Report on the European heritage of philosophical theorizing about justice

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About ETHOS

ETHOS - Towards a European THeory Of juStice and fairness, is a European Commission Horizon 2020 research project that seeks to provide building blocks for the development of an empirically informed European theory of justice and fairness. The project seeks to do so by:

a) refining and deepening the knowledge on the European foundations of justice - both historically based and contemporary envisaged;
b) enhancing awareness of mechanisms that impede the realisation of justice ideals as they are lived in contemporary Europe;
c) advancing the understanding of the process of drawing and re-drawing of the boundaries of justice (fault lines); and
d) providing guidance to politicians, policy makers, advocacies and other stakeholders on how to design and implement policies to reserve inequalities and prevent injustice.

ETHOS does not merely understand justice as an abstract moral ideal, that is universal and worth striving for. Rather, it is understood as a re-enacted and re-constructed "lived" experience. The experience is embedded in firm legal, political, moral, social, economic and cultural institutions that are geared to giving members of society what is their due.

In the ETHOS project, justice is studied as an interdependent relationship between the ideal of justice, and its real manifestation – as set in the highly complex institutions of modern European societies. The relationship between the normative and practical, the formal and informal, is acknowledged and critically assessed through a multi-disciplinary approach.

To enhance the formulation of an empirically-based theory of justice and fairness, ETHOS will explore the normative (ideal) underpinnings of justice and its practical realisation in four heuristically defined domains of justice - social justice, economic justice, political justice, and civil and symbolic justice. These domains are revealed in several spheres:

a) philosophical and political tradition,
b) legal framework,
c) daily (bureaucratic) practice,
d) current public debates, and
e) the accounts of the vulnerable populations in six European countries (the Netherlands, the UK, Hungary, Austria, Portugal and Turkey).

The question of drawing boundaries and redrawing the fault-lines of justice permeates the entire investigation.

Alongside Utrecht University in the Netherlands who coordinate the project, five further research institutions cooperate. They are based in Austria (European Training and Research Centre for Human Rights and Democracy), Hungary (Central European University), Portugal (Centre for Social Studies), Turkey (Boğaziçi University), and the UK (University of Bristol). The research project lasts from January 2017 to December 2019

Executive Summary

This report provides an introduction to the European heritage of philosophical theorizing about justice. Since this is a contribution to the inter-disciplinary ETHOS project, which aims to provide building blocks for the developent of a contemporary European theory of justice, we have structured this work as a presentation of the main *contemporary* philosophical methods, questions and debates about justice arising from the European heritage, and thus cite historical sources somewhat selectively, rather than taking a primarily historical approach. A 'philosophical' approach to justice is one that takes normative questions seriously (broadly speaking, normative questions are questions about how the world ought to be). Since normative questions cannot be answered simply by collecting empirical evidence, they call for a rigorous approach which differs from that of empirical science. We outline three main methods philosophers have used to approach questions of justice: reflective equilibrium, rational reconstruction and critical interpretation.

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

In outlining these issues we provide an introduction to redisributive, recognitive and representation-based approaches to justice, including an engagement with the work of Nancy Fraser, who first theorized justice in terms of the combination of these three approaches. We also indicate ways in which personal and group identity, citizenship and social relations may bear on claims of justice, and reflect on the relevance of the notion of vulnerability – central to the ETHOS project – for theorizing justice.

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

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I. Introduction

This is the first report of the ETHOS project's work package two, which aims to provide 'philosophical foundations for a European theory of justice and fairness'. In this report, we introduce the European heritage of philosophical theorizing about justice. We write this report with a specific aim: to contribute to ETHOS, an inter-disciplinary project that seeks to provide the building blocks of a contemporary European theory of justice. Therefore, we think it necessary to foreground the methods, questions and problems of political philosophy in a way that makes the fruits of our discipline and its heritage accessible and useful for framing and conceptualizing justice and fairness as seen from broader perspectives, not necessarily philosophical. Thus, our approach here is not to attempt to rehearse the long history of political philosophy in Europe, but rather to introduce those with an interest in justice in Europe to the thinking about justice in political philosophy as it is widely understood in Europe (and elsewhere) today, while providing selective context that links contemporary debates to some of the influential historical figures. The task at hand is therefore to present and evaluate, for an interdisciplinary audience pursuing an empirically informed theory of justice and fairness for Europe, the relevant lay of the land in justice theorizing in contemporary political philosophy. Such a task is, of necessity, a task of selection. It is worthwhile to write a few words that explain and examine the criteria of selection: besides the generally contemporary focus, why are certain questions, thinkers and traditions of political philosophy highlighted over others?

An answer to this question must start with John Rawls. The contemporary discipline of political philosophy was remarkably and permanently transformed by Rawls' work, especially from the publication of his seminal *A Theory of Justice* in 1971. While many works we cite from after this date are *not* in what is now known as the 'Rawsian tradition' (though many are), we largely agree with Robert Nozick's quip that contemporary political philosophers either have to work within the Rawlsian framework, or explicitly state why they do not. Opposition to, variously, the style, substance, method, and research agenda of that framework is, usually, made in reference to it, however veiled. Accordingly, this framework can be considered, to the extent that such a thing exists in (political) philosophy, a 'dominant' approach. The aforementioned lay of the land must, as a consequence, give central attention to the Rawlsian, liberal, tradition of thinking through the major questions of justice, and engage alternative approaches (republican, communitarian, critical, etc.) through the lens and in the language set by it.

The focus on Rawls and the tradition of work he inspired, by generous and hostile readers alike, is not only due to the stature of his work, but also to the fact that *A Theory of Justice* appeared after a drought in the discipline. Many commentators, especially in the Anglophone tradition, have noted that the tradition of political philosophy was in a period of slump in the first half of the 20th century. Peter Laslett, a British historian, famously remarked in 1953 that 'For the time being anyway, political philosophy is dead' (1953 p. vii). More evocatively, in an essay entitled 'What is Political Philosophy', Leo Strauss claimed that the 'pitiable rump' which is academic political philosophy 'does not exist anymore, except as matter for burial' (1988 [1957] p. 17). Slightly more optimistically, in an essay entitled 'Does Political Theory Still Exist', Isaiah Berlin concluded that it was a 'strange paradox' that, in a period of violent and pervasive ideological conflict, 'political theory should seem to lead so shadowy an existence' (1962 p. 172). Of course, it is not true that there was a literal gap theorizing politics in the first half of the 20th Century; particularly relevant works include Karl Popper's *The Open Society and Its Enemies* (1945), Friedrich Hayek's *The Road to Serfdom* (1944) and Adorno and Horkheimer's *Dialectic of Enlightenment*. These essays, which, though very different, can all be understood as reflections on preventing authoritarianism and fighting

totalitarianism, and have all had a direct or indirect influence on many of thinkers and ideas engaged in this report. None, however, match Rawls' influence and methodological confidence, especially with regard to what Jonathan Wolff has called the '*revival of advocacy*' in political philosophy from the 1970s – that is, the renormalization of arguing for an explicit normative position compared to 'diagnosis' or conceptual analysis (2013).

The 'European' angle of the present work deserves additional comment. In contemporary political philosophy, the boundaries between continents are generally considered irrelevant to justice: there is no more such a thing as 'European justice' than there is such a thing as 'European mathematics' or 'European physics'. Just as the truths of mathematics are not geographically bounded, we share with most philosophers the view that the fundamental philosophical truths about justice (whatever they might be) are not bounded by continents. There have of course been influential thinkers on the European continent who have contributed to a particular, historically European, philosophical tradition, and have influenced law and political institutions and culture in Europe (and elsewhere). But these European roots of the philosophical tradition are considered to be, for the most part, of purely historical interest. The boundaries between nation states, though contested and constructed, are, in contrast, often considered relevant in recent philosophical theorizing about justice – not because each nation state has a peculiar philosophical heritage, but because the nation state has often been considered the basis for a shared political community which goes along with the distinctive shared rights and obligations of citizenship. The comparatively recent European supranational project and the rise of a set of a European political and legal institutions that extend beyond national boundaries raise interesting new questions in political philosophy, and new senses in which philosophical theories of justice can be 'European'. We discuss these issues toward the end of this report.

Before that, we will zoom out to more of a birds-eye view of philosophical theorizing about justice. We first briefly sketch what distinguishes a philosophical approach to justice from other possible approaches to justice, by emphasizing the *normative* focus of philosophical theorizing about justice, i.e. a focus on questions not about how things actually *are*, but about how things *ought* to be (section 2). Next, we discuss what sort of methods can be used to justify normative claims about justice (section 3). Following this, in the main section of the report, we outline some of the major questions about justice that have drawn the attention of philosophers, and indicate how competing conceptions of justice arise from different answers to these questions (section 4). In keeping with the purpose of this report the goal here is not to answer but to expose and elucidate pertinent philosophical questions and challenges. Section 4 ends by contrasting 'ideal' and 'non-ideal' approaches to theorizing justice[1], which is important to understanding the relevance of the concept of vulnerability, central to the ETHOS project (section 5). Finally, we reflect on the implications of philosophical theorizing about justice for justice in Europe in particular (section 6).

