CHAPTER I

PARAGRAPH A

The role of conflict on the institutional evolution

«In wartime it is the fathers who bury their children».

(Herodotus)

«All wars are fought for money».

(Socrates)

«In war, truth is the first victim».

(Aeschylus)

«War is the only thing in the world to take place according to established plans».

(Thucydides)

1. Introduction

The aim of this paper is to define the engine feeding the evolution of the institutional environment characterizing a specific state and political system. Here, the concept of institutions is considered following a comprehensive definition, able to include both their legal and formal aspects, and also their substantial and informal nature. This permits to consider them like the living and transforming forces constituting the social contract, able to adapt to the conditions of the social environment. The source of this mechanism of change is identified in the conflicting and interactive relations between the excluded and included groups. These relations are able to shape the structures and contents of the institutions and social contracts. In particular, the pressure on the elite to change the system structure provokes their counter-action, characterized by the alternation between
competition, cooptation and cooperation. In this framework, the concept of relative power assumes absolute relevance, because it represents the relative and interactive capacity of each group in respect to the others. To better specify this relation, it is initially relevant to define the environment where does the interactions between actors and factors happen.

In particular, two different frameworks – represented by the complexity and panarchy theory – are used. These are very useful to understand the evolutions and accumulation of hierarchies and social structures, thanks to the concepts of chaos, nonlinearity and adaptive capacity. Secondly, the agency capacity of the actors is analyzed, particularly in its interactions with the external and internal factors characterizing the system.

Thanks to this framework, we can contextualize the conflicting and interactional behaviors of the actors inside the frames of feedback mechanisms and emergent patterns. Both these perspective – defining the environment and the agency capacity of actors – are meaningful to understand the relation between conflict and institutional changes.

2. **Introduction: the role of conflict – and its threat – on the evolution of institutional structure**

This paper analyses the relation between the structure of social relations, the conflict and the institutional evolution. The goal is to understand the role of conflict – and its threat – on the evolution of institutional structure. These institutions are norms and rules coming from the consolidation of practises, habits and values acted by the social actors. They regulate the life in common of individuals, groups and organizations, defining their opportunities in the social, political, economic and judicial spheres (March and Olsen, 2006, Binmore, 2005). Binmore (2010) underlines that “*these rules of the game are to be understood as including, not only formal legal rules, but the informal social norms that govern individual behaviour and structure social interaction within the institution*”. Hence, the institutions are not characterized only by a legal conceptualization, but also by a substantial and informal components. They grow from the reciprocal games played by the people and social groups in the effort to coordinate their behaviours, and to successfully consolidate the common structures of society (Binmore, 2005). It is possible to consider the system of rules like living and transforming, shackled by adaptation, renewal and subversion. It is also possible to identify these living institutions with the basis of the social contract, its substantial, procedural, formal and informal concretization, reflecting the character of a society, in a specific time and place (Binmore, 2010, Schmitt, 1972). Following this approach, the institutions – formal and informal – and the social contract have a living and unstable
nature. They have to adapt to the changes of the social, economic, political, technological and cultural conditions characterizing the system, evolving inside a specific historical - but not mechanical - framework. Here, the concepts of violence, conflict threat and power redistribution play a relevant role.

I think this approach could be very interesting. Firstly, this perspective could help us understanding the socio-political clashes exploded – recently – in different places around the world. Therefore, this perspective could be central in the European and Italian debate: the polarization between hegemonic and excluded actors; the problems characterizing the states capacity – both for the political and administrative spheres -; the strong and negative incidence of the economic crisis; all these factors have enlarged the distance and distrust between the citizens and the democratic institutions. This distance is not an empty space, but it contains strong conflicting impulses, charged by a relative incommunicability between the citizens and political spheres. The same is almost true for other countries – like Egypt, Turkey and Brazil – where the changing forces of the development and growth have recently produced relevant social troubles and imbalances. The structural presence of uneven redistribution of resources, goods and services between the different levels and groups of the society – but also the spread of new political and economic interests and ideas - are pushing and fostering violent confrontation. Taking the forms of riots, social conflicts or civil wars, these dynamics are calling for the redefinition of the social, political and economic relations existing in these societies.

