stripping Member States backsliding on democratic values of their right to vote in the Council. Even accepting that such a move would itself undermine the value of democratic equality, as argued in section 2 (above), it may nevertheless be justifiable all-things-considered as a way to protect the democratic character of Council decision-making (this notion is developed in light of the theoretical literature on 'militant democracy' in section 4, below).

There is one further important disanalogy with criminal disenfranchisement that must be considered: at the national level, the democratic nature of a political procedure is ascertained by measuring the degree to which all permanent subjects have a formally equal share of political power - either directly, in referendum voting and ballot initiatives, or, more typically, *via* the election of representatives in a legislative assembly and possibly an elected executive. But the democratic character of the Council is different. Granted, there are voting procedures, with every EU Member State being granted a formally equal vote.<sup>9</sup> But the democratic character of the Council is derivative, it depends on the democratic legitimacy of the Heads of State and Government that constitute its members. And it seems plausible that there is a threshold of backsliding on fundamental values such as democracy, human rights, the rule of law, equality etc. when the *domestic* democratic legitimacy of a backsliding Member States' Head of State or Government ought to be called into question.

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<sup>9</sup> Disregarding for a moment the additional complexity raised by the fact that EU Member States have widely varying populations, a situation that the qualified majority procedure with its double supermajority requirement attempts to address - see section 1, above.

Consider a stylized analogy that drives this point home: the National Assembly in France (its second chamber) has, currently, 577 members, each elected in a two-round run-off election for renewable 5 year mandates which take place in each of the 577 constituencies. The democratic legitimacy of the French National Assembly is largely a function of the procedural legitimacy of the deputies' elections. But now imagine that 1/28th of the constituencies, or roughly 20 constituencies, were *not* elected democratically. The 20 deputies 'representing' these 20 constituencies were elected in very flawed circumstances, whereby freedom of the press, of association, and of speech was not ensured. Further, imagine that these 20 'illiberal' deputies voted as a block. The legitimacy of the National Assembly as a whole would be in question if the remaining deputies would tolerate this violation of democratic and rule of law norms. Certainly it seems reasonable to say that any decision of the National Assembly that reaches a majority due to the votes of these 20 illiberal deputies would not be a democratic decision. If the domestic democratic legitimacy of one of the 28 members of the Council is seriously flawed then decisions taken in the Council themselves seem tainted in their democratic nature on similar grounds.

In sum, while arguments analogous to the 'social compact' and 'deterrent' arguments for criminal disenfranchisement seem irrelevant to justifying stripping a backsliding state of their right to vote in the Council, the republican argument for criminal disenfranchisement, while dissuasive in that context, has an analogue in the context of Article 7 that seems to give a *prima facie* justification for stripping Member States in serious and persistent breach of the EU fundamental values described in Article 2. Further, it may be a requirement of the maintaining the democratic character and legitimacy of voting in the Council to exclude from voting those members whose domestic democratic legitimacy is suspect, and plausible that the governments in serious and persistent breach of EU fundamental values would meet such a standard.

#### 4. *Militant Democracy, Banishment and Expulsion*

The arguments developed over the two previous sections leave us with somewhat of a bind. On the one hand, it seems that stripping Member States of their right to vote in the Council is itself in conflict with EU fundamental values such as democracy and equality. The standard in democratic theory that all those permanently subject to a rule or decision ought to have a formally equal stake in determining its content is violated when backsliding Member States are stripped of their vote but remain subject to the decisions of the Council (as per Article 7.3). On the other hand, permitting Member States in serious and persistent breach of Article 2 fundamental values seems to put the



democratic nature of Council decision making at jeopardy - both in terms of its substantive content and its procedural legitimacy.

The theory of militant democracy was precisely formulated to address such a dilemma. It holds that, under exceptional circumstances, democratic states are permitted to act anti-democratically in order to preserve democracy. Applied to the case at hand, the question is whether the European Council would be justified in acting anti-democratically in temporarily stripping backsliding Member States of their right to vote in the Council until that state can be determined to have reformed those activities that bring them in serious and persistent breach of EU fundamental values. To be clear, I am not here endorsing the militant democratic position in general - indeed, I am convinced by recent arguments that militant democratic policies in national politics, for instance banning anti-democratic parties from running for office, cannot be justified instrumentally as they are likely to backfire (Invernizzi and Zuckerman 2017). Rather, the strategy in this section is to accept for the sake of argument that a militant democratic response could, in some circumstances, justify democratic actors in acting anti-democratically, and then to test whether such an assumption may render the Article 7 sanction a legitimate (if unavoidably lamentable) way of addressing the above paradox.

Militant democratic theory is a particularly suitable terrain for exploring the above paradox, as it explicitly recognizes that there is a democratic cost to militant democratic policies. It was formulated first in the 1930s by Karl Loewenstein, a German theorist exiled in the United States. Loewenstein's foil was, unsurprisingly, European and especially German fascism. He noted that German fascists were all too eager to use the procedures and rights of the liberal-democratic to their advantage; in a first of two seminal articles on the topic he wrote: "Calculating adroitly that democracy could not, without self-abnegation, deny to anybody of public opinion the full use of the free institutions of speech, press, assembly and parliamentary representation, fascist exponents systematically discredit the democratic order" (1937a pp.423-424). When powerful anti-democratic actors undermine and discredit democratic procedures and institutions in this fashion, "democracy is at war" and, paraphrasing Léon Blum, Loewenstein argued that "during war... legality takes a vacation" (p. 432). Therefore, "Constitutional scruples can no longer restrain from restrictions on democratic fundamentals, for the sake of ultimately preserving these very fundamentals". More explicitly still: "If democracy believes in the superiority of its absolute values over the opportunistic platitudes of fascism, it must live up to the demands of the hour, and every possible effort must be made to rescue it, *even at the risk and cost of violating fundamental principles*", including the "concentration of powers in the hands of the government and [the] suspension of fundamental rights" (my emphasis).

In the second article, Loewenstein lauds militant democratic policies taken by Czechoslovakia in 1936. Accepting that the law in question, the 'Act for the Defense of the State', would have been "legally impossible" in

“normal times” (1937b p.643), he argues that “it was justified by the emergency situation” (*ibid.*). What sorts of policies does he have in mind when he speaks of “abolishing, to a large extent, under wide discretionary powers of the government, constitutional guarantees and constitutional rights” in a circumstance he vividly labels “totalitarian peace”? While he focuses on banning political parties (p.646), and repressing freedom of speech and press freedoms (p.652), one can easily imagine a militant democratic justification for criminal disenfranchisement (cf. Müller 2016). Indeed, it is precisely such an argument that advocates of the republican justification for criminal disenfranchisement appeal to (and that have been discredited in this context - see discussion in section 2, above).

It is clear from the presentation of Loewenstein’s argument, and the majority of the literature that picks up on it (see Kirschner 2014 for a representative example) that the theory of militant democracy is a non-ideal theory in a particular sense. The ideal, for democratic states, is *not* to be ‘at war’ against anti-democratic actors, and thus to remain within the ‘normal’ confines of the rule of law and the democratic constitution. Whether or not democrats agree with the militant democratic view that militant policies can *sometimes* be justified in face of serious anti-democratic pressure, the vast majority of democrats can be expected to concur with view that some militant democratic measures *come at a cost to democracy*. In other words, and though this is sometimes confused, even those sympathetic to militant democracy think that there is a *pro tanto* democratic cost to militant measures. The difference between the pro- and anti-militant positions lies rather in the view of militant democrats that militant measures are all-things-considered instrumentally justified despite and in the face of these costs.

The question that then arises is whether the measure of stripping EU Member States backsliding on fundamental values of their votes in the Council can be justified in a militant democratic fashion. I do not wish here to tackle this question at the most fundamental level - whether or not militant democratic measures can *ever* be justified. Rather, I want to work on the presumption that they can be justified when the sorts of conditions described by Loewenstein are in play, and when militant measures can be reasonably expected to act as effective measures of democratic self-defense. Thus, the specific questions in view are a) whether EU Member States backsliding on democratic values can constitute such a fundamental threat to the EU as a democratic community and to Council decisions as democratically legitimated (if indirectly), and, b) whether it can be reasonably expected that stripping such Member States of their right to vote in the Council would be the correct militant procedure in face of such a threat.

To take the first question: it seems that there is surely a case to be made that backsliding on EU fundamentals *can* constitute an existential threat to the EU’s nature as a political community of states sharing a commitment to the values referred to in Article 2 including democracy, equality, the rule of law, and so on. For a start, a Member State being in *serious and persistent breach* of these values would, it seems, itself constitute a

threat to the EU being able to self-affirm its democratic character and, in the absence of a reaction from the EU, its deep-seated commitment to democratic values (Kelemen 2017). Further, and as argued in section 3 (above), it seems to follow from the indirect nature of the democratic legitimation of Council decisions (that they are legitimated *via* the democratic legitimacy of its constituent members) that there would be a threshold of domestic democratic *illegitimacy* of one of the governments that must lead us to conclude that the procedure of voting in the Council was not a democratic procedure and the results of such votes were not democratically legitimate or authorised. All this is not to say that this threshold has been *met* by current examples of EU Member States backsliding on the fundamental values referred to in Article 2; I take no position on that complex empirical question here. Rather, the point is one of principle. It is surely the case that backsliding on such values by one or more Member States *could* constitute an existential threat to the democratic character and legitimacy of the European Union.

The last question then is whether the sanction described in Article 7.3 - removing a Member State's right to vote in the Council while continuing to oblige them to their Treaty obligations - would be the appropriate militant response. I say that it would not. One principle that ought to be invoked when considering militant democratic measures is whether the measure would be *necessary*. The first part of answering that question is the 'existential threat test' - i.e., one must ask whether the severity of the situation warrants a militant response in principle (recall we are accepting for the sake of argument that this can be the case). The second part of that text, however, is whether there are *other*, non-militant measures that could be invoked that would 'defend' democracy in such circumstances. And, at least in principle, such circumstances exist in the context of the EU and European integration where they do not exist at the national context: with recourse to *expulsion*.

In a national context, democratic theorists are usually opposed to the national analogues to expulsion: banishment and 'denaturalization'. The reasons often include that banishment and denaturalization violate the rights of the banished, for instance by making them stateless. All citizens of democratic states have the right to remain in their state (albeit sometimes in prison) and everyone has the right to a nationality. A 'right to have rights', if you will. Such rights, it may be said, are non-contingent and no one, on this view, is utterly beyond the pale. Democratic states punish criminals, and harsh crimes can legitimately be punished harshly, but as has been noted at an earlier point, the very fact that convicted criminals remain subject to the laws of the state is evidence that they are still party to the 'social compact'. This is not the place to rehearse the interesting arguments that can be made for or against such policies, let us just accept for the purposes of this discussion that banishment and denaturalization are unacceptable responses to reprehensible and/or virulently anti-democratic actions, even to

those militant democrats that may otherwise support banning certain political parties, and excluding from the active and the passive franchise persons advocating severely anti-democratic views.

When we move from this context considering the justifiability of such national militant democratic policies directed against individuals (which may be called ‘individual militant democracy’) to the inter and trans-national context, we see important disanalogies. States do *not* have a right to trans-, inter- and supra-national associations with other states. Such associations are voluntary. States would not lose some fundamental rights by being excluded from such associations. Thus, and consequently, their expulsion would not be at odds with fundamental civic and political rights. Nor, as long as the process of exclusion happened within the appropriate legal framework<sup>10</sup>, would the expulsion from the European Union by a Member State in *serious and persistent breach* of the fundamental values referred to in Article 2, especially when such a breach constitutes a ‘existential threat’ to the democratic character and legitimacy of EU rules and Council decisions.

### *Conclusion*

The normatively coherent response to the paradox presented by the fact that stripping an EU Member State of their voting rights in the Council while continuing to hold them to their Treaty obligations (argued for in Section 2) and the fact that the continuing membership of a Member State in *serious and persistent breach* of democratic and rule of law values in the Council jeopardizes the democratic character and legitimacy of Council decisions making (argues for in Section 3) is not stripping the Member State’s voting rights, grounded on a principle of militant democracy, but rather expelling that Member State from the European Union. Article 7 is in conflict with the EU fundamental values of freedom, equality, democracy, and the rule of law. This conflict cannot be justified *via* a recourse to a principle of militant democracy, as an democratically acceptable alternative exists that would safeguard the democratic character and legitimacy of EU Council decision-making, at least in theory, namely expulsion from the Union. Disenfranchisement in the Council should thus be replaced with expulsion from the Union as the ultimate political sanctions for Member States’ violations of EU fundamental values.

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<sup>10</sup> One important limit to my argument here, of course, is that there is currently no Treaty mechanism to expel a Member State. In order not to violate the EU fundamental value of the rule of law, treaty change would thus be necessary in order to realize the prescriptions made in this paper. I postpone the serious consideration of the complications this raises for the practical dimensions of my argument for now, but thank Marie-Pierre Granger for raising this point.

All the above is neither to say that the ‘existential threat’ threshold has been met in the cases of Hungary and Poland, nor to say that expulsion from the Union ought, normatively, to be pursued against them. As other commentators have argued, alternative sanctions to the ‘ultimate’ political sanction currently described in Article 7.3 and criticized in this paper ought to be explored. A legal basis has been plausibly argued to exist for alternative sanctions such as economic sanctions. These seem not to pose the same threat to the fundamental values of the EU than stripping a Member State of their voting rights in the Council, although there has been no systematic engagement with economic sanctions possibilities from the perspective of normative democratic theory to date. I have argued above for an important normative disanalogy between the banishment and denaturalization of an individual and the expulsion of a state from an association. Yet, there is also an important point of similarity, at least in the context of the EU. Expelling a Member State from the Union against its wishes (and the wishes of its citizenry) would have grave effects on the rights and freedoms of its citizens, and on the rights and freedoms of other citizens of the European Union. It ought never to be considered lightly. However, the option to exclude seriously anti-democratic actors from the Union is vital to ensure that its democratic character and legitimacy can be preserved in the face of the all too persistent threat of autocratic politics.

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## C. External Draft Papers

### 1. Cordasco, *The Shpolitics Question to Political Realism and Practice-Dependent Theory*

#### *Introduction*

Political Realist theorists reject Political Moralism. In particular they reject approaches to political theory establishing a certain 'priority of the moral over the political' (Williams, 2005 p.2), and suggest to theorize around justice or legitimacy by starting from within the realm of politics, in an effort to give greater autonomy to distinctively political thought.<sup>11</sup> On a similar vein, Practice-Dependent theorists reject practice-independent theorizing with respect to justice. In particular they reject approaches to political theory which are insensitive to political institutions and cultural practices taking place in a particular order to which our normative theorizing is meant to apply. In fact, they regard institutional and cultural aspects to play a major role in shaping 'the content, scope, and justification of a conception of justice' (Sangiovanni, 2008 p. 138).

Although Political Realists and Practice-Dependent (from now on PRPD) theorists assign relevance to widely diverse institutional or cultural aspects as major sources of normativity for their theorizing, or may rank them differently in shaping their accounts of justice or legitimacy, they seem to have much in common. In particular, their rejection of Political Moralism, on the one hand, and of practice-independent accounts of justice, on the other, points to a shared commitment toward an inherently political account of justice or legitimacy.<sup>12</sup> In fact, it paves the way for a shared approach to political theorizing that takes seriously the constitutive features of existing political orders (e.g. political and cultural institutions, beliefs, practices, etc.) in laying out normative requirements of justice or legitimacy.

In this article, I suggest that the rejection of Political Moralism and Practice-Independent (from now on PMPI) theorizing is motivated by two main connected worries. First, PRPD theorists suggest that PMPI's reliance on moral values that lack anchorage to the constitutive features of a given political order posits an epistemological concern. In particular, PRPD theorists claim that a theory of justice or legitimacy that takes as major sources of

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<sup>11</sup> See, in particular, Williams (2005): 'We reject Political Moralism, which claims the priority of the moral over the political. This is to reject the basic relation of morality to politics as being that represented either by the enactment model or by the structural model. It does not deny that there can be local applications of moral ideas in politics, and these may take, on a limited scale, an enactment or a structural form' (p. 8). See also Geuss 2008; Jubb 2015; Hall 2015; Newey 2010; Philp 2007; Rossi 2012; Rossi and Sleat 2014; Sleat 2012, 2016a, 2016b; Waldron 2013).

<sup>12</sup> See, in particular, Waldron (2016)

normativity moral values that find no counterpart in the constitutive features of a political order would fail to meaningfully apply to that particular order, as it would omit or misconstrue its constitutive features (Sleat 2016a). Second, PRPD theorists suggest that PMPI's reliance on moral values that lack anchorage to the constitutive features of a political order also posits a meta-ethical problem. In particular, theories of justice or legitimacy grounded in moral values that find no counterpart in the constitutive features of politics might fail to motivate those who do not internalize such values to comply with their requirements (Rossi and Sleat 2014).

PRPD theorists offer a strikingly elegant solution to these worries, as they suggest that by maintaining our fidelity to the constitutive features of politics, thus responding to the epistemological worry, we are able to develop theories of justice or legitimacy that successfully overcome the meta-ethical worry. The underlying thought is that, if a common interpretative understanding of the constitutive features of a particular order can obtain, and if we are able to extract from it a set of normative requirements of justice or legitimacy, our theorizing would cease to be arbitrary, thus responding to the meta-ethical worry.

One crucial challenge that PRPD theories face consists in securing a common interpretative understanding of the constitutive features of politics, and a common account of the normative requirements that can be singled out from such constitutive features. In fact, people may disagree on what counts as a constitutive feature of a political order, or on how to rank the relevance of different features, or on what sorts of requirements ought to be extracted.

This sort of conceptual disagreement would bring the meta-ethical worry back into the picture. In fact, if one is able to show that multiple sound interpretative understandings of the constitutive features of a political order are possible, and that they give rise to incompatible accounts of justice or legitimacy, one would have also shown that PRPD approaches, although able to overcome the epistemological worry, by virtue of defining a set of theories that are consistent with the constitutive features of politics, cannot overcome the worry about arbitrariness, for people may still single out diverse and possibly incompatible normative requirements. If this line of critique is successful, PRPD proponents would be in need to show that such a conceptual disagreement is different in kind, and somehow less burdensome, than moral disagreement.

