Justice and Vulnerability in Europe

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An Interdisciplinary Approach

Edited by

Trudie Knijn

Emeritus Professor, Department of Interdisciplinary Social Science, Utrecht University, the Netherlands

Dorota Lepianka

Senior Researcher, Department of Interdisciplinary Social Science, Utrecht University, the Netherlands

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Contributors

Başak Akkan is Lecturer at the Graduate Programme in Social Policy at Boğaziçi University, Turkey, and Senior Researcher at the Boğaziçi University Research Centre Social Policy Forum. She has published in the areas of care policies, intersectionality and child well-being. Her recent publications include 'An Egalitarian Politics of Care: The Intersectional Inequalities of Gender, Class and Age', *Feminist Theory* (2020), and 'Contested Agency of Young Carers within Generational Order: Older Daughters and Sibling Care in Istanbul', *Child Indicators Research* (2019).

Bridget Anderson is Director of Migration Mobilities Bristol and Professor of Mobilities, Migration and Citizenship at the University of Bristol, UK. She was previously Research Director of the Centre on Migration, Policy and Society (COMPAS), University of Oxford. Her interests include methodological de-nationalism, citizenship, nationalism, immigration enforcement (including 'trafficking') and care labour. Books include *Us and Them? The Dangerous Politics of Immigration Controls* (Oxford University Press, 2013). She works with migrants' organizations, trades unions and legal practitioners at local, national and international level.

Sara Araújo is a Researcher at the Centre for Social Studies and Invited Professor in Sociology at the University of Coimbra, Portugal. She gained a PhD in sociology of law with a thesis on 'Legal Pluralism and Epistemologies of the South'. She is co-editor of the book *Dynamics of Legal Pluralism in Mozambique* (DIIS, 2014) and has published book chapters and scientific articles on legal pluralism and decolonialization of legal thinking. She has fieldwork experience in Portugal, Mozambique and East Timor.

Jelena Belic is a Lecturer in Political Theory at the Institute of Political Science at Leiden University in the Netherlands. She received her PhD in political philosophy from the Central European University in Budapest in 2018 for defending the dissertation 'On the State's Duty to Create a Just World Order'. Jelena has diverse research interests in political philosophy which include the debates about global justice and philosophical foundations of human rights.

Bert van den Brink is Full Professor of Social and Political Philosophy at Utrecht University and the Dean of University College Roosevelt in

Middelburg, the Netherlands. He has published widely on the normative foundations or liberal democracy, intersubjectivity and recognition, and the politics of social diversity. He is the author of *The Tragedy of Liberalism* (SUNY, 2000) and co-editor, with David Owen, of *Recognition and Power* (Cambridge University Press, 2007/2010).

Ayşe Buğra is Emerita Professor at Boğaziçi University, Turkey, and an affiliate of the Boğaziçi University Research Centre Social Policy Forum. She has published in the areas of social policy, state–business relations and the socio-economic history of modern Turkey. Her recent publications include the article 'Politics of Social Policy in a Late Industrializing Country: The Case of Turkey', *Development and Change* (2020), and the book *New Capitalism in Turkey: The Relationship between Politics, Religion and Business* (Edward Elgar, 2014, co-authored with Osman Savaşkan).

Sílvia Ferreira holds a PhD in sociology from Lancaster University, UK. She is Assistant Professor in Sociology at the Faculty of Economics of Coimbra University, Portugal, where she co-coordinates the sociology PhD. She is a Researcher of the Centre for Social Studies where she coordinates a project on Social Enterprise Trajectories in Portugal. She is board member of EMES and chairs the COST Action EMPOWER-SE. She has researched welfare and social policy reform, social and solidarity economy and local welfare governance.

Marie-Pierre Granger is Associate Professor at the Central European University (Budapest, Hungary and Vienna, Austria), at the School of Public Policy, the Department of International Relations and the Department of Legal Studies. Her research and teaching interests centre around European Union law, European integration, comparative administrative law, human rights and justice. Her recent book publications include the *Research Handbook on the Politics of EU Law* (Edward Elgar, 2020, co-edited with Paul James Cardwell), *Civil Rights and the Coming of Age of EU Citizenship – Challenges at the Crossroads of the European, the National and the Private Sphere* (Edward Elgar Publishing, 2018, co-edited with Sybe de Vries and Henri de Waele) and *The New EU Judiciary: An Analysis of Current Judicial Reforms* (Kluwer Law International, 2018, co-edited with Emmanuel Guinchard). Her articles appear in both law and political sciences journals, including the *European Law Review*, *Modern Law Review* and *Comparative European Politics.*

Jing Hiah is Assistant Professor in Sociology, Theory and Methodology of Law at the Erasmus School of Law, Erasmus University Rotterdam, the Netherlands. She worked as a Post-Doctoral Researcher for the ETHOS Horizon 2020 programme at Utrecht University (2017–19). For her doctoral

research Jing examined the interplay between legal notions of labour exploitation for human trafficking and lived experiences of labour migrants in the Netherlands and Romania. Jing's research interests revolve around qualitative research methodology in the study of the interplay between law and society, with special attention to mobility, vulnerability, deviance and legal pluralism.

Trudie Knijn is Emeritus Professor of Interdisciplinary Social Science at Utrecht University, the Netherlands, and Visiting Professor of the University of Johannesburg, South Africa. She co-coordinated (with Dorota Lepianka) the ETHOS Horizon 2020 programme (2017–19). Previously she was PI in the 7th framework programme bEUcitizen and in the Horizon 2020 programme SOLIDUS. Among her recent books are *Moving Beyond Barriers: Prospects for EU Citizenship?* (Edward Elgar Publishing, 2018, co-edited with Marcel Hoogenboom, Sandra Seubert, Sybe de Vries and Frans van Waarden) and *Gender and the Generational Division in EU Citizenship* (Edward Elgar Publishing, 2018, co-edited with Manuela Naldini). Her research fields are comparative family and child policy, care and gender relations, welfare reforms and the evaluation of cash and care interventions in the Netherlands and South Africa, (EU) citizenship, solidarity and justice.

Dorota Lepianka is a Senior Researcher at the Department of Interdisciplinary Social Science at Utrecht University, the Netherlands. She holds a PhD in sociology. Dorota's research expertise lies in the field of poverty, inequality and social exclusion, and their social construction. Her current research interests revolve around the issues of collective boundary drawing (insiders versus outsiders), questions of deservingness, inter- and intra-group solidarity and the boundaries of justice. She co-coordinated (with Trudie Knijn) the ETHOS Horizon 2020 programme (2017–19).

Sem de Maagt is Assistant Professor in Ethics and Political Philosophy at the Ethics Institute of Utrecht University, the Netherlands. He defended his PhD thesis, 'Constructing Morality: Transcendental Arguments in Ethics', at Utrecht University in 2017. Sem's work concerns all aspects of ethics: meta-ethics, normative ethics and applied ethics. He has published on a wide range of subjects including constructivism in ethics, the importance of popular philosophy and the philosophy of the self.

Maria Paula Meneses is a Principal Researcher at the Centre for Social Studies, University of Coimbra, Portugal, where she lectures in various PhD programmes. In 2019 she was a visiting scholar at EHSS, Paris. With a focus on political history and legal pluralism, her research has been carried out especially in southern Africa, India, East Timor and Portugal. Her last edited book is entitled *Knowledges Born in the Struggle Constructing the Epistemologies of the Global South* (Routledge, 2020).

Barbara Oomen holds a Chair in the Sociology of Human Rights at Utrecht University, the Netherlands, and works at University College Roosevelt. Her most recent research, supported by an NWO Vici grant, concerns the role of local authorities in international human rights law. She wrote *Global Urban Justice: The Rise of Human Rights Cities* (Cambridge University Press, 2016) and *Rights for Others: The Slow Home-coming of Human Rights in the Netherlands* (Cambridge University Press, 2014). She was a Fernand Braudel fellow at the EUI in 2016–17.

Simon Rippon is a philosopher specializing in moral and political philosophy, with particular research interests in meta-ethics, bioethics, philosophy of public policy and epistemology. He is currently Associate Professor in the Department of Philosophy and the School of Public Policy at the Central European University (CEU) in Budapest, Hungary and Vienna, Austria. He earned his PhD in philosophy from Harvard.

Barbara Safradin is a Junior Researcher in European and International Law at Utrecht University, the Netherlands, and is currently working as a project coordinator for foundation Academie van de Stad. She graduated from Utrecht University and obtained the LLM European Law (cum laude) and the two-year LLM Legal Research (cum laude). Barbara conducted research within the multi-disciplinary FP7 research project bEUcitizenship on barriers to European citizenship. Her research interests include EU citizenship, asylum law and fundamental rights, combining both legal and empirical (qualitative) research methods.

Orsolya Salát is Assistant Professor at ELTE University Faculty for Social Sciences, Department for Human Rights and Politics in Hungary. She has a law degree from ELTE University Budapest and also holds a Diplome en droit français et européen from the Université Paris II-Panthéon Assas and an LL.M in German Law from the Universität Heidelberg. She defended her S.J.D. dissertation in comparative constitutional law at the Central European University (CEU) in 2012, and received a best dissertation award. She worked as a researcher for the bEUcitizen and ETHOS projects and co-taught a course in the Doctoral School of Political Science, Public Policy, and International Relations, and another one in the School of Public Policy at CEU. Previously, she was a junior research fellow at the Legal Institute of the Centre for Social Sciences of the Hungarian Academy of Sciences. During her doctoral studies, she was visiting researcher at the Yale Law School, the University of Zürich and Heidelberg University. Her research includes topics in freedom of assembly, expression, and other fundamental human rights using a comparative and European focus, and Hungarian constitutional law.

Tom Theuns is Assistant Professor of Political Theory and European Politics

at the Institute of Political Science of Leiden University, the Netherlands, and Associate Researcher at the Centre for European Studies and Comparative Politics of Sciences Po Paris. Previously, he held a research position at Utrecht University and a teaching position at the University of Amsterdam. He holds a PhD from Sciences Po Paris, an MPhil from the University of Oxford and a BA from University College Maastricht. Current research projects investigate the ethics of the right to vote and electoral procedures, the tension between democratic ideals and EU foreign policy, and the legitimate scope of EU policies designed to protect and entrench democratic government. He has published peer-reviewed articles in journals such as the *American Political Science Review*, *Journal of European Integration* and *Cambridge Review of International Affairs*.

Alexandra Timmer is Associate Professor at the Netherlands Institute of Human Rights (SIM), at Utrecht University. Her research focuses on equality and non-discrimination, human rights in the Council of Europe and the EU, and gender and law. Her current project entitled 'Gender Injustice: Historical Development and Contemporary Challenges in European Human Rights Law' is supported by a Veni grant from the Dutch Scientific Organisation. She was involved in European projects such as ETHOS and FRAME, and co-coordinates the European Equality Law Network (www.equalitylaw.eu).

Sybe de Vries is Full Professor of EU Single Market Law and Fundamental Rights and since 2012 the Jean Monnet Chair. His research and his education focuses on EU single market law and the interconnection between EU free movement law and fundamental rights. He was the coordinator of the FP7 research project bEUcitizenship on European citizenship. Sybe is a honorary judge at the District Court of Rotterdam and a board member of the Netherlands Association for European Law.

Miklós Zala is a Post-doctoral Researcher, currently affiliated with the Center for European Union Research (CEUR) at the Central European University (CEU) in Budapest, Hungary and Vienna, Austria. He is working on the European Commission H2020-supported project ETHOS. He is also affiliated with CEU's School of Public Policy as a lecturer. He received both his MA in political science and his PhD in political theory from CEU. His research focuses on political philosophy and applied ethics. He was a visiting researcher at Aarhus University, Denmark, Roskilde University, Denmark and the University of Michigan, Ann Arbor, USA. His doctoral thesis examines the case of religious and cultural accommodation. It argues that certain religious and cultural accommodations can be explained and justified by a particular disability accommodation model, the Human Variation Model (HVM). He is currently working on a philosophical defence of the HVM.

Preface

This volume, *Justice and Vulnerability in Europe: An Interdisciplinary Approach*, synthesizes the results of the research programme 'Towards a European THeory Of juStice and fairness' (ETHOS) funded by the European Union's Horizon 2020 research and innovation programme under grant agreement No. 72711. ETHOS aims to unravel what justice in Europe implicates. Questions tackled relate to European (normative) foundations of justice, the scope, scale, grounds and site of justice, what boundary lines are drawn between populations and what mechanisms impede (in)justice. The research grant enabled an interdisciplinary consortium with participants from five universities and a research institute across Europe (in Austria, Hungary, the Netherlands, Portugal, Turkey and the UK) to study these questions during a three-year period (2017 to 2020).

This volume provides an overview of our interdisciplinary attempt to integrate political-philosphical normative thinking about justice with results of empirical studies on law in books and in practice, media, political and/or institutional discourses of justice and daily experiences of (in)justice by vulnerable populations. It claims that a non-ideal theory of justice must be preferred above an ideal theory of justice because in a culturally diverse and still social-economically unequal Europe a utopian end-state theory will fail to address the complexity of justice dilemmas that Europe is facing. The volume also argues that the multi-level legal and governance framework of decision making in Europe necessitates an integrative perspective on justice that would allow 'practising' justice by attending simultaneously and to an equal degree to its redistributive, recognitive and representative aspects that together make up the idea of participatory parity. ETHOS applied these three aspects of justice, formulated by the political philosopher Nancy Fraser, as a critical starting point of our theoretical search and empirical investigations in six European countries and the European Union (EU) as a supranational body (co-)determining their normative and legal frameworks. Our investigation reveals a few interesting insights into the nature of (in)justice in Europe. First, they highlight a discrepancy at the EU level between recognitive justice on the one hand and redistributive and representative justice on the other, exposing how the latter is being overruled by the dominance of economic profits, exploitation of mobile and flexible (labour) markets and by a lack of mutual solidarity between and within nation states. Second, our findings suggest that boundary lines of justice

are still drawn at the disadvantage of some sectors (for instance care work and education) and some categories of the population (frail elderly, disabled persons, ethnic minorities and migrants, young people) whose capabilities are misrecognized and whose needs tend to be dismissed.

As argued throughout this volume, a theory of justice in Europe must take into account the various constituencies that make up the political, legal, social, cultural and economic entity of Europe. While competing justice discourses, combined with the multi-layered character of the EU, and increased inequality between and within European countries may raise doubts as to the possibility of reaching justice in Europe, counter-developments take place. European populations engage in formal and informal protests against being misrecognized, discriminated in the processes of (re-)distribution and/or being misrepresented. Whether these protests will result in more justice for *all* vulnerable persons or will end up reinforcing old and/or drawing new boundary lines between the 'ins' and 'outs' of justice will depend on the degree of commitment of all involved to the ideals of justice that constitute the core of European values and the European Social Model.

Without the help and support of several people this book would not have become a reality. The ETHOS project was generously supported by the European Union's Horizon 2020 research and innovation programme, for which we express our gratitude. We are also very grateful to all those who contributed to this volume and the ETHOS research, in particular Mike Robinson, the best support manager one could wish for, without whose enduring commitment the project could not have been concluded successfully. As ever, the staff of Edward Elgar Publishing have offered exemplary support and service.

Trudie Knijn and Dorota Lepianka

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Acronyms and abbreviations

CA	Capability Approach
CECE	Comité d'études pour la Constitution européenne
CESCR	UN Committee on Economic, Social and Cultural Rights
CFR	EU Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons living with Disabilities
CSRs	Country Specific Recommendations
EASPD	European Association of Service Providers for Persons with Disabilities
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECSR	European Committee of Social Rights
EDC	European Defence Community
EEC	European Economic Community
EFSF	European Financial Stability Facility
EPC	European Political Community
ESM	European Social Model
EStM	European Stability Mechanism
EU	European Union
FDR	Franklin Delano Roosevelt
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic, Social and Cultural Rights
ILM	Independent Living Movement
ILO	International Labour Organization
IMF	International Monetary Fund
LTC	Long-Term Care
MoU	Memorandum of Understanding
NGO	Non-Governmental Organization
OECD	Organisation for Economic Co-operation and Development
OMC	Open Method of Coordination
R-ESC	Revised European Social Charter
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCRPD	UN Convention on the Rights of Persons with Disabilities
USSR	Union of Soviet Socialist Republics

1. Introduction

Dorota Lepianka and Trudie Knijn

1.1 TIMELINESS OF THE QUESTIONS OF JUSTICE

Over the last decades Europe, as a continent and as a political project,[1] has stumbled over a number of crises and has been faced with challenges that put into question the validity of justice ideals deemed constitutive of European values, the European Social Model (ESM) and European democracy. These challenges include: social and economic solidarity in and between nation states in reaction to the financial, economic and social crises lasting from 2008 to 2015; the growing socio-economic inequalities within and between European societies; the accelerating trends of economic and financial globalization, coupled with the flexibilization of the labour market and shrinking social protection, which pressure and ultimately alter European welfare states; the crisis of liberal democracy, marked by a rise in populism, a drift towards authoritarianism and attempts to dismantle the rule of law; rising nationalisms with their antiforeigner rhetoric and strong resistance to accommodating the soaring number of refugees; and – last but not least – a mounting global health crisis (sparked by the outbreak of the Corona pandemic at the outset of 2020) that suddenly exposes the fragility of individuals, societies and the nation-state institutional order.

In his recent 'Introduction' to the *Handbook on Global Social Justice*, Gary Craig (2020) reflects on the meaning of social justice in times of increasing inequality in multi-cultural and multi-religious nations by assuming that notions of justice change as political conditions change. This volume raises a similar question though from a different perspective; it takes a wider scope by not only analysing social (redistributive) justice but also recognitive and representative justice. At the same time, its focus is narrower due to its orientation on Europe instead of the globe. A central question posed in this volume revolves around the issue of how the various economic, social and political challenges may lead (or might have already led) to a reformulation of the ideals of justice as we knew it – its normative foundations, premises, scope and boundaries. Some of the pressing questions we ask include: What is just and what is unjust? Where does (in)justice start? Who is entitled to (what kind

of) justice? On what grounds? Who should secure justice and how? And – last but not least – what barriers to the realization of justice are there and what are their sources?

These questions are of great significance for the 22 per cent (or over 109 million) of Europeans living at the risk of poverty and social exclusion (Eurostat 2019), whose precarity – enhanced by the neoliberal spirit of 'responsibilization' – cannot be prevented or remedied by decimated public budgets and institutions (Shamir 2008; Schulze-Cleven 2018). They are also very relevant to the 38 per cent of the inhabitants of Europe who feel discriminated against because of their minority status and/or otherness associated with race, ethnicity, different cultural and religious belief systems, gender or disability (FRA 2017). And to the hundreds of thousands of refugees camping in Europe (Turkey, Greece, France and Italy).

At the same time, the questions of justice are of high pertinence to the European Union as an integration project founded not only on common economic interests and legal frameworks but essentially also on the assumption of a common history, common cultural heritage and above all common values (Treaty of Lisbon 2009). In this time of crisis and trial, Europe as an integration project has yet to prove its merit. The challenge lies not only in responding to its critics and addressing the strikingly contradictory reactions to the processes of Europeanization, but also in coming to terms with Europe's 'original sin' of being founded on contradictions, where respect and adherence to justice and human rights co-exist, and often blend, with their violations. Paraphrasing Habermas (2007), Europe could be in fact seen – just like modernity – as an 'incomplete' or 'unfinished' project, whereby justice is the result of ongoing struggles over rights (economic, social and political) as well as over the boundaries of inclusion and scope of participation. In the face of the recent crises, this project seems to be desperately in need of revisiting and strengthening (or rebuilding) its (normative) foundation.

This volume constitutes an attempt to answer, at least partially, some of the above questions in relation to justice in Europe. It is an outcome of a collaborative Horizon 2020 project 'Towards a European THeory Of juStice and fairness' (ETHOS).[2] In its essence, the project aimed to construct a, possibly specifically European, theory which is in tune with European values and reflects the achievements and shortcomings of the European integration process. Such a theory, according to Kochenov et al. (2015), has so far remained unarticulated. The main goal of ETHOS was thus to develop an empirically informed European theory of justice by: (1) refining and deepening the knowledge of the European foundations of justice – both historically based and contemporarily envisaged; (2) enhancing awareness of the mechanisms that impede the realization of the justice ideals that live in contemporary Europe; (3) advancing the understanding of the process of drawing and re-drawing of the boundaries, or

fault lines, of justice; and (4) providing guidance to politicians, policy makers, advocacies and other stakeholders on how to design and implement policies to reverse inequalities and prevent injustice.

The guiding premise of the contributions collected in this volume is that justice is not merely an abstracted moral ideal of universal reach, deduced from abstract (philosophical) paradigms or foundational legal frameworks, such as the European Convention on Human Rights (1950), the Treaty of the European Union (2007) and the Lisbon Treaty (2009), deemed binding for all (for example, as a deontological or teleological concept). Rather, it is a continuously re-enacted and reconstructed 'lived' experience, embedded in firm legal, political, moral, social, economic and cultural institutions, and reflected in public attitudes, discourses and individual experiences. Although a theory of justice and fairness may have roots in abstract moral principles of what is socially desirable and appropriate, in order to resonate with the 'here and now' and to form a realistic (and binding) reference for social and political praxis, it needs to take into account people's actual views of and attitudes towards what 'ought to be' as well as their experiences of what actually 'is'. Important here is the realization that (justice) principles are always historical constructs, embedded in particular conjunctures, as well as the fact that even the most concrete formulation of justice principles (for example, as codified 'rights') tells us very little about the 'practicalities of justice', that is, whether 'justice' is actually being done. Therefore, we take a conflict-based approach, whereby perceptions of injustice play a key role in the formulation of (collective) claims to justice as well as in the search for practical justice-seeking solutions. In analysing justice, contributions in this volume are led by the non-ideal theoretical approach to justice that starts from a diagnosis (what 'is', usually an *in*justice that can be identified[3]) and then unravels the structural and cultural problems underlying these injustices, the conflicting claims behind them and the various perspectives on how to overcome injustices. Therefore, we focus not so much on the articulation of an 'end-state' of perfect justice, but highlight instead the importance of incremental, 'transitional' improvements towards more justice in the real world (Sen 2010; see also Van den Brink et al. 2018; Chapters 3 and 12 in this volume).

1.2 COMPLEXITY OF IN/JUSTICE: BEYOND FRASER'S MODEL OF PARTICIPATORY PARITY

In order to cover – and simplify – the wide range of justice principles present in political philosophical traditions, such as equality, liberty and democracy, and the goals of the European Union (EU) – peace, well-being of citizens, freedom and security, combatting social exclusion and discrimination, pro-

moting solidarity among EU countries, and respecting Europe's rich cultural and linguistic diversity,[4] we make use of Nancy Fraser's tripartite distinction between justice as *redistribution*, justice as *recognition*, and justice as *representation* (1995, 1998, 2005, 2007, 2009) as a starting point of our theoretical and empirical investigations, complementing it with the capability approach (Sen 1999, 2010; Nussbaum 2000). Fraser conceives justice as *parity of participation*, which she defines as 'the condition of being a *peer*, of being on a *par* with others, of standing on an equal footing' (1998, p. 12, emphases in the original), and argues for a multi-dimensional approach that treats redistribution, recognition and representation as three primary, irreducible facets of justice that have broad independent application to addressing real-world injustices (Fraser 2009). While redistribution taps into (in)justices rooted in the *economic structure* of society, resulting in poverty, exploitation, inequality and class differentials, justice understood in recognitive terms is about *social status* and the relative standing of a person vis-à-vis others regardless of their gender, race, ethnicity, sexuality, religion and nationality, or any other axes of social differentiation (Fraser 2007, 2009). Recognitive justice implies absence of cultural domination, marginalization in the public space, cultural and social invisibility, and disrespect and disparagement in everyday life. Finally, representative justice taps into being put on an equal footing in political participation, which involves being included in a political community as well as being granted an equal democratic voice (Fraser 2009). Importantly, as noticed by Fraser herself, while analytically distinct, the various facets of justice are in real life interwoven in a complex and often tensioned way. They may mutually reinforce one another, that is, 'just' representation might be contingent on 'just' recognition and/or 'just' redistribution of resources that enable participation. However, in other cases the realization of some justice claims, such as identity claims, is likely to impinge on other claims and/or claims of other members of the community. Useful in analysing such conflicts is also the capability approach, originating in the work of Amartya Sen (1999; see also Nussbaum 2000), which views justice through the lens of a wide range of means that are necessary for people to function in ways that make their lives valuable; and which recognizes how individual opportunities and choices are historically and culturally determined, and contingent on the choices of others.

Rooted in European social and political theory and developed in the spirit of the 'non-ideal', the 'context-sensitive' approach in critical social theory of the Frankfurt School, Fraser's framework offers an outstanding social-theoretical tool for understanding real-world experiences of in/justice, as many chapters of this volume will testify. Yet, while useful as a lens in exploring the complexity of in/justice claims, Fraser's ideal of justice as *participatory parity* leaves room for additional normative and empirical approaches to (in)justice. Chapters in this volume demonstrate that while some forms or facets of justice

fit well into Fraser's tripartite categorization and/or Sen's capability approach (Chapters 8 to 10), there are also justice dimensions that go beyond Fraser's or Sen's conceptualizations, such as restorative justice, historical justice, epistemic justice or procedural justice (see Chapters 4 and 12). Moreover, the chapters on legal theory and the institutionalization of justice in legal frameworks (Chapters 5 to 7) demonstrate that Fraser's model seems unable to capture law as an important site and medium of in/justice. This might be due to the fact that her theory mainly focuses on the public domain, thus excluding private law; on participatory parity, thus not making personal liberty central (see also Scheuerman 2017); and on substantive and 'real' justice, while law and legal theory mainly deal with procedural justice and 'law in books' (Chapters 5, 6, 7 and 12).

1.3 JUSTICE AS LAW, RIGHTS AS MEANS TO SECURE JUSTICE?

Although law and justice are often bundled together, among legal scholars there is no agreement whether law should be informed by moral justice considerations or separated from those questions (Salát 2018; see also Chapter 6). Relevant here are also doubts whether it is at all possible to achieve justice through law, and if so, how and by whom, that is, through which processes and institutions (Herlin-Karnell and Kjaer 2017).

As discussed in Chapters 5 to 7, 'rights' constitute the legal vehicle for formulating and pursuing claims to justice in Europe (Douglas-Scott 2017) and beyond (Pogge 2013). Indeed, commitment to the protection of rights, which informed early European integration (see Chapter 5), found its expression in 1950 in the adoption of the European Convention of Human Rights (ECHR) that is legally binding on all Council of Europe Member States. It was further confirmed in the Treaty on the European Union (TEU) in 2007, in which 'respect for human rights' was declared a European value (Article 2) and 'fundamental rights' were acknowledged to constitute a 'general principle of the Union's law' rooted in the constitutional traditions of the Member States (Article 6). Also a number of other treaties and legal instruments – the Convention on the Rights of Persons with Disabilities (CRPD), Convention on the Rights of the Child (CRC), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), to name just a few – testify to the fundamental importance of human rights in the European normative and legal space.

Still, the relation between justice and (human) rights is not necessarily straightforward and/or unquestioned. Zygmunt Bauman, for example, dismissed the usefulness of the 'human rights' principle for the realization of social justice for its contribution to 'boundary wars' and the perpetuation

of differentiation and divisiveness' (2001, p. 141). Similarly, Sen criticized the 'human rights' framework for being 'intellectually frail – lacking in foundation and perhaps even in coherence and cogency' (Sen 2005, p. 151). Moreover, framing justice in terms of rights better serves some groups than others, depending on the status of the groups in question, the legal recognition and protection this status entails, and the moral grounds (such as needs, deservingness or vulnerability) upon which the protection is granted. Furthermore, enforceable legal rights seem better equipped to secure recognitive justice than to ensure representative or redistributive justice (Chapters 6 and 7). This disconnection of recognitive, redistributive and representative justice in the application of the human rights framework appears to be the major obstacle to achieving justice understood as Fraserian participatory parity. Blind spots regarding human rights seem particularly pertinent in the European multi-level legal order, where international law, EU law, national law and regional law overlap, and sometimes clash.

1.4 EUROPEAN JUSTICE?

Our focus on justice in Europe and European societies might seem a limitation, especially given the rapidly globalizing world, growing human interconnectedness and the widening range of possible agents of in/justice. It may also seem to go against the grain of budding 'global justice' approaches (Craig 2020; see also Chapter 2). However, Europe constitutes a very particular multi-layered site of justice. Formed by a common history, a shared normative core and a set of political and legal institutions that extend beyond national boundaries, Europe remains to a large extent a collection of nation states – each defined by (and defining for) its distinctive political community with its own (cultural) identity as the basis for recognition, shared rights and obligations of citizenship, and distinct path-dependent institutionalization of (in)justice. This multi-layered-ness, coupled with the blurring of boundaries between the 'ins' and 'outs' of justice (discussed in one of the following sections), and the co-existence, not always peaceful, of alternative ideals of justice, makes the study of justice in Europe not only (theoretically) interesting but also pressing.

Another reason to focus on justice in Europe, narrowed down for our research purposes to the EU, its Member States and accession countries that are (allegedly) bound by common normative and/or legal frameworks, is the growing social and political awareness of how the EU as a project has deviated from its normative ideals: democracy, recognition, respect for human rights and fundamental freedoms, non-discrimination, recognition of the special needs of vulnerable groups, solidarity, and – last but not least – social justice and social inclusion and integration.[5] For example, in its striving for a strong European internal market, the EU has allowed for a far-reaching transformation of the

social rights-based citizenship regimes, which led to the infringement of social and economic rights of European citizens (see Chapters 7 and 11). Thereby it decompactified Marshall's (1950 [1992]) model of citizenship, according to which social rights are indispensable for the ability of all citizens to fully exercise their political and civil rights. Furthermore, the decimation of social rights, in coincidence with the accelerated erosion of national decision making and the growing importance of supranational governance, seems to have resulted in the citizens' diminished sense of being protected and represented by the traditional (nation) state. This in turn has contributed to the reconstruction and/or strengthening of exclusive cultural identities and ethno-national egoisms, articulated through support for political movements and 'parties that base their political programmes on exclusion on ethnic, sexual orientation or religious grounds' (EPR 2015). Coupled with inadequate reactions of the Member State authorities to instances of hate speech and hate crime (EPR 2014, 2015), the popularity of such self-described 'patriotic movements' puts in question the normative strength of 'respect for human dignity' as 'the inviolable foundation of all fundamental rights' (LIBE 2015) and the core of European identity. Scrutinized against the grim reality, 'justice in Europe' could be thus seen as a 'concept in transition', an ideal that is currently being redefined to fit the new socio-economic, political and institutional order; a concept that is desperately in need of renewed reflection.

There are at least two approaches to understanding and studying 'justice in Europe' (Rippon et al. 2018). First, by treating 'justice in Europe' as an object of study, where Europe constitutes a 'site' of justice, a concrete spatial and institutional location where justice and injustice take place. All of the empirical studies in this volume (Chapters 5 to 11) focus on justice in European states and institutions, investigating the degree to which the ideals of redistributive, representative or recognitive justice actually 'live' in those states and institutions. Together our contributions show how the relevance of different justice principles varies between European societies, reflecting their unique histories, values, legal traditions and the political philosophy that guided their development as modern (welfare) states. The various chapters also demonstrate how 'justice as praxis', embedded in national laws, policies, discourses and institutional practices, even if informed by (and constitutive of) the common European discourse, may result in divergent outcomes, determined, for example, by the country's economic and political position (Chapters 6, 10, 11 and 12). They show as well that ideas about justice vary not only between but also within European societies, that is, within their legal systems, between different institutions of social life and/or different population groups.

Second, 'justice in Europe' can be approached as 'the particular, *sui generis* character of the European legal and political order' (Rippon et al. 2018, p. 26). As noted by Rippon et al., '[t]o the extent that European institutions are

unique, the evaluation of their normative significance – and particularly the extent to which these institutions help to realize justice (or, conversely, sustain or promote injustice) – will be a particularly European vision of justice' (2018, p. 26). In the current volume, the *sui generis* character of 'justice in Europe' is explored in chapters focusing on the institutionalization of justice in the European legal order (Chapters 5 to 7). The general conclusion with respect to the EU as a site and agent of justice points to a discord between the normative ideal and the social and political praxis. As argued by Trudie Knijn and colleagues (Chapter 14, p. 247):

> Both the EU and the national governments of the Member States created a perfect vacuum of irresponsibility, in which they can blame each other for most of the perils those residing in the EU face. This suggests that Europe is characterized by justice *in default*. Justice values and norms are present in the official rhetoric, less so in practice.

1.5 JUSTICE AMONG WHOM?

One of the basic questions addressed in ETHOS and several contributions to this volume relates to the question of the boundaries of justice, or what philosophers call the 'scope of justice'. Most theories of justice (implicitly) deal with justice relations among people belonging to a single political community – usually a nation state. 'Membership [in a political community]', claims Michael Walzer, 'is important because of what [its] members … owe to one another and to no one else, or to no one else in the same degree' (Walzer 1983, p. 64). However, with enhanced globalization of markets and finance, war refugees at Europe's borders, internal European mobility and shifting sources of belonging, the distinction of who is 'in' and who is 'out', while vital for (non-)realization of justice, is increasingly difficult to draw. The growing incidence of double and multiple citizenships co-exists with rising statelessness, and the category of (non-)citizen – embedded in various sub-state, cross-state and supra-state political communities – becomes increasingly multi-layered (Anderson et al. 2014; Yuval-Davis 2011). As a result, access to primary social goods such as rights, opportunities and the social basis of self-respect differs substantially not only per country but also according to the status of individuals as national citizens, European citizens, citizens of an associated country or citizens of a (particular) third country (Anderson et al. 2014). Crucial as well is the emergence of alternative identity-based sources of belonging (for example, as a member of a specific cultural collectivity or unbounded cosmopolitan), which further complicates the traditional 'in-or-out' division based on formal membership (Yuval-Davis 2011), especially as neither the inclusion of all of

the formal community members nor the exclusion of all of the non-members is absolutely identical.

In this volume, questions about the nature and normative basis of the boundary drawing that defines the 'ins' and the 'outs' of justice are tackled in Chapter 8 by Bridget Anderson, which zooms into the experiences of the Roma to problematize the legal status of citizenship as institutionalized in European nation states, and in the integrative Chapter 14 by Trudie Knijn, Jelena Belic and Miklós Zala, which synthesizes findings of various ETHOS studies on boundary drawing across various spheres of social life.

1.6 VULNERABILITY AND JUSTICE

While vulnerability is considered one of the crucial justice concerns, its meaning and consequences for the realization of justice is frequently contested. On the one hand, vulnerability is understood as 'a universal, inevitable, enduring aspect of the human condition' (Fineman 2008, p. 8). Within this approach, everybody is vulnerable, if not actually then potentially. On the other hand, as noted by Butler, 'precarity is not simply an existential truth'; it is 'lived differently' (2015, p. 20) by different social groups, co-determined by their social location and/or position vis-à-vis other social actors. Thus, while constituting a fundamental feature of human existence, it is also connected to personal, economic, social and cultural circumstances within which individuals find themselves at different points in their lives. Certain social categories – frail older citizens, persons with disability, migrants and members of ethnic minorities, youth and women – are thus often (classified as) more vulnerable than others; and their vulnerability is frequently exacerbated by intersectionality (Chapter 13).

Since the concept of vulnerability carries a particular moral weight, it implies both a need and a moral obligation to take action (Goodin 1985). People or groups defined or seen as 'vulnerable' are often prioritized in the allocation of redistributed resources and/or protection (Brown et al. 2017; see also Chapter 6). However, linking vulnerability with specific social categories and/or situations (like phases in the life-course or adverse circumstances) may have detrimental effects for social justice. First, it may lead to 'naturalization' of vulnerability, for example, when some people are considered 'naturally' more vulnerable than others (Brown et al. 2017), or when vulnerability is considered pathogenic, as in the case of 'morally dysfunctional or abusive interpersonal and social relationships and socio-political oppression or injustice', or in special cases when attempts to alleviate someone's vulnerability result in 'the paradoxical effect of exacerbating existing vulnerabilities or

generating new ones' (Mackenzie et al. 2014, p. 9). Undeniably, as noted by Butler (2015):

> no one person suffers a lack of shelter without there being a social failure to organise shelter in such a way that it is accessible to each and every person. And no one person suffers unemployment without there being a system or a political economy that fails to safeguard against that possibility … in some of our most vulnerable experiences of social and economic deprivation, what is revealed is not only our precariousness as individual persons ... but also the failures and inequalities of socioeconomic and political institutions. (Butler 2015, p. 21)

Second, considering 'vulnerability' in 'situational' terms may lead to the 'stigmatization' of vulnerable 'populations', which are then 'associated with victimhood, deprivation, dependency, or pathology' (Fineman 2008, p. 8), evaluated along the criteria of deservingness and/or risk, denied agency and voice, and subjected to social control (Brown 2011, 2014; Brown et al. 2017). In such a case, 'vulnerability' may in fact become a mechanism for impeding injustice, as analysed in Chapter 13 by Trudie Knijn and Başak Akkan.

In this volume, the concept of vulnerability is explored in Chapter 3, which examines the significance of the concept of vulnerability for theorizing justice in the real world. Further, in some of the empirical contributions (Chapters 8 to 11), the specific theoretically fed ideals of justice and ways of understanding justice are scrutinized from the perspective of vulnerable populations. This explicit focus on the experiences of 'the vulnerable' constitutes a conscious attempt to escape the danger of overemphasizing the already dominant claims while neglecting the less obvious sources of harm and less visible claims to justice. It also allows us to position vulnerable groups as ethical and political subjects, and a source of justice norms. The various contributions explore the perspectives of ethnic and religious minorities, but also other marginalized populations, such as women, the young and the old, poor people and people with disabilities. Since claims to justice may be determined not only by the characteristics of the individual or the group formulating the claim (members versus non-members of a collectivity), but differ as well per sphere or domain of justice (for example, political freedom, freedom of speech and participation, security and welfare, care and work), our investigations touch upon distinct realms of social life: education (Chapter 9), care (Chapter 10) and labour market (Chapter 11) as well as the questions of mobility and citizenship (Chapter 8).

In their unique ways, each of the empirical studies presented in Chapters 8 to 11 problematizes the notion of vulnerability and exposes the working of the cross-cutting, often mutually reinforcing, vulnerabilities. By emphasizing differences between the various sub-categories of 'the vulnerable', each with their unique needs, identities and preferences, the authors of those studies

draw attention to the constructed nature of the notion of 'vulnerability' and the injustice inherent in the (implicit) treatment of the various 'vulnerable groups' as a generic social category. They also show how categorization into specific (allegedly vulnerable) groups enhances vulnerability (and injustice as misrecognition) through stigma. At the same time, all of the contributions testify to the universality of vulnerability as the human condition in the face of which certain classifications and distinctions, such as between 'citizen' and 'migrant' or 'dependent' and 'independent' prove essentially irrelevant: under specific circumstances all of us are vulnerable regardless of our (formal) status. Next, they demonstrate how the category of 'vulnerability' presupposes the existence of a normatively preferred *modus vivendi*, governed by neoliberal ideals of self-sufficiency, responsibility and *in-* rather than *inter*dependence (see Chapter 10). Those results resonate with the observations by other scholars (Fineman 2008; Butler 2015; Brown et al. 2017). Finally, all of the empirically based chapters demonstrate how socio-economic and political institutions, through policy failures, negligence and inadequate institutional practices, create or enhance 'vulnerability' of various social categories – mobile citizens, minority children, frail older citizens, persons with a disability, (female) carers and young workers. In Chapter 13 that classification is further explored as a mechanism that impedes injustice. Indeed, as observed by Butler, 'none of us acts without the conditions to act' (2015, p. 16). At the same time, however, the numerous examples of resistance and coping and attempts to redefine the dominant discourse prove that a conceptualization that reduces 'the vulnerable' to mere 'victims' of circumstance and state (in)action constitutes a harmful simplification and is in itself an act of misrecognition (see Lepianka 2018; Chapters 11 and 13).

1.7 CURRENT VOLUME

All of the chapters in this volume reflect ETHOS research efforts. The book starts with a number of theoretical contributions that discuss how justice is approached and conceptualized in the academic disciplines included in the project: philosophy, legal studies, social and political science and economy (Chapters 2 to 4), followed by empirical studies of the European legal framework that sets the foundation for the realization of justice (Chapters 5 to 7) and studies of how justice and injustice take form 'on the ground', within the realm of experience of those deemed 'vulnerable' (Chapters 8 to 11). The volume ends with three integrative chapters reflecting on the applicability of Fraser's tripartite approach to justice in contemporary Europe (Chapter 12), mechanisms that impede justice (Chapter 13) and boundaries of justice (Chapter 14). Set in the tradition of non-ideal theorizing, all of the chapters in this volume take a critical stance. They problematize not only the issue of justice but also

the notion of vulnerability, questions of the relationship between justice and law, and Europe, the EU and its Member States as sites and agents of justice. Moreover, as seen especially in Chapter 4 and Chapters 12 to 14, the bridging of the empirical 'is' with the normative 'ought' is informed (and complicated) by different academic disciplines: political philosophy, sociology, law, economics and political science, each of which approaches and conceptualizes justice in a distinct, sometimes contrasting, manner. Such interdisciplinary approaches to studying justice are scarce (but see Sabbagh and Schmitt 2016; Roberson 2018). Most academic studies on justice rely either on normative philosophical theories (especially Rawls 1971 [1999]; but also Honneth 1996; Fraser 1998; Walzer 1983) or psychological theories (see, for example, studies by Tyler 1997; Kay and Jost 2003; Pettigrew 2004), while most sociological, economic and legal studies assume but do not problematize the concept of justice. The interdisciplinary approach of this volume can be therefore seen as rather innovative, just like the approach to studying justice in its interdependence between the ideal and the real, the normative and the practical, the formal and the informal – all set in the highly complex institutions of modern European societies.

NOTES

1. In this volume, we understand Europe in the broad meaning as the continent involving 47 countries that are members of the Council of Europe and in its narrower definition as the European Union with its 27 Member States. This distinction is relatively unimportant for our theoretical framework as presented in Chapters 2 to 4, nor is it crucial for the challenges European countries meet in dealing with vulnerable populations or for the analysis of political and media discourses concerning these populations. The distinction is, however, crucial for understanding the legal and institutional order and practice of justice. While the European Union intends to be – or become – a semi-supranational entity, the Council of Europe has a looser aim and structure, mainly oriented at a combination of economic exchange and human rights.
2. The ETHOS project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No. 727112.
3. One of the biggest challenges we are confronted in ETHOS is the implicitness of justice. While people tend to have strong ideas about what is unjust or unfair, they do not necessarily find it easy to say what is just (see, for example, Simon 1995). This is related to the empirical, temporal and psychological appeal of injustice and its call for the immediate eradication of the negative (Simon 1995). However, trying to understand ideas about justice via studying grievances is not unproblematic: injustice is not necessarily the opposite of justice and absence of injustice does not imply justice (Shklar 1990; Simon 1995). In fact, injustice has its own dynamic quite independent from justice. Moreover, paraphrasing Wolff (2015), there are many different ways of avoiding injustice, or – in other words – there are many different ways of doing justice in response to, or in avoidance of, a specific grievance.

4. https://europa.eu/european-union/about-eu/eu-in-brief_en, accessed 24 January 2020.
5. REPORT on the situation of fundamental rights in the European Union in 2015 (2016/2009(INI)) Committee on Civil Liberties, Justice and Home Affairs Rapporteur: József Nagy; Council of Europe (1995) *Framework Convention for the Protection of National Minorities and Explanatory Report*. H (95)10. Council of Europe: Strasbourg; see also Advisory Committee on the Framework Convention for the Protection of National Minorities (2008) *Commentary on the effective participation of persons belonging to national minorities in cultural, social and economic life and public affairs*. ACFC/31DOC(2008)001. Council of Europe: Strasbourg; Committee of Ministers of the Council of Europe (2016) *2.4 Action Plan on Building Inclusive Societies (2016–2019)*. CM Documents CM(2016)25. Council of Europe: Strasbourg.

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2. Thinking about justice: a traditional philosophical framework

Simon Rippon, Miklós Zala, Tom Theuns, Sem de Maagt and Bert van den Brink

2.1 INTRODUCTION

This chapter introduces the methods, questions and problems of political philosophy to a general audience with an interest in justice in Europe.[1] This is necessarily a task of selection. Why highlight certain questions, thinkers and traditions over others? An answer to this question must start with the influence of John Rawls. Contemporary political philosophy was transformed by Rawls's work, especially his *A Theory of Justice* (1971 [1999]). While many later works we cite are *not* in what is now sometimes known as the 'Rawlsian tradition', Robert Nozick's (1974) quip still rings true: contemporary political philosophers must either work within the Rawlsian framework or say why they do not. In consequence, we give central attention to the dominant Rawlsian, liberal tradition, and engage alternative approaches (republican, communitarian, critical and so on) primarily through its lens.

The 'European' angle of this volume and its relation to this chapter 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, most philosophers accept the view that philosophical truths about justice are not bounded by continents. There have of course been influential European thinkers who have contributed to a particular, historically European, philosophical tradition, and have influenced law, political institutions and culture in Europe (and elsewhere). But these European roots of the philosophical tradition are considered, mostly, of purely historical interest. In contrast, the boundaries between nation states, though contested and constructed, are 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 shared

political community, and 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 may, however, bear analogy to nation states in these respects and may have superseded nation states in some ways. (We return to this 'scope of justice' issue in Section 2.4.4 and in Chapter 3, Section 3.6; some of the European legal framework and other aspects of shared European political community are explored in Chapters 5 to 7, and Chapter 14 of this volume.)

In this chapter, though, our goal is a bird's-eye view of philosophical theorizing about justice. In Section 2.2, we will highlight the characteristically *normative* focus of philosophical theorizing about justice – a focus on questions not about how things actually are, but about how things ought to be. In Section 2.3, we discuss what sort of methods can be used to justify normative claims about justice. In Section 2.4, we outline some major philosophical questions about justice, and indicate how competing conceptions of justice arise from different answers to them. Section 2.5 briefly concludes.

2.2 A 'PHILOSOPHICAL' APPROACH TO JUSTICE: NORMATIVE VERSUS EMPIRICAL QUESTIONS

Philosophical questions are, broadly speaking, the kinds of questions that cannot be answered 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? We could, in principle, answer such questions by collecting and analysing empirical data.

The philosophical questions most relevant to theorizing about justice are *normative* questions. The question: 'What are individuals due as a matter of justice?' is a normative question. Various empirical facts may be relevant to answering this question (facts about the nature of human beings and their basic needs, for example). But empirical facts alone cannot answer it. 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 (in reference to Hume 1739–40 [1975], §3.1.1.27). It is the point that you cannot derive any normative conclusion from purely factual claims. If you want to deduce a normative conclusion, you must start with at least one normative claim as a premise in your argument. Normative claims, or 'ought' claims, are claims about things like values, reasons and what one morally ought to do.

There are 'common sense' normative claims about justice that are widely shared in particular societies. But many questions about justice cannot be answered simply by appealing to common sense. Moreover, common sense might be wrong. So, if we cannot answer normative questions either by collecting empirical evidence or by appealing to common sense, then we must answer them by philosophical reasoning.

2.3 METHODS

The primary philosophical method is reasoning and critical reflection. But this phrase is rather vague, encompassing a range of possible approaches. In this section, we outline three main methods used in philosophical theorizing about justice.

2.3.1 Reflective Equilibrium

The dominant method in contemporary political philosophy is now reflective equilibrium, after John Rawls (1971 [1999]). We may describe the process of reflective equilibrium in three stages:

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 that have been formed under the sort of conditions that are platitudinally appropriate for forming reliable judgments generally – for example, not under the adverse influence of drugs, emotion, 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, seeking to improve the coherence and plausibility of the set as a whole. Revise considered judgments about general moral principles that conflict with our considered judgments about many particular cases and adopt new 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 considered 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 unquestionable moral beliefs, but on

the coherence between all judgments that are relevant to the issue at hand. Justification, as Rawls writes, 'is a matter of the mutual support of many considerations, of everything fitting together into one coherent view' (1971 [1999], p. 507). When we describe the 'real-world political philosophy' approach for theorizing justice in Europe in Chapter 3, we understand it from the perspective of this Rawlsian tradition. However, adherents of the two alternative methodologies described below may wish to integrate them into the framework we develop.

2.3.2 Rational Reconstruction

Another influential methodological approach to justice is known as 'rational reconstruction'. On this approach, the focus is not on our considered judgments, but on the pragmatics and normative presuppositions of rational social interaction. Jürgen Habermas (1981 [1984/7], 1992 [1998]) and his colleague Karl-Otto Apel (1976 [1998]) pursue this method by analysing the necessary, or transcendental, conditions of rational language use. They argue that as rational and communicative agents, human beings must accept some minimal presuppositions of their ability to exchange intelligible political claims. Basically, the idea is that claims to the truth, correctness and integrity of a statement 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 with reference to the objective world (truth), the intersubjective world of social norms (correctness) or the subjective world of truthful statements (integrity). 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 about justice. What follows 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 (Forst 2011).

An important difference between the method of reflective equilibrium and the method of rational reconstruction is that whereas reflective equilibrium starts with our contingent considered judgments about justice, the method of rational reconstruction tries to reconstruct the necessary presuppositions of rational (inter)action as such. The relevance of this distinction is that, whereas Rawls's conclusions in reflective equilibrium may be acceptable only to people who hold a general conception of justice similar to Rawls's, the con-

clusions of the method of rational reconstruction should be accepted by any possible rational agent.

2.3.3 Interpretative Methods

While the method of rational reconstruction is a method of interpretation of the norms that govern our social interaction or our self-understanding as agents, interpretative methods in political theory are generally understood as concerned with articulating inherited normative traditions. Authors such as Charles Taylor (1989), Michael Walzer (1983), Alaisdair MacIntyre (1984) and Axel Honneth (1995, 2014) have claimed that practices and theories of justice are derivable neither from a theoretical reflective equilibrium, nor from an understanding of rules for rational social interaction, but from culturally specific standards of practical wisdom embedded in the social and political institutions of particular societies. This approach is indebted to Hegel (1821 [1991]) and to ancient Greek virtue ethics, which stresses the centrality of virtues and communal goods over the entitlements of individuals (Aristotle *c*. 350 BC [1995], Plato *c*. 380 BC [1992]). The modern communitarian heirs of this tradition emphasize that individual self-determination is possible only within a social context that provides an evaluative framework. Prioritizing the social over the individual, they argue that universalism in ethics must come neither from transcendental presuppositions of agency, nor from a liberal reflective equilibrium from one's individual preferences, but from tradition-bound understandings of the good (Taylor 1989; Honneth 2014).

2.4 MAJOR QUESTIONS OF JUSTICE

We now turn to consider predominant questions in the philosophical tradition. Diagrams are used to outline the questions, the major responses and significant sub-questions, then the text offers further discussion. It is not our aim to argue for particular responses here. The aim of this section is rather to provide an orientation for a general audience, offering a synoptic view of the major debates and various concepts that have arisen from them.

The main questions that have dominated the literature on justice in political philosophy are those of 'grounds', 'shape', 'site' and 'scope' of justice. These terms are technical. The question of the *grounds* of justice concerns where claims of justice come from. Debating the *shape* of justice means considering both which things are the primary concerns of justice and on what principles they should be arranged. 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 about the primary areas of our lives that principles of justice apply to. For instance, some hold that it is the constitutional or 'basic' structure of society that is shaped according to the demands of justice (Rawls 1971 [1999]), while others think that justice also makes demands on the actions of private individuals (Cohen 1997). Finally, questions on the *scope* of justice ask 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 (for example, compatriots)?

2.4.1 Grounds of Justice

Perhaps the most general normative question of justice 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? Below, we discuss in turn each of the answers illustrated in Figure 2.1.

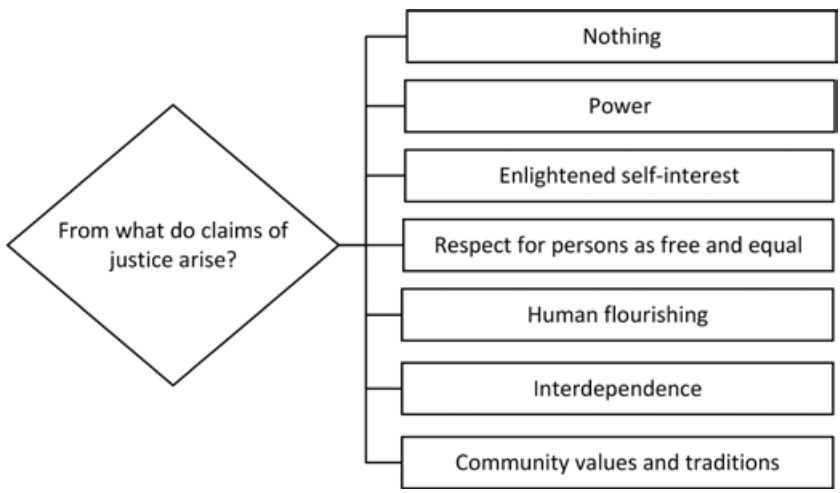

Figure 2.1 Grounds of justice

Discussion of the grounds of justice in philosophy goes back at least as far as Plato's ancient Greek dialogues, the *Gorgias* (*c*. 390 BC [1979]) and the *Republic* (*c*. 380 BC [1992]). The answer has a bearing on which claims of justice we have, and on whom we have these claims. For example, Plato's character Thrasymachus says that 'justice' is a charade: nothing more than the power of the stronger over the weaker (*c*. 390 BC [1979]), 338c2–3). If we accept his scepticism, we may decide that there are no legitimate claims

of justice at all. Plato's character Callicles, who influenced Nietzsche (1886 [1990]), 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 (*c*. 380 BC [1992], 483d–484c).

A less sceptical answer is found in the *contractarian* tradition associated with Thomas Hobbes's *Leviathan* (1651 [1994]). Contractarians say the claims of justice are a social contract justified by enlightened self-interest. Hobbes imagined a hypothetical 'state of nature' prior to government in which there was no security, since anyone's life or resources could be taken by others at any time. In such circumstances, pre-emptive attacks on others may be a rational means of self-defence; the unfortunate consequence of this being that life for everyone would be, as Hobbes famously described, 'solitary, poor, nasty, brutish and short' (1651 [1994], XIII. 9). Self-interest thus demands that individuals in the state of nature form a mutual contract, surrendering their power to a Sovereign capable of enforcing order. While Hobbes himself envisages an inegalitarian and undemocratic state, later contractarians such as Gauthier (1986) have argued for self-interested foundations for democratic, egalitarian systems of justice.

Another answer based in enlightened self-interest is found in the *republican* tradition (Machiavelli 1532 1989]; Pettit 1997; Skinner 1998). According to republicans, claims of justice arise from our interest in living under institutions that enable us to exercise individual and collective agency, while protecting us from arbitrary invasions of our liberty either by fellow citizens or by the government.

A 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 represented by Immanuel Kant (1785 [1983]), is particularly associated with the work of John Rawls and T.M. Scanlon (1998). Rawls develops a theory of justice grounded in a moral conception of the person which understands persons as 'self-authenticating sources of valid claims' (Rawls 2003, p. 23). His theory does not specify how persons should live, but only tries to secure the conditions under which persons can lead their lives independently. Rawls has claimed that his understanding of citizenship combines, in Benjamin Constant's words, the 'liberty of the moderns', conceived around civil liberties warranted through individual rights, and the 'liberty of the ancients', or participatory liberties in republican institutions (Constant 1819 [1988]; Rawls 1993).

Philosophical anarchists claim that the fundamental freedom and equality of persons makes state coercion impermissible, so that legitimate political authority is impossible (Wolff 1970). Some who try to defend political authority against the anarchist challenge argue that legitimate political authority is possible based on the consent of the governed (Estlund 2005), or on the idea

of fair play (Klosko 1987). Others argue that our voluntary associations within a political community ground the legitimacy of political authority (Dworkin 2011).

Social contract theories diverge on whether the contract in question is supposed to be actual or hypothetical (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 plausibly 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 a given system of laws. On the other hand, a merely hypothetical contract is imaginary, and thus, according to critics, no contract at all.

One possible response to this dilemma is to follow a tradition going back to Plato (*c*. 390 BC [1979]), which argues that we give *tacit* consent to the social contract by living in an ordered state and accepting its benefits. Common sense principles of gratitude (to the state) or fair play – that is, accepting a share of the burdens of a mutually beneficial system – 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. A democratic political system allows us to express our explicit consent for certain aspects of the coercive state structure, such as the empowerment of particular representatives. Indeed, some theorists argue that, through their democratic, *political* liberties, citizens can guard and help formulate the laws that set the just terms under which they can exercise their *individual* liberties. According to this view, 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 1992 [1998]).

A different approach grounds justice in a favoured conception of human flourishing. Certain republicans, going back to Aristotle (*c*. 350 BC [1995]), argue that being an active citizen in a political community is essential to a flourishing life. In contemporary philosophy, Martha Nussbaum (2001) argues that certain human functional capabilities, such as the capability to live to the end of a natural life, to have good health or to play, are essential to human flourishing. Some claim that flourishing requires autonomy, and that the institutions of a just society would promote the living of sufficiently autonomous lives by society's members (Raz 1986; Honneth 2014). This is different from Rawlsian liberalism, which attempts to remain neutral on questions of human flourishing.

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 (Hegel 1821 [1991]; Honneth 1995). Contemporary theories of the need for recognition and the harms of misrecognition are developed in the work of theorists such as Charles Taylor (1992), Axel Honneth (1995) and Nancy Fraser (1995). Other theories, in the feminist 'ethics of care'

tradition, emphasize the responsibilities associated with familial and other close relationships over individual liberal rights (Kittay 1999; Held 2006). These theorists, who stress interdependencies, have shown that forms of exclusion from full citizenship underlie many experiences of injustice. The struggle for overcoming these is an important ground of justice itself.

Finally, some political theorists reject altogether the attempt to ground justice in an 'Archimedean point' outside of any existing community, and its traditions and values. *Communitarians* deny that unencumbered individuals choose their values *ex nihilo*. They argue 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 interpreting existing social structures, practices and beliefs (Walzer 1983; MacIntyre 1984). This thought leads them to adopt the interpretative method described in Section 2.3. Accordingly, these thinkers tend to be sceptical of large swathes of universal human rights discourse. Critics of these communitarians claim that they illegitimately attempt to deduce how things *ought* to be from what *is* accepted by members of a community, failing to sufficiently question the social practices and systems of value that are predominant in particular communities.

2.4.2 The Shape of Justice

We now turn to the *shape* or *principles* of justice. Almost everyone can agree that political justice is a matter of treating people as equals, though not necessarily identically. The rub comes in working out exactly what it *means* to treat people as equals, in a just way. Following Rawls (1971 [1999]), we can 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?' A *conception* of justice gives a specific answer to this question, for example in the form of a set of normative principles of justice, or a normative theory. Most people have a concept of justice, but few have a fully-fledged conception. One task of political philosophy 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. An ideally just society would then 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 needs to tell us which goods (the *metric* of justice) should be distributed in what way (that is, it needs to identify just distributive principles). This is not a trivial matter, as shown by the many questions that arise on the 'distribution of goods' branch of Figure 2.2 (pp. 26–7).

There are different proposals for the metric of distributive justice. Perhaps most people think of distributive justice primarily as fair distribution of mate-

rial goods and services. Many philosophers argue this leaves out other important things. For *utilitarians*, the metric of justice is 'utility', or pleasure or welfare, which they often consider the only thing good in itself (Bentham 1789 [1970]; Mill 1861 [1991]). Other theorists consider justice to be primarily concerned not with outcomes like welfare, but with distribution of opportunities. For libertarians or classical liberals, the metric may be negative freedoms; that is, the absence of constraints or interference by others (Berlin 1958 [2002]). John Rawls's (1971 [1991]) liberal theory treats as metrics both basic liberties (freedom of thought, of association, to vote, to hold political office and so on) and other so-called 'primary goods'. Primary goods are all-purpose resources for leading your preferred plan of life, such as basic liberties, opportunities, income and wealth and the social bases of self-respect. More recently, Amartya Sen (1990) and Martha Nussbaum (2001) have argued that the metric of justice should rather be 'capabilities': real opportunities to do and to be what individuals have reason to value. An argument for this is that individuals have different abilities to transform resources into things they value. For instance, moving around is easy for some, whereas others need a wheelchair. What is important for justice, according to proponents of the capability approach, is that we have sufficient capability (in this case mobility), not that we have some share of resources, liberties or welfare.