Secondly, the analysis of the role of conflict in the institutional change could help to coherently criticize the attempt – promoted by the neo-liberal theory – to neutralize the political relevance of the differences in thinking, acting and living. In the last thirty years, the elite – politicians, academic scholars, financial actors and so on – have proposed to the citizens several social, economic, political and financial reforms in institutions. These reforms have been described and defined as neutral, natural and depoliticized (Mastropaolo, 2011; Hay, 2007; Pettit, 2004; Belligni, 2005). The attempts to create a smooth world – and the concrete instruments, techniques and practices used to realize it – have been presented as technical, natural and unavoidable, through the denial of their specific political origin. To be effective, all these transformations have required the elimination of the concepts of differences and conflict, considered by Schmitt (1972) as the main sources of politics. More, their nature has been defined as absolutely undisputable. In the name of necessity, this process has been imposed on the agenda of several countries, like the only technical way to promote the business activity, the competitiveness of the system and the social wellbeing. This dynamic has been particularly based on several key words: reforms, governance, good government, accountability, austerity, efficiency of public administration, transformation of
citizens in consumers, impersonality and formality of the democratic procedures, flexibility of labour market.

In this framework, it is important to give a new centrality to the conflict, confrontation and production of differences. This permits to better disclose the myths and mythology of this narrative, opening new opportunities for the theoretical and philosophical reflection.

3. **Complexity, panarchy and institutions**

To understand the dynamics acting on the institutional evolution, it is firstly necessary to define the environment where do the different actors and factors interact. So, it is basic to quickly analyse the issue of complexity within the social systems. This subject has been drawn from the hard science - physics, biology and ecology -, but it has shown a great adaptability to other fields of study, such as the social science and the international relations. Here, also the institutional evolution is characterized by complexity, framed by the concepts of non-linearity, chaos and order (Byrne, 1998). The chaos is identified as a not-order status (and not a randomness status) preceding the creation or the rewriting of the order in a specific space-time continuum. Byrne (1998, pag 16) - describing the relation between chaos and order - underlines that “whilst ‘chaos’ in its popular usage is to be understood as a description of anti-order, to all intents and purposes as a synonym for randomness, the scientific usage is far more equivalent to not-order, and indeed sees chaos as containing and/or preceding order”. Consequently, the complex interconnections between the different factors - both internal and external - and the alternation between order and chaos produce infinite bifurcations of the history, leading the system through further equilibrium, between the several that are available[v].

This theoretical ground could be further deepened. Biggs et al. (2010), Holling (2001) and Allen and Holling (2010) have considered concepts as hierarchy, sustainability, resilience, rigidity, non-linearity, equilibrium, disequilibrium and adaptive cycles. In this analytical background, the ecological and social system - and their hierarchies - are not closed to changes, but they evolve following the panarchy theory. Holling (2001, pag 396) defines the concept of panarchy as “the representation of a hierarchy as a nested set of adaptive cycles”. In particular, the process of dynamic transformation of hierarchies - both internal (adaptive cycles) and external (accumulation of adaptive cycles) - is central. The internal dynamic is characterized by four phases: exploitation, conservation, release and reorganization. Holling (2001) tell us “the trajectory alternates between long periods of slow
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*accumulation and transformation of resources (from exploitation to conservation), with shorter periods that create opportunities for innovation (from release to reorganization)*. During the exploitation, the potential of the system – represented by wealth, social relations, culture, technology and so on – increases, paralleling the growth of efficiency and rigidity.