[1] This distinction becomes crucial in the next report of work package two (deliverable 2.2), which develops a 'non-ideal' methodology to theorizing justice that seeks to bridge the gap between normative theorizing and empirical social scientific research.

II. A 'Philosophical' Approach to Justice

A. Normative and Empirical Questions

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

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

Normative claims are claims about things like values, reasons, and what one morally ought to do. One common approach to justice outside of most philosophical engagements gives a central place to intuitions or 'common sense'. Common sense seems to suggest not just that people *believe* some things to be good, and that people believe some actions in some circumstances to be morally required, but: that some things, such as pleasure, *really are* 'good', while other things, like pain (under most circumstances), are 'bad'; that it really is wrong to torture children, irrespective of what some people may believe or have done; and that, all other things being equal, if we could intervene to save either a smaller or a larger number of lives, then we have a reason to save the larger number. These are common sense normative claims, in the sense that they are widely shared, and seem to correspond to basic intuitions about justice. But many normative questions cannot be answered simply by appealing to common sense normative claims, and anyway, common sense might be wrong (this is demonstrated by the frequency with which people's common sense intuitions *conflict*). This is where philosophy enters the picture. If we cannot answer normative questions by appealing to common sense, or by going out and collecting empirical evidence, then we must answer them by philosophical reasoning.

B. The relation of Justice to Fairness

In this work package, we take 'justice' as the central moral concept and we treat fairness as a derivate moral concept. This reflects the general usage in contemporary political philosophy and thus best captures the distinction between the two in the relevant literature. That being said though, it should be noted that many languages have

no distinction between the words 'justice' and 'fairness' (Wierzbicka 2006, chapter 5). The distinction is thus largely stipulative, with 'justice' being taken to concern the *morally appropriate distribution of the burdens and benefits of social cooperation*, and fairness referring to a particular view of justice.

The most prominent proponent of thinking of justice in terms of fairness is John Rawls, who calls his preferred conception of justice 'justice as fairness'. Defining a conception of justice in terms of fairness means that, according to Rawls, the correct principles of justice are whatever principles would be chosen by rational persons in an appropriate initial situation for choosing principles for a fair system of mutually beneficial cooperation (1999a [1971], 15-16). For Rawls, the appropriate initial situation is the hypothetical 'original position', including amongst other features the idea of the 'veil of ignorance' which hides information about participants' own characteristics of, for instance, their gender, ethnic or religious identity, and preferred conception of the good life. The basic idea underlying justice as fairness is thus that there are no self-evident principles of justice that exist to be discovered by us, but that justice is defined by whatever rational individuals could agree upon in a situation of equality and impartiality: if the initial situation is fair, the agreed upon principles to regulate our social institutions will be just. Rawls presents justice as fairness as a generalization and abstraction of 'the traditional theory of the social contract as represented by Locke, Rousseau, and Kant' (1999a [1971], xviii). The original position is put forward as a (moralized) version of the state of nature in the social contract tradition (for some classical European sources on the social contract tradition see: Hobbes 1994 [1651], 1988 [1689], Rousseau 1997 [1762], Kant 1983 [1785]).

On a narrow understanding, therefore, justice as fairness in contemporary political philosophy refers to Rawls' specific conception of justice, including the original position and the two principles of justice that are supposed to follow from the original position. On a slightly less narrow understanding, justice as fairness can be used to refer to any view that holds that principles of justice would be agreed upon in a suitably defined initial situation in which rational persons could come to a fair agreement on principles of justice. This includes, for instance, several contractualist theories of justice (Barry 2002, Scanlon 1998), but also several (Kantian) constructivist theories of justice (Habermas 1984/7 [1981], O'Neill 2000).

Obviously, Rawls's narrow understanding of justice as fairness is but one possible conception of justice. But even on the broader understanding of justice as fairness sketched above, justice as fairness is only one possible way to think about justice. One the most influential alternatives to this kind of view is proposed by G.A. Cohen, who denies that principles of justice should be arrived at through a hypothetical initial situation (however the initial situation is understood). In contrast, G.A. Cohen believes that there are certain truths about justice that can be discovered through philosophical reflection, independent from our (initial) agreement on these principles (2008). More generally, just as the contract tradition is but one (influential way) to think about political legitimacy, thinking about justice in terms of fairness is but one way to think about the distribution of the burdens and benefits of social cooperation. Since this working group does not privilege one particular philosophical conceptualization of justice over others but rather seeks to develop a 'non-ideal theory' of justice (as elaborated in report 2.2), the notion of fairness understood (as contemporary philosophers understand it) as a species of justice-thinking will not be given a special focus.

III. Methodology

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

A. Reflective Equilibrium

The most dominant method to justify normative claims about justice is the method of reflective equilibrium, which was introduced in ethics and political philosophy by John Rawls (Rawls 1999a [1971]; see also Daniels 1979). Reflective equilibrium involves a three-step process:

1) Begin with one's total set of *considered judgments* relevant to the domain, including intuitions about particular cases, general principles, and theoretical considerations relevant to the choice of principles. (*Considered* judgments are reasonably confident and stable judgments, in part because they have been formed under the sort of conditions that are platitudinously appropriate for the formation of reliable judgments generally – for example, not under the influence of a strong emotion or strong self-interest, and so on).

2) Scrutinize and adjust each of our considered judgments in the light of reflection, of each other, and of any new information we can gather, seeking to improve the coherence and plausibility of the set as a whole. Revise general moral principles that conflict with considered judgments about many particular cases and adopt principles that explain many such cases, for example. And vice versa: adjust one's considered judgments about particular cases in the light of one's judgments about general principles.

3) Continue working back and forth revising one's set of considered judgments until reaching, in the ideal, a maximally coherent and plausible system of beliefs about justice. The result is the (ideal) state of reflective equilibrium.

The distinctive claim of reflective equilibrium is that justification does not depend on an ultimate foundation of fundamental moral beliefs, but on the coherence between all moral and non-moral considerations that are relevant to the issue at hand. Reflective equilibrium offers a 'non-foundationalist' or 'coherentist' account of moral justification. Reflective equilibrium is non-foundationalist because it claims that there is no moral claim that has a special justificatory standing independent from engaging in the process of pursuing reflective equilibrium. Reflective equilibrium is a form of coherentism because, according to this methodology, justification, as Rawls famously writes, 'is a matter of the mutual support of many considerations, of everything fitting together into one coherent view' (1999a [1971], 507).

B. Rational Reconstruction

Another influential methodological approach to justice is based in what Jürgen Habermas has labelled the method of 'rational reconstruction' (Habermas 1984/7 [1981], 1998 [1992]). The idea is that the everyday pragmatics of rational social interaction in society can be reconstructed from a special interest in necessary presuppositions of such interaction. So, the focus is not on our considered judgements, but on the normative grammar of our

interactions. Habermas (1984/7 [1981]) and his colleague Karl-Otto Apel (1998) have done this through their analysis of the necessary (Habermas) or transcendental (Apel) conditions of rational language use. They argue that as rational and communicative agents, human beings are bound to accept some minimal but pretty unshakeable presuppositions about their ability to make intelligible claims by which they set rules for themselves and others. Basically, the idea is that claims to the truth, correctness, and integrity of a statement which we see being raised in social institutions (including institutions of justice) can be answered with yes-or-no statements, and that in case of disagreement, agents can check the status of such claims by investigating which claims can best be defended in light of reference to the objective world (truth), the intersubjective world of social norms (correctness), or the subjective world of truthful statements (integrity). Human beings are bound by the counterfactual expectation that they speak the truth, abide by valid norms and are truthful in communicative interaction. This normativity implicit in the pragmatics of everyday rational language use is said to represent an Archimedean point from which we can judge the rational acceptability of all possible claims, including claims with regard to political and social justice.