The second component of a distributive theory of justice is a distributive principle. Since utilitarians believe we ought to maximize utility, they adopt a maximizing distributive principle: welfare should be distributed in whatever way maximizes the aggregate welfare. 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 one might doubt that this kind of equal treatment embodies justice, as it allows extreme inequalities in welfare. Can a society really be just if some are left very badly off 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 such view is *strict egalitarianis*m, according to which everyone should get the same amount (Nielsen 1979). A worry about 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 collectively than they might otherwise be if some inequalities were permitted. An alternative proposal that may be less susceptible to these objections is *prioritarianism*, according to which inequalities are permitted, as long as they benefit the worst off group (Rawls 1971 [1999]; Parfit 1997). Another oft-defended distributive rule is *sufficientarianism*, according to which everyone should have enough, or sufficient, to meet a basic threshold for a good life. According to this view,

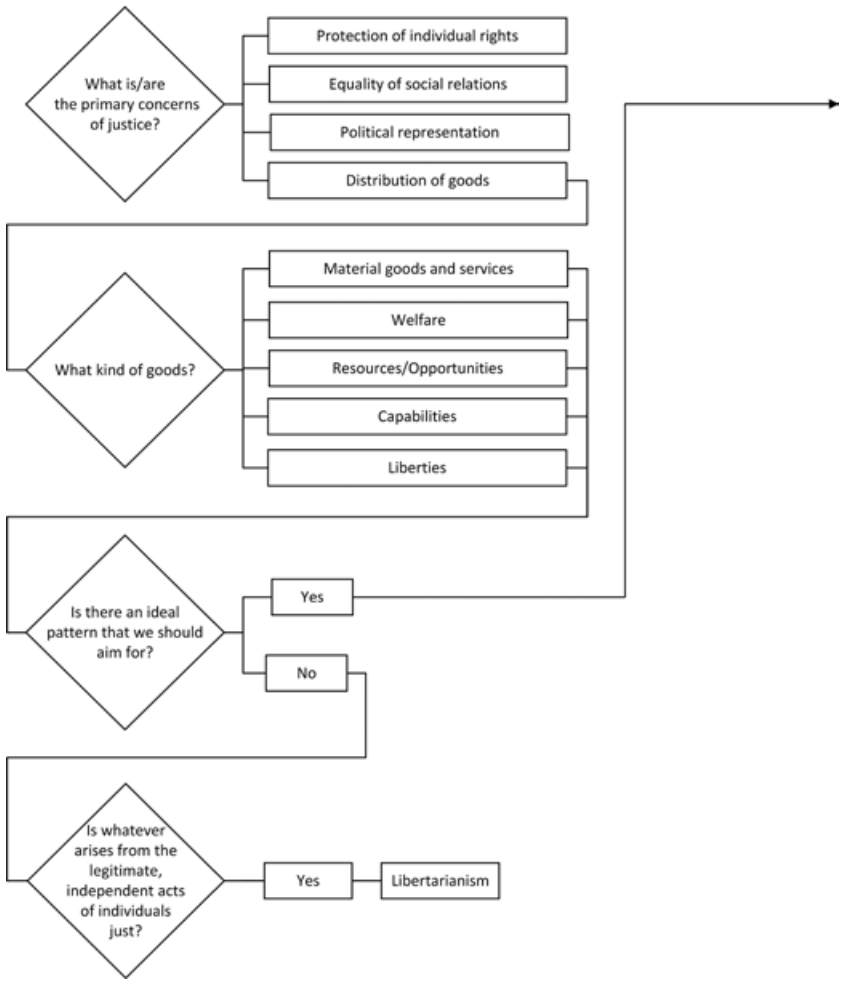

Figure 2.2a The shape of justice

if everyone were sufficiently well off, inequalities wouldn't matter from the perspective of justice (Raz 1986; Frankfurt 1987).

A theory of justice can include more than one of these distributive principles in combination with different metrics, as shown in Figure 2.2. An interesting example of such a combination is found in John Rawls's influential theory of

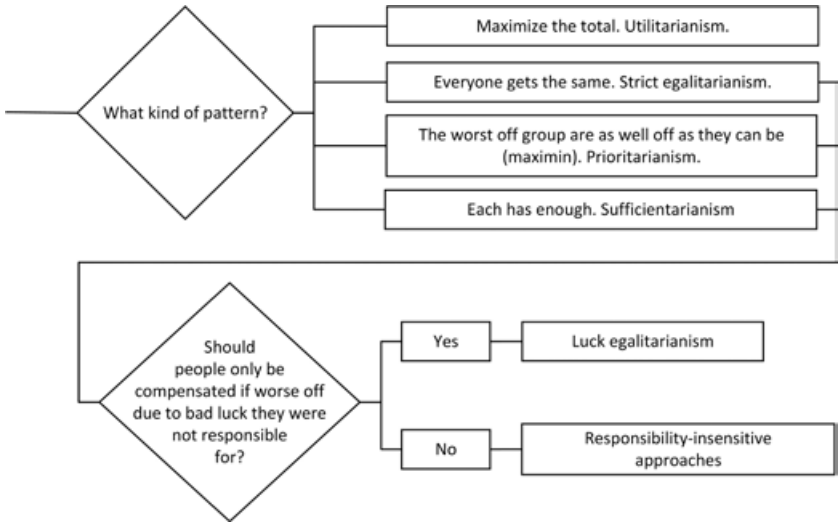

Figure 2.2b The shape of justice (continued)

justice, which gives two basic principles for the regulation of social institutions, with the first principle prioritized over the second. In Rawls's words:

> FIRST PRINCIPLE [the 'principle of equal basic liberties']
> 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.
>
> SECOND PRINCIPLE
> 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 1971 [1999], p. 266)

Some critics have argued that Rawls's theory is insufficiently responsibility sensitive. If some people deserve more than others due to their effort or choices, then an inequality between them, even if it violates the difference principle, may not be unjust. So, an additional concern of many theories of distributive justice is to specify when departures 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 resulting from choice or other things we are responsible for (Arneson 1989; Cohen 1989).

Many luck egalitarians also distinguish between the effects of unchosen 'brute luck', the effects of which they believe should be neutralized, and the results of calculated gambles, or 'option luck', the effects of which should not (Dworkin 1981). In practice, however, the effect of choice and luck on outcomes is intermingled and it is difficult to draw a principled line between them. As Rawls (1971 [1999]) noted, one's natural capacities, one's environment, and even one's propensity to exert effort, depend on natural and social luck.

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* Robert Nozick (1974) notably denied this. According to Nozick, a distribution of property would be just not because it represents some favoured pattern, but because it has an appropriate history. According to Nozick's 'entitlement theory', any 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 unowned land by cultivating them, and that you can justly transfer them by voluntary exchange. Then *any* pattern of distribution of land is just, provided it came about by voluntary exchanges of land that was initially acquired by cultivating it. Moreover, Nozick argues it would be unjust for a state or anyone else to then forcibly interfere to realize some favoured pattern, since this would violate individuals' existing entitlements. This theory has its roots in the work of John Locke (1689 [1988]), who considered justice to consist in respect for every person's natural, absolute rights to self-ownership, ownership of private property and freedom from harm. Although negative views of this kind can be considered theories of distributive justice (and thus as choice-points on the 'distribution of goods' branch of Figure 2.2), it might make more sense to consider them as seeing justice as concerned with something other than the distribution of goods: namely, the protection of individual rights (shown on the first branch of Figure 2.2).

Turning now to the second branch of Figure 2.2, *relational egalitarians* claim that what is fundamental to a just society is equality of social relations, so that distribution of goods has at most a derivative or secondary importance (Anderson 1999). Therefore, a quantitative ideal of equality that focuses on the distribution of certain goods is mistaken, or at least incomplete (Young 1990). Relational egalitarians have criticized three kinds of social hierarchies: (1) hierarchies of domination and command, (2) hierarchies of standing, and (3) hierarchies of esteem (Anderson 2012). 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 (a paradigmatic example of such domination is a slave under the power of a well-disposed master). Egalitarians also 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, p. 43). Equality of esteem requires a society where no individual need occupy an inferior role associated with feelings such as disgust, contempt or fear (Anderson 2012; see also Wolff 1998).

In the Hegelian tradition, theories based on recognition are also relational egalitarian, emphasizing our dependence on the affirmation of others (Taylor 1992; Fraser 1995; Honneth 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. One reason why people may suffer from lower social standing or face other obstacles is because they belong to minority groups. *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 (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 (such as the rights of indigenous populations to self-governance) (Kymlicka 1995).

Turning to the third branch of Figure 2.2, some theorists argue that the fundamental concerns of justice are principles of political participation and voice – that is, of political agency and representation (Habermas 1992 [1998]; Pettit 1997; Skinner 1998; Mouffe 2000). On this view, principles for the distribution of goods of the kind discussed above can only be legitimated through stable politico-legal institutions that lend fair democratic access and voice to the ultimate addressees of questions of justice and injustice: citizens. More practically, there is the question of whether a just political community should incorporate direct or representative democracy. Jean-Jacques Rousseau's *The Social Contract* (1762 [1997]) argued for the former position, while Edmund Burke (1790 [1987]) and John Stuart Mill (1861 [1991]) famously argued for the latter view.

Just as a theory of justice may include multiple distributive principles and metrics, a theory of justice may consider more than one of the preceding concerns as primary. One such influential view is that of Nancy Fraser (1996, 2008). Her 'tripartite' conception identifies redistribution, recognition and representation as three primary and mutually irreducible concerns of justice, though each necessary for the realization of 'participatory parity' (see also Chapters 1, 3, 4 and 12). She initially developed this view as a reaction to scholars such as Honneth, who she thought mistakenly subsumed distributive claims under recognitive claims. Fraser's view, in contrast, is that recognition and redistribution are mutually irreducible aspects of justice that have broad independent application to addressing real-world injustices: 'virtually all real-world oppressed collectivities … suffer both maldistribution and misrecognition in forms where each of those injustices has some independent

weight' (Fraser 1996, p. 22). Over time, Fraser's account expanded to a tripartite view, adding an additional dimension of justice as political representation (2008). Regardless of where one stands on the controversial matter of reducibility, it seems likely that an *empirical* evaluation of the justice or injustice of states of affairs in any society is likely to require knowledge of (mal)distribution, (mis)recognition, and the (in)adequacy of systems of representation in that context.

2.4.3 The Site of Justice

We now consider what kinds of objects (institutions, family life, individual actions and so on) principles of justice apply to – that is, the *site* of justice. Below, we discuss the three main options illustrated in Figure 2.3.

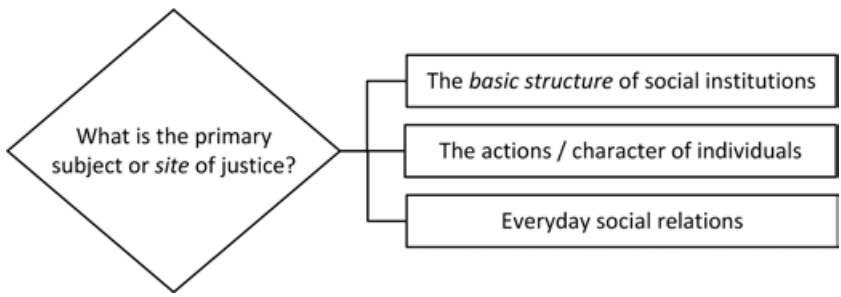

Figure 2.3 The site of justice

A main divide over the site of justice is between theories that consider it sufficient for the existence of a politically just society if principles of justice shape social institutions, and theories that hold that in a just society, principles of justice must shape personal behaviour as well. Rawls (1971 [1999]) held that the principles of justice apply only to the design of the 'basic structure' of society. The basic structure is the system of 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 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 also requires that people also develop an ethos of justice that guides their individual choices.

The site of justice question also animates feminist critics of mainstream political theory; indeed, Cohen cites the feminist slogan 'the personal is political' in laying out his critique of Rawls (Cohen 1997, p. 3). Feminist theorists

have unearthed shortcomings of theories of justice in recognizing women as equal members of society. In liberal theory, the private sphere is seen as the site of individual liberty, in which life, liberty and estate are enjoyed (Locke 1689 [1988]). The public political sphere has instrumental value only, as the space in which laws are formulated and rights are secured. As the head of family, men have been understood to represent interests from the private sphere politically, culturally and economically. In classical republican theory, the public, political sphere is seen as the realm in which the ethical goods of civic engagement and deliberation are enjoyed. It was conceptualized as a sphere for (select) male members of the polity, again resulting in the exclusion of women from debates about justice (Aristotle *c*. 350 BC [1995]). This exclusion of women prevents equal exercise of political rights (Pateman 1989; Okin 1991).

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. Critics have argued that the modern Western concept of citizenship, as defined by an individual's holding of civil, political and social rights, is 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 (contested) claims for differential treatment of specific groups in society, for instance through the granting of minority rights in multicultural societies (Kymlicka 1995).

2.4.4 The Scope of Justice

We now turn to the *scope* of justice: the question to whom the principles of justice, and particularly principles of distributive equality, apply. Do they apply only to fellow citizens of a nation state (or perhaps to a supranational federation such as the European Union, as discussed in Chapter 3, Section 3.6), or beyond borders, to humanity in general (Figure 2.4, below)?

Moral cosmopolitans claim that principles of justice 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 towards our compatriots (Scheffler 2001), and *strict* moral cosmopolitans, who believe that justice makes no distinction between our compatriots and others (Caney 2005). Both positions contrast with that of *anti-cosmopolitans*; those who argue that our obligations to compatriots either 'crowd out' duties towards people with whom we do not share any special relationship, or

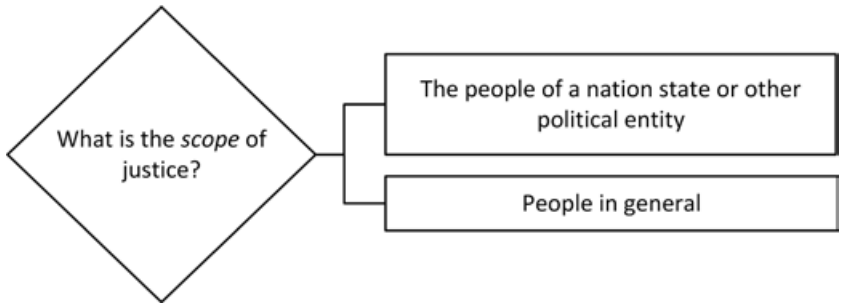

Figure 2.4 The scope of justice

that there are no obligations of justice beyond our communal ties (MacIntyre 1984; Kleingeld and Brown 2019).

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

We turn finally to a debate not about the scope of justice, but about how best to realize it, if its scope is cosmopolitan. *Institutional* or *political* cosmopolitans claim that justice requires the establishment of new 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 (see Kleingeld and Brown 2019).

2.5 CONCLUSION

Political philosophy gives us a framework for thinking through normative questions of justice, and a wealth of competing conceptions of justice. One fundamental issue that we have encountered is that much philosophical thought about justice has been primarily concerned with questions of the (re)distribution of primary goods. The liberal contractualist tradition still largely 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 put neither the individual rational subject nor the embedded community member centre stage; for them justice 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 could be made from within John Rawls's 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.

We have given a sampling of some very different views that have arisen in philosophical theorizing about justice; 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.

NOTE

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3. From political philosophy to messy empirical reality

Miklós Zala, Simon Rippon, Tom Theuns, Sem de Maagt and Bert van den Brink

3.1 INTRODUCTION: THE NEED TO CONNECT NORMATIVE AND EMPIRICAL

The mainstream of analytic political philosophy, which was our focus in Chapter 2, has primarily focused on 'ideal theory' that develops a conception of a more or less perfectly just society. This kind of theory has little need for empirical information. Philosophers have developed interesting and plausible ideal theories about how to distribute limited resources, or recognize each other as equals, or ensure that political power is fairly shared, in a just society.

But we don't live in the just society, nor can we realistically hope to reach utopia from here. So, what does ideal theory tell us to do here and now? Suppose, for example, that in the just society we would all give a certain proportion of our income to charity to help the least fortunate. In the real world, not everyone does their fair share of charitable giving. In consequence, some people starve, or die from curable diseases. One might reflect: If I were to give my fair share, people would continue to die because others would still fail to give theirs. So, am I obliged to give much *more* than my fair share, to mitigate these harms? More generally, people do not and will never comply with all their duties of justice. Knowing this, how should we arrange institutions in a just way? Given the manifold injustices in our society, how should we try to reduce the injustices and work towards a more just society? And what about the empirical complexities of the real world often overlooked by ideal theory: that it contains groups who have suffered a history of discrimination; or that it contains a wide variety of human beings with different abilities, attachments and responsibilities; or that it contains an intricate set of existing social and political institutions with specific roles and particular flaws, for example. What should be done here and now? Ideal theory is not designed to answer these questions, at least not directly.

As we argue in this chapter, those interested in justice in Europe should take an interest in 'non-ideal theory': roughly speaking, a kind of down-to-earth theorizing about justice that takes into account relevant empirical information. Empirical information, of course, includes information about a society's values, beliefs, preferences and experiences of justice and injustice. But justice is not simply what most people believe it is, or would prefer. Looking back on history, from Ancient Athens even until the 20th century, we now see that most people held seriously mistaken beliefs about justice: it was at times widely accepted as just that women should be denied the vote and excluded from the workplace, that slaves were bought and sold, or that the poor and so-called 'idle' would starve or were forced into the workhouse. Today's widely accepted beliefs about justice may come to be seen as equally mistaken. So, we cannot find out what justice is – how the world ought to be – simply by surveying people's beliefs, preferences or the like. This is an instance of 'Hume's Law' (see Chapter 2). Normative theory cannot be built wholly from empirical bricks. We need to take care to integrate empirical information into normative theorizing in the right way.

We proceed as follows. In Section 3.2 we examine the potential differences between ideal and non-ideal theory. We also defend the approach we recommend for thinking about justice in Europe, for which we borrow Jonathan Wolff's (2015b) term 'real-world political philosophy'. In Section 3.3, we give an illustration of this approach to justice; showing how different diagnoses of the nature of disability (that is, attention to the nature of the problem) can inform different policy responses to injustices. Section 3.4 explores the ways public opinion and preference, and the opinions and experiences of vulnerable groups, matter for theorizing about justice. Section 3.5 discusses the crucial concepts of vulnerability and vulnerable groups. Section 3.6 briefly discusses the relevance of existing European legal frameworks and institutions for theorizing justice in Europe.[1]

3.2 IDEAL THEORY AND REAL-WORLD POLITICAL PHILOSOPHY

The term non-ideal theory is used in contemporary political philosophy in several distinct though overlapping ways, almost always in opposition to ideal theory. Following Laura Valentini (2012), we identify three different understandings of the distinction: (1) the degree to which a theory assumes 'full compliance'; (2) the degree to which a theory is 'realistic' or 'utopian'; and (3) whether a theory is 'transitional' or 'end-state'.

The first way of understanding the distinction between ideal and non-ideal theories is as a distinction between theories that assume that (virtually) all agents do everything justice demands (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. Focusing on what justice would demand if everyone was willing to comply with the requirements of justice promises to show us justice in its 'pure' form (Ismael 2016). 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 (Miller 2011; Valentini 2012).

Second, 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 set of principles that are not hostage to empirical facts such as the complexities of 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 assumes 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; see also Chapter 2). But Rawls's theory is designed in a realist way insofar as it assumes common sense facts about moderate scarcity, limited altruism, and the conflicts that arise between individuals with differing conceptions of the good life, that is, differing goals and values. At the heart of Rawls's theory is the idea that justice is a matter of seeking fair terms of cooperation among 'reasonable' people: people who hold more or less coherent conceptions of the good life (usually relating to a religious, philosophical or moral tradition), are willing to accept and act on fair terms of cooperation on condition that others do likewise, and accept that because people reasonably disagree, no one should impose through state coercion the view of the good life that they happen to think is true. Rawls's principles are thus designed for 'beings like us, in circumstances similar enough to those in which we live' (Valentini 2012, p. 658).

Cohen (2008) critiqued Rawls's 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. For example, some critics claim that there is reasonable disagreement not just about conceptions of the good life, but about what justice is, and that this needs

to be taken seriously (Waldron 1999). Others have claimed that justice theorizing should take into account existing power structures, accepted practices and beliefs, and facts about the shortcomings of human nature (Williams 2005; Geuss 2008; Galston 2010). This shows it is a matter of degree how utopian or fact-sensitive a theory is.

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

A good example of a transitional theory is the comparative method adopted by Amartya Sen (2006). Sen thinks that we can approach justice by a process of pairwise comparisons, on the one hand of the current state-of-affairs in a given circumstance, and on the other of the expected state-of-affairs after a reform or policy change, and that we need no conception of an ideal end-state to do this successfully. Simmons (2010) criticizes Sen's view on the grounds that focusing on nearby improvements in justice might lead us further away from the ideal state of affairs (by analogy, heading uphill in the middle of a mountain range might lead us away from the highest peak). Fraser (1995) would criticize such approaches for failing to distinguish between 'affirmative' remedies, which focus on remedying identified unjust end-states, leaving the social processes that generate them untouched and potentially entrenching other kinds of injustice, and 'transformative' remedies that change social processes and solve the problems at their roots. But Fraser can in turn be accused of belittling the potential of incremental improvements in justice (see Chapter 12).

Sen's approach is most powerful and convincing when it is used modestly, that is, when the real-world state-of-affairs in question is grossly or manifestly unjust in a way that the reform or policy change is expected to alleviate. Consider Sen's idea of the example of gender violence: it just seems obvious, even in the absence of an ideal theory of justice, that decreasing the instances of gender violence would reduce the level of injustice in the world, other things being equal. An advantage of this modest version of Sen's comparative approach is that it mitigates the problems of irresolvable but reasonable disagreement and of value pluralism: the idea that there are multiple values that are incommensurable in the sense that they cannot be jointly realized

(Berlin 1969). Even if there is reasonable disagreement and, possibly, value pluralism about perfect justice, this does not mean we need to be committed to such reasonable disagreement about gross injustice. Perhaps reasonable views can and do converge when confronted with such injustices. It may not matter what grounds the injustice in question (presumably this would be the object of widespread disagreement) if one wants to articulate practical proposals for alleviating injustices.

Consider, for example, the idea that it is unjust for a state to make no accommodations whatsoever to enable disabled persons to exercise their right to vote. That this is unjust may be grounded on a plurality of different reasons: it may be considered unjust qua a violation of disabled persons' human rights, qua in conflict with procedural democratic justice, qua unfairly discriminating between disabled and able-bodied people and so on. Some of these reasons may be congruent or intertwined, while other reasons may be incommensurable. Still, this view holds: regardless of the disagreement over *why* it is unjust, we can agree that it *is* unjust for states to make no accommodations whatsoever to enable disabled persons to vote. A state that reforms the organization of elections and electoral policy would then, in this precise sense, become less unjust. In other words, more generally stated, we don't need to settle the precise nature of why certain injustices are unjust to be able to identify them as plausibly unjust.

This approach to prioritizing gross or manifest injustice, however, may seem to undermine interest in theorizing justice altogether. A critic may wonder why, if injustice is manifest, much is needed by way of empirical or indeed normative research. This position is wrongheaded. The fact that certain injustices are manifest *when they are in view* need not entail their obviousness in the absence of analysis. Many manifest injustices may be hidden from sight, either because of a lack of attention to a particular issue or because there are reasons for them to be hidden, both in the passive and the active sense. Returning to the topic of gender injustice, Sen (1990) shows that there are 100 million fewer women alive than ought to be expected by biology, a difference that cannot be (fully) explained by selective abortions. This leads to the conclusion that millions of girls and women are dying earlier than they should, relative to boys and men, due to neglect. The idea that this situation is a manifest injustice does not discount the fact that it took painstaking and difficult work to recognize its existence.

This last point can be generalized: it will often take painstaking empirical work to determine 'the facts', some of which, when in view, will appear manifestly unjust. Furthermore, it will be useful to understand the root causes of the manifest injustices we identify, so that we can address the fundamental problems rather than merely mitigate the symptoms. But even this does not conclude our normative inquiry. This is because solving a problem is not

always as simple as removing or reversing its cause. One does not help a stabbing victim by simply removing the knife; that may make things even worse.

If we wish to understand justice in Europe, we think it necessary to adopt a bottom-up approach to justice that begins from the practical problems and the manifest injustices that we face. This requires collaboration between empirical research and normative thinking, because bottom-up theorizing requires plenty of empirical information to be able to get off the ground (Wolff 2011, chapter 9, 2015b). We adopt Wolff's phrase 'real-world political philosophy' to describe our favoured approach. Real-world political philosophy is non-ideal theory in all three of the senses defined by Valentini (2012). It makes no idealistic assumption of full compliance, it begins from the empirical complexity of real-world problems, and it seeks improvement from where we are now, rather than a utopian ideal.

It is important to note that real-world political philosophy must be partial, as it does not aim to provide a complete account of a just society. Instead it might selectively focus on particular real-world issues such as drug regulation, gambling or public safety (Wolff 2011), or analyse specific forms of injustice and the social mechanisms that bring them about (Young 2011), or focus on particular vulnerable groups, as the ETHOS project generally has (see in particular Chapters 8 to 11). That said, in proposing a bottom-up, partial approach to justice, we do not thereby advocate 'isolationism' in Simon Caney's sense (2012, pp. 258–9). By 'isolationist', Caney means a treatment of the justice of one issue (for example, of climate change or gender) as if it were independent of all other issues of justice, and of general principles of justice. In the approach we advocate, as Wolff writes, 'the first task is to try to understand enough about the policy area to be able to comprehend why it generates moral difficulties, and then to connect those difficulties or dilemmas with patterns of philosophical reasoning and reflection' (Wolff 2011, p. 9). This approach need not be isolationist, since one can go on to connect bottom-up philosophical reflection on one real-world problem with broader normative considerations, including those of a more comprehensive or ideal political theory. In the end, while we believe that this integrative philosophical work is valuable, it does not follow that everything must be provided by the bottom-up, partial theory itself. Moreover, by a 'partial' or 'selective' bottom-up approach we do not mean that problems of injustice should be treated as though they are causally independent of one another, or that we should ignore intersectionality. Injustices, such as those related to climate change, migration and inequality are frequently related, and a sound bottom-up approach to justice would seek some understanding of their relations.

Because of its attention to specific, identifiable injustices, not only is real-world political philosophy partial (in the sense that it cannot hope to provide a complete normative theory of injustice, analogous to an ideal account

of the just society), but it is also rather difficult to characterize in general terms. Perhaps there is no better way to characterize this kind of theorizing than by example. Therefore, though considerations of length mean we cannot resolve or do justice to the complexity of the issues, we now turn to an example of how real-world political philosophy might approach one kind of problem of justice. We will show how concerns of recognition and redistribution arise in connection with a group of potentially vulnerable persons: people living with disabilities. Then we will indicate how different empirical models of the ways in which disabled people come to be disadvantaged suggest different kinds of policy remedies.

3.3 AN ILLUSTRATION: DISABILITY

People living with disabilities are frequently victims of exclusion and stigmatization, and are often disadvantaged in terms of income, wealth and opportunities (Putnam et al. 2019). This twofold concern evokes Nancy Fraser's (1995) two-dimensional framework of justice in terms of claims to recognition and redistribution (compare Fraser's later three-dimensional framework, discussed in Chapters 1, 4 and 12 of this volume). Indeed, as Gideon Calder points out, 'in particular, internally diverse ways, people with disabilities have been on the end of a kind of pincer movement between Fraser's two impediments to parity; maldistribution and misrecognition' (2010, p. 62, quoted in Putnam et al. 2019).

Justice for the disabled can be conceived of as a requirement that people with physical or mental impairments should not suffer disadvantages due to their atypical physical or mental characteristics. This needs an approach that we described above: one that first aims to diagnose injustice by understanding the ways in which people with physical or mental impairments come to be disadvantaged, and only then suggests a remedy. To diagnose injustice in this context, we start by examining the different explanatory models of disability.

Mainstream models of disability are of four different types: (1) the medical model; (2) the radical social model; (3) the minority group model; and (4) the human variation model. These models provide different explanations of the nature of disability and of why it is a problem (Wasserman et al. 2016):

1. The medical model of disability sees disability as an individual pathological condition that results in certain kinds of personal and social limitations. On this view, the limitations and disadvantages that physically or mentally impaired persons face stem from their individual impairments.
2. The radical social model of disability has been embraced by social movements since the 1960s in opposition to the medical model. According to the social model, disabilities are the results of discrimination and exclu-

sion from mainstream society. The activists of the Union of the Physically Impaired Against Segregation (UPIAS), the leading advocates of the social model in the UK, denied any causal role to physical impairments in creating disabilities: 'In our view, it is society which disables physically impaired people. Disability is something imposed on top of our impairments, by the way we are unnecessarily isolated and excluded from full participation in society' (UPIAS 1976, p. 3, quoted in Shakespeare 2006, p. 29).

3. The minority group model of disability, popular among contemporary disability scholars, is a version of the social model that emphasizes the similarity between disabled people and groups such as racial or ethnic minorities, who are subject to discrimination. On this model, the harm of disability arises primarily from exclusion. It advocates placing physical or mental impairments among the suspect categories in discrimination law (see Hahn 1996).
4. Another contemporary version of the social model, the human variation model, emphasizes the interaction between individual characteristics (impairments) and the social/material environment (for example, public buildings). It sees disadvantage as stemming from a *mismatch* between the two, which arises because the social/material environment cannot suit every individual human variation (Putnam et al. 2019).

The four different models of disability may suggest different remedies (Putnam et al. 2019). Wolff (2002) suggests four kinds of possible remedy. We first outline these, then briefly assess their congruence with the different models of disability outlined above:

(a) Personal enhancement: acting directly on the body or mind (for example, medical treatment).
(b) Targeted resource enhancement: the provision of (money for) resources for specific purposes (for example, a wheelchair to improve mobility, or eyeglasses to improve vision, or assistance services).
(c) Status enhancement: changing the way the public see the disabled, and enhancing the social/material environment to improve their functional ability (for example, adding ramps to public buildings for wheelchair users).
(d) Cash compensation: offering money, not for targeted resource enhancement, but to counterbalance supposed suffering such that the person no longer minds or regrets their disability.

As Wolff points out, cash compensation is a problematic remedy: 'I do not know of an argument from within the disability movement that the special miseries of the disabled need cash compensation, and no doubt this would be

considered deeply insulting' (Wolff 2002, p. 211). Therefore, we can focus only on the first three, comparing these remedies with the four models of disability previously outlined.

The medical model sees the problem in personal physical or mental impairment and suggests the cure of personal enhancement. The medical model can also recommend targeted resource enhancement and status enhancement, but only as second-best solutions. The radical social model sees the problem in disabling environments and suggests their reconstruction. This model disfavours personal enhancement as a solution and suggests status enhancement. The minority group model holds that the problem is the exclusion and discrimination of mainstream society, which suggests as a remedy status enhancement for the disabled. The human variation model locates the problem in the mismatch between human variations and environment, and suggests the remedies of either targeted resource allocation or status enhancement, with an emphasis on reconstructing the environment to accommodate the atypical personal characteristics.

In this way, different understandings of the problem of disability, and the mechanisms by which injustice is brought about, can help us shape the kind of policy recommendation to be offered as a remedy. Our method of theorizing justice in the context of disability will be real-world political philosophy insofar as we begin from an empirically informed understanding of the problem, use this to reason about the kind of moral difficulties it raises, and then reason towards principles of justice and policy recommendations that may ameliorate it. We are not engaged in top-down application of a preconceived theory of justice, but in bottom-up reasoning from the specific challenges that confront members of society. (For more on issues of disability and justice, see Chapter 10; also Anderson 2018.)

3.4 THE RELEVANCE OF PUBLIC OPINION AND THE OPINIONS AND EXPERIENCES OF MARGINALIZED GROUPS TO THEORIZING ABOUT JUSTICE

As mentioned in the introduction, empirical information about a society includes information about people's values, beliefs, preferences and experiences of justice and injustice. But justice is not plausibly understood as whatever (most) people believe it is. The question of how real-world political philosophy should be sensitive to psychological states is thus a delicate one.

There are several reasons for taking into account public opinion about justice when we are theorizing about it, as described by Adam Swift (1999). First, public opinion can play a useful cautionary role for the theorist. Knowing that others think differently about justice may give one cause for doubt, and reason

to reconsider one's theory. Philosophical reasoning can lead us to principles of justice that radically diverge from received opinion, and that many would find counterintuitive. While this is not in itself an objection to the principles, it should lead us to take particular care to check our arguments.

Second, at least in democracies, public opinion can set limits on what is politically feasible. Insofar as we are theorizing about justice and offering arguments to try to change the world, and not purely for academic interest, we had better take public opinion into consideration. At the same time, however, we should be wary of taking public opinion as a given and as a hard feasibility constraint on justice. Public opinion can change, and the views propounded by theorists can play a role in changing it. If we hew too closely to the limits of what we view as feasible in the short term, we may miss out on long-term progress.

A slightly different but closely related role of public opinion has to do with the stability of political and economic institutions. Rawls's project in *Political Liberalism* (1993), for instance, was to investigate how a just and stable democratic society is possible. His concern with the stability of the basic structure of society was an important reason for giving a justificatory role to public opinion. Rawls's basic idea was that there exists a reasonable pluralism of conflicting religious, moral and philosophical traditions, so the principles of justice for a society should be justified not by reference to any particular tradition, but rather by reference to shared principles and values that are implicit in democratic practices and institutions as such. Rawls sought an 'overlapping consensus' in which citizens affirm the same basic conception of justice, though for different reasons, stemming from their differing conceptions of the good and their desire to pursue these. Rawls contrasts this idea of an overlapping consensus with that of a mere *modus vivendi* in which there would only be a balance of power between competing groups. In case of an overlapping consensus a society is stable for the right kind of reason, because all reasonable citizens can wholeheartedly affirm the shared conception of justice (for different reasons), whereas in a *modus vivendi* a society may be momentarily stable, but not robustly so.

Third, one might think that public opinion plays a constitutive role in determining the true principles of justice. The boldest version of this view is the one encountered in the introduction: that justice is just what people believe it is. This view is implausible because public opinion can be abhorrent or incoherent. Weaker versions of it have been defended by interpretivist theorists such as Michael Walzer (1983) and David Miller (1999, 2016). Walzer's egalitarian theory of distributive justice starts from an analysis of the social meanings that arise from our conception and creation of different kinds of goods. Walzer considers himself guided by a 'decent respect for the opinions of mankind' (1983, p. 320). At any rate, Walzer is certainly guided by his interpretation

of the meaning of actual institutions and practices, and the ways that they treat different criteria and arrangements as appropriate for the distribution of different kinds of goods. For example, our institutions suggest that money and political office should not be distributed according to the same logic: political office is not to be bought and sold. Similarly, Miller claims that a theory of justice is to be developed by 'bringing out the deep structure of [the public's] set of everyday beliefs' (1999, p. 51), so that philosophical theorizing about justice should be constrained by the public's commitments. A main challenge that has dogged theorists like Miller is to explain why theorists are entitled to use a critical standpoint to, as it were, correct the deficiencies of existing public opinion and of the practices of their fellow citizens, while yet maintaining that normative theorizing should be fundamentally constrained in any way by what people happen in fact to think or to treat as appropriate (Baderin 2018).

A modified version of the constitutivist view is not similarly theoretically problematic. On this view, public opinion does not determine the true principles of justice at a fundamental level, but rather the true principles of justice, which have independent grounding, give weight to public opinion on certain issues. For example, it might be that society's conventional desert claims are mistaken, but when people have acted in good faith on these, they still seem relevant to what these people should get as a matter of justice (Swift 1999).

There are many more contexts in which the true principles of justice plausibly give weight to the public's experiences and preferences, not just their opinions about justice. For example, suppose that a town can apply for a limited grant to build either a handball arena or a football stadium, and that a large majority would prefer the handball arena. All other things being equal, it is plausible that justice requires following the majority preference and building the arena. More generally, justice must take into account what people experience as beneficial or detrimental to their well-being.

In addition to considering the opinions, preferences and experiences of the public as a whole in theorizing about justice, we have particular reason to take into consideration the experiences and opinions about justice of marginalized and vulnerable groups, such as women, ethnic minorities and refugees. Members of marginalized and vulnerable groups often have unique insight into the circumstances of injustice they experience (Young 1990). Their relevant social knowledge may be largely tacit, which means it is not a matter of knowing propositions that can be straightforwardly expressed and transmitted by testimony. Indeed, their knowledge of injustices they face may be tacit because of hermeneutic injustice they have suffered, where the dominant social group denies them the conceptual resources needed to fully interpret and express their experiences of injustice (Fricker 2007; Lepianka 2019; Rippon and Zala 2019). Consequently, members of marginalized and vulnerable groups have special claims to be heard and to be included as participants in

theorizing about justice; both *epistemic*, in virtue of their superior epistemic standpoints, and *moral*, in virtue of their claims to recognition as victims of injustice (Wasserman et al. 2016). For a presentation of some of the ETHOS project research that attempts to give voice to marginalized and vulnerable groups, see Chapters 8 to 11 of this volume.

3.5 VULNERABILITY

As we have seen, it is important to listen to the opinions of the members of marginalized and vulnerable groups. Members of vulnerable groups are more likely to suffer injustice, giving them a claim to recognition, and they are in a privileged epistemic position to identify the injustices they may face and the mechanisms that reinforce these. But what is vulnerability, anyway? We can understand vulnerability in either an absolute or a relative way.

Absolute vulnerability is thought of as an inherent, ontological property of human life. On this view, our human nature as embodied creatures who are mortal, needy and dependent on others makes us essentially fragile and susceptible to suffering, wounding and injury (Mackenzie et al. 2014). This absolute view of vulnerability is closely connected to the focus on interrelatedness and dependency of human beings found in the 'ethics of care' tradition.

In contrast, relative vulnerability is the 'susceptibility of particular persons or groups to specific kinds of harm or threat by others … vulnerable persons are those with reduced capacity, power, or control to protect their interests relative to other agents' (Mackenzie et al. 2014, p. 6). While some vulnerability may be intrinsic to the human condition, relative vulnerability often has a context-dependent, situational character. Situational vulnerability is socially constructed, that is, it 'may be caused or exacerbated by the personal, social, political, economic, or environmental situations of individuals or social groups' (Mackenzie et al. 2014, p. 7). To take an example, in a natural disaster, situational vulnerabilities may arise from the way in which social factors mediate and amplify its effects in certain populations (Mackenzie et al. 2014; see also Young 2011, chapter 2). A subset of situational vulnerabilities can be identified as pathogenic. 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, p. 9). Another morally important point is that while broad groups are subject to vulnerabilities, whether these vulnerabilities are manifest (that is, whether harms occur because of them) depends on a range of different factors, such as socio-economic status and education, access to health care and so on. For example, all pregnant women are vulnerable to complications in childbirth, but

these complications do not occur with equal frequency or harmfulness to all women. Within vulnerable groups, some are more vulnerable than others, and vulnerability is frequently exacerbated by intersectionality (Anderson et al. 2018; see also Chapter 13 of this volume).

Implicit in the relative notion of vulnerability, then, is the role of social causation in creating vulnerabilities. This is especially important in the context of theorizing about justice because unjust social structures often create vulnerabilities. For example, in Section 3.3 we encountered the radical social model of disability: that it is society that turns impairments into disabilities. A related claim is that society unnecessarily institutionalizes the disabled, although they could be just as creative as others if adequate social accommodations were provided (Shakespeare 2006; see also Chapter 10). Similarly, Judith Butler makes the distinction between 'precariousness', that is, a 'general feature of embodied life', and 'precarity', that is, a politically situated concept where 'precariousness is amplified or made more acute under certain social policies'. 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, interviewed in Kania 2013, p. 33).

It is evident that vulnerability bears a complex relationship to the human being, to the social world, and to justice, for which it very much matters whether a vulnerability is absolute or relative, whether it is situational, and whether it is exacerbated or made manifest by unjust social structures. Real-world political philosophy for a project like understanding justice in Europe needs a division of labour. It is necessary to identify what situations or processes worsen (or can alleviate) what kind of vulnerability of what groups. These groups are numerous, and it is also clear that vulnerabilities can also intersect (Crenshaw 1991; Wolff and de-Shalit 2007). It is probably impossible to give a comprehensive list of vulnerable groups that exist in Europe and their vulnerabilities. But the ideas of vulnerability and of vulnerable groups can work together with the concept of manifest injustices we encountered in Section 3.2, helping us to identify and better understand the manifest injustices that exist across a pretty heterogeneous region. Vulnerable groups are likely to include ethnic and cultural minorities (Chapter 8), children (Chapter 9), the elderly, caregivers and people living with disabilities (Chapter 10), and women (Chapter 11), who may be subject to marginalization and misrecognition. However, it must be remembered that vulnerable groups are not internally homogeneous. Some are more vulnerable than others, and intersectionality plays a significant role. Specific problems of relative vulnerability can be raised within vulnerable groups due to hierarchies of social and political influence, relative socio-economic position, gender and so on (see also Bugra 2018). But even the identification of particularly vulnerable persons and the

nature of their vulnerabilities is not the end of our normative inquiry, because the mere identification of vulnerabilities, like the identification of manifest injustices, does not yet tell us what should be done about them, or who should be responsible for doing it, for example, the nation states or the European Union as a supranational entity.

3.6 THE RELEVANCE OF EUROPEAN LEGAL AND INSTITUTIONAL FRAMEWORKS

Real-world political philosophy begins from the real world we live in, rather than an ideal world we might like to live in. The current European legal frameworks and traditions, both within European states and at the supranational level (in the EU and in the Council of Europe, for example) is of importance for at least two reasons. First, it is important to understand how vulnerabilities and injustices arise from the way that legal and social institutions impact on particular groups and individuals. Second, if we want to make pragmatic proposals about what to do here and now, we must propose amendments to current law and policy, however imperfect it may be, rather than propose some imaginary policy we would like to have instead. We must be able to get there from here.

The EU as a unique supranational entity raises the scope of justice question, as discussed in Chapter 2. For anti-cosmopolitans, principles of justice will apply at the level of the EU as they apply to nation states only insofar as fellow citizens of the EU are analogous to compatriots, with whom we are engaged in a shared political project and with whom we have communal ties. For institutionalists, inspired by the Rawlsian idea that justice concerns arise only in situations in which individuals cooperate for mutual benefit, principles of justice will apply only insofar as the institutions at the supranational level are robust enough to trigger obligations. One influential institutionalist, Andrea Sangiovanni, argues that 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, p. 228). Since some member states may benefit more than others from this project, this raises the question what principles should apply for the redistribution of benefits and burdens.

One important question to consider both from the pragmatic perspective of real-world political philosophy and from the perspective of the scope question is the legal question of which areas of policy are competencies of supranational institutions, and which competencies are reserved to states. Supranational institutions cannot, at least currently, be expected to uphold justice in Europe in areas in which they have no legal competence to intervene.

For these reasons, we need to pay close attention to the nature of existing legal frameworks and institutions. (The nature of various existing European legal frameworks and traditions, and their impact on justice, is explored in detail in Chapters 5 to 7 of this volume.) We should not forget, though, that justice is normative: it is not about what *is* the case, but about what *ought* to be. We should therefore not limit ourselves to internal criticisms of European institutions, taking their current ambitions for granted. The fact that institutions currently do not take responsibility in particular areas does not imply that they should not (be enabled to) take responsibility. As well as the specificities of the European legal frameworks and traditions, we should not forget to pay heed to considerations of moral responsibility, capacity and efficiency when considering who should remedy injustices in Europe.

NOTE

1. This chapter draws on material previously published in ETHOS reports by Rippon et al. (2018), van den Brink et al. (2018) and de Maagt et al. (2019).

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4. Redistribution, recognition and representation: understanding justice across academic disciplines

Trudie Knijn, Tom Theuns and Miklós Zala

4.1 INTRODUCTION

The ETHOS project adopts Nancy Fraser's tripartite theory of justice as a framework for analysing justice-related problems in Europe, as outlined in the introduction of this book. There are at least two reasons why taking Fraser's framework, which consists of the normative dimensions of redistribution, recognition and representation (see Fraser 1990, 1995, 2005, 2007; Fraser and Honneth 2003), was useful as a theoretical starting point for the project. The first reason is historical: in the twentieth century and especially after World War II it became a generally accepted demand in Europe that states must be welfare states where individuals and relevant social groups are both adequately represented and recognized. The second one is the need for ecumenical justice-desiderata that can be applied by several disciplines; the Fraserian framework has the potential to provide a common denominator for an interdisciplinary project. This chapter evaluates the contribution of several academic disciplines – economics, political and social science and law – to the different premises of redistributive, recognitive and representative justice conceptions. Although most of these academic disciplines eschew explicit normative judgements, they nonetheless implicitly express normative assumptions about justice.

We show that these various assumptions and remedies to forms of injustice that emerge from it may be incompatible. Not only because of the various assumptions of the academic disciplines, but also because of possible tensions and trade-offs between justice conceptions themselves, such as Fraser's own redistribution–recognition dilemma. In this context, a multidisciplinary approach to justice results in enriching the three core concepts, even when the concepts are unevenly grounded in the respective academic disciplines. The chapter also argues that theorization of justice goes beyond the three aspects

highlighted in the Fraserian model, for instance including considerations of restorative and procedural justice, which can be highly relevant (see also Chapter 12 in this volume).

Before we move on to examine the theorization of justice in various academic disciplines through the lenses of these three aspects of justice, we start by shortly reflecting on the redistribution–recognition dilemma as a central aspect of Fraser's non-ideal justice theory (see Chapter 1) and the controversies it has raised. Section 4.2 analyses and assesses the conceptualization of justice in legal, economic, political and social theory through the lens of redistribution. Section 4.3 looks at these disciplines through the lens of recognition. Section 4.4, in turn, focuses on the conception of justice as representation. Subsequently, Section 4.5 probes for justice conceptions in the discussed disciplines that are not well captured through the tripartite framing of justice as redistribution, recognition and representation. Finally, in the conclusion the various remedies to injustice as brought forward by the academic disciplines are evaluated.

4.2 THE REDISTRIBUTION–RECOGNITION DILEMMA

Fraser's 'non-ideal' theoretical approach to political philosophy focuses on the instances of (in)justice observable in the real world by asking: 'how fair or unfair are the terms of interaction that are institutionalized in the society?' (Fraser et al. 2004, p. 367). She develops a justice principle with the idea that democratic societies must satisfy 'participatory parity' (Fraser 1990, 1995) holding that 'social arrangements that institutionalize obstacles to participation are unjust' (Fraser 2007, p. 315). Both maldistribution and misrecognition are problematic in virtue of violating the principle of participatory parity because both hinder or exclude individuals or social groups to 'participate as peers' in a democratic society (Fraser 2007, p. 315). Struggles for recognition and (re) distribution can work at cross-purposes: redistribution can harm the goals of recognition and not every recognition claim can foster socio-economic justice at the same time (Fraser 1995). The reason for this is that socio-economic injustices require socio-economic restructuring that 'often call[s] for abolishing economic arrangements that underpin group specificity' (Fraser 1995, p. 74). This is what Fraser calls the redistribution–recognition dilemma.

Moreover, in the real world, many injustices are a combination of maldistribution and misrecognition, implying that most groups regarding these two categorical injustices are 'bivalent' (Fraser 1995). For example, both gender

and racial inequalities can be considered as injustices that are mixtures of maldistribution and misrecognition. But then, we are faced with the dilemma:

> Insofar as women suffer at least two analytically distinct kinds of injustice, they necessarily require at least two analytically distinct kinds of remedy – both redistribution and recognition. The two remedies pull in opposite directions, however. They are not easily pursued simultaneously. Whereas the logic of redistribution is to put gender out of business as such, the logic of recognition is to valorize gender specificity. (Fraser 1995, pp. 78–9)

Fraser acknowledges that no easy solutions are available for resolving this dilemma:

> The redistribution–recognition dilemma is real. There is no neat theoretical move by which it can be wholly dissolved or resolved. The best we can do is try to soften the dilemma by finding approaches that minimize conflicts between redistribution and recognition in cases where both must be pursued simultaneously. (Fraser 1995, p. 92)

In addition, she articulated the dimension of *representation* as political participation stemming from globalization: within the 'Keynesian-Westphalian' system of nation states based on 'the social-democratic paradigm' following World War II, the redistribution–recognition model was an adequate way to analyse claims-making about justice (Fraser 2007). But political claims-making is no longer only about relations among fellow citizens in a bounded nation state. Focusing 'on the "what" of justice (redistribution or recognition)' it was taken for granted 'that the "who" of justice was the national citizenry'. This Westphalian model of nation state social democracy is no longer taken for granted:

> [w]hether the issue is immigration or indigenous land claims, global warming or the 'war on terror', Muslim headscarves or the terms of trade, disputes about what is owed as a matter of justice to community members now turn quickly into disputes about who should count as a member and which is the relevant community. (Fraser 2007, p. 313)

Thus, justice requires a new participation frame that problematizes the political space as bundled polities and decision rules to identify who is included/excluded from the 'circle of those entitled to a just distribution and reciprocal recognition' (Fraser 2007, pp. 313–14).

Therefore, the purpose of this chapter is to build up and build out from Fraser's framework to expand it with interdisciplinary input while not losing sight of some of its key assumptions – to highlight the importance of a context-specific analysis and direct attention to the fact that a given individ-

ual or group can suffer different kinds of injustices, which should not be examined in isolation. By enriching Fraser's theoretical framework and applying it to real-world situations, as is shown in Chapters 5 to 11, this volume aims to understand the tensions, potentially contradictory remedies and omissions in an empirically informed theory of justice.

4.3 MULTIDISCIPLINARY PERSPECTIVES ON REDISTRIBUTION

Despite Fraser's objections, considering redistribution foundational remains common in justice-theorizing. The principles and assumptions of just and fair redistribution vary between justice conceptions, ranging from the absence of constraints, access to welfare and/or primary goods, to the demand of real individual opportunities to do and be what people have reason to value (the 'capabilities' approach). In analysing justice concepts in various disciplines, this section shows that economists, legal, political and social scientists and political philosophers all approach redistributive principles differently in the light of their diverse normative and theoretical assumptions and traditions. Thus, what an 'optimal redistribution' would be or how it should be reached cannot be settled scientifically.

Since Marx proclaimed his economic and political philosophy by turning upside-down the triggers of social change and explaining hegemonic ideology as founded in the forces of production and class interests, debates on what comes first, 'ideas' or 'material resources', are ongoing. Fraser, as a self-defined cultural Marxist, acknowledges that redistribution is not only a matter of the allocation of resources to needs. She accentuates needs not as predefined categories but as subject to struggle and interpretation, concluding that inequalities among the struggling parties are structured simultaneously by access to material resources and discursive resources: 'However, in welfare-state societies, needs-talk has been institutionalized as a major vocabulary of political discourse' (Fraser 1989, p. 291). Here, redistribution is not a matter of economic classifications but embedded in the discursive political domain: 'needs-talk appears as a site of struggle where groups with unequal discursive (and non-discursive) resources compete to establish as hegemonic their respective interpretations of legitimate social needs' (Fraser 1989, p. 296). Today, she argues that belonging, in- and exclusion, and having a say are crucial for making claims on recognition and redistribution with the ultimate goal of 'participatory parity'. In line with that, we analyse arguments and principles of economic, law and social disciplines as well as of political philosophy from the point of view of (re)distributive justice.

Controversies on justice concern its principles, shape, scope and site (Rippon et al. 2018; Chapter 2 of this volume). While Rippon et al. demon-

strate that the grounds of redistributive justice principles are multi-fold in the theoretical literature, ranging and varying for example from bare power relations to enlightened self-interest, human development and independence, this rich variety is only minimally reflected in economic theory, as José Castro Caldas (2018) explores. While one could expect that economic theory par excellence would be interested in redistributive justice, Castro Caldas sketches the typical hegemonic economic theory in the twentieth century as indifferent if not aversive towards principles of just redistribution with disastrous effects. Self-interest, utilitarianism and 'rational choice' have dominated the redistributive approach of economists resulting in what Castro Caldas (2018) calls 'the economization of justice', an economic theory that claims to be 'independent of any particular ethical position or normative judgments' (Friedman 1953, p. 4). The 'neutral' proscription of certain economic policies, often paired with resistance to redistributive policies, seems, however, to often belie the claim to value-neutrality.

However, alternative and dissenting views are available. For instance, Amartya Sen's (2009) ideas of sympathy and commitment as moral capabilities offer a redistributive justice perspective that brings to the fore functionings (states and activities constitutive of being healthy, safe, happy and enjoying self-respect) and capabilities (the alternative combinations of functionings to achieve). He challenges economists to engage in 'reasoned diagnoses of injustice, and from there to the analysis of ways of advancing justice' (Sen 2009, pp. 4–5). Joseph Stiglitz (2016) goes a step further by focusing on the principles of the underlying productive and financial systems. He analyses inequities caused by current rent-seeking behaviour resulting in savings being channelled to speculation in real estate and financial markets, while gross inequalities of outcomes and opportunity deplete the potential of those at the bottom and hinder not only present economic demand but also future growth. From this perspective, reducing maldistribution requires 'more investment in public goods; better corporate governance; anti-trust and anti-discrimination laws; a better regulated financial system; stronger worker's rights; and more progressive tax and transfers policies' (Stiglitz 2016, p. 149).

The articulation of principles of (re)distributive justice in social theory follows a similar path (Anderson et al. 2017). By assuming rational choice of individuals and separating the economic analysis of the causes of inequality from the social analysis of consequences of inequality, mainstream sociology pretended to have become a 'real positive science' and left behind or marginalized normative justice reflections on the relationship between injustice, structural inequalities and capitalism (Streeck 2016; Romero 2019). Nonetheless, Anderson et al. (2017) report that some sociologists have challenged social and institutional power mechanisms causing maldistribution. Bourdieu (1979) unravelled the intergenerational transfer of economic, social and cultural

capital and showed how this was supported by networks of the elite, state institutes and schools. As a cause of poverty, sociologists have shown that maldistribution is a cumulative indicator for lack of money, housing, education, health, (political) voice and culture (Deleeck 2001). Finally, Wilkinson and Pickett (2009) indicate that redistributive injustice goes at the cost of individuals at both the upper and lower end of the social ladder, in addition to undermining social cohesion, social well-being, health, safety and prosperity. While social theorists might be committed to a just and fair society in diverse ways, the dogma of 'value-free' science binds them to mainly pragmatic arguments; explicit moral reasoning is avoided.

That inequalities are structured simultaneously by access to material resources and discursive resources is shown by black, disability and gender studies representing justice-oriented but marginalized subdisciplines in social theory (Romero 2019). Like Fraser social and economic gender studies mostly define gender as a basic organizing principle of the economic structure of societies that are divided into paid 'productive' labour and unpaid 'familial' or 'reproductive' labour. Gender principles organize paid labour in a gender-divided and hierarchical order with well-paid 'male' and lower-paid 'female' jobs (Fraser 1998). The underlying premise though is that 'gender injustices of distribution and recognition are so complexly intertwined that neither can be redressed entirely independently of the other' (Fraser 1998, p. 10). Also in line with Fraser and Gordon's (1994) analysis of dependency, scholars in the debate on care, gender and citizenship critique the concept of dependency as a negatively connoted term in the context of industrial capitalism, at least for those who were not able or permitted to participate fully in that market: women, minorities, the old and the disabled.

An alternative approach is to define care relations as interdependent by arguing that 'every citizen is dependent on someone else in one way or another'. That assumption allows for the recognition and redistribution of reproductive work during the life course for both genders (Knijn and Kremer 1997, p. 352). Kittay adds to this that 'having dependents to care for means that without additional support, one cannot – given the structure of our contemporary industrial life and its economy – simultaneously provide the means to take care of them and do the caring for them' (Kittay 1998, p. 130). By analysing care work and its systematic gendered distribution, feminist scholars question mainstream assumptions of social theory, economics and philosophy that a society is composed of equal and autonomous persons (Chapter 10).

While mainly an epistemic rather than a substantive position on justice, 'standpoint theory' comes to a similar conclusion by providing insights in everyday experiences of (in)justice by exploring marginalized standpoints. The process, sites and experiences of 'marginality' provide a different lens through which to understand social citizenship and issues of justice (Turner

2016). Standpoint theory has the potential to draw attention to class as well as other attributes that are more commonly associated with identity politics. In that way, it reflects Fraser's attention to human needs seen as an unequal discursive arena. In such an arena, different categories of the population compete to generate those interpretations of legitimate social needs that will become hegemonic. Disability, gender and black studies also bring attention back to the physical body by reflecting on the materialized aspects of identity – able-bodiedness, race and ethnic-bodiedness, and gendered bodies – as categories of exclusion in the redistributive process (Anderson et al. 2017).

From the economic and social theory disciplines, it might be concluded that redistribution is about the interpretation of needs, a central domain of welfare states, about the organizational principles of the labour market and its relationship to the domestic arena, about the functioning of global financial markets and the tendency towards rent-seeking instead of investing in public goods, and about redistribution principles that promote or undermine assumptions of a 'good society'. Such theorizing is absent in legal theory that tends to conceive redistributive justice in a rather formal way. A substantive legal theory of (re)-distributive justice is missing, and a legal vocabulary of needs-interpretation is not translated into law (Salát 2018).

Political theory does better in identifying the relationship between representation of marginalized groups and their resources. However, Buğra (2018) in her overview of political theory agrees with Bauman (2001) that socio-economic transformations accompanied by the salience of identity politics, multiculturalism and different types of communitarianism replace criteria of social justice by those of respect for difference. Individual anxiety and fear channels people away from the claims of social distribution. She argues that relating recognition and representation to the 'freedom to pursue one's valued ends of life' is 'an important concern in different conceptualizations of justice' in political theory scholarship (Buğra 2018, p. 8). The question remains what freedom means and how this relates to the proper setting of socio-economic and political relations where people could be equally free (Buğra 2018). Even a 'fair' distribution of resources available to people to pursue their valued ends (Rawls 1999) has to take into account the differences in the ability to use these resources in a way that allows different types of instrumental freedoms.

4.4 MULTIDISCIPLINARY PERSPECTIVES ON RECOGNITION

Recognitive justice entails that individuals are provided with care, respect and esteem; there must be adequate social appreciation of the value of one's contribution to the social division of labour (Honneth 1996). Recognition can be categorized according to 'the kind of features a person is recognized for'

(Iser 2013). Charles Taylor, for instance, differentiates between three forms of recognition: universal recognition that recognizes equal dignity of all human beings, the recognition of difference that 'emphasizes the uniqueness of specific (and especially cultural) features', and the recognition of 'concrete individuality in contexts of loving care that are of utmost importance to subjects' (Taylor 1992, p. 37).

One might expect that recognition would be a constitutive aspect of legal theory because the idea of human rights 'is based on the idea that every human being has certain universal, inalienable and indivisible rights, regardless of the political community to which (s)he does (not) belong' (Salát 2018, p. 15). But since many find grounding human rights in 'a certain conception of human nature' as a case of 'unwarranted essentialism', the solution is usually a compromise that 'universal human rights apply equally to everyone, but their actual interpretation might be culturally varied, to some – allegedly "limited" – extent' (Salát 2018, p. 15). Hence, in legal theory, as in European Union (EU) law, Salát concludes: 'issues of supremacy and national identity remain a contested field because it is a formal structure of deciding which particular conception of justice is to prevail, framed in the language of national identity' (Salát 2018, p. 33). By implication, legal theory has challenges to address recognitive consequences of human or fundamental rights. Salát explains that this is due the contested formal obligation to treat human rights globally in a fair and equal manner according to the 1993 Vienna Declaration on human rights:

> [w]hile the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms. (Salát 2018, pp. 33–4)

The consequence is that fundamental (human) rights which the state must strive for are not enforceable as an individual fundamental right in court.

Furthermore, recognition concerns are also present in the sphere of 'status-rights'. These are 'rights of the person to be recognized as member of the community, being it citizenship, refugee or protected person' (Salát 2018, p. 34). By consequence legal recognition often comes with the exclusion of others who do not satisfy the criteria of the given status.