This moves the system to the conservation, where the vulnerability of the system (lower resilience) is higher. A threat, an accident or a spark can trigger the release of accumulated potential, creating the space for innovation and recombination of the relations which characterize the reorganization phase. Then, the innovation are tested, some fail and others survive in relation to their adaptive capacity.

The adaptive component of the system arises during the disequilibrium and innovation phases, when the system can switch to a different equilibrium, closer to its new conditions. The nature of this process – peaceful or radical – is determined by the rate of resilience and rigidity, the first supporting the incremental and the second the radical innovations. So, during an historical juncture[vi] and bifurcation, a rigid institutional system could dramatically collapse through an implosive process, while a resilient system is more able to evolve, also moving throughout troubles and clashes[vii]. In the first case, the chaotic disequilibrium will provoke the demolition of the old order and the promotion of a new one, characterized by a new set of institutions and social norms. In the second case, a resilient system have an higher capacity to progressively solve the social problems accumulating in the society, coping with them thanks to a conflicting but not destructive process. The alternation of the above mentioned phases, and the accumulation of radical or reforming evolutions, permit the progressive accumulation of hierarchies, characterizing the external dynamic. I think this model is really interesting, because combines both an elliptical dynamic – closer to the concept of historical circularity of the realistic though -, and an accumulative and evolutionary process, more in tune with the historical linearity characterizing the liberal though. Contemporary, this model and the complexity theory offer us an exceptional framework where contextualize the actions and interactions of the game actors.

4. *Actors agency, feedback and emergent patterns*

In these environment, the summa of different factors – social, political, cultural, economic, ecological or technological – interacts with the actors’ agency. This relation produces a non-
linear effect on the society and institutional evolution. To better understand it, we have to consider the action opportunities handled by the social, political and economic actors, such as groups, organizations, associations and governmental networks. Two concepts are particularly relevant: feedback mechanisms and emergent patterns.

De Landa (2000), Homer-Dixon (2002) and Klijn (2008) define as positive feedback (deviation-amplifying) the mechanisms leading to an exponential growth of the effects, and negative feedback (deviation-counteracting) those reducing or nullifying the factor’s effects. The emergent patterns surface from this process of positive or negative interactions, driven by the concrete actions of resistance or acceleration operated by the social actors. These actions are characterized by a set of strategies that are more or less clear, through repertories of performances more or less conflicting and capacity of alliances more or less defined (Tilly and Tarrow, 2008). They can be implemented by different actors, going from the groups and associations inside the civil society to the individuals, organizations, parties and corporations operating in the political and economic spheres. The second are particularly forced to act to protect the interest of their social groups, corporation or financial networks, trust and legitimacy circles and patronage affiliations. Inside these emergent patterns, new ways of political conceptualization – between conflict and cooperation -, socio-economic direction and technical and legislative solutions arise.

As mentioned before, the actions, behaviours and agency capacity of the political and social actors interact with several internal and external factors. These factors regard numerous fields, but we can consider – for example – the interference of the regional and international context; the issue of trust (Tilly, 2005; Klijn et al, 2010); the dynamics characterizing the explosion of social problems inside the communication and political arenas (Hiltgartner and Bosk, 1988); or the satisfaction of the group voracity (Lane and Tornell, 1999). But it is also particularly important to underline the results of this interaction between social, economic or governmental actors: the definition of new social practices (Bevir and Rhodes, 2005); the reduction or increase of the willingness to cooperate (Mulder et al, 2006); the transformation of the designed public policies (Klijn, 2008); or the evolution of conflicting repertories (Tilly and Tarrow, 2009). These dynamics are frequent, covering different fields of the social life. We can consider – for example – the opposition against the realization of strategic infrastructures (incinerators, TAV, highways and so on); the actions of the guilds to block the process of economic liberalization; the process of emergence and disappearance of corruption, where several actors - like judicial power, media, fractionalized political sphere, social groups, bureaucratic body - follow alternative feedback strategies.