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

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

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

C. Interpretative Methods

The method in rational reconstruction is a method of interpretation of the basic normative grammar of our main social institutions and/or our self-understanding as agents. Central to this interpretation is the expectation that there is a rule-governed logic to various kinds of rational (inter)action. But most interpretative methods in political theory are more concerned with articulating received normative traditions and their moral sources. Authors such as Charles Taylor (1989), Michael Walzer (1983), and Axel Honneth (1992; 2013) have claimed that practices and theories of justice are derivable neither from a theoretical reflective equilibrium (Rawls 1999a [1971]), nor from an understanding of rules for rational social interaction that are always already implicit in our language use (Habermas 1984/7 [1981]), but from culturally specific standards of practical wisdom embedded in the social and political institutions of given societies. Taylor and Honneth, for instance, have claimed that modern societies are

characterized by a limited range of what Taylor calls 'constitutive goods of modernity' (such as the moral autonomy of the individual, the authority of knowledge, the authority of ordinary life, and individual authenticity). These are taken to be the true normative foundations of more formal and seemingly freestanding political conceptions of justice. This approach is central to most communitarian strands in political theory, which are indebted to Ancient Greek virtue ethics and political philosophy, which stress the central virtues and goods within community over the entitlements of individuals (Aristotle 1995 [350BC], 2009 [350BC], Plato 1992 [380BC]). Constitutive goods are at the heart of our shared moral traditions and practices, and our understandings of agency, ethics, politics and law have been developed in their light. According to this way of thinking, universalism in ethics must come not from transcendental presuppositions of agency proper, but from the gradual expansion of traditions-bound understandings of the good (Taylor 1989; Honneth 2014).

IV. Major Questions of Justice

Having outlined the nature of a philosophical approach to justice, and having said something about the variety of methods used in theorizing about justice in political philosophy, we now turn to a consideration of some of the broad questions about justice that have been addressed in the philosophical tradition, and some of the main answers that have been proposed and discussed. We will use diagrams to indicate the major questions and the dominant responses, and then discuss them in the text. It is not our aim to argue for particular answers to these questions here. Indeed, it is not the task of this report to go into very much detail about the strengths and weaknesses of the various responses or give a comprehensive survey of every possible question and view; the aim of this section is rather to provide an orientation in the complex terrain of justice in political philosophy for an interdisciplinary audience. This will serve to provide the ETHOS project with a synoptic view the major debates, and of the various concepts that have arisen from them, as well as of how these 'hang together'. The reader should pay particular attention to the diagrams, which have been designed to highlight the major questions and the dominant competing views of the European heritage.

The section proceeds by considering the main questions that have dominated the literature on justice in political philosophy, namely the 'grounds', 'shape', 'site' and 'scope' of justice, before engaging the question of the appropriate level of abstraction for justice theorizing ('ideal and non-ideal justice'). This language for considering different aspects of justice is common in Anglophone political philosophy literature, but the meanings of these terms differs from ordinary English somewhat. When asking what the *grounds* of justice are, philosophers wonder from where claims of justice arise. Debating the 'shape' of justice, in contrast, means considering what the primary concerns of justice may be. Philosophers may agree on the grounds, but not on the shape, for instance agreeing that claims of justice arise as a result of respect for free and equal persons, but disagreeing whether this means social relations or resources ought to be the primary locus of our concern. Questions of the *site* of justice are different again; although justice is a virtue that is commonly used to discuss and assess many kinds of human behaviour, philosophers disagree about the 'primary' subjects that principles of justice apply to. For instance, some hold that it is the constitutional or 'basic' structure of society that are shaped according to the demands of justice (Rawls 1999a [1971]), while others think that justice also makes demands on the actions of private individuals (Cohen 1997). Questions on the *scope* of justice ask the question of *to whom justice is due* – do the primary actors of justice (identified once the 'site' of justice has been fixed) owe the duties of justice (the 'shape') to all persons,

or only some (e.g. adults, compatriots, family members, etc.). The answer to all these questions may, arguably, differ according to the level of abstraction and idealization that is adopted by the theorist. Rawls famously stipulated that he would theorize justice assuming that people comply fully with the demands of justice, and that 'natural' and 'historical' circumstances were favourable. However, some think that a *useful* theory of justice ought to be pitched at a lower (or higher) level of idealization. We consider this question last.

A. Grounds of Justice

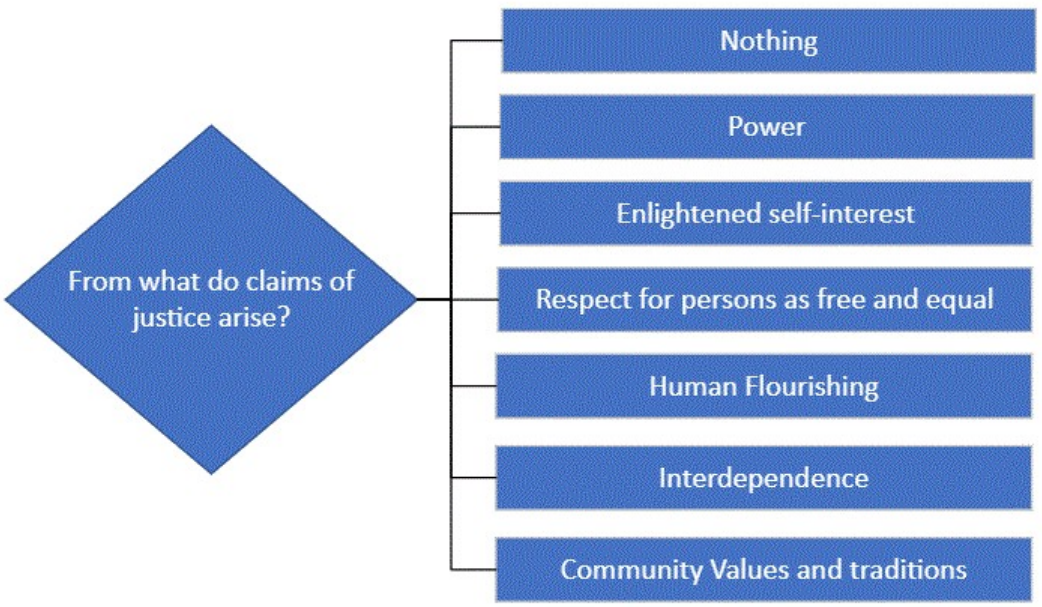

Figure 1: Grounds of justice

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

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

A somewhat less skeptical answer is found in the *contractarian* tradition associated particularly with Thomas Hobbes' great work *Leviathan* (1994 [1651]). According to contractarians, the claims of justice are a social contract justified by enlightened self-interest. Hobbes imagined a *state of nature* prior to government in which there was no security, since anyone's life or resources could be taken by anyone else at any time. In such circumstances, pre-emptive attacks on others may be a rational means of defending oneself from potential future attacks, the unfortunate consequence of everyone engaging in these being that life for everyone would be, as Hobbes famously described, 'solitary, poor, nasty, brutish and short' (*Ibid*. XIII. 9). Self-interest thus demanded that the individuals in the state of nature formed a mutual contract, and at the same time surrendered their power to an appointed Sovereign who was capable of giving protection and enforcing order and property rights. While Hobbes himself envisages an inegalitarian and undemocratic state, later contractarians have argued for self-interested foundations for democratic, egalitarian systems of justice (see e.g. Gauthier, 1986).

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

An importantly different, though related, answer sees justice as a social contract justified not by self-interest, but by fundamental moral respect for others. The liberal contractualist tradition, rooted in the Enlightenment conception of persons as free and equal, as represented most strongly by Immanuel Kant (1983 [1785]), is particularly associated with the influential work of American philosopher John Rawls, and with T.M. Scanlon (1998). Rawls develops a theory of justice grounded in a moral conception of the person which understands persons, to use Rawls' famous phrase, as 'self-authenticating sources of valid claims' (Rawls 2003, 23). His theory claims to be non-perfectionist because it does not specify how persons should live, but only tries to secure the conditions under which persons can lead their lives independently and successfully. Rawls has claimed that the associated understanding of citizenship combines, in Benjamin Constant's famous words, the liberty of the moderns, conceived around an understanding of civil liberties warranted through individual rights, and the liberty of the ancients, participatory liberties in republican institutions (Constant 1988 [1819]; Rawls 1993).

A problematic question for social contract theories is whether the contract in question is supposed to be an actual or hypothetical one (that is, a contract we *would* or *should* have signed if we had been given the opportunity). If the social contract is an actual contract, then it seems plausible to say that we should obey its terms because we have consented to them. But, of course, there was no historical moment when we all explicitly agreed to live under the system of laws that (imperfectly) provides for justice. On the other hand, a merely hypothetical contract is no contract at all – in the words of one critic, G.A. Cohen, 'A hypothetical contract, one might say, is not worth the paper it's not written on.' (2008, 341) So, it is not obvious how appeal to a hypothetical contract can ground claims of justice, or a government's claim to political authority. One possible response to these difficulties is to follow a number of philosophers back to Plato (1979 [380BC]), who have argued that we give *tacit* consent to the social

contract by living in an ordered state and accepting its benefits. Common-sense moral principles of gratitude (to the state) or fair play (i.e., accepting a share of the burdens of a mutually beneficial system of reciprocal exchange), may support the claim that we have a duty to obey a system of law that is basically just, even when it is not to our personal advantage to do so. A *democratic* political system allows us to express our explicit consent for at least certain aspects of the coercive state structure, such as the empowerment of particular representatives, or enacting certain policies. Indeed, some theorists argue that through their democratic, political liberties, or *public autonomy*, citizens ideally guard and help formulate the laws that set the just terms under which they can exercise their individual liberties, or *private autonomy*. According to this view, which is best placed in the broad republican tradition of political thought, the exercise of active and deliberative citizenship in historically grown institutions under the rule of law – not the imagined theoretical terms of an original contract – is the ultimate source of claims concerning justice (Habermas 1998 [1992]).