Another issue in legal theory is the recognition of (ethnic) minorities. Nation states can do so by giving special status like cultural and language rights, such as rights of self-governance and territorial autonomy (Salát 2018). In such cases, justice claims of recognition and representation seem to merge. Despite their universalist orientation, human rights theory – and indeed, human rights law – often recognizes the equal dignity of members of minority groups. In addition to equal treatment, this demands positive measures regarding several

types of minorities as well as for women (Salát 2018). In sum, recognition as it is conceptualized in legal theory is subsumed to the 'right to have rights', while in other disciplines it is much broader.

Political theory deals with recognition in a 'Janus-faced' way. Buğra (2018) explains that political theory sees recognizing individuals and groups as indispensable for justice. For instance, Philip Pettit's (2004, 2014) republicanism requires non-domination and the 'eyeball test', according to which members of a society should be able to 'look one another in the eye without reason for fear or deference' (Buğra 2018, p. 11). State actions that undermine these principles are unjust in virtue of violating the idea of equal citizenship.

The political-theoretical perspective on recognition also has negative sides related to intersectionality: groups are not homogeneous and people have intersecting identities, which means that an individual being 'grouped' in terms of ethnicity, gender, age, sexual orientation or class might place them in a disadvantaged position. There is, therefore, a tension between group and individual rights, for instance the oppression of women within a group (Buğra 2018; see also Okin 1999). Buğra's argument here is in line with Fraser's who emphasizes that no acceptable recognition claim can violate basic rights and liberties (Fraser 1995) nor should identity claims prevail over claims for recognizing the equal status of individuals or groups (Fraser 2001). Instead of an 'identity model' of recognition that might result in a 'drastically oversimplified group identity', overlooking the 'complexity of people's lives', and the 'multiplicity of their identifications' (Fraser 2001, p. 24), she offers the 'status model' of recognition as an alternative, which understands misrecognition as the lack of equal status of minority group members.

In social theory recognitive justice is discussed as a matter of categorization, for instance:

> [Paul] Willis showed how 'lads' opposing and obstructing middle-class schools norms ended up in low-skilled jobs, Bourdieu explained the mechanisms that mean that the privileged reproduce better-off offspring not only by the transference of economic capital, but also through providing a useful social network (social capital) and high-standard (cultural) education (cultural capital). (Anderson et al. 2017, p. 4)

Knowledge of the (marginalized) experiences of embodied people for instance LGBTQI, ethnic and elderly persons and people with disabilities provide a different lens through which to understand issues of justice, which can otherwise reflect the majority's experiences. As Wasserman et al. (2016) point out, not giving due attention to the first-hand experiences of individuals with certain disabilities in designing public arrangements is a sign of misrecognition, because it is disrespectful to disregard experiences of either the

victims of injustice (in case of stigmatization) or the future users of the given arrangements.

While contemporary mainstream economics is largely silent on recognition, historically, economists have contributed to the conceptualization of recognitive justice:

> [Adam] Smith's human being is endowed naturally with multiple and contradictory propensities. Among them is the desire for approbation. But since that desire alone would not render him fit for society, nature has endowed him also 'with a desire of being what ought to be approved of; or of being what he himself approves in other men' (TMS, III.I.14). He thus 'naturally desires, not only to be loved, but to be lovely ... [; he] naturally dreads, not only to be hated, but to be hateful … [; he] desires, not only praise, but praiseworthiness ... [; he] dreads, not only blame, but blame-worthiness' (TMS, III.I.8). (Castro Caldas 2018, p. 4)

This idea from Smith is related to the relational character of recognition, namely that someone must be recognized by others in a community, and that individuals must be able to appear in public without shame. Similarly, Sen has argued that 'the ability to go about without shame' is a relevant basic capability which should figure in the 'absolutist core' of notions of absolute poverty (Sen 1983, 1993).

4.5 MULTIDISCIPLINARY PERSPECTIVES ON REPRESENTATION

Recognition and redistribution are deeply connected to representation. Democratic theorists and political philosophers are in broad disagreement about what theory of just representation is convincing, and what conceptualization of representation is normatively defensible (Rippon et al. 2018). EU institutions have been frequently diagnosed with a 'democratic deficit', often ascribed to a lack of sufficient democratic control over EU policies and regulations, and insufficient citizen participation in EU politics (Kosti and Levi-Faur 2018; Rippon et al. 2018). Even where a law, polity or policy meets other demands of justice such as redistributive and recognitive concerns, there may be representative injustices.

Fraser first focuses on 'ordinary-political' misrepresentation, where certain voices within a polity are unjustly excluded or muted. Pettit (2004) nuances this ordinary-political approach, drawing attention to two distinct dangers of such misrepresentation: the 'false negative danger', which 'involves the missing out or ignoring certain public interests', and the 'false positive danger', consisting of inaccurately 'misrepresenting common interests and falsely identifying other interests as common interest'. Another form of misrepresentation is 'misframing': the unjust exclusion of certain persons from

a political community because the boundaries of that community have been (unjustly) drawn (Fraser 2009).

Critical Social Theory has explored the socio-political determinants that lie behind philosophical analyses, asserting that the object of knowledge and the knower are embedded in historical and social processes. Theorists in this tradition claim that reflective assessment of communicative rationality and intersubjectivity are central to human emancipation (Benhabib 2004). Discourses of moral justification are thus necessarily open-ended and the 'dialectic' of rights and identities they involve introduces a different dimension to the way we think about transformative remedies against injustices (Buğra 2018, p. 19). As such, critical-discursive theories do not 'consider the existing structure of institutions and social relations as given', nor 'regard identities as fixed and unchanging' (Fraser 2014; Buğra 2018). This enables the theorist to think about *convergence* as a possible outcome of processes of democratic negotiation where norms of just representation prevail.

Mainstream politico-theoretical concerns with representative justice mainly focus on the question of formal versus civic participation, and the challenges to representative government from pluralism and autonomy. Another traditional concern is with 'electoral proportionality' (Buğra 2018; Salát 2018), which might be related to Fraser's idea of participatory parity; certain electoral systems better translate votes into seats, although there may be trade-offs regarding minority representation. Buğra notes, however, that outside formal processes, issue-specific interest groups, petitions and referenda 'have an increasing appeal' to those engaging in 'unconventional types of political action' (Buğra 2018, pp. 25–6). In line with Sen, she argues that political theory has to cope with the paradox that democratic representative politics claims to give guidance on what to do with the fact of value pluralism despite democratic polities being riven by intractably divergent views of the good life. Settling such conflicts democratically requires an equal chance to people to 'represent their grievances and claims' in the context of 'public reasoning' (Buğra 2018), and to 'live under a government in such a way that we do not think of it as an alien will in our lives' (Pettit 2014).

Legal theory, like mainstream political theory, treats mainly the formal aspects of representation – the 'ordinary-political' level – such as 'the right to vote, and the fairness of elections, including the voter districts' (Salát 2018, p. 43). A key demand of representative justice in legal theory is that 'every voice gets potentially heard and has an equal weight'. Although different electoral systems, including in Europe, are 'rather grossly disproportionate in varying ways, not only by application, but by design' (Salát 2018, p. 43), the international and human rights law frameworks have only a very moderate impact on electoral proportionality, given that electoral laws belong to the core

of national sovereignty and any nation states therefore resist interference in this domain.

In addition, legal theory does not engage in the notion of equitable representation of people's interests, considering it 'too vague or contested for being substantively legalised' (Salát 2018, p. 44). The lack of the right to interest representation has a significant impact on the assessment of legal representative justice. Law alone cannot explicitly claim that representation and representative justice is about representing minority interests since voters are free to vote against their own or anybody else's interest. Thus, legal theory considers that it is 'a political presupposition, but not an actual legal obligation, that representatives represent the interests of the represented' (Salát 2018, p. 44). This may blunt the impact that a legal-theoretical perspective can yield on the assessment of representative justice and characterizes the law's bias towards procedural over substantive conceptions of justice. As Salát sums up, '[g]enerally speaking, in the case of collision between procedural and substantive justice, law will side with the former' (Salát 2018, p. 26).

Social theorists have been sceptical of the idea that 'political rights are based on what people are deemed to have in common and grounded in a universal inherent value of human life' (Anderson et al. 2017, p. 14). This 'universalist' perspective may paper over differences in people's identity, deeming them 'irrelevant to issues of justice', or even consider these differences undermining justice by 'emphasizing difference rather than commonalities' (Anderson et al. 2017, p. 14). Critical approaches, for instance to the marginalization of racial minorities, challenge the supposed 'objectivity, neutrality, and colour blindness' of liberal politics (Anderson et al. 2017, p. 15). Second, social theory has challenged universalist and formalist approaches to representation through emphasizing that identity is comprised of 'a multiplicity of fluid, unstable, and dispersed identities' (Alcoff and Mendieta 2003). A theory of representative justice that takes the stability of shared identity to be central is thus normatively suspect and empirically dubious.

Of the disciplines under study, economic theory has had the least to say on the question of representative justice (Castro Caldas 2018). The 'justice lacuna' in economic theorizing can be explained historically by Sylvia Nasar (2011) who sees it as a process in which the academic disciplines aim to fulfil the requirements of 'positive science' and in doing so have removed characteristics that could not immediately be tested because of its critically reflective nature.

This concern with positivism has also been central to other disciplines, including social theory, as reported by Anderson et al. (2017). The conceptualization of homo economicus (Castro Caldas 2018) as well as the condition to select value premises that are 'objective' deprive economists and social theorists of any critical leverage on valuations that are upheld by powerful groups

or even the state. It influences how economic, legal and social theory alike, can perceive *interest*, noted by Salát (2018) and Anderson et al. (2017) and their engagement with representative justice (albeit in very different ways).

4.6 BEYOND REDISTRIBUTION, RECOGNITION AND REPRESENTATION

In the previous three sections we have used the three justice conceptions elaborated by Nancy Fraser as a starting point for a conceptualization of justice based on a review of academic disciplines in the context of the ETHOS framework. Unsurprisingly, the way these disciplines conceptualized justice do not perfectly fit Fraser's mould. This section consequently presents and evaluates in a comparative and synthetic manner alternative justice conceptions developed in the disciplines.

In legal theory, Salát (2018) highlights two justice perspectives that deserve further attention: procedural justice, which is opposed to substantive conceptions of justice, and community justice, which is closely associated to the related notion of restorative justice. Looking at political theory, Buğra (2018) analyses the focus in that discipline on the importance of freedom, which cuts across and may transcend Fraser's tripartite conception of justice, for instance with the idea of justice as non-domination – a 'neo-republican' justice conception. Buğra also draws attention to a particular type of 'procedural justice' that focuses on the acceptability of certain idealized deliberative procedures to generate authoritative norms. As disciplines often wary of explicitly normative assessment and theorization, social and economic theory offer more difficult terrain for the articulation of alternative paradigms of justice. Nevertheless, a justice concern with resisting the hegemonic social construction of dominant identities is central to social theory, as reported by Anderson et al. (2017), who also draw attention to justice concerns such as mobility justice. Castro Caldas (2018), in turn, theorizes 'economizing on justice' to articulate the finding that mainstream economic theory is very reticent to acknowledge justice concerns.

The notion of procedural justice in legal theory, as articulated by Salát (2018), cuts across and beyond the three dimensions proposing a different perspective of justice expressing the legal attachment to the (procedural) value of the rule of law and the associated notion of legal order and certainty. As Salát writes: 'Procedure is considered to lead to justice in a fundamental sense by lawyers. Procedural justice is the rule of law itself in as much as it is the opposite of arbitrary decision-making, i.e. rule of man' (2018, p. 21). This is particularly the case in criminal law, where procedural rules grouped under the notion of the 'right to a fair trial' have largely but not totally replaced substantive ideas of justice. Salát (2018) reports that the legal notion of 'equity' introduces a substantive dimension as do human rights. Generally, where human

rights are approached in a substantively thick manner, they are either framed in terms of or understood through the lens of human dignity. However, human rights also concurrently reinforce the procedural dimension of legal justice in, for instance, a focus on electoral proportionality, which ought to be understood through Fraser's notion of representative justice, and in the right to a fair trial.

Another major alternative framework of justice-theorizing in legal theory is captured variously by concepts such as 'restorative' and communitarian justice. These heterogeneous aspects share 'practical orientation' and focus on 'bottom up initiatives with the goal of improving the life of the community' (Salát 2018, p. 26). Restorative justice seeks to frame justice in terms of the reparation of harm and the restoration of harmony to a fractured community, most standardly (though not exclusively) understood in terms of a criminal offender repairing the harm of their crime. Though clearly distinct from Fraser's terminology, Salát notes an interesting interaction between restorative justice and recognitive justice in that the former also 'aims at recognition of full membership in the community of persons who suffered harm' (2018, p. 27).

In political theory, Buğra also signals two alternative orientations to theorizing justice. The first is a primacy to the value of *freedom* implying concerns with the just distribution of material resources 'available to people to pursue their valued ends' (Buğra 2018, p. 10). An alternative approach frames distributive justice through the pursuit of freedom such as Sen's approach, commonly known as the 'capabilities approach' sensitive to differences in the ability to use resources to have different types of instrumental freedoms (Buğra 2018). She further reports on the 'neo-republican' theory developed in detail by Pettit (2014), who argues that justice requires the absence of relations of domination both in context of the 'vertical relations between people and the government' and 'concerning the horizontal relations between people' (Buğra 2018, p. 11).

A second alternative to theorizing justice is related to justice as representation and the notion of procedural justice. Discourse ethics in political theory posits a justice-norm that is input- rather than output-oriented. Buğra (2018) reports Seyla Benhabib's (2004) theory that holds that those approaches ought to be considered as authoritative which could in principle be agreed to under ideal conditions:

> [This] metanorm presupposes the principle of universal moral respect, meaning that all beings capable of speech and action are to be included in the moral conversation, and the principle of egalitarian reciprocity, according to which in discourses each should have the same rights to various speech acts to initiate new topics and as for justification of the presuppositions of the conversations. (Buğra 2018, pp. 18–19)

One of the core insights of this approach is that moral justification is 'necessarily open-ended' and, for that reason, their resolution and negotiation is unavoidably political.

The discipline of social theory has had a touchy relation to normative theorizing, with general scepticism of the validity and value of normative approaches (Anderson et al. 2017). A similarity between several alternative approaches in social theory departs from the insight that social identity is constructed and that, thus, the hegemonic construction and manipulation of identities as tools of domination can be resisted even at the level of ontology:

> Critical social theory combines critical analysis of contextual and structural constraints, challenges and opportunities with agents' reflection on their situation … In the end, the purpose of applying critical theory is to analyse the significance of dominant understandings generated in European societies in historical context, examining how vulnerable categories of people occur and are represented in the real world, and how such representations function to justify and legitimate their domination. (Anderson et al. 2017, p. 21)

Such approaches raise important questions about the salience of identities for justice that resonate also in the sphere of politics (see Buğra 2018).

A second important theme that arises in social theory concerns borders and mobility (Anderson et al. 2017) related to the notion of social construction. One angle with which to critically view and challenge borders is the recognition that they are constructs that, inter alia, control certain persons for the benefit of others. Anderson et al. use the notion of 'mobility capital' to capture the differential between the 'mobility aspirations and capabilities', particularly for low-skilled workers and refugees. They conclude that in a period defined by growing globalization, urbanization and migration attention to mobility justice will become ever more important (Anderson et al. 2017).

Economic theory offers a paucity of justice-theorizing beyond (and indeed within) Fraser's tripartite framework. Castro Caldas (2018) coined the term 'economizing on justice' to describe this, while acknowledging that certain heterodox economists move beyond these limitations. Nevertheless, as emphasized also elsewhere in this chapter, the lacuna of justice-theorizing and 'justice sensitivity' in contemporary economic literature is an important finding in its own right, and one that warrants particular attention to develop an empirically sensitive and multidisciplinary perspective on justice and fairness in Europe.

4.7 CONCLUSION: THE PULL OF POSITIVISM AND FORMALISM IN CONCEPTUALIZING JUSTICE

Fraser's ideas on the liberal Westphalian welfare state and its economic principles, the redistribution–recognition dilemma expressed in opinions on

need-interpretation, the construction of dependency, organizational and systemic principles of the gendered division of the public and the familial spheres, and the gendered and racialized labour market remained in the margins of mainstream social and economic theory. In legal theory, theoretical reflections on (re)distributive justice are almost absent, while in political theory it seems that (re)distributive justice theory is mainly a servant of the freedom to express and having a voice.

These disciplinary orientations can be explained, historically, through 'influence of positivism' in economic, political and social theory, also by celebrating the 'homo economicus', which has come under pressure in the wake of recent economic crises, though not to such an extent that the paradigm has shifted. The dominant economic conceptualization of 'homo economicus' has found its way in other disciplines precisely through the lack of problematizing the relationship between maldistribution, misrecognition and misrepresentation. However, a critical analysis of redistributive justice going beyond a fair distribution of welfare state resources is under way. More engaged scholarship on the principles of the capitalist production and its maldistributive effects is emerging (Sen 1977; Piketty 2014; Stiglitz 2015), while from the other side, engaged scholars are reporting on the daily experiences of maldistribution by marginalized and vulnerable populations (Gorashi 2010; Anderson 2013; Lamont 2013).

The theorization of recognition in the disciplines under study show some more convergence, again except for mainstream contemporary economic theory. Although recognition is rarely explicitly conceptualized, it does emerge as a relational principle based on hierarchies in identities and social roles (Rippon et al. 2018, pp. 15–16). As such, justice as recognition is concerned with what kind of standing vis-à-vis other persons she deserves (Iser 2013). Justice is not only about 'having', but also about 'doing', 'being', 'being seen'. Certain forms of injustice, such as sexual harassment, demeaning stereotypical depictions in the media, disparagement in everyday life or marginalization in public spheres and deliberative bodies, cannot be overcome by redistribution alone but require remedies of recognition. Misrecognition can damage the identity of those to whom it is denied and, as such, constitutes a form of oppression.

The disciplines given central stage in ETHOS' multidisciplinary research on justice in Europe have traditionally approached issues of representation and misrepresentation quite differently, although interesting comparisons and synergies can be identified. Legal theory tends to conceive of representative justice in a formal way, along the lines of Fraser's concern with 'ordinary-political' misrepresentation (Salát 2018). Political theory is more attuned to identifying the political mechanisms by which marginalized groups and individuals in a polity have a hard job in being heard, and also extends

the discussion to consider the political theoretical engagement with Fraser's representative 'misframing', or the boundaries of representative justice (Buğra 2018). Social theory, in turn, has tended to put aside the question of formal political processes when considering issues relevant to representative justice, focusing instead on how the construction of certain identities ('othering') has the effect of excluding marginalized and vulnerable (groups of) persons from positions of power and influence (Anderson et al. 2017). Finally, economic theory is marked mainly by the absence of considerations of representative justice, which is one effect of the search for a 'value-free' social science that we find echoed in social theory (Castro Caldas 2018).

In conclusion, the disciplines discussed in this chapter frequently develop justice conceptions in their own unique register, which, although overlaps and similarities can be identified, often depart from the terms Fraser developed. It may seem that this chapter, and particularly Section 4.5, functions as a veiled critique of Fraser's account of the facets of justice and their interrelation. Highlighting alternative conceptions of justice, however, does not serve as an implicit rejection of Fraser's view, especially given that Fraser's is an explicitly normative theory, while we have seen that the nature of justice-theorizing in the disciplines under study is often heavily tempered by commitments to positivism or formalism. Rather, while it seems underspecified in some points, Fraser's framework provides a template that helps us to make sense of the main debates in the field and to offer a useful heuristic tool for approaching different claims of justice, the fault-lines and boundaries of justice, and the mechanisms that inhibit the realization of justice in Europe in an interdisciplinary and empirically informed fashion.

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5. Four or fewer freedoms: justice contested and codified between 1941 and 1957

Barbara Oomen and Alexandra Timmer

5.1 INTRODUCTION

A key aspect of investigating the foundations of justice in Europe is to understand how these developed over time. Such an inquiry can begin in many different places and at many different moments. This chapter, however, focuses on the period during and after the Second World War, from 1941 to 1957. One reason for this is that the Second World War was, in many different ways, the reason for closer cooperation within Europe and for the institutionalization of such cooperation. Another is the degree to which this particular period was still characterized by an openness and indefiniteness in terms of the type of justice to be institutionalized in Europe. By the time of the formation of the European Economic Community (EEC) in 1957 this was very different – clear choices had been made in terms of the type of justice institutionalized in the European project. A close consideration of the particular debates that led to these institutional outcomes, of the people involved and the ideas that they held can offer important insight into the conceptions of justice on and off the table in this early period of European formation (Norman and Zaidi 2008).

As set out in the introduction to this book, justice as a concept and an overarching ideal is – surprisingly – not often discussed amongst those studying Europe, most notably not amongst lawyers and others studying European institutions. It could well be that the notion of justice is simply too big, or too abstract to engage with. Recent scholarship, however, has lamented Europe's justice deficit, explicitly calling for a systematic inquiry on the interrelationship between law and justice in the European project (Kochenov et al. 2015). Williams, to quote an example, speaks of the 'uncertain soul' of Europe: 'People simply do not know what the EU stands for' (Williams 2010, p. 9). Ward, another scholar concerned about the lack of engagement with larger questions of justice in Europe today, quotes Vaclav Havel in stating that

'Europe today lacks an ethos, it lacks imagination' (Ward 2003, p. 257). In response to this, we seek to understand how Europe was imagined at a very formative moment, thus connecting bodies of literature that all shed light on justice in Europe, which are so far surprisingly disconnected: the literature on transatlantic dialogues (Borgwardt 2007), on European human rights law (Duranti 2016) and on the history of the European Union (Dinan 2004).

We take the Four Freedoms Speech of the American President Franklin Delano Roosevelt (FDR) in 1941 as a point of departure. This is for two reasons. One is that that these Four Freedoms provided a first glimpse of a number of essential features of post-war institutionalization of justice in Europe, most notably its combination of emphasis on individual freedoms, an obligation towards multilateral cooperation to protect them, and some form of supranational supervision of their enforcement. Roosevelt, in his speech, not only set out what the war was *against*, but also what it was *for*. In contrast to earlier attempts to stimulate multilateral cooperation with international law as its main fabric, such as the Hague Peace Conference and the interbellum experiments largely led by Woodrow Wilson, the speech envisaged an *international* community to safeguard *individual* rights. As such, this period could be considered a 'Grotian moment', a paradigm shift in international law that transformed internationalization and crystalized conceptions of justice in an unprecedented manner (Scharf 2010).

The formulation of the Four Freedoms marked the beginning of a series of foundational moments, in which certain conceptions of justice were tabled, ignored or enthusiastically embraced as Europe crawled out of war to take its current institutional shape. The malleable character of this institutional shape also means that the 'Europe' referred to here had different forms over time – from an ideal with supporters in nations all over the European continent, to the institutionalized Europe in the context of the Congress of Europe, the European Coal and Steel Community and the EEC (Chakrabarty 2009).

In order to analyse which justice conceptions dominated and which ones were ignored, this chapter focuses on a number of key moments, personalities and processes that led to the transformation of one justice ideal into a notably different one. Each codification of justice, after all, is 'propelled by individuals, and individuals are still inspired to positive action by ideas' (Borgwardt 2007, p. 298). Out of all the important moments in the formulation, negotiation, contestation and institutionalization of particular conceptions of justice, some of the most important were the drawing up of the Atlantic Charter, the founding of the United Nations and the drawing up of the Universal Declaration of Human Rights (UDHR), the Congress of Europe, the founding of the Council of Europe, and the run-up to the EEC. After a discussion of these marking moments, we outline which conceptions of justice conquered, which would remain contested and which were more or less circumvented in

this foundational period. The conclusion, finally, considers the degree to which the post-war codification of particular justice ideals and the neglect of others still casts its shadow over Europe today.

5.2 TRANSATLANTIC FOUNDATIONS

5.2.1 FDR's Four Freedoms and the Atlantic Charter

The tale of the conceptions of justice that gained prominence during and after wartime Europe thus starts, perhaps surprisingly, in Washington in January 1941. In his State of the Union address that would be recognized as one of the most important speeches ever, FDR not only advocated American involvement in the war but also emphasized how the war threatened the American way of life, and sketched his vision of the world order in future days, 'which we seek to make secure' (Engel 2016). These days needed a moral order, based on the 'cooperation of free countries, working together in a free, civilized society' (Roosevelt 1941). This world order would be founded on four fundamental freedoms: the freedom of speech and expression, the freedom of worship, the freedom from want (as a means to internationalize the New Deal) and the freedom from fear, 'everywhere in the world' (Ead 2016).

FDR's 'doable plan' (Roosevelt 1951) for peace and the vision of justice underpinning the Four Freedoms speech can be summarized as combining liberty rights, social justice and security for everyone in the world, made possible by a world order based on cooperation. The connection of these ideals with the future of Europe would take place seven months later, on a ship on the Atlantic, when Roosevelt and Churchill wrote the Atlantic Charter. This eight-point statement contained provisions on peace, called for the abandonment of the use of force and against aggrandisement. It also emphasized, as a common principle, the respect for 'the right of all peoples to choose the form of Government under which they will live' (Atlantic Charter, 1941, p. 2). In addition, the leaders expressed commitment to doing away with trade barriers, in order to secure 'for all improved labour standards, economic advancement, and social security' (Atlantic Charter, 1941, p. 2). Where it concerned the means to realize this, Churchill had proposed 'an effective international organization' to keep such peace, but found the provision struck out by FDR who feared a lack of domestic support (Borgwardt 2007).

Just as Roosevelt had added the words 'everywhere in the world' in the Four Freedoms speech, in handwriting, at the very last moment, here too a small sentence scribbled down last-minute by a statesman – inadvertently – contained the seeds for a future revolution in the field of justice. It was Churchill who, most probably for poetic effect, added 'all the men in all the lands' to the statement that called for a peace in which 'all the men in all the lands may live

out their lives in freedom from fear and want' (Borgwardt 2007, p. 20). The underlying message of universal rights was, however, not lost on those colonized by the British, such as the young lawyer Nelson Mandela (Borgwardt 2007). As a result, Churchill was called to the House of Commons the next month, where he explained that the Charter covered primarily 'the restoration of sovereignty, self-government and national life of the States and nations of Europe now under Nazi yoke' (Churchill 1941). Issues of self-governance for the colonies, he asserted, formed quite a separate problem. It was thus within weeks of the formulation of the Atlantic Charter that its promise was limited to those in mainland Europe, with the vast masses under European rule in the colonies exempted.

5.2.2 The United Nations and the Universal Declaration of Human Rights

The Atlantic Charter, in Churchill's words, was a 'milestone or monument which needs only the stroke of victory to become a permanent part of the history of human progress' (Chruchill 1941). Even if this stroke would take four more years, negotiations on the post-war order continued. One important moment came with the January 1942 'Declaration by United Nations', in which 26 countries from all over the world expressed support for the purposes and principles of the Atlantic Charter. The Declaration formulated as the purpose of victory 'to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands' (Borgwardt 2007, p. 55), thus marking the emergence of modern human rights law. The term 'human rights' and the reference to religious freedom were inserted at the initiative of the Americans – to the discontent of the Soviet signatories.

Yet, it was far from given that human rights would also become one of the objectives of the United Nations, to be formed in 1945. When the US, the UK, China and the USSR came together in Dumbarton Oaks in 1944, the only main aim of the post-war organization they could agree upon was that of peace. The Economic and Social Council, propagated by the US, was already problematic to the Soviets, and only the Americans were in favour of a provision on human rights (Hoopes and Brinkley 1997). It was only due to the smaller countries, and persistent non-governmental organization (NGO) lobbying (most notably by the American Jewish Committee) that the United Nations (UN) also formally purported to promote and encourage 'respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion' (Korey 2001, p. 2). Another document, negotiated in San Francisco in the same month, encapsulated the same *zeitgeist*: the need to secure the freedom from fear of aggressive war. The Nuremberg Charter would focus

on outlawing wars of aggression, and punishing crimes like genocide during wartime, and subsequently make its way into the Genocide Convention of 1948 (Sands 2003). The legal attention to the atrocities committed during the war, however, did not extend to the kind of attention to restorative justice that would become important by the end of the century.

The UN Charter might have referred to human rights, but their substance still had to be worked out and written into the Universal Declaration of Human Rights. This work was undertaken by a commission under the leadership of Eleanor Roosevelt and a drafting committee with French, Chinese, Chilean, Australian, Russian and Lebanese delegates (Morsink 1999; Glendon 2002). Possibly as a result of this diverse composition, the UDHR, adopted on 10 December 1948, contained an impressive range of civil and political, social and economic rights. The underlying principles were famously depicted by René Cassin as a portico with four founding principles: dignity, liberty, equality and brotherhood. Conspicuously absent, however, was the right to self-determination – a clear indication of the dominance of Western (colonial) powers in the negotiating process. The Declaration also, for the same reasons, lacked an explicit right to equal treatment – even if the Indian Hansa Mehta had successfully ensured gender-neutral language by advocating changing 'all men' into 'all human beings' in the first article (Glendon 2002, p. 289).

Although the UDHR is a relatively comprehensive document, it clearly reflects the dominance of American and Western European viewpoints. The document contains references to social and economic rights, but not to the extent and with the weight that negotiating partners like the Latin American countries and the USSR had called for (Norman and Zaidi 2008). It also emphasizes rights over responsibilities, even if Mahatma Gandhi was hardly alone in underlining that 'the very right to live accrues to us only when we do the duty of the citizenship of the world' and in arguing in favour of a statement of duties (as quoted in Maritain 1948, p. 18). Moreover, it neglected the position of minorities – another consequence of domestic American politics (Humphrey 1968). These choices would not be rectified in the institutionalization of justice in post-war Europe, as set out below.

5.3 NEGOTIATING JUSTICE IN POST-WAR EUROPE

While the architecture of global justice was negotiated in the context of the first UN meetings, discussions on a separate supranational organization in and for Europe gathered speed. Such discussions could build upon interbellum activities like the Pan-European movement, and on the French statesman Briand's idea of how to turn an 'idea of philosophers and poets' into a federal European bond in the context of the League of Nations (Briand 1930). They were triggered by the notion of '*nie wieder*' following the devastation of the

Second World War, but also by a fear of the emerging geo-political reality. Communism was clearly on the rise in the East, and Churchill had already set out how 'an iron curtain has descended across the continent' (Churchill 1946a). Just as the UDHR has been described as the 'last train out of the station' for the UN, so Spinelli has described what was at stake in the small window of opportunity before the Cold War set in as a 'brief, intense period of general crisis when the States will lie broken, when the masses will be anxiously waiting for a new message, like molten matter, burning, and easily shaped into new moulds' (Spinelli and Rossi 1941).

The question, of course, was into what mould the 'molten matter' would be poured. As old as the proposals of poets, philosophers and politicians for uniting Europe was the debate on the reasons for doing so. The aims of European cooperation, and the underlying perceptions of justice would be central to the negotiations to which we now turn: the Hague Congress, the formation of the Council of Europe and, finally, the stepping stones that led to the formation of the EEC.

5.3.1 The Hague Congress: Carving the Course of Justice for Europe

A decisive moment in casting Spinelli's mould was the Hague Congress, held from 7 to 11 May 1948 and largely organized by Winston Churchill. The former prime minister had already laid the rhetorical foundations to 'recreate the European fabric, or as much of it as we can, and to provide it with a structure under which it can dwell in peace, safety and freedom', in the 1946 Zurich speech in which he proposed the United States of Europe (Churchill 1946b). In opening the Hague Congress, Churchill set the tone by emphasizing that 'President Roosevelt spoke of the Four Freedoms, but the one that matters most today is Freedom from Fear' (Churchill 1948). The Congress was a watershed moment, not only because of 'the doors that it opened, but also because of what it turned away from' (Cohen 2009, p. 273). A large part of the explanation for the choices made in terms of justice lies in the composition of the attendees, with a strong emphasis on politics and business, and very little space for labour; for these reasons, the Congress was depicted by some as having a 'right wing bias' (Brugmans 1969, p. 24). The outcome of four days of heated negotiations was a pledge that foreshadowed the direction Europe would take. Its preamble curtly stated how:

> Europe's mission is clear. It is to unite her peoples with their genius of diversity and with the conditions of modern community life, and so open the way towards organized freedom for which the world is seeking. It is to revive her inventive powers for the greater protection of the rights and duties of the individual of which, in spite of all her mistakes, Europe is still the greatest exponent. (European Movement 1949, p. 94)

The delegates pledged their desire for a 'United Europe, throughout whose area the free movement of persons, ideas and goods is restored', thus prioritizing market freedoms and the demands of capitalism. In addition, delegates called for a 'Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition' (European Movement 1949, p. 94). The social and economic rights still enthusiastically being debated by the delegates working on the UDHR in Paris were thus sidelined. The Economic and Social Committee passed a resolution emphasizing these rights but this did not make it to the final pledge (Loth 2015).

A third element of the pledge introduced the idea of a Court of Justice. This revived the old idea of instating a World Court in the European context, and thus strengthening the rule of law at the European level – the Court would limit the sovereignty of states in supervising their compliance with a strictly defined set of rights. The two final articles envisaged the type of democracy that Europe would be, by proposing a European Assembly. At the time, the ideal of Europe had unprecedented support among the population at large, and the Congress itself could well be considered a 'civil society achievement' (Glasius 2006, p. 111). The Congress led to the creation of the European Movement on 25 October 1948. Another, more intergovernmental outcome of the Congress was the agreement by the French, the British and the Benelux countries to set up a Council of Europe, which would be officially founded in London in May 1949 (Brugmans 1969).

5.3.2 Working Towards a European Convention

It was the European Movement, as a civil society organization, that took the lead in translating broad conceptions of justice for Europe into specific proposals. On 12 July 1949, the European Movement submitted a Draft Convention on Human Rights to the Committee of Ministers of the Council of Europe. This draft proved to be crucial in the evolution of European human rights law, as it provided the basis for the final text of the European Convention on Human Rights (ECHR) which would be adopted only a year later. The chief aim of the draft was to lay down the freedoms that together would guarantee peace and prevent a re-emergence of totalitarian regimes (Bates 2010). The drafters referred to the UDHR and acknowledged its importance (European Movement 1949). However, the European Movement felt that Europe needed a legally binding human rights instrument, to safeguard individual freedoms.

The text laid down individual freedoms (Article 1) and political liberties (free elections, the 'right of political criticism and the right to organize a political opposition', Article 2). Seeking to protect Western democracy was the draft's main aim (Bates 2010). Social and economic rights were not included, but Article 4 did provide that the selected rights 'shall not imply any limitation

whatsoever of other rights not here enumerated and in particular of the rights proclaimed in the Universal Declaration of Human Rights'.

The justice conceptions that underlay this Draft Convention were deeply contested, as became clear in a 1949 publication of the European Movement. Out of the seven criticisms discussed in the publication, some sound remarkably familiar for modern readers, including the criticism that the draft only guaranteed a limited number of rights and omitted others; that the European Court of Human Rights (ECtHR) might encroach upon the jurisdiction of national courts, would be inundated with complaints, and would be exploited for political ends; and that the ECHR would involve some surrender of sovereignty (European Movement 1949). Here, too, there seemed to be a strategy of discrediting social and economic rights and making them invisible. These rights were not mentioned as such, and the only concrete right that was mentioned in the publication is the 'right to rest' (European Movement 1949, p. 120). A legal-technical argument was used – only rights that are 'practicable to enforce through the processes of a court of law' were chosen for inclusion in the Draft – thus masking what was actually a very contentious political issue, going to the very core of how justice was conceived.

When the European Movement's Draft Convention was presented at the very first session of the Consultative Assembly of the Council of Europe, held in Strasbourg in August 1949, many representatives attending the conference still believed that they were there to create some form of 'economic and political' European union as was decided at the Hague Congress (Robertson 1961; Bates 2010). The Committee of Ministers, however, rejected virtually all the recommendations that were produced concerning further European integration, save the ones concerning a Convention on Human Rights (Bates 2010). The Consultative Assembly discussed whether the Convention should only include the minimum number of rights necessary to ensure the functioning of democracy, or whether the scope of the Convention should be broader. In particular, there was debate on whether family related rights (for example, the right to family life and the right to marry), the right to education, and the right to property should be included. Bates concludes that 'the original ambitions for the Convention were very basic indeed' and that it was primarily seen as a 'collective pact against totalitarianism' (Bates 2010, p. 75).

In the period between the Consultative Assembly of the late summer of 1949 and the adoption of the ECHR and the founding of the Council of Europe in 1950, the rights to be included were further negotiated. For one, the right to free elections was dropped from the final text, at the insistence of the British, to be included in an Optional Protocol, together with the right to own property and the right to education (Bates 2010). Against a backdrop of fierce political debate about colonialism and a fear of communism, these three rights were all the subject of much contestation. The British Colonial Office might have

held that 'colonialism, as such, did not present human rights problems' (as quoted in Bates 2010, p. 762), but colonialism did prove an impediment to the inclusion of these rights into the main text of the ECHR. The right to property was contested because socialist governments, in particularly the UK and Sweden, were concerned that it would hinder the nationalization of private property for political and social purposes. The right of parents to choose the education of their children raised the question whether communist parents in non-communist countries had the right to have their children educated in line with Marxism and Leninism (Robertson 1961).

To make the distinction between territorial Europe and the colonies overtly clear, the final text of the Convention also included a so-called 'colonial clause' (then Article 63), which made clear that the Convention did not automatically apply to the overseas territories of the European powers. This clause had been much disputed in the Consultative Assembly. Léopold Sedar Senghor, later President of the Republic of Senegal, pleaded with the Assembly to suppress the clause: 'In adopting Article 63, the Assembly would transform the European Declaration of Human Rights into the declaration of European Human Rights. This would be to deny the same rights to other men. This would mean betraying the spirit of European civilisation' (Vasak 1963, p. 1208). This plea, however, proved to be in vain.

Ultimately, the ECHR formed a sort of trade-off compared with the UDHR. It broke new ground in creating a supranational court with the power to issue binding judgments. But this came at the expense of a broad conception of rights, as enshrined in the UDHR, as only civil and political rights made it into the Convention. As Duranti states, the adoption of the Convention

> marked more than a momentous step forward in the genesis of international human rights law. It signified a rejection of the expansive understanding of human rights enshrined in the Universal Declaration and the emergence of a transnational conservative countercurrent to domestic policies implemented in recent years at the level of the nation-state. (Duranti 2016, p. 278)

5.3.3 Thin Conceptions of Justice in the Formation of the European Economic Community

Turning, now, to the institution that would one day become the European Union, the story of human rights is, in the words of de Búrca, one of 'the road not taken' (de Búrca 2011). There was a moment of opportunity, in 1952 and 1953, when there was a real chance that further European integration would be aimed at protecting human rights and democratic institutions. The European Movement, which a few years earlier had played such a crucial role in drafting the ECHR, set up the Comité d'études pour la Constitution

européenne (CECE, Study Committee for the European Constitution), which was tasked with drafting a constitution for a European political community. The CECE's vision for a new European community was that it would guarantee 'the common well-being, existence and external security of the Member States and of protecting the constitutional order, democratic institutions and fundamental freedoms' (de Búrca 2011, p. 649). Subsequently, a draft Treaty on a European Political Community (EPC) was created, but this was discarded when the French National Assembly refused to ratify the European Defence Community (EDC) Treaty. Further European integration would be based on economic, rather than explicitly justice-based interests, starting with the European Coal and Steel Community in 1954. What is more, in contrast with the founding of the Council of Europe, European economic integration would be more state-driven and technocratic (Duranti 2016).

Justice conceptions at the European level became very thin, apart from two powerful ideas. The first was that economic cooperation would preserve peace, especially between Germany and France. This was famously put forward in the Schuman Declaration of May 1950, proposing the creation of a European Coal and Steel Community. The second underlying justice conception, also already mentioned in the Schuman Declaration, was linked to the idea that economic cooperation would raise the standard of living. The resolution adopted at the Messina Conference (June 1955), which laid the groundwork for the future EEC, reiterated this and stated that a policy of further European integration 'appears … to be indispensable if Europe's position in the world is to be maintained, her influence restored, and the standard of living of her population progressively raised'.[1] Apart from this, however, there is little evidence of any justice concerns in the resolution at all.

The Treaty of Rome, establishing the EEC in 1957, contained Four Freedoms of a very different nature from those formulated by Roosevelt. These were the Four Freedoms of the internal market; of movement of goods, capital, services and workers. The Treaty contained no reference to human rights, with the exception of a provision on equal pay for men and women (Article 119). The EEC was premised on the idea that the Member States had strong national welfare systems in place, and that social policy at the European level could be minimal. The Treaty did contain a chapter on social policy (Articles 117–128), but the founding fathers agreed that the creation of the common market would not require harmonization of labour and social standards; this was the notion of 'embedded liberalism' (Ashiagbor 2013). Domestic social policies would ensure that the fruits of European economic cooperation would be distributed fairly within each state, in line with national preferences (Vandenbroucke 2017). The important exception to this was agriculture, as the Treaty of Rome provided that a common agricultural policy would be established 'to ensure thereby a fair standard of living for the agricultural population, particularly

by the increasing of the individual earnings of persons engaged in agriculture' (Article 39(1)b). Thus, Europe was sometimes called a welfare state for farmers (Knudsen 2009).

The underlying idea was that European economic cooperation would bring what later scholars have termed 'upward convergence' (Vandenbroucke 2017, p. 22). The standard of life would improve everywhere in Europe, but the poorer countries would develop faster than the richer ones, thus reducing differences between them over time. In justice terms, the idea of upward convergence mostly translates to distributive justice rather than *re*distributive justice. The newly created EEC was not constitutionally committed to the redistribution of wealth, but the upward convergence idea can nevertheless be connected to an egalitarian ideal, namely that equality should be promoted by 'levelling up' rather than 'levelling down' (which would mean reaching equality at the level of the lowest common denominator, making everybody equally badly off) (Fredman 2011).

Eventually, the overarching aim of the Community was laid out in Article 2:

> The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it. (Article 2)

The references to harmony and stability point to a conception of justice as peace, and the reference to the standard of living hints at justice as prosperity, but there is not much else. Kochenov's view is that, in later years, '[t]he grand promise of European integration ended up being hijacked, if not consumed by the Internal Market' (Kochenov et al. 2015, p. 27). Though this view might not be shared by everyone, it is clear that this foundational document took what would one day become the European Union away from the wide variety of justice conceptions present in earlier years, to a much narrower interpretation.

5.4 CONCEPTIONS OF JUSTICE

What, now, in very general terms, can be considered the conceptions of justice that underpinned the early days of European integration? In previous sections, we analysed the understandings of justice as they emerged in day to day encounters in the key moments described above, as well as in key texts. Here, it is clear how such conceptions shifted over time, shaped not only by the geo-political context but also by individuals and the coalitions that they formed. In all, there were clearly conceptions of justice that conquered and

were thus codified in legal text, others that remained deeply contested and others that were more or less circumvented.

5.4.1 Conceptions that Conquered

If there was one understanding of justice, one overarching objective shared by all negotiators in the period analysed, it was that of justice as *peace*. Roosevelt's emphasis on the 'Freedom from Fear' for everyone in the world pointed at the simple need for an absence of warfare, but also for disarmament and international cooperation towards that overarching objective. The first article of the UN Charter defines maintaining international peace and security as the first purpose of the UN, with other goals subservient to that end. At the Congress of Europe, Churchill quoted freedom from fear as the main objective of European integration. The ECHR emphasizes that fundamental freedoms are the 'foundation of justice and peace' (ECHR, 1950, preamble), and the Treaty of Rome underlines that economic and social progress, and eliminating trade barriers would ultimately 'strengthen peace and liberty' (Treaty of Rome, 1957, preamble). Peace, in all instances, is the overarching objective.

Another outcome of the negotiations, much less logical to many, was the understanding of justice as *liberal freedoms*. The 'Freedom of every person to worship God in his own way' and the 'freedom of speech and expression' (Roosevelt 1941) that FDR formulated as what was essentially at stake in war also became key objectives of peacetime cooperation. Whereas the UDHR still included a much broader understanding of rights and freedoms, the ECHR exclusively codified these civil and political rights. Such freedoms were combined with an emphasis on the free market, an approach already apparent during the Congress of Europe of 1948 and later codified in the EEC.

In terms of the institutional architecture needed to guarantee both peace and these particular freedoms it was *supranationalism* that proved victorious. Such supranationalism went much further than the mere intergovernmental cooperation of the UN. It included the commitment, of the nations that founded the Council of Europe, to give up part of their sovereignty to strengthen the rule of law at a European level. The ECtHR, after all, was given the mandate to control whether states complied with their human rights obligations. In these choices one discerns a concept of justice as working together, with the movement 'towards an ever-closer union' as a manifestation of justice in itself.

5.4.2 Conceptions Contested

The justice contestations in post-war Europe saw clear winners. Other concepts, sidelined in the process, were only to emerge much later. Most notably, this applies to the understanding encapsulated in FDR's 'Freedom from Want',

which could roughly be translated as *redistributive justice*, with social and economic rights as key stepping stones towards this aim. Such an internationalization of the American New Deal was still an option at the start of the negotiations on the UN and the UDHR. The Congress of Europe, however, proved to be a key moment in sidelining social and economic rights, which subsequently were conspicuously absent from the ECHR. The Congress of Europe did deal with social and economic questions in its Social and Economic Committee, but the soon to be formed Council of Europe did not have jurisdiction on these matters. With the bifurcation of the European project into the Council of Europe and the European Economic Communities, and with the exclusion of social and economic rights from the ECHR, questions of distributive justice thus became mainly the province of the EEC. However, while the EEC was based on the ideal of upwards convergence, apart from in the field of agriculture, there was little by way of actual redistribution of wealth and resources. The Marshall Plan left aside, founders of the European institutions relied on strong national welfare states, reliant on national welfarism, not on European integration, to bring about redistributive justice.

Justice as *representation* was also sidelined. What was at stake here was who would get to participate, in what manner, in the newly shaped European polity. The groundswell movement for such a polity, clearly, consisted of individuals and civil society. They provided the philosophical grounding, wrote the pamphlets, organized the meetings and public support. They also ensured that 'human rights' made it as an objective of the UN. In addition, they arduously pleaded for a democratic European parliament. In the end, however, such public participation in the European project would be marginalized, with both the Council of Europe and – even more – the EEC as intergovernmental entities.

A third conception of justice for which the seed was planted in the post-war era, but which would remain in the freezer for half a century afterwards, was that of justice as *accountability*. Nuremberg came to stand for an ideal closely related to natural law, the notion that there are certain crimes so heinous that they shock the conscience of mankind, and thus deserve prosecution by the international community – whatever the laws of the land. This understanding of justice made it to the Genocide Convention, but its actual institutional consequence – the setting up of a permanent international criminal court to prosecute the crimes concerned – was not taken any further as the Cold War set in.

5.4.3 Conceptions Circumvented

For all the openness in the post-war period, Spinelli's 'molten matter' saw very little attention with regard to a number of understandings of justice which a modern-day spectator may consider key. For one, FDR's 'everywhere in the

world' would largely prove to be a hollow phrase. The idea of *universal justice* for all mankind might have been rhetorically present in negotiations on the UDHR, but the millions of people in European colonies, under colonial rule, were quickly exempted from the justice codified in the post-war period. This is not only apparent in the way in which FDR's idea of self-determination, for countries large and small, disappeared from the table. It also shows in the lack of regard for the rights enshrined in the European Convention in the wars fought by many European countries against independence movements in their colonies, and in the inclusion of the 'colonial clause' in the text of the Convention itself. Clearly, the subject of European justice conceptions, in the eyes of the founders, lived on continental Europe.

Finally, it is striking to what degree justice as *recognition* of minority rights and the rights of vulnerable persons was absent in post-war discussions. The protection of minorities was a central object of international cooperation in the interbellum, and direly needed in the period after the Second World War. Still, there was very little attempt to codify the protection of those groups that suffered most from discrimination because of their position as a group. One reason could be the way in which the explicit attention for particular groups had led to the atrocities of the Second World War. Another, more political, could be that the lobbying position of minorities as such was not as strong as that of other groups.

5.5 CONCLUSION

This chapter has emphasized the degree to which the codification of justice in Europe was the outcome of the work of individuals, at a particular moment in time, against the background of geo-political forces. One of these individuals, Hendrik Brugmans, by 1958 labelled the Congress of Europe 'a tepid affair' (Brugmans 1969, p. 25). By then, the inspiration in FDR's Four Freedoms speech and the passion clearly present at the Congress of Europe had worn out, and given way to technocratic and pragmatic cooperation around a specific conception of justice. If justice is understood as 'a set of practices and procedures developed from our responses to injury and wrongdoing, a notion born of experiences – of sympathy, compassion, pain, suffering and outrage' (Douglas-Scott 2015, p. 63), it is clear to what degree both the wartime experience and that of subsequent events shaped initial institutional responses and debates. It was the assault on peace that led to its prioritization, the abuse of power by the nation-state that led to its curtailment in the form of human rights and supranationalism, and the fear of communism that led to the emphasis on liberal and political rights. Also, European justice was – though less explicitly – formulated against the claims to universality and self-determination that many people in the colonies, under European rule, stood for.

As such, justice as it was conceived, debated, negotiated and ultimately institutionalized in post-war Europe can be understood as a movement from 'four to fewer freedoms'. As contributions by Safradin and De Vries (Chapter 7), Anderson (Chapter 8) and Knijn and Hiah (Chapter 10) to this volume set out, these institutionalized conceptions still cast their shadow over Europe today. The 'contested' and the 'circumvented' conceptions of justice discussed above (justice as redistribution, representation, accountability, universality, and the recognition of minorities) have remained salient, or have become even more salient over time. The narrow understanding of justice as human rights in general, and liberal and political rights in particular, has led to the criticism that attention is lacking to social and economic rights, and to social and economic justice in the broader sense. The lack of accountability for large-scale violence continues to impact feelings of (in)justice in Europe. One of the other key critiques of European supranational institutions today, concerning the lack of democratic legitimacy, can also be related to conceptions of justice as participation and representation sidelined in those early days.

Finally, the lack of attention for equality, and for the needs of minorities, both within Europe and globally, remains one of the most pressing justice concerns. However, ideas that were once merely trickles, feeding into the river of justice in Europe, could be strengthened again in the future. If justice, as institutionalized and codified, was the work of men in their times, it is also possible for people who are concerned about the course it took to renegotiate its contents in this particular day and age.

NOTE

1. Resolution adopted by the Ministers of Foreign Affairs of the Member States of the E.C.S.C. at their meeting at Messina (1–3 June 1955).

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6. Framing justice claims as legal rights: how law (mis-)handles injustices

Marie-Pierre Granger and Orsolya Salát

6.1 INTRODUCTION

Does law integrate justice considerations, and should it? Can law effectively address injustices, such as misrepresentation, maldistribution or misrecognition (Fraser 2009), through the conferral and enforcement of legal rights? This chapter addresses these questions, drawing on research carried out in the ETHOS project under the heading of 'law for – or against – justice?'. It involves a theoretically informed 'black-letter' law analysis of international, European, national and local legal frameworks which regulate voting, housing and education in six European countries (Austria, Hungary, the Netherlands, Portugal, Turkey and the UK).[1]

We start with briefly outlining the relative importance of rights as a vehicle for justice in the European context, before introducing key theoretical debates on the relationship between law, rights and justice, and relevant conceptual features of legal rights. We also point to some of the challenges of framing different justice claims as rights in Europe. We then explore the scope and limits of addressing injustices through legal rights. We do so by analysing how legal systems handle justice claims when formulated as legal rights, and how they manage the confrontation between competing conceptions or dimensions of justice, expressed as conflicts between rights, between rights and other legally protected interests, between overlapping and competing legal orders, and between law and politics. We conclude on the implications which this institutionalization of justices through rights has for achieving greater justice in Europe, and in particular the prioritization of certain justice claims, groups or processes over others.

6.2 LAW, JUSTICE AND RIGHTS IN EUROPE

In Europe, rights have become a key instrument for fighting all forms of injustices, ranging from school segregation of ethnic minority children, to the

political disenfranchisement of disabled persons, or homelessness. However, using rights to pursue justice comes with a number of theoretical and conceptual challenges, and with concrete implications for fighting injustices, which need to be identified and considered before seeking to frame justice claims as legal entitlements.

6.2.1 Rights as the Main Vehicle for Justice Claims in Europe

The protection of rights is central to the notion of constitutional democracy, and a core tenet of legal liberalism, which are the basic foundations of European societies. Even so-called 'hybrid' regimes, such as Turkey and Hungary, operate within a formal framework of rights (Bozóki and Hegedűs 2018). In this context, rights have become, and are likely to remain, a primary legal vehicle for making justice claims in Europe (Douglas-Scott 2017).

The commitment to rights protection already featured prominently in early European cooperation and integration projects (see Chapter 5), and found a strong expression in the 1950 European Convention on Human Rights (ECHR), to which state parties to the Council of Europe (CoE), including the six countries covered in this study, must adhere.

Moreover, Article 2 of the Treaty on the European Union (TEU), the European Union (EU) foundational document, states that respect for human rights is a core EU value. The Treaty therefore provides for a sanction mechanism against member states which pose a serious threat to human rights (Article 7 TEU), a procedure which has recently been initiated against Hungary and Poland. It also requires candidate countries, such as Turkey, to respect fundamental rights (Article 49 TEU). The EU's own commitment to rights protection has been further reinforced with the Lisbon Treaty in 2009, which confers legal authority to the EU Charter of Fundamental Rights (CFR) over measures adopted by EU institutions and member states when they implement EU law (Article 51(1) CFR), and provides for EU accession to the ECHR (Article 6 TEU).

This centrality of rights in the way the EU and European states approach justice questions has implications for fighting injustices, given the complex and contested relationship between law and justice and the peculiar nature of legal rights.

6.2.2 Law, Morality and Justice

Legal theory distinguishes between legal and moral rights, and the discipline is structured by a long-standing debate on the separability of law and morality. To the extent that moral rights are closely related to notions of what is just and fair in a given society, or for human beings in general, the choice of

perspective determines whether law should integrate justice considerations at all, and if so, whether legal rights are an appropriate vehicle for that purpose (Kochenov et al. 2015; Granger et al. 2018).

On one side of the debate, positivists argue that law and morals should be separated. They consider law has its own system of validation and basis of authority, which is different from morals, and thus accept the legal validity of immoral laws. This is not to say that justice considerations are irrelevant, but rather that they are treated as *external* criteria for determining whether laws are 'good' or 'bad', without however affecting their validity. Natural law proponents, in contrast, insist on the necessary moral foundations of law, and most argue that grossly unjust laws are invalid and illegitimate (Salát 2018, pp. 8–14).

Constitutional and international law, and their formal inclusion of fundamental/human rights, testify of a trend towards recognizing a core morality and justice component in law, which can be invoked to challenge the validity of unjust laws. Where legal theorists agree that justice can be pursued through law, they may still disagree as to what legal rights are actually about, and their role in fighting injustices.

6.2.3 Theoretical Perspective on (Legal) Rights and the Who, What and How of Justice

Whilst space restrictions preclude a detailed theoretical elaboration on the concept of legal rights (for more, see Granger et al. 2018; Salát 2018), a few particularly relevant aspects must be highlighted, on the nature, subjects and functions of rights, and their relationship with interests.

Dominant perspectives in legal theory tend to emphasize the individualized nature of rights (Granger et al. 2018). Most human/fundamental rights frameworks recognize the individual rights of 'natural persons' (individuals), and sometimes also that of 'legal persons' (such as companies, or non-governmental organizations (NGOs)), but they are reluctant to accept the notion of collective (or group) rights. Consequently, before a court, collective claims are usually framed in terms of individual rights (and non-discrimination), and brought forth by individuals (or NGOs, if these have 'standing' to challenge measures which undermine the rights and interests they protect and promote).

In the European context, the notion and recognition of 'vulnerable groups', and associated special protection needs, has influenced the interpretation and application of individual rights (Granger et al. 2018), to sometimes incorporate a duty to facilitate a group's special way of life (for example, in relation to Roma and housing, see Granger 2019).

Despite their conceptual reservations towards group rights, legal systems work with formal qualifications de facto resulting in group-differentiated

rights. As such, they contribute to defining the 'who' of justice (Granger et al. 2018). A typical such category is citizenship, which continues to condition access to many rights and resources, and is generally considered as a legitimate and lawful ground for treating people differently (for the discussion of the role of citizenship in defining the scope of justice, see Chapter 14).

Moreover, scholars (like practitioners) disagree as to who is, or should be, the duty bearer. Traditionally, fundamental/human rights were viewed as imposing obligations on states and their various organs (state agencies, ministries, cities or public bodies). More recent trends suggest that they can also place duties on private actors (for instance, employers, landlords or church-run private schools) (in relation to the EU Charter, see Chapter 7).

Legal philosophers, furthermore, debate the function of rights: are they claims, privileges, immunities or powers (Hohfeld 1919)? Depending on the answer, invoking rights would generate different expectations and reactions from public and private actors.

Another point of contention is the relation between rights and interests. Human rights protect the dignity and the fundamental interests of individuals. The proponents of, respectively, will- and interest-based theories disagree as to whether individuals can waive their rights, and the corresponding duties. The answer matters particularly for individuals whose agency is limited or lacking, such as children or persons with severe mental illnesses (MacCormick 1977). International and national legal instruments, for instance, usually protect children's right to education by making school attendance mandatory until a certain age, in line with an interest-based perspective, but allow for parental choice with regard to religious education to differing degrees.

Whilst fundamental and human rights primarily centre on protecting core individual interests, they may also promote broader societal interests. The right to vote, for example, is seen as 'crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law'.[2]

Not all private or public interests can be framed as individual rights, however, which results in legal blind-spots when addressing justice claims through rights. Typically, legal systems are reluctant to recognize a right to a clean and sustainable environment, although recent litigation initiated in the Netherlands suggests that it is possible to (re)frame the fight against climate change as a human right, to exert legal pressure on political leaders (Nollkaemper and Burgers 2020). In any case, even when individual and societal interests, and the conceptions of justice which they carry with them, are translated into legal rights, that does not mean they all have the same leverage. Indeed, the legal operationalization of rights affects the relative weight of justice claims when these are framed as legal entitlements.

6.3 RIGHTS CLASSIFICATION AND JUSTICE HIERARCHIES

The different conceptualizations of rights in legal theory (along subject, object, functions or purpose) translate, in legal doctrine, in distinctions and classifications between rights, and create particular frames and hierarchies through which justice claims are processed and evaluated.[3] Although these are not rigid, and evolve over time, they can still be quite 'sticky'. Moreover, these analytical differentiations between rights, and thus between the justice claims which they project, do not always neatly align with the categorization of justice claims as identified in all other disciplines, such as the triadic redistribution, recognition and representation approach (Fraser 2009). To the extent that they are not evident to non-lawyers (or even to lawyers trained in different legal traditions), features of the legal operationalization of rights in the European context, such as the multiplicity of legal sources (international law, constitutions, EU law, legislation, or executive administrative regulations), the nature of obligations involved (positive versus negative rights), evolutionary elements (generations of rights), and considerations related to the nature of rights (substantive versus procedural rights) are briefly reviewed, together with their relevance for fighting injustice.

6.3.1 Legal Sources and Justice Hierarchies

Legal systems classify rights according to their legal 'source'. The terminology of 'fundamental rights' usually refers to rights enshrined in constitutional law, and 'human rights' to those laid down in international law (although the distinction is often blurred in legal doctrine). Rights are, moreover, frequently laid down in legislative or regulatory acts ('statutory rights'). In any case, even when they are guaranteed in general terms in constitutional and international instruments, rights often require 'concretization' – a more precise delineation of their implications, through legislative, regulatory or administrative implementation, or in contractual terms (Granger et al. 2018).

The right to vote (Theuns 2019), like the right to education (Salát 2019), is often explicitly laid down in national constitutions. In contrast, the right to housing rarely gets an express mention in constitutional texts and courts have been weary of recognizing its constitutional authority in the absence of explicit textual instructions (Granger 2019). Moreover, the right to vote and the right to education are recognized by various international treaties, such as the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of Persons living with Disabilities (CRPD), as well as European rights instruments, such as the ECHR and the EU Charter; in contrast, inter-

national and European treaties for the protection of socio-economic rights, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) or the Revised European Social Charter (R-ESC) acknowledge only a (limited) right to housing (Granger et al. 2018).