This continue “dialogue and clash” dynamic dominates the relations between existing
Institutions, innovative thinking, public policies implementation and actor agency. It makes the creation and consolidation of the institutions – from the ideas to the institutions – similar to the process of amalgam and transformation of the sedimentary rocks (De Landa, 2001). Further and heterogeneous levels of “new materials” – cultural, technological, political, economic or social – are socially created. They progressively deposit, cement and stratify, interacting both with the existent material and the internal and external factors of complexity. To consolidate this picture, we can think to the millennial evolutions of the energetic sectors (Smil, 2010), of the languages and meanings (Focault, 1998) or of the shapes and contents of political, economic and social rights (Oestreich, 2007). They represent a perennial process of rewriting the past institutions, where the imagine – explicit or implicit – of the future institutions is shaped by the coexistence and strong interaction between the old and the new structures. In the next paragraph, I try to quickly stylize this dynamical process, which lead to the evolution of ideas into institutions.

5. The social concretization of institutions

In a simplified way, I identify this “new materials” – which could be compared to the magma spilling out from the oceanic ridge – with the ideas, theories and technological solutions, which are characterized by a political but fluid nature. These are created and elaborated inside the universities, the academic world, the think thank organizations, labour associations, labs, private or public research centres and so on. The evolutionary process is characterized by the diffusion of these ideas into the society, and their interaction with the tradition (Bevir and Rhodes, 2005), the socio-economic conditions and the social problems. This interaction leads to their transformation in social, economic, technological, productive and political practices, informal rules and specific behaviours. These intellectual and practical materials – thanks to their capacity for problem-solving and attractiveness – are then absorbed by specific groups, entering into their porous borders of values and toolboxes. More powerful are these groups, more higher is the probability that these values and solutions will become socially, technically and economically hegemonic. Once these semi-consolidated materials have conquered the political arena, the agenda setting and the problem-solving realm, they could become efficiently institutionalized. The formal institutionalization moves through the implementation of official structures, constitutions, laws, codes, norms and statutes; and also through the creation of agencies, administrative bodies or specific offices to regulate and manage an issue. This dynamic – finally – produces the consolidated structure of institutions, characterizing a specific social, political and economic contest. Evidently, the consolidation of social norms and institutions could be
operated through a non-planned action – as during a radical and break-down process -, or following a designed project. But in every case, it is important to consider the opportunity for the actors to operate their agency capacity, which could deeply modify the design of the reform, protecting interests, rents of power or also established rights (Tilly and Tarrow, 2008; Polany, 2010).

5. Institutions between conflict and cooperation

The relation between included and excluded groups produces evolutionary and emergent patterns, strongly acting on institutional shape[x]. These institutions are strongly linked to the social, political and economic balance of power between groups characterizing a society and its productive structure[xi]. Considering the analysis of the second paragraph, the institutions define who can exploit the resources of the system, and who is excluded from this exploitation. Therefore, they signal the different opportunities owned by the groups in respect to the activities of taking, dividing and elaborating the factors of production (Schmitt, 1972).

I think the division between central and peripheral groups is basic on the institutional change, because the continue confrontation between their interests is the fuel feeding the evolutionary process. Historically, these dynamics produce alternation between conditions favourable to the financial and economic interests – like during the golden age of haute finance (Polany, 2010) or the neo-liberal age (Crouch, 2012; Mastropaolo, 2011) – or more favourable to a larger set of citizens and social groups – as during the Keynesian age –[xii]. Acemoglu and Robinson (2012) – contextualizing this confrontation – use the concept of inclusive and exclusive institutions. Weirich (2011) adds another detail to this framework, underling “a society’s social contract may be disadvantageous for some of its members. Their lacking bargaining power may prevent their blocking adoption of that contract”. As we can note, the concept of relative bargaining power is basic: the insider and outsider groups are differently characterized for the relative bargaining power, and consequentially for conflicting capacity.