Still another approach is to ground justice in some essentialist conception of human flourishing. Attempts to ground justice in some idea of flourishing are perfectionist, insofar as they hold that there is a specific way of life which enables humans to flourish. Certain republicans, going back to Aristotle (1995 [350BC], 2009 [350BC]), have argued that being an active citizen in a political community is an essential condition of a flourishing life. In contemporary philosophy, Martha Nussbaum (1990) has argued that certain human functional capabilities, such as the capability to live to the end of a natural life, to have good health, to form play and enjoy recreational activities, are essential to a flourishing human life. In a less essentialist but still politically perfectionist vein, Joseph Raz (1986) has argued that members of modern, liberal societies need to be sufficiently autonomous in order to flourish in their pluralistic social forms. According to this and similar views, the institutions of a just society would promote autonomy-enhancing social forms, which enable the living of sufficiently autonomous lives by society's members (cf. Honneth 2014). This is different from non-perfectionist Rawlsian liberalism, which finds its normative foundation in a more minimalist conception of fair social cooperation, and which attempts to remain neutral on questions of the good life.

Views such as Raz's and Honneth's are close to the Hegelian argument that our conception of ourselves as free and equal individuals depends on others recognizing us as such (Honneth 1992, 2014; cf. Hegel 1991 [1821]). Contemporary theories of recognition that emphasize the need for recognition by others and the harms of non-recognition and misrecognition are developed in the work of theorists such as Charles Taylor (1992), Axel Honneth (1992), and Nancy Fraser (1995). Other theories, in the feminist 'ethics of care' tradition, emphasize familial and other close relationships and their attendant responsibilities, duties and obligations over individual liberal rights (Tong and Williams 2016; for important theorists of the ethics of care see Held 2006; Kittay 1998). Such theories do not mean to normatively tie individuals to just one station in the fabric of social life and its roles. But they do stress that existing inequalities and interdependencies matter in answering questions of justice, politically as well as socially and in the family. Indeed, they have shown that practical and conceptual forms of exclusion from full citizenship based on identity underlie many experiences of injustice. The struggle for overcoming arbitrary exclusion from citizenship is an important ground of justice itself – it concerns respect for persons as free and equal.

Feminist theorists especially have done important work in unearthing shortcomings of theories of justice with regard to the recognition of women as equal members of society. Most importantly, they have criticized the strong division between 'public' and 'private' spheres in both liberal and republican accounts of justice and citizenship. In liberal theory, the private sphere is seen as the site of individual liberty, in which life, liberty, and

estate are enjoyed. The public political sphere has instrumental value only; it is the space in which laws are formulated and rights are secured which need to be in place if private life is to flourish. As the head of family, men were understood to represent interests from the private sphere politically. This prevents women from exercising political rights – which has been a political reality in Western societies (Locke 1988 [1689]; Pateman 1989; Okin 1991; Leydet 2017). In classic republican theory, the public, political sphere is not seen as of instrumental value only, but as the realm in which the ethical goods of civic engagement and deliberation are enjoyed. It was conceptualized and practised as a sphere and hence as goods for male full members of the polity, again resulting in the exclusion of women from debates about justice (Aristotle 1995 [350BC]; Okin 1992; Leydet, 2017). We return to these issues in subsection C, on the site of justice.

Finally, some political theorists reject altogether the attempt to ground justice in some universal 'Archimedean point' outside of any particular, existing community, and its associated set of traditions and values. *Communitarian*s have criticized what they see as the liberal picture, in which unencumbered individuals choose their values *ex nihilo*, arguing that there is no such thing as a self apart from its communal attachments, and that the claims of justice cannot be universal, but must be a matter of interpretation of existing social structures, practices, institutions, and beliefs (see Walzer 1983; MacIntyre 1984; Sandel 1990; historically cf. Aristotle 1995 [350BC]; Hegel 1991 [1821]). Certainly, the practice of interpretation of existing communal values has an important place in practical political argument, because an effective way to persuade another of some view is to show how it can be deduced from their existing commitments. But the opponents of communitarians worry that these views commit the naturalistic fallacy, illegitimately deducing how things *ought* to be from what *is* accepted by members of a community. In consequence, communitarians may embrace moral relativism, and may have a tendency to affirm the status quo even when the status quo is oppressive to some; failing to sufficiently question the social practices and systems of value as they exist in particular communities.

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

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

B. The Shape of Justice

Figure 2: The shape of justice

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

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

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

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

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

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

The first principle states:

> *Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all [the 'principle of equal basic liberties']*

The second principle states:

> *Social and economic inequalities are to be arranged so that they are both:*
>
> *(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, [the ' difference principle'] and*
>
> *(b) attached to offices and positions open to all under conditions of fair equality of opportunity [the 'principle of equality of opportunity']* (Rawls, 1999a [1971], 266)

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

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

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

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

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

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

A further fundamental concern for theories of justice outside distributive questions is the question of *representation*. At a fundamental level, there are those who argue that not principles of distribution but principles of political participation and voice are fundamental in thinking about justice. Ultimately, politics – including the politics of distribution – is about power. According to some, the variations of egalitarianism discussed above can only gain trustworthy forms of social and political power through stable politico-legal institutions that lend fair democratic access and voice to the ultimate addressees of questions of justice and injustice: citizens. Authors as diverse as Hannah Arendt (1958), Jürgen Habermas (1998 [1992]), Claude Lefort (1988), Chantal Mouffe (2000), Philip Pettit (1997) and Quentin Skinner (1998) would accept this primacy of politico-legal institutions and agency. An interesting account is given by Nancy Fraser (2008), who distinguishes three aspects – recognition, redistribution and representation – which she deems equally fundamental to the concept of justice.

With regard to representation, from a more practical point of view, there is the question over whether a just political community should be a direct, or representative democracy. Jean-Jacques Rousseau's *The Social Contract* (1997 [1762]) is a prime work for the former position, while Edmund Burke (1987 [1790]) and John Stuart Mill (1991 [1861]) famously argued for the latter view. There is also a lively contemporary debate what is the best form of representation within the framework of representative democracy. The three main types of political representation are single member district representation, proportional representation and group representation (Christiano 2015). Charles Beitz (1989) holds that the single member district representation serves the goals of justice best, because of its good consequences, as it results in a two-party system where party programs become more moderate. Proponents of proportional representation think that the system of proportional representation 'requires that parties be relatively clear and up front about their proposals, so those who believe that democracy is ethically grounded in the appeal to equality tend to favour proportional representation' (Christiano 2015; see Christiano 1996, chap. 6). Supporters of the group representation system argue that none of these former types of representation is satisfying because both single member district and proportional representation allows the systematic defeat of certain social groups (Young 1990, chap. 6).

One influential taxonomy of the shape of justice was proposed by Nancy Fraser. This 'tripartite' conception identifies redistribution, recognition and representation as important facets for theorizing the shape of justice, and has been used as a heuristic tool to conceptualize justice across the different ETHOS work packages. It is therefore helpful to briefly engage the tripartite conception, Fraser's views about the interrelation of these facets of justice, and the ensuing debate over the correctness of her view.

Fraser has a strong philosophical view about the interrelation of the three aspects of justice that has generated much controversy in the philosophical literature. Without endorsing her views, we posit that the controversy over Fraser's views on the interrelation of different facets of justice illustrate important fault-lines in the debate on justice. Just as Fraser argues for the view that justice cannot be collapsed into any of these three facets (as we detail below), other philosophers argue, contrariwise, that one of the three facets is prior and/or subsumes the others.

Before going into the substantive content of Fraser's tripartite conceptualization of justice it is useful to clarify the development of these concepts. While the ETHOS project uses the terms justice as recognition, redistribution, and representation, the use of these terms in ETHOS is as a starting point for theoretical reflection, and takes no position on Fraser's particular (controversial) views on the interrelation of these aspects of justice. The original conceptualization by Fraser was based on the conceptual distinction between justice as recognition and justice as representation (Fraser 1996). Her point in this first statement, her influential Tanner lecture on Human Values, immediately illustrates the contentious nature of her argument, as she frames it as a *disagreement* she has with certain scholars of justice-as-recognition (centrally Charles Taylor and Axel Honneth) and of justice-as-redistribution (such as Todd Gitlin and Richard Rorty). The first group, according to Fraser, subsume distributive claims under recognitive claims, while the second do the opposite. Fraser's view, in contrast, is that *recognition and redistribution are irreducible aspects of justice* that have broad independent application to addressing real world injustices. In her words, 'virtually all real-world oppressed collectivities… suffer both maldistribution and misrecognition in forms where each of those injustices has some independent weight, whatever its ultimate roots' (*ibid*, 22).