In this article, I wish to illustrate a further challenge which comes after one successfully responds to the problem posed by conceptual disagreement. In particular, I wish to put under scrutiny the possibility of successfully responding to the meta-ethical worry once the problem of conceptual disagreement is solved. In fact, I shall attempt to show that, even granting that a unique shared understanding of the constitutive features of a given political order can be secured, and that a unique set of normative requirements can be singled out from it, one may still fail to form reasons to comply with such normative requirements.



The underlying claim is that theories of justice or legitimacy grounded in a shared understanding of the constitutive features of a political order, do not immediately equip us with reasons to comply with their normative requirements. In fact, one may plausibly agree on what the constitutive features of a political order are, and on which requirements ought to be singled out from them, and yet be unwilling to comply with them.

Assume, indeed, that we form a shared and epistemologically correct understanding of the constitutive features of a particular order; assume further that we acknowledge that such an interpretative understanding calls for a unique set of normative requirements: why should we comply with them? In fact, one may ask, why should we engage with the enterprise of politics at all? Why shouldn't we rather look for more attractive enterprises, whose constitutive features call for different sets of normative requirements?

*Why not shpolitics?*

The shpolitics question, originally known as the shmagency question, developed by David Enoch (2006, 2010) with reference to constitutivist theories about agency, demands PRPD theorists to provide reasons for why one should engage with the enterprise of politics, in an effort to respond to the meta-ethical worry. In fact, failure to provide such reasons would make one's engagement with the enterprise of politics, and thus one's compliance with its normative requirements, entirely arbitrary. As such, theories of justice or legitimacy, grounded in a shared understanding of the constitutive features of politics, far from successfully overcoming the meta-ethical worry, would bring arbitrariness back into the picture. For if politics is optional, the normativity of its requirements is contingent on our willingness to engage with it.

However, in order to provide such reasons, theorists must resort to values that are external to the enterprise of politics. For any attempt to extract reasons to engage with the practice of politics from the constitutive features of politics itself, would ultimately fail to respond to the shpolitics question. Such a solution, however, seems to be ruled out by PRPD approaches, which suggest that our theorizing about justice or legitimacy should start from within the enterprise of politics itself.

In this article, I lay out two plausible strategies to respond to the shpolitics question. The first consists in showing that politics is inescapable, in that we cannot but engage with it. As such, any attempt to forfeit on its normative requirements would be misplaced. The second is to give up on full-blown normativity and limit the normative reach of one's theorizing to those who are already motivated to engage with the enterprise of politics. Both solution, I attempt to show, face substantive challenges.

A viable strategy for PRPD approaches, I will suggest, is to accept that reasons for engaging with the enterprise of politics must lie outside the political domain, while insisting on the relevance of the constitutive features of politics in singling out normative requirements of justice or legitimacy.

### *Fidelity to Politics and Arbitrariness*

PRPD theorists claim that the political sphere does not lend itself to be straight-forwardly regulated by the moral sphere.<sup>13</sup> This is for two main reasons: first, because people widely disagree about what morality demands; second, because the political domain is separate from the moral sphere, and, as such, it poses its own normative demands which are distinct from the demands of morality.

These two main rationales for rejecting the priority of the moral over the political could be aptly framed in terms of worries that PRPD approaches share toward PMPI accounts of justice or legitimacy. In particular, on the one hand, there is a worry concerning the arbitrariness of accounts of justice or legitimacy that are straightforwardly grounded in moral values or principles that lack anchorage to the political domain. In fact, given the existence of ineradicable and ubiquitous disagreement about the demands of morality, one may worry that PMPI accounts of justice or legitimacy would fail in motivating those who fail to internalize the moral values from which one starts to theorize.<sup>14</sup>

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<sup>13</sup> See, in particular, Philp (2007): 'The integrity of the good life in which ethics and politics are effortlessly linked seems a utopian aspiration [...] Political virtue is not only not rooted in the good life, it is in its nature exposed to demands that may compromise some of our most cherished commitments' p. 34. See, also, Rossi (2013): 'Realist political philosophy cannot be a branch of applied ethics. Rather, it tries to carve out some space for action-guiding political theory within an analysis of the actual meaning and purpose of politics in a given context. This is to say that it proceeds from an empirical informed analysis of a society's political culture, and, on that basis, tries to produce the most appropriate political prescriptions – which may well not be those that are morally optimal sub specie aeternitatis. In fact, most realists would deny that we can determine what would count as morally optimal without a prior understanding and interpretation of the relevant political context' p. 559.

<sup>14</sup> See, in particular, Rossi and Sleat (2014): 'We need politics in part precisely because of the ubiquity of moral disagreements about what we collectively should do, the ends to which political power should be put, and the moral principles and values (footnote continued)

In order to illustrate such a worry, imagine that Bob grasps the relevance of the value of free and equal moral personhood, and extracts a set of normative requirements of justice or legitimacy from it. Betty, however, fails to internalize such a value and is thus unable to form reasons to comply with Bob's requirements. She would rather start from the moral ideal of self-ownership, from which she extracts a different set of normative requirements. The arbitrariness that is implied in their moral premises makes them unable to converge on a shared basis for their theorizing, and, as a result, their accounts of justice or legitimacy fail in being fully intelligible to one another.

The worry about arbitrariness is two-fold: first, there is a non-ideal concern expressed by the fact that those who internalize different moral values would not actually comply with the normative requirements one lays out; second, there is a meta-ethical concern, according to which those who internalize different moral values would fail to form reasons to comply with one's theory of justice. PRPD theorists, I suggest, are mostly concerned with the meta-ethical objection, and claim that we need politics precisely because of the inevitable arbitrariness taking place within the moral domain, giving rise to unsolvable disagreement laying out our accounts of justice or legitimacy.<sup>15</sup>

On the other hand, the rationale underpinning the separateness of the moral and the political domain, can be framed as an epistemological worry about the fidelity to the enterprise of politics. In particular, one might suggest that, since the political and the moral sphere constitute two distinct domains, normative theories of politics grounded in values which lie outside the political sphere, or which find no counterpart in the constitutive features of politics, would fail to apply to actual political orders, as they would fail in being theories of politics at all.<sup>16</sup>

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that should underpin and regulate our shared political association. As such, politics cannot be a domain that is straightforwardly regulated by morality' p. 691.

<sup>15</sup> On moral disagreement as positing a meta-ethical puzzle, see Rossi (2013) where he claims that realists observe that the function of politics 'is precisely to overcome our disagreement about ethics', p. 560.

<sup>16</sup> Sleat, I believe, offers the best characterization of the epistemological worry: 'Politics is a practice characterized by disagreement, authority, and legitimate coercion. It may be characterized by much else besides, but these are at least some of the characteristics of the human practice or activity that political theories seek to be about, and the context in which political values are asserted, claimed, debated, critiqued, and so on. Being constitutive of politics, political values must take them as fixed features of the political domain. This means that for a value to be a value for politics it must be fully consistent with their

(footnote continued)

In order to illustrate such a worry, suppose, once again, that Betty lays out a set of normative requirements grounded in the moral ideal of self-ownership, which finds no counterpart in the constitutive features of the particular political order to which her theory is meant to apply. PRPD theorists would aptly object that such a theory, by neglecting the constitutive features of politics, fails in being a political theory. In fact, Betty's normative requirements are grounded in a moral value that is not consistent with an accurate investigation of beliefs and practices taking place in the political scenario she analyzes and to which they are meant to apply. As such, her theory is defective as it starts from premises that omit or misconstrue the main object of her investigation.<sup>7</sup>

Sleat has an analogy that may be of help in clarifying the epistemological worry:

Imagine a scenario in which a precocious young scientist claims to have discovered that all previous theories of how and why hydrogen (in its most common isotopic form) reacts the way that it does with other elements are incorrect, and that she, during her doctoral research, has developed a better theory. When she published her research, however, it turns out that the theory only works if we assume that hydrogen has two protons, two neutrons, and two electrons. What would the right response to her theory be given we know that in reality hydrogen has only one proton, no neutrons, and a single electron? The theory might have the virtue of being internally coherent on its own terms, free from any contradictions, flawed reasoning, or inconsistencies. But even if that were true we would nevertheless insist that it is still a bad theory, though bad in the very specific sense that it is not a theory of hydrogen because of what we know to be true of the composition of hydrogen atoms: it fails to qualify as a theory of hydrogen at all. (Sleat, 2016a, p. 265-266).

Although Sleat's analogy concerns a descriptive domain, we could frame the epistemological worry also in normative terms. Suppose, indeed, that I look at the constitutive features of football in laying out a set of rules that are meant to apply to chess. Such an attempt would seem unwarranted, as chess' players would find my proposal as ultimately unintelligible. This is because I have laid out my theory by looking at the constitutive features of football, which

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presence. It cannot be incompatible with the general conditions such that a belief about a value is inconsistent with any particular constitutive feature of politics (for example, political freedom is the absence of political authority), nor, as an assumption built into the understanding of the value itself, can it depend upon the general conditions being overcome for their realization in practice. In such cases the value would not be a value for the political domain but for a world in which politics or the need for politics is absent (which is, whatever else we might think about the attractiveness of such a world, not our own). It would not be a value suitable for the activity of politics' (Sleat 2016a), p. 258. In this regard, it is worth looking at Jubb (2015) where he claims that the value of equality could be plausibly internalized by realist accounts of legitimacy precisely because its normative standing is not arbitrary but rather derived from 'widely experienced and understood harms of status' p. 680.

widely differ from those of the game of chess. In this regard, my theory would fail in being a theory of the game of chess at all, as it concerns a strikingly different enterprise.

Surely, theorists developing PMPI accounts of justice or legitimacy would plausibly respond that PRPD's concerns are ultimately misplaced. In fact, one may suggest that moral values or principles, on which one grounds accounts of justice or legitimacy, are not arbitrary, in that their normative relevance is not contingent on people's internalization. In this regard, the fact that one might fail to grasp the relevance of the ideal of free and equal moral personhood, does not undermine the normative standing of the moral value.

Hence, moral disagreement does not undermine the normative standing of the requirements one singles out from valid moral values. On a similar vein, one may respond to the epistemological worry by arguing that if the moral and the political sphere are two distinct domains, it does not follow that they should be independent from one another. Hence, the football-chess analogy would be misplaced, for we should imagine the political domain as a sub-set of the moral domain.

Yet, whether one accepts PMPI's plausible responses to PRPD's worries, one should not underestimate the appeal of what PRPD approaches promise to deliver, which is to lay out accounts of justice or legitimacy that would be able to respond to the moral disagreement that is ubiquitous within pluralistic societies. In fact, if one accepts that the moral and the political domain are separate, and that our theorizing around justice or legitimacy is ultimately bound to start from an accurate investigation of the constitutive features of actual political orders, we are offered with a shared basis for our theorizing, which rules out the sort of arbitrariness that is implied in starting from moral premises over which we profoundly disagree. As such, the normative requirements we single out from a shared understanding would also overcome the meta-ethical worry, for everyone would find such requirements intelligible, by virtue of stemming from shared premises.

Suppose, indeed, that we gather around a table in order to define a set of normative requirements that a particular political order is supposed to meet. Instead of resorting to moral values that find no counterpart in the political order to which these requirements are meant to apply, and over which we inevitably disagree, we attempt to form a common and accurate interpretative understanding of the constitutive features of the specific political order, which would serve as a shared basis for our theorizing. Such a strategy would allegedly solve the worry about arbitrariness by responding to the epistemological worry. In fact, once we accept that the constitutive features of politics represent the only plausible starting point for our theorizing, we rule out arbitrariness about the premises of our political theorizing. As a result, the normative relevance of the set of requirements we extract from our investigation on the constitutive features of politics would not be contingent on our ability to internalize particular moral values, as we all share the same premises.

In order to show how such an approach could be plausibly made to work, let us consider Sangiovanni's careful illustration of the procedure entailed by practice-dependent accounts:

Consider the higher level moral principle that all human beings should be treated with equal, ultimate, and general moral concern (let us call it principle P). Must an institutionalist deny this to be the case? It may seem that he must, since P has global scope, applying to persons as such and independently of institutions. This would, however, be a mistake. The institutionalist can (a) affirm P, but argue that the reasons for endorsing first principles of justice for which P is a premise (call them J1, J2,..., Jn) cannot be derived from P alone, and (b) claim that those further reasons must (in part) derive from an interpretive understanding of the institutional contexts to which Jn is intended to apply (C1,C2,..., Cn). Though the practice-independent theorist need not deny (a)—first principles of justice can be derived from P in conjunction with other higher-level moral values—he does deny (b). For him, there is no independent layer of first principles Jn: there is only P, principles that can be directly derived from P and other higher-level moral values (P\*), and different contextual applications of P\* to Cn.

The above quoted passage helps us in highlighting how PRPD approaches may overcome the two worries. In fact, by confining the premises of political theorizing to values or principles that can be validated through an interpretive understanding of the institutional context, PRPD theorists allegedly form a shared basis for their theorizing. Such a shared basis, in turn, rules out much arbitrariness concerning the premises of political theorizing. In fact, the interpretive understanding of the institutional context rules out values or principles that do not find political counterparts. Moreover, Sangiovanni helps us in clarifying that PRPD approaches, may not rule out moral values qua moral. In fact, what matters is that these values we take as a starting point for our theorizing are consistent with the constitutive features of the political order to which our theory is supposed to apply. As such, whether they are purely political or also belong to the moral domain should not concern us. In fact, provided that such values are consistent with the constitutive features of politics, their moral origin should not bring back arbitrariness into the picture.<sup>17</sup>

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<sup>17</sup> This clarifies that moral values can be political values as well. On this particular aspect see also Sleat (2016a).

*The Shpolitics Question*

In spite of a wide variety of objections advanced against PRPD approaches,<sup>18</sup> critics have largely neglected one of the main obvious challenges that PRPD face, which consists in securing a shared interpretative understanding of the constitutive features of politics, and in extracting a unique set of requirements of justice or legitimacy from it.

In fact, these enterprises may give rise to conceptual disagreement at various levels. First, one might worry that a common account of the constitutive features of a certain political order is somewhat chimeric, as we may disagree on what counts as a constitutive feature. For instance, one may suggest that people's beliefs about justice or legitimacy, by virtue of being subject to a process of continuous change, should not count in laying out our shared basis for singling out normative requirements of justice or legitimacy, whereas practices and institutions, by virtue of being more stable, should be taken into account. On the contrary, one might suggest that practices and institutions are more stable by virtue of path-dependence. As such they do not necessarily tell us anything substantive about shared values underpinning them. Second, we may disagree on how to rank the relevance of such constitutive features. For instance, one may suggest that practices, social institutions and beliefs about justice should all count but to different extents. Third, we might disagree on which values are consistent with our shared understanding of the constitutive features of a given political order, and last, but not least, we could disagree on which requirements ought to be extracted.

All these instances of conceptual disagreement could prove fatal to PRPD approaches, for if we could show that different, though epistemologically sound, interpretative understandings of the constitutive features of a certain political order can be offered, or that different and incompatible values are consistent with it, or that incompatible sets of normative requirements can be extracted from shared values, we would have failed in overcoming the worry about arbitrariness. In fact, if multiple interpretative understanding are consistent with the constitutive features of a political order, arbitrariness takes place in the form of our choice among diverse

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<sup>18</sup> PRPD approaches are subject to a wide range of criticisms, mostly of two main kinds: on the one hand, they are accused of resorting to pre-political moral values or principles in laying out their accounts of justice or legitimacy (Erman and Moller 2013, Larmore 2013); on the other, it is argued that if pre-political moral values are taken out of the picture, PRPD approaches are bound to accept accounts of justice or legitimacy that are consistent with despicable practices (Erman and Moller 2015). These critiques, I suggest, are rather unpromising. In fact, even if we could show that PRPD accounts of justice or legitimacy, so far formulated, resorted to pre-political moral values, we would not have shown that such an enterprise is, indeed, impossible. On the other hand, to claim that PRPD approaches are bound to cope with accounts of justice or legitimacy that are consistent with despicable practices, does not really constitute an objection. Surely, it may be a hard price to pay, but that is exactly what PRPD approaches amount to.

interpretative understandings. If, on the other hand, we are able to secure a shared interpretative understanding but incompatible values are consistent with it, arbitrariness takes place in the form of our choice among diverse values from which we start our theorizing. If we are able to converge on similar values, but incompatible sets of normative requirements can be extracted from them, arbitrariness takes place in the form of our choice among diverse sets of normative requirements.

However, one may suggest that PRPD approaches, by virtue of responding to the epistemological worry, already rule out much of the arbitrariness which is pervasive in PMPI's reliance on moral values over whose normative relevance we substantively disagree. In fact, if our disagreement is confined to diverse, though epistemologically sound, interpretative understandings of the constitutive features of a political order, or to the relevance of values that are consistent with our shared understanding of what politics is, or to which sets of normative requirements we should extract from our shared values, arbitrariness is very much reduced. In this regard, although PRPD approaches may not be able to rule out entirely our disagreement, they equip us with tools that are of the utmost importance if one cares about developing accounts of justice or legitimacy that robustly respond to the meta-ethical worry.

However, I suggest, there is a further challenge that PRPD approaches face, which does not rest on our failure in reaching a shared basis for laying out our accounts of justice or legitimacy. In fact, I assume that these difficulties could be somehow successfully overcome. The challenge that I wish to present consists in that our ability to form a shared understanding of the constitutive features of a political order, and to develop a unique theory of justice or legitimacy that is meant to apply to it, does not implicitly equip us with reasons to comply with such normative requirements.

Suppose, indeed, we form a shared understanding of the constitutive features of politics, and that we agree on how to rank their relevance, such that we are able to single out a unique theory of justice or legitimacy that is meant to apply to a given political order: did we really solve the worry about arbitrariness? My suggestion is that resolving our conceptual disagreement about what politics is and what it entails does not tell us anything substantive about what we should do. In fact, one may be willing to ask: why should those requirements matter? Why should I engage with politics in the first place? Why not *Sh*politics?