Firstly, I quickly define the concept of relative power. We can consider it as the capacity and the force that every group has relatively to its opponents. Higher is this relative power, higher will be the group capacity to defeat the opponents, through a conflict or an electoral competition. Basically, the relative power of the different socio-economic groups depends by four principal factors: a) income of the group, and its role in the productive processes and economic structures; b) capacity of organization, leadership and alliance; c) ideological and identity consistency; d) hegemonic and problem-solving capacity. Moving by this concept, we can identify the different conflicting strategies. We can imagine
the outsiders acting to open the political and economic arena, to gain voice in the agenda setting. This attempt is intrinsically characterized by conflict, because the goal is to increase their pay-off, reducing that of insiders and elites. The same is true for the action of the elites, characterizing the attempt to increase their wellbeing, political control and economic power. Then, the conflicting strategies – civil war or electoral competition, social disorders or popular referendum, only to quote some opportunities – are strongly related to the general context, to the structure of the opportunities, and to the nature of the political regime (autocracy or democracy, kleptocracy or military regime).

We begin with the conflict promoted by the outsider groups. Coping with these first-stage actions, the elites react considering the relative power of the outsiders. This interactive model could have three different outcomes: competition, cooptation and cooperation[13]. First, the elites and the insider groups could consider not so dangerous the threat coming from the outsiders - because their relative power is considered very low -, so maintaining a closed and extractive institutional structure. This situation is almost typical of rigid systems, where the ruling groups are not able to adapt the institutions to the necessary changes emerged from the social, economic and political environment. The conservation of the unfair balance of power could lead the outsiders on a path of violent confrontation (competition phase), which is faced by the elite through the repression. If the early repression fails, the competition between groups could totally explode, opening the opportunities for civil conflict, secessionist impulses, coup d’état, violent social disorders and zero summa games[14]. The result of this violent confrontation is strongly related to the effective actor’s capacity to mobilize resources, opportunities and alliances, and it ranges from the victory of the insiders (status quo conservation) to the success of the outsiders (radical change of institutional structures). Second, the elites could differently consider the threat coming from the outsiders, perceiving their intrinsic dangerousness. To prevent the total changes and openness of the institutional environment – limiting the transformations of the status quo -, the elite and the insiders can co-opt (cooptation phase) some fragments, groups or individuals (like big man) belonging to the outsider groups, integrating them in the ruling structure. This process immediately reduces the opportunity of violent contraposition, but it produces only a little change on the weak structure of institutions, maintaining almost unchanged the causes for the conflict. Third, the elites and the insider groups could be absolutely aware of the relative power of the outsiders, considering credible their threat and being afraid to totally lose their income and wellbeing. Now, the reaction proposed by the elite will be totally different from the other two cases, pushing the communication and cooperation between the opposite groups and supporting the “sweet” transformation of the institutional structures (cooperation phase). At the limit, the same elites and insiders can anticipate the actions of the outsiders – hence, anticipating...
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the explosion of conflict – promoting the openness of the institutional structure and relaxing the pressure accumulated in the system (North et al, 2012).

Alongside the conflicting action of the outsiders, there is also the institutional evolution led by the insider groups and elites[xv]. After the exhaustion of the complex contextual condition which have promoted and sustained a balanced inclusion of the peripheral groups in the social, economic and political system, the elite and the insider groups can try to reaffirm their power and control on the structures of society. The consolidation of the neo-liberal theory is a meaningful example of this dynamic: the reduction of the working class role following the process of deindustrialization in the Western economies; the increase of the weight of the financial markets; the persistence of structural problems in operating capacity of the administrative and bureaucratic bodies of the states and governments; and – more recently – the growth of international economic competitiveness lead by the giant economies of China, India, Brazil and others; all these factors have contributed to open relevant opportunities for the reorganization of Western societies, more in tune with the request of powerful insider groups. Their strategy is different from that of outsiders, due to their superiority in power, resources and capabilities. It could involve the strong usage of the repressive and military structures of the state to recover or enlarge the power of the elites. But it could also involve a more subtle and underhand set of actions, based on the elites’ capacity to define powerful narratives, meanings and symbols. This perspective is absolutely relevant considering the success of the neoliberal theory, which has been able to radically transform the theoretical and practical pillars of the previous order. Consider for example the redefinition of the vectorial meaning of the term “reform”: from an instrument to promote the wellbeing of citizens, it has been transformed in something that reduce it, increasing the wellbeing of elites and ruling groups[xvi]14. Despite that – and despite their strong political charge –, the reforms have been ever presented to the citizens as technical, apolitical, necessary and unavoidable instruments. Spoiled by their specific political origin, they are narrated as natural and given law of economy and markets. The same has happened – and it is strongly happening – for the concepts of governance, accountability, administrative efficiency and so on.