Through processes of constitutional and judicial dialogue, there is a general convergence in the recognition and general definition of rights across sources. Yet, there remain strong variations in the way these rights are interpreted in different jurisdictions, and implemented in specific regional, national or local contexts (Salát 2018; see also Granger et al. 2018; Granger 2019; Salát 2019; Theuns 2019). For example, whilst the right to vote of citizens is recognized in all relevant international and constitutional instruments, at national level it may be subject to various limitations, which disenfranchise certain citizens, such as expatriates and prisoners in the UK, or mentally disabled persons placed under legal guardianship in many EU states (Theuns 2019).

The legal source of a right matters, as it defines its position in relation to other rights or legally recognized interests enshrined in different legal sources. Courts use interpretative techniques to reconcile apparently conflicting provisions across different sources. However, where this is not possible, the right, or the version of it which is recognized in the most authoritative legal source in a given situation, would technically prevail.

In Europe, the traditional picture of legal hierarchy is that of a pyramid, with the constitution at the apex and all other norms deriving their authority and validity from it. Whilst the pyramidal, and state-centred, representation of legal hierarchies is both normatively and empirically challenged, notably by constitutional pluralism (Walker 2002), it still bears on legal interpretation and practice (Granger et al. 2018). Constitutional texts and case law therefore still feature as primary references for fundamental rights protection, with international and European treaties and charters coming to complement them, where they align.

There are variations across jurisdictions though. The Dutch constitutional system, for example, is particularly sympathetic towards international law, which occupies a strong legal position. The UK, which does not have a formal written constitution, follows a different approach, informed by the principle of parliamentary sovereignty, and a dualist perspective towards international law. There, international human rights instruments, and the norm they contain, are incorporated into domestic law through an act of Parliament (such as the Human Rights Act, incorporating the ECHR).

The legal and practical relevance of the constitution in claiming justice as a matter of rights depends on whether it includes, explicitly or implicitly, fundamental rights. The Austrian constitution, for instance, does not contain a bill of rights, with the result that the ECHR and the EU Charter serve as primary sources of rights. The importance of rights contained in the constitution is also

influenced by whether it can be judicially enforced, in particular against legislative or executive acts. In the Netherlands, for example, judges cannot review legislation for compatibility with the constitution, but they can check that it complies with ECHR or EU law. European instruments have therefore come to occupy central stage in litigation and judicial decisions as sources of rights.

Even in countries which have formal judicial review mechanisms, threats on judicial independence, often accompanied by a weakening of constitutional rights, limit the capacity of courts to stand as a buffer against government-driven or sponsored injustices (for instance, in Turkey and Hungary).

EU law occupies a special position in the legal orders of EU member states. According to the case law of the Court of Justice of the European Union (CJEU), provisions of EU law (even when laid down in 'technical' EU Directives or Regulations) that confer rights to individuals and are precise enough prevail over any conflicting national law provisions, even constitutional ones.[4] The Luxembourg court's vision of the unconditional supremacy of EU law is contested though. National (constitutional) courts usually accept that EU law norms 'trump' provisions contained in national legislative and lower ranking acts, but many insist that, ultimately, the constitution remains supreme. They therefore limit their acceptance of the supremacy of EU law to situations which fall under EU competence, and under the condition that it does not conflict with national (constitutional) identity (such as national conceptions of human dignity, democracy, rule of law or the social state).[5] Still, the (super) constitutionalization of EU law creates a systematic bias in favour of its economically liberal outlook (Scharpf 2010). A good example is the way property developers and real estate agencies leveraged EU free movement rules and state aid law against Dutch social housing schemes; or, more recently, threats of legal action by flat-sharing platforms like Airbnb invoking EU Directives on services and e-commerce, against attempts by cities to regulate their activities in order to keep rents and house prices at reasonable levels and prevent speculation and gentrification (Granger et al. 2018; Granger 2019).

The structural strength of EU law serves well certain justice goals though. The EU has, indeed, elaborated a relatively strong non-discrimination legal framework, laid down in both Treaty provisions and legislation, with a strong focus on the discriminatory grounds of gender and race in economic matters (employment, access to goods and services). Article 21 of the EU Charter, furthermore, prohibits discrimination on a broad range of grounds by EU institutions as well as states (although only when they implement EU law). This legal framework, together with the ECHR non-discrimination provisions, and relevant equality provisions in national constitutions and legislations, can be mobilized by civil society organizations against rules and practices (such as segregated schooling or racial prejudices in flat rental practices) which have

adverse effects on vulnerable individuals, such as persons with disabilities, or members of minorities, such as Roma, or persons of immigrant descent. The capacity of EU non-discrimination law to influence national laws, policies and practices nonetheless depends on the ability of those affected, and the organizations that support them, to mount and sustain advocacy campaigns and litigation strategies to pressure policymakers and judges for an alignment on European legal requirements. The legal mobilization of EU law has for long been a playground for companies fighting national restrictions on business activities; but women's organizations have also effectively used EU law and processes to promote women's rights causes (Conant et al. 2018).

Where justice claims are framed as rights, the source of the rights will therefore determine their relative authority and strength in a given context. Yet, not all rights trigger the same expectations on public and private actors, therefore promoting or, on the contrary, undermining certain dimensions of justice.

6.3.2 Negative and Positive Rights and Obligations

Legal rights can be classified depending on the duties they generate. They are 'negative', in the sense of protecting the rights-holder from interference, or 'positive', as in imposing obligations on others to take measures to bring about their realization. A single right often involves both negative and positive dimensions. Negative obligations are more readily recognized and protected than positive ones. In Europe, international and constitutional instruments and their interpreters are reluctant to impose strong policy interventions through legal rights, especially where their realization involves substantial redistribution (Granger et al. 2018; Granger 2019).

Constitutional texts either comprise, or have been interpreted as imposing, both negative and positive obligations in relation to the right to vote and education (Salát 2019; Theuns 2019). For instance, the Dutch constitution requires the state to guarantee sufficient access to public school, and to fund both state and special confessional or alternative schools. The Turkish and Portuguese constitutions spell out positive obligations towards disabled children and immigrant children to education. Legal systems are, however, more reluctant to impose positive obligations in housing matters (Granger 2019). National constitutions, when they refer to a right to housing at all, tend to stay clear of them, in particular if some reallocation of resources is involved. Only the Portuguese constitution comes closer to it, listing specific duties imposed on the state under the right to housing (Granger 2019).

National or local legislation, as they result from domestic political processes and explicit policy choices, are, expectedly, more inclined towards positive obligations, including redistributive ones. For instance, UK legislation recognizes a 'conditional right to housing', placing a duty on local authorities

to provide accommodation for particularly vulnerable individuals (Granger 2019); relevant UK education acts also lay down positive duties on local authorities to secure diversity in school offerings, and to provide free meals, transport and milk for those in need (Salát 2019).

Some international human rights instruments and their implementation bodies (special monitoring committees and courts) take, at times, a more generous stance on positive obligations than national constitutional texts (although they often phrase them in moderate and conditional terms). The following examples reveal the ambivalence of international and European human rights bodies in the field of social rights, when it comes to directing policy choices and imposing costly redistributive measures on state parties through the recognition of strong positive obligations. The ICESCR, widely ratified, covers a range of social rights, including the right to housing (Article 11(1)), but specifies that states commit to 'working progressively towards the full realization of the rights' (Article 2(1)). The Revised European Social Charter (R-ESC), the main CoE social rights instrument, requires states to take measures to ensure the effective realization of rights, but the European Committee on Social Rights, monitoring its application, declared that social rights, such as the right to housing, could not be interpreted as imposing an 'obligation of results' (Granger 2019, p. 24).

Specialized human rights instruments, informed by the specific need for protection of particularly vulnerable groups, lay down stronger positive redistributive obligations. The Convention on the Rights of the Child (CRC), for example, requires states to provide material assistance and support programmes towards housing for the benefits of children (and their families), and the CRPD calls on states to take necessary measures to ensure that disabled persons can effectively exercise their right to vote (Granger et al. 2018).

The ECHR, which is backed up by a relatively robust compliance regime (individual complaints and court-monitoring), and generally endowed with significant legal authority in domestic law systems, has been interpreted to create positive obligations, and especially in relation to vulnerable groups (Granger 2019).

As already noted, EU law exerts a relatively strong influence on its member states' legal systems, through a comparatively strong institutional enforcement regime. However, in matters of voting, housing and education, its influence is limited, as it creates very few positive obligations (such as EU citizens' right to vote in EU and local elections, or housing assistance to asylum-seekers under the EU Reception Directive, Granger et al. 2018).

International and European instruments may thus impose certain positive obligations on the state, but their actual influence on domestic policies depends on their ratification and implementation, the effectiveness of monitoring and compliance mechanisms, and national constitutional and judicial attitudes

towards those instruments (Granger 2019; Salát 2019; Theuns 2019). The Austrian constitutional court, for example, considers that the Austrian constitution prevents the imposition of positive obligations in housing through reliance on the ECHR. In contrast, the Dutch human rights committee interpreted the relevant Dutch constitutional provision in the light of international human rights instruments, as imposing a duty to ensure sufficient, affordable and qualitative housing, and a special duty to pay particular attention to vulnerable groups (Granger 2019).

6.3.3 Rights Generation and Hierarchies of Justice Claims

The distinction between negative and positive rights runs through the so-called 'three generations' of (human) rights, an influential conceptual human rights framework (Vasak 1977), which persists despite the 1993 Vienna Declaration on the indivisibility of human rights, and generates a hierarchization of rights.

Civil and political rights, such as the right to vote, are first generation rights. These freedom-rights, generally associated with negative obligations, are widely acknowledged and recognized as creating enforceable subjective legal rights, and tend to be supported by strong judicial enforcement mechanisms, at national or at least European and international level. The second generation, social, economic and cultural rights (such as the right to housing), and the third generation, collective or solidarity rights (for example, environmental rights), are typically perceived as involving positive obligations, and consequently less amenable to judicial enforcement. When recognized at all in constitutional settings, they are often classified as principles of a programmatic nature which guide policy action but cannot be invoked in judicial review, even in countries with strong welfare traditions, like Austria or the Netherlands.

The hierarchy of human rights implied by the generational approach is not neutral for justice. Indeed, justice claims which can be framed as first generation rights tend to have more legal purchase than those laid down as second or third generation rights. This logic is visible in the context of housing, where the CJEU relied on the first generation right to private and family life (Article 7 CFR) as a basis for recognizing a right to accommodation protecting mortgage holders from eviction (Granger 2019). In the same vein, although in a different policy context, the Dutch climate change case was argued, and won, on the basis of a violation of the right to life and right to private and family life under the ECHR, and not any third generation right to a clean environment (Nollkaemper and Burgers 2020).

6.3.4 Procedural versus Substantive Rights and the Rule of Law

Law traditionally distinguishes between substantive and procedural rights. Stemming from the field of criminal justice, procedural guarantees (such as notification requirements, the right to be heard, the duty to give reasons or the right of access to one's file) and associated institutional infrastructures (notably independent and impartial tribunals, administrative review mechanisms and ombudsbodies) now infuse all legal and policy areas. The distinction between substantive versus procedural rights is of limited relevance though, as so-called substantive rights, such as the right to education, vote or housing, also entail institutional and procedural requirements. For instance, the European Court of Human Rights (ECtHR), interpreting Article 8 ECHR on the right to private and family life, clearly stated that the right to a home includes both procedural and substantive dimensions (Granger 2019).

Invoking procedural guarantees can help ensure that the bodies entrusted with allocating such benefits made their decisions on the basis of the proper considerations (such as actual needs) and not based on irrelevant or illegal reasons (such as prejudice, personal interests, institutional convenience or expediency). However, procedural justice serves substantive justice only to the extent that the legal system has committed to substantive justice goals. The ECtHR, for example, could rely on Article 6 ECHR (the 'procedural' right to a fair trial) to require a state party (France) to provide accommodation to an (immigrant) claimant who invoked a substantive (and enforceable) right to housing under domestic law (Granger et al. 2018). In the absence of such substantive commitments, however, procedural guarantees may well reinforce institutionalized injustices.

The procedural justice dimension further comes through in the context of eviction. The ECtHR, again, insists on the need to provide procedural guarantees before evicting or expelling individuals and families from their home, in particular when they are already in a vulnerable situation (Granger 2019). The CJEU, for its part, reads EU consumer protection directives in combination with the EU Charter to offer procedural guarantees in eviction related to mortgage default and repossession procedures (Granger 2019). National laws too provide for (more or less) stringent procedural guarantees (involving, typically, notification, counselling, mediation, extensions or the intervention of a bailiff) to afford some (temporary) relief and protection to those at risk of losing their home. However, in some countries, like in the UK, the multiplication of shorter term or more flexible tenancy contracts in the private rental market undermine this protection (Granger 2019).

Procedural guarantees appear weaker in relation to redistributive justice. Decisions on the granting of benefits, although they would generally be

expected to follow procedural steps, can rarely be challenged in court, even on procedural grounds (Granger 2019).

The operationalization of rights in legal doctrine, as exposed above, advantages certain dimensions of justice, or (groups of) claimants; it also places varying responsibilities for delivering on justice claims on public and private actors, and engages special decision-making and policy processes, driven by legal logics. In doing so, it projects its own picture of the who, what and how of justice. Moreover, it provides for its own way of engaging with conflicting justice claims.

6.4 RIGHTS AND THE BALANCING OF COMPETING JUSTICE CLAIMS

The definition of justice and the identification of injustices are influenced by the legal confrontation between individual rights, or between them and protected collective interests, or between legal orders pursuing different objectives and prioritizing different sets of values. The way legal systems manage these conflicts determine where justice eventually lies, at least in formal and institutional terms.

6.4.1 The Scope and Limits of Rights

All legal systems in Europe balance the individualized justice perspective carried by human rights frameworks with the collective needs of society. International and European instruments as well as constitutional documents treat (most) individual rights as not unlimited and absolute: they accept that their exercise can be restricted, to protect either others' rights or recognized public interests. Moreover, they use specific analytical methods to decide on the scope and limits of rights, and to draw the line between the competing visions of justice articulated through conflicting rights and interests, such as the so-called proportionality analysis.

Apart from the freedom from torture, and in some constitutions, human dignity – hence the attraction, in such contexts, of linking a right, such as housing, to 'dignity' – other rights, including the right to vote, housing and education, can be subject to limitations in their exercise. National and international courts have developed detailed argumentative frameworks and standards for this purpose, which display increasing formal and structural convergence.

The judge normally starts with defining the 'scope' of the right, and then examines whether the problematic measure interferes with the so-defined right at all. Then she looks at whether it pursues a legitimate aim: these can be either the protection of others' fundamental rights or a recognized public interest, such as public order, public health, morals or national security.

The judge further examines whether the measure is proportionate to the aim pursued, in the sense of being necessary and suitable, and providing for the least-restrictive means (Salát 2018). In case of a conflict of rights, judges would assess the respective 'weight' of the conflicting rights, and try, as far as possible, to 'maximize' or 'optimize' both (Alexy 2002). Most restrictions are, in any case, justified on public interest grounds.

Competing justice concerns are therefore channelled into the balancing exercise through their formulation as either individual rights or public interests. Within this framework, the exercise of property rights by landlords can be limited in order to protect individual rights, such as tenants' right to a home concerning eviction-related procedural guarantees or a right to affordable housing for rent control measures. Alternatively, restrictions, such as the Vienna rental regulation which lowered rent for certain types of flats by 80 per cent, may constitute justified restrictions on landlords' right to property, on grounds that the policy pursued, in a proportionate manner, the legitimate general interest of 'making accommodation more easily available at reasonable prices to less affluent members of the population, while at the same time providing incentives for the improvement of substandard properties'.[6]

EU law applies a similar framework, except that the default position of the 'right' is taken by EU free movement rules, and restrictions aimed at protecting other human rights or other recognized public interests are the ones which need to pass the proportionality test (meaning that they cannot limit free movement disproportionately). The CJEU ruled, for instance, that a local policy to prevent gentrification, which required local connections to be allowed to buy or rent property in a particular area, restricted EU free movement rules. It recognized that the objective of securing sufficient housing for lower-income and other disadvantaged local population was generally a legitimate one, but found that the particular measure failed the proportionality test, because it did not guarantee that it would (primarily) benefit the poorer or most disadvantaged. The Court's approach signalled that EU law would tolerate housing policies which interfered with cross-border movement, but only where they were clearly targeted at lower-income and other vulnerable populations; in doing so, it rubber-stamped prioritarian housing policies, and placed under suspicion policies aimed at preserving particular social, linguistic or cultural communities (Granger et al. 2018).

Proportionality analysis is a widespread technique used to decide between competing justice claims formulated as individual legal rights or public interests. It influences not only judicial decisions, but also legal and policy measures, as law- and policymakers anticipate judicial challenges (Stone Sweet and Matthews 2008). Whilst it appears to provide for a rigorous analytical framework for balancing justice claims, it is, in fact, a flexible tool giving judges significant discretion in deciding where the scale of justice tips. For

example, in the context of education, the ECtHR agreed that the Swiss ban on teachers in public schools wearing headscarves, which restricted their exercise of freedom of religion, pursued the legitimate aim of preserving religious harmony and state neutrality in education, and could be justified by the right of the child not to be indoctrinated, and the right of the parents to raise their children according to their own worldview. A similar German measure was however invalidated by the German constitutional court which, relying on the exact same arguments weighed differently, reached the opposite conclusion.[7]

6.4.2 Managing Competitions between Different Legal Orders and their Respective Visions of Justice: Margin of Appreciation and Constitutional Identity

Often, the question about justice is not who is entitled to what, but rather who is to decide, and how (Fraser 2009). In Europe, the confrontation between different visions and dimensions of justice framed as individual rights and public interests takes place at contact points between overlapping and competing legal orders, namely international (human rights) law, CoE/ECHR law, EU law and national (and even regional or local) law. These distinct (even if partly integrated) legal orders are driven by different aims and concerns: the protection of individual freedoms for the ECHR; economic and political integration for the EU; the preservation of national cohesion and identity for national constitutions; or the protection of local interests, communities and identities in local regulations. These, inevitably, impact on the way these different legal layers protect individual rights and balance between them and collective aims.

A wide range of legal methods exist to resolve the systemic tensions that different understandings of rights between legal orders that all claim legitimate authority generate, and help identify a solution. Two sets of particularly relevant modulating devices are worth outlining here: the 'margin of appreciation' in the relationship between the ECHR and national legal orders, and 'constitutional identity' in the EU–member states context.

The 'margin of appreciation' is a doctrine developed by the ECtHR, which consists in the Court renouncing jurisdiction to a certain extent ('narrow' or 'wide' margin) over a contested measure, handing back to the state party the matter of deciding whether it conforms to the ECHR (Granger et al. 2018). The doctrine does not follow a one-size-fits-all approach, but provides a flexible framework, which varies across rights, policy contexts and affected individuals or groups. For example, the Court leaves a wide margin of appreciation to states in relation to voting rights, but that should not amount to excluding individuals or groups of citizens from the country's political life (Granger et al. 2018). In relation to housing, the Court made it clear that the margin of

appreciation narrows where the right in question is 'crucial to the individuals' effective enjoyment of fundamental or "intimate rights"'.[8]

The doctrine of 'constitutional identity' serves a similar function in managing the relationship between the EU and national constitutional orders. It has gained traction over the last decade, since the coming into force of the Lisbon Treaty (2009), which gave textual recognition to the need for the EU to respect member states' 'national identities, inherent in their fundamental structures, political and constitutional' (Article 4(2) TEU). The German constitutional court actively invoked the national identity clause (or, in the past, other doctrines to the same effect) to protect its own vision of human dignity from adverse EU law interventions (Nowag 2016). Other courts have, however, avoided direct confrontation, by either claiming that EU law is not relevant to the case, or that it is not violated, or that it is clear, and therefore does not require CJEU clarification via a preliminary reference. For instance, the UK Supreme Court refused to consider an appeal against a judicial decision which ruled that the exclusion of British expats (emigrants) from the Brexit referendum vote did not interfere with EU free movement law and thus could not be reviewed under it (whilst at the same time hinting that it may be a discriminatory restriction on the exercise of the right to vote, under domestic law).[9]

6.4.3 Rights and Justice: Between Law and Politics

In the previous section, we looked at some of the techniques which legal systems have devised to decide which legal order, and which court (European or national), has the ultimate say on a particular right-claim. But a further question is whether questions about justice should be handed over to lawyers and courts at all.

To some extent, the answer depends on the 'quality' of each institutional and procedural set-up. If both processes are 'well-functioning', the question boils down to whether decisions about justice should be made through political debates, using lobbying and advocacy tools, and via representative or consultative institutions; or whether they should be determined by lawyers and judges, in the context of more or less inclusive judicial proceedings, triggered by and focused on the injustices faced by specific individuals in a given context (which may – or may not – reflect more systemic problems) and fitted in a straight-jacket of legal concepts and reasoning. Where political systems provide for inclusive, discursive and participatory processes for deciding who deserves what in a particular society (like in the Netherlands and a lesser extent the UK, Austria and Portugal), turning to a judicial venue appears both less appealing and legitimate than where a more authoritarian government runs the show (like in Hungary or Turkey). In the latter case, courts and their due process guarantees may be the only viable venue for justice activists (to the

extent that these institutions are still independent and robust enough to stand up to political and societal pressure).

The legalization of justice claims through rights framing results in a judicialization of debates about justice. Thereby, what Hirschl (2008) calls 'mega-politics' questions (and therefore mega-justice questions) are taken out of the hands of politicians and political processes, and put in front of courts, which resolve them through legal arguments and techniques. As illustrated above, these can be flexibly applied, but they still constrain the decision-making process in a way which influences the outcomes, if only because they are presented as 'given' rather than up for deliberation. Moreover, the authority enshrined in law and legal decisions legitimizes certain justice claims, and delegitimizes others.

Courts in Europe are not always keen to take on the task of deciding on questions of justice, in particular where there is no consensus or when it involves redistribution of resources. They have therefore developed avoidance strategies, disguised behind legal doctrines, which go under different labels but can generally be described as 'judicial deference'. Some of the doctrines touched upon in this chapter, such as proportionality, the margin of appreciation or constitutional identity, are regularly applied by European judges to avoid revisiting the policy choices made by national or local politicians, which sometimes enjoy strong political and social backing. National legal systems have similar legal devices through which courts exercise stricter or looser scrutiny over policy decisions.

6.5 CONCLUSIONS

The rise of human rights law and the perceived success of rights litigation have led policy actors, including activists and NGOs, to (re)frame many justice issues in rights terms. As illustrated throughout the chapter, framing justice as rights, and injustices as rights' violations, has implications for who can make which claims, against whom, and who ultimately decides. Moreover, the organizing principles of legal systems, legal doctrines and reasoning, influence which justice claim prevails.

Beyond the black-letter law, which was the focus of our research, we must remember that core features of justice systems, and notably their speed, effectiveness, fairness and independence, matter significantly for the actual realization of justice claims through legal rights. Further, the conditions of access to court, including standing and admissibility requirements, and costs, as well as legal support infrastructure, make a difference in terms of bridging the gap between the law-in-books and the law-in-practice (Conant et al. 2018).

The presence of an effective judicial framework, however, plays in favour of justice claims which can be more easily fitted within an enforceable rights

framework. In the European context, they have supported judicial challenges against discriminatory practices, such as the disenfranchisement of foreigners, (former) criminals and mentally disabled persons, the placement of Roma children in segregated schools and the institutionalization of (mentally) disabled children. However, it has been more difficult to harness legal rights to promote redistributive housing policies or broader educational or political equality objectives. The evidence gathered in the ETHOS research project suggests that in the current European legal context, framing justice as rights serves better (certain) recognitive justice claims, the key issue there being which status receives legal recognition and protection, and on which basis (needs, deservingness or vulnerability). A rights-approach (in the sense of enforceable legal rights), however, runs into challenges with representative justice, in particular where the injustices lie at the collective or institutional level, and generally struggles with redistributive demands.

NOTES

1. The chapter draws primarily on, and refers to, the analysis and findings in Salát (2018), Granger et al. (2018), Granger (2019), Salát (2019) and Theuns (2019), ETHOS reports published at https://ethos-europe.eu/, and country reports on which some of these were based. Given space limitation and the nature of this chapter contribution, references to primary sources are kept to a minimum and we invite interested readers to consult the reports, listed at the end of the chapter, for further references.
2. ECtHR, *Hirst v the United Kingdom (no. 2) [GC]*, App. No. 74025/01.
3. Legal doctrine refers here to both the interpretation and application of the law by legal practitioners, including judges, and its analysis by legal scholars, as both proceed with the same analytical logic.
4. European Court of Justice, Case 6/64, *Costa v ENEL*, ECLI:EU:C:1964:66.
5. For example, BVerfG, Order of the Second Senate of 14 January 2014 – 2 BvR 2728/13 –, paras. (1–24), ECLI:DE:BVerfG:2014:rs20140114.2bvr272813.
6. ECtHR, *Mellacher v Austria*, App. 10522/83, 11011/84 and 11070/84, 19 December 1989, para. 47.
7. BVerfG, Order of the First Senate of 27 January 2015 – 1 BvR 471/10 –, paras. (1–31), ECLI:DE:BVerfG:2015:rs20150127.1bvr047110. http://www.bverfg.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html (accessed 10 January 2020).
8. ECtHR, *Winterstein and others v France* App. No. 27013/07, 17 October 2013.
9. R (on the application of Shindler and another) v Chancellor of the Duchy of Lancaster and another – UKSC 2016/0105.

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7. The impact of the European Charters in times of crisis and their role in effectuating social justice ideals for European citizens

Barbara Safradin and Sybe de Vries[1]

7.1 INTRODUCTION

Justice is conceived as the normative basis upon which the European Union (EU) is founded.[2] But events of the 21st century such as the financial and migration crisis, and the terrorism threats have led the EU to put justice on a higher agenda (Douglas-Scott 2017). Particularly important in this respect have been the effectuation of fundamental (social) rights at EU level through the binding EU Charter of Fundamental Rights (CFR) attached to the Treaty of Lisbon (2009), and the proclamation of social justice and a highly competitive social market economy in Article 3(3) of the Treaty on the European Union (TEU). In addition, the Council of Europe (CoE) has long been a promoter of social rights with the CoE Revised Social Charter (R-ESC) constituting the key regional instrument for the protection of social rights of European citizens.

Nevertheless, it has been argued that the EU's handling of the Eurozone crisis has illustrated a lack of solidarity and disregard for justice claims at EU level (Douglas-Scott 2017). Especially Eurozone Member States with sovereign debt crises such as Greece, Portugal, Ireland, Cyprus and Romania were hit by this crisis, whereas of the non-Eurozone Member States, Hungary, the United Kingdom and Latvia were particularly affected (de Vries and Safradin 2018). These countries were subject to external conditionality regimes, which involved cuts in wages, pensions and welfare services. The austerity measures resulted in persistent violations of social rights and justice of their citizens, which have been challenged before national courts, the European Court of Justice (CJEU) and the European Committee of Social Rights (ECSR).

The main question that this chapter seeks to address is whether and if so, how fundamental social rights as laid down in the CFR and the R-ESC have been applied in Europe in times of crisis to effectuate social justice for

European citizens. Moreover, it will assess which future challenges exist for European citizens in accessing social justice claims through the European Charters. These social rights relate to values of 'equal treatment and respect' and 'freedom', values upon which the Union is founded. As such, the capability of individuals to enjoy their social rights should be a central consideration of social justice (understood in the spirit of Nancy Fraser as participatory parity) in all EU Member States. However, the degree to which European states meet ideals of distributive, representative or recognitive justice varies widely (see Chapter 4 for a detailed discussion of Fraser's tri-partite framework of justice that informed the ETHOS project and this book). In fact, the austerity measures that were adopted in the economic crisis have resulted in the unfair distribution of resources, which fuels deprivation of social rights and inequality within and between societies (de Vries and Safradin 2018).

The chapter is organised as follows. The first section will draw particular attention to the notion of social justice in the European legal order. Hereafter, the limitations of the CFR in the social domain will be addressed, in particular when it comes to realising social justice in times of crisis. The third section illustrates the specifics of how several legal and natural persons attempted to invoke the CFR and R-ESC to challenge the austerity measures taken in the wake of the economic crisis, with a particular focus on the role of the CJEU and the ECSR in this matter. Lastly, some recommendations are given on how these instruments could be utilised in the future in order to better promote, respect and protect fundamental social rights of European citizens in crisis times. As such, this chapter allows us to illustrate what still remains to be done so that fundamental social rights become a reality for everyone in Europe, including the most vulnerable ones in society. The chapter largely draws upon the ETHOS research conducted by de Vries and Safradin (2018).

7.2 PAVING THE WAY TOWARDS A SHARED CONCEPT OF JUSTICE IN THE EU?

The 2009 Lisbon Treaty has for the first time explicitly referred to the notion of 'social justice', stipulating in Article 3 of the TEU that the Union 'shall promote social justice'. With this provision, the EU legislator has explicitly raised attention and importance to social rights in the hierarchy of EU values. Scholars such as Sionaidh Douglas-Scott have raised the question as to whether it is possible to secure 'social justice' in an EU which has for so long focused on a market-driven rationale. In fact, EU legislation has been beneficial in the field of equality law, in particular in the domain of equal treatment between men and women, and especially the right to equal pay for equal work for male and female workers. The CJEU gave this right as enshrined in Article

157 of the Treaty on the Functioning of the European Union (TFEU) the status of a fundamental right in the *Defrenne II* case.[3]

But the justification for the adoption of a EU legal framework in this field was predominantly found in the need to prevent distortions of competition and to create a level playing field in the EU's internal market (de Vries and Safradin 2018). The EU's approach to equality thus seemed more market driven than fundamental rights' driven with a view to realise more equality amongst citizens. Douglas-Scott argues in this context that:

> [I]t is difficult to see how the EU can promote itself as the sort of social market community urged, for example, by Habermas, when so many of its members would veto such a role for it (no doubt in many cases due to an absence of solidarity), and when the austerity measures taken in the wake of the Eurozone crisis undermine social justice. (Douglas-Scott 2017, p. 63)

Furthermore, adding a social dimension to the EU's internal market has not been easy since many of the EU Member States do not stand behind the idea of a common, harmonised, redistributive social policy as they are divided about whether a social welfare system should be more market driven or redistributionist (Douglas-Scott and Hatzis 2017). But it should be emphasised that social objectives have long been recognised as part of the EU's internal market, which was confirmed in the above-mentioned *Defrenne II* case wherein the Court held that what is now Article 157 TFEU 'forms part of the social objectives of the Community which is not merely an economic union, but is at the same time intended to ensure social progress and the constant improvement of the living and working conditions of their people'. In addition, in various documents of the European Commission and the Council, the importance of the social dimension of the internal market was recognised. However, as stated above, the creation of a more social Europe was originally not seen as an aim in itself. As a consequence, the EU's competences in the social policy field remained limited, which meant that EU measures, including those adopted in the wake of the crisis remained ad hoc and fragmented, and resulted in social injustice for European citizens. Douglas-Scott argues that this resultant injustice is indeed attributable to a so-called 'asymmetrical and unbalanced integration' (Douglas-Scott 2017, p. 63).

Despite the lack of legislative powers for the EU to protect EU citizens against social injustice, we should point at the (potential) impact of the CFR to counterweight austerity and to strengthen redistributive (for example, right to housing, social benefits), recognitive (for example, right to education) and representative (for example, right to collective action; representation in a trade union) justice. Yet some of the stringent austerity measures that have been adopted in the wake of the Eurozone crisis appear to be contradictory to the

social fundamental rights as laid down in the European Charters as well as to the EU's desire to foster social justice within the meaning of Article 3 TEU (Douglas-Scott 2017).

Against this background, the EU and particularly the EU Member States created a perfect 'vacuum of irresponsibility' in which they can blame each other for most of the pitfalls. This suggests that Europe is characterised 'by justice *at default*. Justice values and norms remain holding principles in abstraction, less so in practice' (Knijn et al. 2019, p. 85; see also Chapter 13). Having said that, the focus of justice as a social and political concept entails a deeper understanding of justice, which also requires, as Douglas-Scott argues, 'nurturing freedom and the realisation of justice'. She thereby advocates for human rights as a 'powerful symbolic and actual force' for justice and a better departure for achieving justice in the EU (Douglas-Scott 2017, p. 59).

7.3 THE CFR AND LIMITATIONS FOR SOCIAL RIGHTS PROTECTION

Despite the fact that the CFR became legally binding with the Lisbon Treaty in 2009 and despite its potential for the protection of citizens' social rights, there are still important limitations that could restrict justice realisation for EU citizens, which will be highlighted below.

7.3.1 Limited (Scope of) Application of the CFR in Respect of Social Rights

Article 51(1) of the CFR stipulates that the rights of the Charter apply to the EU institutions and only to the Member States when they are implementing Union law. The CJEU played a pivotal role in broadening the scope of the CFR. For example, it further interpreted this right in its landmark judgment *Åkerberg Fransson*, in which it argued that the rights as laid down in the CFR must be respected in all situations in which national legislation falls 'within the scope of EU law' and it thereby equated 'implementation' with 'scope of application'.[4] At the same time, it restricted the Charter's scope again in *Siragusa*, in which the CJEU held that this order did not trigger the application of Article 17 of the CFR since the national law at issue did not have any corresponding obligations under EU law (de Vries and Safradin 2018, p. 14). However, the Court's case law is not always clear on what this exactly entails. In the case of *Dano*, for instance, the Court was unwilling to apply the Charter despite the fact that Germany acted within the framework of EU legislation, which in other Court decisions sufficed to trigger the CFR. In this case, a Romanian national legally residing in Germany could not seek a remedy under the CFR

as Member States are not competent to determine the conditions for granting social benefits (de Vries 2019).

Moreover, another limitation of the CFR in effectuating social justice is that Article 51(2) of the Charter stipulates that this instrument 'does not extend the field of application of Union law'. The CFR in itself cannot, for instance, constitute a legal basis for legislative action in the social policy field.

7.3.2 Rights versus Principles Dichotomy: The CFR's Solidarity Rights Title

Compared to the R-ESC, the CFR constitutes a broader catalogue of rights with the specific Solidarity Title IV covering various social and workers' rights. These rights include the right to fair working conditions, protection against unjustified dismissal, and access to health care, social and housing assistance. All EU Member States are bound to the social rights in this document, except for the United Kingdom and Poland who have secured Protocol No. 30. This Protocol provides that the Solidarity Chapter containing social rights cannot create justiciable rights different from the degree that such rights are already protected under national law.

Nevertheless, the CFR includes a complicated distinction between so-called 'rights' and 'principles' as laid down therein. This distinction is particularly relevant for social rights. More specifically, Article 52(5) of the CFR stipulates the following:

> [t]he provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

In other words, this refers to the idea that rights, which contain so-called 'principles' within the context of Article 52(5) of the CFR cannot create directly enforceable rights for individuals that want to invoke them before courts (that is, representative justice). Even more so is the fact that this provision does not explicitly refer to which rights can be regarded as 'principles' and which provisions can be seen as so-called 'principles'. An example can be found in Article 34 of the Charter, which stipulates the following:

> [t]he Union recognizes and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.

The idea behind this distinction is that there exists a 'dichotomy between individual and fully enforceable rights on the one hand, and programmatic norms (principles) that require the intervention of the legislator or the executive … on the other' (Peers and Prechal 2014, pp. 1505–6). However, although Article 52(5)'s aim was to clarify the judicial nature of rights and principles and to thereby reinforce legal certainty, it has been questioned whether this provision in fact does not lead to more confusion. Deciding which provision contains a right or principle is complex, and introducing a new category of principles – EU law already contains a range of various principles – is not really helpful. In such circumstances, it is important to assess whether EU law or policy exists in this field, since the principle shall then 'be judicially cognisable only in the interpretation of such acts in the ruling on their legality' (Article 52(5)). The CJEU could play an important role in explaining Article 52(5) and in interpreting the principles contained in the Charter. The Court had the opportunity to do so in the *Association de Médiation Sociale* (*AMS*) case, which concerned Article 27 of the CFR on workers' right to information and consultation within the undertaking. But the Court did not embroider on the distinction of rights and principles as laid down in Article 52(5) of the Charter. By contrast, the Advocate General addressed the content of Article 27 of the Charter and thereby held that in the Charter as well as in national constitutions, claims of the nature of social rights are typically designated as 'social rights' to indicate that no individual subjective rights can be derived from them, but they only function via the implementation or enforcement through the State. They can then be regarded as 'rights' in terms of their content and nature, but 'principles' in terms of their enforcement (de Vries and Safradin 2018). This led many to believe that (most of) the social rights in the Solidarity Title should be considered principles, until the Court's decisions in *Bauer et al.* and *Max Planck*, which will be discussed hereafter.

7.3.3 The Question of Horizontal Direct Effect of the Charter Provisions in the Social Domain

Another important point to make regarding the scope of the CFR is the issue of horizontal application of fundamental rights. To what extent do the rights contained in the Charter apply in horizontal relationships – that is, between private parties, and can they be invoked before a national court in a dispute between private parties (that is, horizontal direct effect)? Within the context of the Eurozone crisis, this question is of particular importance with respect to labour disputes between employers and employees, and the litigation process. An example of a CFR provision that is horizontally directly effective is Article 23, which lays down the principle of equality between men and women 'in all

areas'. However, not all provisions in the Charter enjoy horizontal effect (de Vries and Safradin 2018).

It is often the CJEU that decides which provisions of EU primary law, including the CFR, and of secondary EU law, can enjoy full horizontal direct effect. In the *AMS* case for example, the CJEU argued that this provision does not have *horizontal* direct effect, meaning that it cannot be invoked in labour-related proceedings between private parties, because it does not have *direct effect* in the first place. It argued in particular that it is 'clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law'.[5] But the CJEU did not explicitly exclude the possibility of Charter provisions having horizontal direct effect either.

In another earlier case, *Kücükdeveci*, the CJEU applied a different approach in assessing the possibility of horizontal direct effect of EU fundamental rights, building upon its prior judgment in *Mangold*. In *Kücükdeveci* the CJEU held that non-discrimination on the basis of age, as a general principle of EU law can enjoy horizontal direct effect, also in situations in which EU secondary legislation such as directives are incapable of having such an effect. In this case, the CJEU provided strong hints that Charter principles that embody the general principle of non-discrimination on age can have horizontal direct effect. The Court argued that, unlike Article 27 of the Charter in *AMS*, the principle of non-discrimination on grounds of age laid down in the Charter under Article 21 'is sufficient in itself to confer on individuals an individual right which they may invoke as such'.[6] This finding thereby differentiates the *Kücükdeveci* judgment from the *AMS* case (de Vries and Safradin 2018).

In the 2018 judgment of *Bauer et al.*, concerning the right to paid annual leave in case of death as laid down in Article 31(2) of the Charter, the CJEU took a new position on horizontal direct effect of the CFR in the field of social rights.[7] In this judgment the Court did not only rule that the rights in the Charter can have horizontal direct effect (that is, that they can be applied vis-à-vis other individuals) but also that this may go true for fundamental social rights laid down in the Solidarity Title IV, provided that these rights are *directly effective* in the first place. This judgment thus illustrates that the CJEU has taken a first and important step in acknowledging that fundamental social rights, in particular the right to paid annual leave, enjoy (horizontal) direct effect. Until now, this has only been the case in the field of non-discrimination and internal market cases. With *Bauer*, the CJEU has expanded this rationale to social rights, in addition to non-discrimination rights and as such, as Sarmiento argues, has opened up 'a new playing-field in the enforcement of social rights in Europe' (Sarmiento 2018). By this and by emphasising that Article 31(2) constitutes an essential principle of EU social law *Bauer et al.* may contribute to the attainment of a social market economy as laid down in Article 3(3) of

the TEU, thereby reinforcing the protection of social rights for EU citizens (de Vries and Safradin 2018). The Court in *Bauer et al.* also explicitly refers to Article 51(1) of the Charter and the addressees mentioned therein. It thereby explicitly rejects the argument that the Charter would *never* apply to private parties as Article 51 only mentions EU institutions and its Member States. By pondering on the personal scope of application the Court thus affirms horizontality of the Charter provisions *in principle* (de Vries 2019).

7.4 THE (IN)APPLICABILITY OF EU LAW DURING THE FINANCIAL CRISIS AND THE CJEU'S ROLE

As argued above, social rights as laid down in the CFR can only be applied when the situation falls within 'the scope of Union law' as laid down in Article 51(1) of the Charter and further elaborated in the *Åkerberg Fransson* judgment. The CFR does not operate in a vacuum, which means that there must be another 'accompanying' or 'supportive' provision of primary or secondary EU law, which triggers the application of the CFR. That the threshold for application may be high particularly follows from a stream of judgments by the CJEU on austerity measures adopted during the 2008 financial crisis. This case law is exemplary of the Court's reluctance to rely on the CFR where the compatibility of national austerity measures with Union law is concerned, thereby disregarding justice claims of EU citizens (de Vries and Safradin 2018). In a majority of these cases the Court held that the Member States were not 'implementing Union law' within the meaning of Article 51(1) of the Charter and that it therefore lacked jurisdiction. On this point, Peers argues that the Court's unwillingness to apply the CFR was not justified, even when adopting a narrow definition of the application of EU law, since Council measures had been implemented in these cases on the basis of Article 122 and 143 TFEU that expressly required the reduction of costs to be implemented (Peers 2014).

There are a number of reasons which explain the CJEU's hesitance to apply the CFR in austerity cases. First of all, some financial assistance programmes which have been implemented on the basis of the European Stability Mechanism (EStM), the European Financial Stability Facility (EFSF) and bilateral loan agreements executed by Greece did not fall within 'the scope of Union law' for the purposes of Article 51 of the Charter (de Vries and Safradin 2018). One landmark case that illustrates this is *Pringle*.[8] This judgment concerned the legality of the EStM Treaty, which is a treaty under public international law concluded by the Members of the Eurozone, with the aim of creating a permanent crisis mechanism to safeguard the stability of the Eurozone area. Despite the fact that the application of the CFR was not the main point to be addressed in the *Pringle* case, the CJEU did stipulate that Article 122(2)

TFEU, which provides the Union the competence to grant *ad hoc* financial assistance to Member States that are threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, did not provide for an appropriate legal basis for the establishment of the EStM. In this context, the Court argued that the adoption of the EStM does not infringe the principle of effective judicial protection as covered under Article 47 of the Charter and as such the situation does not fall 'within the scope of' EU law within the meaning of Article 51. In a similar way, the European Commission stated that when giving to these memoranda, Greece did not 'implement' EU law under the terms of Article 51 of the Charter and therefore the CFR did not apply (Koukiadiaki 2019).

A second reason that explains the cautious approach of the CJEU concerns the (in)ability of a link between a relevant EU law source and a Member State action (Koukiadaki 2019). The ETHOS case study of Portugal is relevant to mention in this context. The Troika, composed of the International Monetary Fund (IMF), the European Central Bank (ECB) and the European Commission, negotiated the international bailout for Portugal in the period 2011 and 2014. Part of these negotiations consisted of the adjustment programmes, including the conditions on financial support, conclusion of loan agreements, and monitoring the implementation thereof (Douglas-Scott and Hatzis 2017; see also Chapter 11). Since 2010, Portugal has been subject to withdrawal of policies aimed at combating poverty and social precariousness, justified by the necessity to control the public deficit. The austerity measures of the Portuguese state predominantly consisted of freezing almost all social and pension benefits, which led to a significant lowering of social rights protection for Portuguese citizens (de Vries and Safradin 2018). The international bailout by the Troika consisted of a Memorandum of Understanding (MoU) that was signed by the European Commission on behalf of the EU and the Member States. The most important elements of the MoU were incorporated into Council Decision 2011/344/EU (de Vries and Safradin 2018). During this period, litigants ranging from trade unions, companies and natural persons challenged the national budgetary measures that infringed their social justice realisation (de Vries and Safradin 2018). In numerous cases, the CJEU declined to answer preliminary references submitted by Portuguese lower courts that questioned the compatibility with the CFR with national austerity measures that implemented the MoU (Douglas-Scott and Hatzis 2017).

In the case *Fidelidade Mundial* and *Via Directa*, a Portuguese trade union was seeking a restitution of the collectively agreed holiday and Christmas allowances that were suspended by the State Budget Act for 2012 in State-owned insurance enterprises (de Vries and Safradin 2018). The referring Portuguese labour courts from Lisbon and Oporto sent preliminary references to the CJEU, questioning whether the latter measures complied with the fun-

damental rights as laid down in the CFR, in particular the right to equality and non-discrimination (Article 20 and 21), and the right to fair and just working conditions (Article 31(1)). In October 2014, the CJEU declared the preliminary reference by the Portuguese courts inadmissible, for lack of jurisdiction to review Portuguese law vis-à-vis the CFR. It argued in particular that the austerity measures that were taken by the Portuguese government and included in the State Budget for 2012 did not trigger EU law and therefore fell outside its jurisdiction. The CJEU referred to an earlier decision in which it had already dismissed on the same grounds a preliminary reference by a Portuguese court challenging a similar austerity measure included in the State Budget Act for 2011.[9]

In the *Sindicato dos Bancários do Norte* case, the CJEU held that in line with its established case law, the CFR and its requirements are only binding upon Member States when 'they are implementing EU law' as stipulated in Article 51 of the Charter. It continued that under Article 6(1) TFEU, the Charter is binding and has the same value as primary EU law, but it does not create new EU competences nor modify existing ones.[10] Again, the CJEU declared itself inadmissible to rule on the issue at hand since the contested national provision at issue was not implementing Union law. In the *Fidelidade Mundial* case, the CJEU argued that the facts at hand had the same nature as in the *Sindicato dos Bancários do Norte* case and as such the referring questions were analogous to the latter case. Therefore, the Court concluded that neither the 2011 nor 2012 Budget Acts were implementing Union law in the sense of Article 51(1) (Barnard 2013).

A further obstacle that adds to the CJEU's unwillingness to apply the CFR in the crisis context is that national austerity measures could also conflict with other international instruments and organisations that protect social rights, such as the R-ESC, International Labour Organization (ILO), United Nations (UN) and IMF (de Vries and Safradin 2018). These international systems have their own reporting mechanisms and remedies available and one could argue that the availability of these mechanisms provides litigants with alternative remedies in cases in which the CFR does not apply (de Vries and Safradin 2018). At the same time, the careful approach of the CJEU in the austerity context is contrary to its established line of cases regarding, for example, economic rights and civil rights, in which it has often taken a generous approach in reconstructing the applicability of EU law, and refusing the cases at hand *only* when the situation has no link at all with Union law.

In any case, in the above stream of austerity cases, exposing the limitation of Article 51(1), the CJEU clearly restricts litigants from effectuating social justice claims and the rights that they enjoy under Union law. It is therefore safe to conclude that the application of the CFR has not (yet) resulted in an

effective mechanism for EU citizens to challenge the infringement of social labour rights in the context of the economic crisis (Koukiadaki 2019).

7.5 THE IMPACT OF THE ECSR ON SOCIAL JUSTICE IN TIMES OF CRISIS

In addition to the CJEU, the ECSR has been, and still is to this date, an important body that monitors the compliance of the R-ESC. It has, unlike the CJEU, been very active in responding to social rights violations in times of crisis. This section will take a closer look at the impact and role of the ECSR in the austerity context.

The R-ESC is a counterpart to the European Convention on Human Rights (ECHR), the latter embodying civil and political rights. It guarantees a broad range of everyday human rights related to employment, housing, health, education, social protection and welfare and considers these rights to be basic and intrinsic rights for everyone in Europe. Important to mention is that the R-ESC is a CoE instrument which applies also to non-EU states, such as Turkey, whereas all EU Member States are parties to the CFR. Within the context of the current project, Portugal and the Netherlands are the only State parties that have implemented (almost) all provisions of the revised R-ESC in their national legal framework (de Vries and Safradin 2018). Despite its increased visibility and relevance to policy areas impacted by EU law, the R-ESC has in most cases been overlooked under EU law, specifically regarding the protection of fundamental social rights in the EU legal order (de Vries and Safradin 2018). Despite this, the ECSR has had an active role in holding States accountable for violations of social rights during the economic crisis. It has two procedures in place to ensure that State Parties comply with their commitments under the Charter: (1) publishing national reports with recommendations and (2) the collective complaints procedure, allowing trade unions and non-governmental organisations (NGOs) with consultative status to present complaints to the ECSR. A Protocol opened for signature in 1995, which came into force in 1998, allows national and international trade union organisations, employers' organisations and NGOs to submit their complaints on violations of the R-ESC. Among the countries included in the analysis, Hungary, the United Kingdom, Austria and Turkey have not ratified this Protocol, while Portugal and the Netherlands did (de Vries and Safradin 2018).

Unlike the CFR, the R-ESC is not subject to limitations regarding its scope and thereby does not restrict litigants from effectuating social justice claims and the rights laid down therein, albeit it must concern a collective complaint procedure in which trade unions and NGOs with consultative status can present complaints to the ECSR. Individual situations may not be submitted here. The

R-ESC has been essential in the protection of social labour rights of various vulnerable groups in Europe in times of crisis (de Vries and Safradin 2018).

The binding conclusions of the ECSR are of significant importance for the adequate protection of social rights in times of crisis. In its conclusions of 2009, the ECSR stipulated that:

> the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the [European Social] Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need the protection most.[11]

The ECSR has been particularly active against Greece, Portugal and Spain in responding to social rights violations as a result of austerity measures taken during the crisis.[12] It stipulated in the case on the *PanHellenic Federation of pensioners v. Greece* that 'states parties … should – both when preparing the text in question and when implementing it into national law – take full account of the commitments they have taken upon ratifying the European Social Charter'.[13] At the same time, the ECSR has argued that social rights, such as the right to housing, could not be interpreted as an obligation of results towards States, showing the cautiousness of the ECSR towards positive redistributive obligations in the social domain (Granger 2019).

The ECSR has condemned various State parties in recent years for justice violations, that is, for not providing free health care services to undocumented immigrants, but also other violations of the right of refugees' establishment of working conditions below the minimum acquired and prohibiting the right to strike. In the case of Greece, the ESCR has argued that the legislative reforms that were taken in the wake of the Troika measures did not comply with the R-ESC and should therefore be annulled. This concerned in particular measures regarding tackling of youth unemployment, where Greece limited the social security coverage for youngsters (Article 12(3)), such as a salary below the poverty level, which violated their right to a remuneration that guarantees a decent standard of living and their right to enjoy social rights without discrimination.[14]

In Turkey, trade unions used the ECSR complaint procedure to criticise workers' right to organise, especially during the instalment of the state of emergency by the Turkish government. In 2017, Turkey prohibited five strikes under the state of emergency, thereby arbitrarily curtailing the human rights and representative justice claims of their citizens. Despite the fact that Turkey lifted the state of emergency, to date the country still does not effectively implement the provisions of the R-ESC, specifically when it comes to labour rights and anti-discrimination on the labour market. Dismissed workers do

not enjoy a right to appeal and are blacklisted from other jobs (de Vries and Safradin 2018, p. 30).

Many of the social rights as laid down in the CFR are based on or correspond to the provisions of the R-ESC. At the moment, the CFR requires the case law of the ECtHR to be taken into account, while no analogous obligation exists to refer to the ECSR conclusions or case law. Despite this, judgments and conclusions of the ECSR are important legal sources that give meaning to the provisions laid down in the R-ESC (Peers 2014). The R-ESC moreover contains certain rights that are more detailed than the ECHR, such as the right to education (that is, justice as recognition), albeit it has a more limited enforcement mechanism than the ECHR and the CFR, consisting of merely monitoring and a collective complaint procedure. Hepple (2001) argues that the interpretations as given by the ECSR should at least be equally given the same value as the ECtHR in the EU legal order. The fact that the legal status of the R-ESC has not been explicitly coordinated with the ECHR in the EU legal order, and that the CJEU only refers to the R-ESC in passing, poses a serious limitation to fostering social justice in the EU (de Vries and Safradin 2018).

7.6 FUTURE CHALLENGES AND RECOMMENDATIONS FOR SOCIAL JUSTICE REALISATION IN EUROPE

The following policy recommendations have been identified to allow the EU legislator to move towards a more comprehensive European Social Welfare model, in which *all* citizens and their justice ideals in Europe, regardless of their status, are being protected:

1. Elevation of so-called social principles in the CFR – which do not constitute self-standing rights – into enforceable rights which have the same status as civil and political rights.
2. Despite the fact that the EU has limited competences in the social domain, the EU legislator should consider to launch the process of EU accession to the R-ESC (Wixforth and Hochscheidt 2019). The legal basis for such an accession could perhaps be found in Article 216(1) TFEU, considering the number of areas covered by the R-ESC in which the EU has attributed powers to the Member States. The accession is also in line with the action plan of the newest European Commission President Ursula von der Leyen who wants to foster a Social Europe: 'in our Social Market Economy we must reconcile the market with the social. Therefore I will refocus our European Semester to make sure we stay on track with our Sustainable Development Goals.'[15] The EU's accession to the R-ESC could moreover reinforce the implementation by Member States of the *European Pillar of*

Social Rights as adopted in November 2017, which is a non-binding document that aims to deliver new and more effective social rights for citizens, building upon (a) equal opportunities and access to the labour market; (b) fair working conditions; (c) social protection and inclusion. At the moment, it is not clear who is in charge of the enforcement of these rights at national level. If certain actors such as trade unions and civil society organisations would mobilise themselves and put weight on this document at the national and EU level (that is, bodies that demand responsibility and hold EU and national governmental structures accountable under the R-ESC), this could provide for a more binding force of this instrument. Unfortunately, the mandate and interest of these actors in reinforcing higher social standards at the European level differs in each Member State.

3. In order for the CJEU to play a more visible role in social justice protection and to 'socialise' or make more inclusive its case law, Wixforth and Hochscheidt (2019) argue that it would be desirable to introduce European minimum standards in the form of directives in more socially related legal fields. At the same time, implementation thereof highly depends on the political will of Member States in this area. The question then is how we can guarantee that any EU-wide harmonisation of social policies does not result in agreement on the lowest common social standards. In the view of trade unions, implementation of a 'social progress protocol' would then be necessary (Wixforth and Hochscheidt 2019).
4. More awareness should be created on the use of the CFR in the judicial domain, particularly when it comes to the application of this instrument by national judges. The scope of EU law is the broadest at national level and as such, the impact of the CFR is highly relevant for national authorities, national legislators and courts. However, according to Eurobarometer surveys and research of the Fundamental Rights Agency of 2018, there is insufficient awareness and implementation of the CFR in the 28 Member States.

In a politically divided area such as social policy and employment, where decisions largely fall within the scope of Member States' competences, EU action to implement these policy recommendations, and specifically EU accession to the R-ESC, can only be limited. Furthermore, there must be a political will on the part of the Member States to realise social justice. At the same time, CJEU case law shows that in matters that are subject to EU regulation, such as non-discrimination, particularly on the enforcement of the non-discrimination principle concerning equal pay for men and women (that is, justice as redistribution), the CJEU has proved to be a real defender of the European acquis (Wixforth and Hochscheidt 2019).

However, where social policy fields have not been subject to harmonisation at EU level – including the rights of association and withdrawal of labour, wages, and the amounts of social benefits (including minima) – the CJEU has fewer possibilities to act. Against this background, an even more fundamental question for today's social justice experience would be the adequacy of the division of powers, particularly whether it is desirable and beneficial to extend Europe's competences in the social domain, including the adoption of minimum EU standards on social policy regulation (de Vries and Safradin 2018).

7.7 CONCLUSION

The recognition of fundamental rights as general principles of EU law by the CJEU goes back to the late 1960s, with *Internationale Handelsgesellschaft* forming the first landmark case. Many years later, EU law expanded citizens' protection of fundamental social rights, in particular through the legally binding CFR (2009) and the adoption of the EU's Social Policy Agenda. This chapter has illustrated that the CFR is becoming increasingly important and is the first EU-wide instrument that includes both civil and political rights on the one hand and social rights on the other, thereby covering all layers of the ETHOS' justice taxonomy (that is, representation, recognition and redistribution) in one document. Despite this, the potential of social rights contained in the CFR is limited due to the limited scope of application of the Charter, their characterisation as principles rather than self-standing rights and the consequential unclarity as regards their horizontal direct effect, sometimes leaving individuals in private disputes without a remedy. Moreover, the EU's handling of the Eurozone crisis has illustrated a lack of solidarity and disregard for justice claims at EU level. The CJEU has only rarely dealt with fundamental social rights in the austerity context. The fact that the CFR is only applicable when national measures 'fall within the scope of Union law' can be seen as an inevitable restriction to the effective enforcement of social justice claims for EU citizens (de Vries and Safradin 2018).

Despite the fact that the CFR is largely inspired by the provisions of the R-ESC, the latter instrument has to a large extent been disregarded in the more recent developments concerning the protection of fundamental social rights in the EU legal order. Nonetheless, the role of the ECSR has been more active than the CJEU in the austerity context. The latter institution has played a pivotal role in the realisation of justice claims for European citizens at times when they needed it the most.

It is especially in moments of crisis that fundamental rights could remedy justice errors by providing a check against national austerity measures, which are inadequate and/or disproportionate (de Vries and Safradin 2018). The

CJEU's role in this matter will be crucial to guide national courts in referring to the CFR and the R-ESC, particularly in areas in which social rights need to be balanced with economic freedoms. Nevertheless, the CJEU has limited the scope of its role in the financial crisis context, as was illustrated through *Pringle* and other subsequent rulings in which it disregarded the application of the CFR. This being said, in the latest *Bauer* ruling the Court expanded the force of social rights protection in private disputes and shows its willingness to place the burden of justice realisation on private parties as well. One of the examples that has already lifted social rights protection to a higher level in the EU is the adoption of the European Pillar of Social Rights of 2017, a development that should be applauded. As Douglas-Scott rightly points out, 'human rights are crucial and should play a vital role in European integration. Now is the time for the EU to move beyond ambivalence and to state clearly that it believes in human rights as the best route to justice' (Douglas-Scott 2017, p. 78).

NOTES

1. We would especially like to thank (former) student assistant Simona de Heer, who provided valuable insights and research assistance for this chapter.
2. Europe is here defined as the 'European social legacy', conceived as a mix of market economy, social regulations and a culture of human rights in the ETHOS selected Member States and Turkey.
3. *Defrenne v Sabena* ECR 455 [1976].
4. See *Åkerberg Fransson* EU:C:2013:105, para. 21.
5. *Association de Médiation Sociale (AMS)* ECLI:EU:C:2014:2, para. 45.
6. Ibid., para. 47.
7. *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* EU:C:2018:871.
8. *Thomas Pringle v Government of Ireland and Others* EU:C:2012:756.
9. *Sindicato dos Bancários do Norte* EU:C:2013:149, para. 7.
10. Ibid., paras. 10–14.
11. ECSR, *Conclusions 2009*, Vol. I, para. 17.
12. Ibid.
13. ECSR, Complaint no. 79/2012, para. 47.
14. Ibid.
15. European Commission, Opening Statement in the European Parliament Plenary Session by Ursula von der Leyen, accessed 9 January 2020 at https://ec.europa.eu/commission/presscorner/detail/it/speech_19_4230.

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8. Justice, citizenship and methodological de-nationalism

Bridget Anderson

8.1 INTRODUCTION

In 2002 Andreas Wimmer and Nina Glick Schiller, building on the work of scholars such as Ulrich Beck and John Urry, made a significant contribution to social science in their elaboration of the challenges of 'methodological nationalism'. This naturalises the nation state as a container of social processes and thereby pre-determines and defines certain objects of sociological inquiry, simultaneously removing the nation state form itself from critical inquiry (Wimmer and Glick Schiller 2002). It has important implications for theories and practices of justice, as it prevents us from asking questions such as: what (if any) are the injustices arising from the nation state form itself? How could such injustices be remedied given the crucial role of the state in shaping mechanisms of justice? Or, to respond directly to Wimmer and Glick Schiller's concerns, what would a methodologically de-nationalist approach to justice look like?

In this chapter I will draw on ETHOS research with Roma people to explore how European states have contributed to the construction of racialised minorities, and how the racial hierarchy built into nation states is not only a historical artefact but has major contemporary ramifications. That is, there are indeed injustices baked into the nation state form. Roma people are often legal citizens of a state where they reside, and they may also be European Union (EU) citizens exercising their free movement rights, but the history of European nation state formation has contributed to them being 'minoritised', that is, being turned into a negatively racialised 'minority group'. Attention to their experiences can help us better understand how citizenship is racialised, and how to build connections between 'migrants' and 'citizens'. This, I argue, is a critical first step towards a methodologically de-nationalist approach to justice.