The *sh*politics question, originally known as the *sh*magency question, has been developed by David Enoch in relation to constitutivist theories about agency such as Korsgaard (2009), Rosati (2003) and Velleman (2009). In particular, Enoch's claim is that any attempt to extract meaningful normative requirements from what is constitutive of the enterprise of agency is bound to be only conditionally normative on our willingness to engage with that enterprise, unless we provide binding reasons for why we should engage with it in the first place. If we fail in



providing these reasons, there is no way to respond to those who lack motivations for engaging with agency and rather prefer to be shmagents:

Classify my bodily movements and indeed me as you like. Perhaps I cannot be classified as an agent without aiming to constitute myself. But why should I be an agent? Perhaps I can't act without aiming at self-constitution, but why should I act? If your reasoning works, this just shows that I don't care about agency and action. I am perfectly happy being a shmagent - a nonagent who is very similar to agents but who lacks the aim (constitutive of agency but not of shmagency) of self-constitution. I am perfectly happy performing shmactions-nonaction events that are very similar to actions but that lack the aim (constitutive of actions but not of shmactions) of self-constitution. (Enoch 2006, p. 176).

The challenge posed by shmagency question, I suggest, can be aptly extended to PRPD approaches, as they could be plausibly regarded as constitutivist theories about politics. In fact, their aim is to lay out requirements of justice or legitimacy from the constitutive features of political orders. The basic idea, indeed, is that we do not need to resort to pre-political moral values in laying out our theories of justice or legitimacy, as a shared understanding of the constitutive features of politics would already provide enough basis for our theorizing. Moreover, by ruling out moral values that do not find actual political counterparts, we also rule out moral disagreement that would be stemming from our reliance on such values.

However, the challenge highlighted by the shpolitics question consists in that even a unanimous agreement on what politics is and what it entails does not equip us with reasons for engaging with the enterprise of politics. For we may reach a consensus on what a certain enterprise is and what it entails without necessarily being willing to engage with it. For instance, I may agree on what the game of football is, and on how its constitutive aims point to the appropriateness of its current set of rules, without necessarily being willing to engage with it. In fact, why should I pick football over tennis? Or why should I not give up on sport? If we fail in providing reasons for why one should engage with a certain enterprise, its rules or requirements would ultimately be contingently normative on our willingness to engage with it.

However, reasons for engaging with a particular enterprise cannot come from within the enterprise itself, for its constitutive features or aims are silent with respect to why we should engage with it in the first place. For instance, we may agree on that the constitutive aims of football embody a desire to unveil players' physical and technical potential in an effort to entertain the public, yet this would not provide binding reasons for why we should play or watch football games. In the same way, we may agree on that the constitutive aim of politics is to respond

to Williams' first political question, which is that of 'securing of order, protection, safety, trust, and the conditions of cooperation' (Williams, 2005 p. 3), yet, we may be motivated to engage with other kinds of enterprises that embody different constitutive aims, or that employ different devices in order to respond to the first political question. Perhaps, the enterprise of shpolitics would offer answers to the first political question which one would find more appealing; or, perhaps, we are not that persuaded by the urgency or the relevance of Williams' first political question.

Essentially, binding reasons for engaging with a certain enterprise cannot come from its constitutive features, but should rather come from outside the enterprise itself. For instance, one may suggest that securing the conditions for cooperation is morally binding, and show that politics would constitute the best means to achieve this end. As such, we would possess binding reasons for engaging with the enterprise of politics and comply with its requirements, singled out from our shared understanding of its constitutive features. However, such an enterprise would plausibly be ruled out by PRPD approaches, which would deem such a strategy as instance of the enactment model, which is championed by PMPI theorizing.<sup>19</sup> In fact, such a strategy would ultimately make our political theorizing around justice or legitimacy as ultimately dependent upon a pre-political ideal to which politics is meant to respond. As such, we would be somehow stuck with PMPI's claim according to which the political domain would ultimately constitute a sub-set of the moral sphere.

### *The Inescapability Thesis*

Among the responses that constitutivist theorists offer to the challenge posed by the shmagency question there is one that deserves particular attention as it may partially apply to PRPD accounts. Such a response is known as the inescapability thesis and, in its simpler formulation, claims that agency is inescapable, in that we cannot but engage

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<sup>19</sup> The model is that political theory formulates principles, concepts, ideals, and values; and politics (so far as it does what the theory wants) seeks to express these in political action, through persuasion, the use of power, and so forth.(Williams 2005, p. 1)

(footnote continued)

with it. Ferrero (2009), indeed, argues that agency possesses two unique features that make it different from ordinary enterprises. First, agency is special in that all ordinary enterprises fall under its jurisdiction (e. g. love, friendship, politics, etc.), insofar as they all require agency for us to engage with them; second, agency is unique in that it is the only standpoint from which we can evaluate whether or not to engage with agency itself. In fact, it is claimed that even choosing to be a shmagent requires us to be agents in the first place.<sup>20</sup>

There are, I argue, three main ways in which PRPD may attempt to import arguments from the inescapability thesis. The first, which I have partly anticipated within the previous section, consists in claiming that, although many enterprises fall out of the political jurisdiction, politics is essential in securing the conditions for cooperation and coordination that are crucial to many ordinary enterprises. Hence, politics could be seen as a hub-enterprise, in that it is often a pre-condition in order to engage with many other enterprises. As such we would have binding reasons to engage with it.

There are, however, two main concerns with this strategy. First, there might be alternative viable options to secure the conditions for coordination and co- operation. For instance, one may follow theorists of the spontaneous order in claiming that repeated interactions, within non-political contexts, can make us converge on conventions and norms that would be better suited in solving coordination and cooperation problems compared to political institutions. Second, even granting to politics its role as a hub-enterprise and its best suited position in securing the conditions for cooperation and coordination, we may worry about the sources of normativity of PDPR theories. In fact, one may plausibly object that our reasons for engaging with practice of politics would then come from other enterprises, that are not necessarily internal to the political realm. For instance, if our binding reasons for engaging with the enterprise of politics come from the fact that it constitute the only available means to develop

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<sup>20</sup> Here is the full quote from Ferrero (2009): "Agency is special in two respects. First, agency is the enterprise with the largest jurisdiction. All ordinary enterprises fall under it. To engage in any ordinary enterprise is ipso facto to engage in the enterprise of agency. First, intentional transitions in and out of particular enterprises might not count as moves within those enterprises, but they are still instances of intentional agency, of bare intentional agency, so to say. Second, agency is the locus where we adjudicate the merits and demerits of participating in any ordinary enterprise. Reasoning whether to participate in a particular enterprise is often conducted outside of that enterprise, even while one is otherwise engaged in it. Practical reflection is a manifestation of full-fledged intentional agency but it does not necessarily belong to any other specific enterprise. Once again, it might be an instance of bare intentional agency. In the limiting case, agency is the only enterprise that would still keep a subject busy if she were to attempt a 'radical re-evaluation' of all of her engagements and at least temporarily suspend her participation in all ordinary enterprises", p. 309. Further developments of the inescapability thesis can be found in Ferrero (2016), Silverstein (2014) and Katsafanas (2013).

meaningful human relationships, the normativity of our accounts of justice or legitimacy would ultimately depend upon the moral worthiness of developing meaningful relationships.

The second strategy would consist in claiming that PRPD accounts of justice or of legitimacy are not supposed to make us reflect about whether we should engage with the practice of politics, but merely to adjudicate the legitimacy of already existing orders. This answer has some intuitive advantages in that it seems to annihilate the problem of lacking reasons to engage with politics. In fact, one would assume that, by virtue of being already within a political scenario, we have implicitly sorted out the problem of motivations for engaging with politics, such that we can articulate our normative theories as if politics were in fact inescapable.

The problem with such a strategy consists in that having already engaged with a given enterprise in the first place does not prevent us from dropping our commitment at later stages. In fact, imagine Bob and I are going out for a drink. He starts telling me of his latest romance with Betty, and of how Betty left him without any motives. After five minutes I start to find his laments annoying and refuse to continue the conversation. Bob, then, claims that it is my duty to listen and help. After all, we have been friends for a long time. However, I reply that my previous commitment does not impose any particular duty to stick with the enterprise of friendship. In fact, I do not want to be his friend anymore, as I would rather be his shfriend. Conveniently enough, shfriendship entails going out for drinks, having fun, travelling, etc., but does not impose on us any duty to help in relation to one's romantic delusions. I have looked into what friendship is, agreed on what it entails, and I simply do not want to get involved anymore.

Bob's case may be easily framed in the terms of the shpolitics question. In fact, if I do not have external and binding reasons to engage or continue my engagement with the enterprise of politics, the simple fact of having already engaged with it does not pose any obligation to comply with its requirements. As such, adjudicating the justice or legitimacy of already existing orders does not tell us anything substantive about why one should comply with the requirements of just or legitimate orders.

The third strategy, on the other hand, would consist in claiming that 'every- thing is political'. As such, since all other enterprises we are willing to engage with fall under the jurisdiction of politics, and there is no other way to engage with them than to engage with politics in the first place, politics would be some- how inescapable, such that we would all have reasons to engage with it. In fact, if all other enterprises fall under the jurisdiction of politics, or could be said to represent some of its constitutive features and aims, we do not need external reasons to comply with the requirements we have singled out from our shared interpretative understanding, as internal reasons would do the job.

Such a strategy, though, faces another crucial challenge in that it brings back arbitrariness into the picture. For if everything is political, our moral disagreement about values from which to start in laying out our theories of justice or legitimacy is brought back under the label of conceptual disagreement. In fact, by stretching the definition of politics up to such an extent, we would not have overcome the epistemological worry, as potentially infinite accounts of the constitutive features of politics could be laid out. As a consequence, since one may pick values underpinned by or consistent with each of these enterprises in singling out a certain set of requirements of justice or legitimacy, we would have failed in responding to the meta-ethical worry, for these diverse accounts of justice or legitimacy may be incompatible in the exact same way in which PMPI accounts are.

Therefore, by following the third strategy, PRPD account would fail in securing their appealing and privileged position in ruling out moral disagreement.

### *Justice Without Full-Blown Normativity*

Perhaps, though, PRPD proponents are not seeking to develop full-blown normative accounts of justice or legitimacy. Maybe, what they are up to is lay out some normative requirements aimed at people who already have independent reasons for engaging with politics and who continue to exhibit them. It does not really matter whether these reasons are grounded in moral values which are external and prior to the political realm, as long as these values are not provided by the theorist, as one cannot be accused of political moralism for letting people resort to moral values in order to evaluate whether or not to engage with a certain enterprise.

In this respect, PRPD theories might leave out of the picture those of us who are not willing to engage with politics, but this should not be worrisome given how many people already live and continuously choose to live within political associations. After all, one might notice, most people already live in political communities, and, many of those who do not, often desperately attempt to migrate towards social orders where minimum standards of political legitimacy are met. Although this does not grant to politics the status of inescapable, it certainly seems to scale back the relevance of the shpolitics question. For one may, indeed, be tempted to argue that the shpolitics question relates mainly to meta-ethical concerns but does not really say anything interesting about the world we live in, insofar as nobody is really interested in shpolitics. In this regard, PRPD theorists may be happy to concede that the normativity of their theorizing is contingent on people's motivations to engage with politics, so long as the large part of the world would find their theorizing relevant.

This is, I believe, a viable option for PRPD approaches to pursue but we should be careful in delimiting the relevance of the shpolitics question to abstract, and politically irrelevant, meta-ethical discourse. In fact, shpolitics defines the set of all possible and alternative enterprises to politics. This is to say that, although PRPD accounts could come up with a certain specific definition of politics from which to single out theories of justice or legitimacy, there is a large, possibly infinite, number of slightly/largely different enterprises, with their own constitutive features, from which to select slightly/largely different normative requirements.

Essentially, although many of us would, broadly speaking, be keen on engaging with politics, our accounts of politics and, consequently, the requirements of legitimacy that we extract from them, may differ to different degrees. This means that our general willingness to engage with politics is no guarantee that we shall be willing to converge on the same normative requirements. In fact, suppose that Bob extracts a set of normative requirements  $R$  from the constitutive features of politics  $P$ . He, then, claims that all those who have reasons to engage with politics should follow  $R$ . However, Betty replies that she has a slightly different account of  $P$ , call it  $P_1$ , from which she extracts  $R_1$ . Similarly, Alf extracts  $R_1$  from  $P_2$ , and so forth. PRPD proponents may reply that any meaningful account of justice or legitimacy is to be based on the actual constitutive features of politics and that any attempt to theorize around the political by omitting or misconstruing its constitutive features would fail to respond to the epistemological worry, and, as such, undermine the relevance of our accounts of justice or legitimacy. Essentially, if  $P_1$  or  $P_2$  omit or misconstrue the constitutive features of politics, then  $R_1$  and  $R_2$  would fail in being political theories at all. However, there is no reason for why we should be prevented from designing the basic constitutive features of different enterprises we wish to engage with (call them shpolitics, a-politics, b-politics, etc.), and extract their normative requirements, rather than focusing on the constitutive features of actual political orders. For if we lack external reasons to engage with politics and to comply with its requirements, nothing prevents us from designing an account of how politics should be.

Essentially, the objection to accounts of justice or legitimacy without full-blown normativity consists in that such a strategy could plausibly overestimate the extent to which our willingness to engage with politics translates into a shared account of what politics, and its requirements, should be. In fact, when we give up on full-blown normativity, the simple fact of meeting the epistemological desideratum tells us very little about which enterprises we should be engaging with, as it only tells us which requirements apply to which enterprises. I take this to be the main claim behind Estlund's defence of utopian theorizing:

A lot of work is being done in this objection by a definition. A theory's subject matter is asserted to lie outside of politics unless it grants a substantial role to laws, police, criminal courts, and so on. Consider a

theory that gave compelling arguments for the conclusion that a society could not be characterized by political justice, or authority, or legitimacy in conditions where there was a substantial role for laws, police, and courts. On the definition of politics in question, this would not be a political philosophy. But that is only because politics has been defined out from under it. Fine, let it not count as a political philosophy. This would leave entirely intact its claim to have the correct theory of justice, authority, and legitimacy. (Estlund, 2014, p. 231).

Estlund, here, is happy to concede that what he is doing is not political philosophy. In fact, shpolitical philosophy could have better insights on what our social orders should look like.

### *Conclusion*

The shpolitics question, I believe, does not undermine the relevance of PRPD approaches towards justice or legitimacy, as it does not annihilate, nor it reduces, the role that the constitutive features of political orders should play in shaping our accounts of justice or legitimacy. In fact, the shpolitics challenge tackles merely the possibility of extracting, from the constitutive features of politics, binding reasons to engage with it, but is silent with respect to how are we to single out our normative requirements.

In this regard, the two main desiderata emerging from PRPD theorizing should still remain valid, for if one cares about singling out theories of justice or legitimacy underpinning institutional arrangements that would allow us to respond to widespread moral disagreement, PRPD approaches have crucial insights that cannot be ignored.

A viable option, I suggest, would be to accept that reasons for engaging with the enterprise of politics lie outside the political realm, and to resort to the ideal of securing the conditions for peaceful cooperation among members of a given community and at a meta-community level, in order to provide binding reasons for taking the requirements of justice or legitimacy one singles out as normative. For if we take such an ideal as normatively binding, and we are able to show that politics, with its own requirements emerging from its constitutive features, is the best means to secure the condition for peaceful cooperation, our engagement with the enterprise of politics would cease to be conditionally normative.

Reasons for engaging with politics and complying with its requirements would then be stemming from the moral ideal of peaceful cooperation, thus undermining the independence of the political domain from the moral

realm, but such a strategy would not reduce the political to the moral, nor it would assume that the constitutive features of politics are silent with respect to our theorizing.

This approach, I suggest, would possess three main merits: first, the moral ideal of securing the conditions for peaceful cooperation would eliminate the normative contingency our accounts of justice or legitimacy; second, it would also serve as to establish the relevance of the constitutive features of politics in laying out the requirements that a political order must meet, thus responding to the epistemological worry; third, it would deliver accounts of justice or legitimacy that are very much keen on dealing with the problem of ubiquitous disagreement that is pervasive within pluralistic societies.

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## 2. Efthymiou, Why Current Restrictions on EU immigrants' Access to Welfare Rights should be Lifted: An Argument from International Reciprocity

### Introduction

Defenders of current restrictions on EU nationals' access to welfare rights, intended as basic welfare rights such as social assistance benefits, in host member-states often invoke a principle of reciprocity among member-states to justify these policies.<sup>21</sup> The general argument is that duties of reciprocity characteristic of welfare rights are triggered by membership to a system of social cooperation. For example, Richard Bellamy and Joseph Lacey (2018) have argued, also [here on EuVisions](#), that newly arriving EU immigrants who look for work do not meet the relevant criteria of membership because they have not yet contributed enough to qualify as members (Bellamy & Lacey 2018; Sangiovanni 2013; 2017). Therefore, current restrictions on their access to welfare rights are justified. The regulating assumption here is that the collective goods produced by cooperation among states at the level of the EU must be brought about in a way that does not undermine the ongoing production of collective goods by social cooperation within both host and sending member-states.<sup>22</sup> Therefore, freedom of movement, whatever its merits, should not undermine the welfare systems of host member-states.

In this (relatively) short essay, I challenge this argument by showing how restrictions on EU immigrants' access to welfare rights are inconsistent with duties of *international* reciprocity. There are different variations of

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<sup>21</sup> By welfare rights here I mean mainly basic basic welfare rights such as social assistance benefits (e.g. means-tested JSA and housing benefit in the UK or Arbeitslosengeld II in Germany) as current restrictions concern those welfare rights as well as the preconditions and the duration of access to such rights (e.g. see EU directive 2004/38 and ECJ's relatively recent judgement in 'Dano' (C-333/13).