The contentious character of Fraser's claim was marked by reactions to it. From the Marxist perspective, Judith Butler criticizes Fraser's insistence that, analytically, one can separate social/recognitive and economic/redistributive justice, even if Fraser thinks that for practical purposes, they are almost always intertwined (Butler 1997, cf. Fraser 2013). From the analytic tradition of thought about distributive justice, Ingrid Robeyns complains that Fraser is insensitive to the complexities of this debate and the differences between, for instance, Dworkin's luck egalitarianism and Sen's capabilities approach (2003). On the side of recognition, Honneth went further, co-authoring a book with Fraser wherein they debate the differences in their views (essentially doubling down on their positions regarding the (un)acceptability of what Fraser calls Honneth's 'distorted' recognitive 'reductionism' (Fraser and Honneth 2003). Through engaging these and other scholars in debate, Fraser's view on the nature of justice evolved. While maintaining the (controversial) irreducibility, analytic separability, and practical interconnection of different aspects of justice, Fraser's account expanded from the initial bipartite view to a tripartite view adding justice as political participation (Fraser 2005).

Regardless of where one stands in this controversy it seems likely that an evaluation of the justice or injustice of particular states of affairs is likely to require empirical knowledge of the (mal)distribution, (mis)recognition, and presence or absence of adequate systems of representation in a particular context. The

working assumption, therefore, is that whether one agrees with Fraser or not on the interrelation of different facets of justice, data on the permeation of justice as redistribution, recognition and representation in Europe can be important to an interdisciplinary and empirically grounded assessment of European justice.

C. The Site of Justice

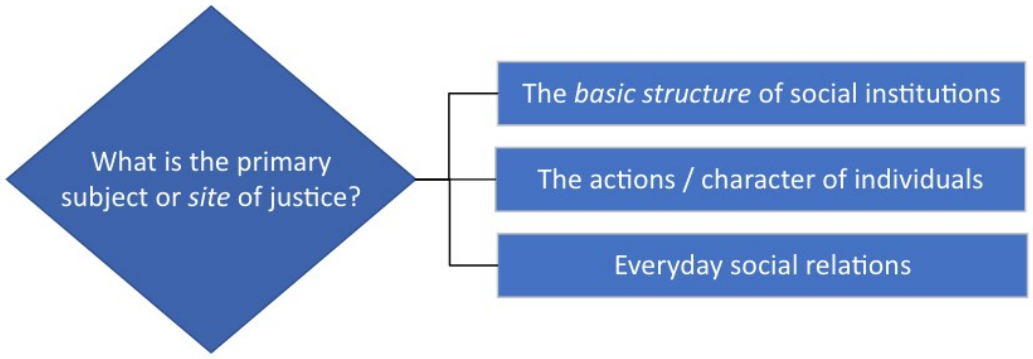

Figure 3: The site of justice

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

A main divide over the *site* of justice is between theories that consider it sufficient for the existence of a politically just society if *social institutions* are shaped according to principles of justice, and theories that hold that a politically just society is impossible unless the principles of justice shape private, personal behaviour and actions as well. Rawls' (1999a [1971]) theory held that the principles of justice as described above are to be applied only to the design of what he called the *basic structure* of society. The basic structure is the system of the main political and social institutions that determine the fundamental terms of social cooperation, such as the constitution, the system of property rights, the economic structure, and the laws regarding familial rights and obligations. G.A. Cohen (1997) criticized Rawls for ignoring unjust power relations and inequalities that can occur due to people's private choices even within a just basic structure. Cohen argued that a just society requires that people develop an *ethos* of justice that guides their individual choices even within a system of just rules. Liberal perfectionist authors such as Joseph Raz have developed similar arguments (Raz 1986). This is a matter of character: of citizens sharing core ethical dispositions that are geared towards making choices that do not conflict with but will strengthen a just basic structure. The site of justice issue has also been a main concern of feminist critics of mainstream political theory; indeed, Cohen himself cites the feminist slogan 'the personal is political' in laying out his own critique of Rawls (Cohen, 1997: 3). Many have argued that by naively focusing on public institutions of politics, society and economics, liberal theories of justice have traditionally neglected structural forms of injustice within the family and

so-called private sphere. These have been regarded as placed outside the public domain. (Pateman 1987; Okin 1989; MacKinnon 1987). Theories of recognition and critical social theory have made much the same point; Axel Honneth (2014) has recently published contours of a theory of justice for the family embedded in a more fully encompassing theory of freedom and justice.

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

D. The Scope of Justice

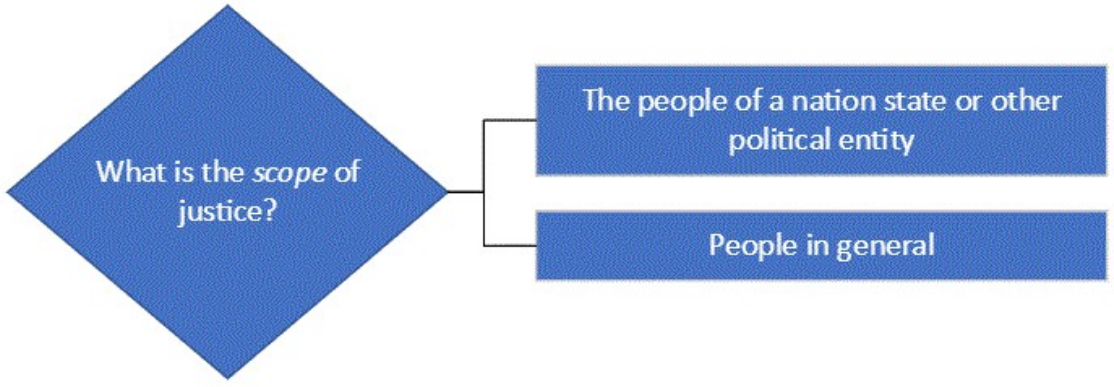

Figure 4: The scope of justice

We now turn to the *scope* of justice. This is the question of *who* the principles of justice apply to. Do principles of justice apply only to fellow citizens of a nation state (or perhaps to an institutionalized system of nation states such

as the European Union, an issue we return to in section 6), or do they apply beyond borders to people in general? *Moral cosmopolitans* claim that principles of justice (for example, egalitarian distributive principles) have a global scope, applying to people everywhere. Moral cosmopolitans divide among themselves between *moderate moral cosmopolitans*, who believe our duties to provide assistance to the distant needy are partially mitigated by special duties we have toward our compatriots (e.g. Scheffler 2001), and *strict moral cosmopolitans*, who believe that the principles of justice should make no distinction between our compatriots and everyone else (e.g. O'Neill 2000; Caney 2005). Both these positions contrast with that of *anti-cosmopolitans*; those communitarians who argue that our obligations to our compatriots either 'crowd out' duties toward people with whom we do not share any special relationship, or that there are no obligations whatsoever beyond the realm in which we have communal ties (Kleingeld and Brown 2014; for an important anti-cosmopolitan work, see MacIntyre 1984).

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

There is, however, a vigorous debate about whether there are in fact global institutions that entail cosmopolitan principles of distributive justice on Rawlsian grounds. *Right institutionalists*, as Michael Blake and Patrick Taylor Smith (2015) label them, deny that such global institutions exist. Consequently, they sharply distinguish between domestic and international justice on Rawlsian grounds, leading them toward an anti-cosmopolitan stance that severely limits distributive obligations to foreigners (Blake 2001; Nagel 2005; Freeman 2007). *Left institutionalists* agree with right institutionalists that demands of justice are triggered only when we are participants in shared institutions, but argue that the institutions of international politics and trade are sufficient to trigger robust distributive obligations, leading them toward a cosmopolitan stance (e.g. Moellendorf 2011; Cohen and Sabel 2006; Sangiovanni 2007; for an overview of the debate see Blake and Smith 2015).

Within the moral cosmopolitan camp, we turn finally to a debate not about the scope of justice, but about how best to realize it, given that its scope is cosmopolitan. *Institutional* or *political cosmopolitans* claim that justice requires the establishment of global institutions, something like a world government. *Statist cosmopolitans* on the other hand claim that an (adjusted) Westphalian system of states can institutionalize cosmopolitan justice. Most moral cosmopolitans can be located somewhere in between these two extremes (for a good overview see Kleingeld and Brown 2014). We return to this debate in section 6, below, on the relevance of particular European institutions for theorizing justice.