I begin by arguing that the subordination of 'Roma people' is in part a consequence of David Goldberg's 'racial state' and of Europeanisation processes, and that what unites the very different groups that fall under this umbrella

term is misrecognition (Goldberg 2002). I then touch on the contemporary consequences and expressions in the practices of misrecognition directed against Roma that are imbricated with maldistribution. One state response to racialised misrecognition is to utilise the legal status of citizenship as an equalising mechanism. In the case of the Roma this results in a distinction between national minority Roma and 'migrant' Roma, and in some cases the institutional representation of the former. Yet neither citizenship nor institutional representative mechanisms are sufficient to address the injustices arising from the nation state form, which creates exclusions of 'migrants' and 'national minorities' alike. Following Fraser, the political situation of the Roma could be analysed as a problem of framing (see Chapter 4), but, rather than 'misframing', it might be better seen as illustrating the shortcomings of framing itself. The case of Roma people suggests that we should not assume differences between the 'migrant' and the 'citizen', and not taking such differences as a starting point enables us to see the work that these categorisations do and how 'migrants', 'citizens' and 'Roma' are interconnected. I demonstrate this with reference to mobility and welfare benefits and conclude with a call for theories of justice to problematise the ideal of citizenship, at least in its usual state-embedded form.

I should emphasise that the author is not an expert in Romani Studies and my aim is not to highlight the 'Roma problem'. Hence, I do not give an overview of data that illustrates Roma people's marginalisation, impoverishment and exclusion. Rather I seek to illuminate a *European* problem by examining the institutional roots of racial misrecognition and misrepresentation, both of which are also related to maldistribution.

8.2 STATE-MAKING, EUROPE AND THE CONSTRUCTION OF RACIALISED MINORITIES

As a legal concept, the state is a form of political organisation characterised by a permanent population, a defined territory, a government and a capacity to enter into relations with other states (Crawford 2012). As a socio-political ideal, it is a project that seeks the territorialisation and bordering of political power with a view to producing an intergenerationally enduring 'people' often called the 'nation' (Anderson 1983; Gellner 1983; Breuilly 1993; Stevens 1999; Torpey 2000). Nation-building projects are never complete insofar as the authority of states is constantly challenged by sub-, supra- and transnational organisations and groups (Soysal 1994; Agnew 2005; Beck 2005; Sassen 2006), including those making calls for a different 'nation' or who do not accept territorial boundaries.

A considerable body of sociological, historical, psychological and political theory has highlighted the links between nationalism, xenophobia and racism,

notably by highlighting how nationalist discourses distinguish between the national 'people' and undesirable 'foreigners' or 'migrants' or citizens who are racialised Others (Reicher and Hopkins 2001; Triandafyllidou 2001; Parekh 2008; Anderson 2013). In his book *The Racial State*, David Goldberg has argued that race was integral to the emergence of nation states, both conceptually and materially: 'At precisely the time rapidly emergent and expanding social mobilities produced increasingly heterogeneous societies globally, social order more locally was challenged to maintain homogeneity increasingly and assertively. The racial state … is key to understanding the resolution to this modern dilemma' (Goldberg 2002, p. 11). Differences in religion, which had torn apart communities in what is now known as Europe, were internalised and rendered tolerable at the same time as European colonialism contributed to equate difference with 'race'. However, modernity's egalitarian commitments require navigation around ideologies of race and Goldberg distinguishes between *racist* states such as Apartheid South Africa and *racial* states which do not rely on theories of 'natural' inferiority but nevertheless are racially configured. While nationalism is concerned with congruence between nation and state, liberal citizenship intervenes to insert legal as well as inherited membership into belonging. Goldberg (2002, p. 266) argues that this does not in fact de-racialise citizenship:

> The modernist conception of citizenship, accordingly, has built into it as a constitutive (if not foundational) condition the identification of individual citizen with the state. Implicit in this identification is a triple logic: first, of the disposition to frame citizenship in identity terms; second, of the state taken as a coherent, a singular entity; and by implication third, of citizen-members as settled and more or less statically located within the space of the state.

While the focus of the 'nation' in nation state is on the inclusion of 'the people', the 'racial' in Goldberg's racial state highlights the exclusion of multiple peoples. These exclusions can affect those who hold the legal status of citizenship, such as racialised indigenous groups and other minorities. However, democratic states strive to keep these exclusions apart from matters of race and portray them as linked to migration and citizenship. Indeed, Goldberg argues, the story of modernisation and racial progress depicts a teleology that ends in racelessness, 'rendering invisible the racial sinews of the body politic and modes of rule and regulation' (2002, p. 203).

The current configuration of Roma identities shows how racialisation intersects with histories of state-making and historical and contemporary responses to mobility, exclusion and minoritisation. The term 'Roma' brings together a wide variety of groups with different languages and histories of exclusion and subordinated inclusion. In Turkey distinctions are made by region between the Roma, Dom and Lom. In Austria difference is marked by national minority

or recently settled status (as well as ethnic affiliations such as Lovara, Sinti and Burgenland-Roma). In the United Kingdom the portmanteau term Gypsy/Roma/Traveller clearly indicates the composite nature of how the community/ies is/are understood. In Hungary Roma includes different language groups, the Romungro, Olah and Beás. In the Netherlands the Social Inclusion Monitor explains: 'Roma and Sinti are, like other groups, not homogeneous: various [Roma and Sinti] groups came to the Netherlands at different times, from different countries. The [Roma and Sinti] families differ very much from each other' (MOVISIE 2013, p. 5, cited in Hiah and Knijn 2018, p. 23).

Importantly, the use of the 'Roma' category since the 1990s has largely been driven not by individual states but by European institutions (namely the Council of Europe, the Organization for Security and Co-operation in Europe and the EU) and international bodies such as the Open Society Institute (Vermeesch 2012). Roma-led organisations such as the International Romani Union and the Roma National Congress, supported by international funders, have also played a key role in its diffusion (Nirenbert 2009). The EU funded a number of initiatives to support the Roma during its eastward expansion process (Guy 2009). The Copenhagen criteria outlined the fundamental requirements to be met by candidate countries before they could join the EU, included ensuring 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for minorities'.[1] Roma-related issues have also been included in the progress reports submitted by Turkey as part of its EU accession process, allegedly spurring the government to launch the Roma Democratic Opening Process (Akkan 2018). Simhandl (2009) highlights how the discursive shift from 'Gypsies' to Roma was also a shift from characterising these peoples as nomadic and belonging nowhere to discursively settling them in 'Eastern' Europe. This has meant that 'Eastern Roma' could be portrayed as obstacles for 'pre-modern Eastern Europe' to draw level with 'post-modern Western Europe', while rendering the situation in Western Europe itself largely invisible (Simhandl 2009).

The 'Roma' grouping is produced at the intersection of individual statehood and the development and expansion of the EU. However, it is important to recognise that this is against a historical backdrop of brutal and long-running European violence. Diverse groups characterised as Ciganos/Gypsies/Nomads have been persecuted for generations across Europe, partly in the drive to sedentarise and territorialise European populations. This persecution culminated in the Porajmos, or Pharrajimos or Samudaripen,[2] the Nazi persecution which saw 'Gypsies' stripped of their citizenship, subjected to forced labour and murdered in death camps in their hundreds of thousands. Europe has been slow to acknowledge this anti-Gypsy history. For example, it was only in 1988 that Roma survivors of labour camps in Austria became entitled to state compensation (Meier and Vivona 2018). There continues to be considerable anti-Gypsy

racism and some measures have Roma peoples as Europe's most negatively perceived minority (Buchanan 2015). Indeed, what the many different peoples covered by the term 'Roma' might be said to have in common is precisely misrecognition, both in the past and today, suggesting a more complex and closer relation between recognition and misrecognition than simple opposites. It is not that, across Europe, there is a united Roma people who are discriminated against, but rather that the defining feature of 'Roma people' is discrimination. The multiple peoples designated as Roma are connected by exclusion more than by shared ethnicity or culture. The term's implications of cultural commonality may appear alien to the diverse array of communities it is meant to designate and it is important to understand criticism of Roma 'disunity' in this context (McGarry 2014).

8.3 MISRECOGNITION IN PRACTICE

For all the differences between Roma groups there are three overlapping and common social 'markers', none fixed and all inter-related, that work to categorise people as Roma in their everyday experiences: phenotype, culture and socio-economic marginalisation. The question of how this identity is fixed, how the Roma subject is interpellated and by whom, is critical to experiences of misrecognition, misrepresentation and maldistribution, and it also tells us about the racialised construction of the nation state.

The first social marker is phenotype and more particularly skin pigmentation. This was widely experienced by Roma interviewees as a key marker of their identity and it is reflected in the discourse. In Turkey, for example, the Roma are called *esmer vatandas* or 'dark-skinned citizens' (Akkan 2018). In the United Kingdom, Roma who saw themselves as having darker skin were pleased that super-diverse contexts enabled them to 'pass' as 'Indian' or 'Turkish' (Anderson et al. 2018). The second marker, 'culture', is imbricated with the first marker of 'race'. In European discourse there has been a significant shift away from biological racism towards markers of ethnic and cultural difference (Balibar 1991). Certain kinds of racist expression, such as pseudo-scientific associations of non-white phenotypes with lower intelligence (Banton 1998), have been de-legitimised, but racism has rarely worked solely through skin colour and long drawn on markers of culture and disposition. The shared history signalled by ethnicity/culture, like race, is usually imagined and claimed through ancestry, and both Hungary and Austria have an ancestral requirement for official recognition of 'national minorities'. In addition, minority and racialised cultures are often associated with tradition and backwardness, for instance through infantilising representations of 'joyous' music playing country folk, who sometimes indulge in picaresque 'naughtiness' (Araújo and Brito 2018; Hiah and Knijn 2018). A broader under-

standing of culture as way of life and social positioning suggests that 'Roma culture' more generally can be depicted as anti-social behaviour. A Dutch academic inadvertently captured this when trying to explain the social context of hostility to Roma:

> I also wouldn't want to live next to someone like that … a Roma family who … celebrated finding a house and invited three quarters of their family. The whole street was full of cars. In the evening a pig is slaughtered in the backyard that makes a lot of noise … all those children hanging out of the window looking at how the pig is treated. We can't have that can we? Or women crying rushing out of their house because they are being chased by their husbands, we can't have that either, right? (Hiah and Knijn 2018, p. 29)

As the quote suggests, while ancestry is emphasised in ethnicity claims, family receives greater emphasis in conversations about culture. A common trope in representations of minority cultures is that they are exceptionally prone to violate human rights and oppress women. In an instantiation of what Spivak (1988) calls 'White men saving brown women from brown men', Roma men are often described as perpetrators of domestic violence, forced marriages and other crimes. In contrast to the sexism of dominant cultural groups which is acknowledged as complex and context dependent, that of minority cultures is simply attached to 'tradition' and detached from broader social structures. The racialising gaze claims objectivity and fails to see its power:

> We do not look away from the Roma background. When I am sitting in front of you [the interviewer was a person of colour raised in the Netherlands and speaking perfect Dutch] I see that you are neither Roma nor Dutch, that's fine … I do not have to do anything with that, but I save this information. I also do not have to be completely blank. And that goes for dealing with Roma. That you can take note of the fact, 'Hey that is a Roma' … then look into the problem. (Hiah and Knijn 2018, p. 30)

The third social marker of Roma identity is their marginalised socio-economic status. Roma identity is extremely difficult to disentangle from socio-economic factors. Poverty is focused on by policymakers, media, academics and some activists, all with very different intentions. It is bound up with perceptions of a 'culture of deprivation' (Anderson et al. 2018) or 'poverty' (Zemandl 2018) and is often related to attempts to 'responsibilise' people or train them away from deviance, or indeed remove them from settlements or states (Cahn and Vermeersch 2000; Nacu 2012). The association of Roma with ignorance, criminality, laziness and cunning is such that, when Roma are *not* poor, this too is suspicious (Araújo and Brito 2018). The case studies indicate that at the national level Roma/Gypsies are often synonymous with vulnerable socio-economic groups and phrases like 'multiply disadvantaged child' (Zemandl 2018) or

'multi-problem families' (Hiah and Knijn 2018) are scarcely coded ways of referring to Roma people. The Roma themselves demand redistributive justice but at the same time are critical of 'class reductionism or … excess of paternalism' (Araújo and Brito 2018, p. 25) which offer a truncated picture of their lives, especially when marginal socio-economic status is stigmatised not simply as a description of one's earnings or living conditions, but also as a matter of 'culture'.

Given the considerable evidence of Roma people across Europe being subject to racist abuse and violence including from the police, it should come as no surprise that many 'Roma' seek to avoid being categorised as such. 'Roma' is now widely used in policy and activist circles, but this dissemination is relatively recent and it is probably fair to say that widespread Roma self-identification currently constitutes more of a project than a reality. For some, it is a move away from pejorative stereotypes often summoned by words like 'Ciganos', 'Cigany' and 'Gypsy': in Austria, the 'Roma' national minority was thus named in part because the word means 'person' in Romanes (Meier and Vivona 2018). For others, it is a term imposed from above that has little daily resonance: 'its use is a symptom of spastic … political correctness' (Zemandl 2018, p. 12). Those who use the term 'Roma' can find it has little traction on the ground:

> I worked in Tyrol for a while and there I said that I am a Roma woman and they asked, 'What does that mean?'. Then I told them, 'Well, a Gypsy …' 'Right, right, of course.' Of course, then you face the first stereotypes. But it was okay for me because we started to discuss them. (Meier and Vivona 2018, p. 27)

The imperfect correspondence between internal and external adscriptions of Roma identity raises the question of whether sometimes Roma labelling itself may be a form of symbolic violence or misrecognition, especially when the label is systematically used to offer statistical evidence of disadvantage and marginalisation (Gatti et al. 2016).

8.4 MAKING THE DIFFERENCE: A QUESTION OF CITIZENSHIP

The category of 'Roma' compares and overlaps with others like the 'EU citizen' and the 'Third Country National'. Indeed, the repeated association of Roma with a range of social problems which blur socio-economic location, phenotype and culture parallels the ways in which 'migrants' are imagined as poor, negatively racialised and having a backward 'culture'. As noted in previous sections, democratic states strive to portray themselves as 'raceless', and the legal and apparently equalising status of citizenship is a key mechanism for

enabling this. All legal citizens are supposed to be equal regardless of race/ethnicity, and in many states there are legal and policy measures in place to ensure that social or institutional practices that fail to recognise this are prohibited as discriminatory. However, its dominance in defining the scope of justice makes citizenship, as legal or socio-cultural relation, a critical 'faultline' of justice (see also Chapter 14). Who sheds and who retains their 'migrant' status is bound up with nationally specific ways of encoding race. Consider the phrase 'second generation migrant' or 'person of migrant background', terms which may be applied to people who have not crossed a state border in their lives. It signals that it is possible to be at once a 'migrant' and a legal 'citizen', but notably such terms in Europe are rarely applied to the descendants of white immigrants. It is too easy to dismiss this as simply because of public ignorance given that such terms are actively institutionalised by several European states. If the development of the modern state 'depended on the ideological work of manufacturing sameness' and the nationalising logic of sameness derives from a conceptualisation of 'race' within Europe and in Europe's colonies, we should not be surprised that racialised differentiations can be highly salient in popular representations of 'the migrant', overriding legal status or other forms of belonging (Anderson 2013).

The category of Roma exposes how racialisation and mobility controls are connected, and how state bordering constructs the distinction between indigenous people, national minorities and immigrants. In Turkey before World War II 'itinerant Gypsies' were explicitly linked to immigrants (Akkan 2018). In the contemporary United Kingdom, which hosts a considerable number of EU citizens from post-2004 accession states, 'Roma' are associated with 'migrants', and Roma policy must be understood within the paradigm of migration control as much as the paradigm of ethnic minorities and anti-racism. Despite the institutionalisation of differences between 'Roma' and 'Gypsy' in some cases practices of mobility and protest look to be joining up the Eastern 'Roma' and the Western 'Gypsy' (Anderson et al. 2018). However, while 'migrants' may be legitimately excluded from the democratic nation without invoking race or ethnicity because they are not citizens, those Roma who have citizenship and thereby stand in a legal relationship of equality with other citizens must be included.

There are two interconnected mechanisms for placing Roma within nationalising logics. The first is to distinguish Roma 'migrants' from 'national' Roma, and the second is to institutionalise the representation of the latter as a constitutive community within the state. For minority groups to constitute national minorities both Austria and Hungary require ancestral residence. In Hungary Article 1.2 of the 1993 Ethnic Group Act required minorities to have 'lived on the territory of Hungary for at least a century'. The Austrian Ethnic Group Act also had a strongly territorial understanding of minority, and

national minorities were defined as Austrian nationals 'living and residing in parts of the federal territory whose mother tongue is not German and who have their own traditions and folklore'.[3] According to legal practice, recognition requires continuity of residence for three generations or 90 years; residence, home and rootedness in Austria or *Beheimatung*; and Austrian citizenship (Jurić-Pahor 2009). Roma peoples' alleged lack of attachment to territory meant the authorities were reluctant to grant them national minority status for many years (Meier and Vivona 2018).

Other states too seek to distinguish between migrants and 'their' Roma/Gypsies/Sinti (the term itself can be instrumental to making the distinction). Portugal and the Netherlands both make strong claims to being 'raceless' in Goldberg's sense of the word. The official narrative of the Portuguese state has been that the country is 'race blind' and until recently ethnically homogeneous (Araújo and Brito 2018). In both states the official stance is that specific representative mechanisms would 'discriminate' against ethnic minorities. In the Netherlands this alleged neutrality marked a shift as for many years, under the model of pillarisation, minority policies financed associations representing minority groups. From 2010, criticism of minority inclusion policies (associated with labelling and stigmatisation) led to their abolition and to a policy shift towards 'problematic social categories' (Hiah and Knijn 2018). While the language of autochthony has been repudiated, when Roma/Sinti families date their arrival in the Netherlands is highly relevant to their status and to their position vis-à-vis social inclusion policies (Hiah and Knijn 2018). Through distinguishing between Roma as national minorities and Roma as migrants the relation between the national and the racial state can be obfuscated and the citizenship relation cast as non-racial, but national minorities are also racialised, and under political pressure these distinctions can break down. For example, in June 2018 the Italian Interior Minister Matteo Salvini undertook to expel non-Italian Roma people from Italy and said, in an interview with the television station Telelombardia on 18 June 2018: 'Unfortunately we will have to keep the Italian Roma because we can't expel them.' Given how states institutionalise citizenship as a crucial vector of difference, they can hardly be described as 'honest brokers' in providing redress against this kind of racial injustice.

In recent decades, efforts have been made to embed the representation of Roma as national minorities by putting in place specific institutions or representative mechanisms. In Hungary, for example, the Minority Rights Act 1993 guaranteed both individual and collective minority rights and statutorily recognised the Roma and 12 other named groups 'as national or ethnic minorities'. These national minorities were given the right to establish local, regional and national minority self-governments (MSGs). However, despite their title the authority of MSGs is limited to issues framed around protection of traditions

and culture, with no power to address socio-economic issues. In a damning assessment following attempted reforms the Organization for Security and Co-operation in Europe found that 'the MSGs tend to marginalise Romani issues by depositing them in a parallel, fairly powerless, quasi-governmental structure rather than addressing them through established governing bodies' (OSCE/ODIHR 2006, p. 6). As one interviewee in Hungary put it: 'We are not ahead, no matter whether the government interferes or someone else. Everybody is only interested in their own interests and not looking at what could be good for us, only their own interests … Official political institutions hide behind the law' (Zemandl 2018, pp. 47–8). There is a similar disenchantment in Austria where the Ethnic Group Act 1979 attempted to institutionalise dialogue with minority groups and where Ethnic Advisory Councils represent autochthonous Roma who have been resident for three generations. Yet still there is a sense, as one Roma interviewee asserted, that 'politics is made by others' (Meier and Vivona 2018).

8.5 REPRESENTATION AND FRAMING

Fraser's identification of representation as key to justice suggests a methodologically de-nationalist approach as she comes to it via a critique of what she calls the Keynsian-Westphalian frame of modern territorial states and the assumed scope of justice as the citizenry: 'Faced with global warming, the spread of AIDS, international terrorism and superpower unilateralism, many believe that their chances for living good lives depend at least as much on processes that trespass the borders of territorial states as on those contained within them' (Fraser 2005a, p. 304). Misrepresentation concerns 'the scope of the state's jurisdiction and the decision rules by which it structures contestation'. In other words, it encompasses the boundary-setting of the political community (the criteria used to distinguish members from non-members) and the 'terms on which those included in the political community air their claims and adjudicate their disputes' (2005b, p. 81). Fraser (2009) identifies two kinds of misrepresentation. She labels 'misframing' the form of misrepresentation that arises when a community's boundaries wrongly exclude some people from 'authorised contests over justice' and distinguishes it from the injustice of 'ordinary-political misrepresentation' or exclusion from political decision-making within the nation state paradigm. People may be unjustly excluded from the political community because the boundaries themselves have been unjustly drawn (see also Chapter 14).

The minority institutions described above can be characterised as attempts at what Nancy Fraser would term 'ordinary political representation'. However, ordinary political representation seems hard to achieve given the racial state and the fact that institutional representation is not seen as appropriate for

migrants or those Roma who do not have formal citizenship. More fundamentally, representation in territorial institutions appears to be at odds with a population that makes no territorial claims and whose multifarious identities are united by exclusion. It is not simply that Roma lack a political consciousness, but that most do not lay claim to a particular territory that materially affects to gather together nation and state. Some Roma aspire to be 'citizens without frontiers' (Isin 2012) but, like that of (other) migrants and (other) racialised groups, their representation remains trapped in the forced sedentariness of the national frame.

In the past one response to Roma exclusion was a brief attempt at Roma nationalism. However, I have already noted the heterogeneity of Roma identity, and the elaboration of Roma nationalism has become an elite-driven process and thus it is possible that ordinary Roma have no clear understanding of what Roma nationalism actually is (McGarry 2009). The suggestion that there is a need to inculcate Roma nationalism seems rather bizarre in a European context where nationalist sentiment is often seen as a problem and the general trend is to encourage the de-nationalisation of political claims.

Fraser argues that the national framing of claims for justice is limiting and the territorial state cannot accommodate many justice claims. Is it then more appropriate to analyse the Roma, like migrants, through the lens of misframing? While political justice is often understood as requiring inclusion into territorial states, perhaps we need to problematise the scale of membership and, therefore, representation. European institutions have attempted to insist that all levels of government share a responsibility for inclusion (Agarin 2014). But what exactly is understood by 'government', and how can fair representation be achieved at all relevant levels? One interesting issue is the relationship that should exist between Roma representatives in different institutions and organisations. Should European representatives be chosen by those working at smaller scales or should they be directly accountable to individual Roma? In the former case, should they only be chosen by representatives who explicitly identify as Roma or also by other groups which are lumped under this label in institutional discourse? The Roma are so heterogeneous, even within one state, that their umbrella grouping is clearly an artefact of European institutions and other powerful stakeholders. So, what does it mean to be included in this umbrella group, rather than recognised as, for example, Rom or Dom?

Attention to the situation of migrants and Roma suggests that the problem is not only misframing but framing itself. As Muldoon (2012) notes, 'To suggest, as [Fraser] does on many occasions, that the Westphalian system "gerrymanders political space" or "partitions political space along territorial lines" is to presume that the whole world is already a political space with moveable internal boundaries' (p. 637). The experience of migrants and Roma, citizens and non-citizens, suggests that the racialising fixing in place is itself

a source of injustice. For example, in the Netherlands the Roma are categorised along with Sinti and Traveller groups as people living in mobile homes or *Woonwagenbewoners*. The Dutch Caravan Act 1968, passed at the apogee of the Keynesian-Westphalian state, aimed to 'normalise' and 'integrate' Roma communities and deprived many people of trades which relied on them being mobile (Hiah and Knijn 2018). Rather than reframing alone, we need to think more carefully about mobility, states and justice, returning us to the challenge of methodological nationalism.

8.6 METHODOLOGICAL DE-NATIONALISM AND JUSTICE: MISFRAMING AND MOBILITY

A methodologically de-nationalist approach to justice does not assume legal citizenship in a state as a condition for equality. It therefore does not assume a distinction between 'migrant' and 'citizen'. Like 'migrant' and 'Roma', 'citizen' is both a juridical and a social subject and citizenship theories have delved deeply into the distinction and relation between citizenship as a legal status with associated rights and citizenship as belonging and connection (Benhabib 2004; Hindess 2004; Bosniak 2006; Bauböck and Guiraudon 2009; Shachar 2009; Carens 2013). The case of Roma people exemplifies the constructed nature of 'migrant' and 'citizen' as states struggle to differentiate between 'their' Roma and Others, but also illuminates how some legal citizens can be stripped from the rights of citizenship by virtue of their perceived foreignness.

Roma citizens are not recognised as 'belonging' to the nation, or only belong in an exceptional way (Anderson and Dupont 2018). They are often singled out as not having the right values, as being members of a group that may be legal citizens, but do not have the values of the citizen. For example, in ETHOS research on social assistance, all national studies found that Roma people were singled out by non-Roma claimants, and in some cases by client managers, as being predisposed to fraud and laziness (Anderson and Dupont 2019). It is not only Roma who are stigmatised for claiming certain kinds of welfare benefits (Anderson and Dupont 2019). The rights of the welfare state have been described as the pinnacle of the achievements of citizenship, enabling 'social citizenship' (Marshall 1950), yet in a vicious circle those who claim benefits are stigmatised, and those who are racialised, poor or otherwise marginalised are not believed to be eligible for benefits.

The relation between governing and sedentariness does not only shape the experiences of migrants and the Roma. The Roma people who, as EU citizens, cannot be removed under immigration controls are finding that homelessness policies are being mobilised to displace them instead (Fekete 2018), but more generally across Europe rough sleeping can result in expulsion. If one is

a citizen this may be expulsion from a neighbourhood, city or region; if one does not have legal status it may be from a country. While mobility regimes for citizens are typically governed at the local rather than national state level, anti-begging legislation is also being used by many European states to restrict the mobility of unwanted populations. Even before the development of European welfare states, poor relief was often limited to parish residents. The poor were liable to be 'moved on' if there was any suggestion that they might become unemployed, stay long enough to make a claim on the parish, or have a baby that would be born in the parish and therefore become the parish's responsibility (Anderson 2014). In a move that is highly reminiscent of old poor laws, access to the welfare state has replaced the levers of immigration controls in efforts to control the mobility of certain EU citizens (Shutes 2016). To deter people who do not have the resources to support themselves, complex restrictions are imposed on access to certain non-contributory benefits. Returning nationals are not exempt from these restrictions: they may be legal citizens, but they are no longer local residents.

Not assuming difference between 'migrant' and 'citizen' enables us to find similarities between them. Citizens do not always have to have reside outside the national territory to find themselves turned into migrants. In some areas of the United Kingdom citizens who cross a local authority boundary and claim social housing are also referred to as 'migrants'. They are subject to the kinds of complaints that are more customarily levelled against international migrants: taking housing away from locals, coming to take advantage of the welfare state, committing crimes, bringing drugs and so on. To deserve to get onto the waiting list for social housing in many local authorities, not only is there a minimum period of residence (sometimes as long as ten years) but also an effective 'good character' requirement, demonstrated through volunteering, going to the gym, even stopping smoking (Carter 2015). That is, these internally mobile citizens are effectively turned into migrants and must find a means of recovering their status in ways that parallel the requirements put on naturalising migrants.

Internal mobility for the purposes of accessing the welfare state more generally is frowned upon. In the Netherlands social assistance claimants can be sanctioned for a month's worth of benefit if they move without a 'clear and good reason' (Knijn and Hiah 2019). In Turkey some recipients of disability and elderly allowance cannot even move to a different street in the same district. Any application is immediately terminated and treated as a new application, as a result of which the benefit is withdrawn for months (Akkan and Serim 2019). In Hungary social housing claimants have to be able to prove residence for a year in a local area (Veres 2019), while in Portugal claimants can be required to check in at the parish council every two weeks in order to confirm unemployment status (Brito 2019). Social assistance claimants often

have little choice about where they live and indeed can often effectively be forced to move. One British young mother described how she was moved to cheaper accommodation: 'They dumped me, basically. I didn't know where the shops were. It was in the middle of nowhere. The closest GP [General Practitioner] was 40-minutes' walk. The closest shop was about 20-minutes' walk' (Dupont et al. 2019, p. 40). In Turkey for the parents of disabled children to be able to claim social assistance, they must take their child to hospital to receive a medical report and return there every one to three years. This requirement is extremely onerous for some who do not necessarily have access to the appropriate transport and for whom getting out of the house is very difficult (Akkan and Serim 2019). At the same time as residence must be settled, claimants can be required to travel long distances to work. In Austria applicants must be prepared to make a two-hour one-way commute, and longer if they live in a remote area. This commuting requirement was felt to be unfair:

> If that's the worst job you can imagine you also need to ask whether it's justified to commute in the first place. Then it also depends on my resources, my environment and so on. If I have five children to care for and then also need to commute, then the situation becomes critical. (Meier and Tiefenbacher 2019, p. 43)

8.7 CONCLUSION: RE-SCOPING JUSTICE

Attention to the experiences of the Roma can help inform a methodologically de-nationalist approach to justice. This problematises the legal status of citizenship insofar as it is implicated in racial misrecognition as well as in the political and economic marginalisation of those constructed as migrants and national minorities. The historical and contemporary experiences of people now categorised as Roma also illustrate the importance of mobility for redistribution, recognition and representation. The issues arising from the tension between nationalism and the freedom to move are fundamental to justice and are not confined to Roma but raise questions for all of us.

NOTES

1. Presidency conclusions of the Copenhagen European Council, 21–22 June 1993, accessed 23 March 2020 at http://www.europarl.europa.eu/enlargement/ec/cop_en.htm.
2. *Porajmos* means 'devouring', *Pharrajimos*, 'fragmentation or destruction' and *Samudaripen*, 'mass killing'.
3. Volksgruppengesetz – Bundesgesetz über die Rechtsstellung der Volksgruppen in Österreich, BGBl. Nr. 396/1976, last amended by BGBl. I Nr. 84/2013, Art 1 (2).

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9. Education and justice: inclusion, exclusion and belonging

Başak Akkan and Ayşe Buğra

9.1 INTRODUCTION

This chapter investigates the dynamics of inclusion and exclusion affecting minorities and other vulnerable groups in the system of education as an area where the manifestation of the three dimensions of justice pertaining to redistribution, recognition and representation has been traced in six country cases: Austria, Hungary, the Netherlands, Portugal, Turkey and the UK. This investigation is carried out by exploring the discourses on education situated within the political frames in which the dynamics of inclusion and exclusion affecting minorities and vulnerable groups are constructed. The determinants of inclusive education include access to good quality education and freedom to choose the education that complies with the cultural preferences and the understanding of good life of different groups of people. The chapter discusses the tensions pertaining to the inclusionary and exclusionary aspects of education with respect to the recognitive and representative factors that define the terms of belonging in a pluralistic society.

The chapter furthermore argues that the life chances of students from minority groups are determined by the sense of belonging in an inclusionary education system. The exclusionary dynamics created by the inequalities of opportunity in access to quality education and the experiences of alienation/discrimination caused by misrecognition which affect school performance limit the contribution education is expected to make to capability development for children from minority groups. The inclusionary features of a system of education, which recognizes differences of social and cultural background and values the parental choice, have implications for the development of the capabilities of children. However, the parents' freedom in choosing the type of education which they find in conformity with the values underlying their conception of good life might not always be in conformity with the children's freedom to choose and affects their future life chances. Then, how do the demands and choices of parents from minority groups relate to the well-being

and capabilities of their children? In this regard, the chapter argues that an inclusionary system of education lies at the heart of such a vision where the individuals, with their unburdened distinctiveness, could live the good lives that they choose through their enhanced capabilities, or substantive freedoms, in the education system.

Within this analytical frame, the transformative character of education is highlighted in an inquiry into the ways in which the tensions between equality and difference or between different definitions of good life and the development of a sense of belonging in society emerge in the systems of education of different country cases.

9.2 THEORETICAL FRAMEWORK

Fraser's normative theory of justice (Fraser 2003, 2008) highlights that socio-economic disadvantages are significantly intertwined with cultural differences and calls for the assessment of different dimensions of injustice related to redistribution and recognition (see Chapters 1 and 4). Her tripartite justice framework has been employed by education scholars to understand education as a matter of justice (Gewirtz 2006; Huttunen 2007; Keddie 2012a, 2012b; Power 2012). The literature suggests that education with its inclusionary and exclusionary boundaries, on the one hand, reinforces existing social inequalities pertaining to class, gender, race and ethnicity (Hart 2012); on the other hand, education has a role in overcoming injustices and eradicating persistent inequalities in society (Unterhalter 2003; Tikly and Barrett 2011; Power 2012).

The redistributive dimension of justice becomes significant given the socio-economically driven inequalities in access to good quality education. Poverty is still considered to be one of the causes as well as the consequence of educational inequalities leading to early school leaving and affecting the labour market prospects of children from a disadvantaged background (Keddie 2012b). Although the socio-economic disadvantages, which also have a spatial character, significantly define equal access to education, the injustices in education are not limited to the class positions. Ethnic, racial, cultural or religious backgrounds could also operate as important categories of exclusion and hamper students' educational outcomes (Keddie 2012b).

Injustices faced by minority groups are often defined by the interface between the misrecognition of ethnic, religious or racial differences and redistributive inequalities. The exclusionary dynamics created by the inequalities of opportunity in access to quality education as well as the experiences of alienation caused by misrecognition which affect school performance limit the contribution education is expected to make to capability development for children from minority groups. Hence, differences themselves are not matters

of inequality, but, depending on 'the extent to which race, ethnic, or gender differences are salient with regard to the experience of education' (Walker and Unterhalter 2007, p. 10), the social arrangements in the school environment can appear as inequality producing mechanisms. Injustices in the realm of education might stem from rules and practices with an exclusionary character that are insensitive and culturally blind to the diverse backgrounds of students; or differences could be overemphasized in a discriminatory and stigmatizing manner. These could manifest themselves in the silencing of knowledge of the 'other' in the curriculum, or creating inferiority in relation to the dominant culture of the society as a result of the prevailing middle-class values in the education system (Keddie 2012b; see also Lynch and Baker 2005). The ways in which cultural, ethnic, linguistic, religious, racial and other diversities are addressed in a system of education define the inclusiveness of the education system which could foster either belonging or alienation among students from minority communities.

Discursive space of education manifests the normative understanding of a shared future of the society and the ways and means of dealing with different value systems in the social context. In today's pluralistic societies where conflicting values coexist, the moral values and societal norms that the education system incorporates and promotes become especially important in their implications for social cohesion. Several critical questions emerge here: In a particular context, could the education system accommodate the plurality of 'good lives' associated with different cultural and religious belief systems? Whose and what knowledge are privileged in an education system? The extent to which inclusiveness characterizes the rules, practices and content of education in these areas appears as the main question to be pursued in contemplating the discursive frame of education where concerns of 'equality and difference' are revealed in a given society.

Education has a crucial significance for the formation of common values and a shared language as the basis of societal dialogue around the notions of the common good. The socio-economic inequalities and cultural differences that are not well accommodated in an education system are perpetuated by the non-representation of the minority cultures and vulnerable groups in the society. Either they are not represented well, that is to say, their claims do not find a voice in the education system, or their membership to a certain group is highlighted and their claims are expected to voice those of the group with which they are identified. Keddie (2012b, p. 275) refers to this matter as 'unburdening minority groups of their constructed distinctiveness [which might go together with stigma]'.[1]

Respecting parental choice is a way to address the question of representation in the education system. Parental choice is granted by the human rights legal framework as the Universal Declaration of Human Rights (1948) states in

Article 26: 'Parents have a prior right to choose the kind of education that shall be given to their children.'[2] And the right to choose the kind of education as it is being framed by the international law pertains to the religious freedom of the parents. Right to education is a complex legal issue; it belongs both to freedom rights and social, cultural and economic rights (Salát 2019). Parental choice as it is being discussed in this chapter pertains to the choice of the education system that best suits the cultural and religious sensitivities of the family. The overemphasis on the choice paradigm is also a contested one, as our choices could also be adapted preferences determined by the boundaries of society and policies (Nussbaum 2000). In a different vein, the emphasis on parental choice could controversially help the privileged class to extend the educational opportunities for their children. The principles for fair representation and equal opportunities manifest tensions in contemporary societies. Thus, a further question is the possible tension between parental choice and future choices that would be available to children. Parental choice in certain cases could be in conflict with the life chances of children.

In this respect, the capability approach provides significant insights into dealing with such difficult questions pertaining to the place of education for a just society. According to Sen, education is 'a relatively small number of centrally important beings and doings that are crucial to well-being' (Sen 1992, p. 44). Hence, discourses on the well-being of children in relation to their capability building experiences in the education system open the way to dealing with the question of equality and difference with a perspective that avoids 'binary thinking' (Lister 2003).

In Sen's capability approach, capability refers to the substantive freedom to achieve actual functionings, or various things a person may value doing or being (Sen 1999). Here Sen draws attention to personal differences, diversities in the physical environment, variations in social climate, which determine the different opportunities to translate resources into the desired functioning to achieve alternative lifestyles. He also insists on the relational aspect of capability deprivation and argues that the social exclusion paradigm makes a useful contribution to the capability approach by highlighting this aspect (Sen 2009). In Sen's approach, therefore, freedom acquires a different meaning than it has in the conceptualizations of justice that exclusively consider the resources available to people to pursue their valued ends, and it takes into account the differences in the ability to use these resources which contribute to the general capability of a person to live more freely. This approach addresses political freedoms, economic facilities, social opportunities, transparency guarantees and protective security which complement each other in ways that determine the strength of their joint significance for freedom as an end (Sen 1999).

The consideration of capabilities rather than resources draws attention to certain conditions that define individuals' decisions and choices; hence, the

capability approach takes into consideration 'human diversity; complex social relations; a sense of reciprocity between people; appreciation that people can reflect reasonably on what they value for themselves and others; and a concern to equalize, not opportunities or outcomes, but rather capabilities' (Walker and Unterhalter 2007, p. 3) that allow individuals to take decisions, make choices that matter to them for a 'valuable life' (Walker and Unterhalter 2007). What, then, are the capabilities which matter most in developing agency and autonomy for educational opportunities and life choices (Walker 2006)?

The capability approach perceives education as an 'unqualified good for human development freedom' (Walker 2006, p. 168). The normative ideal of education as the prerequisite to the development of basic capabilities needs to be distinguished from the non-ideal reality of education which could well be a space of 'unfreedom' and capability deprivation that reproduces inequalities (Unterhalter 2003; Walker 2006; Tikly and Barrett 2011). Education, in its importance for the well-being of children, is to be constructed as a place of freedom in the sense that it is expected to be a transformative and empowering experience that would affect our present and future choices. Walker and Unterhalter highlight this point and argue that: 'We need to be clear that respecting a plurality of conceptions of the good life (and hence of how education is arranged) is not the same as endorsing all versions of the good life, and this has clear educational implications' (Walker and Unterhalter 2007, p. 15).

Education in this respect lies at the heart of such a vision of convergence where the individuals with their unburdened distinctiveness could purse the valuable lives that they define through their enhanced capabilities and freedom in the education system. This is a transformative process where the redistributive, recognitive and representative ideals in the education system contribute to the development of a sense of belonging in society. The freedom to pursue individual choices goes hand in hand with this sense of belonging as education, with its transformative character, could accommodate equality and diversity as complementary ideals in our complex societies.

9.3 METHODOLOGY

As argued by Tikly and Barrett (2011), the institutional injustices are embedded in the discourses which shape our understandings of education by indicating what is/is not or what can/cannot be said. Therefore, the discourses on education are important to understand the political frame in which inequalities are constructed. The methodology of this chapter includes qualitative content analysis with elements of discourse analysis. Such methodological approach involves a systematic search for underlying meanings, patterns and processes and careful mapping of themes and arguments used to convey the exclusionary/inclusionary aspects of education. The investigations of different country

cases conducted for this chapter in the context of ETHOS share the common methodological approach which consists of the analysis of official documents and reports by non-governmental organizations (NGOs) active in the field of education or concerned with minority issues in general, as well as a series of interviews with administrators, politicians, teachers and NGO representatives. Documents analysed in each country context are in the political or advocacy category such as policy documents and strategy papers by the Ministry of Education, NGO reports, other governmental reports, recommendation papers, laws, local regulation and so on. Along with the document analysis, interviews were conducted with the representatives of teachers' unions, student unions, advocacy groups engaged in the area of education, representatives of minority groups, administrators from the Ministry of Education and other relevant ministries. The country case studies (Akkan and Ruben 2018; Dupont 2018; Hiah 2018; Kende 2018; Roldao et al. 2018; Tiefenbacher and Vivona 2018) focus on diverse minority groups and, by insisting on different dimensions of injustice that affect these groups, they consider the role of education in the development of individual capabilities in their relational aspect.

Drawing on the discourse analysis provided in the country cases, the analysis here contemplates the inclusionary and exclusionary aspects of education with respect to position of the minorities and vulnerable groups in different country contexts. The study has a comparative perspective that sheds light on the problems of redistribution, recognition and representation in the field of education through the investigation of common and divergent themes discussed in the country contexts.

9.4 DISCOURSES ON EDUCATION IN SIX COUNTRY CONTEXTS

Drawing on the country cases studied within the framework of the ETHOS project,[3] problems regarding access to good quality education are observed to be related to the 'segregated' character of the education system, with inequalities of access to education closely reflecting the spatial dimension of inequality. The country studies demonstrate that the quality of schools differs according to the characteristics of the neighbourhoods divided along the intersecting lines of class and ethnicity. Socio-economic differences, that is, redistributive factors, remain important in identifying the inequalities and vulnerabilities which affect the religious and ethnic minorities in the European context.

Education systems often tend to be 'difference blind' or differences are addressed in a discriminatory manner by using the language of 'disadvantage' (see Kende 2018; Roldao et al. 2018). While difference blindness operates as a barrier to the acknowledgement of the claims and grievances, recognition

of difference which takes the form of misrecognition informs policies that lead to further segregation. The questions of 'managing diversity' in contrast to 'difference blindness' also relate to the question of the accommodation of different values/value systems in the education system (Dupont 2018). The exclusionary dynamics often operate through the feelings of alienation of the students from minority groups whose history, culture or language do not find a place in the curriculum or appear in a negative light. Their values are interpreted to be in conflict with the way society's values are defined, their claims for cultural recognition are seen as a threat to social cohesion (Dupont 2018). Their access to channels of representation is often limited and they do not have the opportunity to adequately express their grievances and claims and to contest stereotyping and stigmatizing tendencies concerning their values or their cultural worth. Equal participation, trust and representation are significant concepts to understand education's role in shaping the boundaries of a 'good' society. If the value universes are seen to have incompatible characteristics reflecting different conceptualizations of good life, the transmission of culture would appear as a particularly difficult problem to be solved by balancing the demands of the family and the society.

9.4.1 'Managing' Diversity

The educational discourses that are revealed address several tensions and controversies around the accommodation of differences in the education systems. In some cases, difference blindness has been brought forward as a way to tackle ethnicity-based discrimination as in Portugal (Roldao et al. 2018). The absence of statistical data on ethnicity and race is stated as an indication of the tendency to overlook a crucial aspect of the injustices faced by vulnerable groups. This tendency is reflected in the official discourses which prioritize poverty as the main factor behind the inequalities in access to education and overlook the barriers constituted by ethnic and racial identity (Roldao et al. 2018).

Where the disadvantages are dissociated from the underlying social and cultural inequalities, the recognition of disadvantage might easily articulate with discriminatory tendencies. In Hungary, this problem is presented regarding 'the double discourse' which denotes the use of 'disadvantaged children' and 'Roma children' as synonyms (Kende 2018). As an aspect of the 'colour-blind racism' in the Hungarian education system where the ethnic registration of Roma children is prohibited, the terms 'disadvantaged' or 'multiple disadvantaged' are used when what is meant is the Roma students: 'Since the Roma is not just a social category but also a recognized minority with specific rights deserving recognition …, using the 'disadvantaged' category makes the Roma children as an ethnic minority disappear from the system' (Kende 2018, p. 24).

The recognition of Roma in association with their disadvantages is a tendency that can be observed in different country contexts. It reflects and reinforces the prejudices underlying the discrimination faced by the community. Different policy measures introduced to address the observed disadvantages often contribute more to segregation than the inclusiveness of the education system. This is also the case in Turkey as an interviewee who is a Roma activist observes:

> Teachers often label Roma children as children having difficulties in learning and there are cases that Roma children are sent to CRCs (schools for students with special needs). If the CRCs diagnose these children as mentally disabled, this will have serious consequences for their future life course. (Akkan and Ruben 2018, p. 20)

The problems of stigmatization and discrimination of minorities recognized by their disadvantages manifest themselves also in the Austrian context where the deficiency in German language aptitude appears as a central issue in the debates on inclusive education (Tiefenbacher and Vivona 2018). The measures taken to deal with German language deficiency, which include the separation of 'irregular' students with a migration background lacking language skills from the 'regular' ones have implications on the irregular students' future prospects in education (Tiefenbacher and Vivona 2018).

In Austria, where the question of diversity is mainly discussed in relation to native language differences and the imperfect mastery of German as a key element shaping the problems of equal access to education, Tiefenbacher and Vivona (2018) reveal that the children from families with a migration background are the targets of such arrangements. The discourses draw attention to the possibility that in the presence of a 'deficiency-oriented' approach, discriminatory tendencies can play a role in reducing differences to a real or assumed disadvantage.

Discourses on diversity and the policies designed to deal with social segregation vary according to the perceptions of the reality of class-related, ethnic, religious or racial differences which are also time and space bound. As elaborated by Dupont (2018), in the UK acknowledgement of cultural diversity appears as a new phenomenon, a reality of 'modern' British society that is 'increasingly' becoming 'multi-faith', 'multicultural', 'diverse', 'pluralist' or of 'mixed-belief' (Dupont 2018, p. 14). 'The irreversible plural nature of modern Britain' is a challenge that must be faced with an adequate response to avoid 'the conflict that can and does take place among those of different cultures and beliefs' (Dupont 2018, p. 14). Diversity is approached as a problem to be managed and calls for a system of education which helps the children to learn to 'navigate' the rough sea of cultural diversity (Dupont

2018). The approach to diversity as a problem to be managed is also prevalent in other country cases. In the Netherlands, for example, civic education was introduced in 2006 and currently there is a legislative proposal to make civic education mandatory in all schools, including denominational schools. These steps are taken also with the objective of providing students with an education on citizenship and democratic rule of law, with the intention of contributing to social integration in a society of diverse cultures with different value systems (Hiah 2018).

In Portugal, the 'management of diversity' that goes against the denial of difference appears as a recent concern reflected in 'the creation of some institutions and projects, and even some alterations in the legislation' (Roldao et al. 2018, p. 20). Such developments reflect a new perspective on diversity that challenges the discourses on the 'non-racial' nature of Portuguese colonialism and the unproblematic character of Portugal's multicultural society (Roldao et al. 2018).

In the case of the current Hungarian government's approach to the problems of equal access to education encountered by the Roma minority, the term segregation does not have entirely negative connotations. As Kende (2018) demonstrates, the inclusion of Roma in the Hungarian public education system is emphasized as a major goal in the National Social Inclusion Strategy 2011–2020. However, in the official government discourses, segregation at school is put forward as an inclusionary mechanism for Roma students to catch up with the larger society which is referred to as 'affectionate segregation' (Kende 2018, p. 28). The segregation that is implemented is out of compassion towards Roma students left behind. Thus, the changes in the regulations and the application of the legal prohibition on segregation could easily be argued to have an exclusionary impact on the Roma minority. The policy of integration through 'affectionate segregation' could be welcomed by the 'white' majority who are happy to provide a good education for their children by separating them from the Roma children.

9.4.2 Values and Cultural Worth

The recognition of group difference appears in conflicting discourses on the 'respect for cultural and religious sensitivities' on the one hand and the possible tension between the values of the society and those of minority groups on the other. In the UK and the Netherlands, respectively, 'Britishness' and 'Dutchness' are discussed as the values of the larger society that should be embraced by the minority. In this regard, Dupont (2018) refers to the policy

document Green Paper (2018) which emphasizes the importance of acquiring British values in education:

> Children and young people should be taught about fundamental British values and should have the opportunity within school, further education, and beyond the school gates to mix and form lasting relationships with others from different ethnic, religious or socio-economic groups so they are well equipped for adult life. (Dupont 2018, p. 44)

In parallel to this emphasis of 'Britishness', Dupont draws attention to discourses where the 'overemphasised Muslimness at the expense of Britishness' is problematized and 'what it means to be British Muslim in contemporary society' (Dupont 2018, p. 25) is questioned.

As elaborated by Hiah (2018), in the Netherlands civic education is meant to enable the religious and cultural minorities to acquire the knowledge of the values of a larger society. A recent legislative proposal underway is described which aims to enforce civic education defined in terms of learning about 'Dutchness' in all schools:

> Dutch traditions, values, and freedoms must be anchored in education. It is expected from the teachers to endorse Dutch values and freedoms. Every teacher needs to know how to communicate these values to their students. In this way, students become better acquainted with Dutch fundamental rights, values, and traditions and learn how we treat each other in the Netherlands. (Hiah 2018, p. 12)

In Turkey, the cultural construction of Turkishness has been problematized by the Alevi community that is not able to identify with this construction. As discussed in the Alevi Democratic Opening Report:

> The state since the founding years of the Republic has constructed the Turkish identity on several dimensions and legitimized it. Ethnic, religious, and cultural dimensions that come together and forms this identity are Turkishness, Muslimness, intertwined with modern life in society. (T.C. Devlet Bakanlığı 2010, p. 145)

The discourses on the embracement of larger values of the society also recall the contested nature of cultural worth of different religions, ethnicities or belief systems. Dupont (2018) points to the hierarchies in value discourses in the UK where Islamic values are situated at a lower level due to the perceptions of their 'oppressive' nature as a Muslim activist interviewee observes:

> Religion is hierarchised in the UK. I feel like the way that we look at organised religion is very much – it correlates or it's very similar to the understanding of superiority and white supremacy. So I would say there are certain religions like, well, Christianity that are seen very differently and are perceived very differently to Islam. I would say something about Hinduism and Sikhism as well in the sense that

> Hinduism, Sikhism – at the moment Hindus are seen as the community to model the rest of minority communities on. They're seen as being 'integrated'. They've made it. While the Muslim community, it's not seen that way. We're going back to this kind of idea of the clash of civilisations and the barbaric, very oppressive religious doctrine Islam has, and then the more liberal or progressive, like maybe acceptance of sexualities – people are picking and choosing. And that difference is being negatively constructed in a way that is in favour of certain religions and not others. (Dupont 2018, p. 51)

The tendency to identify ethnic differences with disadvantage, which is particularly strong in the case of Roma, is also closely related to perceptions on values. In Hungarian and Turkish discourses, the Roma community is depicted as one that does not comply with middle-class values. Kende explains that in Hungary: 'The quantity of the curriculum for this very low socialized group is so incomprehensible and because the curriculum is also lexical knowledge-based that schools cannot be a pleasant experience for them' (Kende 2018, p. 32).

In parallel to the discourses on minority values and their compatibility with the values of the larger society entrenched in the education system, another issue is the extent to which minority cultures are included in the school curriculum. The absence of the history and culture of minorities is problematized in the narratives in different countries as a reflection of difference blindness or misrecognition. Akkan and Ruben (2018) signal non-recognition and misrecognition of Alevi in the Turkish curriculum and in the UK, the Netherlands and Portugal the silence of the curriculum on the colonial past emerges as an issue that determines the belonging of the minorities to the country. Hiah critically argues that 'the diversity in the stories' is not being reflected in the curriculum and such curriculum lacks 'attention for the migration history of the Netherlands including the Dutch colonial past and the role of the Netherlands in the slave trade' (2018, p. 16). Another striking story in the Netherlands is the festivity of 'Sinterklaas' during which the mythical figure of Saint Nicolas is accompanied by his black-faced helpers – Black Petes. Regarded by the (white) majority as a harmless children's festival, it is seen by others to be inherently tied to the history of slavery; with the figure of Black Pete perceived as a caricature of black people. Hiah argues that 'the absence of quality education on the history of slavery and the colonial past has resulted in the misrecognition of minorities in Dutch society' (2018, p. 16).

Roldao et al. also draw attention to the inferior depiction or non-representation of minorities in the Portuguese history curriculum: 'A significant part of the Portuguese population is not represented in history books or, if they are, they are represented as inferior, not fully-citizens, and their history is not part of the national history. This is the case of afro-descendants and Roma communities' (Roldao et al. 2018, p. 18). Exploring this issue as a European problem,

Roldao et al. (2018) critically argue that Europe is presented as a positive construction without any references to the colonial past. Dupont (2018) states that the UK discourses on the 'whiteness' of schooling reinforced by 'a specific blindness to global and migration issues' are illustrated by statements by a Muslim activist as well as by a non-Muslim teacher and a parent who mentioned that history classes focus on 'the Tudors and the Kings and the Queens': 'It was not about kind of like the British empire or imperialism or colonialism and how that has impacted and shaped the way that minority communities are seen in the UK today' (Dupont 2018, p. 30).

If children from minority groups are discriminated against, alienated or are overwhelmed by the subjects they are asked to master, that would obviously have a negative effect on their happiness and well-being. A school system where children do not feel they belong can indeed make children unhappy, and parents can respond to this by seeking separate niches in the education system which they think would serve the needs of their children and positively contribute to their happiness and well-being. However, the parents' choices are often informed by the desire to educate their children in accordance with their own values and their right to do so is rarely contested in most European contexts. Conflicts and controversies emerge when the right in question is expressed with references to the impact of education on identity formation and demands for an education which would foster the children's feelings of belonging in the cultural milieu of the family and close community.

Happiness and well-being are closely related to the feeling of belonging. If these value universes are seen to have incompatible characteristics reflecting different conceptualizations of good life, the transmission culture would appear as a particularly difficult problem to be solved by balancing the demands of the family and the society. The controversies around this problem are exacerbated by the tendency to identify identity and culture with religion, as extensively discussed by Dupont regarding the UK. He refers to the association British Muslims for Secular Democracy that denounces educators who 'have overemphasized Muslimness at the expense of Britishness and the whole child' (Dupont 2018, p. 26).

It is probably not possible to have exact prescriptions about the extent to which the existing rules can be bent or religious beliefs that seem to conflict with gender discrimination can be accommodated in practice without compromising the children's present well-being as well as their future choices about the life they wish to live. The controversies that emerge here are not necessarily between Muslims and non-Muslims but between people with different views about the values to be transmitted in education. There might be a way of addressing them without overlooking the underlying inequalities that affect the children's position in the education system in the present and the terms of their participation in society in the future. This would require reconsidering

the existing rules and practices as well as the curriculum. The same observation can be made in relation to the controversies that are reflected in different discourses on the problems of and expectations from education in different country contexts.

9.4.3 Social Cohesion, Trust and Representation

The relationship between social cohesion and an inclusive system of education is a two-way one. Different dimensions of injustice that are highlighted in different discourses on education constitute an obstacle against the positive contribution education is expected to make to social cohesion. At the same time, in the societies divided along the lines of class, ethnicity, religion or race, the inequalities that characterize social relations define the exclusionary dynamics observed in the realm of education.

The inability to develop a sense of belonging in society because of the character of the curriculum or the experiences of discrimination in school leads to feelings of alienation and the erosion of trust in the system of education as well as in the society at large. This is forcefully stated by the representative of an anti-racist association in Portugal:

> Minorities often have a relationship of fear with the State and the school is an institution of the State; then they also end up delaying their children's enrolment in school, and, especially, they do not create a relationship of trust. The school has to be concerned about building trust. (Roldao et al. 2018, p. 13)

Where there is an erosion of trust emerging from the exclusionary effect of the curriculum as well as the rules and practices, parents who feel powerless to make their grievances heard might also contribute to enhanced school segregation by the choices they make in relation to the education of their children. A Roma activist in Hungary interviewed by Kende refers to this by saying that

> The [Roma] parents themselves cannot be convinced to send their children to mixed schools, primarily because they cannot afford the cost of the public transport. Secondly, they feel more secure in the nearby segregated schools, and thirdly they are afraid that their children are not able to cope with the higher expectations. (Kende 2018, p. 34)

Given the inequalities of 'voice' which block the representation of minority grievances and claims, the minorities might believe that they do not have the possibility to question and contest the prevailing social institutions and practices. They might therefore accept and adapt to them in whatever way they find to protect the well-being of their children. Roldao et al. (2018) observe that some of the attempts that are made to include minority representation in

Portugal mainly aim at facilitating the management of ethno-racial diversity in the realm of education. This is reflected in the following quotation from the representative of the High Commission on Migration:

> The representativeness of all the interlocutors is absolutely decisive for the success in the implementation of public policies. In this way, all mechanisms of hearing and participation must be stimulated in its various aspects: from more formal mechanisms to informal structures such as youth groups or Neighbourhood Associations. It is also necessary to ensure that the presence of more established structures, such as the Migrant Associations, continues to function, promoting, inter alia, the dissemination of training opportunities and funding lines for projects on the ground. (Roldao et al. 2018, p. 23)

This particular perspective on representation is problematized because it does not involve any concern for the presence of minorities in leading places in policymaking even in the areas which concern them directly. Minority representation is thus seen in relation to their role as mediators, consultants or facilitators in policy processes.

In Austria, there is a well-developed institutional frame for representation, but as one interviewee observed, the demands put forward by the unions of parents and students were not heard until recently. According to this interviewee, on the other hand, there have been important improvements recently and the impact of unions has increased (Tiefenbacher and Vivona 2018). What is worth noting in this assessment of the positive developments in representation is the emphasis of their 'newness' and their relationship with the approach adopted by the Ministry of Education and the Minister in person in Austria. This draws attention to the importance of the outlook of the ruling government and hence of the political environment in which the possibility of representation of different actors is defined. While there might be steps taken to allow a larger diversity in the voices that are heard in debates around the system of education by the government in power, dialogue and mutual understanding can still be impaired by the political controversies and tensions which prevail at the level of society.

In Hungary and Turkey, two countries marked by intense political polarization, the political environment appears to be particularly inimical to the expression of critical views in a healthy public debate. This is a point that receives particular emphasis in Hungary. Kende argues that 'there is no visible public debate about the role of education. In Hungary, every social issue is over-politicized and highly divisive among the left and the right, the liberal and conservative camps, without any interaction between the two sides' (2018, p. 31). Akkan and Ruben (2018) express similar concerns with respect to the silenced demands of the Turkish secular middle class. Secular groups confront the government regarding its policies of Islamization in education through the

proliferation of religious schools and the introduction of elective courses on religion in the curriculum. They point to the parents' organization advocacy work and the difficulties it faces in a political environment where the Ministry of Education refuses to accept secular groups as partners and easily disregards their claims (Akkan and Ruben 2018).

The fact that in different contexts diversity is frequently mentioned as a problem to be managed and dealt with also makes it difficult to discuss the role of education in contributing to social cohesion in a healthy environment of dialogue with equal representation. In the case of the Muslim minority in the UK, Muslim schools are central to the debates around the 'balkanization' of the education system which is an emphasized factor in the failure of education to contribute to social cohesion. Thus, making the school system reflect the diversity in the society appears to be a widely shared objective. However, controversies around this objective could be hardly avoided given the complex problems posed by different perspectives on religion and secularism which articulate with security concerns. In relation to 'non-discrimination' as a principle, for example, non-Muslim stakeholders portray Islamic extremism as a problem, while it is the problematization of Islam itself that attracts the criticism of Muslims (Dupont 2018). In some discourses on the problem of segregation in the UK, minority religious schools, Muslim ones, in particular, are seen as posing a particular challenge for social cohesion.

9.5 CONCLUSION

Based on the discourse analysis of six country cases, this chapter reveals that different dimensions of injustices, which are reflected in various forms of exclusion, define the position of the students from minorities and vulnerable groups in the system of education and thus constitute a barrier to the development of their capabilities. Discourses outline diversity as 'a problem to be managed'. Injustices related to recognition, which constitute an important factor defining the inequalities in education, pertain to the problems of 'difference blindness' and 'misrecognition', as well as the third problem which cannot be separated from the first two, pertaining to 'the attitudes towards the worth of different cultures'.