<sup>22</sup> See Bellamy, R. and J. Lacey (2018). "Balancing the rights and duties of European and national citizens: a democratic approach." *Journal of European public policy* 25(10): 1403-1421; Sangiovanni, A. (2013). "Solidarity in the European Union." *Oxford Journal of Legal Studies* 33(2): 213-241; Sangiovanni, A. (2017(forthcoming). *The Bounds of Solidarity: International Justice, Reciprocity, and the European Union*. Cambridge (Mass), Harvard University Press.

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this challenge but my focus here will be on one that uses a veil of ignorance device to support this claim. What matters from a perspective concerned with international cooperation, I will argue, is what kind of policy EU member-states would choose if they were not to know whether they were net contributors or net beneficiaries to the relevant scheme of international cooperation.

As I hope it will become clearer in the rest of this essay I doubt a veil of ignorance device founded on a notion of international reciprocity could also be used to justify current restrictions on EU nationals' access to welfare rights.<sup>23</sup> More specifically, in this essay I show how a direct appeal to *international* reciprocity is sufficient for justifying immediate and continuous access to welfare rights for EU immigrants without the need for instituting a European federal welfare-state (Habermas 2001), a European Basic Income scheme (Van Parijs 2017; Viehoff 2017) or, for that matter, a European Super-state (Morgan 2007).<sup>24</sup> In that sense, this essay provides a positive argument as to why reciprocity grounds immediate access to welfare rights for EU nationals.<sup>25</sup> It does so by moving

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<sup>23</sup> Different versions of the relevant veil of ignorance device are possible here. I follow one that is closer to Rawls (1999) than Dworkin (2002). Andrea Sangiovanni follows a more Dworkinian approach. What matters essentially for him is what kind of insurance EU member-states would buy as members of such a group of states if they were not to know whether they were net contributors or net beneficiaries to the relevant scheme of social cooperation as well as the relevant types of policies they would be allowed to take insurance for. The focus of this paper is on a Rawlsian device but below at endnote XI I discuss briefly why I also think that the use of such an insurance scheme would not necessarily imply restrictions on EU immigrants' access to social assistance benefits.

<sup>24</sup> Habermas, J. 2001. 'Why Europe Needs a Constitution' *New Left Review* 11: 5; Van Parijs, Philippe, and Yannick Vanderborght. 2017. *Basic income: a radical proposal for a free society and a sane economy*. Cambridge, Massachusetts: Harvard University Press; Viehoff, J. (2017). "Maximum convergence on a just minimum: A pluralist justification for European Social Policy." *European Journal of Political Theory* 16(2): 164-187; Morgan, Glyn. 2009. *The idea of a European superstate: public justification and European integration*. Princeton: Princeton University Press. Here I don't have the space to discuss whether a concern for international reciprocity is consistent with subscribing to an EBI without introducing ad-hoc considerations based on other principles through the back door. I discuss this issue in some detail in Efthymiou, D. *EU migration, Welfare Rights and Non-Domination* (manuscript).

<sup>25</sup> There is a growing literature on the importance of immediate access to welfare rights for EU nationals seeking work in other member-states (Bruzelius et al. 2017; Ferrara 2016). But most of that literature only advocates access for a limited period of time (usually no more than six months) rather than continuous access for the full residency period as advocated in this essay. See Bruzelius, Cecilia, Constantin Reinprecht, and Martin Seeleib-Kaiser. 2017. "Stratified Social Rights Limiting EU Citizenship."

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the level of the analysis from the transnational level (i.e. from the analysis of relationships between individuals of different nationalities within host member-states) to the international level (i.e. to an analysis of relationships between member-states). This is in order to highlight how a focus on EU immigrants' contribution at their host state conveniently sidesteps the international dimension of welfare rights access as an upshot of human capital exchange among self-determining member-states who have opted to reciprocally lift physical restrictions on freedom of movement. If the arguments below are sound then EU immigrants need not meet criteria of social membership, or stakeholding, to the host society's scheme of social cooperation to be granted access to welfare rights on grounds of reciprocity.<sup>26</sup>

### *The idea of reciprocity*

It is important for the development of the argument to explain what reciprocity entails when it is placed at the centre of a theory of international justice. Reciprocity-based views can be developed in a variety of ways but usually take a Rawlsian formulation.<sup>27</sup> They are therefore informed by two general requirements of reciprocity. First, each agent participating in cooperation should benefit on terms that are *fair* as opposed to terms that are merely mutually advantageous. Second, that the proposed terms of cooperation must be *reasonably acceptable* to others as free and equal agents, and not as manipulated, dominated, or one-sidedly (Rawls 2005, 136-7).

To illustrate: imagine two societies A and B. Now imagine they agree to freedom of movement and to allow access to their labour markets. Assume further that A is richer, on average per capita terms, than B. It therefore experiences a higher influx of inward EU migration than B and that some of these immigrants apply for benefits.

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JCMS: Journal of Common Market Studies 55 (6):1239-53 and Ferrara, Maurizio. 2016. 'The Contentious Politics of Hospitality: Intra-EU Mobility and Social Rights', *European law journal*, 22(6), 791-805.

<sup>26</sup> On when and how a concern for reciprocity is sufficient for grounding access to welfare rights on grounds of membership to a system of social cooperation see: Efthymiou, D. "EU Migration, Out-of-work Benefits and Reciprocity" *European Journal of Political Theory* (early on-line). On why a principle of transnational non-domination provides a more coherent justification for granting EU immigrants to welfare rights see Efthymiou, D. *EU migration, Welfare Rights and Non-Domination* (manuscript).

<sup>27</sup> See Rawls, J. (2005) *Political Liberalism* (Columbia Uni. Press) at 17-8, Rawls, J. (1999) *A Theory of Justice*, (Harvard University Press) at §13, 49 and pages 414-5. See also Rawls, J. (2001) *Justice as Fairness: A Restatement* (Harvard University Press) at § 18. Hence, I use the term Rawlsian here in a methodological sense and not in order to refer to Rawls's own views on the EU. For an illuminating exchange on Rawls's views see Van Parijs, P. (2003) "Three Letters on the Law of the Peoples and the European Union." *Revue de philosophie économique* (7), 7-20.

Should society A restrict access to welfare rights to those coming from society B? It seems to me that an answer can be given without looking (as some reciprocity views do) into a variety of different types and degrees of contribution to society A by an individual EU immigrant. Furthermore, this answer need not appeal to principles of transnational justice but merely to principles of international justice, I will show.

The relevant question that a reciprocity-based approach needs to ask head on to provide an answer is the following: what restrictions, if any, would (representative) member-states opt for with respect to access to their welfare systems if they were to opt for freedom of movement but didn't know how the benefits and costs of freedom of movement would be distributed among them? I will argue that if freedom of movement is opted for, and therefore restrictions both to immigration and emigration are lifted, then the fair policy would be the one that would grant both high-skilled and low-skilled immigrants immediate access to welfare rights. We may call this, following Rawls, an example of fair terms of cooperation among presumably, or at least relatively, well-ordered liberal democratic member-states. It therefore renders the EU a special case of international cooperation among liberal democratic states. Below I explain why this rule would have been opted for behind a veil of ignorance device, namely when member states don't know whether they will be on the sending or the receiving end of migration (VOI hereafter).<sup>28</sup>

### *Behind the Veil of Ignorance*

What are the relevant facts that we must allow behind the veil before we choose a principle to regulate access to welfare rights as an aftermath of labour migration? First of all, there is evidence that opening borders allows for a

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<sup>28</sup> Recall also that for a currency union to be an optimal currency area there must be labour mobility: i.e. freedom of movement of labour. For a good discussion of the conditions necessary for creation of an optimal currency area see De Grauwe, P. (2012) *Economics of Monetary Union*. Oxford University Press.

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creation of an economic surplus due to the more efficient allocation of human capital.<sup>29</sup> It is reasonable to also assume that less well-off member-states would have an interest in restricting emigration of high-skilled workers to (more) better-off member-states whereas more better off member states would have an interest in restricting immigration of low-skilled workers from less well-off member-states. Furthermore, and due to current inequalities among member states, it is highly likely that high-skilled workers would move from worse-off member states to better-off states, and even more so in times of economic crisis and economic divergence. Thus,<sup>30</sup> EU's member states essentially have to choose between three options behind the VOI: immigration only for low-skilled, which is reasonably rejectable if they were to end up being better-off states, immigration only for high-skilled which is reasonably rejectable if they were end up being worse-off states. Therefore, the best, and not reasonably rejectable

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<sup>29</sup> Immigration produces such a surplus by mechanisms such as meeting shortages in labour supply as well as increasing productivity by complementarities with the skills of nationals and existing capital stock. George Borjas, *Heaven's Door* (Princeton: Princeton University Press, 1999), pp. 88 and 99-102.

<sup>30</sup> On the positive fiscal impact of EU immigration see *The Fiscal Effects of Immigration to the UK* by Christian Dustmann and Tommaso Frattini (2014) and Dustmann, C. and T. Frattini (2014). "The Fiscal Effects of Immigration to the UK." *The Economic Journal* **124**(580): F593-F643; Dustmann, C., et al. (2010). "Assessing the Fiscal Costs and Benefits of A8 Migration to the UK\*." *Fiscal Studies* **31**(1): 1-41.

See OECD's International Migration Outlook 2013:

<http://www.oecd-ilibrary.org/docserver/download/8113141e.pdf?expires=1460113129&id=id&accname=ocid49014605&checksum=625356CC45A31BF3087B742BD0F1FFB7>

For the financial impact of inward EU migration to the UK from A8 countries (CZ, EE, HU, LV, LT, PL, SK, SI) see: [http://www.cream-migration.org/publ\\_uploads/CDP\\_18\\_09.pdf](http://www.cream-migration.org/publ_uploads/CDP_18_09.pdf)

A study of the Bank of Greece on emigration found that nearly 70% of Greek citizens who emigrated between 2010 and 2015 have a bachelor degree compared to 27% and 42% of the general population in the two most popular destination member-states of the EU, Germany and the UK respectively.

<http://www.bankofgreece.gr/BogEkdoseis/ekthdkth2016.pdf>

<http://www.bankofgreece.gr/BogEkdoseis/oikodelt201607.pdf>

<http://blogs.lse.ac.uk/greeceatlse/2016/12/06/brain-drain-and-the-greek-crisis/>

(footnote continued)

option is immigration for both high-skilled and low-skilled.

If this is the case, then member-states, behind the veil of ignorance, that is when they don't know whether they will be on the sending or the receiving end of migration, would opt for a policy that would compensate them for losses of high-skilled labour and that would not overburden their welfare systems with disproportionate numbers of low-skilled workers. That is they would opt for provisos that member-states should be provided with assistance in order to maintain the overall position of their least advantaged citizens where that is necessary due to unreasonable costs associated with freedom of movement. The relevant two provisos here are: first, a proviso concerning compensation for asymmetrical human capital flows from less well-off to better-off members. This is the focus of the analysis below given the overall positive fiscal effect of EU immigration on host member-states and its overall negative fiscal effect on sending member-states. A second proviso is also relevant here, although in practice less urgent, if relevant at all. It concerns the overburdening of host member-states caused by EU immigrants' access to welfare rights. This proviso, however, does not necessarily entail restrictions on access. It could be operationalized in the form of a fund to which member-states non-compliant with best practices concerning welfare rights have to contribute. This fund could be established within current EU's institutions. For example, via the use of monitoring reports concerning the progressive realisation of socioeconomic rights in member-states (that are already issued by the council of Europe) and corresponding penalties (that are not currently imposed but can be imposed by the European Court of Justice).<sup>31</sup> EU immigrants' access to welfare rights

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<sup>31</sup> Where such a fund proves insufficient to top up the ensuing costs an insurance scheme could be considered. Given, however, the high probability of overall fiscal benefits to better-off host member-states from EU migration and the effectiveness and coverage of a non-compliance fund, the institutionalisation of such an insurance scheme seems premature, if not unnecessary. Further, due to the nature and profile of EU migration the premiums paid to such an insurance fund are very likely to be very low, and therefore unreasonable not to opt for behind a veil of ignorance device. Therefore, a Dworkinian VOI device (that takes under consideration the relevant facts about EU migration) does not deliver a different conclusion to the one that the proposed Rawlsian device delivers with regard to immediate access to welfare rights. It only provides an alternative mechanism for its funding. An additional advantage of granting EU immigrants immediate access to social assistance schemes on Rawlsian grounds is that it does not make the institutionalisation of such a complex Dworkinian insurance scheme a prerequisite for justifying access but rather treats such schemes as assurance devices to be used only, and if necessary, in the case of (footnote continued)

is linked then to the exchange of human capital across a region made possible by freedom of movement. It is an upshot of a form of economic cooperation with a significant impact on the welfare systems of *both* host and home states. It is these relations that trigger a need for justification. In this case, justice as reciprocity is a demand for fair terms of cooperation among member states that agree to open their labour markets to each other.<sup>32</sup>

If these facts are generally known what is the relevant normative baseline by which we could judge whether proposed, and existing, restrictions on access to welfare rights are justified? A good place to start is to recognise the fact that the significant inequalities in bargaining power found among EU's member states could play a distorting role and suppress the price that worse-off states could reasonably demand for opening up their labour markets to migration.<sup>33</sup> Therefore, any regulations concerning the movement of human capital across the EU calls for fair terms of cooperation that respect each party to the agreement as equal. A veil of ignorance device by bracketing inequalities of bargaining power, helps us to tease out in more detail those fair terms of cooperation by modelling that concern for equal respect. The key point here is that freedom of movement of human capital constitutes a sufficient condition for triggering duties of reciprocity *as fair cooperation* among participant states and that the further determination of those terms must be carried out in a way that would ensure that those terms are *reasonably acceptable* to others as free and equal agents, and not as manipulated, dominated, or one-sidedly.

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unreasonably costly, but also quite unlikely, scenarios. The role of an insurance scheme, therefore, is, at best, merely auxiliary and not central to what justice as international reciprocity requires in the case of access to welfare rights.

<sup>32</sup> These are not the only conceptions of reciprocity available. Another way one can approach this issue is to argue that a weaker principle of reciprocity as fair play is at work in such cases. More specifically, if we accept that it is permissible that you lose certain rights when you benefit from the actions of others then it is possible to argue that the least advantaged of the host member-state lose the right to restrict access to welfare rights for EU immigrants as soon as their overall position improves as a result of EU migration. This is not, however, the conception of reciprocity discussed here. See Klosko, G. (2005) *Political Obligations*. Oxford: Oxford University Press.

<sup>33</sup> The alternative to an agreement behind a veil of ignorance for such states is not a closed-borders policy but de-facto freedom of movement for its high-skilled workforce and de-facto unfreedom of movement for its low skilled workers. Any minor improvement to that non-agreement baseline is one that they could be compelled to agree to outside a veil of ignorance.

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*What policy would suit best the discharge of these duties of reciprocity?*

There are five reasons to think that the fair sharing of these benefits and costs must primarily take the form of immediate access to welfare rights over alternatives.<sup>34</sup> To begin with, worse-off member-states must be compensated for the costs of training human capital and any opportunity costs they may have to face as a result of high-skilled emigration. One potential problem here is that trained high-skilled labour, and talent, is not easily replaceable and hence directly compensatable (Brock and Blake 2014).<sup>35</sup> Investment of more resources to education and training does not necessarily result in equally good outcomes if the most talented and the most ambitious leave the country in significant numbers. A better policy, therefore, to opt for behind the VOI is a guarantee for open borders for all EU immigrants; not just for the high-skilled immigrants that every better-off state has reasons to want but also for the low-skilled that might need or want to follow them. Seen from that light access to welfare rights serves as an enabling condition, in the form of welfare payments, that makes transition costs of immigration lower, not just for high-skilled but also for low-skilled EU immigration.<sup>36</sup> In this way, immediate access to welfare rights balances the outflow of high-skilled labour with a greater outflow of low-skilled workers and reduces the pressure on the welfare-system of sending member-states.<sup>37</sup>

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<sup>34</sup> For example, that alternative could be an EU fund that would collect the relevant payments and compensation and then redistribute them to all member-states who suffer losses of human capital and tax revenue that undermine their welfare systems. For a similar proposal concerning brain-drain, see Brock, G. (2009) p. 202. The above five reasons suggest that such a fund must be given a peripheral and supplementary rather than central role in the discharge of duties of reciprocity.

<sup>35</sup> Brock, G. (2014) *Debating Brain Drain*, p.46-7.

<sup>36</sup> Empirical evidence (see link to EU Commission's report below) suggests such incentives are currently low. Therefore, there is plenty of room for strengthening such pulling factors where it is actually required by justice as reciprocity.

[http://ec.europa.eu/employment\\_social/empl\\_portal/facebook/20131014%20GHK%20study%20web\\_EU%20migration.pdf](http://ec.europa.eu/employment_social/empl_portal/facebook/20131014%20GHK%20study%20web_EU%20migration.pdf)

<sup>37</sup> This argument also shows why it would be unfair for sending states to cover the costs of welfare rights during transitional 'waiting periods'. First, because they would shoulder a double burden: covering the costs of access to welfare rights for low-skilled workers who offer their labour power to another labour market while also losing revenue and invested funds from the outflow of high skilled workers. Second, a focus on the net member claimants as the basis for the accrued liability of better-off

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A second reason is that immediate access to welfare rights could serve as a buffer both against social dumping and its consequences on migration. In the context of a multilateral institution such as the EU if EU immigrants have immediate access to welfare rights then better-off states have an incentive to ensure that worse-off member-states observe welfare rights as non-compliance with such standards on the part of the latter will result in greater number of migrants accessing their welfare systems. At the same time, citizens of worse-off member-states are given an assurance mechanism by having their access to welfare rights protected against domestic social justices by other member-states.

Third, representatives of member-states behind a VOI device have reasons to prefer immediate access to welfare rights for all EU immigrants to a reparation fund or a similar policy. If member-states legitimately own some of the gross value of high-skilled human capital that emigrates to other member-states then they are to decide whether they want compensation in form of annuity payments or in the form of increased opportunities for immigration.<sup>38</sup> Given that immediate access to welfare rights expands the range of choices all immigrants have over where to work and live it looks like members-states, behind the VOI, have a good reason to demand that at least part (if not all) of their compensation is paid in that currency. More freedom of choice for a greater number of EU immigrants is surely a tie-breaker between two equally good policies from the perspective of fair terms of exchange. Even if most people prefer to stay where they are, there is still a good chance they are willing to trade-off some of their compensation for better terms of migration in the case they decide or need to exercise that option *due to* freedom of movement.