These concepts are able to strongly shape the implementation of public and fiscal policies characterizing the governmental actions, coercing the opportunities of these policies inside specific paths. In this perspective, these narratives have strong effects on the concrete production of public policies, so transferring their effects on the social wellbeing and balance of power between groups. I think that it is essential to break the veil of ignorance covering the political nature of this relation, so opening new opportunities for the definition of alternative solutions to the problem we are facing in these time. In the complex
world I have described the neutrality doesn’t exist, and the difference are to evaluate and not to negate.

**PARAGRAPH B**

The interdependence of justice and virtue: a Kantian approach

«The establishment of a perfect civil Constitution depends on the problem of governing the external relations among states through law».

(Immanuel Kant)

1. **Introduction**

Much work in contemporary liberal thought relies on a strict distinction between justice and virtue. In formulating the demands of these two domains (i.e. perfect duties of justice enforceable by law, and imperfect duties of virtue that, by contrast, allow the agent to freely choose the manner in which and to what degree she performs them), scholars often refer back to Kant’s distinction between duties of Right and duties of virtue. The two main contentions of the present paper however, are, first, that such a strict separation of justice from virtue is not tenable and, second, that although Kant did indeed strictly separate the sphere of Right from the sphere of virtue in *The Metaphysics of Morals*, he appeared to be aware of the problems to which such a rigid distinction could lead in some of his other works, most notably in *Toward Perpetual Peace*.

In order to make my point of the interdependence of justice and virtue (Right and virtue, in Kantian terms), I will focus on Kant’s notion of indirect ethical duties, i.e. duties of virtue to fulfill a duty of Right from the motive of duty. I will argue that indirect ethical duties is intermediate duties, on which, though they are duties of virtue, Right must rely.

Justice (or Right) merely demands the compliance of my external actions with its laws. It may enforce this compliance by means of external coercion, but it may not force me to adopt a particular maxim for acting, as that would amount to paternalism. I will argue, however, that in practice legal systems do depend on at least a majority of its subjects...
acting in accordance with their laws from the motive of duty, i.e. from respect for the law. This, however, leads to the following paradox: how can Right depend on something – i.e. its subjects acting from the motive of duty – that it may not demand?

In the following sections I will undertake the presentation and solution of this paradox in several steps. In Section II, Kant’s description of Right as the authorization to use coercion will be briefly expounded as well as the differences between Right and ethics. Next, Section III will clarify how Kant’s equation of Right with the authorization to coerce, will eventually lead to the concept of ‘strict’ Right: a legal system that could organize its coercive force in such a manner that human freedom has no choice but to obey its prescriptions. In practice, however, all legal systems do leave room to freely obey or disobey, which implies that compliance with legal norms must depend on other incentives besides coercion.

Subsequently, Section IV will demonstrate that Kant’s distinction between duties of Right and ethical duties is too rigid and that, in fact, Right depends on its subjects regularly fulfilling duties of Right from the motive of duty, i.e. as indirect duties of virtue. This will lead to the abovementioned paradox that Right depends on its addressees complying from the motive of duty, which, however, it may not demand.