E. Ideal and Non-Ideal Justice

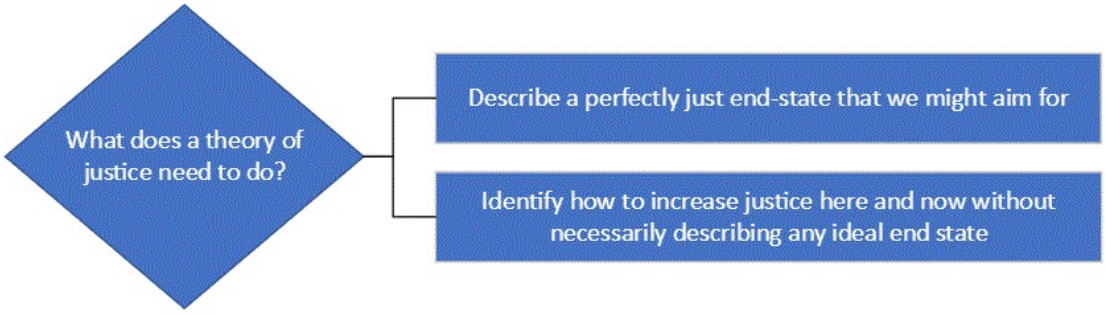

Figure 5: Ideal and non-ideal justice

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

In one sense, the distinction between ideal and non-ideal theories can be understood as the difference between *end-state* and *transitional* theories, as shown in the diagram above (Valentini 2012). Rawls's (1999a [1971]) theory is an end-state theory in this sense, since it sets out to describe a *fair* and *well-ordered* society, in which not only is the basic structure just, but citizens accept the principles of justice and the justice of basic structure, and recognize that their fellow-citizens accept it too. The problem with end-state theories is that they don't directly tell us much about what we ought to do in the here-and-now, in societies which are far from the ideal. Other theorists have argued for *transitional* theories that lay more emphasis on how we can identify and correct glaring injustices. Some theorists claim that for this purpose, we do not need to know what an ideal society would look like (Young 1990; Mills 2005; Sen 2009; Wolff 2015).

A second way of understanding the distinction between ideal and non-ideal theories is as a distinction between theories that assume that all agents comply with the demands of justice (*full compliance*), and those that assume only *partial compliance* (Valentini 2012). The obvious attraction of idealization in this sense is that it makes analysis more tractable. The risk is that it takes us too far from where we stand for the theory to provide useful guidance. For example, in a full compliance condition, we would only need to do our fair share to prevent injustices. But what should we do when compliance is only partial? For example, what are our duties with respect to global warming when others do nothing? Should we then do more than, less than, or just what would be our fair share in a full compliance condition? The answer seems to hinge on contingencies of the particular problem at stake (Valentini 2012, 655; Miller 2011).

Finally, we can understand the distinction between ideal and non-ideal theories as one between *utopian* and *realist* theories (Valentini 2012). The most prominent example of a utopian theory is that of G. A. Cohen (2008). Utopian theories treat justice as a timeless value that is not bound by substantial concessions to contingent facts on the ground, such as observations about human nature, real world political disagreements, and so forth. This means they do not so much tell us what we should *do* in the world we live in, as how to *think* about what kind of

world would be ideal. Rawls describes his own theory as ideal insofar as it assumes full compliance, and that natural and historical circumstances are favourable, including the stipulation that society is developed enough economically and socially for justice to be achievable (Rawls 1999b: 8). But Rawls' theory is designed in a realist way insofar as it assumes the facts about moderate scarcity, limited altruism, and the conflicts that arise between individuals with differing goals and values. Rawls's principles are thus designed for 'beings like us, in circumstances similar enough to those in which we live' (Valentini 2012: 658). Cohen critiqued Rawls' theory for being too fact-dependent, and hence not utopian enough. Other critics have targeted Rawls from the opposite side: arguing that his theory of justice is not realist enough, because it fails to take seriously what they regard as relevant facts about real world politics, such reasonable disagreement about justice (Waldron, 1999), or existing power-structures, accepted practices and beliefs, and facts about the shortcomings of human nature (Williams, 2005; Galston, 2010; Geuss, 2008)[2].

V. Vulnerability

An important groupof theories broadly opposed to the abstractions and idealizations discussed above under the moniker 'ideal theory' build on the idea of *interdependence* and emphasize *vulnerability* as a crucial concern for justice. Given the importance of the notion of vulnerability to the ETHOS project as a whole, it is useful to treat some of the most central philosophical debates over this notion.

A. What is Vulnerability?

There are two broad approaches to vulnerability in the current philosophical literature (Mackenzie et al. 2014). The first understands vulnerability as an absolute notion: an ontological property of human life. According to this approach, due to our embodiment we humans are fragile and susceptible to suffering, wounding and injury (Mackenzie et al. 2014). Thus, as Martha Fineman puts it, vulnerability is 'a universal, inevitable, enduring aspect of the human condition' (Fineman 2008, 8; quoted in Mackenzie et al. 2014, 4). This first approach to vulnerability is motivated by the ethics of care and its aim to turn the fundamental focus of political philosophy towards the interrelatedness and dependency of human beings (Mackenzie et al. 2014, 4). Authors who emphasize the ontological aspect of vulnerability include Judith Butler (2004), Martha Nussbaum (2006), Alasdair MacIntyre (1999), and Martha Fineman (2008).

The second approach also ties the idea of vulnerability to interconnectedness, although from a different perspective, because here, vulnerability is a relative notion. According to this second approach, the reason why

[2] Indeed, this work package's next deliverable (2.2) also works on developing a methodology for bridging the abstraction and idealization typical of 'ideal-theoretic' approaches to justice with sensitivity to empirical facts about the manifestation of justice in the real world.

there must be a special focus on vulnerability is the 'susceptibility of particular persons or groups to specific kinds of harm or threat by others' (Mackenzie et al. 2014, 6). This approach owes a lot to the work of Robert Goodin (1985). According to this understanding of vulnerability, 'vulnerable persons are those with reduced capacity, power, or control to protect their interests relative to other agents' (Mackenzie et al. 2014, 6).

Based on these two different kinds of understandings of vulnerability, Mackenzie et al. (2014, 7-9) identify three different *sources* and two different *states* of vulnerability. The three different sources are *inherent, situational* and *pathogenic* vulnerability, whereas the two different states are *dispositional* and *occurrent* vulnerability. By providing this taxonomy, they make it possible to analyze vulnerability in a way that acknowledges the ontological character of vulnerability on the one hand, and its context dependence on the other hand.

Inherent vulnerability 'refers to sources of vulnerability that are intrinsic to the human condition' (Mackenzie et al. 2014, 7). Inherent vulnerability stems from the fact that human beings are mortal, needy and depend on others: 'We are all inherently vulnerable to hunger, thirst, sleep deprivation, physical harm, emotional hostility, social isolation, and so forth' (Mackenzie et al. 2014, 7). The notion of situational vulnerability highlights the context dependent character of vulnerability, which 'may be caused or exacerbated by the personal, social, political, economic, or environmental situations of individuals or social groups' (Mackenzie et al. 2014, 7). A good example of situational vulnerability arising is that of natural disaster in which social factors mediate and amplify the effects of a natural catastrophe (Mackenzie et al. 2314, 7; see also Young 2009, 47).

Mackenzie et al. identify pathogenic vulnerability as a special subset of situational vulnerabilities (Mackenzie et al. 2014, 9). This subset includes 'morally dysfunctional or abusive interpersonal and social relationships and socio-political oppression or injustice' as well as special cases when the attempt to alleviate someone's vulnerability leads to 'the paradoxical effect of exacerbating existing vulnerabilities or generating new ones' (Mackenzie et al. 2014, 9).

It is important to make explicit an obvious point about vulnerability that has moral implications: while broad groups are subject to vulnerabilities (e.g., all pregnant women are vulnerable to complications in childbirth), whether these vulnerabilities are manifest (i.e., whether harms occur because of them) depends on a range of different factors (such as socioeconomic status and education, access to health care, and so on). Within vulnerable groups, some are more vulnerable than others, and vulnerability is frequently exacerbated by intersectionality.

Implicit in the non-ontological, relative notion of vulnerability is the role of social causation in creating vulnerabilities. This is especially important in the context of theorizing about justice because unjust social expectations often create vulnerabilities. For example, the original claim of the disability social movements of the 1960s was that it is society that disables them (rather than their impairments); thus, they claimed that society unnecessarily institutionalizes the disabled despite the fact they could be just as creative as the abled if adequate social accommodations were provided (cf. Shakespeare 2006). Tom Shakespeare calls this phenomenon the 'colonialisation of disability,' and as he explains

> [t]he lives of disabled and older people are colonised by service providers. Broader structural relations – the failure of society to support and include vulnerable people – are obscured by focusing on the inadequacies of the individual. There is a tendency to view those who receive care as burdens, and to infantilise them. The colonising process comprises the way in which recipients of services are described, the way in which service users' voices are often ignored, and the way that the issue is constructed as a social problem. Since the 1970s, a liberation movement has been challenging the colonization of disability. The demand for a different approach

> to personal support has been central to the disabled people's movement. Civil rights and independent living have been the two key elements of the disability agenda. First, disabled people fought to escape from residential institutions. Second, disabled people fought to escape from care, and to establish forms of support which were more empowering (Shakespeare 2006, 137-8).