Socio-economic inequalities and cultural differences which are not adequately addressed define the limitations of education in meeting the expectations about capability development. They also create doubts about the contribution of education to social cohesion. The combined effect of injustices related to redistribution and recognition make the minorities feel discriminated against, alienated or excluded, and consequently lead to an erosion of trust in society. Their access to channels of representation is often limited and they do not have the opportunity to adequately express their grievances and claims and

to contest stereotyping and stigmatizing tendencies about their values or their culture. Apart from the preconceptions about values and culture (of both the minorities and the society) which often inform the approaches to social cohesion, the perceptions of culture and identity as fixed and unchanging might not serve the development of capabilities as the core objective of education. The parents' freedom of choosing the type of education which they find in conformity with the values underlying their conception of good life might not be in conformity with the children's freedom to choose and affect their life chances. There is, therefore, a need to question the given views on values, cultures and conceptions of good life in a transformative approach that addresses the underlying injustices that lead to capability deprivation.

NOTES

1. Sen (2000). See also Fraser (2001, p. 29) where she contemplates the institutionalized value patterns that deny some people the status of full partners in interaction – whether by burdening them with excessive ascribed 'difference' or by failing to acknowledge their distinctiveness.
2. https://www.un.org/en/universal-declaration-human-rights/ (accessed 19 August 2020).
3. https://ethos-europe.eu (accessed 19 August 2020).

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10. Just care for the elderly and disabled

Trudie Knijn and Jing Hiah

10.1 INTRODUCTION

Listening to and understanding the 'lived experiences' of frail elderly and adult disabled people and their care workers questions redistributive, recognitive and representative justice principles in care systems and care relationships. Disabled as well as frail elderly persons' experiences of patronizing treatment probes recognitive justice principles because it harms self-respect, undermines self-esteem and denies them participation as full humans in social relations and society at large. Moreover, if unable to afford proper care, there is a lack of redistributive justice because they do not share in the common good as if they are not worthy of getting the resources to live the life they value. Not having a say in representative arenas might undermine political participation but also the voice to get things done. But it is not only people in need of care who might experience injustice. Those who care for them, most often women as informal or formal caregivers, also face the consequences of the undervaluation – in wage and status – of caring work. Care work is still gendered, jobs are low paid and often precarious, working conditions are suboptimal and many care workers feel that they can't give proper care to the people who need it most.

Since the 1970s feminist scholarship on care and gender has unravelled care as a formative structural and cultural basis of gender inequality. This literature shows that the perception of care as women's work, its assumed familialistic and domestic character, and its belonging to the sphere of reproduction diminish its worth as a valuable public good that comes with a reasonable price. Moreover, the association of care needs with 'dependency' contrasting, for instance, wage workers' 'independency' (Fraser and Gordon 1994) does not fit with the dominant discourse of autonomous individuality and hampers the analysis of what care recipients wish and need to fully develop their capabilities. Cross-national studies (Doyle and Timonen 2007; Saraceno and Keck 2010; Genet et al. 2012) show that different care systems prevail and that some European countries have implemented improvements in care treatments and care systems for the benefit of justice. Care workers and people in need of care have contributed to those improvements by agenda setting of claims and

human rights via their representation in advocacy organizations, trade unions and political parties fighting for care workers' rights.

This chapter explores justice and care from the perspective of Nancy Fraser's claim for participatory parity, focusing in particular on justice as recognition and redistribution (Fraser 1989; Fraser and Honneth 2003) and in addition, Amartya Sen's capability approach (Sen 1985, 1999). The chapter is based on two reports of the Horizon 2020 programme 'Towards a European THeory Of juStice and fairness' (ETHOS). The reports (Anderson 2019; Knijn 2019) are ethnographic and sociological analyses of principles and discourses of justice and their realization in national care systems and practices from the perspective of both care recipients and caregivers.

The next section of the chapter outlines the idea of justice and care by highlighting the complicated relationship between (inter)dependency, participatory parity and capabilities, followed by a section on the methodology of the chapter. The third section analyses the discourses on care at the European level, their assumptions and agendas. The fourth section dives into the lived experiences of care and explores the practices and care relations between care recipients and caregivers operating under diverse care regimes, showing how care workers and care recipients cope with the main boundary lines in care, which will be identified below (passivity versus activity, dependency versus independency and residential care versus community care). The final section concludes that for justice in care to be reached, a tailor-made and stepwise care system should be developed in constant deliberation with stakeholders.

10.2 THEORETICAL FRAMEWORK

Our theoretical point of departure is embedded in the ETHOS programme that proclaims redistributive, recognitive and representative justice in order to develop individual capabilities as well as participatory parity (Chapters 1 and 4 of this volume). We understand redistributive justice as 'being secured to have access to resources in order to be capable of doing what one has reason to value'. Recognitive justice is understood as 'being acknowledged in one's identities of choice'. Representative justice is defined as 'having a say in order to participate in and give shape to the society people live, in accordance with the values they appreciate'. In outlining the three justice principles of redistribution, recognition and representation as conditions for participatory parity, Fraser mainly focuses on the political economic structures where she differentiates between production and reproduction, the latter including care (Fraser 1987, 2016).[1] Here, care is considered gender-unequally divided unpaid or underpaid 'reproductive' domestic labour that under the political economic structures of capitalism hampers women's equal participation (Fraser 1989). She suggests that these boundaries result in unequal distribution of wealth

(and poverty) amongst those participating in reproduction and undervaluation of reproductive labour of women. Ingrid Robeyns (2003) nuances Fraser's focus on participatory parity by extending the scope to the misrecognition of human diversity, that is, people who have no or limited potential to participate on the labour market because they are excluded for reasons of misrecognition on the basis of embodiment, race and/or gender. Following Robeyns (see also Anderson 2019), we find that the Capability Approach (CA) developed by Amartya Sen (1985, 1999) complements Fraser's participatory parity in CA's explicit focus on human diversity: 'At a normative-philosophical level it seems more appealing to try to develop a normative account that includes all people, and does not treat the disabled, the weak, the ill, the young, the frail, the elderly, and inmates as "special cases"' (Robeyns 2003, p. 549). Still, CA assumes that not everyone is in the same way able to convert resources into outcomes because people differ in preferences, live in various contexts and therefore have different opportunities to the beings and doings that are conditional to living a life that one has good reason to value (see Chapter 1).

While analysing justice in care systems and care relations between care workers, frail elderly and adult disabled persons and combining the overarching concept of participatory parity with CA, we are aware of the paradigmatic differences between both approaches. Where Fraser emphasizes the role of institutional structures, Sen focuses predominantly on the individual. In this contribution, we depart from the perspective of Fraser, that social problems are influenced and created by societal structures and cultural assumptions more than by individual factors, and utilize Sen's CA for pragmatic reasons. First, because care systems (insurance, facilities, cost-price systems) from the perspective of care recipients make up a specific category of the social-economic redistribution structure; the reproductive sphere that is intertwined with the mixed paid and unpaid labour market of care. Care recipients therefore depend on the redistribution of resources supporting individuals who have no or limited capacity to earn their own income. The question then is if redistributive principles in care systems meet their needs, and if and how participatory parity and the capability to live the life one values gets shape, is it by accepting the limited beings and doings or by stimulating alternative forms of integration and participation? Recognition of diversity is therefore a second condition of justice in care. Whether adult disabled people and frail elderly are awarded with enough and good quality resources depends on the acknowledgements of a wide variety of needs, identities and preferences among a population with highly diverse physical impairments. Institutionalized care systems can facilitate such a diversity, equally important are care relations that account for diverse needs, identities and preferences. Frail elderly and adult disabled people are a special case only in as far as they have care needs while they may differ in all other aspects of their lives, identities, contexts and normative

accounts of living the life one has good reason to value. Third, representative justice is at stake regarding having a voice in the kind and character of care interactions and provisions; being able to express one's needs and preferences, and getting these fulfilled, contributes to human development, despite the risk of 'adapted preferences'.

Finally, given the still gendered character of care work the issues of redistributive, recognitive and representative justice as well as capability development also bring caregivers/workers into the picture. How is their work valued in the care system? Are their preferences and identities recognized? Do care relations allow them to meet and acknowledge care recipients and what means do they have to represent their own interests and realize their own capabilities? Therefore, the main questions of the chapter are: (1) What are care-related justice principles in European discourses on frail elderly and on disabled persons? (2) To what extent could these principles be provided in care systems and care relations? (3) What are the implications for participatory parity and capabilities of care recipients and care workers?

In the literature, core concepts in analysing justice and care are 'embodiment', 'vulnerability' and 'dependency', each of which is central in demarginalizing people with disabilities and frail elderly, while gender and class inequality are core issues regarding caregivers. 'Embodiment' refers to the normativity of able-bodiedness that assumes that people with impairments due to age or physical or mental constraints per definition are *in*capable of making use of practical opportunities. Disability studies (Ingstad and Reynolds Whyte 1995; Shakespeare 2000), however, highlight the social construction of disability in a social context, work environment and physical built environment. An impairment to a body does not necessarily constitute disability. Sophie Mitra (2006) by referring to CA differentiates between *potential disability* and *actual disability*. While severe constraints indeed reduce people's potential disability they might not hamper an individual's actual disability because that

> depends on whether the impairment places restrictions on the individual's functionings. At the functioning level, the focus is on what an individual values as doing (or being), and on what the individual succeeds in doing/being. In this examination, disability at the functioning level is referred to as *actual disability*. An individual is disabled if he or she cannot do or be the things he or she values doing or being. (Mitra 2006, p. 241)

In the same vein, disability and old age are associated with vulnerability, that is, 'with reduced capacity, power, or control to protect their interests relative to other agents' (Mackenzie et al. 2014, p. 6). Two amendments can be made here. First, *vulnerability* as the opposite of capability also depends on the relationship between what people aim for and what they succeed in doing or being. Second, at a more ontological level authors such as Martha Fineman

accentuate that vulnerability is not restricted to people with impairments but is 'a universal, inevitable, enduring aspect of the human condition' (Fineman 2008, p. 8).

This brings us to the concept of *dependency* as a social construct. Fraser has, with Linda Gordon, unravelled its contextualized meaning and its implications. 'What in pre-industrial society had been a normal and un-stigmatized condition became deviant and stigmatized … certain dependencies became shameful while others were deemed natural and proper' (Fraser and Gordon 1994, p. 315). They showed that the concept of 'dependency' since the Industrial Revolution is no longer reserved for production workers depending on waged work but is applied to all who depend on the wage worker or the state for an income. This nowadays commonly accepted categorization defines all who are outside the capitalist production process as 'dependents'. However, if we consider vulnerability as a universal aspect of the human condition, then the same goes for dependency. As Trudie Knijn and Monique Kremer following Joan Tronto (1993) state: 'Every citizen is dependent on someone else in one way or another. Therefore, it is more fruitful to use an alternative perspective: All citizens are interdependent, but not always in an equal way' (1997, p. 352). From there they conclude that in care systems and care relations it is not dependency itself that defines the relationship between care recipients and caregivers but the redistribution of resources (facilities, subsidies, insurance, budget, housing and so on), the (mutual) recognition of values, needs and identities, and the say they have in giving shape to the lives they value to live. All of which depends on structural and interactional power relations that give shape to care systems and care relations.

In conclusion, the focus of this chapter is on justice and care from the perspective of participatory parity, acknowledging that disabled and frail older people are not per definition incapable or vulnerable nor are care workers. They have their own perspective on how they value the life they want to live, and we consider them to be interdependent in their specific contexts and conditions. Lack of acknowledgement of their agency might undermine redistributive, recognitive and representative justice in care systems and care relations.

10.3 METHODOLOGY

The chapter is based upon two reports of the Horizon 2020 programme ETHOS. The first report, 'Justice, care and personal assistance' by Bridget Anderson (2019) is an ethnographic study of experiences of home care workers and home care recipients, the second report, 'Boundary lines between private and public care; living independently at home or in a home' by Trudie Knijn (2019) focuses on European social policy discourses concerning facilitating care needs in residential and home settings. Anderson's report (2019) is

a mini ethnography and interview-based research, conducted in five European countries (Austria, Hungary, the Netherlands, Portugal and Turkey) involving care users, care workers, disabled people and personal assistants and, in some cases, their family members. A mini ethnography is a short ethnography that 'explore[s] the feelings, beliefs, and meanings of relationships between people as they interact within their culture or as they react to others in response to a changing phenomenon' (Fields and Kafai 2009). It facilitates understandings of norms, values and roles and is a way to capture practices and what is unsaid. The national researchers conducted field visits, accompanied care workers and personal assistants during their work, and held interviews with care workers and care recipients. The focus was on their lived experiences concerning justice claims in care. In other words, their sense of justice and fairness in care systems and care relations were contextualized in the respective national legal and policy framework and care systems (Anderson 2019). Knijn's report (2019) expands on Anderson's report by exploring the different national care systems and their institutional contexts through diving into the boundary lines between the private and the public domain of care. National researchers were asked to send in additional information, such as policy and legal documents and data on – changes in – national care systems, discourses and redistributive policies. In addition, the national reports have been re-analysed from the perspective of boundary drawing between public and private care systems. Central concepts of this research including recognition, redistribution, capabilities and functionings were used as sensitizing concepts, interpretative devices that allowed us to focus on issues of (in)justice concerning care relations and discourses, but at the same time allowed us to capture those instances of behaviour and meanings that did not fall within the narrow definitions of any of these concepts.

In the next two sections, the discourses and lived experiences of justice and care will be explored following the idea of boundary lines between public and private care systems and their assumptions.

10.4 EUROPEAN DISCOURSE ON JUSTICE AND CARE

Different histories and related path-dependent institutionalization characterize European countries' justice principles in care (Saraceno and Keck 2010). All over Europe the demographic turn (Eatock 2019) worries governments and policy makers on how to balance the increasing costs of care for the growing number of needy elderly people and with doing justice to this ageing population. In that process, discourses of *Active Ageing* and *Living Independently* and *Prevention of Care* showed up. The European Union (EU) has strongly campaigned for and supported in various programmes the social participation

of disabled and frail elderly people in combination with recognizing individualized rights and responsibilities: 'Active ageing means helping people stay in charge of their own lives for as long as possible as they age and, where possible, to contribute to the economy and society.'[2] Part of the Active Ageing framework is the Independent Living strategy whose moral imperative is preventing passivity and institutionalization of elderly persons along with engaging them to become more physically and socially active. Similar assumptions underly the 'Living Independent Movement' that finally, after years of struggle, succeeded in getting human rights of people with disabilities acknowledged by the European Commission in its European Disability Strategy 2010–2020 that underlines the United Nations' Convention on the Rights of Persons with Disabilities (UNCRPD).[3] The European Association of Service Providers for Persons with Disabilities (EASPD), in which about 15,000 service providers are gathered, speaks about a paradigm shift in society's view on people with disabilities in referring to ratification by Member States and the conclusion by the EU of the UNCRPD:

> This paradigm shift therefore requires a movement away from a medically oriented model of care, where the person with a disability is viewed as a passive receiver of care or worse as a person who needs to be cured, towards a social rights model where individuals are supported to become active citizens making a contribution to their own communities like everybody else.[4]

From a justice perspective the combination seems promising for all persons with physical impairments, no matter their age; the human rights perspective might guarantee recognitive justice by acknowledging the right to actively participate on parity in society and supporting people in living the life they prefer and value to live. Redistributive justice succeeds if resources are available to condition these preferences. In that case, actual disability will disappear. Nonetheless, the strategy of Independent Living is contested (Timonen 2016; Zaidi and Howse 2017; de Sao José et al. 2019), especially its implicit and sometimes explicit creation of artificial though polarizing boundary lines of passivity versus activity, dependence versus independence and community care versus institutionalized (residential) care.

In these discourses the passivity-activity boundary line touches upon recognitive justice in the sense that the strategy of independent living, on the one hand, recognizes disabled persons and frail elderly as being capable of and having the right to active participation, thereby valuing and supporting them as dignified and valued members of society. On the other hand, activity appears in the discourse as a moral obligation condemning passive care consumers. The diversity of potential preferences and fragilities is set aside as is the option that people can decide for themselves to live the life they prefer. While it might

be that older people and adult disabled persons long for and benefit from being active or even productive, the moral imperative to be active may contrast the physical and mental preferences of frail elderly and people with disabilities who might be served better by being allowed to take a break after a long working life or a history of impairments; a just society should allow those populations with disabilities to have a voice in the way they live their lives, and must provide resources for doing so (de São José et al. 2019). The programmes are phrased in terms of 'their own (care recipients) interests', which suggests a patronizing approach, while it is not certain and even questionable that these programmes represent the feelings and experiences of disabled and/or frail elderly people themselves. Regarding elderly persons – from the age of 50 on – modes of subjectification position them as people who need to be addressed as a specific sort of subject endowed with specific sorts of capacities for action. This ageist discourse classifies the ageing population as passive, ignorant and isolated; persons who without intensive support do not follow up the moral imperative of being active and independent. Regarding disabled persons dealing with a wide variety of impairments the discourse ultimately ignores that passivity not only follows from disablement but also from lessened functionings that allow for passivity. All in all, these programmes ignore the diversity of older as well as disabled persons and their specific preferences.

In the dependency-independency boundary line redistributive and recognitive justice are intertwined. Being recognized as autonomous and independent persons is the core objective of the European Disability Platform and the core message of the Active Ageing framework. That discourse contributed to seeing frail elderly and disabled persons as autonomous decision makers and to getting rid of prejudicial, social, spatial and infrastructural barriers for active participation. However, by accentuating 'independency' as the countervalue of 'dependency' both programmes overlook two main side effects of the discourse. First, by assuming independency as universal modus it denies not only the fundamental vulnerability of all humans and their dependency on social relations and resources, but most of all that frail elderly and disabled persons can't do without additional support and involved caregivers. Recognitive justice in care is an interactional and relational concept that cannot stress only the needs, interests and preferences of those that receive care. Therefore, interdependency instead of independency should be the countervalue of dependency. Second, discourses don't develop in social-economic vacuums. The independency discourse of the disability movement is partly driven by service providers seeking a niche[5] while the Active Ageing framework is mainly driven by budgetary reasons such as preventing rising costs of care and improving economic contributions by staying or getting employed. Pleading for independency in a context of reduced public spending on and increased marketization of care misrecognizes not only the interdependent relation-

ship between frail elderly and the caregiver, it also disregards redistributive justice by underestimating the costs of adequate public resources for staying at home as long as possible. Exemplary are the 'best practices' advertised in the Independent Living programme of Active Ageing. These are: guidelines and digital tools (e-health apps, smartphones, TV-based platforms and equipment) to advance social interaction and prevent loneliness of elderly people, workshops and meetings to distribute information and raise awareness, and preventing care dependency by stimulating physical activity (Knijn 2019), none of which are investments in care work.

The boundary line between residential and community care relates to the dependency-independency boundary because care dependency is in these discourses primarily understood as dependency on public resources spatially situated in public residential settings. Interestingly, community care is pictured as independent living, thereby ignoring that being dependent on the family or the community is just another form of dependency. Janet Finch (1990) already stated three decades ago that in the UK, care 'in the community' means care 'by the community' – voluntary, informal and unpaid – often coordinated and regulated by public services. The discourse on Living Independently is straightforward on this boundary line. By associating passivity, dependency and residential care as opposites of activity, independency and community care, the EU in accordance with non-governmental organizations, market parties, national and local governments have created an autonomy discourse that denies interdependency between people in need of care and caregivers, disassociates family and community care from redistributive resources and in the end disregards the concept of care as a fundamental systemic and relational concept. This development suggests what Hanne Marlene Dahl (2012) has described as neo-liberal care where services and choices have become standardized, care has been de-professionalized and discourses of the 'active citizen', 'participation' and 'responsibility' have become dominant 'signifiers' and 'the citizen can no longer choose between passivity and activity. S/he has a moral obligation not to be passive, to care about his/her own body and mind' (Dahl 2012, p. 285). The ultimate effect is neglecting the EU gender equality strategy because the bulk of caregiving will be on the female kin. At the same time, the European Commission (2013) presents a counter discourse in its report on long-term care (LTC) by recognizing drawbacks of relying on unpaid informal care, such as private out-of-pocket payments for informal undeclared work by mainly illegal female immigrants in precarious jobs, not guaranteeing good quality care and indirect costs in taxes foregone. Inspired by the 'social investment approach' (see also Morel et al. 2012), the European Commission presents good alternatives for LTC; public support to family carers by way of care allowances, care leave or social protection schemes and replacing informal with formal care in various models of LTC financing and delivery.

Despite these suggestions of the European Commission in 2013 and more in line with the Independently Living discourses, all over Europe frail elderly and disabled persons are confronted with long waiting lists and shortage of available support. Long foreseen demographic developments have not encouraged Member States to invest sufficiently in LTC and by austerity politics during the 2008–15 crises residential care places were reduced, provisions for home care and personal assistance were limited and care workers were fired (see ETHOS country reports by Akkan and Serim 2019; Brito 2019; Knijn 2019; Knijn and Hiah 2019; Veres 2019; see also Eurofound 2017). Moreover, market parties could take part in the care niche expanding an already existing boundary line between the well-off and the average care receiver. These developments have consequences for justice in care relations at home and in homes in particular for participation parity and capability development, as will be illustrated in the next section by cases embedded in country contexts.

10.5 LIVED EXPERIENCES: CARE RELATIONS AT HOME AND IN HOMES

Passivity and activity in practice are not exclusionary or binary concepts. Persons can be active in decision making while passive in daily routines because they are impaired, need rest or just do not feel like participating in activities offered by volunteers, care workers or local agencies. The reverse is only thinkable if people are forced into active participation and can't decide by themselves whether they want to. Having a frail body does not mean having a frail mind. The potential disability might result in actual disability if lack of resources limits functions but equalizing passivity with actual disability denies the free will of the person in need to make an active decision for living the life one values. The latter is well illustrated by Adrienne, a care recipient who sometimes decides not to use her prosthetic leg, although it cannot always be avoided:

> Even if I would pick up that leg and [throw] it in the corner … I could. And if I would never be able to use the leg anymore, I would also make peace with it. But as long as I can, I will keep trying. [with the leg on] I sit better, and it looks better but if it hurts [with the leg on], then I will only suffer from it. And you can say, nice two legs, but if it hurts then I feel like, I have less pain without putting on the leg and this way [without wearing the leg] is fine too … but when I visited the physiotherapist and I was not wearing the leg, he would say: next time we are going to practice walking using the bridge again, so you should wear your leg next time. (Dutch home care recipient, quoted in Knijn and Hiah 2019, p. 40)

In contrast, being disabled is not a given but made by (a lack of) resources that hamper persons in how active they like to be, if only in taking a walk, as this Portuguese woman living in a residential home explains:

> Sometimes we would like to go and take a walk in the city, but nobody can go with us. We are stuck here all day long, going down to eat, going up to watch television, going down to eat again and going up to sleep. Every day is like this … for me the worst time is after lunch, when we are alone in the little living room. It's rare that someone goes there too … We can walk so we go anywhere we want. Sometimes we take a nap, but sometimes I don't want to sleep, so I stay here. Those who are in a wheelchair can't go where they want, and 'the girls' don't take them here, so we are alone most of the time. (Portuguese older woman in nursing home, quoted in Brito 2019, p. 44)

Given that care takes place in relationships, the possibility to meet care recipients' preferences bounces back on the care workers who have several though limited repertoires to cope with them. The care worker in the Portuguese nursing home not only has no time for a walk but sometimes feels that time constraints make her treat people disrespectfully: 'If there were more caregivers in each shift, we could work more slowly and could try not to hurt them … I mean we don't do it on purpose but sometimes we can't be gentler' (Brito 2019, p. 38). The Dutch district nurse, pressured by contracted time schemes, tends to lose patience and takes an educative, almost patronizing stand: 'You have to work efficiently because otherwise you will be out of time. It also tires me, going back and forth. And Adrienne has to be corrected in what is logical in terms of work … With her, you have to teach her how to work systematically' (Knijn and Hiah 2019, p. 39).

Contributing to the capabilities of care recipients therefore might imply recognizing passivity as well as activity and having the resources to either let go or join in. Yet neo-liberal care practices have led to standardized procedures in the different settings and conditions of care services and needs (Dahl 2012) that might frustrate both recipients and workers. Care workers have to cope with limited time and frustrated care recipients under these conditions, which might result in moral distress (Anderson 2019; see also Tufte and Dahl 2016), especially if care recipients have not adapted their preferences to the conditions of the care systems.

Dependency versus independency are the extreme poles in a situation where people are not fully capable of living an autonomous life or to be active in society on their own capacity. The Living Independently movement in trying to avoid that situation promotes prevention of care dependency as well as the recognition of human rights of people who need support in realizing their capabilities. Cash-for-care allowances available in many European countries since the 1990s seem to offer a solution because they solve two issues at the same

time; recognitive justice by acknowledging autonomous decision making on care provisions, and redistributive justice by spending public resources on care work by relatives as in Turkey. In elderly care we see an increasing number of live-in migrant care workers (Da Roit 2010) who are vulnerable due to a lack of minimum labour protection. In such cases, care workers are dependent on the boundary lines drawn by the care users who see it as a monetary relation in which they do not account for probable homesickness or loneliness of the migrant care worker:

> Leman and Sinasi confronted problems with the previous caregivers. They went abroad to visit their older child. At that moment, the caregiver stayed at home alone and talked with their family in their home country on the phone. Sinasi saw that the phone bill was very high at the end of the month. When they got back from vacation, they were upset, and the job of the caregiver was terminated. (Quoted in Akkan and Serim 2019)

Publicly financed personal assistance is another kind of cash-for-care arrangement implemented in Austria for disabled persons to realize their capability to participate in social life. Austrian case studies show that the arrangement is supportive to service users but also that the dependency relation is turned upside down. Personal assistance users dictate the rules of the care relationship by misrecognizing the assistants and denying the interdependent care relation. The service users:

> draw a lot of attention to not mix up private life, friendship and personal assistance. They draw a strict line between work and private life. They adopt a rather strict leadership style and set of about 52 written rules, which they submit to all personal assistants at the beginning of every month. In case a rule is violated, the violator will receive a verbal rule-reminder, in case a rule is not obeyed because it was formulated in a misleading manner, the rule will be revised and submitted to all assistants again. The set of rules is permanently updated based on experiences of the assistants. (Meier 2019, p. 17)

While the idea of cash-for-care arrangements is to secure redistributive as well as recognitive justice for people in need of care or assistance by facilitating their independency it appears to be forgotten or denied that care relations by definition are interdependent. Accentuating the independency of one party might undermine the independency of the other. The risk of misrecognition can be diminished in regulated cash-for-care systems defining the rights and obligations of both parties.

The dichotomy between *community care versus residential care* represents a political and ideological divide for redistributing care budgets among needy citizens. Communal care has been promoted mainly for budgetary reasons and is accompanied by normative ideas on activity and independency. Living

Independently, for instance, became a dominant approach in Dutch elderly care while the bulk of care is already performed by unpaid female kin. They and their care needing relatives might – if indicated – receive professional qualified home care, paid for by compulsory long-term care insurance in combination with income-based contributions provided by non-profit voluntary organizations. However, due to austerity reasons combined with a discourse on 'Living at home as long as possible', the government has dissolved elderly homes that formed a crucial link between home care and nursing homes. The effects are disastrous for many elderly persons who are not frail enough for a nursing home and too frail to live alone at home. The same effects are seen in Austria where residential care, condemned as it was for familiaristic reasons, suddenly became popular in that country at the time the government decided that families would be liberated from financial responsibility for elderly care. Accordingly, a paradigmatic shift occurred towards the more expensive residential care now paid for by the state. Unexpectedly, but foreseeable, this caused long waiting lists for elderly residences because the government had not anticipated this shift, hence a deficiency in residential places. That lack is present in all European countries dealing with availability and access for, on average, half of the Europeans in need of residential care – varying from about 30 per cent in the Netherlands to over 50 per cent in Austria, Hungary and Portugal (Eurofound 2017). A side effect is that only those who are prosperous enough and/or can rely on their family members are assured of their care needs being met. Well-off care users buy care on the private informal care market, following the general trend in Hungary (Széman 2015; Veres 2019) and elsewhere in Europe. In addition, residential settings for frail elderly and adult disabled persons are increasingly paid for by private resources due to a shortage of public care homes. The growing share of private residential care homes in many European countries also reveals polarization of care services between poorer and more affluent elderly. Indications are higher costs for residents of private care homes, their location in more affluent urban areas and the availability of more profitable care services (Eurofound 2017).

10.6 CONCLUSIONS

Nice and positive stories can be told about care relations between care recipients and care workers, though these stories can be told only despite and not thanks to care systems in place. All European countries are seeking for redistributive justice regarding elderly and/or disabled persons by balancing private – meaning familial – and public budgets. Most scenarios, however, fall short. When almost half of the needy elderly population in Europe is waiting for residential care, when care workers in home care and residential care don't have enough time for persons who can't fully help themselves, when the care

relations turn into commodified and hardly protected work relations at the cost of female workers, something is really wrong with redistributive justice in care.

This failure in just redistribution in care bounces back on recognitive justice in care; the two aspects of justice are intertwined. Participatory parity and the capabilities of care users and care workers depend on the care relationship, that is, on the efforts both parties undertake to recognize each other as partners in an interdependent relationship. When this is absent, such as in the case of the personal assistance scheme in Austria, recognitive justice for care workers fades into just a monetary and interchangeable relationship. Which does not mean that monetary care relations per se contradict recognitive justice; exemptions are possible such as in the Hungarian case of an elderly woman (age 93) who has bought care out of her own pocket because the government fails to provide adequate care and about whom the interviewer says:

> She explained that she was doing her best to make the care givers' stay as acceptable as possible as she was aware of how difficult it must be for the care givers to find themselves in someone else's home for days in a row away from home. She said it was important for her to be consistent and predictable in her requests and not to act on a whim, but in a manner, which was helpful for the care givers to follow. She also said that she often did not insist on certain things, that she tried to let go of certain expectations. She gave thought about what it took for a care giver to leave her home behind and suddenly spend days and nights in a stranger's house, occupy an unknown space and at the same time perform tasks that one usually would do at home, some of these being the most mundane activities, like waking up in your bed and going to sleep in your bed, washing your cup, making a tea etc. (Veres 2019, p. 32)

Care as an interdependent relationship implies that care recipients and care workers both define the relationship, its principles and aims within the restricted conditions of the care systems that they can soften but are unable to solve. Feelings of guilt for not doing enough, moral distress and efforts to compensate by investing time and nice gestures but also training care recipients to conform to the schedules are some of the strategies of care workers to deal with restricted conditions. Adapted preferences, withholding complaints and giving compliments are strategies of care recipients who lack the recognition of their needs and identities. The opposite, authoritarian employer attitudes are strategies of care users who don't recognize needs, skills and voices of their care workers. Neither is 'Independent Living' an alternative for good quality care. What might help is to install an unbroken chain of care in which interdependent care relations recognize individual needs that must be addressed.

By recalling and unravelling the core ideological countervalues detected in the confusing EU approach – activity-passivity, dependence-independence and community care versus residential care – it can be argued that boundary

lines of public and private care are fluid, complex and hard to define in contrast to what the Active Ageing Strategy suggests. Such fluid boundary lines could be optimized by offering a stepwise transition from state-regulated and publicly financed home care services to light and successively heavier forms of public residential care depending on the articulated needs of care recipients. Acknowledging interdependency of care users and caregivers may reduce the fear of becoming dependent. Yet, the moral imperative of the Active Ageing Strategy to autonomy and participation in its turn can inspire such a care chain model by the moral obligation to acknowledging not per se the activities but the diverse capabilities of ageing and disabled individuals and the ones who care for them in whatever setting to avoid becoming and being treated as passive dependents. Finally, gender equality is crucial and should not be neglected by recognizing care users' preference for autonomy.

Crucial of course is the question in national care policies of whether residential care is viewed as the last resort because alternative options are too costly. The answer to that question relates to the moral obligations of and towards elderly and/or disabled populations. What do societies owe to the more vulnerable parts of the population? To this matter, an unbroken chain of care makes a difference. The once existing (and now broken) chain of elderly homes in the Netherlands exemplifies a stepwise regulated and assessment-based need of care from the very light forms of care (housekeeping assistance) to more severe forms of care (care and nursing at home paid for by mandatory health insurance) and the most intensive form of care (individualized residential settings). Such a chain, if well-functioning, offers a tailor-made trajectory of recognition of care needs that is accessible on the basis of assessment, no matter one's income, and thus complies with redistributive justice claims. In all countries in our study this chain is broken, fragmented and disturbed or never existed. Missing elements are funds and regulations for care at home, clear assessment criteria for residential care, subsidies for the costs of residential care, individualized rooms in residential settings and tailor-made services recognizing the still present autonomy of disabled persons of all ages.

For care workers such an unbroken chain of care also meets the criteria of redistributive and recognitive justice. It offers social protection for care jobs, in home care and in residential care as well as job satisfaction and therefore is crucial for care workers' own sake and commitment to their jobs. This is a largely gendered job in which turnover rates are high and unprotected work is sky-rocketing. Professional care workers in residential settings are the best protected workers in the field and their complaints about high work pressure indicate that redistributive justice is not realized due to misrecognition of the value of their work and their high performance. Thick boundary lines between residential care and home care still hamper recognitive and redistributive justice in both localities. Restoring the care chain by a stepwise connection of

care at home and care in homes is morally and efficiently imperative in recognizing and redistributing interdependent justice.

NOTES

1. De Sousa Santos's abyssal line would be another way to view the boundaries between production and reproduction (de Sousa Santos 2017).
2. https://ec.europa.eu/social/main.jsp?catId=1062 (accessed 17 June 2019).
3. https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/the-convention-in-brief.html (accessed 17 June 2019).
4. In addition to representatives of disability organizations (15 non-governmental organizations), a main promotor is the European Association of Service providers for Persons with Disabilities (EASPD) in which about 15,000 service providers are gathered. https://www.easpd.eu/en/content/our-members (accessed 17 August 2020).
5. Ibid.

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11. Welfare, labour and austerity: resistances and alternatives through women's gaze

Maria Paula Meneses, Sara Araújo and Sílvia Ferreira

11.1 INTRODUCTION

Rights, progress and efficiency come together in the narrative over which the European Union (EU) was built. However, there is a growing awareness on the faultiness and mechanisms that still limit access to justice and the deepening and strengthening of social justice in the European project, as the ETHOS project sought to address (see Chapter 1). High expenditure on social protection, when compared with other realities, grounded on the principles of solidarity, equality and social cohesion represent the soul of the EU (Vaughan-Whitehead 2015). The European Social Model (ESM) was conceived as a unifying and protective umbrella that should strengthen the rather fragile European identity, distinguish Europe from North America and provide tools to protect citizens from uncontrolled neoliberalism (Hermann 2017).

There are multiple expressions of how the EU project has deviated from its initial objectives. Cuts in social policies, youth unemployment and precariousness, the increasing of inequalities and social exclusion, the narrative of the inevitability of welfare state retrenchment and the democratic deficit are some of the signs. At the core of this chapter is the idea that European welfare and employment regimes are experiencing a convergence towards neoliberalism with nefarious results for distribution and social justice, with an extra burden being placed on families in which women play a significant role. Defined as 'a political project that is justified on philosophical grounds and seeks to extend competitive market forces, consolidate a market-friendly constitution, and promote individual freedom' (Jessop 2013, p. 70), the ongoing neoliberal policies have dangerous consequences for democracy and citizenship that are here addressed with a focus on gender inequality in the workplace, women's resistances and alternative projects.

Reforms to the ESM started in the 1990s. It was however after the 2008 economic and financial crises that changes had a deep impact on the ESM. The leading question of this chapter is how the austerity discourses, translated into policies and laws in the context of the recent crises, have affected EU democracies and citizens' rights. This implies a triple focus: (1) on austerity in the books, that is, the political and legal path chosen by European institutions and member states; (2) on austerity in action, addressing how those choices impacted citizens' vulnerability; (3) on institutional and non-institutional processes of resistance and coping. Considering that gender analysis has been high on the European agenda since the 1970s and still dominates the representation of European values we opted to focus on the vulnerabilization of women by the attacks to the welfare state.

With the aim of addressing misrecognition and vulnerabilization, this chapter analyses the mechanisms that, at various institutional levels, impede parity (Meneses et al. 2018a). For vulnerable groups, such as women, in order to secure 'participatory parity' it is fundamental to analyse both the institutions and economic structures of redistribution (Fraser 2000). For Nancy Fraser, 'participatory parity' as a matter of justice involves being able to 'participate as a peer in social life'. The lesser social value assigned to women, including the idea that they are of less social worth – misrecognition –, is an obstacle to achieving that goal (Fraser 2000; see also Chapters 13 and 14).

This chapter, building upon theoretical and statistical analysis with empirical data collected through case studies in six countries (Austria, Hungary, the Netherlands, Portugal, Turkey and the UK), aims to identify some of the dominant fault lines that limit access to redistributive justice, with a focus on the economic sphere. In parallel, and by discussing the exclusionary processes that legitimate various forms of (in)justice in contemporary Europe (that affect how justice and fairness is (socially) constructed and experienced), it aims to contribute to the ETHOS main goal: an empirically informed European theory of justice.

We start by addressing the common ground of the EU project under the ESM and proceed with the analysis of the neoliberal turn. We then explore the legal and political discourses used to overcome the crisis, as an intensification of a previous trend. This is followed by a discussion of the consequences of the EU political choices for people's lives, with special emphasis on women. Before concluding, we focus on the other side of the same story, asking what kind of resistances, protests and alternatives emerged during the crisis.

11.2 THE EUROPEAN HETEROGENEITY UNDER THE ESM

The ESM never meant homogeneity. There were always differences between welfare systems and employment regimes in different countries. Those differences are crucial to explain the uneven impacts of the neoliberal turn and the 2008 crisis.

Gøsta Esping-Andersen's (1999) typology of welfare models retains explanatory capacity. According to this typology, Europe has three main welfare models of redistribution: (1) a liberal one, with low, residual means tested social protection with little decommodification which prioritizes the role of the market in providing welfare (such as the UK and Ireland); (2) a social-democratic model with generous and universal protection, with high decommodification, which prioritizes the role of the state in guaranteeing welfare (such as the Nordic countries); (3) a conservative-corporative model with generous social protection for those in the labour market and gaps of protection for those outside, with low levels of defamiliarization, relying on the social reproduction work done in the household (the case of continental Europe). Later on other authors have included other regimes, namely: (4) a Southern European model, with gaps of protection and residual social protection for those outside the social insurance schemes, social assistance designed not to discourage participation in the labour market and a strong role of the family without active state policies to promote it (Andreotti et al. 2001); (5) Central and Eastern European welfare regimes shaped by their past as planned economies and neoliberal regime changes towards a market economy, described as recombinant welfare states with a mix of market orientation, targeting and universality (Cerami 2008). This typology has been tested for the transformations of the welfare state towards the social investment state and parallels have been identified, thus maintaining the heterogeneity of the ESM (Meneses et al. 2018a).

Labour relations and working conditions, employment protection and protection in case of unemployment are also not the same across the EU. Several employment regimes distribute work and related benefits: (1) the liberal regime in Anglo-Saxon countries with very low levels of coverage of collective conventions and of low labour union affiliation, good coverage of unemployment benefits and low protection from unemployment; (2) the inclusive model in Nordic countries with high coverage of collective conventions and union density, high coverage and high levels of replacement rate of unemployment subsidies, medium levels of unemployment protection compensated by social protection (flexicurity); (3) the dualist regime in the countries of continental Europe characterized by high coverage of collective conventions,

but medium labour union density, unemployment benefits depending on the employment status with high coverage rate and the highest levels of protection from unemployment; (4) the Southern European employment regimes characterized by a low labour union density but high collective conventions coverage, low unemployment coverage rate like the liberal regime, but higher benefits income and duration and high protection from unemployment; and (5) the East European countries, with low level coverage of unemployment protection, low level of labour union conventions and low union density (Gallie 2013; Lima 2015).

As Bernd Brandl and Barbara Bechter (2019) underline, although collective bargaining systems were generally targeted within the flexibilization strategy and pressure to change these systems by the EU institutions, these attempts met the national institutions and social partners so that the predominant structure of collective bargaining was not radically altered.

11.3 THE NEOLIBERAL GLOBAL TREND: EFFICIENCY AS A MEASURE OF RIGHTS

Since the 1980s the data available revealed a continuous growth of social protection expenditure (Abrahamson 2010). However, qualitative changes were taking place in European welfare states, particularly since the end of the 1990s. These changes were a reaction both to the fiscal and legitimacy crisis of the Keynesian welfare state that started in the 1970s and to the Washington Consensus. They could generally be described under the concept of social investment state, coined by Giddens (1998). Social policies became seen no longer as a remedy for market externalities or a hindrance to the economy, but as a tool for economic growth. Some of the agencies that were louder in the 1980s, such as the Organisation for Economic Co-operation and Development (OECD) and the World Bank, changed their position to consider the productive effect of the welfare state in the economy (Abrahamson 2010; Jenson 2010). The Communication from the Commission 'Modernizing and improving social protection in the European Union' argued that social protection systems have the potential to act as a productive factor, contribute to economic and political stability and help European economies to be more efficient and flexible (Commission of the European Communities 1997).

Jane Jenson and Denis Saint-Martin (2003) detected, in the programme of the social investment state, the shifts between the different responsibilities for welfare from the state to families, market and the third sector. This shift was interpreted by the authors as representing a shift from social rights-based citizenship regimes towards social investment regimes. Policies became oriented to the investment in human capital through education; productive social policies to facilitate labour market participation were enacted, through workfare

policies and investment in social services so that, for example, women could enter the labour market. Moreover, a focus on social inclusion and social cohesion, through selective support to marginalized or social groups at risk shaped many policies, such as for older people; younger people; persons with disabilities, migrants and ethnic minorities (see also Chapters 6 and 7).

Innovation and entrepreneurship became seen as the key to economic growth to be compatible with an effort to face the challenges of the ESM (Jenson and Saint-Martin 2003). The Presidency Conclusions of the Lisbon European Council (2000) affirmed a new strategic goal for the EU: 'to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion'.[1] This idea became the backbone of the 2000 Lisbon Agenda and the 2005 Renewed Lisbon Agenda. In 2000, a group of experts produced a report on the future of social Europe considering that Portugal, Ireland, Denmark and the Netherlands were taking the right steps to escape the path dependency of the typical problems of their type of welfare regime; through social pacts in order to achieve wage restraint and flexibility; growing use of activation measures; and an integrated action involving different policy areas and social actors in the fight against poverty and social exclusion (Ferrera et al. 2001).

A new concept came to the fore – flexicurity –, inspired by Dutch and Danish experiences (Wilthagen and Tros 2004). It combined flexibility in the labour market with social security, particularly as social and employment policies became increasingly coordinated at the EU level. The argument was that while labour flexibility allowed businesses to adapt to global competition, social policies could protect workers from the consequences of this flexibility. According to Maria da Paz Lima (2015), this generated the slow dismantling of industrial relations and collective labour rights through a series of policies such as the individualization of the labour contract, the flexibilization of workers' dismissal, the increase of employers' power, wage moderation and reduction of some social benefits, and pressures upon collective bargaining.

Since the signature of the Treaty of Amsterdam, in 1997, the EU reinforced the capacity to influence member states' social and employment policy and overcome the difficulties of coordination, particularly in matters of welfare and employment where member states retained strong autonomy. The Open Method of Coordination (OMC) was a soft law instrument for achieving this convergence. As the next section addresses, the 2008 crisis brought important changes, less apparent discursively, that came to consolidate the austerity paradigm.

11.4 THE AUSTERITY PARADIGM AS THE CONSOLIDATION OF THE NEOLIBERAL TREND

11.4.1 European Financial Governance

There are different moments during the crisis initiated in 2008. At first, there was the impression that one could witness the return to demand-side economic policies to promote economic recovery. In December 2008, the European Commission approved the *Economic Recovery Plan* with expansionist measures to prevent the recessive consequences of the financial crisis on economic activity and employment. This Plan would complement the rescuing of the failing banks by promoting demand, through public spending, tax reductions and direct support to families and small and medium-sized enterprises. These were supposed to be exceptional measures that would allow returning to the budgetary targets of the Economic and Monetary Union once the return to economic growth and job creation was guaranteed (Costa and Caldas 2014). This period lasted until February 2010, in the context of an increasing tension between budgetary stimulus and budgetary consolidation policies.

In March 2010, a ten-year strategy for the economy of the EU – the Europe 2020 strategy – was proposed by the European Commission, with the motto 'smart, sustainable, inclusive growth'. Although it was presented as a follow-up to the Lisbon Strategy, several aspects were different from the previous period: many components of the social OMC were suspended; there was a bias towards fiscal consolidation and economic recovery; and strong control mechanisms were put in place not just on fiscal and economic policy but also on wages and collective negotiation. The struggle against poverty and social exclusion was not included and social reporting was diluted, with tolerance to non-compliance. Gender equality was basically ignored from measures and priorities and affected by the cuts in public jobs and wages and in social welfare and healthcare services (European Women's Lobby 2012).

For the Heads of State or Government of the Euro Area the priorities became competitiveness and budgetary discipline, to be achieved through structural reforms oriented to economic growth. In December 2011, economic governance was strengthened through the Budgetary Compact, with a rule for all member countries to include in domestic legal systems limits to structural and public deficits. The Six-Pack (2011) and the Two-Pack (2013) included measures to reform the Stability and Growth Pact and greater macroeconomic surveillance to reduce public deficits and macroeconomic imbalances and provided the legal basis for the European Semester. This is now a system of enhanced fiscal and macroeconomic surveillance associated with an automatic

procedure imposing financial sanctions on those countries that fail to comply with the policy recommendations.

Since 2015, with more positive indicators, the new European governance sought to return to the social pillar of the EU. This is evident in the increasing recommendations on social and labour dimensions in the country-specific recommendations of the European Semester. The concern with societal and social challenges reappeared in various documents: for example, in the Five Presidents Report, *Completing Europe's Economic and Monetary Union* (Juncker et al. 2015), in the Communication from the Commission *On Steps towards Completing Economic and Monetary Union* (European Commission 2015) as well as in the steps to materialize the proclamation of the *European Pillar of Social Rights* at the Gothenburg Summit, in 2017 (European Council 2017). This does not mean, however, a consistent concern with the expansion of social policies. For instance, Sonja Bekker (2018) notices that the numerous references to pensions in country reports are often about making pension systems sustainable, including increasing retirement age, with detrimental effects in welfare.

11.4.2 Social State Retrenchment Packs

Austerity measures implied the reduction of public expenditure through cutting personnel and social expenses, tax raises to reduce income and consumption in order to reduce budgetary deficit, privatizations, internal devaluation, cuts in the minimum wage and cuts in the public sector (Lima 2015). At a structural level, EU policies targeted particularly social and employment protection and collective bargaining systems, through labour market deregulation, fragmentation of labour relations and erosion of the welfare state. In terms of employment protection, flexibilization affected labour rights and working conditions. For example, one witnessed, in some countries, a dramatic increase in working hours and a reduction in supplementary work pay, the multiplication of atypical contracts, extension of the maximum length of fixed-term contracts (being the case of Portugal). In other countries it meant the maximum renewal of these contracts (such as the case of the Netherlands), severance pay to ease layoffs, a relaxing of redundancy rules, and challenging dismissals made harder (such being the case of the UK, Turkey and Hungary) (Leite et al. 2014).

The EU countries which signed a Memorandum of Understanding with the International Monetary Fund (IMF), the European Central Bank (ECB) and the European Commission (EC) (the Troika) for receiving emergency loans, or those which were under Stand-By Arrangements with the IMF were the ones where these alterations were most acute, such being the case of Portugal. In the Portuguese case, the Troika and the IMF support was associated with

conditionality of structural reforms in the labour market and the collective bargaining systems, including also wage moderation (Meneses et al. 2018b).

The new EU economic governance framework with the Country Specific Recommendations (CSRs) led to various significant changes in collective bargaining systems at the national level (Brandl and Bechter 2019). Measures reinforcing the obligation to work for unemployed people, reducing the amounts of benefits and restraining the rules of access to unemployment protection took place in various countries, such as Portugal and the UK (Dupont and Anderson 2018; Meneses et al. 2018b). Wage restraint has been a significant boost for the EU and IMF as a measure to promote competitiveness, both for the countries under international bailout and the European Semester CSRs. Besides the impact that the European Semester has had on the different countries, one must also bear in mind how the national differences are played in this context. For instance, whereas the UK government was substantially aligned with austerity and quickly implemented it, others (such as France) had a more moderate approach to austerity.

11.5 THE SOCIAL CONSEQUENCES OF AUSTERITY

11.5.1 (Un)employment

The crisis and the EU reaction had dramatic effects on employment. Although there was an employment recovery after 2013, it was mainly for higher-paid jobs. In 2016, several countries were in compliance with the Europe 2020 target employment rate of 75 per cent (among them the Netherlands and UK) and others were getting closer (case of Austria, for example). However, several countries lost an important percentage of employees, due to workers' migration. Here, Romania (10.2 per cent), Latvia (16.3 per cent) and Portugal (10.6 per cent) showed critical numbers. In some countries there was employment destruction, in particular core employment, partly replaced by an increase in temporary work and self-employment (the Netherlands and Finland). The UK experienced employment recovery both in core and self-employment (Eurofound 2017).

The crisis hit the manufacturing, construction and agriculture sectors the most, and these jobs do not seem to have recovered. For example, the services sector accounted for 71 per cent of employment in the EU in 2016, and whereas Austria and Hungary experienced small increases in the period 2008–16 (less than 2.5 per cent), Portugal experienced a strong increase (more than 5 per cent) (Eurofound 2017). The UK as well as Portugal experienced increases in high-paid jobs. Between 2011 and 2013, Portugal, on the other hand, experienced employment destruction in mid-paid jobs. Countries that experienced downgrading of employment in terms of the incidence of job

growth in lower-paid jobs were, for example, Hungary and the Netherlands. Polarization in job growth was experienced in Austria with both lower end and upper end jobs being created (Eurofound 2017).

Although labour market and employment protection deregulation measures targeted particularly permanent employees in the core labour market, an assessment of the consequences of austerity/structural reform measures in core and peripheral EU countries shows, for instance, that insiders in the core countries where not affected, contrary to what happened in the more peripheral countries. In the latter, both permanent and temporary workers were affected by deregulation of employment protection. Here, where protection of outsiders is also weak, reducing protection has much harder effects than in central countries (Prosser 2017). Therefore, recovery is not taking place in the same jobs and in the same way in the different countries, leading to polarization of the labour market overall, with the consequent increase in inequalities.

11.5.2 Precarization and Flexibility

Precarity is often associated with deficient social protection, showing that flexicurity seems not to be working in most countries and the model of the Netherlands and Denmark is not easily exported. Labour precarization was a trend prior to the 2008 crisis. However, the crisis made job insecurity worse. During the crisis there has been a reduction of workers in full-time permanent employment (a variation of 59.5 per cent in 2009 to 58.2 per cent in 2016 hides sharp internal differences such as the decrease of core employment in Spain and Finland and an increase in Sweden and the UK), except for the higher-paid jobs, and an increase in part-time and temporary employment (Eurofound 2017).

In 2016, temporary employment was lower than before the recession (14.2 per cent in 2016 to 14.5 per cent in 2006), showing that these trends were already occurring in the labour market as the increase in temporary contracts started taking place before the recession, in 1985 (Eurofound 2018). Countries where temporary employment rates are above the EU average include the Netherlands, a country of flexicurity, and Portugal, a country of precarity (above 20 per cent – Eurofound 2018).

Part-time work, one indicator of labour flexibility, became a trend before the crisis. Using data from the Better Life Index, OECD,[2] we analysed the proportion of workers in part-time work, that is, of persons who usually work less than 30 hours per week in their main job, by sex, in 2006, 2013 and 2016, that is, before the crisis, at the peak of the crisis and after the crisis in Europe (Meneses et al. 2018a). Part-time work has been increasing in the EU for a long time (for instance, from 16 per cent in 1996 to 20 per cent in 2015). During the crisis, part-time work kept increasing, particularly in involuntary part-time

work,[3] from 22.4 per cent of all part-time work, in 2007, to 29.1 per cent, in 2015.

The proportion of women in part-time jobs is much higher than men, which has consequences in terms of social protection, particularly in those countries where benefits are more connected to the employment trajectory, such as in the case of the conservative/corporatist and the Southern European welfare models. The Netherlands, often highlighted as the most successful case of flexicurity, stands out as the part-time ratio represents more than half of women, but the proportion of women in involuntary part-time employment is the lowest (de Vries et al. 2018). Countries such as Austria and the UK also stand out for women's part-time employment, representing around one-third, mostly done on a voluntary basis (Dupont and Anderson 2018; Meier and Apostolovski 2018), a change in the dominant male breadwinner household model replaced by a model where the main income is complemented by the part-time income of the partner, usually female, in the case of Austria, and a trend in the liberal model of the UK, where the market is the first solution for care (Dupont and Anderson 2018).

In Southern European countries, such as Portugal (the country with the lowest numbers of part-time employment for women), voluntary part-time work decreased from 2006 to 2016, but not involuntary work. Numbers by themselves might say very little. Higher rates of full-time employment are not necessarily equivalent to gender equality. It may be a sign of low wages implying a dual breadwinner model, being the reality in Portugal and Hungary (Hungler and Kende 2018; Meneses et al. 2018b) or of lack of adequate part-time job opportunities in the absence of affordable childcare, as the UK study illustrates (Dupont and Anderson 2018).

The data available also indicate polarization between countries and precarization for the Southern European countries regarding women's part-time employment. The sharp increase of women in involuntary part-time employment occurred in European countries severely hit by the austerity measures (for example, in Italy, Spain, Ireland and Greece) and in Hungary. Other countries, however, saw a decline of involuntary women's part-time work until the peak of the crisis in 2013, such as Belgium, Denmark, Finland, Germany and Poland. After 2013 until 2016 there was a reduction in Portugal, Spain and Sweden, but the numbers remained high (Eurofond 2018).

Self-employment is another form of atypical employment and it does not seem to have been affected particularly by the recent crisis. Own-account work is officially recognized by the International Labour Organization (ILO) as contributing to vulnerable employment. Self-employed people are less likely to have formal work arrangements and therefore lack social security protection and a voice at work. In the EU it remains at 15 per cent of all employment, although with country variations. Due to the decline in the primary sector,

it has declined, among others, in Portugal, whereas it has increased in the UK and the Netherlands. Self-employment in the UK and the Netherlands is promoted with tax advantages, which explains the interest for this form of work. As Dupont and Anderson (2018) stress, with its liberal employment and welfare regime, the UK is paradigmatic in terms of the way the typical industrial model of work is changing, with an increased diversity of employment and work statuses, and uncertain boundaries between the different forms of work, sometimes to be clarified in courts.

Own-account self-employed is an ambiguous category, which may indicate an erosion of the labour status as workers are usually dependent on a dominant single client and are more vulnerable due to its usual small size and the low coverage by social protection.[4] In Portugal, as in most countries, self-employment is not the outcome of a choice for a new form of work but a structural feature of precariousness. The so-called false self-employment has been a feature of the Portuguese labour market for a long time, and not just in the private sector. As Meneses et al. (2018b) indicate, this implies that although the worker fulfils all the criteria of an employee (for example, a single employer, a workplace, a constant payment) the labour relation is under the form of self-employment. Thus, the worker is extremely vulnerable in terms of employment protection, labour rights and social protection. This situation is facilitated by the legal framework and the enforcement instruments as employers are exempt from the fiscal and legal obligations of dependent work, dismissal happens without penalty and contributions for social security are significantly lower. Attempts at changing this situation have been timid and, more recently, legitimizing the situation of false self-employees. For instance, an unemployment subsidy was created in 2013 for self-employed workers who work for a single company and are economically dependent on this company (in 80 per cent of total income).

11.5.3 (In)security

Although austerity and changes in welfare and employment regimes took place in all countries, the Scandinavian countries demonstrated more resilience of their welfare states and the Southern European countries demonstrated their extreme vulnerability. Using data from the Better Life Index (OECD – data for 2006, 2013 and 2016) comparing labour market insecurity – defined as the expected earnings loss associated with unemployment, which depends on the risk of unemployment, the expected duration of unemployment and the expected degree of mitigation that unemployment subsidies provide against the earnings loss – we verify that labour market insecurity is higher in Southern European countries, lower in the Nordic countries and the Netherlands, followed by the countries of the conservative-corporatist model.

Most of the Central/Eastern European countries are in the second cluster with the highest labour market insecurity.

11.5.4 (In)dignity

Precariousness, flexibility and insecurity directly or indirectly affect people's dignity. Not only are people easily humiliated when they have no individual resources and power to react but the instability inhibits the possibility of making plans and deciding about private matters. Regarding the UK, Pier-Luc Dupont and Bridget Anderson state: 'people living precarious lives also found their personal autonomy severely curtailed by power imbalances that allowed not only employers but also jobcentre officials to discriminate or otherwise dominate them with impunity' (2018, p. 44). In the case of Portugal, when a couple, in their late thirties, testify they have to submit the decision of pregnancy to the time frame of a fixed-term labour contract and how stressful it might be, we realize how many different forms violence may assume and that European young citizens are submitted to situations that are not compatible with values of freedom and equality (Meneses et al. 2018b). Also precariousness and insecurity associated with the introduction of new technologies (especially the possibility of working online) may result in an assault on citizens' private lives and the absence of defined leisure or rest moments.

11.5.5 Women's Situation

We referred above to gender inequality and justice in the labour market. This reality is present in all six countries studied, stressing how part-time work, and particularly involuntary part-time work affects mostly women, with consequences on the redistribution of careers and welfare. This is one of the many aspects of gender inequality, which range from the pay gap to the unequal distribution of care. EU policies have long been oriented to tame these inequalities, namely with anti-discrimination policies, pregnancy and parental protections and the social investment state promoting participation of women in the labour market, including the support for social services for children and the elderly.

The increased participation of women in the labour market is often associated with labour market segregation. There was a substantial concentration of women in low-paid jobs (about 68 per cent) and a lower weight of female work in other jobs (less than 40 per cent in medium-paid jobs and above 40 per cent in high-paid jobs) in 2015. The substantial percentage of part-time work in the EU is done by women (four out of five). Among the voluntary part-time workers, 78.2 per cent are women whereas the percentage for men is only 21.8 (Eurofound 2018). The effects of the crisis combined with a disinvestment in

policies and agencies promoting gender inequality had several effects in this landscape.

The crisis initially had a more negative redistributive effect in male-dominated sectors such as manufacturing and construction but, in second phase, women also started to lose jobs mainly in service sectors affected by household expenditure cuts and welfare services cuts, for which unpaid work is a substitute. The expected outcome of this was intensification of the unpaid work performed by women (European Union 2012). Still in 2011–13 women experienced less job losses than men and the gender employment gap decreased by 2.5 per cent from 2008 to 2016 (Eurofound 2018).

The gender gap appears to be reducing as men occupy low-paid, typically female jobs and get into a more precarious situation. This results from the disappearance of typically male-dominated jobs and from women's increased presence in high-paid jobs. That is, the reduction of gender equality is not so much the outcome of the improvement of women's working conditions but of the worsening situation of men. On the other hand, austerity measures worsened the situation of women in terms of economic dependence with the reprivatization of care due to cuts in social and health services, increasing costs of care services and reductions in maternity and parental leave benefits (European Women's Lobby 2012).

The diminishing family income and the retrenchment of the welfare state create an extra burden on families where women play a significant role. The erosion of the welfare state is compensated by the 'welfare society' (Santos 1999, p. i). This means that public responsibilities of care are moving from the public to the private sphere (for example, childcare, housework, elderly care) and the private sphere is still predominantly women's responsibility. The participation of women in the labour market is variable in Europe (particularly visible in the differences between Hungary, Portugal and Turkey – see Hungler and Kende 2018; Meneses et al. 2018b; Yilmaz et al. 2018). While in Portugal women have the heavy burden of combining family care and jobs, in Hungary and Turkey they are encouraged to stay at home, as it is very difficult to conciliate both work and care, and are in a very disadvantaged situation when compared with men.