Fourth, moving to a state of affairs with immediate access to welfare rights entails lower transition costs than instituting a fund for international transfers across EU members. Such a fund would require the founding of an EU body that would have to regularly process all the relevant info and determine the

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host member-states is rather misleading because the benefits and costs of schemes of labour exchange depend on the average skill profile of the immigrant group as a whole and not on whether a given member-state 'imports' more claimants than it 'exports'.

<sup>38</sup> This argument is somewhat analogous to one that Mathias Risse puts forward with regard to the underuse and overuse of territory in his Risse, M. (2012) *Global Justice*, p. 155.

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relevant annuities. Instead, immediate access requires only minor revisions to regulation 2004/38 in light of earlier decisions of the European Court of Justice (ECJ).<sup>39</sup> Furthermore, the current political choice that we are facing in the EU is not between closed-borders with no compensation paid and closed-borders with compensation paid, but freedom of movement with or without (or with more or less) access to welfare rights. Both a closed-borders utopia and a utopian Eurocosmopolis with a federal transfer fund are off the institutional map of the EU. Therefore, freedom of movement with immediate access is more in line with the EU institutions that are already in place. In a world where significant international transfers are unlikely, freedom of movement with access to welfare rights seems like the best, even if second-best, approximation for realising justice as reciprocity internationally. All of the above reasons suggest that immediate access is a comparatively effective policy that is not only normatively desirable but also both technically and politically more feasible than alternatives.<sup>40</sup>

Finally, what speaks in favour of this proposal is its direct linkage to the criterion of justificatory reciprocity as an impartial standpoint that shows equal respect to all agents involved. This is, recall, the requirement that terms of cooperation that are proposed must be reasonably acceptable to others as free and equal, and not as manipulated, dominated, or under pressure of being socially or politically inferior.<sup>41</sup> It requires that EU citizens treat others as addressees of reason and not merely as means to self-enrichment that can be shovelled around like objects whenever that is convenient to the more advantaged.<sup>42</sup> Within a given member-state a policy meets this criterion of reciprocity by placing behind a veil of ignorance whether an individual within a society's basic structure is a net-contributor or a net-beneficiary to the welfare system and therefore it treats everyone as an equal addressee of reasons. International reciprocity, among different member-states, meets the same criterion of reciprocity by placing behind a veil of ignorance whether an individual member-state is a net-contributor or a net-

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<sup>39</sup> See e.g. ECJ's judgment in 'Collins' (C-138/02).

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF>

<http://curia.europa.eu/juris/showPdf.jsf?docid=61560&doclang=en>

<sup>40</sup> On the criterion of comparative effectiveness see Rawls, J. *The Law of Peoples*, p.89 and for a scalar account of political feasibility see Lawford-Smith, H. (2013) "Understanding Political Feasibility," *Journal of Political Philosophy*, 21, pp. 243-59.

<sup>41</sup> For a defence of this interpretation of Rawls see Samuel Freeman (2007) and David Reidy (2007) who also draw an additional and relevant distinction between reciprocity of advantage and reciprocity of justification. See Freeman, S. R. (2007). Rawls. London; New York, Routledge and Reidy, D. A. (2007). "Reciprocity and Reasonable Disagreement: From Liberal to Democratic Legitimacy." *Philosophical Studies* 132(2): 243-291.

<sup>42</sup> See Rainer Forst (2017). *Normativity and Power*. Oxford: Oxford University Press.

beneficiary of movements of human capital and therefore it treats every member-state as an equal addressee of reasons when it comes to choosing an appropriate EU policy concerning EU nationals' access to welfare rights. And such equal concern is difficult to square with policies that restrict rather than secure equal access to basic welfare rights for all EU citizens, not just for the few and privileged ones.

### 3. Eszter Kollar: Temporary Labour Migration and Beliefs about Justice in Immigration

#### *Introduction*

Debates about justice and labour immigration in Europe have centered on two important normative questions. Wide-spread concern with “social dumping” and “welfare tourism” gave rise to demands to protect the local economy and the prospects of local workers from the burdens of labour immigration. Human rights and labour advocacy groups, as well as liberal political theorists, instead, have focused on problems of discrimination and exploitation, and demand equal treatment of migrant workers. Each of these positions express important moral concerns that should shape our judgement about what we owe to temporary labour migrants. However, I argue that the normative justification in their favor takes a domestic scope of justice and has a blindspot for important moral concerns of other, often more vulnerable, groups; namely *potential* migrant workers and populations left behind in the source country. Justice requires that we carefully adjudicate the claims of all concerned and offer normative solutions that no one could reasonably reject. In short, the demands of social justice need to be reconciled with the demands of global justice.

Before we can delineate a system of rights and duties for temporary labour migrants, first we need to understand what is the just or morally defensible solution to ease the tension between immigration and the welfare state. Prior to regulating temporary work programs, we need to ask whether they are morally defensible at all as part of the solution, or should we think of them as unjust practices within the policy repertoire of oppressive states.

The “liberal inclusivist” solution to the problem of immigration pressures prefers a highly selective admissions regime at the border, and putting the few that “got in” on the path to full citizenship. However, as Chandran Kukathas critically noted, this solution is not necessarily the morally best option we have. “While one obvious response is to say “so much for the worse” for open immigration, it is not less possible

to ask whether the welfare state is what needs rethinking.” (Kukathas 2005, 219). If we are worried about immigration pressures on the welfare state, why limit access to the state’s territory rather than access to the welfare state? This paper aims to rethink the normative problem of labour immigration by focusing on the welfare state leg of the tension, instead of admission.

I argue that the joint demands of social *and* global justice raises a difficult *trilemma* in the context of temporary labour immigration. Three normative criteria are particularly relevant for fairly adjudicating the claims of all affected, and to work out what justice demands through systematic philosophical reasoning.

1) *Equal treatment*: Migrant workers, it is argued, ought to be treated as equals, having the same rights, obligations, and status as native workers, eventually put on the path to citizenship, consistent with principles of liberal equality in democratic societies. The political philosophy of temporary labour migration has dominantly focused on this first desideratum. The problem is that this solution leads to accepting less migrant workers with more rights, and raises a concern with reduced opportunities and resources for those excluded and those left behind in source countries. 2) *Global justice*: A commitment to improving the conditions of the globally most vulnerable populations requires that we open borders and remove the most resistant barrier in front of the “natural” flow of the global pool of talents and skills to promote more, and a better distribution of, global wealth. This solution, however, raises several concerns about its implications for promoting justice within receiving societies. More open borders generate pressures on the local economy and on welfare services, and is thought to come at the expense of the most vulnerable native workers. 3) *Social (domestic) justice* requires that we safeguard and improve the conditions of poor and precarious workers within receiving societies.

Reasoning about the trade-off between the openness of a labour migration regime, i.e. the number of migrant workers that should be admitted, and the extensiveness of the package of rights that is owed to them, I argue, should proceed in light of this trilemma. In the context of the European Union where internal labour mobility between relatively well-off but unequal populations is governed by freedom of movement, while strong restrictions apply to global poor workers trying to cross external borders, this trilemma raises particularly difficult normative questions. I argue that in order to promote the equality of all persons worldwide and properly respond to the joint demands of social and global distributive justice, we need to abandon the first horn of the trilemma. Consistent with the equality of all, a more open labour migration regime coupled with highly qualified domain-specific rights differentiation between native and immigrant workers can be justified.

### *1. Empirical assumptions: Beliefs about Immigration and the Welfare State*

Native populations in receiving countries often express attitudes of fear about the detrimental effects of immigration on heightened competition in the economy, pressure on welfare services and the declining prospects of native workers, and respond with hostility. Those attitudes may be based on false beliefs about the empirical effects of labour migration on the host society. Another, perhaps more prevalent problem is that hostility to labour migration often expresses unjust attitudes, such as racism or xenophobia, towards migrant workers and the populations in source countries. Concerning false or unjust beliefs, I concord with Chris Bertram (2019) that the normative character of attitudes towards migrant workers should matter to our moral evaluation. In a liberal democracy restriction on immigration requires weighty empirical evidence of harm or threat to essential public goods and institutions. Furthermore, as a moral minimum, it must be shown that the immigration policy does not assign unequal weights to the life and prospects of foreigners. It must assume the equal moral worth of all.

Assuming such conditions are met, still the empirical impact of immigration is subject to heated debates among empirical scientist. Critics of labour immigration policy, like George Borjas (2016), argue that while immigration can be a net benefit for the nation by increasing total wealth, not everyone benefits. Unskilled workers, in particular, carry the burden. Immigration, in effect, redistributes wealth from those who compete for jobs, the native unskilled workers, to those who employ immigrants, typically at lower labour costs. Immigration policy, then, is not merely a concern with the global poor or global equality of opportunity, it is also a domestic policy of redistribution of wealth and power.

The effects of large scale low skilled immigration on the native worker are several. First, decreasing economic prospects: an increase in the labour supply leads to heightened competition among low-skilled workers with an impact on native worker's prospects. Borja estimates that a "10% of increase in the number of workers with a particular set of skills probably lowers the wage of that group by at least 3 percent" (Borjas 2016). Second decreasing social security is partly due to the so-called social dumping effect, i.e. the deregulation of social and welfare protections to ensure competitive advantage for market actors. When companies hire migrant workers without paying social contribution, part of the workforce effectively falls outside the social security system. Third decrease in the local worker's political bargaining power is due to

the fact that organizing migrant workers collectively is a difficult matter. Their increasing presence in the local workforce diminishes the native workers' overall weight in negotiations.

## *2. Normative Proposals: Beliefs about Justice and Immigration*

The political philosophy of temporary labour migration has dominantly focused on the requirement of equal treatment. It grew out of a normative critique of guestworker programs. It is clear that severely restricted guestworker schemes, such as the ones currently in place in the Gulf States and Singapore, are morally impermissible. They impose harsh working conditions, extreme working hours, severe restrictions on movement, prevent family reunification or marrying a local citizen, or violate other fundamental human rights. The challenging normative question is whether time-limited work visas coupled with social, economic and political rights restrictions are permissible in human rights respecting democratic states? Migrant rights organizations and liberal theorists of social justice have provided ample criticism of such a practice pointing to various forms of unequal treatment involved. Their

The “liberal inclusivist” solution to the problem of immigration pressures (Walzer 1983; Miller 2008) prefers a highly selective admissions regime at the border, and then putting the few that are “in” on the path to full citizenship. Michael Walzer (1983) has argued that if migrant workers are admitted to the state’s territory, they should be given equal rights and be put on the path to full citizenship. In his critique of guest worker programs, he has argued that anything less than full membership would confine some residents on the state’s territory to long-term inferior status. Such inferior status is akin to “a family with live-in servants”; a form of second-class citizenship (Walzer 1983, 61). On Walzer’s liberal inclusivist position, then, democratic citizens in rich receiving states have the following choice: “if they want to bring in new workers, they must be prepared to enlarge their own membership.” Otherwise they need to restrict entry and fill in shortages for socially necessary labour from within the domestic labour market. Walzer clearly prefers fewer admissions with equal rights. A package of restricted rights offered to large group of migrant workers is intolerable in democratic states because it erodes social and political equality. Moreover trading off citizenship for socioeconomic opportunities commodifies the good of citizenship, and corrupts a special political good.

David Miller (2008), in a similar vein, argues against temporary labour migration schemes on the basis of normative ideals embodied in modern democratic states. States are under the joint requirement

towards people residing in their territory: equality of citizenship and the need to integrate immigrants into the national culture to achieve self-determination. Both of these are very costly and necessitate strong limits on admissions both in terms of numbers and of selection criteria.

Arguments motivated by concern with the interests and vulnerabilities of migrant workers zoom in on the specific kind of wrong done to them. These critiques of temporary work programs provide a more fine grained analysis and break down the general idea of “second class citizenship” into different forms of unequal treatment: exploitation, political and social domination or structural injustice (Lenard and Straehle 2011; Stilz 2010; Nuti 2017). So one solution to the immigration vs. welfare tension is to limit immigration, in order to ensure an extensive and equal package of socio-economic rights to citizens and denizens alike.

Challenging this position, Chandran Kukathas argued that this solution is not the only possible and not necessarily the morally best solution we have. “While one obvious response is to say “so much for the worse” for open immigration, it is not less possible to ask whether the welfare state is what needs rethinking.” (Kukathas 2005, 219). If the problem is that immigration puts pressures on the welfare state, then why limit immigration and not access to the Welfare State? Kukathas argues, we could, in principle, free the movement of people from government restrictions and allow economic freedom and associational freedom to drive population movement. The welfare state, currently only serving the interests of a privileged few could then be adjusted to a lower provision level to be widely spread among all.

A third possibility, increasingly popular among economists, is an open borders regime coupled with differentiated rights for migrant workers. The idea is to let more people in, maintain extensive socio-economic rights for citizens, but limit the socio-economic rights of incoming immigrants. From a global economic efficiency perspective, increased international labour mobility is widely thought to be a win-win-win scenario for receiving and sending countries, and the migrants themselves. Leading economists have argued that workers from the developing world should move to developed countries to increase their productivity. The so-called *place premium*, i.e. income gains that would hypothetically accrue to the migrant worker, is the key variable that explains the potential economic gains. An average worker moving from a low income to a high-income country would be four or five-fold more productive due to a positive change in the social infrastructure; namely less corruption, property rights protection, contract enforcement, political stability, physical infrastructure and public goods provision (Clemens et al 2010). Her increased productivity would contribute to welfare gains in receiving countries and in countries of origin through remittances (Clemens et. al, 2010; Milanovic 2016; Rodrik 2011, 2017). Dani Rodrick sums up the



economic imperative of removing barriers to labour migration with the following comparison between trade and migration.

If trade deals were strictly about efficiency and growing the size of the overall economic pie, trade negotiators would drop everything else on their agenda and spend their whole time trying to strike a bargain whereby workers from poor countries could participate in the labour markets of the rich countries. (Rodrik 2017, 7)

Developed countries have strong domestic economic and demographic interests in recruiting workers from the developing world, and in the past decades have tailored their immigration regimes to fill labour shortages through international recruitment (Milanovic 2016; Shachar 2009). Labour immigration policy in the real world is allegedly designed to promote the national interest of recruiting states. This has two consequences. First, recruitment is highly skewed towards high-skilled migrants to attract the best and the brightest of the world. The higher skilled and more educated migrants are, the higher the net benefit of labour migration to the receiving country. Second, the package of rights offered shape the effects of labour immigration. The more extensive package of rights is offered to immigrant workers, the more costly they are to the host society in terms of labour costs and welfare expenditure, which diminishes their comparative advantage over domestic workers. A less extensive package of rights results in more net benefits in the host society and the more acceptable labour migration becomes for the host population (Ruhs 2013).

The main point is that admission and integration rights cannot be studied in isolation from one another. There is a complex policy choice between admitting less migrant workers with a generous package of rights vs. admitting more workers with a restricted package of rights, in the context of divergent economic, political and moral considerations.

To most people on the left, this third option seems like a dangerous idea; backtracking on or outright betraying centuries of social and political struggle of the labour movement for decent work and human security. In this paper, my aim is to bring to the fore a difficult moral trilemma that arises from the joint demands of social and global justice in labour immigration. I argue that reasoning about the trade-off between the openness of a labour migration regime (numbers) and the extensiveness of the package of rights that is owed to them, I argue, should proceed in light of this trilemma.

### 3. *The Demands of Justice: A Moral Trilemma*

#### a) *Equal treatment*

The liberal inclusivist position, articulated by Walzer, Miller and others, centers on the normative principle of equal treatment. The arguments rest on two kinds of concerns. First, safeguarding political and social equality in liberal democratic receiving countries. Second, they may focus on the interests and vulnerabilities of migrant workers.

The equal treatment view is clearly laudable for protecting a vulnerable group and articulating unrecognized forms of injustices done to them in host societies. This focus on injustice in host societies, and host societies alone, is also a source of its normative flaws. The equal treatment view focuses our attention to the rights of immigrants in relation to the receiving state instead of focusing on the rights of all persons vis a vis any state. It construes the scope of the community of equals too narrowly, to include only native citizens and already admitted migrant workers. It takes a domestic normative perspective and understands equal treatment as *equal terms of membership* and equal access to citizenship within the receiving country. As Branco Milanovic put it,

“Under current conditions, people in rich countries and their governments are very concerned with providing ... equal treatment to all people living within the country’s borders. At the same time they are largely indifferent to the treatment of workers outside their borders (Milanovic 2016, 150).

This view fails to properly weigh the interests of potential future immigrant workers and of the populations left behind in the countries of origin. It is the position of domestic liberal democratic elites with a blind spot to the demise of the global poor.

#### b) *Global Justice*

Development economists (Milanovic 2016, Rodrik 2017) as well as radical global egalitarians (Carens 1992, 2013; Cole 2011) argue for a more open labour migration regime as an instrument to realizing global equality of opportunity; a core principle of the social compact between citizens of the world. Expressing a

global luck egalitarian position, they extend the principle of equality of opportunity with the country of birth as a morally arbitrary circumstance to be mitigated from life prospects. Joseph Carens argues that birth-related circumstances should not be taken as the moral basis of entitlement to advantages (Carens 2013, 227-228). Milanovic argues that “the citizenship premium that one gets from being born in a richer country is in essence a rent ... an “exogenous circumstance” ... independent of a person’s individual effort” (Milanovic 2016).

The case for open borders, however, does not need to rely on such a radical conception of global justice. Everyone agrees on the normative premise that poverty is bad and should be mitigated. We then need to endorse the empirical premise widely concerted in development economics that more open borders, or a less restrictive labour migration regime, is instrumental to global poverty eradication. It is arguably the most effective path to reducing poverty and inequality in the world (see Rodrik 2017 above). A moral commitment to improving the conditions of the globally most vulnerable populations requires that we open borders and remove the most resistant barrier in front of the “natural” flow of the global pool of talents and skills to promote more, and a better distribution of, global wealth.