In a similar vein, Judith Butler makes the distinction between 'precariousness' (i.e. a 'general feature of embodied life' (Butler in Kania 2013, 33) and 'precarity', which is a politically situated concept where 'precariousness is amplified and made more acute under certain social policies' (Butler in Kania 2013, 33). Thus, according to Butler precarity is 'induced' and 'precaritization helps us think about the processes through which precarity is induced – those can be police action, economic policies, governmental policies, or forms of state racism and militarization' (Butler in Kania, 33).

B. Vulnerability and the Demands of Justice

Armed with an understanding of the different ways in which vulnerability works, we now turn to the question of what is the place of vulnerability within theories of justice. Four important issues must be considered. The first is the question of what exactly is the connection between vulnerability and related moral demands. Some theorists hold that vulnerability is itself a moral notion that grounds obligations regarding those who are vulnerable. This view is held by theorists of different genres, such as the consequentialist Robert Goodin (1985) and care ethicist Eva Kittay (1999). Other theorists hold that vulnerability as such does not ground obligations, rather, 'its normative significance derives from its role in alerting us to the presence of other morally salient claims, such as those based on harm or need' (Mackenzie et al. 2014, 12). In that respect, the ethics of vulnerability overlaps with the ethics of need (Mackenzie et al 2014, 12; for the ethics of need, see Wiggins 1991; Brock 1998).

The second important justice issue regarding vulnerability is the question of who should bear primary responsibility to the vulnerable (Mackenzie et al. 2014, 13-6). Some theorists (e.g. Goodin 1985) think that anyone who can assist bears responsibility for the vulnerable, especially those 'to whom a person is most vulnerable' (Mackenzie et al. 2014, 13). Others emphasize the state as a crucial actor in alleviating vulnerability, with also highlighting the concern that the state's endeavour to alleviate vulnerability should go hand in hand with promoting the individual's autonomy – a danger here is that state actions might be paternalistic towards the vulnerable (Mackenzie et al. 2014, 15).

Third, there is a debate among vulnerability theorists whether autonomy is incompatible with alleviating vulnerability, or on the contrary, the very goal of reducing someone's vulnerability is to enhance the person's autonomy. From an ontological vulnerability standpoint, theorists like Eva Kittay (1999) and Martha Fineman (2008) claim that autonomy and eliminating vulnerability is incompatible. Catriona Mackenzie (2014) and Joel Anderson (2014), on the other hand, hold that autonomy and vulnerability are not oppositional concepts.

Finally, the fourth justice-related issue is to examine what kind of theory of justice (including the institutional arrangements it promotes) will be justified or ruled out if we hold vulnerability to be an important moral concern. Philip Pettit (1997), for example draws a connection between vulnerability (that he understands as a situation where an agent is both dependent and exposed to another agent) and domination. Domination is, in his view, a specific social relationship 'where one agent has the capacity to interfere arbitrarily in another's course of action', and which can be seen as a primary cause of the intensification of vulnerability' (Garrau and Laborde 2015,

55). Thus, Pettit offers republicanism as a solution that alleviates the possibility of citizens' dominating their fellow citizens. That is, a just state must arrange its institutions accordingly not to allow the harming of citizens' republican freedom. Consequently, according to Pettit, a just state must be at least in this specific sense a republican one.

Plausibly, states have duties of justice to ameliorate and/or compensate for the vulnerabilities of their most vulnerable citizens. If so, states should pay attention to identifying vulnerable groups. Furthermore, certain theories of the just state are ruled out, such as a libertarianism, or certain forms of anarchism (Mackenzie et al 2014, 14.)

C. The Importance of Vulnerability for ETHOS

Having both the different conceptions of vulnerability and why they are important for justice in mind, it is apparent that vulnerability is a ubiquitous element of social life and that it is highly context dependent. Thus, real world normative research that aims to theorize justice in Europe must put flesh on the abstract bones by identifying *what situations or processes* worsen (or can alleviate) the vulnerability of *what groups*. These groups are numerous, and it is also clear that vulnerabilities can also intersect (cf. Crenshaw 1991; Wolff and de-Shalit 2007). It is thus impossible to give a comprehensive list of vulnerabilities and vulnerable groups within Europe. Nevertheless, the authors of this deliverable make the following observations:

First, while we acknowledge the ontological character of some aspects of vulnerability, we do not think that reducing socially constructed aspects of vulnerability is incompatible with autonomy. Following Mackenzie et al. (2014), we think the very goal of reducing the vulnerability of vulnerable groups is to enhance their autonomy, understood as the enhanced capacity, power, or control of vulnerable persons to protect their interests. Second, to the degree that reducing the vulnerability of groups of persons is a demand of justice, it is necessary to identify vulnerable groups in Europe. This is an empirical task, but such groups are likely to include children and the elderly, caregivers, people living with disabilities etc. But vulnerable groups may also include ethnic and cultural minorities who may be subject to marginalization and misrecognition, such as the Roma, or Muslims, but also national minorities or immigrants. Indeed, the ETHOS project (see deliverable 5.1 especially) looks to see how vulnerability is created in these groups by certain forms of injustice (unjust distribution, malrecognition, the lack of representation, etc.). Again, it is not the goal of the ETHOS project to enumerate all vulnerable groups. Further, as discussed in section A, the identification of certain groups' *ontological* vulnerability should not serve as a pretext for accepting persons being made even more vulnerable, discussed above as the 'colonization' of disability, or, using Butler's terms, precaritizing precariousness. It is nevertheless an important task to focus on at least some, and indeed ETHOS does so: various WPs discuss such groups as the physically and mentally impaired, immigrants or certain ethnic minorities.

Finally, it is also clear that if we hold reducing vulnerability to be an important component of justice, it will require an efficient state guided by the above discussed relational concerns and republican freedoms. This leaves open the question whether reducing or eliminating vulnerability should be the purview solely of nation states of the EU, or should be considered part of the role of the EU as a supranational entity itself. We will not answer this question here, but some of the discussion of the next section will be relevant to it.

VI. Justice in Europe

First of all, what does it mean to speak of 'justice in Europe'? The boundaries of Europe are contested and, importantly, constructed. As noted in the introduction to this report, contemporary political philosophy is largely insensitive to such boundaries between geographic regions and continents. It is suspect, from the perspective of normative theory, to construct a particular approach to 'justice in Europe' that would be different from justice in a different regional context. That said, there are at least two interpretations of the term 'justice in Europe' that are not only acceptable but salient and heuristically useful. First, the term can simply designate the object of study. ETHOS theorizes justice in Europe in the sense that the empirical aspects of the project investigate justice in European states and institutions. Such a move need not treat the justice or injustice of the object in question as free-floating and independent of injustices elsewhere (what Simon Caney calls 'isolationist' approaches to justice – 2012, 258-9), and indeed the approach to theorizing justice in Europe that we develop in deliverable 2.2 rejects such a move. Second, the term 'justice in Europe' can be understood to focus attention on the particular*, sui generis* character of the European legal and political order. To the extent that European institutions are unique, the evaluation of their normative significance – and particularly the extent to which these institutions help realize justice (or, conversely, sustain or promote injustice) – will be a particularly European vision of justice. The European-ness of this analysis, however, is straightforwardly *contingent* (on the institutions' *sui generis* character) and not reflective of thicker notions (which we consider suspect) that tie the correctness of moral views to a 'European culture' or shared 'European history'.

As has become clear in this report, the literature on justice in political philosophy is vast and diverse. Each position in the debates outlined above corresponds to a different position on the evaluation of the state of justice in Europe. Correspondingly, the degree to which European states or institutions meet ideals of distributive, representative, or recognitive justice vary widely. Furthermore, this evaluative eclecticism on European (in)justice is accompanied by divergent views even of more principled questions: what is the *proper function* of national, subnational and, especially, supranational institutions in pursuing justice? What one considers the appropriate role of European institutions such as the European Union and the Council of Europe in pursuing justice in Europe is, clearly, reflexive to where one stands in these debates. This section examines in more detail two literatures on 'justice in Europe' that are particularly developed – the first on the role of European integration and European supranational institutions in realizing distributive justice, and the second on the degree to which European institutions themselves measure up to demands of justice as representation.