11.6 RESISTANCES, PROTESTS, ALTERNATIVES

António Casimiro Ferreira (2011) argues that in addition to the economic and financial aspects of the austerity model, there is also a social model of naturalization of inequalities. This new 'austerity society' is characterized by (1) fear as a source of legitimacy; (2) the emergence of a new constellation of power that combines elected and unelected power; and (3) destabilization of the normative structure with the use of a law of exception. Legitimacy by fear,

prompted by predictions of catastrophic scenarios, asserts itself as a mechanism for converting the narrative of austerity into a dominant political-social model, assuring the absolute priority of the moral values of economic and labour neoliberalism, and by consequence of misdistribution. Casimiro Ferreira uses an expression of the Mozambican writer Mia Couto that poetically states that 'there is more fear of bad things than bad things themselves', along with the idea that 'there are those who fear the end of fear' (Mia Couto, quoted in Ferreira 2011, p. 132).

Empirical work made very clear how traditional inequalities and exclusions were reinforced with some groups being particularly affected by the economic crisis, like women, persons with disabilities, migrants or Roma. Young people, in general, especially the generation that grew up with the European promises of progress, became a very vulnerable working mass, available to accept almost anything in order to have a job. Plans for the future are put on hold and survival in the present is a permanent struggle between precarious jobs and family help. The ideas of fear are very clearly expressed though in different ways in the cases of Austria, the Netherlands and Portugal (Meier and Apostolovski 2018; Meneses et al. 2018b; de Vries et al. 2018). The first was subjected to lighter austerity measures than the other two but in all cases fear, disappointment and a sense of hopelessness became a constitutive element in citizens' lives.

The narrative of the absence of alternatives combined with the threat of a future that will certainly be worse than the present might have unexpected consequences. On one side of the coin, there is fear and resignation, on the other there is a strong perception of injustice. Europe disappointed its citizens and if no solution is being given and the promises fail, citizens will be more open to narratives of hope even if they contradict the European project values and the idea of the Union. It is impossible not to see a correlation of austerity and the success of right-wing populist discourses. The promise of a future that might be different has to garner sympathy when the discourse of democratic institutions does not provide a more justice-based alternative.

However, in a first moment, the perception of injustice also led to strong public protests mobilized by a young and well-educated European generation that was raised under the promises of democracy, rights and opportunities. Below the excerpt of a letter written by a Spanish organization called 'Youth with no Future' (*Juventud sin Futuro*) is presented:

> We grew up listening to how our country had entered into an age of modernity and wellbeing, that we were the better prepared generation and the one with more capabilities, and that the rights conquered by those who came before us would be extended and generalized … For the first time, the crisis has shown to the generation born of those who did the transition, the weaknesses of the political and economic model we live in, the falsity in promises of more well-being, and the vulnerability of

> the rights our parents passed on to us but, in most cases, have not taught us to stand for … The time to turn this situation around has come: this is the time for the generation to whom the future was stolen to fight for its rescue. (Juventud Sin Futuro 2013)

Austerity policies in Portugal before and after the Troika intervention pushed people into the streets in numbers that had no precedent in the Portuguese consolidated democracy. In Portugal, one of the mobilizers of the first big protest of 2011 explained, in an interview, the inspirational strength was that of the Arab Spring. The Arab Spring was about major changes in non-democratic contexts, it was about contradicting an imposed fate. A message was being sent to the world about struggle and resistance. An open letter to civil society by the organizers of one of the anti-austerity protests in Portugal states:

> We will not neglect the structural, domestic and international problems that affect many people's lives in the search for employment. We want to alert for the urgency of rethinking national strategies and we do not resign in face of the arguments of the absence of alternatives to this situation. It is with a sense of responsibility that we, as the most qualified generation ever, want to be part of the solution.[5]

Many protests that spread throughout Europe and movements like Occupy and Indignados defended a real democracy that is not compatible with rules dictated by financial markets. If European institutions and their leaders claimed that austerity was the only way and national governments ruled according to that, protesters were discussing something different. They were not looking for solutions for the crisis inside of the current model, they wanted to discuss a new model of democracy and representative justice that is open to the voices of citizens and takes seriously the values inscribed in European treaties and national constitutions.

However, if some movements pointed to the structural deviations of the EU and argued for radical transformations with a revolutionary impetus, it is also true that many people and organizations acknowledge the need for reforming existing welfare state institutions in order to make them more resilient or to guarantee better life prospects for people. Several contested ideas, such as universal income, came back to the public discussion, addressing some of the most important debates such as the meaning and the future of work. Beyond the diverse and sometimes oppositional positions regarding the basic income guarantee proposal, the idea that all persons should be entitled to a basic income regardless of their work status, question the workfarist orientations, particularly as these become conditional for access to welfare benefits, and even what is socially valued and acknowledged as work (Meier and Apostolovski 2018).

11.7 CONCLUSION

Before the crisis, and as expressed eloquently in the Lisbon Agenda, Europe wanted to stand out in the globalized world as an economy able to combine competitiveness and social cohesion. The European Social Model was an anchor, a proposal for an active role of the state in ensuring some levels of social protection for the population. With the programme of the social investment state articulated with the knowledge economy and society framework, the EU was able to tame the pressure of the Washington Consensus for deregulation and welfare retrenchment, by articulating discursively the positive role of social policies in economic growth. This, however, did not mean that welfare states were not being qualitatively reformed to abandon important elements of redistribution via decommodification as the orientation to workfare became dominant. Social policies became seen no longer as a remedy for market externalities or a hindrance to the economy but as a tool for economic growth. Social rights-based citizenship regimes were transformed in social investment regimes. The consequences of not having the citizens and social justice as the main motivation for social investment, but economic growth, is that distributive policies became less secured. Social and economic rights become dependent on the market's mood and its impact on each country.

The crisis did not hit everyone in the same way, neither did the 'one size fits all' character of the austerity and structural adjustment reforms. Countries were affected in different ways as they started from different starting points and went through different austerity levels and structural adjustment measures. There are also different forms and intensities of exclusion inside each country. It must be kept in mind that policies and laws, even when enrolled in a common discourse, may have different results according to each country's position in the European economy and citizens' position inside civil society. The ideal of flexicurity is an excellent example to understand different consequences for the same discourse. Raised before the crisis, flexicurity was inspired by Dutch and Danish experiences and proposed the combination of flexibility in the labour market with social security. Though it seemed an acceptable shift that would not jeopardize the equality values of Europe, in practice only a few countries could accomplish both flexibility and security. It was not an exportable idea.

Briefly, the analysis carried out for this chapter clearly suggest that misrecognition and vulnerabilization of labour and social protection (misdistribution) in the name of austerity is perpetrated through institutionalized patterns – in other words, through the workings of the institutions that regulate interactions (Fraser 2000, p. 114). Indeed, notwithstanding the effects that a general reorientation towards austerity became a structural characteristic of EU governance, the countries which experienced more difficulties and harder

deregulation policies in welfare and labour rights are those which already experienced stronger neoliberal transformations, be it the UK, the Central/Eastern European countries, Turkey or the Southern European countries under international intervention for neoliberal structural adjustments. Within countries, some social groups were more affected than others by the crisis and austerity such as young people and women, already typically in a disadvantageous situation in the labour market and in the economy. Gender discrimination tends to reinforce all other inequalities and vulnerabilities. As a recent Oxfam report states, in the aftermath of a crisis:

> women are more exposed to gender-based violence, more likely to lose their jobs or be pushed into lower-paid work and more vulnerable to losing social benefits and protections, including pensions. Women are also more likely to increase the amount of unpaid care work that they do when measures to cut public spending are introduced. (OXFAM 2020, p. 40)

In short, the outcome is, therefore, the intensification of polarization both between and inside countries. Without properly funded organizations giving voices to young people and women, more human and just economic models will be increasingly hard to achieve.

NOTES

1. Lisbon European Council, 23 and 24 March 2000, Presidency Conclusions, accessed 4 December 2018 at http://www.europarl.europa.eu/summits/lis1_en.htm.
2. Available at http://www.oecdbetterlifeindex.org, accessed 8 May 2018.
3. Involuntary part-time workers are those working part-time only because they could not find a full-time job.
4. Other self-employed categories include business owners, liberal professionals or farmers (Eurofound 2018).
5. Protest of the *Generation in Distress* (Geração à Rasca), accessed 22 March 2018 at https://geracaoenrascada.wordpress.com/2011/03/04/convite-a-sociedade-civil/.

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12. The interplay and tensions between justice claims: Nancy Fraser's conception of justice, empirical research and real world political philosophy

Bert van den Brink, Miklós Zala and Tom Theuns

12.1 INTRODUCTION

This volume took a real world political philosophy as its starting point (see Chapter 3) by adopting the tripartite distinction between justice as redistribution, justice as recognition, and justice as representation, taken from the work of Nancy Fraser (1995, 1997, 2005), as a starting point for conceptualizing justice (see Chapter 1). In Chapter 4 this framework was then developed, amended, and complemented by looking at different academic disciplines' theoretical conceptualizations of justice. A next step was to amend and complement the theory conducting empirical research (Chapters 5 to 11). The current chapter explores how in the course of the volume our understanding of justice developed and departed from Fraser's tripartite view.

Nancy Fraser's approach was developed from a 'non-ideal' theoretical, 'context-sensitive' approach in critical social theory. In that sense, methodologically, it is not far removed from the 'real world political philosophy' approach developed in Chapter 3 of this volume. We now will see in what way the empirical findings as presented in this volume confirm or contrast the Fraserian model. Our main thesis is that the empirical chapters help demonstrate, first, that Fraser's tripartite theory rightly points out some genuine tensions between justice claims, but also show that her tripartite conception is not wholly adequate, in the additional dimensions of justice and tensions that arise that her theory cannot account for.

This chapter starts with (1) an introduction to Fraser's position regarding the 'trilemma' of justice and the meta-value of parity of participation. Then

it (2) engages her views on the interplay and tensions between justice claims. The chapter moves on to (3) analysing theoretical and empirical research on the conceptualization of justice. This enables us to (4) reflect on the extent the tripartite approach is applicable in light of the findings of our collaborative project.

12.2 PARTICIPATORY PARITY AND THE TRILEMMA OF JUSTICE

Fraser's tripartite understanding of justice has deep roots in European social and political theory, and more specifically the critical social theory of the Frankfurt School. These European roots are characterized by a rejection of prescriptive and utopian idealization (ideal theory) and by the philosophical articulation of normative criteria for evaluating justice claims from everyday practice and the history of social struggles (Habermas 1984/87; Honneth 1996).

Fraser has observed that this approach is characterized by a 'distinctive dialectic of immanence and transcendence' (Fraser and Honneth 2003, p. 202). This enigmatic phrase captures the idea that the standards for criticism of given social interactions are already present (or 'immanent') in those interactions (Thompson 2006, p. 12). Articulating ideals of justice is not in essence a matter of abstract theorizing, it is rather a matter of articulating ideals that are immanent in practice. By virtue of their normative force, these ideals 'transcend' those practices, giving them a critical and prescriptive edge.

Fraser's work offers a social-theoretical toolbox for understanding and addressing real world experiences of injustice caused by given institutional arrangements in society. At the heart of her 'dialectic of immanence and transcendence' sits the ideal of the *parity of participation* that demands that all members of society can participate as peers in social interaction. This principle starts from 'the equal autonomy and moral worth of human beings'; it is deontological and non-sectarian (Fraser and Honneth 2003, p. 229). This is the liberal core of Fraser's normative theory, which is immanent in the emancipatory social movements of late modernity (remember that in the US context, 'liberalism' as a term stands for a moderately progressive, civil rights-focused political view).

From liberal normative beginnings, Fraser's normative theory developed through deep social-theoretical insight into the dynamics of social and political struggle. It does not focus on liberal ideals and formal rights, but on their social and institutional implementation and realization. It is therefore unsurprising that redistribution, recognition, and representation are the dimensions of justice that Fraser focuses on (see also Chapters 1 and 4). Responding to constellations of injustice with 'restorative' strategies of redistribution, rec-

ognition, and political representation of individuals and groups belongs to the standard repertoires of justice in modern welfare states and societies.

The distinction between economic and cultural injustice that is central to the approach is analytical (Fraser 1997, p. 15). However, while we may agree that both forms of injustice should be remedied in culturally diverse societies that are characterized by capitalistic market relations, the remedies they propose often seem to pull in different directions, leading to apparent tensions between justice claims. Whereas claims to cultural recognition draw attention to the specificity of group identity, redistributive claims 'often call for abolishing economic arrangements that underpin group specificity' (for instance, received interpretations of socio-economic roles for women and particular immigrant groups) (1997, p. 16; Fraser et al. 2004). The 'redistribution-recognition dilemma' states that '[p]eople who are subject to both cultural injustice and economic injustice need both recognition and redistribution. They need both to *claim and deny their specificity*' (p.16, emphasis added). We are also confronted with a frequent lack of fit between authoritative political forms of representation and state transcending forms of moral affectedness typical of contemporary forms of economic and cultural injustice (Fraser 2005, pp. 75ff.). Adding the perspective of justice as *representation* results in what we may call a 'trilemma of injustice'.

The work collected in this volume has used these dimensions of justice as a fruitful starting point of analysis. The theory is multi-dimensional, articulates a principle of parity of participation that has great normative force, and leaves room for additional normative and empirical approaches to (in)justice. Perhaps the aspect of the multi-dimensional approach that has benefitted authors most is the insight into the entwinement of dimensions of (in)justice. The intertwining of recognition-based and redistributive injustices is aptly highlighted by Orsolya Salát (2019a, pp. 2–3, emphasis added):

> While originally … it was assumed that education would first of all affect issues of recognitive justice, the research shows more and more that the three aspects are not or *cannot be meaningfully separated* alongside rights, or at least in a rights framework.

The trilemma of injustice generates several kinds of interplay and tensions between justice claims. First of all, the redistribution-recognition dilemma serves to remind us that, when probing justice claims, it is important to always ask which consequences awarding more recognition for identity claims will have on people's socio-economic standing, and vice versa. Second, given that one dimension of justice cannot be reduced to the other, we need to acknowledge that tensions between justice claims cannot be made to disappear; if Fraser is right, they are here to stay. Third, as a matter of representation, even

where we reach more or less justifiable balances between justice claims in social and political agreements, we need to be open to the possibility that the agreements reached do not fit the frame of the problem – that is, the scope both of all those who are subjected to injustice and of all those who deserve to be addressed by solutions.

12.3 TRADE-OFFS BETWEEN DIMENSIONS OF JUSTICE

The view that we have developed under the term 'real world political philosophy' (Wolff 2011; Van den Brink et al. 2018, pp. 10ff.) was informed by an investigation into non-ideal theoretical approaches to justice. These approaches are shared by theorists such as Andrea Sangiovanni (2008, 2016), David Wiens (2012), Jonathan Wolff (2011, 2015), among others, starting their investigation from a diagnosis and then aiming to provide a solution to the given problems (Chapter 3; Wolff 2011). In that sense, real world political philosophers are similar to a doctor who examines the patient first and then offers a cure to the patient's ailment (Van den Brink et al. 2018, p. 10). That is a different approach from thinking of problems of injustice in terms of dilemmatic conceptual oppositions, as Fraser is wont to do. The dilemmatic approach runs the risk of failing to recognize injustices as they meet us 'on the ground', rather than in a pre-given conceptual dilemma between conflicting analytical dimensions of justice.

Fraser has distinguished between 'affirmative' and 'transformative' strategies for repairing dilemmatic injustices. Affirmative remedies for injustice she presents as 'correcting inequitable outcomes of social arrangements without disturbing the underlying framework that generates them'. Transformative remedies, by contrast, are 'aimed at correcting inequitable outcomes precisely by restructuring the underlying generative framework' (Fraser 1995, p. 23). Whereas affirmative remedies, in her view, generally promote and solidify problematic group differentiations, either in terms of class or naturalized group identities, transformative remedies 'deconstruct' such differentiations and ask how they facilitate or obstruct cooperation of members of society as peers. The latter have her strong preference.

With this understanding of possible remedies to injustice in place, Fraser's account of justice and injustice becomes more than an analytical tool faced with a conceptual dilemma. In her 1995 seminal article, she associates affirmative strategies with the liberal welfare state and mainstream multiculturalism on the one hand and transformative strategies and deconstruction of group identity with socialism on the other hand (Fraser 1995). However, we have not found a prima facie reason why the liberal welfare state and mainstream multiculturalism could not be open to transformative politics.

Take the case of home care, thoroughly discussed by Trudie Knijn. She argues for the restructuring of the care sphere, promoting what she labels the 'chain model' of care. The chain model aims to 'stimulate capabilities of ageing individuals and the ones that care for them in whatever setting to avoid becoming and be treated as passive dependents' (Knijn 2019, pp. 48–9). She reports that in the Netherlands, for example:

> the … chain of care exemplifies a stepwise regulated and assessment based chain of care from the very light forms of care (housekeeping assistance) to more severe forms of care (care and nursing at home paid for by mandatory health insurance) and the most intensive form of care (individualized residential). Such a chain, if well-functioning, offers a tailor-made trajectory of recognition of care needs that is accessible on the basis of assessment, no matter one's income, thus complies to redistributive justice claims. In all other countries in our study the chain is broken, fragmented and disturbed. Elements are missing in the recognition of care needs and the redistribution of the costs of care. (Knijn 2019, pp. 48–9)

It would amount to a significant reform of the care sphere if the chain model were to be applied (including in the Netherlands, which does not fully satisfy the chain model's criteria). For it would significantly reshape the boundaries of the public and private spheres. But, in contrast with Fraser's view, we think that this kind of fundamental reshaping of important boundaries such as the public/private one *can* be made within the purview of the welfare state.

As Elizabeth Anderson (2008) points out, many aspects of public policy are not adequately captured by Fraser's original two dimensions of redistribution and recognition, which Anderson illustrates in a discussion of affirmative action for African-Americans. She concludes that, once we recognize the correct rationale for race-based affirmative action, an affirmative-redistributive policy will *no longer* work against recognition (2008, p. 171). And, what is equally important, the affirmation-recognition of the group will not be based on the group's cultural distinctiveness (Anderson 2008, pp. 166–7). For Anderson, this dissolves Fraser's dilemma. And indeed, it dissolves a blindness of the dilemmatic 'pull in two directions' proposed by Fraser. The pull in two directions is not so much there in reality; it is rather a result of how reality is conceptualized by the theorist of justice.

Furthermore, empirical research done into the education of children with special needs (Salát 2019a, pp. 44–6; see also Chapter 6) and reflections on how different metrics of justice play into affirmative and transformative strategies (Buğra and Akkan 2019; see also Chapter 9) show that wholesale transformative approaches to injustice are often not reachable. Through their general and idealized agendas, they run the risk of neglecting the strong need for improving individual situations of persons in the here and now (Robeyns 2008). In conclusion, while Fraser's distinctions are analytically helpful, we

ought to remove the perhaps all-too-ideological categorizations of liberal welfare state and mainstream multiculturalism with affirmation of the status quo, and socialism and deconstruction as the only truly transformative remedies.

One fundamental insight that is not captured by these categorizations in Fraser's earlier work (1995) is that the functional role of ready-made substantive theories of *social* justice might be replaced by theories of *democratic* justice, which treat justice as a subject of democratic deliberation rather than as a theoretical issue (Fraser 2005, pp. 86ff.; cf. Habermas 1996; Forst 2011). Seen in this way, which Fraser now embraces, we hold the principle of parity of participation to have both a substantive evaluative role – specifying a desired end-state by which social arrangements may be evaluated – and to serve as a procedural standard by which 'all affected' can determine whether the norms and expectations by which they are governed are legitimate. Rather than looking at constellations of injustice through schematic categorizations, the imperative is to build a piecemeal theory of justice for *particular* constellations, as has been done for immigration (Cole and Heath Wellman 2011), the regulation of drugs (Husak and de Marneffe 2005), gambling (Wolff 2011; see also Chapter 3), prostitution (de Marneffe 2010), or same-sex marriage (Corvino and Gallagher 2012; cf. Van den Brink et al. 2018, p. 10).

Our approach to real world political philosophy of justice, then, focuses on elucidating and repairing specific constellations of injustice in the here and now. What seems to be needed is a *combination* of the best possible affirmative strategies that open up what may seem 'second best' remedies in everyday life, with an analysis of the need for deeper restructurings of the institutional context.

12.4 THE TRIPARTITE UNDERSTANDING OF JUSTICE IN LIGHT OF THEORETICAL AND EMPIRICAL RESEARCH

Our joint focus for the work collected in this volume was deliberately limited to real world, manifest injustices in Europe. As far as the empirical work is concerned, this set the scope for the range of justice concerns that were examined in six countries: Austria, Hungary, the Netherlands, Portugal, Turkey, and the United Kingdom. The identification and analysis of these contemporary European problems was not only done from the perspective of different academic disciplines, but also with a diverse methodological toolkit. These methodological tools, to name a few, included the analysis of legal texts, the discourse analysis of national newspapers and politicians' speeches, focus groups and ethnographies.

A core question is what we can expect from the empirical research regarding conceptualizations of justice. Social science is unable to provide the criteria that enable us to judge 'who and what counts' from the point of view of justice, and who and what does not. We agree with Fraser that 'such judgments necessarily involve a complex combination of normative reflection, historical interpretation and social theorizing' (Fraser 2009, p. 292). Empirical data must be combined with normative premises in order to be able to reach normative conclusions (Van den Brink et al. 2018; see also Chapter 3). For this reason, the empirical research has aimed to look at justice and fairness through the threefold Fraserian lens of redistribution, recognition, and representation. The application of this three-dimensional desideratum is not straightforward, however. The previous chapters frequently report that the examined countries understand the same justice-related issues differently; guarantee different rights and entitlements, and confront vulnerable groups with different demands. They also justify the treatment of these vulnerable groups from different normative considerations. The chapters do not show that approaching these institutional, social, and cultural contexts from one normative framework of justice is straightforward or likely to be successful.

Therefore, our collaborative project shows that we have to *complete and adjust* Fraser's framework in at least three different regards. First, the Fraserian categories are incomplete because there are further important dimensions of justice beyond the 'three Rs', which are relevant in the European context. Second, Fraser's approach sometimes requires *additional explanatory and normative work*. For Fraser's tripartite conception is not always fine-grained enough to diagnose complex real world injustices. Third, justice in Europe requires an *alternative framing of justice* to Fraser's, specifically, one that can justify this special mid-level in between full-blown global justice and the nation state. Let us see these difficulties in more detail.

Starting with dimensions: while the Fraserian tripartite conception is certainly an illuminating framework in general, these three categories often miss important aspects of injustice. Empirical research points to dimensions that do not fit well to Fraser's categorization, such as redressing historical injustice (Akkan and Hiah 2019), epistemic injustice (Lepianka 2019), and justice understood as capabilities (Buğra and Akkan 2019; Lepianka 2019). Historical injustice and the politics of commemoration exhibit a complexity that redistribution, recognition, or representation cannot easily theorize (Akkan and Hiah 2019). The reason for this is that rectifying historic injustices falls under the category of corrective justice, sometimes but not always related to Fraser's relational egalitarian goal of participatory parity.

Epistemic injustice as a missing dimension is discussed by Dorota Lepianka (2019). Epistemic injustice has two important versions, testimonial injustice and hermeneutical injustice (Fricker 2007). Regardless of the specific

definition or form, epistemic injustice is generated by stereotypes and prejudices about marginalized groups and derives from unequal power relations (Lepianka 2019). At the end, those who are considered highly credible as 'knowers' are usually drawn from privileged groups.

On a closer look, these epistemic power relations are beyond the scope of Fraser's dimensions. For example, hermeneutical injustice, which refers to the phenomenon of the privileged sometimes lacking adequate conceptual resources to adequately discuss some forms of injustice, comes closest to being a problem of misrecognition, but it has important aspects beyond recognition. Withholding the conceptual resources to talk about injustice is a special type of injustice, but it is not misrecognition as such.

The capabilities approach (Sen 1992; Nussbaum 2000) appears to enjoy quite some take-up among empirical researchers (Anderson 2020; Buğra and Akkan 2019) while Fraser herself considers her approach as a broader capability view (Fraser 2007, p. 319). Surprisingly though, on reflection the capability view might actually be an alternative to Fraser's three-dimensional view. Bridget Anderson (2020), for example, references Ingrid Robeyns (2008), who puts forward her capabilities approach defending distributive justice in opposition to Fraser. Robeyns's (2008) critique is that Fraser supports only *social* capabilities, and not individual functionings (Fraser 2007, p. 319). Robeyns shows that this view is implausibly narrow: some personal functionings, like being well fed or educated, are inherently valuable, regardless of their social contribution to equal status (Robeyns 2008).

A second insight is that Fraser's theory needs additional explanatory and normative work, because her three proposed dimensions can be insufficient to diagnose certain injustices. Consider the case of justice in education and the problems of the Roma. In the case of education, participatory parity is an incomplete principle for justice in education (Chapter 9). As far as the Roma are concerned, the Fraserian framework faces difficulties when confronted with the diverse injustices experienced by this group. In other words, both issues are more complex than Fraser's three-dimensional categorization allows. Let us take a look at these two issues in turn.

Regarding education, Orsolya Salát looks through the lens of Fraser's three justice concerns and finds the intersection of redistributive and recognitive problems (Salát 2019a, pp. 4–6). But she also exposes problems that are more difficult to theorize within Fraser's scheme. Regarding schooling for disabled children, she highlights that 'no system examined here fully realizes inclusive education or even sees it possible for everyone. All countries maintain the possibility of sending pupils with disability[ies] into segregated education' (Salát 2019a, p. 44). For example, in the case of Austria, an otherwise wealthy European country, Salát mentions that while the attempt to provide inclusive education can be seen in the creation of the so-called 'model regions for

inclusive education', the 'implementation in the model regions … do not demonstrate unequivocal success, and it seems especially clear that an important obstacle to realize a well-functioning inclusive school is lack of resources in terms of finances, infrastructure, time, and personnel' (Salát 2019a, p. 23). In our view, the lesson here for how we ought to conceive of justice is that while Fraser's approach is deliberately non-ideal theoretical, her theory of participatory parity forgets the 'theory of the second-best' (cf. Margalit 1996; Wolff 2011). Maximizing justice – in this case, participatory parity – certainly would require the widest possible inclusion of children with disabilities. But it might be the case that, in certain situations, investing more in the already functioning (and less inclusive) system leads to better educational results for disabled children. Of course, we do not want to suggest that this is certainly and always the case. But Fraser's theory of participatory parity seems to overlook the importance of incremental *transitions* away from manifest injustices in the real world (Sen 2010; Van den Brink et al. 2018).

Theorizing the situation for the Roma is not only a challenge to Fraser, but also to all Western political theorists (see Kymlicka 2002). Bridget Anderson (Chapter 8) analyses the case of the Roma in Europe and finds that 'in the current European context, Roma is a contested, multidimensional and highly racialized identity which simultaneously evokes material poverty, racialized phenotypes, and cultural practices' (Anderson and Dupont 2018, p. 4). They also find that whereas there is a continued attempt in the European Union (EU) since the 1990s to enhance the representation of this disadvantaged minority group, 'the results have been ambiguous' (Anderson and Dupont 2018, p. 4).

On the one hand, in some national and municipal contexts, those who identify as Roma have the right to elect Roma representatives in local, regional, and national governments, and Roma civil society leaders have had opportunities to influence policymaking through permanent and ad hoc consultative mechanisms. There have also been attempts to symbolically recognize Roma history, including their persecution, in official discourses. On the other hand, these measures do not seem to have translated into substantive representation, to the extent that Roma interests and perspectives continue to be widely overlooked by public authorities.

Anderson and Dupont are not the only ones, of course, who observe the complexity of the situation of the Roma (Kymlicka 2002). Fraser considers the Roma as an example of unjust exclusion that is a result of 'the combined operation of culture and political economy' (Fraser 2007, p. 316). As such, 'status hierarchies map onto class differentials to prevent some actors from participating at all in mainstream arenas of social interaction' (Fraser 2007, p. 316). But, as Kymlicka (2002, p. 75) points out, it is not clear what these 'mainstream arenas' should be: for instance, should the Roma be defined as a national or a transnational minority? Fraser's approach of participatory parity

cannot provide a clear answer to this question – we must again look elsewhere for theoretical resources.

But Fraser's approach requires important complementary work in another regard as well. Here, the shortcoming of the tripartite conception of justice is not that it cannot capture the complexity of certain justice-related phenomena, but that these dimensions overlook an important site, or medium of justice: law. This is especially problematic in the European context. Tom Theuns (2018) has analysed the legal rules and practices regulating the exercise of the right to vote in local, national, and EU elections of marginalized groups, such as convicted prisoners, disabled persons, and immigrants. A large part of Theuns's analysis fits to Fraser's framework, but the lacunas are telling too. To wit, differences among the six countries regarding, for example, the voting rights of convicted prisoners are based on principles, not merely different, unreflective practices. For example, Theuns emphasizes that the United Kingdom's legal system approaches the question of voting rights regarding both convicted prisoners and (mentally) disabled persons in epistemic terms, unlike other countries (Dupont 2019). This might be described as an instance of recognitive injustice, but only if the epistemic justification is refuted. Fraser's theory, on the other hand, does not engage or respond to the matter of epistemic concerns for matters of representation and political rights. Similar problems arise regarding franchise for non-citizen residents and non-resident citizens. Theuns also discusses the case of dual citizenship of kin minorities, which, in the case of Hungary (Salát 2019b), has led to an interesting twofold problem: one being the question of the permissibility of external voting, the other the unequal voting rights for these external voters/dual citizens (Bauböck 2007; Theuns 2018). This shows that our tripartite justice concern is complicated by the different national-supranational legal frameworks which sometimes overlap, and sometimes clash, and Fraser's approach does not provide us with tools to discuss these difficulties in adequate detail. The core problem here, as William Scheuerman (2017) aptly observes, is that Fraser tends to ignore fundamental questions of law. As such, Scheuerman points out, she cannot provide answers to important questions regarding the law; in his words:

> I remain rather skeptical that 'participatory parity' can get us far enough in grappling with the nuances of modern law or rights … Could we, for example, usefully rely on the idea of participatory parity to develop a sophisticated defense of negative or 'liberal' liberties? Or even some basic concept of legal personality, arguably a constitutive feature of modern subjectivity? How far could participatory parity go in analyzing modern criminal or private law (property, contracts), or even international law, a legal arena in which many key principles and practices seem disconnected from Fraser's radical democratic normative starting point? (Scheuerman 2017, p. 153)

One might wonder what a Fraserian approach to the European multi-level legal order, with the interplay of international law, EU law, national law, and regional law, would look like. In other words, law provides an important site and medium to articulate, and often regulate and execute justice claims (both on the European and national level). Disregarding the complex system of law leads to feasibility concerns for a theory that aims to provide solutions to problems here and now.

Our final area where we found the need to move beyond Fraser's framework is that, in an important sense, justice for Europe seems to require an alternative 'framing' of justice than Fraser prescribes. Fraser (2009) thinks that today we live in the time of 'abnormal justice'; the Westphalian framework is no longer exclusive, but relevant other frameworks are also present, and gaining in importance and support. Thus, Fraser extends the idea of the injustice of participatory imparity beyond the traditional framework of the nation state. When this happens, that is, when a framework excludes people who should be represented by it, we are dealing with 'misframing' (Fraser 2009). The idea of (mis)framing arenas of justice allows the theorist to 'map' the adequate 'political space' for theorizing justice (Fraser 2009). Against approaches of global justice based on mere personhood – such as the approach of Martha Nussbaum (1996) – or the idea of all-affectedness – like Peter Singer's (2004) view – Fraser defends a meta-principle of 'all-subjectedness', which holds that 'all those who are jointly subject to a given governance structure have moral standing as subjects of justice in relation to it' (Fraser 2009, pp. 292–3).

To a large extent, the difficulty for justice in Europe arising from the work gathered in this volume is the mapping of adequate political space – this is an important issue that Fraser aptly realizes. But her offered solution of the all-subjectedness principle cannot provide solutions to pressing European questions of justice regarding this mapping. How can we justify the existence of the EU? Why should richer countries in the EU support Bulgaria, for example, instead of African countries that are worse off (Van Parijs 2019)? On subjects such as these, Fraser's all-subjected principle yields no answer.

Van den Brink et al. (2018) suggest that something like Andrea Sangiovanni's practice-dependent view of justice might be applicable to the case of justice in Europe. Sangiovanni (2013) tries to find an answer to 'the point and purpose' of the EU. He holds that the *raison d'être* of the EU is to provide important insurance for member states against the risks of the mechanism of European integration itself. As such, he accepts the limited distributive nature of the EU based on the facts of European integration. We disagree with his favoured direction of the EU, but not with his mapping of the European political space, that is, that the EU is a political unit and arena that we have reason to focus on. In other words, whatever we think about the appropriate level of redistribution within member states of the EU, Sangiovanni is right that first we have to

understand what is the history and function of this political-economic union. Again, Fraser's attempt to provide a realistic political theory for responding to injustice is underspecified for a real world situation. The more nuanced, Europe- (and EU) focused analyses of Sangiovanni and Van Parijs reveal challenges for theorizing justice in Europe which seem not to be on Fraser's US-inspired radar.

12.5 THE INTERPLAY AND TENSIONS BETWEEN JUSTICE CLAIMS

So, what we have found is this. Analysing questions of injustice and justice in terms of three dimensions – redistribution, recognition, and representation – and two strategies – affirmation and transformation – has been fruitful. As a heuristic tool, Nancy Fraser's framework helps articulate real world concerns about injustice in light of an ideal implicit both in everyday experiences across Europe and in the main institutions of state and society: that each member of society should be treated as a peer in social cooperation.

Our joint empirical and conceptual research in the current volume has been wide-ranging. So it does not come as a surprise that we have found that Fraser's dilemmatic approach to the multi-faceted understanding of justice often seems schematic and has limitations when brought to the analysis of policy decisions and normative theory. In analysing concrete injustices in Europe, we concluded that Fraser's instructive analytical tool requires both *additional normative and empirical work* and is often in need of *alternative and more fine-grained approaches* in normative theory.

At its core, the theory invites awareness of the fact that awarding more recognition for identity claims will also have consequences for the socio-economic standing of members of society, and vice versa. Second, it makes clear that the tension between justice claims cannot be made to disappear by being reductionist about what justice *is*. Third, even where we reach more or less justifiable balances between justice claims in social and political agreements, we need to be open to the possibility that the agreements reached do not fit the frame of the problem – that is, the scope both of all those who are subjected to the problem of injustice and of all those who deserve to be addressed by solutions. We found that when formulated in terms of catchy 'dilemmas' of justice, the social world may appear as an inescapably tragic universe in which, whatever those affected by injustice will do, they end up in trade-offs by which victims of injustice either lose their sense of identity and self or their socio-economic status.

Despite Fraser's non-ideal orientation, her trilemmatic approach to justice is tied to a near utopian, end-state vision in that injustices are best addressed through the deep restructuring of society on the socio-economic and political

level and the deconstruction of collective identities on the recognitive level. This is the point at which the empirically sensitive approach of real world political philosophy takes a different turn. A standard conceptual taxonomy of the ways theories of justice can be ideal or non-ideal distinguishes between three sometimes overlapping metrics (Van den Brink et al. 2018; see also Chapter 3): the degree to which a theory assumes 'full compliance', is 'fact-sensitive', and is directed to an 'end-state'. Fraser's approach is non-ideal on the first two metrics: it accepts that facts about socio-economic, cultural, and political dimensions of identity determine justice concerns all the way down. But on the third metric it is firmly focused on end-state rather than transitional considerations. Indeed, a socialist agenda of deep economic restructurings and a deconstructivist approach to collective identity sets the horizon for the transformation of society and overcoming of injustice in Europe. When confronted with Europe's deep political and cultural pluralism, this substantive focus on a socialist and post-traditional horizon of end-state justice sits uneasily with findings in both the normative and the empirical work gathered in this volume. It also sits uneasily with an often neglected aspect of Fraser's own theory, that is, its openness to a theory of *democratic* justice and her professed anti-sectarianism.

Seen as a theory of democratic justice, Fraser's own interpretation of what the principle of parity of participation demands will play a *substantive and partial* (socialist, deconstructivist) evaluative role while supporting a *procedural standard* by which all affected by a constellation of injustice – including those who would not follow the socialist and deconstructivist agenda – can determine whether the norms and expectations by which they are governed can be accepted as legitimate. Rather than presenting an objective framework for all theories of justice, the theory will then be seen as one among several normative theories that theorists and policymakers can appeal to when analytically making sense of and normatively seeking solutions to injustices in society. The results of that will have to be brought in democratic debate with those subject to the injustices and the policymakers through lenses of redistribution, recognition, and representation.

This reading of Fraser's theory brings it closer to the real world political philosophy strategy that the philosophical work in the present volume has developed. As we have shown earlier, an empirically informed yet monolithic European theory of justice and fairness is not feasible (Van den Brink et al. 2018). Empirically informed and action-guiding theories of justice need to be *case-based*: geared to helping us better understand, evaluate, and recommend responses to European injustices. Such theories combine solid normative reasoning with empirical research and policy analysis in order to comprehend 'why [a policy area] generates moral difficulties, and then to connect those dif-

ficulties or dilemmas with patterns of philosophical reasoning and reflection' (Wolff 2011, p. 9).

The interplay and tensions between justice claims are always strongly contextual. Real world political philosophy starts from identifying gross injustices from a set of overlapping perspectives inspired by reasonable and publicly shared normative principles like the principle of parity of participation. The hope is that reasonable views will be able to unite against identifications of what is manifestly unjust, even when they do not agree on what perfect justice would be. Reasonable people will accept that it is unjust when disabled persons are not able, as a result of their disability, to exercise their right to vote. These same people may well disagree about why this is unjust. Some may claim it violates human rights, others may claim procedural democratic justice is harmed, still others may view it as blatant discrimination. But regardless of why people consider it to be unjust, it is possible to build a coalition around the finding that it is, and that a solution needs to be found where disabled persons are de facto disenfranchised.

This approach is in parallel with what Cass Sunstein (1994) labels 'incompletely theorized agreements'. Sunstein's main focus is on law and legal decisions but his point is generalizable. In his view, there are three possible levels of disagreement (Sunstein 1994, pp. 1739–42; Howard 2019, p. 32). People might disagree about an abstract theory, they can disagree about mid-level principles, and they can disagree about particular outcomes. Sunstein proposes the type *of incompletely theorized agreement* where there is an agreement about the actual outcomes, and people are in favour of the outcome from various abstract theories and perhaps even from mid-level principles. We hold that real world political philosophy embraces this type of incompletely theorized agreement. Thus, Fraser's theory is an important lens through which we can analyse justice in Europe, but often what is more important is that there is a convergence regarding a policy outcome (such as affirmative action in education) that helps eliminate injustice here and now. Being ecumenical, we believe that this is a strength, and not a weakness of real world political philosophy.

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13. Mechanisms that impede justice

Trudie Knijn and Başak Akkan

13.1 INTRODUCTION

Various chapters in this book have investigated mechanisms that generate injustice as well as mechanisms that contribute to justice. Some (Chapters 4, 5 and 6) have examined legal rules and practices related to the exercise of specific rights, others (Chapters 7 to 10) explored discursive constructions of justice-related tensions in political and advocacy discourses or analysed struggles for justice by bringing in the perspective on (in)justice of vulnerable populations and stakeholders in the domains of welfare benefits and care. The focus was on social groups that are defined as vulnerable by the European Court of Human Rights (ECtHR), in European Union (EU) law and in EU legislation such as ethnic and national minorities, people with disabilities, frail elderly, migrant care workers and young unemployed women. Together they embody intersectional categories of age, class, ethnicity and gender in specific configurations.

This chapter aims to unravel mechanisms of redistributive, recognitive and representative justice causing outcomes for vulnerable populations in Europe that are supportive for reaching the capability to live the life one values (focus on individual development) and participatory parity (focus on equal social participation). Such mechanisms consist of entities (with their properties) and the activities that these entities engage in bringing about change. Section 13.2 conceptualizes mechanisms that impede (in)justice and outlines the theoretical and methodological approach of the chapter. Section 13.3 elaborates entities as mechanisms of (in)justice and Section 13.4 focuses on activities that impede (in)justice. The final section of this chapter is a concluding one that reflects on the findings.

13.2 THEORETICAL AND METHODOLOGICAL CONSIDERATIONS

In its most evidential description, a mechanism is something that brings forward something else. Jon Elster (1989, pp. 3–4) formulates the crucial role of mechanisms as follows:

> To explain an event is to give an account of why it happened. Usually … this takes the form of citing an earlier event as the cause of the event we want to explain. [But] to cite the cause is not enough: the causal mechanism must also be provided, or at least suggested.

For instance, it is insufficient to explain increasing inequality (Piketty 2013; Inchauste and Karver no year) in Europe by the increasing dominance of neo-liberalism; for a real understanding of the relationship between the two phenomena, mechanisms of deregulation, trade in worthless financial packages, dominance of financial over economic capital, interinfluences of political and financial elites and political reactions to economic crises should be analysed. In the same way, the well-being of disabled people cannot be explained by the absence or reduction of public care services only; it also needs to explain what images of disabled people circulate in the political and media discourse, what alternative forms of care exist and how these create forms of (in)dependency between care receivers and care givers. The main purpose of using the concept of 'mechanisms' is to offer a causal and intelligible analysis of regularities being observed by specifying in detail how they were brought about. Peter Machamer et al. (2000, p. 5) state that 'It is the entities that engage in activities, and they do so by virtue of certain of their properties' while it is activities that are the producers of change. Hence, mechanisms consist of, for instance, social institutions such as welfare offices (entities) with their legally regulated social policy, client managers and target group of stakeholders (properties) and the evaluation of deservingness, means-testing and surveillance (activities) in bringing about change. The type of change brought about depends upon the properties and activities of the entities and the relations between them. A mechanism, thus defined, refers to a constellation of entities, properties and activities that are organized such that they regularly bring about a specific outcome (Hedström and Ylikoski 2010).

In this chapter, we crosscut the three aspects of justice as defined in the ETHOS research programme (Chapters 1 and 4) by focusing on mechanisms as entities and activities regarding the theoretical assumptions (Chapters 1 to 4) and the empirical findings (Chapters 5 to 11) on justice of the ETHOS project with the aim to define the building blocks of a more coherent understanding of justice in Europe. Methodologically we opt for a non-ideal theorizing

approach. This approach, as Bert van den Brink and colleagues (2018) state, implies 'partial' instead of 'full' compliance with the demands of justice, 'fact-sensitivity' and articulating 'transitional' improvements towards greater justice (Chapter 3 in this volume). The focus is on injustices and thinking about the ways in which these could be overcome by way of a bottom-up theory construction and inclusion of subjective experiences of marginalized persons, while at the same time generalizing such experiences in order to identify shared values and practices. Consequences for analysing mechanisms of justice are a search for social institutions and activities that either promote or hamper 'participatory parity' (Fraser 1997, 2003) and capabilities (Sen 1999), that is, the possibility to partake in the social, political and private realms on an equal footing with others with an open eye for understanding diversity in people's capabilities to function in ways that make their lives valuable.

The focus of the chapter is on 'vulnerable populations', a paradoxical concept (Granger et al. 2018; Rippon et al. 2018) because it refers to the universal and intrinsic precarious human embodiment as well as to the particular and situational causes and conditions of individuals or social groups (Mackenzie et al. 2014, p. 7). Vulnerability might result in 'precarity' 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, p. 9). Being categorized as vulnerable is a Janus-faced qualification of, on the one hand, being acknowledged in one's needs and, on the other hand, being labelled as weak and dependent. In order to illuminate the Janus-faced nature of vulnerability, this analysis focuses on mechanisms – entities, their properties and activities – entailing justice principles by providing or withholding resources via public goods to cater for the special needs of vulnerable populations, and mechanisms that create vulnerable populations as categories of difference with or without their consent.

13.3 ENTITIES (WITH THEIR PROPERTIES) AS MECHANISMS OF JUSTICE

In Europe multiple entities are involved in creating (in)justice, ranging from the supranational level of the United Nations (UN), the World Bank, International Monetary Fund (IMF), EU's Parliament and Commission, the European Council and the European Courts (both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR) to the national and sub-national governmental levels but also social institutions as schools, media, courts, care systems and welfare offices. While the international and European entities provide a legal and discursive framework for justice, the translation of these principles at the level of the nation state and their subsequent interpretation in national laws and regulations and practices

like work, care, education, media and law do not always operate on the basis of the fundamental assumption of participatory parity. In a levelling-down process the justice principles of the highest supranational level set out in binding law like Conventions, Regulations and Directives but also in Declarations, Charters and Guidelines gradually lose meaning in the constitutional hierarchy due to preoccupations, scarce resources or exclusionary practices.

Illustrative for the relationship between various governmental entities is the redistributive justice principle of the *right to housing* as an accepted human right at supranational levels like the International Covenant on Economic, Social and Cultural Rights (ICESCR). Recognizing the right of everyone to 'an adequate standard of living … including adequate … housing …', the UN Committee on Economic, Social and Cultural Rights (CESCR) set out that 'freedoms, such as a protection from forced eviction and arbitrary interference, as well as entitlements, such as the security of tenure and equal and non-discriminatory access to adequate housing' should be guaranteed. Also, the Human Rights Committee (HRC) and the Revised European Social Charter (R-ESC) insist on the right to housing (Granger et al. 2018). In addition, other UN Treaties contain many of the Covenant's rights to housing, and entail minimum core obligations in the field of housing with respect to specific groups, such as persons with disability, children and refugees. It is left to the nation states, however, to take the appropriate and necessary measures to implement these rights (Granger et al. 2018). The maximum commitment expected from nation states is to work progressively towards the full realization of that right without discrimination. The analysis of Granger et al. (2018) shows with some exceptions the right to housing assistance is categorized only as a 'principle'. Such a principle is meant to guide legislative and policy action and judicial interpretation but, generally, cannot be enforced in court.

This example is not intended to claim that at the supranational entity justice principles are of the highest degree and that these are spoiled, denied or neglected by lower (sub-)national entities. Paradoxically, the EU and Member States themselves have minimized the possibility of the realization of these justice principles by proclaiming liberalization of the housing market and by enforcing cutbacks in public spending on social housing, housing subsidies and tax reductions. These policy reforms contradict the supra-nationally agreed right to housing, with the effect of outsourcing responsibility for social housing to the free market and the sub-national level of local government. Redistributive justice regarding the right to housing now depends on multiple governmental levels as well as the free market with its specific properties, values and resources. These developments show that universal justice principles are substituted by *sufficientarian* coupled with *prioritarian* justice principles in a process of austerity and liberalization (Granger et al. 2018; see

Chapter 2). The free market principles of demand and supply nor local governments will and can compensate for its un-equalizing effects.

In the field of *recognitive* justice, this levelling down of the fundamental assumption of participatory parity also becomes clear. The recognitive justice principles, as set out in international and European human rights treaties and EU law, become diffused, dispersed, fragmented and contrasted and contested in social institutions, discourses and in daily practices. Illustrative for a contentious tendency towards recognitive justice are public discourses on commemoration of national histories (Akkan and Hiah 2019) and on education for minority group children (Buğra and Akkan 2019; Lepianka 2019). Involved in the discourse are media, politicians and opinion leaders each representing 'power elites', that is, entities having the power to define situations and setting the rules of the game (Goffman 1959; Bourdieu 1979; Miller 1999). In defining (in)justice and the principles according to which claims to justice might be established and/or evaluated as legitimate the type of remedies that might be sought to correct for injustice, they have epistemic power. The exclusion of certain voices by missing out or ignoring certain public interests and misrepresenting common interest (Pettit 2004) result from and reflect unequal power relations.

Properties at stake in the educational discourse are legal and policy instruments to define the distributive and recognitive inclusiveness of the educational systems as well as the school curriculum representing the moral values and societal norms that the education system incorporates. Buğra and Akkan (2019) highlight three related problems of capability deprivation in education: (1) the segregated character of the education system and the inequalities of access to education due to different quality of schools according to the class- and ethnicity-based neighbourhoods; (2) difference blindness and misrecognition towards the worth of different cultures limit education in meeting the expectations about capability development, social cohesion and an erosion of trust in society; (3) minority claims for cultural recognition are seen as a threat to social cohesion, and they do not have the opportunity to adequately express their grievances and claims and to contest stereotyping and stigmatizing tendencies. Dorota Lepianka (2019) in addition focused on the media as relevant entities in informing and influencing public discourse. Their properties consist in communicating a specific rank-ordering of 'social problems' that demand public attention and expressing popular discontent with existing educational practices. The analysis shows that media debates about justice principles are contextualized and revolve around the question of whether and 'how' the current educational system succeeds in fulfilling its fundamental social mission, be it enhancing educational attainment, passing on values and/or strengthening social cohesion. Many debates touch upon questions of access to (quality) education and educational segregation (often

discussed in terms of redistributive justice) and the assimilative agenda of schools, which in general offer minorities very few opportunities to nourish their own identity, thus infringing on minority claims to recognition (Lepianka 2019). Recognitive justice is also at stake in media debates on distinguishing 'better' and 'lesser' languages and cultural backgrounds, and in an ambivalent evaluation of minority recognition claims as self-exclusion which disadvantages the individual, the group in question, as well as the national community. Media outlets as entity for redistributive grievances permeate discussions about access to quality education, school admission policies, education tracking systems, and redistribution of public resources among various types of schools. Underpinning all those claims is a firm belief in the role of education in nourishing talent and ambition, and its significance for the alleviation of social inequalities. The debates expose tensions over the principles that govern the allocation of 'justice', and – indirectly – groups whose well-being is, often implicitly, prioritized.

Social institutions as entities dealing with populations depending on income support and/or care have a few *properties* in common. While economic rights are increasingly regulated at the supranational and international level, social rights, not covered by the four freedoms (mobility of capital, goods, services and labour) of the European internal market but regulated by national social laws, have to be put in practice by local or regional authorities or are outsourced to markets (see Chapters 7 and 11). Other involved entities are advocacy organizations and client organizations assumed to represent clients' interests. Regarding care systems and cultures, Bridget Anderson and Pier-Luc Dupont (2019) and Trudie Knijn (2019) conclude that among European countries there are dissimilarities in the institutionalization and organization of care and income support. Consensus on redistributive justice principles and on which needs will be recognized is absent. Also care workers' rights show a rich variation ranging from strict national labour regulations for care work, cash-and care and personal assistance systems to unregulated private contracts. Moreover, care provision is very vulnerable to policy reforms that define the responsible entities; shifts from the family to residential settings and vice versa seem to be less inspired by the voices of involved care givers and care recipients than by austerity measures or processes of individualization. Most important however, is that families as private entities of care and income support are included in an often unrecognized way without being compensated or at a very low level. Mechanisms that impede justice in the domain of care exist in multiple redistributive constraints: limited budgets, low quality residential settings, low wages, limited labour protection and work pressure are serious barriers for participatory parity of people in need of care and care workers. Recognitive constraints pertain to an underestimation of the meaning of family dependency and a still patronizing attitude towards frail elderly and

disabled persons undermining the capabilities of care recipients, caring family members and the mostly female (migrant) care workers.

Regarding welfare benefits, local welfare offices are entities deciding on redistribution in the context of national welfare states' regulations and laws. They are funded by mandatory taxation, potentially redistributive, specific in its aims, compulsory and surveilling. Social assistance is the most basic non-contributory benefit all over Europe. It is targeted at individuals and households living under a defined minimum income and in some cases is reserved for specific categories, such as families with children or poor elderly people (Anderson and Dupont 2019). Social assistance is implemented by social workers and claimant managers with some discretionary power in direct contact with the welfare clients with their multiple identities. While individual conditions and characteristics of clients vary, the interpretation of their needs and deservingness depends on social workers in an unequal power relationship. Therefore, the study signals a trade-off between transparent procedures and clear formulations of rights of claimants, criteria for sanctions, surveillance and accountability allowing for tailor-made approaches, on the one hand, and insecurity about the rules and procedures, on the other hand. Claimants' capability to decide what one needs is hard to secure and thus participation on equal grounds.

In this section multi-level governments, social institutions and public discourses as entities (with their properties) are analysed as mechanisms of justice from the perspective of their contribution to improving capabilities and to participatory parity. Justice takes shape within these contexts and these entities setting the rules of the game, being positioned to decide on public resources, influencing public opinion and representing its battlefield. Justice for vulnerable people depends on how they are imagined, classified and treated by governments, social institutions, courts as well as discourses. In Europe, with its diverse and pluralistic societies, supranational entities intend to promote recognitive justice principles for women, ethnic minorities and migrants as well as for disabled persons. The application of these principles in new recognitive frameworks goes along with tensions that arise from nationalistic discourses. At the same time, redistributive justice principles are constrained and in decline due to austerity policies, cutbacks in public spending driving national governments and social institutions to misrecognition of needs.

13.4 ACTIVITIES AS MECHANISMS OF JUSTICE

Mechanisms of justice exist in entities that 'are' and 'do' by their activities. In an interactive process of affirming and transforming justice principles, activities as mechanisms of justice recognize identities, give shape to voice and representation and conclude on deservingness and needs by setting standards

for appropriate behaviour and living. The shape, content and form of these actions may differ per social sphere (Walzer 1983).

A main consideration in analysing these activities concerns the relationship between equality and inclusion as two poles of distinction, that is, on the relationship between redistributive justice and recognitive justice. Equality and inclusion may follow different 'logics' though a sharp distinction between the two poles of justice cannot be made if only because the rules of the game dictate who is 'up' or 'down', or 'in' or 'out' (Silver 2007). Exclusion – on whatever basis, being race, ethnicity, religion, gender or age – has consequences for inequality (Nullmeier et al. 2019). Nonetheless, activities contributing to enforcing equality differ from activities promoting inclusion even if the entities that operate in bringing forward justice in both arenas are the same. Inclusion may take two routes: categorization of perceived identities or individual differentiation, meaning that differentiation which is unavoidable and even needed in reaching justice in diverse and plural societies may contribute to injustice if based on perceived identities. Here we outline differentiating activities that impede (in)justice as: (1) categorization of difference; (2) having access and being eligible; (3) deciding on deservingness; and (4) negotiating justice based upon participatory parity and capabilities.

13.4.1 The Categorization of Difference

Categorization of group difference points at the controversy between universalist liberal principles and politics of identity (Buğra 2018). This controversy exists in the tension between, on the one hand, justice principles and activities in a pluralistic society inspired by group differences which inform different experiences and shape different aspirations and demands concerning participation in society. On the other hand, justice principles and activities accounting for non-homogeneity of group identity, reconciliation of group difference with the common good of the society, and plurality and dynamics of individual lives. Individual non-conformity and dissidence remain important.

A core question is whether activities like minority policies (that is, differentiation based on categorization) contribute to participatory parity. Regarding groups like Roma it is not easy to juxtapose a universalistic versus a minority group discourse (see Chapter 8; Anderson and Dupont 2018; Buğra and Akkan 2019; Lepianka 2019). In contemplating participatory parity, recognition of Roma minority culture could bring forward activities (segregated schools) resulting in exclusionary outcomes for individuals' capabilities aimed to promote participatory parity. Roma's positioning as a disadvantaged minority group is also problematic as redistributive policies suffer from a mixture of colour-blindness (not acknowledging minority cultures) and discriminating institutional practices. Illustrative is the denial by local authorities of the legit-

imate human rights-based claim for living in mobile homes, in combination with the stigmatizing treatment of all Roma in social welfare practice (Hiah and Knijn 2018). If the willingness of the minority group to contribute to the majority claim of the common good is doubted the non-homogeneity of the group is overlooked and individuals are treated as representing ascribed identities. Categorization of difference regarding Roma populations that reduce individual options to escape also affect representative justice. The ideological constructs of a dominant group contribute to the negative self-definition of minority group members' reason why minority candidates may be less likely to put themselves forward as political representatives of a stigmatized group (Anderson and Dupont 2018).

Differentiation based on categorization operates in various ways for different groups. Activities contributing to the participatory parity of elderly and/or disabled people recognizing their autonomy and capabilities are increasingly put on the supranational, EU and domestic political agendas. Nonetheless, categorizations like 'the elderly' or 'the disabled' do not justify the rich variety of capabilities and lifestyles within and among people of age and disabled persons (Anderson 2020; Knijn 2019). From the perspective of recognitive justice, it is imperative not to be colour-blind to their – and their families' needs – by requesting autonomy and self-responsibility, not to classify elderly and disabled persons as vulnerable categories of the population per se and to avoid a patronizing approach that neglects their freedom to live the life they value.

Legal mechanisms are developed internationally and at the European level to exercise anti-discrimination practices. These mechanisms of categorizing differences pertain to prioritize and protect the needs and rights of certain groups classified as *disadvantaged and vulnerable*. For political reasons these categories are non-specified such as ethnicity and religion-based minorities or women, children, older persons and persons with disability (Granger et al. 2018). In applying this to the right to education, activities that pursue 'anti-discrimination' emerge as mechanisms of accommodating the exercise of rights to education at individual and group level. Orsolya Salát (2019) highlights a complex case law developed by ECHR prohibiting discrimination and requiring to 'pay particular attention to the special needs of vulnerable persons (be they ethnic or religious minorities, persons living with disabilities, etc)'. The Court emphasizes inclusive education as a guarantee of universality and non-discrimination for pupils with disabilities, as well as to the ethnic minorities. In line with this understanding, ECHR jurisprudence has set out positive obligations, as well as procedural and substantive requirements regarding segregated schools. This activity to impede injustice is followed up by all countries operating within the framework of non-discrimination, although their constitutional contexts differ (Salát 2019).

Discursive practices of media and politics, operating by labelling, othering of ethnic and religious minority members and negative stereotyping (Lepianka 2019) can be labelled activities that impede justice. For instance, the categories of race as a mechanism of exclusion operate at different levels: by applying the term 'black' to denote schools with over 50 per cent of a non-western background inherently applying this to children with Moroccan, Syrian, Iranian, Surinamese, Latin American and African background as is the case in the Netherlands. Or by presenting insulting and pejorative images of Africans as 'primitive peoples' with no history of their own in Portugal. Activities of overemphasizing, as in Austria, the 'otherness' of members of religious and ethnic minority groups whose mother language is not German that pursue reducing difference through education could undermine their self-esteem, their sense of belonging and their ability to participate on equal grounds. Many activities are captured between either defining minority cultures as different, thus less worthy, or difference blindness in the discursive framing of equal opportunities. Yet where the disadvantages are dissociated from the underlying social and cultural inequalities, the recognition of disadvantage might easily articulate with discriminatory tendencies.

In understanding categorization of difference as an activity, the interplay between temporality and history in shaping (ideas about) the socio-economic order, the vision of the common good, the permanence of class structure, and/or the permanence of ideas about justice claims of minority and marginalized populations is imperative. In many cases (minority) claims to recognition and/or representation can be understood through the lens of history or rather, a specific memory of (national) history, which may differ between various social groups (Anderson and Dupont 2018; Lepianka 2018; Akkan and Hiah 2019). The categorization of difference as a mechanism operates at different levels in different entities. The activities that are scrutinized in the realm of entities like law, media, education and the welfare state operate with a categorization of difference; such categorization determines who has access to certain resources, whose identity and claims are recognized and whose voice is heard.

13.4.2 Having Access and Being Eligible

Openness of the public domain, and availability of resources, relevant institutions and people are major conditions for realizing capabilities and participatory parity. However, access to quality education, residential care, social housing, employment and welfare benefits are increasingly limited due to a combination of reduced public budgets, flexibilization of the labour market and the neo-liberal self-responsibility paradigm. Giving access is one side of the coin accentuating minority and vulnerable populations' dependency on powerful institutions dominating the redistribution of public goods and allow-

ing for the recognition of minority cultures and lifestyles. Claiming or taking access is the other side of the coin expressing resilience of people defined as marginal or vulnerable who oppose differentiation based on categorization. Anderson and Dupont (2019) and Knijn (2019) show that this giving and taking access is partly reached in the case of personal assistance for disabled people, which is an effective materialization of the access claim of the Independent Living Movement (ILM) (Chapter 10) and in the case of welfare benefits and social housing for temporary status holders (Knijn and Hiah 2019). In most cases, however, austerity politics combined with repsonsibilization cause an imperfect application of having access and being eligible as justice activities. What happens can best be illustrated by the case of young women's access to the labour market (Meneses et al. 2018). Activities of the EU and the European Council during the economic crisis in alliance with the IMF and the European Central Bank (ECB) exist in forcing the Southern Member States to accept austerity policies, reducing public spending and outsourcing public goods. In particular the Southern countries had to redefine the 'common good' by prioritizing economic market principles above principles of redistributive justice. Hence, universal social rights are substituted by deservingness and reciprocity principles that limit redistribution of public goods. It has increased gender inequality and leads to 'adaptive preferences' of the economic vulnerability of especially young – female – persons and their acceptance of the neo-liberal 'rules of the game', setting aside their plans for the future in a permanent struggle for jobs (Meneses et al. 2018).