Large-scale immigration of the low skilled poorer segments of the global population as a demand of global justice, however, raises several concerns about its implications for undermining social justice within receiving societies. In response to societal grievances, development economists often combine their open border proposal with limited package of rights for the sake of political feasibility. They present the moral choice as the second-best option compared to the morally first best option of open borders and equal status, in order to maximize welfare gains for the migrants and their societies of origin. Milanovic (2016), for example, presents his case for strong migrant rights restrictions as a realistic policy scenario to accommodate the “culture shock” experienced by native populations and the resulting hostility towards low-skilled labour migrants. This view takes attitudes of host populations to be a relevant constraint on the normative proposal.

### *c) Social Justice*

Open borders are problematic from the point of view of poor and precarious local workers for two reasons. First, large-scale temporary work programs potentially produce adverse effects on the local economy, and result in more vulnerability and precariousness for the local working class (Ruhs 2013). Second, the social

dumping effect described above erodes the welfare state and weakens its capacity to safeguard the interest of the least advantaged members of the host society. So the native working class may carry a *double burden* from labour immigration. Social justice requires that we safeguard the prospects of poor and precarious workers, the worst-off members in receiving societies.

Does social justice, then require that we limit immigration? Not necessarily. Two considerations are relevant to this question. Firstly, the effects of labour immigration on the local economy depend first on how well the state manages and regulates the design of temporary work programs and migrant work recruitment (Ruhs 2013). Currently employer-driven schemes, that mostly benefit economic elites, need to be reformed with the aim of reaping the benefits for all and especially the most vulnerable. Background injustice in receiving societies needs to be corrected, and should not be taken as a relevant constraint on a just labour immigration regime.

Secondly, the effects of labour immigration on welfare state capacity depend on the scheme of migrant rights offered. If indeed migrants put pressure on welfare provision, it does not warrant restrictions on movement (admission), but warrants some, carefully designed restrictions on access to the specific welfare services that are, in fact, at stake.

I argue that these three normative principles present a genuine moral trilemma; that is only two out of three demands can be jointly realized. Reasoning about the trade-off between the openness of a labour migration regime, i.e. the number of migrant workers that should be admitted, and the extensiveness of the package of rights that is owed to them, I argue, should proceed in light of this trilemma. The three options are the following:

- I. Equal rights and Social justice → undermines Global justice
- II. Equal rights and Global justice → undermine Social Justice (under non-ideal conditions of global background inequality)
- III. Global Justice and Social Justice → sacrifice Equal membership rights for all migrants.

I argue that in order to promote the equality of all persons worldwide and properly respond to the joint demands of social and global distributive justice, we need to abandon the first horn of the trilemma.

Consistent with the equality of all, a more open labour migration regime coupled with highly qualified domain-specific rights differentiation between native and immigrant workers can be justified.

#### 4. Ujlaki, Refugees: A Threat? The Possibilities and Problems of a Rawlsian Interpretation

##### *Introduction*

Migration is intertwined with human existence ever since early humans left Africa and a group of them arrived at the Australian shores at least 40,000 years ago. In our age, migration seems to acquire a new urgency as a political theoretical problem. Contemporary forms of migration call our current practices and policies into question and challenge the fundamental ethical assumptions of the political community about particular rights, obligations, membership, and sovereignty. Although different forms of the phenomenon may have diverse implications to these questions – for instance refugeehood as an extreme case of migration –, and also the extent of migration may also entail different problems and solutions. Yet, it seems that, since the beginning of the current refugee crisis, it is an increasingly dominant public opinion that migration across borders not only challenges existing political communities but carries several *threats*.

The question about how to react to the continuously growing masses of migrants is of crucial practical relevance. While we are arguing about who deserves aid and assistance and who does not, who is responsible for working on the problems and who is not; spatial restructuring of world population takes place, moreover, which seems more urgent, millions of lives are at constant risk. Therefore, the question arises: can it be a justifiable position to claim that migrants or refugees pose a threat towards host states or towards the whole ‘Western’ culture? The task of political theory is to engage with these challenges of political life in a way which countervails deep emotional reactions with considered arguments about migration and membership. Therefore, one may expect from one of the biggest political philosophical enterprises of the twentieth century, namely Rawlsian liberalism, to argue against the justifiability of regarding attendance-seekers this way. However, it seems that Rawls himself neglects the whole problem of migration. Therefore, it appears to be unusual that Rawls deals so briefly with these concepts. It would be reasonable to expect Rawlsian political theory to offer a liberal account and resolution to the moral dilemmas raised by migration in the broader sense and also by the current refugee- and immigration crisis.

The aim of the article is to propose a Rawlsian position in the topic of migration despite the lack of an elaborated conception of migration in his works. The primary basis for it will be his numerous, albeit somewhat

incoherent remarks about certain problems related to migration. Fortunately, these remarks provide enough materials to build a defensible liberal conception of migration that can help us to point out why it is suspicious and unjustifiable to regard immigrants and refugees indiscriminately as potential threat to host states. However, before offering this Rawlsian perspective, we have to answer a possible objection to this project based on the undeniable difficulties of interpreting Rawls's suggestions for the topic of migration. It is true that, first, Rawls continuously bypasses the entire topic. Second, his few remarks about the related issues are unhelpful. Third, some of the latter conceptions are even contradictory with other, fundamental, elements of his theory. If it is possible to develop a Rawlsian argument for a coherent and liberal understanding of migration as not a threat, but an integral part of human coexistence, we have to address these possible objections.

In the article I examine how the issues of migration arise in Rawls's political philosophy. Building on Thomas Pogge's differentiation between Rawls's domestic and international theory, I show how the problem of migration – hand in hand with refugeehood – slips out from the Rawlsian framework (Pogge, 2004). Since the domestic theory regards society as a closed system, its domain of application is too narrow to include the phenomenon of migration across borders, so it pushes the problem to the domain of the international theory. Though, the latter also bypasses the problem: while it ignores any other possible forms of migration, it finds the reasons of mass migration generated by humanitarian injustices eliminable in the domestic sphere. This *circularity* makes it impossible both for migrants and refugees to gain entry to the boundaries of Rawls's political theory. The article contributes to literature in two ways. First, it claims that the reason why migration slips out from the whole Rawlsian framework is not to be regarded as a pure mistake. Rather, there is a good reason to disregard it, indeed, it can be only understood if put in a higher-level argument: the question that to what extent a theory is allowed to bypass some realities of the world and from which elements should we abstracted from belongs to the debate between ideal and nonideal theory. Therefore, we should engage in debates of these to understand whether it is justifiable to disregard migration in a political theory. Nevertheless, for doing this, we must recognize the weaknesses of Rawlsian political philosophy. Second, I offer an interpretation of Rawlsian liberalism which argues that regarding persons or collectivities as a threat is unjustifiable. Instead of some obscure remarks on migration in Rawls's international theory, I use the idea of the person, formulated in the domestic theory, to form a Rawlsian account of immigrants. Since this idea of the person is at the basis of his theory, I propose a Rawlsian standpoint which rejects the idea that any group of people can be regarded as a threat. Moreover, Rawls's works imply that *if* there is a threat to a society – be it existential, financial or cultural, – it might come as much as from within the society as from outside of it. Fortunately, Rawls does have a solution to the threat appearing from inside, therefore, I argue that he also has a solution to the worst case: in which migration *does* pose an inherent threat to the society.

The article is structured as follows. Since Rawls formulates a few remarks on migration in his latest, international theory, first I display how he interprets migration and refugeehood there, then, I present the way he pushes it to the domain of the domestic theory. Next, I highlight the ideas of the domestic theory which may be used for the problem an interpretation of migration. I do this in a different way than Rawls himself implies in his international theorizing: rather than regarding particular reasons of migration as eliminable in just circumstances, I regard the migration as a frequent element of modern society which may need regulations; and I point out that just as in the case of Rawls's solution to the problem of the intolerant sect, we may cope with the effects of migration. Finally, I show that the reason why the phenomenon is eliminated from the whole Rawlsian framework overarches his whole *oeuvre*: the discrepancy between his ideal theory and some realities of human life necessarily directs us to the field of the contest between ideal and nonideal theory.

### *Migration in The Law of Peoples*

In order to argue for the intelligibility of analyzing Rawls's *LP* first, I invoke Thomas Pogge's distinction between Rawls's theories. According to Pogge, Rawls's most referred books can be divided into two areas, namely, domestic and international theory of justice (Pogge 2004). Pogge regards Rawls's famous *A Theory of Justice* (1999 [1971] furthermore *TJ*) as domestic theory, however, the correction of *TJ*, titled *Political Liberalism* (2005 [1993] furthermore *PL*), can also be classified into this group which I am going to call together domestic theory of Rawls. Regarding the topic of the article, the most important characteristic of the domestic theory is what I call the *closed system assumption*, which is intended to show that both *TJ* and *PL* are worked out for society as a 'closed system isolated from other societies' (*TJ*, 8). The other category, which is called international theory by Pogge, means *The Law of Peoples* (2000 [1997], furthermore *LP*). It can be considered as Rawls's last project to extend a liberal idea of justice to the 'society of peoples' (*LP*, 3). The *closed system* assumption of the domestic theory makes it clear why *TJ* and *PL* are totally unaware of the phenomenon of migration across borders. Therefore, it is reasonable to start exploring Rawls's ideas connected to the topic in the international theory, where he indeed makes some remarks about migration.

*LP* has two relevant characteristics which make the theory suitable for including some aspects of migration, however, as I shall argue, the book does not pay attention at all to the topic or it does in an unhelpful way. The two characteristics are its focus on *foreign policy* and the conception of *realistic Utopia*. The first, substantive characteristic highlights that, in *LP*, Rawls attempted to outline an answer to some practical political problems of foreign policy, by presenting the moral vision that citizens and officials of liberal democracies ought to follow when

trying to work on these challenges (Martin – Reidy, 2006: xvi). Rawls claims that *LP* 'is developed within political liberalism and is an extension of a liberal conception of justice for a domestic regime to a Society of Peoples'. He emphasizes that, 'in developing the Law of Peoples within a liberal conception of justice, we work out the ideals and principles of the foreign policy of a reasonably just liberal people' (*LP*, 9-10). Therefore, it is important to see that Rawls's international theory of justice is not a fully-developed theory for international relations of states, rather, it is a theory worked out for the particular conduct of liberal peoples. This condition implies that, since most forms of migration take place among states and involve crossing of state-borders, foreign policies and practices of liberal (and perhaps non-liberal) states should include these aspects of migration. Hence, at least to some extent, a theory of foreign policy of particular states is expected to deal with migration.

The second characteristic of *LP* which makes it potentially capable to address the problems of migration is what Rawls calls *realistic Utopia*. While the foreign policy characteristic illuminates the consciously marked limitations of *LP*, this methodological characteristic points out the way Rawls understands the possibilities of political philosophy as such. According to Rawls, answers to the mutual relations of peoples should be examined in a political philosophy of a realistic Utopia which 'extends what are ordinarily thought to be the limits of practicable political possibility and, in so doing, reconciles us to our political and social condition' (*LP*, 11).<sup>43</sup> This reconciliation implies that there is no reason why most aspects of migration should be excluded from a political theorizing of this kind, hence it is an easily discernible reality of modern world. Migration is a fact with which political philosophy should reconcile. Thus, while the former characteristic, the focus on foreign policy makes it reasonable from Rawls to renounce the task to examine the entire phenomenon of migration in modern circumstances, the latter, namely the conception of realistic Utopia implies that there are some aspects of international migration which a political theory for international relations of liberal states should include. I attempt to offer a more or less satisfactory list of forms of migration which might be confronted with *LP*. Migration can be typologized from multiple dimensions (e.g. Petersen, 1958). Following the domestic and international distinction between Rawls's theories, formulated

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<sup>43</sup> Rawls uses 'peoples' instead of states because according to him, only the former is able to have moral motives (*LP*, 17). However, in reality, political conduct is a feature of states which have the required actors and authority to put decisions into effect.

(footnote continued)



by Pogge, a plausible typology is to distinguish between internal and international migration. In my analysis I build on a threefold distinction which differentiates between (i) internal migration, (ii) immigration and (iii) forced migration (Weinstein – Pillay, 2016: 164).

However, I perform some clarifications with the two latter conceptions. Hence the authors define (ii) immigration as ‘movements from one general population to another, such as from one country to another’, therefore this category is more useful to be called mere ‘international migration’ which might have two dimensions, among them the first is (ii/a) emigration from a place of origin and (ii/b) immigration to a different state. The importance of this differentiation is apparent in current political theorizing of migration.<sup>44</sup> The other remark which should be added is that the last category, called (iii) forced migration diversified in the literature into several categories of those persons who are forced to move by different reasons. Asylum seekers, refugees, trafficked persons and different kinds of displaced persons who are identified, labelled and also differentiated by international community and international law.<sup>45</sup> In addition, there is a huge number of people who are not labelled in any of these ways, though, they are also forced to move by similar reasons (Fiddian-Qasmiyeh et al; 2014: 4). However, among these categories, in this article I only focus on refugees and asylum-seekers because of the initial question of the unjustifiability of the view which regards them as a threat to destination states and host states. A reason for this in part is that although other forms of forced migration may effect a large number of people, since refugeehood is frequently connected to political conflicts and crises, it necessarily appears as a mass phenomenon, and also, it acquires public recognition more often.<sup>46</sup>

Types of migration in the literature, mentioned above, show that there are some aspects of migration that a realistic Utopia worked out for the foreign policy of liberal states should not be disregarded. In the followings, I

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<sup>44</sup> Current debates highlight that in both political practices and theorizing there is a moral *asymmetry* between the right to enter and the right to leave (Fine – Ypi, 2016; Miller, 2016; Wellman, 2016). Therefore, these two directions of international migration should be treated differently.

<sup>45</sup> For example, stateless people are distinguished from refugees, however, most of the time, stateless people become refugees (Costello, 2017: 721).

<sup>46</sup>As I will argue later, both refugees and immigrants should and *can* interpreted from a Rawlsian viewpoint. However, from a moral perspective, this position does not differentiate between these categories. Thus, any cases in which differentiation between refugees or immigrants is unimportant, I will use Miklósi’s neutral term of ‘attendance-seekers’ which remains *neutral* considering different types of admission claims (Miklósi 2017, 55).

demonstrate how Rawls regards these in *LP*, and why his account of international migration is unhelpful for proposing a Rawlsian position in regarding immigrants or refugees a threat.

Clearly, (i) internal migration within borders of a state belongs to a domestic theory. Therefore, it is justifiably placed outside the scope of *LP*. In turn, since *LP* is worked out for the foreign policy of liberal states, it should mention some aspects of international migration: (ii/a) emigration regarded from the viewpoint of the departing state, (ii/b) immigration regarded from the viewpoint of the host state, and (iii) refugeehood regarded both from the perspective of the host state and from the viewpoint of the international community. Rawls briefly pays attention to (ii/a) emigration which occurs in societies which are decent, yet not liberal. Somehow, in this part of his argument he only acknowledges that hierarchical societies must ‘allow and provide assistance for the right of emigration’ in the case of religious minorities (*LP*, 74). This remark implies the confusing perception that, in Rawls’s view, emigration does not occur in the case of liberal democracies. In contrast, in the beginning of *LP*, Rawls stipulates that his theory ‘takes people as they are (by the laws of nature), and constitutional and civil laws as they might be’ (*LP*, 13). Regarding the first condition, it would be odd to assume that Rawls would think that peoples do not migrate from one place to another. In the case of the second condition, it is also hard to believe that Rawls would regard a realistic Utopia as a political philosophy in which emigration does not occur. The latter condition is rather formulated in order to argue that in a realistic Utopia ‘should, or ought to’ exist without ‘the gravest forms of political injustice’ (*LP*, 7). Therefore, the only case in which emigration might be eliminated from a political philosophy of a realistic Utopia if it necessarily emerges as a consequence of some political injustices. Yet, this conceptualization of emigration would be too narrow, since as literature indicates, emigration may happen for several, not evil reasons such as for the hope of acquiring or changing an activity, for the hope of income growth (these two taken together are often called as economic migration), for residential opportunities, for better living conditions, or for social reasons (Weinstein – Pillay, 2016).<sup>47</sup>

Considering (ii/b) immigration and (iii) refugeehood (as a form of forced migration), Rawls can be again accused with conceptual vagueness. He describes immigration as a phenomenon caused by particular reasons. By these he only means reasons which follow from the already mentioned political *injustice* (*LP*, 6-7). According to Rawls, persecution of religious and ethnic minorities, the denial of their human rights, political oppression and starvation, altogether with population pressure, and inequality and subjection of women are consequences of political injustices (*LP*, 8-9). Immigration defined as a consequence of these reasons highlights that Rawls uses a

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<sup>47</sup> Moreover, it is debatable that in which category should climate change caused migration be put, while, it seems that it is one of the primary drivers of migration in more vulnerable states (EJF, 2017).

surprisingly narrow notion of migration in which other forms – which are caused by less pressing reasons –, such as economic migration, are purely left out. Again, it is not justified why general reasons of immigration are left out from the definition, and therefore, also from the scope of the realistic Utopia. Hence, Rawls's narrow definition of both emigration and immigration fails.

Furthermore, it seems that what Rawls calls reasons of immigration, are rather regarded as reasons of refugeehood in current political theorizing. Since the latter category is usually regarded as a subtype of forced migration, it would be justifiable that the phenomenon which 'would disappear in the Society of liberal and decent Peoples' is refugeehood, rather than immigration as Rawls suggests (*LP*, 8-9). By contrast, as I already demonstrated, current political theorizing sharply distinguishes between refugeehood and immigration, which should be treated as highly different phenomena with quite distinct implications.