A. European distributive justice

Most existing theories of distributive justice[3] are either theories of domestic justice, placed in a paradigm of liberal nationalism, or post-national theories of global justice and citizenship (Leydet 2017). That is, most theories either claim that justice is a relation that can only hold between fellow-nationals of a liberal-democratic state (domestic justice), or they claim that relations of justice can hold between all human beings (global justice). Both of these positions seem to suggest that the position of European institutions such as the EU or the Council of Europe is marginal with respect to the pursuit of distributive justice: if there are no demands of distributive justice beyond the state, then the role of European institutions cannot be more than auxiliary. On the other hand, if duties of distributive justice are global in scope, then it may seem that pursuing European-level justice is a distraction from the ultimate ideal. Consequently, there has been a growing interest in the question of distributive justice in Europe among political philosophers, which has resulted in a debate between these two major positions.

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

Perhaps unsurprisingly, one response to the liberal nationalist's arguments has been to try to find ways of conceiving of the European project in cultural terms. If European institutions, through integration, could create a sort of 'thick' European identity by crafting an important legal and political European citizenship, then perhaps Europe could become the sort of 'site' of civic solidarity that could support more extensive redistributive schemes between European states and peoples. One prominent avenue for theorizing such a project lies in recognizing and celebrating the particular complexities of European identity which is sometimes argued to complement and not challenge particular, national identities (Weiler *et al.* 1995, Cederman 2001, Bellamy 2008).

Post-nationalists hold that the link between the nation-state on the one hand and a just constitution and a shared civic identity on the other hand is a contingent rather than a necessary one. Post-nationalists focus on legal and political institutions of democratic citizenship. They argue that it is exactly because we can no longer count on

[3] Following usage typical in the political philosophical literature we review, we use 'distributive justice' rather than the term justice as redistribution or the corresponding 'redistributive justice', sometimes used in the context of Nancy Fraser's work (e.g. Fraser and Honneth 2003).

taken-for-granted shared languages, civic codes and traditions and a shared political history, that the old nationalist assumptions of civic integration no longer work (Habermas 2012). Indeed, the argument is that the way forward is a focus on a shared morality of human dignity and human rights rather than on historically grown national traditions. According to Habermas, the only-seemingly-necessary link between liberal-democratic institutions and national identity stands in the way of finding satisfactory answers to challenges of justice and citizenship in Europe today. Once the normative core of liberal-democratic institutions is linked not to national identity but to a shared morality of human dignity, a post-national account of justice and citizenship becomes visible (Habermas 2012). This raises the question of whether and when European supranational institutions aid or hinder post-national or *cosmopolitan* justice. For post-national theorists, then, justice at a European level would at best be a (first) necessary step towards cosmopolitan justice at a global level (Cabrera 2005), the legitimacy of which is subject to the extent to which these institutions *in fact* better secure cosmopolitan justice (Van Parijs, 2011).

Between liberal national and post-national accounts, which are each cautious about according European institutions a central role in realizing justice, a third approach argues for the normative importance of supranational institutions at realizing justice. Theorists who argue for this position generally adopt an institutionalist approach to justice according to which obligations of social justice are only triggered in the presence of relevant forms of social interaction, as discussed above (section IV. D.). This approach is influenced by Rawls' idea that justice concerns arise only in situations in which individuals cooperate for mutual benefit – and that principles of justice apply only to the basic structure under which this cooperation takes place. The innovation relevant to *European* justice applies this Rawlsian institutionalist approach to European institutions (Sangiovanni 2013).

According to Sangiovanni, the EU is 'an attempt to support the interests of each of its member states in enhancing both growth and internal problem-solving capacity (including the capacity to act on domestic commitments to national solidarity) against a background of regional stability' (Sangiovanni 2013, 16). Because some member states gain more than others from integration, Sangiovanni tries to spell out which principles should regulate this specific kind of interaction. In contrast to the more principled liberal nationalist and post-nationalist positions, for Sangiovanni the content of fundamental principles of social justice varies with the type and extent of social interaction involved, meaning that the content of justice in Europe will not be the same as that of domestic justice, nor that of global justice. It is in light of such European analyses of justice that one finds the most internally constructive suggestions for the reform of European institutions, such as for instance the goal of a European Social Union (Vandenbroucke et al. 2017).

B. A European Democratic Justice Deficit?

A question quite separate from the proper role (if any) of supranational European institutions in the realization of distributive justice concerns the extent to which European institutions embody procedural ideas of justice as representation. This is the central concern in the debate in political philosophy around the European Union's

supposed 'democratic deficit'[4] (Lord and Magnette 2004; Scharpf 1999; Føllesdal and Hix 2006). EU politics is usually diagnosed with a democratic deficit for lacking supposedly key characteristics of an ideal democracy. The EU's democratic deficit has been diagnosed in many different and sophisticated accounts (e.g. Bellamy and Castiglione 2003; Bowman 2006; Eriksen and Fossum 2002, Weiler 2012), which seek to highlight challenges to the EU's democratic credentials and often suggest possible remedies.

Of course, not all EU scholars agree there is a democratic deficit at all. Majone argues that the application of democratic standards to EU governance is a category error (1994). For him, the EU is a regulatory state, which ought to pursue pareto-efficient policies (Majone 1998, 18-25). Moravcsik also rejects the democratic deficit through the opposite path; he argues that EU policies measure up to legitimacy standards quite as well as policies enacted in national democratic fora (2002). Nevertheless, the dominant position is that the EU is not currently organized in a manner that justice as representation requires and, as such, suffers from some kind of democratic deficit.

Two of the most important concerns in such diagnoses are 1) the lack of sufficient democratic *control* and; 2) the lack of sufficient citizen *participation* (for an overview, see Jensen 2009). Analysts emphasizing the lack of democratic control that citizens of the EU are able to exercise on its politics typically highlight certain institutional features that such control would require and that are missing from EU politics. A frequent proposal is the direct election of the European Commission (EC) president (Hix 1998, Decker and Sonnicksen 2011). This procedure would supposedly reinforce the EC president's mandate and accountability, allowing citizens to express (dis)satisfaction in line with the Schumpeterian ideal of a competitive democracy. A step in this direction was taken by European parliamentary groups when they unilaterally put forward *Spitzenkandidaten* (Hobolt 2014).

A second important strand in the literature concerns citizen participation in EU politics. The most evident and mediatized lack of democratic participation is the low and generally dropping participation in European Parliament (EP) elections (Mattila 2003). Given the highly publicized introduction of *Spitzenkandidaten*, and the economic circumstances, there were expectations that turnout for EP elections would stabilize after years of decline. This proved inaccurate, with 42.54% turnout in the most recent election in 2014 continuing the trend of decline. Concerns over citizen participation are not, however, exclusively focused on voter turnout. Several theorists of EU legitimacy look to deliberative politics to find a metric of legitimacy analysis, inspired no doubt by concurrent trends in democratic theory. Some see deliberative politics as a source rather than a metric of legitimacy. The move towards favouring increased deliberation as a means to improve the 'input legitimacy' of EU institutional bodies, is often made by theorists seeking to criticize, evaluate or promote certain EU institutional setups (Joerges and Neyer 1997, Smismans 2000, cf. Pollack 2003, Kohler-Koch 2010). Joerges and Neyer for

[4] We use the terms 'democratic deficit' and 'democratic justice', more standard in the political philosophical in lieu of the terms justice as representatio' or the corresponding 'representative justice' sometimes used in the context of Nancy Fraser's work (e.g. Fraser and Honneth 2003).

instance propose a notion they also call 'deliberative supranationalism', to justify the 'comitology' system of EU legislation (1997, 292-298). Long criticized for its lack of transparency and the absence of Euro-parliamentarians, Joerges and Neyer defend such fora as unique sites of a discursive politics of persuasion, despite limited membership (*ibid.*).

VII. Conclusion

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

But that may be exactly the point. If we want to think about a theory of justice for Europe, then the past and present of political philosophy leaves us with us a wealth of conceptions of justice that may help us think about the future. One fundamental issue that we have encountered throughout this report is that the past and present of philosophical thought about justice has been primarily concerned with questions of the (re)distribution of primary social goods. The liberal contractualist tradition still affirms that paradigm today. Traditionally, the liberal mainstream has been countered by a conservative and communitarian camp, according to which claims of justice should be founded not in abstract understandings of the rational subject, but in concrete understandings of rich moral-political traditions. In contrast, republican and deliberatively democratic political theories neither put the individual rational subject nor the embedded community member on centre stage; for them *political justice* is the grounding concept, where this is understood as the just ordering of politico-legal institutions that enable citizens to effectively claim civil, political and social rights in diverse societies. Although that same argument can probably be made from within John Rawls' doctrine of political liberalism, there is an important difference in focus between liberal theories that put individual liberties, including political ones, centre stage in thinking through matters of justice, and those that put the agency of citizens of a shared political system centre stage. The mainstream of philosophical reasoning has focused on the former; the problems of trans-border European integration may demand a stronger focus on the latter.

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