Such a narrative of fear also operates in other domains and regarding other social groups; 'adaptive preferences' we see in frail elderly adapting to reduced care provisions (Anderson and Dupont 2018; Knijn 2019) and among welfare recipients and social workers accepting deservingness and reciprocity criteria (Anderson 2020). A representative justice perspective is at stake because organizational and political choices are neither transparent nor the result of a democratic process in which all voices are heard. Moreover, precarity, expressed in increasing vulnerability and exploitation in the labour market, invokes lives already characterized by uncertainty and instability (Meneses et al. 2018).

Being eligible is conditional to getting support in creating and improving justice by stimulating capabilities and choosing the life one prefers. Setting eligibility criteria is an activity that defines the right to receive resources and to get access to organizations that matter, such as schools, (health)care, media, trade unions or legal processes. Human rights outline the broad criteria for eligibility but do not suffice for its specification due to diversity of human beings and their specific needs. Setting eligibility criteria is an unavoidable as well as a normative activity in welfare organizations, public healthcare, education migration offices, social housing and even in the media. By consequence,

eligibility criteria intended to be inclusive inevitably define the boundary lines of belonging, and of acceptable behaviour often with the intention to minimalize the target group. Hence, eligibility criteria per definition contrast with universalism. For example, although entire populations of Europe suffered from World War II, not all can claim compensation. It took many years to put in place restorative justice, and some populations that extremely suffered were recognized more easily than others, with Roma as the latest category being recognized for restorative justice. Eligibility criteria can be defined as just and fair if they define target groups on the basis of criteria that are in tune with the intention of the redistributive character of the public good, recognize the needs of minorities and individuals within minority groups, are transparent and democratically debated, and exclude all other implicit criteria. Eligibility for social housing and social assistance therefore should only be based on income, not on ethnicity, cultural or religious background or gender. Eligibility for good quality schools at all levels should be universal given its importance for development of individual capabilities as well as for society at large, and the same goes for healthcare. Nevertheless, it becomes clear from our studies that many eligibility criteria are not appropriate from the perspective of justice. This is related to several assumptions on eligibility criteria that impede its implementation such as prioritization and localism. Eligibility for housing and social benefits as well are increasingly tied to reciprocity as societal contribution and integration, meaning being employed or actively looking for jobs, being committed to the local community, having children and displaying good behaviour (Anderson and Dupont 2019; Granger 2019).

13.4.3 Deciding on Deservingness

A third form of justice creating activities can be viewed as a subcategory of having access and being eligible. Selectivity and conditionality divide deserving from the undeserving vulnerable populations grounded in criteria of equity, need and reciprocity, resulting in increasing numbers of homeless people, poor households including poor children, and job and income insecurity. Moreover, the empirical ETHOS studies manifest that exclusion and polarization between the 'us' that belong to the political community that owes us and to which we are due and the 'them' that undermine our sense of belonging as well as our public goods is just one of its manifestations. In this context scapegoating is a performative mechanism expressed in the (social) media by politicians and the populations at large blaming a certain category of the population as the cause of 'the problem'. For instance, in the Netherlands one speaks about 'migrant benefits', because the majority of welfare beneficiaries are migrants coming from third countries (Knijn and Hiah 2019) and in Portugal prejudice against Roma as allegedly being dependent on subsidies creates a feeling of

injustice among claimants, although most of the time this is based on wrong information and years of racism institutionalized against this group (Araújo and Brito 2018). Self-blaming or blaming one's group identity is a way to adapt one's preference to being defined as 'undeserving'. Disabled persons and elderly in need of care blame themselves for not being able to 'live independently', the righteous claim of the disability movement may impute those who are 'passive' care dependents (Knijn 2019). In the same vein, welfare beneficiaries blame each other for not doing their very best to get a job (Anderson and Dupont 2019) and young unemployed women blame themselves for not having a regular job (Meneses et al. 2018).

The equity principle is detected in the ETHOS studies on welfare benefits and social housing. The existence of needs regarding these public goods are accepted but envisioning it as the result of a self-inflicted need gap leads to the ambiguous criterion of desert that simultaneously speaks to charity and justice (Anderson and Dupont 2019). 'Reciprocity', 'contribution' or 'counter-achievement' are put central in times of austerity exacerbating the restrictive tendencies of the deservingness paradigm. For instance, since 2008, public work programmes in Hungary aim to replace benefits as a quasi-punishment for there is no welfare without work (Meneses et al. 2018). Deservingness criteria encourage suspicion-based activities towards claimants' purported needs and contributions and the relegation of large sections of the population to the ranks of the undeserving.

13.4.4 Negotiating Justice on Behalf of Participatory Parity and Capabilities

As stated in the theoretical approach above, mechanisms of justice may also create vulnerable populations as categories of difference. Negotiating vulnerability, its categorization and the resources to overcome unequal participation and incapability are imperative activities from a justice perspective. The ETHOS studies present various activities giving shape to vulnerability that result from their legalization in human rights and EU law, institutionalization in voting rights, charters and dialogues, discussed memorization practices, and lived social interactions. Interestingly, in EU law the use of the notion of vulnerability and its relevance is growing. Developed in the context of human rights law, it increasingly serves as a point of reference for the design of EU policies, and in the interpretation of EU law. Though the concept of vulnerability is not yet explicitly included in Treaty provisions (Granger et al. 2018), its use in international law such as the Convention on the Rights of the Child and the Convention on the Rights to Persons living with Disabilities has an increasing influence on migrant, minorities and disabled persons' rights, for instance, in the sphere of access to education and inclusiveness. This adds to

the complexity in which these legal orders interrelate, and which is legally managed by concepts like the 'the margin of appreciation' (ECHR) and subsidiarity, supremacy and constitutional identity (EU law). However, national constituencies define whether substance rights follow from the recognition of vulnerability.

Negotiations on the right to vote also show up in the ETHOS project. Protected by international human rights instruments sensibility for the voting rights of vulnerable and marginalized populations increases. Pressure by both the ECHR and EU law resulted in a greater enfranchisement of immigrants, and mentally disabled persons, and in a partial re-enfranchisement of convicted prisoners. Although with limitations and conditionalities regarding foreign residents, mentally disabled persons, and criminals potentially undermining the foundations of the democratic system of government, increasing enfranchisement boosts representation of those categories (Theuns 2019).

A quite different conclusion is drawn from the analyses of the recognition and protection of vulnerable groups when it comes to their work-related social rights. A tendency to 'economize on justice' has detrimental practical implications in respect to the realization of social justice. Castro Caldas (2017) argues that the separation between economy and moral philosophy is not obvious and unavoidable although European economic policy is mostly aligned with the rules of financial markets. In searching for formal and informal activities of negation and deliberation that may offer instruments for overcoming the negative implications of redistributive injustice ETHOS studies show disappointing results. De Vries and Safradin (2018; Chapter 7) explain that strengthening the Treaty system of the European Social Charter within the Council of Europe and its relationship with EU law is vital for implementing social rights for many vulnerable groups of citizens. Especially the elderly, youth, persons with disabilities and migrants have been undermined in effectively enjoying their fundamental rights. In contrast, the responsible European Court of Justice has taken a cautious approach in dealing with national cases that challenged austerity measures based on fundamental rights. This illustrates that the EU's social model has been seriously undermined during the Euro zone crisis, although the recently launched European Social Pillar is conceived as a recognition that the EU's commitment has neglected its social dimension (de Vries and Safradin 2018).

Path dependency is a determinant for institutional change, for instance, in representative justice as Araújo and Meneses (2018) show. Protection of vulnerable groups depends on social dialogue structures that are under pressure even in countries where their presence had deeper roots. Trust between social partners built up in a strong welfare state tradition is imperative for protecting workers and national economies. A lack or disruption of such a tradition (such as in the UK, Portugal, Hungary and Turkey) is a fundamental part

of the problem. Araújo et al. (2019) studying alternative dispute resolution (ADR) mechanisms as functional instruments such as mediation to improve access to labour justice see potential in ADRs to surpass some of the barriers to access justice. ADR is less expensive, faster and geographically closer to citizens than courts and uses an understandable language. In multiplex situations ADR allows a deeper comprehension of the conflicts and helps to solve the superficial dispute as well as underlying problems. The authors warn, however, of a dual justice system, with courts serving first class citizens, and informal justice serving second class citizens that cannot afford or understand courts procedures. This may result in the reproduction of societies' power asymmetries, the possibility of being co-opted by the state, and the risk of an individualized approach undermining collective action in a neo-liberal and fragmented labour market (Araújo et al. 2019).

Deliberation as an activity is another means to strive for participatory parity, for instance, in disputes on commemoration of minorities' past and present belonging to European societies (Akkan and Hiah 2019). Showing an increasing sensitivity to historical injustices, the ongoing effects of the colonial and imperial past points at awareness of the need for redefining the collective identity and for restorative justice. In that process deliberations on moral dilemmas identify the injustices in the majority/minority relations. Majority voices may favour the discourse of 'the past should stay in the past' or refer to the 'perception of complex figures in their own times', but clearly silencing is no longer an option in ensuring a sense of belonging to a society. Deliberating alternative narratives is a manifestation of a moral dilemma evident in plural and diverse societies.

Efforts to improve recognition of vulnerable groups and negotiate minorities' status exist in top-down as well as bottom-up activities in an entwined process of advocating, deliberating, convincing, processing and claiming as exemplified by the case of restoring disability rights. The Independent Living Movement contributed to a paradigm shift in the EU approach on disabled and ageing persons. Participatory parity has been stimulated by recognizing the claim to get equal access to all domains of life (education, employment, health services leisure activities) and by stimulating their human rights (Knijn 2019). Again, however, its success depends on the application of nationally defined redistributive justice principles. Where family dependency still is an unrecognized though substantial alternative for collective resources both people in care of need and their mostly female care givers remain vulnerable. There seems to be a trade-off between the discourse of self-determination and the recognition of care work, as is illustrated by the case of Austria, where service users reach a sense of self-determination at the cost of obfuscating the care work needed to get it done. If participatory parity of the one goes at the cost of the other (their work contract, dignity and voice) capabilities are not conferred by connection

with other people. The fact that both 'family' and 'home' care, whether paid or unpaid, is predominantly female seems to be taken for granted. Precisely because of its obviousness, the gendered nature of affiliation, emotion and interdependence thus remains an unspoken assumption.

13.5 CONCLUSIONS AND DISCUSSION

This chapter considered the mechanisms (entities and activities) that lead to justice outcomes in Europe. Regarding entities, one important mechanism is that of multi-level governance. All the countries considered are members of the Council of Europe with its dedication to human rights, democracy and the rule of law, and party to many UN Treaties. In addition, all – save for Turkey – are Member States of the EU. Within nation states, the sub-national levels of regional and local government play an important role in setting out understandings of justice as well. This creates a constitutional pluralism in which there is an interplay between local, national, EU and human rights-informed understandings of justice principles. Most striking in this complex governmental hierarchy is the ambivalent position of the EU regarding redistributive versus recognitive justice in the context of suboptimal representative justice. On the one hand, the EU is a profound defender of minority rights, of gender equality and LGBT and disabled persons' rights and offers lots of programmes and initiatives to stimulate recognition of diversity. From that perspective one could say that participatory parity of under- or unrecognized groups and individuals as well as their representation in policy aims of Europe became an undeniable aspect of the European theory of justice and fairness, although lower governmental levels do not always adapt to these principles. On the other hand, the EU has promoted a free market of persons, capital, services and goods with strict economic budgetary restrictions to all its Member States, has stimulated austerity measures and put Member States under rigid regulations negatively affecting the participatory parity and capabilities of exactly these minorities, women, frail elderly and disabled persons. Nation states and local and regional authorities have reduced welfare benefits, excluded categories from welfare benefits, outsourced social housing programmes to the competitive market, reduced care facilities for elderly and disabled persons, and turned towards a paradigm of distrust based on reciprocity and deservingness. These developments challenge or even violate redistributive, recognitive as well as representative principles. In that process vulnerable populations are badly represented and instead adapt preferences with consequences for their capabilities and for affirmative and transformative remedies. Justice principles expressed in visions, codified and institutionalized in legal tradition and/or bureaucratic, professional, cultural and social practice, determine not only the shape, scope and site of justice experienced by individuals, groups and societies, but also

the choice of remedies, that is, the claims for justice to tackle the injustice. Power asymmetry stands in the way of differentiation without categorization, equal access to and eligibility of (public) resources while desert has substituted rights. Negotiation and deliberation as activities of representative justice are ongoing but so far have not resulted in realizing the full development of vulnerable people's capabilities nor in ensuring participatory parity.

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14. Living and theorizing boundaries of justice

Trudie Knijn, Jelena Belic and Miklós Zala

14.1 INTRODUCTION

This chapter integrates the ETHOS empirical findings as described in the previous chapters with the project's main theoretical framework founded on Fraser's 'three Rs': redistributive, recognitive and representative justice, and further developed in the ETHOS research programme, as outlined in the introduction of this volume. The chapter elaborates and conceptualizes the most important dimensions along which drawing boundaries of justice takes place. Drawing boundaries relates to the processes of inclusion in or exclusion from the 'scope of justice' – the group to which one 'owes' or within which one can legitimately claim what is her 'due'. 'Owing' to others and claiming one's 'due' stand for the most stringent obligations regarding claims for redistribution, recognition and representation. In the Fraserian framework, justice ultimately requires 'participating as peers' in a democratic society, and exclusion from such participation amounts to 'a grave moral wrong' (2007, p. 314). The chapter shows that exclusion and inequality are present across the borders of political communities as well as within them in institutional settings and in discourses and social practices. The assumption is that such boundary lines, which we call *fault lines of justice*, are historically dynamic and contextually contested and debated.

Institutionalized (in)justice materializes in drawing boundaries of justice between citizens and non-citizens on arbitrary and/or formal (legal) bases. Formal exclusion and unequal treatment of non-citizens are justified by them not having a claim to the legal citizenship status. Although the dominant discourse and practice is that formal belonging to political community is necessary to be included in the scope of justice, having citizenship status alone is not sufficient to be protected against exclusion and inequality on institutionalized grounds as well as in social practice. The previous chapters discuss various intersecting boundary lines in the European Union (EU) and its Member States including ethnicity, religion, gender, age, physical able-ness, as well as social

economic positions such as being unemployed, living on social benefits or working in undervalued sectors (such as care) and/or on precarious contracts. Differentiation in exclusion from/inclusion in the scope of justice means that those excluded are 'vulnerable' to further injustices because they either have no right to claim what is their 'due' such as decent income, housing, education and political participation, or cannot claim it effectively. Moreover, they are denied dignity, respect and recognition, all of which are needed to live a life one values. In what follows we first generalize from the various empirical findings in order to categorize boundaries of justice, and then use these categories as the basis to refine the ETHOS's theoretical framework.

The chapter is structured as follows. We start by clarifying our methodological approach. In the next section, we problematize external boundaries of justice as limited by territorially bounded political communities and manifested in national citizenship. In the following section, we conceptualize internal boundaries of justice by drawing on Fraser's notion of 'institutionalized patterns of subordination and exclusion'. We then explain the ways in which the existing forms of categorizations lead to exclusion, and in the subsequent section, we conceptualize categorizations along the lines of age, ethnicity, ability and gender. Finally, we end by refining the ETHOS's theoretical framework based on these categorizations.

14.2 METHODOLOGICAL CLARIFICATION

The chapter employs the method of moving back and forth between philosophical principles of justice and empirical findings of the ETHOS project. The first three chapters of this volume outline the philosophical approach to justice (see Chapters 2 to 4), and the subsequent chapters (Chapters 5 to 11) describe and interpret the empirical findings. In this chapter, we refine the ETHOS's theoretical framework by integrating the philosophical arguments and the empirical findings regarding drawing boundaries of justice. The aim is to make final steps in defining the building blocks of a more coherent understanding of justice in Europe.

The ETHOS empirical studies as presented in the previous chapters come to a critical analysis based upon various kinds of data (discourses, legal regulations, document analyses, ethnographies, interviews, focus groups and secondary analyses of surveys), they focus on different themes (housing, voting, education, care, work and income) and address different populations that are subject to social exclusion and thus became vulnerable (ethnic minorities, fragile elderly, young women, disabled people), and as such do not lend themselves to a simple aggregation. Thus, in order to juxtapose the diverse empirical findings with the philosophical principles of justice, we employ the Weberian approach to 'arrive at concepts that, while they do not reflect empir-

ical reality strictly speaking, nevertheless provide heuristically useful idealizations that allow one to better grasp and typologize social phenomena' (Knijn and Lepianka 2018; Theuns et al. 2019, p. 13; see also Chapter 4).[1] Here we will use this approach to formulate categories of boundary drawing as revealed by the critical evaluation of our empirical studies. This can secure a bottom-up theory construction and inclusion of subjective experiences of marginalized persons, while at the same time enabling generalization from such experiences in order to identify shared values and practices.

14.3 BOUNDARY DRAWING BETWEEN CITIZENS AND NON-CITIZENS

Political communities were and still are inherently exclusive since they limit the scope of justice to 'own citizens'. It is believed that formal belonging to a territorially bounded political community manifested in the legal status of citizenship defines the scope of justice (Walzer 1983; Miller 1995; Nagel 2005). In Europe, the EU and beyond, this view has become increasingly challenged since it excludes those beyond borders of political communities and is also blind to various forms of exclusion that take place within political communities.

Historically speaking, the emerging idea and practice of modern citizenship had an inclusionary and equalizing impetus by virtue of creating the identity of an 'imagined community' (the modern nation) (Anderson 1983) as well as by extending the legal status of citizens to all those belonging to a territorially bounded political community (the state). Within these communities the scope of rights as well as the scope of their holders have been gradually extended to reach its peak with the introduction of what Marshall (1950) termed as 'social citizenship' in the post-World War II European welfare state. In Marshall's view, social citizenship presents the culmination of the universalist tendencies of citizenship since it accords the identical set of civil, political and social rights to all members of polity to compensate for the stratifying hierarchies generated by the capitalist markets.

The initial aims of citizenship were also to exclude 'the others' – those who are seen as not belonging to European nation states even if they were subjected to their rule. The ongoing processes of growing global interdependence make national citizenship even more exclusionary along three dimensions: territorial affectedness, sedentariness and national belonging. These three lines are not distinctive of national citizenship in Europe but characterize the concept of national citizenship as such.

National citizenship presupposes a *territorially bounded political community* whose members are equally affected by the community's decisions and therefore have the claim to participate in making these decisions. As Lepianka

(2018) shows, even political actors with more universalist aspirations calling themselves 'social democrats' direct their agendas strictly to citizens. Such views deny that all those affected by a polity's decisions have the right to have a say in the polity's decision-making and assume that the affectedness is limited to the polity's members only. However, given the EU integration, global interdependence of economies, environment, communication and movement, affectedness by a community's laws and decisions extends far beyond its borders as the failure to adequately address climate change, war refugees, mobile EU citizens and the reiterating financial crises are painfully showing (Fraser 2009).[2] If affectedness is the basic principle for recognizing the right to the legal status of a citizen as well as to a bundle of rights it entails, including the access to resources, then ignoring the cross-border affectedness amounts to arbitrarily excluding those who are significantly affected by the decisions of the national or European community. The Westphalian division of political space into bounded polities amounts to the injustice of 'misframing' since it has created the frame of the disputes about justice that wrongly excludes some from consideration (Fraser 2007).

The second line of exclusion from national citizenship is assumed *sedentariness of the population*: the idea that citizens have long-term ties to a specific territory (Anderson and Dupont 2018; see also Chapter 8). The sedentarist character of national citizenship creates boundary lines of justice by fault or default for those who move around. When it comes to groups that are dispersed across borders, Anderson and Dupont (2018) highlight how assuming sedentariness generates the problem of political representation of Roma – in order to be represented, they need to be included into national institutions designed according to the needs and interests of the majoritarian, sedentarist population, and this amounts to the misrecognition of Roma. The distinction between sedentary and mobile populations became even more salient with the introduction of EU citizenship in the 1990s in order to secure the partial inclusion of EU internal migrants in their new residence countries by recognizing their additional rights on the basis of freedom of movement. This created a fault line between mobile EU nationals and third country nationals who acquire additional rights in a much harder way, if at all. This is especially problematic given that many of the third country nationals belong to populations of the former European colonies and have contributed to the wealth of current Europe (Oomen and Timmer 2017; see Chapter 5). EU mobile nationals, in turn, are still disadvantaged compared to local sedentary citizens since they typically do not have access to full social rights and participation in decision-making (Theuns 2019). Hence, mobile EU citizens can appear both advantaged and disadvantaged depending on which population they are compared to. To identify fault lines of justice, we need to define relevant reference points since disadvantages are always positional and relative to another group or person

compared. Going back to the EU citizenship, one can say that it generated fault lines between EU mobile nationals, third country nationals and local (sedentary) citizens. The further complication arises from the imperative to make 'mobile' migrants more 'sedentarist' by attempting to connect them to territories via residence requirements often depending on their employment. This places migrants in a dependent position with regard to their employers and, consequently, makes them vulnerable to exploitation (Meneses et al. 2018; Akkan and Serim 2019; also Chapters 8 and 10).

Finally, national citizenship presupposes *national or ethnic belonging* to the imagined community as the pre-condition for granting citizenship, which is in tension with several ongoing trends. The first tension arises between an inherently particularistic national identity as the basis of rights and an increasing 'internationalization' of citizenship via international human rights law norms, which assumes universal personhood (Soysal 1994). The two pull in different directions – while the former implies limitations of rights to those sharing national identity, the latter is 'indefinitely extensible' (Leydet 2017). The second tension is between national identity and increasingly internally diverse nation states. Namely, the prioritization of national belonging amounts to the imposition of the majority culture to minorities that share a different ethnic or religious identity (Leydet 2017; Buğra 2018). An additional tension is between national (as cultural) identification and different types of identities that persons self-identify with. Members of national minorities as well as those members of national majorities who do not identify on national grounds are ascribed an identity that they do not necessarily share. Lastly, taking national identity as the basis of citizenship assumes belonging to one community, which is challenged by transnational migrations since they create overlapping memberships between territorially separated and independent polities. Persons can simultaneously belong to and have overlapping affiliations with two or more polities, which are often recognized as dual or multiple citizenships (Bauböck 2003).

As we can see, three fundamental presuppositions of national citizenship including territoriality, sedentariness and national/subnational belonging reveal boundary drawing based on power inequalities between those who meet these criteria, and thus get recognized as citizens, and those who do not meet them and, hence, have no claim to the legal status, no matter how affected they are by decisions of a particular political community (beyond or within its borders).

14.4 BOUNDARY DRAWING AMONG CITIZENS

Limiting the scope of justice to a territorially bounded political community is also problematic since it ignores various fault lines of justice that occur

within the nation states, thus making the ideal of equal (national) citizenship unrealized.

Social citizenship rights were a 'pinnacle' of a modern social democratic state that according to Marshall (1950), have weakened class differentiation and secured social cohesion and integration. This view was challenged on the grounds that the extension of citizenship rights to the previously excluded groups had not translated into equality and full integration (Young 1989). Fraser argues that socio-economic and cultural injustices are both rooted in processes and practices that systematically disadvantage some groups of people vis-à-vis others, thus creating 'a vicious circle of cultural and economic subordination' (1995, p. 72). For instance, gender cultural norms are not only dominant at the domestic sphere (where women are still responsible for the care that is central to productivity), but are institutionalized in the state and the economy leading to women's economic disadvantage, which in turn makes it more difficult for them to participate in decision-making and change these norms. This shows how economic disadvantage and cultural disrespect are intertwined and justice requires tackling both through redistribution, recognition and representation (Meneses et al. 2018; see Chapter 11).

While the differential challenge was motivated by the 'struggle for recognition' taking place at the end of the 20th century, our empirical chapters unravel another paradigm shift with the emergence of 'austerity society'[3] both at the level of the EU as well as its Member States. The EU response to the 2008 financial crisis was the introduction of various austerity measures which fundamentally redefined the European Social Model to make it more compatible with the neo-liberal economic model, thus giving new impetus to the struggles for redistribution. Importantly, the austerity measures are not limited to decreasing public spending, but amount to a complete institutional transformation including the politics of privatization of public services, labour market deregulation, fragmentation of labour relations and erosion of the welfare state. This has devastating effects on employment and economic security such as the loss of jobs, increased precariousness and in-work poverty (Araújo and Meneses 2018). The core feature of 'austerity society' is the increasing insistence on the 'responsibilization' of individuals for their own fate in face of technocratic solutions presented as the only possible path. The shift from collective responsibility for personal well-being of vulnerable members of a political community (which informed the European Social Model[4]) to individual responsibility for one's living conditions has thickened boundary lines. Austerity policies set back redistributive justice by introducing much stricter *criteria of inclusion* and reducing universal access to public goods. This has resulted in fear and insecurity among workers as well as among professionals and people depending on care and welfare benefits (Meneses et al. 2018; Anderson and Dupont 2019; Granger 2019).

According to Fraser, injustice is ultimately about being excluded from participating as a peer in social life. Such exclusion is not accidental but results from institutionalized patterns which she defines as 'the workings of social institutions that regulate interaction according to parity-impeding cultural norms' (Fraser 2000, pp. 113–14). It may be helpful to think of these norms in terms of *ethos* that permeates both institutions and society. These institutionalized patterns constitute some categories of social actors as less than full members of society by them deviating from what is constituted as a dominant norm of 'normalcy'. Thus, the patterns place persons into a vulnerable position based on their personal features and traits. Even though a marginalized position is not restricted to people of a certain age, gender, ethnicity, race, able-bodiedness or religion, the risk of marginalization is higher for ascribed categories deviating from the 'normalcy' – that is, the able-bodied male of a specific age, religion and ethnicity. The parity-impeding values are institutionalized at various institutional sites which range from formal ones, including laws, public policies, administrative codes and professional practices, to more informal sites such as customs and social practices. Social subordination is 'an institutionalized relation' and as such, a serious violation of justice (Fraser 2000, p. 113). This mirrors Tilly's (2005) idea of 'durable inequality' as 'modes of social organization whereby bounded social groups are subject to systematic disadvantages in relation to dominant groups'. In their most stable form, these modes of social organization are tied to all kinds of group identities, including race, gender, ethnicity, religion, family line and national citizenship. Tilly explains that the reason why inequalities track group boundaries is 'social closure' – once members of a certain group attain control over an important good, they want to secure such advantage by closing its ranks for members of other groups. We will come back to this shortly.

Social closure is instantiated by two important features of the emerging 'austerity society' in Europe – the imperatives of 'deservingness' and 'reciprocity'. The 'deservingness' principle concerns a growing insistence on individuals being personally responsible for their circumstances and actions, and therefore deserving of consequences of their actions. The insistence on 'reciprocity' requires individuals who receive public goods to do something in return (for example, economically and/or socially contribute to society). In combination, these imperatives narrow down the spectrum of needs and consequently create rather strict boundary lines between deserving and undeserving citizens. The right to social housing, for instance, is limited to narrowly defined vulnerable groups (Granger 2019). To deserve social assistance, one has to prove that one is fully (not only partly) unable to work, or is ready to participate in public works, and is also expected to display a certain virtuous behaviour (Anderson and Dupont 2019). While access to public goods and services has always been conditional upon specific requirements, what an 'austerity society' changes

is that these requirements are becoming stricter and more complex. The rationale of such further restrictions is that the public goods are decreasing, which in turn necessitates decreasing the number of those who can get access to it. 'Deservingness' and 'reciprocity' move an 'austerity society' away from social citizenship and a moral imperative of collective responsibility for social cohesion, towards individual responsibility for one's own well-being (Young 2011; see also Fraser and Gordon 1995). The institutionalized patterns of subordination, however, challenge the imperative of personal responsibility at a fundamental level by showing how actions of others 'block' possibilities of our actions (Young 2011), thus preventing persons from fully developing their functionings and living lives they have reason to value (Sen 1999). In other words, under conditions of institutionalized subordination and exclusion, persons are still able to make choices, but the consequences of such choices are to an important extent attributable to persons' social and economic positions rather than to their personal actions only.

14.5 CATEGORIZATION AND DIFFERENTIATION

The previous chapters show that differentiation is operating in every aspect of social reality; it is evidential, ubiquitous, and seemingly unavoidable. If performed carefully, without prejudice and with the purpose of enhancing people's capabilities and functions, differentiation can be a valuable instrument in reaching justice in a world characterized by human diversity. For instance, in assigning home care to elderly and disabled persons, insurance companies, governments and care providers cannot avoid differentiating between the able-bodied and the less able-bodied to determine who needs what kind of support, and given the scarce resources, who will receive how much financial compensation (Anderson and Dupont 2019; Knijn 2019; see also Chapter 10). By understanding and recognizing individual capacities and meeting them, differentiation might assure that the proper means reach the people in need of them, while avoiding fraud and abuse.

The chapters show that in practice differentiation is too often based on categorization of assumed and ascribed group characteristics of persons who deviate from 'normalcy', and as such get excluded from participatory parity. The case of care exemplifies the inherently complicated relationship between redistributive, recognitive and representative justice in which two major paradigms are conflicting. The paradigm of 'independent living' is embraced and prioritized by the EU and most of the Member States as a principle of recognitive justice which meets the claims of social movements such as the Independent Living Movement, which mainly represents disabled populations. The same paradigm influenced social policies concerning elderly populations as outlined in the *Active Ageing* agenda of the EU. What is overlooked in this

agenda is that neither elderly people nor disabled persons can be categorized according to one single norm. In this case, the dominant categorization (disabled, aged) fails to differentiate among persons that legitimately have different claims, which in turn makes the provision of public goods insufficient to secure participatory parity (Knijn 2019). Moreover, independent living necessitates proper facilities and conditions in support of it, which shows that it also has an important redistributive justice dimension with regard to both those in need of care and those providing it. When it comes to the status of care providers, the European Commission (2013) inspired by the social investment paradigm (the idea that the investment in human capital should foster individual and social prosperity) addressed that issue by pleading for compensation for the working time of carers because of foregone alternative employment and reduced accrual of social protection (Knijn 2019; see also Chapter 9). Such measures can improve gender equality in care work as well as appropriate long-term care. This shows that in principle, recognitive and redistributive justice could be combined when an adequate differentiation takes place. Though in times of scarce resources, austerity measures and the lack of acknowledgement of the implications for care giving by female family members a trade-off is most likely (Knijn 2019). As to children with disabilities, Salát (2019) signals the same kind of problems. She concludes that no educational system in the countries under study fully realizes inclusive education or even sees it is possible for everyone. While all countries except Hungary maintain the possibility of sending pupils with a disability into special education, the lack of finances, resources and staff, or negative effects of outsourcing special education to the market, hamper its realization.

Hence, while differentiation might be unavoidable to do redistributive justice in heterogeneous societies, the cases of redistributing public goods to care for elderly and disabled persons, and to educate disabled children show that drawing category-based boundary lines is a complex matter due to the non-homogeneity of the categories (Buğra 2018; see also Chapter 9). Following Sen (1992) one could say that in the process of defining and providing the necessary means and conversion factors to enhance capabilities and functionings, boundary drawing appears as a complex normative mixture of expected identities and 'deservingness', getting shape in more concrete criteria with regard to various social domains. In constructing deservingness criteria of equity, needs, conditionality, sameness, attitude and/or merit/reciprocity (Miller 1999; Oorschot van 2000) are applied that define whether people will receive public support that adequately meets their needs. These criteria reshape the identities of mainly vulnerable populations by (re-)identifying older and disabled people as autonomous, and self-relying, or as family members instead of individual citizens, and when efforts to contribute to society become conditional for receiving benefits, social housing and care. Therefore,

categorizing vulnerable people and minorities goes beyond pure categorical thinking in terms of existing categories such as age, gender, race, ethnicity or able-bodiedness. Rather, it works via redefining these identities of vulnerable populations in categories of recognized deservingness by policing their needs in the context of redistributing scarce resources. Such (re)categorization of persons then makes it more difficult for the provision of public goods to secure participatory parity. In sum, misrecognition of individual differences due to inadequate categorization often results in maldistribution of resources.

14.6 CATEGORIZING FAULT LINES OF (IN)JUSTICE

According to Fraser, boundary drawing amounts to institutionalized patterns of exclusion that can be present in different social domains including institutions, public policies and social practices. The normative significance of these patterns is that they amount to the exclusion from participatory parity and as such constitute injustice. When it comes to the EU, identity-based boundary drawing at a formal, institutional level is legally allowed only to prevent discrimination. Minorities are typically legally recognized in order to compensate for misrecognition and maldistribution. According to Article 3(3) Treaty on the European Union (TEU), the Union 'shall combat social exclusion and discrimination, and shall promote social justice and protection' (TEU 2008). Given the complex legal structure of the EU, lots of legal incentives to protect minorities and vulnerable groups get lost in the process of translating the European legal standards to concrete legal entitlements of those residing in the EU, resulting in a wide gap between the original idea of justice as an equal entitlement to various rights and the daily experiences of members of these groups. In this section, we will capture this gap by categorizing the most salient fault lines of injustice, while acknowledging that these necessarily interact since humans have multiple identities manifested in different contexts and social spheres. For instance, it may appear confusing and against social expectations if the hard-working entrepreneur goes bankrupt and suddenly becomes a welfare recipient with debts, or if the construction worker becomes disabled and must ask for healthcare and income support. We will set these complications aside in order to illuminate the general boundary drawing that characterizes the European ethos.

Age-related categorization at the labour market typically exemplifies a default line of justice. Younger generations are not excluded from the labour market because of their age, they are excluded because the neo-liberal labour market offers mainly precarious jobs to newcomers, the reduction of social protection and the prioritization of economic above social rights. By consequence, younger generations are excluded from participation in permanent jobs during and after the economic crisis (Meneses et al. 2018; also Chapter

11), thus facing the 'social closure'. Tilly (1999) distinguishes two aspects of social closure: 'opportunity hoarding' which refers to denying access to the goods in question to outsiders, and 'exploitation', which means allowing access but 'only in ways that exclude out-groups from the full value added of their efforts' (Tilly, as discussed in Anderson 2010, p. 8). Tilly considers 'opportunity hoarding' not so much to be motivated by out-group antipathy to young ones, women, disabled people and migrant care workers but by in-group favouritism expressed in protecting vested interests of those already 'in'. 'Opportunity hoarding' exists not only regarding being employed, but also what kind of employment one can get. In this respect, the fundamental change taking place in the European labour market is through the introduction of 'flexicurity'. Initially, the concept combined the flexibility in the labour market with social security, but in the light of the 2008 crisis, it often omits the latter – many young people find themselves working in insecure, part-time jobs, while having very limited access, or no access at all, to income compensation (Araújo and Meneses 2018; see also Chapter 11).

Second, *ethnicity-based categorization* takes multiple forms due to national, cultural and institutionalized path dependency. This takes place despite European Conventions and Treaties as well as the case law of the European Court of Justice legally prohibiting discrimination. For instance, the concept of national minorities still defines groups of people once belonging to and still present in the previous continental empires of Austria and Turkey. In both countries the rights of recognized ethnic or religious minorities to preserve and foster their ethnicity and language is guaranteed, protected and provided for (Meier and Vivona 2018; Buğra and Akkan 2019; see also Chapter 9). Interestingly, in these countries migrants who arrive from territories beyond the borders of the former empire are not included in the concept of 'minorities'; instead, they are migrants with a much weaker citizenship status than members of the recognized national minorities. The former oversees empires such as the Netherlands, Portugal and the UK have more complicated categorizations of minorities. In addition to religious and subnational minorities, these countries harbour previously colonized oversees racial and ethnic minorities that are defined as different from natives, as in the UK and the Netherlands, or whose difference is denied, as in Portugal, despite obvious reasons for recognizing it (Anderson et al. 2018; Araújo and Brito 2018; Hiah and Knijn 2018; see also Chapter 8). Categorization of minorities by the recognition of their ethnic, religious or racial difference from the majority population pressures members of minorities to constantly prove that they deserve membership in the political community (Lepianka 2018). This raises substantive justice dilemmas about historical memorization (Akkan and Hiah 2019), educational discourses, law and practices (Lepianka 2019; Salát 2019), welfare regimes (Anderson and Dupont 2019) and voting rights (Theuns 2019). Anderson addresses this in

Chapter 8 by analysing the minority group *par excellence* – Roma. None of the studied Member States has been able to adequately include Roma as national citizens with minority rights that fit in with cultural and institutional regimes; instead they all struggle with the conflictual relationship between recognitive, redistributive and representative justice at all governmental levels, institutionalized and social practices. These are reflected in individual dilemmas of categorized versus preferred identities: educational systems systematically undervalue the capacities and cultural heritage of minority group children; welfare professionals express distrust in Roma applicants for benefits; migrant care workers are exploited; and the denial of the colonial past and suppression of oversees populations by European nation states offends fellow citizens descending from slavery and modern colonialism. All three justice principles are at stake here: redistributive justice because of the reciprocity principle that demands that contributing and receiving should go together while in practice individuals are judged according to the social perception of group behaviour, which goes hand in hand with scarce resources for maintaining minority cultural practice; recognitive justice because majority as well as minority cultures have problems with meeting universal human rights by denying diversity and pluralism or claiming exception from human rights; and representative justice because potential spokespersons fear to identify with their minority group because it might result in ostracism (Anderson and Dupont 2018; Chapter 8).

Avoiding *gender-based* categorizations has been and still is one of the more successful aims of the EU in overcoming gender inequality. For instance, equal pay for equal work, equal pensions and equal contracts were all initiated by the EU and accepted by Member States to various degrees. Nonetheless, gendered injustice still prevails. We identified five obstacles to gender justice: (1) the EU paradigm of autonomous individuals who move for employment without the burden of family life, and buy what they need on the free market; (2) the mainly soft law guaranteeing social rights fails to protect equal payment and care facilities for family members (children, frail elderly and disabled kin); (3) the undervaluation of formal regulated care work as part of service work; (4) the distinction between legally regulated public sector employment and mainly unregulated family care work; and (5) the dependency paradigm stating that autonomy implies independency from the state which goes at the cost of family independency. Hence, enduring gender justice cannot be secured by the institutionalized EU gender-equality regulations only. Just like in the case of age and disability-related injustice, it is the concept of 'dependency' as elaborated by Anderson et al. (2017; see also Chapter 10) that redefines women's identity as the criterion for social closure. The EU's gender-equality principle recognizes women as active and autonomous agents being capable of running their own life. This contributes to human dignity and women's capability to live the life they value. The effect of austerity policies, however, is the reduction of

public support and structural conditions for participatory parity. By ignoring interdependency as a cornerstone of human relations and in times of austerity, re-familialization of care dependency and flexibilization of the labour market undermines gendered justice (Meneses et al. 2018; Knijn 2019).

All these categorizations show that the European ethos is still characterized by the imperative of exclusion reinforced by the emergence of 'austerity society' and permeating both formal and informal institutions in the EU and the Member States. In reaction, positive initiatives of civil society actors take place across the EU with regard to all three dimensions of justice. Recognitive justice, for instance, has gained a lot due to the 'independent living' movement having secured the conditions for life a disabled person has a reason to value in the EU (Knijn 2019; Chapter 9). Regarding representative justice, civil society organizations (CSOs) play an important role in political representation of Roma. Anderson and Dupont point out that stigmatized identities can hamper institutionalized forms of political participation but also stimulate CSOs as non-electoral forms of representation (Anderson and Dupont 2018). While such representation cannot fully replace the electoral one, and many Roma still do not feel represented, it is one positive step towards the recognition and representation of Roma in at least some EU Member States. The situation is most grave regarding redistributive (in)justice. Despite growing awareness about injustice, it is very difficult to mobilize people to fight against it. For instance, young people became 'a very vulnerable working mass' (Meneses et al. 2018, p. 64), while the third country nationals are afraid to openly oppose the working conditions since the loss of employment would lead to losing their residency too. Mobilization against socio-economic injustice is also difficult because of the ongoing trend of 'individualizing' relations between employees and employers by limiting unionizing and decentralizing collective bargaining mechanisms. Attempts to antagonize deprived individuals one against another with regard to getting social benefits (for example, needy versus working poor) do not help either. Nonetheless, a significant mobilization against austerity measures takes place across Europe. Protestors demand a new model of democracy including the restoration of the European Social Model based on equality and solidarity. While these are justifiable demands, it seems inadequate to fight for them at national levels since their cause is global – the subordination of individual and collective rights to decent life to the imperative of economic growth that benefits a very tiny minority of the world's population (Meneses et al. 2018).

14.7 CONCLUDING REMARKS: REFINING THE THEORETICAL FRAMEWORK

We have defined the ETHOS's theoretical framework as based on the Fraserian framework as recognitive, representative and redistributive justice. All three dimensions of justice are necessary to secure 'participatory parity' – participating as a full member in the social and political life of one's society (Fraser and Honneth 2003). These ideal types represent the theoretical foundation of a non-ideal European theory of justice. The other foundation are empirical studies on the institutional regulations and practices, social relations and lived experiences of members of vulnerable groups captured by the categories of boundary drawing within the EU. These categories take place along the lines of citizenship, age, ethnicity, gender and able-ness, some of which are taken to constitute a dominant 'normalcy' in the studied societies, whereas all those that depart from such a norm along any of these lines are taken to be deviant in some sense, and as such, justifiably excluded from a particular 'inner' scope of justice. These categories interact with what we take to be the core norms of the emerging 'austerity society' in the EU – the norm of 'deservingness' and 'reciprocity'. Persons are defined as 'deserving' or 'undeserving' by virtue of sharing an identity or having particular personal traits, and by whether and what they contribute to society. This shows the fundamental contradiction in the emerging 'austerity' society – a growing insistence on personal responsibility for one's life circumstances while at the same time there are many fault lines of justice that block persons' opportunities and actions. To wit, there is an imperative that people are personally responsible for the way they live and what kind of opportunities they have at the time when so little actually depends on their actions and beliefs. This fundamental contradiction then serves as the basis for refining our preliminary ideal types of justice.

Within the Fraserian framework, the ideal types draw attention to the existence of boundary drawing as institutionalized patterns of subordination. Based on our analysis, we add that these patterns, which are especially salient in the 'austerity society', come as a result of institutionalized and social practices in the name of those embodying the 'normalcy' and deciding what recognitive, redistributive and representative justice for everyone else is. This is further complicated by the fact of the multi-layered structure of justice in the EU. While the Fraserian framework of justice does not clearly distinguish between different sites of institutionalized exclusion, our findings show that it is the EU with other supranational levels that are the most important site for recognitive justice by strongly promoting minority rights and anti-discrimination policies. At the lower level governments, however, we see processes of boundary drawing either by fault or default in which recognitive justice principles

fragment or even fade away. As to redistributive justice, there is no such clear trickling down of principles. The EU as supranational entity has competences in economic and monetary policies, while redistributive policies are reserved for the national level. Such division of competences is determined by the national governments of the Member States. Both the EU and the national governments of the Member States created a perfect vacuum of irresponsibility, in which they can blame each other for most of the perils those residing in the EU face. This suggests that Europe is characterized by justice *in default*. Justice values and norms are present in the official rhetoric, less so in practice. Given that the EU is a dynamic *sui generis* organization that constantly keeps changing, there is room for optimism that principles of justice may be actualized in practice too.[5]

NOTES

1. There is a distinction between abstractions and idealizations in the sense that the former brackets some known truths, whereas the latter makes some false assumptions about the real world. While idealizations necessarily imply abstractions, it does not hold the other way around (see O'Neill 1989, pp. 207–9).
2. To establish a connection between affectedness and recognition of the legal status of citizens further arguments are needed. First, as Fraser points out, we need the normative criterion to decide which kind of affectedness is normatively relevant. In her view, such a criterion is the 'all-subjected principle' – all those who are subjected to a given governance structure have a moral standing as subjects of justice in relation to it (2009, pp. 65–6). Second, we also need a substantive argument for why even a normatively relevant affectedness entails the entitlement to inclusion and rights of participation (see Miklosi 2012). Since this is not the place to engage with these substantive issues, we will set them aside.
3. Ferreira (2016) defines 'austerity society' as characterized by the fear as a source of legitimacy (prompted by predictions of catastrophic scenarios); the emergence of a new constellation of power that combines elected and unelected power; and the destabilization of the normative structure with the use of a right of exception.
4. The European Social Model rests on six pillars: increasing minimum working rights; universal and sustainable social protection; inclusive labour markets; strong and well-functioning social dialogue; public services; and social inclusion and social cohesion (Araújo and Meneses 2018, p. 9).
5. It is noteworthy that recently there have been some positive steps with regard to reviving the European Social Model at the EU level, such as the new Social Pillars, but it remains to be seen whether they will have any actual effect.

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15. European justice in times of the Corona crisis: some preliminary reflections

Trudie Knijn and Dorota Lepianka

15.1 REPRESENTATION, REDISTRIBUTION AND RECOGNITION: REVISED OR ACCENTUATED?

At the time we conducted our research, wrote our chapters and composed this book, the Corona virus and the pandemic it caused was far behind the horizon. Today – April 2020, when we are writing the afterword, 'old normality' has disappeared, which allows and even urges us to reflect – preliminarily – on the meaning of justice in Europe in an era where political, economic, social and cultural relations are undergoing a radical shake-up. What does this immense drama of almost 150,000 deaths in Europe only tell us about justice on the continent? Do the principles of justice that we unravelled in our ETHOS study help us understand how Europe reacts to the needs of nation states and its populations, or are new principles applied? Are the already vulnerable populations sufficiently protected or have they become even more vulnerable? Have new categories of vulnerable populations come to the fore? And are old boundary lines that define the 'ins' and 'outs' of justice sustained, or resolved? Are new lines being drawn?

As said, these are only preliminary reflections as the Corona virus continues to proliferate and its ultimate effects are not yet to be foreseen. While competing schemes of justice are continuously fought over and reformulated, the scale and the depth of the Corona crisis appears to induce European and national politicians to search for unity at a unique speed and scale. This 'closing of ranks', however relative, can be cautiously viewed as an indication that European leaders have learned from the failed, disastrous reactions to the previous crises – economic and financial. It shows as well that, at least under such extraordinary circumstances, political thinking in terms of values is not entirely dead, and that attempts to combine moral and economic reasoning,

and stepping beyond national egoism in the name of common good and future perspectives is still (or again) possible.

Of the three battlefields of justice that form the core of the concept of 'participatory parity' explored in this book and in the ETHOS research project – redistribution, recognition and representation – it is representative justice that these days appears crucial. Having a say in political decision making on the distribution of funds that are needed to rescue national economies, and inherently the economy of Europe at large, constitutes one of the main issues in question. Who is to make the decisions if not the European Central Bank that is, in principle, devoid of any political decision-making power? Is it the European Council, consisting of the heads of Member States? The European Commission? Or the European Parliament – the only European institution chosen in democratic elections? How does the unique European Union (EU) multi-level governance operate? On what grounds are decisions being made?

After a lot of deliberation and mutual insults, frequently wrapped in nationalistic framing, a political compromise has been reached on the support for Southern European countries that have been particularly strongly hit by the Corona crisis. Nonetheless, important justice-related questions remain. One could wonder, for example, if 'customary' procedures of representation should have been applied here, in the sense that national parliaments should have been consulted and/or asked for approval for the decisions made, or whether the fact that national parliaments had been only marginally involved has been a blessing for the EU as an integration project, faithful to the values of justice and solidarity. After all, one may say that compromises on representative justice have had to be made in order to protect European countries against the operations of speculative financial markets. The risk of rating agencies downgrading national economies and, by implication, increasing interest rates for state loans had to be avoided. At the same time, the clash between some countries (in this case the Netherlands and Italy) on reducing national debts in times of an all-compassing external disaster shows the risk of viewing justice principally through the lens of 'national interest' and/or what is conceived as national interest by politicians focused principally on their domestic electorate.

Representative justice in Europe – and beyond – is also at stake where autocratic leaders misuse the pandemic to strengthen their authoritarian power and to further supress the already restricted, often critical, voice of citizens, media and advocacy organizations. In two of the countries involved in our ETHOS project – Hungary, a Member State of the EU – and Turkey, a member of the Council of Europe – political leaders in power abuse the pandemic to brutally muzzle all oppositional voices. Moreover, in Turkey ten thousands of imprisoned political opponents' lives are in danger while they are still not proven guilty and are waiting for their trial.

But there is more to say on representative justice in the context of the crisis. As pointed out in some of the chapters of this volume (Chapters 8 to 11), vulnerable groups are easily forgotten; especially those in a particularly precarious situation (older citizens, care workers, minority members) hardly have a say. In the magnitude of the pandemic and efforts to combat its effects, it is the experts and politicians who determine the hierarchies of deservingness (see also Chapter 8). In the division of scarce resources (protection materials, medicines, Corona tests), the interests of the cure sector prevail above those of the care sector, often at the cost of death for many older citizens and serious health risk for care workers (Chapter 10). Similarly, voices representing refugees and/or minority members (Chapter 8), who are at a greater risk of infection and less likely to receive necessary care, are lost in the national (media) debates. Also mobile workers and people on flexible contracts, most of whom are young, find it much more difficult to have their interests represented, and to get their fair share of protection measures, than workers with permanent contracts and more labour market security (compare Chapter 11).

Regarding redistributive justice, the Corona pandemic clearly illustrates the enormous costs of the neo-liberal efforts to develop a competitive European market. It shows the disastrous effects of austerity responses to financial and economic crises, in which taxes have been used to save the 'sinners' responsible for the crises – financial actors and institutions, such as banks and their shareholders, at the cost of public services, healthcare, education, the cultural sector, and people working in these domains. Suddenly, in the face of the pandemic, it becomes clear how vital public sectors and their employees are and how neglected and undervalued they have been in an ideological attempt to economize public interest and subjugate it to the logic of the market.

Redistributive justice is also at stake in the fragmented and liberalized labour market, where social protection of workers has been systematically undermined by celebrating the 'liberation' from permanent jobs as a form of 'freedom'. The discourse and practice of flexibility (without security) now boomerangs back to hit millions of Europeans who, under the conditions of lockdown and 'social distancing' introduced to slow the rapidity of epidemic growth, lose their jobs, income, healthcare insurance, and who might have trouble paying rent in the coming months. A positive reaction of the EU on the looming economic recession is the installation of a European unemployment fund, in line with the proposal of Vandenbroucke (2020). Indeed, a deep crisis was needed to seriously consider and readily implement the idea that

> the EU should become a European Social Union, that is a union that supports the member states' welfare states in some of their key functions, on the basis of common social standards and in pursuit of upward convergence. Such a union

> would be a (selective) Support, Guide and Guarantor, both in the realm of insurance and redistribution. (Vandenbroucke 2020, p. 37)

In addition, nation states implement all kinds of compensations for companies, employees and self-employed workers, through subsidies, loans and welfare benefits, which not long ago, and under the dominant logic of neo-liberalism, was unimaginable.

Nevertheless, all those measures, however laudable, should be viewed as a reaction to the crisis caused by the Corona pandemic. Their implementation here and now does not guarantee that the maldistribution, reflected in soaring poverty, increased social insecurity and inequality within and between Member States, which for years has undermined the European Social Model, will continue to diminish after this crisis. Indeed, the state is back in, but it remains to be seen whether this could be explained as a matter of 'economizing justice' (Castro Caldas 2018; see also Chapters 4 and 11) or as a lasting reorientation on the previously common standards of distribution.

The first signs are not yet comforting; in efforts to save companies from bankruptcy, generic financial support does not – in principle – discriminate between big market players, who in the past few years have transferred millions to their already rich shareholders, evaded paying taxes and have not refrained from firing their flex-workers at the outset of the current crisis (hence, current protests against subsidizing Booking.com, KLM/Air France or Virgin Group), and small entrepreneurs, who struggle to survive and save the jobs and income of their relatively few employees. Questions arise as well about who will cover the costs of public services during and beyond the pandemic. Will banks and other financial institutions, as well as their shareholders, reconsider their greediness and, by paying their share of taxes, finally contribute to keeping the public sphere alive and healthy? Will we witness a rise of a new generation of politicians who will stand up for social services and defend their right to flourish as a vital part of a democratic social order rather than a mere economic cost? There is a lesson to be learned here. An idea of a specifically and uniquely European approach to redistributive justice and solidarity is still vivid among European citizens but it remains to be seen to what extent this idea is shared by actors who dominate our political and, especially, economic institutions.

Recognitive justice, like other aspects of 'participatory parity', touches upon Europe's normative ambitions. This volume shows that, within the EU, in policy and daily practice 'justice' often appears to be a multi-interpretable, situationally applicable instrument for identity politics and/or recognition of individual and categorical needs and rights, such as those of persons with a disability, older citizens, women, migrants and/or ethnic minorities. The Corona pandemic makes us painfully aware of the situated vulnerability of

some neglected categories of the population. Older citizens appear to be more vulnerable to the virus and among the casualties there are many people of age. However, it is also crystal clear that the increased death rate among older people is not only 'identitarian', that is, related to the age category they belong to, but also a consequence of inadequate public health policy, which fails to protect the most vulnerable. While many vulnerable elderly and/or disabled people, whether living alone or in nursing homes, depend on care services, home care providers and care institutions became the last in line for necessary protection, both for their clients and the predominantly female employees (see also Chapter 10). Under the current crises, the cross-cutting categories of gender, old age, disability and class (underpaid care workers), often discussed under the banner of 'intersectionality', become real human beings whose lives are neglected and possibly sacrificed. Issues of gender equality and gendered division of labour acquire new relevance. Working in the already undervalued and underpaid care sector, female care workers continue, mostly unprotected, to take care of elderly and/or disabled people. While their often heroic work receives a lot of appreciation and is applauded, both by the public and the politicians, very practical questions arise as to whether that appreciation will bring concrete rewards in terms of salaries, but also job security and better working conditions. Deplorable conditions in understaffed nursing homes are a consequence of public cutbacks, which disproportionally hit mostly female care workers. Public applause, however sincere, is not enough: symbolic recognition of care work as a vital profession that is instrumental to the well-being of some of the most vulnerable social groups must be coupled with redistribution and work-autonomy, which in the current crises, should translate into, for example, care workers having more of a say on the distribution of vital protection measures.

15.2 VULNERABILITY: COMMON AND CONDITIONAL

Vulnerability is a core concept in the ETHOS research and in this volume. Above, we hinted at how the crisis has hit most vulnerable groups and sectors within the political communities of the nation states and the EU at large. Equally important, however, is the commonality of vulnerabilities among the European population as well as its double character as an ontological aspect of human life and a conditional phenomenon. This double character of vulnerability, discussed in Chapters 1 and 3, has become most topical in the context of the Corona crisis. The commonality of vulnerability implies that no one can escape from being affected by the disease, whether by getting infected, by coping with the infection and its consequences among loved ones, or by being affected by the consequences of lock-downs. Living under mild or strict

lock-down conditions, dealing with insecurity about current and future income or working conditions, being estranged from affectionate bodily contact with friends and extended kin hit all. It goes for people with obesity as well as for the 'physically fit'; for the homeless as well as for the 'hard-working men and women' in so-called 'vital sectors' (healthcare, education, construction work, supermarkets, distribution centres, taxi- and bus-services, truck drivers); for flex-workers, artists and even for top managers of sectors that until very recently cherished the thought of being untouchable (such as Uber, Airbnb or temporary job agencies). The commonality of vulnerability shows its ontological character – people are inherently fragile. Greater awareness of human *inter*dependency might be then yet another lesson to be taken from the Corona crisis. Such an awareness may help to develop a model of co-existence that would form an alternative, however humble and modest in the beginning, to the neo-liberal self-centrism.

This, however, does not take away the relevance of conditionality. As discussed above (and in Chapters 1 and 3), circumstances determine to a great extent the (individual) capability to cope with vulnerabilities of whatever kind. In Chapter 3, we have quoted Mackenzie (2014, p. 7) saying that vulnerability 'may be caused or exacerbated by the personal, social, political, economic, or environmental situations of individuals or social groups'. Strikingly illustrative for that statement, in the current Corona crisis, is the ambivalent attention for (European) populations who lack citizenship of the country where they live or work. The ambivalent consequences of sedentarian as well as territorial boundary drawing (discussed in Chapters 8 and 14) become particularly apparent in the case of two groups: foreign workers and refugees, and in two respects: pragmatic and moral. First, closing European borders (for mobile workers and seasonal labourers from within and outside of Europe) hit both the (unprotected) mobile workers, who lost their income, and their employers all over Europe, who become painfully aware of the economic and social indispensability of agricultural day labourers and/or informally contracted home care workers from abroad. The crisis painfully manifests the disastrous consequence of the non-acknowledgement (and non-recognition) of foreign mobile workers as contributors to Europe's well-being and prosperity and of keeping a blind eye to the exploitive labour relations under which they worked and lived. Second, the continued negligence of refugees hits back severely on European values and human rights ideals. To leave refugees locked up, forgotten or abandoned in camps at the European borders is an absolute denial of what Europe claims to stand for. Although small steps have been taken by moving a few thousand refugees from some shabby camps on the Greek islands to some better-equipped camps on the Greek mainland, and by some EU Member States adopting parentless refugee children (with one of our ETHOS countries of investigation, the Netherlands, refusing to show this

humanitarian approach), this misery questions the centrality of justice in the moral core of Europe.

15.3 DIVERSITY AND PRAGMATISM AS CORE ISSUES OF AN EMPIRICALLY BASED THEORY OF JUSTICE IN EUROPE

What this Corona crisis and the subsequent reactions teach us is that a European theory of justice and fairness cannot reach beyond a pragmatic approach that recommends building 'a piecemeal theory of justice for particular constellations' (Van den Brink, Zala and Theuns in Chapter 12). Human and societal diversity create space for a multiplicity of human needs and desires and lead to varying, and sometimes competing, justice claims. Also, in Europe the growing social and cultural, but also ethnic and religious, diversity results in the co-existence, not always peaceful, of conflicting schemes of values and ideas of what is just and what constitutes a just society. The results of our empirical research presented in Chapters 5 to 11 show how differently the seemingly similar justice-related issues might be understood in different countries and/or by different social groups. They also show that European states differ in their approach to and protection of vulnerable groups, for example, by guaranteeing different rights and entitlements and/or putting forward different obligations as conditions for entitlements.

The complexity exposed by our empirical investigations raises serious doubts as to whether one normative framework of justice is likely to successfully account for all the institutional, social and cultural contexts that Europe is so rich in. Indeed, the fundamental message conveyed in this volume is that the development of a commonly shared monolithic European theory of justice and fairness is impossible. An alternative we propose involves developing a theory that is sensitive to particular forms and constellations of injustice that appear in concrete social contexts. This involves combining solid normative reasoning with empirical research and policy analysis in order to comprehend, as much as possible, 'why [a policy area] generates moral difficulties, and then to connect those difficulties or dilemmas with patters of philosophical reasoning and reflection' (Wolff 2011, p. 9). Importantly, such an approach would allow us to account for the role of incremental changes, gradual and sometimes relatively negligible transitions away from manifest injustice (see Chapter 2). Seen from such a perspective, and scrutinized under regular conditions, Fraser's distinction between *affirmative remedies* to injustice, which seek to rectify inequalities without radically altering the structural and cultural relations from which they are produced, and *transformative remedies*, which seek to radically reform these structures and cultures, loses its relevance. As noted by van den Brink, Zala and Theuns (Chapter 12), empirical explorations

undertaken as part of our project, and partly presented in Chapters 5 to 11, show that 'wholesale' transformative remedies to injustice are not always attainable and/or desirable. Indeed, they seem highly unlikely under the conditions of 'old normality'.

Nevertheless, as the Corona crisis shows, radical reforms that challenge structural as well as cultural relations are not only possible, but – at least under the current crises – necessary, although their long-term effects might appear dubious. Moreover, transformative politics is possible within the existing institutional structure: the liberal welfare state and mainstream multiculturalism. What the ETHOS project thus proposes is combining the best possible affirmative strategies, strategies that are open for 'second best' remedies in everyday life, inclusive and likely to impede at least some of the mechanisms that generate injustice (Chapters 13 and 14), with a more thorough analysis of structural injustices that could lead to transformative restructuring of the institutional context. If the pandemic might have a positive effect, it could be this.

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