So far in the article I also did not differentiate between types of attendance-seekers. Although, there is an alternative interpretation of Rawls's ideas, in which this conceptual differentiation is accomplished. This interpretation may offer some foundations to a Rawlsian position on the unjustifiableness of regarding specifically refugees as a threat. In this alternative solution refugees are not regarded as a subtype of immigrants. Rather, this interpretation assumes that by immigration Rawls would only mean a phenomenon which is manageable by an appropriate domestic policy, and which is sharply distinguished from the currently witnessed refugee crisis in which millions of lives are at continuous risk and which hardly seems to end in the near future. For creating this interpretation, I turn to some conceptions which indeed concern Rawls in *LP*.

At the basis of the international theory of justice eight principles underlie. These principles are formulated to guide the conduct among free and democratic peoples. Two principles among them might be considerable for the question of refugees. One is about 'peoples are to honor human rights' and another prescribes that 'peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political or social regime' (*LP*, 37). At first sight, these two principles altogether may guide the conduct of states towards their population – with concrete, practical suggestions – in case of their basic liberties are at stake. However, these principles are unhelpful to offer more than mere obscure ideas in three senses: firstly, they lack explicitly formulated guidance. I will call this problem – which is acknowledged by Rawls himself – the *lack of standards*. Secondly, *LP* deals only with the conduct of peoples towards peoples, and the dimension of the conduct towards individuals is entirely missing. I will call this the *scope of subjects problem*. Thirdly, the principles are also unsatisfactory to offer concrete guidance because *LP* regards some realities of modern world eliminable. I will refer to this problem as the *discrepancy problem*, which occurs between what Rawls finds eliminable and what is

expected to be abolished in the world taken as we know it. In the next paragraphs, I display these three problems in details.

The problem with the principle of duty to honor human rights is its *lack of standards*. Rawls himself admits that it is difficult to measure the level of their violations and to ascertain at what circumstances those require intervention (*LP*, 102-3). Therefore, the other principle, duty of assistance, might offer a solution to the problem of measurement. Unfortunately, it does not help either because Rawls notices that ‘there is no recipe’ how to help societies *burdened* by unfavorable conditions (*LP*, 108).<sup>48</sup> Indeed, he offers three guidelines for accomplishing the duty to assistance. The first one is about the aim: assistance must extend only to ‘realize and preserve just institutions’ (*LP*, 106-7). The second one is about the possibilities to comply to the duty: beside dispensing funds, a more crucial element is giving advices to the burdened state about the importance of human rights, especially rights of women, without ‘improperly undermining a society’s religion or culture’ (*LP*, 108-11). The third is that the assistance-giving societies must abstain from paternalistic acts (*LP*, 111-12). Although these guidelines are more or less concrete, one may believe that they only work if the aimed people accepts assistance and advices. However, the complexity of the international arena stems from the fact that the belief about the rightness of the aims are only evident from a liberal viewpoint.<sup>49</sup>

The problem of *lack of standards* also arises in the case of intervention to outlaw states. In their case, assistance is *per definitionem* not possible, for the reason they are not willing to comply with the law of peoples. The proposed interpretation in which two principles of *LP* may display Rawls’s possible ideas towards treating refugees properly is derived from Rawls’s ideal theory of the law of peoples in which there are only liberal and

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<sup>48</sup> In *LP*, Rawls differentiates between five types of domestic societies: liberal societies, decent peoples, outlaw peoples, societies burdened by unfavorable conditions, and benevolent absolutisms (*LP*, 4).

<sup>49</sup> As Chantal Mouffe points out, international arena viewed this way not just problematic but also dangerous. Mouffe claims that spreading what is believed as reasonable by liberal societies, that is, viewing international conduct as it lacks ‘agonistic channels’, is likely to lead to war, that is, it can evoke extreme forms of antagonisms (Mouffe 2005, 230).

(footnote continued)

decent societies. Although this ideal part of *LP* contains the principle of non-intervention, in the nonideal part, in which not only liberal and decent peoples form the Society of Peoples, Rawls argues that interference with outlaw states is only legitimate if ‘the offenses against human rights are egregious’ (*LP*, 102-3). This definition is not only obscure but even problematic: while previously he claimed that there are kinds of policies which are definitely unjust (see *LP*, 8-9), here it is not that convincing that he would truly find inequality of women, for example, ‘egregious’.<sup>50</sup>

The second problem with the alternative interpretation, in which principles of justice formulated in *LP* are taken as prescriptions for dealing properly with refugees, is what I called *the scope of subjects problem*. Both in the case of the duty to honor human rights, which, by the way, implies that war is justified ‘in grave cases of intervention to protect’ these rights (*LP*, 79-80); and in the case of the duty of assistance, the proposals concern only peoples rather than individuals. While, as I already mentioned, the duty of assistance principle offers some guidance for (liberal and decent) peoples about how to help other states as a collectivity, it does not offer any prescription to states about their duty to assist those persons *within* the other society who need help and who do not get the necessary support from their own government. It means that refugees are a group of the population which is a bigger unit than mere individuals with which the domestic theory deals, but at the same time, they are a smaller unit than a people with which the international theory operates. The only part in *LP* where Rawls differentiates between groups is about the principles conducting just war against *outlaw* states. There he distinguishes three units of an outlaw state: its leaders and officials, soldiers and civilian population (*LP*, 94). However, refugees or displaced persons do not form a distinct unit in the argument of *LP*: the scope of subjects of the principles are too narrow to them directly as propositions to deal with refugees.

These two problems can be called conceptual objections towards *LP*. In both cases, insufficiency emerged either because the way in which guidance is formulated or the subjects towards the guidance is aimed. However, there is a third problem in *LP* which calls for more than a mere conceptual argument, moreover, it occurs in both interpretations: in which immigration and refugeehood are taken as synonyms, and in which refugeehood

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<sup>50</sup> As some critics pointed out (among them the most elaborated is Okin, 1989a and 1989b; cf. Nussbaum, 2003; Abbey, 2007; Hartley – Watson, 2010), in both *TJ* and *PL* Rawls maintains a gendered form of society which perpetuates roles according not to justice but to biological sexes (a good example where he differentiates ‘the virtues of a good son or a good daughter’) (*TJ*, 467). One may reasonably argue that inequalities between sexes exist in his own domestic theory too. If the feminist critique is correct, further implications can be found in *TJ*. Although, subjects of that work are persons instead of the peoples of the international theory. He claims that ‘[a] person’s right to complain is limited to violations of principles he acknowledges himself’ (*TJ*, 217). Following this logic one can claim that no state has the right to intervene with another on the ground of inequalities between the sexes until it gets rid of those inequalities within its boundaries itself.

formulates a distinct problem with distinct implications. The problem is what I called *discrepancy* between some of Rawls's conceptions and realities of modern world. Rawls believes that the reasons of immigration, among which some called by him as *great evils* of history, are forms of injustice, and will eventually disappear. He argues that following just policies and establishing just institutions – like the ones he proposes in the domestic theory – will eliminate the very existence of those injustices (*LP*, 6-7). Therefore, he claims, 'the problem of immigration is not, then, simply left aside, but is eliminated as a serious problem in a realistic Utopia' (*LP*, 8-9). He fails to recognize that migration is not an extreme case which should and could be eliminated. Actually, migration, either in form of relocation for indefinite time or in form of a claim to renouncing one's citizenship for various reasons, is rather the result of the normal operation of modern societies than a last resort.<sup>51</sup> Despite refugeehood, which clearly belongs to nonideal circumstances, it is not justified why immigration and emigration should be placed outside of ideal theory.

A surprising remark should be added. Though Rawls consciously tries to get rid of any extraneous matters in the ideal part of *LP*, he still uses some remarkably factual than ideal conceptions as a framework of his ideal theory of international relations. Before *LP* was written, some political philosophers of the Rawlsian stream of theorizing expected that a Rawlsian liberal account of international theories would have been a cosmopolitan theory of justice. However, Rawls disappointed these adherers of his: in *LP* he rejected cosmopolitanism and argued for more or less closed borders (Martin – Reidy, 2006; Pogge, 1989; Sadurski, 2014). In Rawls's framework, boundaries of a state actually appear as a historical contingency, however, it is not to be discarded for this reason (*LP*, 8). Parallel to the conception of natural facts worked out in *TJ*, *LP* implies that boundaries of states and the fortune that some of us born into one geographical location and others into another, are also mere natural facts. What might be just or unjust is only the way institutions deal with these contingencies.<sup>52</sup>

Accepting state boundaries as a part of ideal theory involves an interesting consequence. In a footnote of *LP*, Rawls notes that a government has a right to limit immigration 'to protect a people's political culture and its constitutional principles' (*LP*, 39). The reason for this remark is that every people is responsible in the first place for its territory, size of population and its land's integrity (*LP*, 8). Thus, Rawls seems to accept the standpoint of several liberal political theorists (such as Miller, 2016; and Wellman, 2016.) – which I call *the asymmetry thesis* – that there

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<sup>51</sup> For the distinction between different types of individual claims to exit a state, see Stilz, 2016.

<sup>52</sup> As stated in *TJ*, 'the natural distribution is neither just or unjust; nor is it unjust that persons are born into society at some particular position. They are simply natural facts.' (*TJ*, 102).

is a moral asymmetry between a right to exit and a right to entry: everyone ought to have a right to emigrate, but a right to immigrate can (or ought to) be restricted (cf. Fine – Ypi, 2016). However, with this asymmetry, and the right to control borders, the idea of *protection* enters to the Rawlsian framework. Because protection generally appears *against* something, Rawls's remark may offer as a basis exactly for any viewpoints which argues for regarding prospective entrants as a *threat*. Rawls's remarks on the topic are quite worrying. Whether he hints here at immigrants or refugees, posing a collectivity by its existence as a threat to a society and its culture seems an *unjustifiable* idea. Unfortunately, Rawls is pretty silent on the details of this idea. I believe, the underlying argument for his remark can be found in his recurring account of *socialization* which is elaborated in his domestic theory of justice. Although, in the next chapter I will argue, that his domestic theory offers a solid argument why regarding both immigrants and refugees as a threat is unjustifiable.

In this chapter I argued that *LP* offers two directions to interpret Rawls's conceptions of migration and refugeehood. However, I argued that both ways are insufficient in some aspects. Beside the main *circularity* problem, that is, migration is entirely sent over to the domain of the domestic theory of justice which, however, justifiably disregards it because of its *closed system* assumption, I ascertained three main problems of interpreting *LP* for the phenomenon of migration. The first way of interpretation lead to some pervasive *conceptual* problems. The objections I proposed against Rawls's explicit ideas and notes about the related topic are intended to highlight that both migration in the broader sense and refugeehood are wider problems than how Rawls portrays them. Regarding the second interpretation, in which I examined problems which are visibly concern Rawls. I argued that this way of interpretation is confronted by three main problems. These are the *lack of standards* in actual guidance, *LP's unhelpful scope of subjects*, that is, it is not occupied with conduct towards individuals, and *discrepancy* between theory and realities of modern world. In the next chapter, I will examine whether Rawls's domestic theory of justice eliminates these problems of *LP*.

#### *Migration in Rawls's domestic theory of justice*

In this section I argue that, although Rawls's remarks about migration in *LP* proved to form an incomplete account of the topic, some ideas in his domestic theory help us to provide a proper Rawlsian account of migration and an answer to the question why regarding attendance-seekers as a threat is unacceptable from a Rawlsian liberal standpoint. However, for accepting this argument, one has to eliminate the controversial elements of *LP* which are confronted with the very basis of his theoretical framework.

The Rawlsian idea of society is expressively based on individuals as *free* and *rational*. These persons choose the principles of justice in the original position which will regulate all further agreements (*TJ*, 11). However, the Rawlsian framework is also based on another central conception, namely, on the idea of a well-ordered society, which serves as a limitation of the theory. In a society of this kind, what I will call *acceptance* element is about ‘everyone accepts and knows that the others accept the same principles of justice’. The second element ascertains that ‘the basic social institutions generally satisfy and are generally known to satisfy these principles’. I will call this the *institutions* element. The third element, which I will call *socialization*, declares that persons’ ‘public sense of justice makes their secure association possible’ (*TJ*, 4-5; cf. Moon, 2015). All of the three elements of the idea of a well-ordered society implies that the *closed system* assumption is necessarily required in the domestic theory. However, as I will show in this section, even by abandoning the strict form of the closed system assumption, the underlying ideas of the Rawlsian framework remain untouched.

The socialization element of the conception of a well-ordered society refers to the idea that just institutions are likely to be stable only if citizens have the capacity – namely *a sense of justice* – to maintain and respect them. After human beings are born, they are departing on a road where they acquire a skill of judging what is just and unjust, and they become able to understand why just institutions are valuable in themselves (*TJ*, 46). In his works, Rawls insists that ‘those who grow up under just basic institutions acquire a sense of justice and a reasoned allegiance of those institutions to render them stable’ (*PL*, 142). While elaborating *LP* he also maintains this account of moral development. In his view, constitutional democracies are the ones where – by *reasonable pluralism* – individuals can effectively develop a sense of justice. Therefore, in their political cooperation those who socialized under just institutions are more likely to be fair and tolerant with others. This theory of moral development overarches both Rawls’s domestic and international theory (*TJ*, 17; 41-2; 119; *PL*, 142; *LP*, 15).

Two elements of the idea of a well-ordered society raises a problem regarding attendance-seekers. One may argue that building on the *acceptance* element may offer skepticism about whether attendance-seekers, who are only *prospectively* members of the political community, do, in fact, accept principles of justice, and it is even more uncertain to others whether these prospective entrants would accept these principles. The third element, what I called *sense of justice*, may offer similar concerns. Although, proclaiming a collectivity as a potential danger just by the mere fact of their belonging to that group of persons is an anti-liberal idea which have served as a basis for what he later calls ‘great evils of history’ (*LP*, 6-7). Yet, one may argue that since a great number of incomers have not had the liberal democratic type of socialization, they do not have a capability to comply and respect just institutions. Moreover, since in *LP* Rawls incomprehensibly defined emigration as a phenomenon which does not concern liberal democracies – in which socialization under just institutions are possible – could this mean that from



a Rawlsian viewpoint *no immigrant* is capable to comply to the liberal democratic institutions? Would not this claim presuppose that, in spite of the Rawlsian idea of the nature of human beings, humans are not entirely equal from a moral perspective?

A possible solution to inquire these questions is to include immigration and refugeehood into the domestic theory. In the following parts of this section I will offer a thought experiment to show why these concerns are false, and how can attendance-seekers be included into a Rawlsian liberal framework. To this mental visualization I will use a modified version Rawls's own thought experiment applied in the *original position* (cf. Brownlee – Stemplowska, 2017: 22; 25).

By abandoning the closed system assumption of the domestic theory, one might consider attendance-seekers as future entrants to an already existing political community. Therefore, one can regard them as one of the parties in the original position, where initial bargaining about the principles of justice takes place. Rawls claims that 'all sane adults, with certain generally recognized exceptions have the right to take part in political affairs' (*TJ*, 222). In this proposed thought experiment, one has to form the question: is there anything that makes adult immigrants or refugees incapable to this minimal requirement to participate in political life? With other words, apart from legal differences, such as their present absence of their citizenship, are these prospective members of the political community different in a moral sense? Answering this question, one must engage in the differences between citizens and would-be immigrants.<sup>53</sup>

Rawls assumes that 'each person beyond a certain age and possessed of the requisite intellectual capacity develops a sense of justice under normal social circumstances' (*TJ*, 46). However, those who do not comply to this criterion are not merely excluded from the deliberation. In their case, Rawls proposes the principle of *paternalism*. He claims that 'we must choose for others as we have reason to believe they would choose for themselves if they were at the age of reason and deciding rationally' (*TJ*, 209). According to this prescription, if one considers immigrants and refugees as potential future residents, one has to treat them as they would treat themselves. Would they *threaten* citizens? In Rawls's view, they would not: he argues that all human beings are capable of developing a sense of justice. Although there are people who 'lacks the requisite potentiality either from birth or accident', at

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<sup>53</sup> It is important to note that prospective immigrants are not equivalent with prospective citizens. Claiming a right to immigrate is different from claiming a right to citizenship (and therefore also from claiming a right to renounce one's civic obligations). Thus, granting a right to residence in a state would not grant automatically equal citizenship rights. For more details, see for instance Stilz, 2016.

the heart of the Rawlsian account of equality there is the idea that ‘there is no race or recognized group of human beings that lacks this attribute’ (*TJ*, 506).

It seems that from a Rawlsian perspective, prospective entrants should not be seen as a threat at all since with some exceptions, every adult human being is more or less at the same level of moral development. If there is a threat to just institutions, to other citizens, or to ‘our culture’ – whatever one understands by the latter – it comes just as much *from within* the society as from outside. Rawls notes that ‘in any kind of well-ordered society the strength of the sense of justice will not be the same in all social groups’ (*TJ*, 500). This remark sheds light to the fact that attendance-seekers framed politically as a collective threat is an overly homogenous, and therefore, false image of the society and the so-called ‘Western’, ‘European’ or ‘Christian’ culture. Although, those who seek attendance to Western states may have very different cultural or religious norms, the latter societies already have this cultural heterogeneity in their countries.<sup>54</sup>

Let us suppose the worst scenario: in which some cultural, religious or philosophical differences put our existing institutions at stake. Rawls gives an account of dealing with some of those threatening persons, in a part of his domestic theory where he examines the question of tolerance against intolerant groups. Considering this worst case, abandoning the society as a closed system assumption allows to include threatening prospective incomers into the argument, *ipso facto* perceiving them as an intolerant group of the society. Fortunately, *TJ* offers several materials for the intolerant argument.

According to Rawls, during moral development human beings recognize and accept that different points of views exist. Nonetheless, this process requires some extremely complex abilities (*TJ*, 468-9). Those who do not have the requisite abilities might become intolerant and therefore endanger just institutions, since they are more likely to set free their disruptive inclinations (*TJ*, 454). Rawls proposes that if an intolerant sect presents ‘considerable risks’ to our legitimate interests, citizens can properly force the intolerant to respect the liberty of others (*TJ*, 218-9).<sup>55</sup> Nevertheless, this radical step does not necessarily have to be made because of the *psychological principle*. The principle means that ‘those whose liberties are protected by and who benefit from a just institution will, other things equal, acquire an allegiance to it over a period of time’ (*TJ*, 219). So, according to Rawls, even an intolerant

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<sup>54</sup> Indeed, contemporary liberal theorists apt to accept that cultural convergence may be valued for some reasons, and in cases when immigration threaten to destroy a state’s culture or a crucial element of its culture, restrictions might be justified. However, they also tend to agree that a pure desire to maintain cultural homogeneity cannot justify neither internal migration restrictions nor immigration restrictions (Miller, 2016; Oberman, 2016).

<sup>55</sup> By considerable risks, Rawls means that the constitution itself has to be in danger in order to justifiably deny the freedom to the intolerant.

sect will tend to lose its intolerance over time. Transposing this Rawlsian account of the intolerant to the worst possibility in which domestic theory is regarded without the closed system assumption, and attendance-seekers with cultural and other differences are put into the framework, from a liberal perspective, it is still not enough to justifiably deny residence (or, in the case of refugees, asylum at least). Therefore, the second element of the conception of a well-ordered society, which I called *institutions* element offers solution to the concerns raised by the other two elements. If, following Rawls's logic, 'the basic social institutions generally satisfy and are generally known to satisfy these principles', they will benefit even those, who tend to behave similarly as members of the intolerant sect (*cf. TJ*, 4-5).

*PL* is more explicit about why cultural differences cannot form a justifiable account on excluding one either from society or from deliberation. Moreover, in the correction of his original idea of justice as fairness, Rawls engages exactly with the problem of how to tackle with the fact that citizens are profoundly divided by religious, philosophical and moral doctrines; however, he still uses the closed system assumption. In turn, the task of *PL* is exactly to take domestic cultural diversity into the picture, thus, the question is not that can a challenge from outside undermine a society, but rather should be formulated in a way that can a challenge from inside undermine it. I believe, Rawls's domestic theory stands or falls by the same conditions: if it is unable to deal with a threat undermining society from outside, it is also unable in the case of a threat from inside; and if it is able to eliminate threat engendering from inside, it is also able to disentangle threatening elements coming from outside the society. Hence, the question from now on is whether *PL* can deal with a particular characteristic of modern world, namely pluralism or heterogeneity.

While revising his domestic theory, in *PL*, Rawls adjusts the idea of a well-ordered society formulated in *TJ* to the fact of *reasonable pluralism*. He claims that the plurality of reasonable yet irreconcilable religious, philosophical and moral comprehensive doctrines is a normal condition of democratic culture. Therefore, the question is that despite profoundly divided by these doctrines 'how is it possible that there may exist over time a stable and just society of free and equal citizens' (*PL* xviii). With other words – and this formulation of the question may be more suitable regarding immigration – the question is 'how is it possible for those affirming a religious doctrine that is based on religious authority, for example, the Church or the Bible, also hold a reasonable political conception that supports a just democratic regime?' (*PL*, xxxvii) This narrower formulation of the problem of *PL* shows that, from a Rawlsian perspective, threat comes as much from *within* the borders of a state as from outside. Any rhetoric which displays attendance-seekers in a way that since their culture is too different from 'ours' and too irrational – i.e. based on religious convictions – cannot be the basis for a Rawlsian standpoint. The essence of *PL* is exactly the recognition that a liberal society, even so understood as a closed system, must deal with the presence

of non-liberal or even anti-liberal views. For a liberal political theory therefore, dealing with anti-liberal attendance-seekers counts as the same problem as dealing with anti-liberal citizens. Although, the fact that in practical thought, currently, migration is closely linked with the refugee crisis, which – by its novelty, rapidity and degree – may mislead us to perceive the problem of anti-liberal attendance-seekers and citizens as different problems. Except these truly serious features of the phenomenon, from a liberal perspective, prospective entrants themselves do not have anything special in their characteristics which would make them more threatening than a common citizen.

Thus, while Rawls's international theory implies that socialization might form a crucial element in persons' ability to accept and comply with just institutions of liberal democracies, his domestic theory shows that even without the requisite socialization, in just circumstances, the disruptive inclinations of citizens will tend to lose. Since Rawls excludes the proposition that any race or particular group of people is unable to acquire the necessary abilities to conform to just institutions, a Rawlsian position cannot justify any claim which regards attendance-seekers unable to lose disruptive inclinations. This proposed position with the offered thought experiment displays that the strict form of the closed system assumption is not inevitable for the domestic theory. Abandoning this strict form of the assumption allows us to envisage a case in which attendance to an existing political community is possible, while it does not endanger underlying elements (such as those of the well-ordered society or the conception of the person) of the Rawlsian framework.

In this chapter I argued that some conceptions at the heart of Rawls's political philosophy, namely the conception of the person and the original position, are helpful to propose a Rawlsian position to how to regard prospective immigrants and refugees – even in the worst case in which their entry carries considerable threat. This interpretation is to some extent differs from what Rawls's international theory formulated in *LP* implies about the topic. The divergence, and the variety of possible interpretations is caused by an overarching problem, which is manifested in what I called *circularity*: both theories of Rawls sends questions of migration to the domain of the other. In the next chapter I attempt to highlight the reasons why Rawls turns away from the entire topic, and why is it problematic from a theoretical perspective.

### *Migration: a nonideal phenomenon?*

In the previous sections I attempted to show that, although Rawls's works have serious deficiencies regarding the phenomenon of migration, they offer enough materials to interpret some emerging questions of migration in a Rawlsian way, such as the unjustifiableness of regarding migrants as a threat. However, as I argued, for this Rawlsian interpretation, we must relinquish some misleading remarks of Rawls's international theory of justice, while turning

to conceptions fundamental to his domestic theory. Despite all these arguments, one pervasive problem remains in question: namely, *circularity* by which the international theory ‘pushes’ migrants into the domain of the domestic theory, while the latter regard migration as a phenomenon disturbs only the international relations. Hence, the question still remains: why migration and migrants do not fit at all into the Rawlsian framework?

The circularity problem exceeded not only as a result of the already mentioned deficiencies of Rawls’s works, such as conceptual inaccuracy about the reasons and forms of migration or as the lack of standards in Rawls’s attempts to offer guidance to political conduct. Rather, it is a deeper problem which permeates the entire work of Rawls, namely discrepancy between the universal political philosophical language and particular circumstances which are interpreted by them. One may argue that circumstances may be justifiably avoided by Rawls’s theorizing, if regarded as ones belonging to particular policy problems, however, I will argue that the circularity problem emerges because of a certain way of understanding political philosophy.

Originally, the distinction between *ideal* and *nonideal* theory emerged from Rawls’s works. The framework of Rawls’s theories is built on the belief that any urgent and pressing problem of nonideal theory can be solved only if principles that are appropriate to guide the basic institutions of society are worked out under idealized, therefore *favorable*, circumstances, and under conditions of *strict compliance*. Then, when this first step is made, one can inquire how problems of our actual, *unfavorable* circumstances, in which only *partial compliance* can be hoped, might be solved according to social justice (*TJ*, 8; 216; *PL*, 284-5; *LP*, 5; Stemplowska – Swift, 2012: 374).

Since Rawls is explicit on the precedence of ideal theory over nonideal theory, one may easily acknowledge why a fact as migration as a consequence of such mentioned natural limitations and historical contingencies as states, state borders. Moreover, because of the closed system assumption of the domestic theory, international migration purely excluded from its domain. In contrast, as I argued in the former chapters, Rawls’s international theory concerns with some forms of migration (primarily immigration), although it brings about serious conceptual problems, for instance, it defines immigration as a result of injustice. In spite of this notion of immigration, it would be more intelligible to understand in one hand immigration as phenomenon emerging because of natural limitations and historical contingencies, and on the other hand, refugeehood and other forms of forced migration, as a result of injustice. However, after this conceptual clarification is done, one pressing suspicion remains: is it truly just a historical contingency that people tend to move from a territory to another special destination? Should desire to move and actual movement of persons be excluded from ideal theory?

Questions about what should be fit into ideal theory are frequent in political theorizing of past decades. Rawls’s belief in the possibility to theoretically elaborate the principles of justice for basic social and political

institutions inspired numerous political theorists. Still, some critics argued that this enterprise is flawed because of various reasons. These critics believe that nonideal theory should get more attention in political theory. However, their criticism is manifold in their argument, ideas and even in the definition of the adversary ideal theory (Jubb, 2012; Lawford-Smith, 2010; Valentini, 2009; 2012). The complexity of the topic leads to a chaos about what is the real problem with ideal theory of so-called nonideal theorists (Stemplowska – Swift, 2012: 374). Still, what they have in common, is the notion that ideal theorists necessarily make some mistakes when trying to elaborate theories of reality by disregarding crucial elements of real world circumstances.

The debate between ideal and nonideal theory is, therefore, able to illuminate why the Rawlsian framework is unsatisfactory in offering ideas about both migration in the broader sense and the current refugee crisis. While Rawls uses ‘classical and well known’ leading ideas (*TJ*, xviii) for creating a systematic account of justice, he must use some abstraction. Moreover, this abstraction is called *idealization* by some of his contestants because it not just ignores some facts but also assumes falseness (O’Neill, 1989; 1996). Idealization disturbs nonideal theorists in three ways (Valentini, 2012). Some nonideal theorists claim that these falseness makes a theory unable to give prescriptions about what to do in real-world circumstances in which some people do not take their fair share (Miller 2011; 2016). However, some nonideal theorists, such as contemporary political realists claim that ideal theory, especially Rawls’s one has feasibility problems since its prescriptions are unable to reach, thus, it fails to guide political action (Williams, 2005; Geuss, 2008; Horton, 2010; Galston, 2010). The lack of action-guidance in ideal theory bothers some other critics in a way that they argue that for a more just world, we do not need to elaborate a theory of the most just one (Sen 2006; 2009).

The three most referred works of Rawls which I take into account in this article show that there is a line of reflections to the claim of nonideal theorists from the part of Rawls. As *PL* with its supplemented idea of *reasonable pluralism* shows, Rawls expressly realized that some of the idealizations of his original idea untenable, therefore in his later works he took into account some crucial circumstances of particular modern societies. As I argued, *LP* also lifts up some contingencies – borders of states – from the nonideal part of his theory into the ideal part. Therefore,

it is questionable, why an activity which is inseparable from human existence such as movement, does not fit into a theory of compliance in any work of Rawls.<sup>56</sup>

While *reasonable pluralism* of *PL*, which is indeed a fact taken into account, involves deep disagreement, it is not justified why migration as another fact intertwined with human existence should be regarded as something that endangers political community with even deeper disagreement. However, as I argued, Rawls's conception of the person, which lies at the basis of his enterprise, disqualifies any argument about *moral* differences between individuals or groups of persons. Therefore, as I proposed in the former chapter, even in the worst case, in which prospective entrants are possibly threatening just institutions, this threat emerges as much as much within the society as from outside of it. Thus, it is not justified why migration is excluded from the Rawlsian framework. The circularity by which the enterprise of Rawls averts the problem of migration remains an unjustified element of his works.

The most pressing problem of Rawls's works, regarding the question of migrants is the *circularity*, by which Rawls's domestic theory regarded as a closed system averts the whole phenomenon of migration into the domain of the international theory, while the latter pushes it back to the domain of the original theory of justice. The article intended to show that despite the insufficiencies of Rawls's theories on the topic of migration and attendance-seekers, we are left with enough materials to propose a Rawlsian liberal interpretation to migration, which offers some practical ideas about how to countervail deep emotional reactions to a mass phenomenon such as the current refugee crisis with considered arguments of political theory.

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<sup>56</sup> With the explanation of János Kis, the distinction of strict and partial compliance can be supplemented in the following way. On one hand, there are levels of compliance which do not affect the reasons for complying. Kis calls this as 'sufficient compliance'. On the other hand, all levels below are 'insufficient compliance'. He points out that although politics is the domain of the latter, it would be perverse from Rawls 'to allow the standards of fairness and justice to be manipulated by the failures to comply' (Kis, 2008: 33). It explains why Rawls is 'silent about politics as we know it' (ibid.). However, it also explains why some contingencies fit into the ideal theory without preventing it to achieve its aim: namely, creating the principles of justice that can guide action in even nonideal circumstances. One might reformulate the argument of Kis: would taking migration into the account of ideal theory prevent sufficient compliance? It is hard to believe.

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### 5. Wolthuis, No Justice Without Law

The question raised by the organizers of the workshop is: how should a theorist of justice respond to, or take into account, prevalent views of a just European Union?

The problem that has motivated this question is that these prevalent views appear to be “intractably divergent” to the workshop organizers. There is no agreement, for example, about whether the EU should redistribute wealth, to build a more social union. Or, a second example: some think that the Eurogroup acted unjustly or showed too little solidarity with Greece in the sovereign debt crisis, while others thought Greece brought this crisis upon itself.

A theory of justice obviously cannot contain or support conflicting or inconsistent views of justice. So the question needs to be reformulated as follows: how can these disagreements be explained? Or solved?

My answer shall be that, in order to make these conflicts more tractable, we need to distinguish between:

- Reasonable and unreasonable views of justice;
- Views of justice and views of other standards;
- Views of EU justice and views of justice concerning other subjects;
- Stable views of justice and instable views of justice.

And my conclusion will be that, once we make these distinctions, we shall see that EU justice is, and ought to be, restricted to internal market justice. My main argument is that there can be no justice without law; and that only internal market law is real law and can only be stable EU law, if it is seen as part of a legal system that also consists of member states’ law and international law.

#### *Reason*

Some views of justice we view as plainly wrong or unreasonable. What is reasonable, however, is difficult to spell out. A well-known notion of the reasonable is John Rawls’s. Persons are reasonable when they are ready to propose and follow principles of justice that free and equal persons can accept. A view of justice is also reasonable if it can be accepted by persons viewed as equal and free. Persons are free in that they can have and revise a purpose in life and pursue it. And they are equal in that they have this capacity to a roughly equal degree.

#### *Justice*

It is just that persons get what is theirs and that what is theirs is protected. What a person has is his freedom and what he has acquired by exercising his freedom. But the freedom of a plurality of persons can only be protected through a system of positive law. In a state of nature each person can only follow his own view of what is just. This disagreement means that no one’s freedom is protected. A public notion of justice, laid down in a system of positive law, is required. A key characteristic of a system of positive law is that it establishes the rule of law, which means (among other things) that the executive and the judiciary are “under law”. And hence, that these state authorities are not also legislators. So a key characteristic is a separation of powers. Another feature of a just system of positive law is that those subjected to its rules are its legislators or control or select those who makes the rules.

*EU*

Is there place for justice in the European Union? The criteria (just given) are (a) that there is a body of rules legislated by those bound by it (or their representatives) establishing each party's rights and duties, (b) that an executive who is not also legislator applies these rules and (c) that parties have access to an independent judge. Only when these criteria apply there is rule of law, not rule of men.

If we approach the EU from this perspective, it appears to us as basically a market union. Internal market law satisfies the three criteria just mentioned. (I do not argue for this here.) Its internal market law governs border crossing commerce and interaction of the citizens of EU member states. In Kant's vocabulary internal market law is cosmopolitan, commercial law. This means that in its capacity as a market union, with its internal market law, the EU is a subject of justice.

*Stability*

One of the key topics of a theory of EU justice is the stability of the principles of EU (or cosmopolitan) justice. Its principles of justice should not come into conflict with principles of social justice (applicable to nation states) and of international justice (applicable to the international order of states). Rawls solves this problem by deducing his law of peoples from previously constructed principles of social justice. And Kant's version of natural cosmopolitan law is formulated rather narrowly, to fit in a structure of right to which also the right of state and the right of nations are parts.

EU internal market law can be viewed as positive cosmopolitan law. The reason is that it fits well with social justice regimes and international law. Border crossing commerce is simply not a topic of these other notions of justice. Social justice applies to inner state law, while international law concerns the relations between states. Cosmopolitan law governs the relations between persons of different states who engage in border crossing commerce. It is also clear that the rules of internal market cannot be unilaterally given by one nation state; they have to be enacted by a treaty to which the member states of the cosmopolitan union.

*Intractably divergent views?*

With these distinctions drawn I can now conclude that the two examples at the start are not instances of intractably divergent views of EU justice.

The EU is, as far as justice is concerned, a market union. The only system of positive law satisfying the criteria for a public system of justice, is internal market law. It is no part of internal market law to redistribute wealth. It concerns the rights and duties of EU buyers, sellers, travellers, researchers. We could ask, in a reformative spirit, should the EU develop in the direction of a social union? That is not for a theorist of justice to decide. But a problem would in that case be that an issue of stability would be raised: principles of EU social justice would in that case come into conflict with principles of member state social justice.

The sovereign debt crisis or similar crises concerning the Economic and Monetary Union, to turn to the second example, is/was not an issue of EU justice. The reason for this is that EMU regulations and institutions do not satisfy the criteria of a public system of justice just mentioned.

- (a) Its rules do not establish right and duties but codify economic wisdom instead about public debt and price stability. They are rules of thumb of state household management.
- (b) The rules are executed by the Council, which has also formulated the rules (that is: the Member States have). This means that there is no executive authority that is under law, applying these rules. This is not rule of law but rule of men, where a majority of these men (nations) turn against a minority. This is what Kant calls a “depostism”.
- (c) There is no access to an independent judge.

So the sovereign debt crisis is no crisis of EU justice. The sovereign debt crisis is not a crisis of member state solidarity either, but of international justice. What is troublesome is that the conditions attached to the solidarity of the Eurogroup minus Greece with Greece undermined the independence and equality of a sovereign state. The group made demands about Greece’s household management, which is an internal matter for Greece to decide. That the group could make these demands and that Greece could find itself in such a position of dependence vividly shows that the EMU is a highly problematic kind of international cooperation, from the point of view of justice at least.

Also here I can ask: should the EMU be transformed into a proper fiscal union? Then again stability issues would arise. The EU law will interfere with national law concerning household management. The stability would be solved only if the member states dissolve into a federal Europe, but that seems to be not what we want.

My conclusion is that EU justice is and ought to be cosmopolitan justice, internal market justice, and the main argument is that there can be no justice without law and that only internal market law is real law and can only be stable law.