Finally, Section V will turn to Toward Perpetual Peace in order to provide a solution to this paradox. There, Kant argues that the very act of living in a good Rechtsstaat develops one’s virtue by instilling respect for the law in its subjects. Therefore, Right may not demand virtue, but it can help cultivate it, thus undoing the paradox.

2. What is Right?

It becomes clear from Kant’s description of Right as “the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom” (MS 6:230) that the function of Right is to ensure equal spheres of individual freedom. The manner in which it realizes this task sets it apart from the other domain of morals: ethics (or virtue). Kant explains that all lawgiving consists of two elements: a law, which prescribes or proscribes certain actions, and an incentive, which determines our free choice in accordance with the law (MS 6:218).

Next he distinguishes ethical from juridical lawgiving. The former prescribes an action as duty and also requires the idea of duty to be the incentive for my actions. Ethical
lawgiving thus does not only prescribe external actions, it also requires us to perform the internal ‘action’ of making the idea of duty the incentive for our actions. By contrast, the incentive characteristic of juridical lawgiving is not duty, but rather external coercion. The reason for this distinction is clear: it is impossible to force someone to act from a particular incentive, which is why the only constraint possible in the case of virtue is self-constraint (Selbstzwang). Right however, in contrast to virtue, does not require us to act from a certain incentive, but only that our external actions comply with its laws. Contrary to internal motives, the external actions prescribed by Right may therefore very well be externally coerced.

Thus far we have found that the function of Right is to preserve everyone’s individual freedom in accordance with a universal law, and that the manner in which it does so is by external coercion. In §D of the introduction to the Rechtslehre, Kant justifies such a limitation of freedom – which coercion always is – by arguing that, when someone acts in a manner incompatible with the rightful freedom of another[xx], his action is deemed a hindrance to freedom and thus wrong. It follows that coercing someone to refrain from such an unlawful act would itself be lawful, since a “hindering of a hindrance to freedom” is “consistent with freedom in accordance with universal laws” (MS 6:231). In fact, in §E Kant even concludes that “Right and authorization to use coercion mean one and the same thing” (MS 6:232). Right, therefore, does not need us to act in accordance with its laws from the motive of duty, for the actions it prescribes are such that they may be coerced externally. The motive for action thus ceases to be insight into and respect for the laws – motives on which virtue must rely – and is replaced by the incentive to avoid being coerced, resulting in behavior in compliance with Right.

2. Strict Right

In §E Kant describes strict Right as the possibility of a thoroughgoing, “reciprocal use of coercion that is consistent with everyone’s freedom in accordance with universal laws” (MS 6:232). In this section he presents us with an image of Right as a fully independent realm that is “not mingled with anything ethical,” requiring “only external grounds for determining choice” (MS 6:232). Kant goes even further, arguing that his concept of strict Right, governed by a complete “reciprocal use of coercion,” is analogous to the law of the equality of action and reaction. By attempting to clarify the concept of strict Right by referring to an example from the world of science, Kant thus conjures up an image of strict Right as a system governed by laws that, by analogy to the laws of physics, are impossible to disobey.
Strict Right requires no ethical motivation whatsoever and must therefore rely solely on a thoroughgoing (durchgängig) external coercion. Whereas ethical coercion consists in constraining oneself from the idea of duty, juridical coercion is instead characterized as pathological (MS 6:219). Juridical lawgiving appeals to aversions, “for it is a lawgiving, which constrains, not an allurement, which invites” (MS 6:219). In Kant’s lectures on ethics he further describes pathological coercion as the means by which “we are trying by the idea to engender in the agent that degree of inclination [or rather aversion] of which we believe that his freedom will not have power enough to counter it” (VE 27:521). Kant here seems to imply that compliance with the law is not a matter of choice; it is rather coerced in such a manner that human freedom cannot but obey.

Though Kant has explained in §D that the limitation of freedom is justified – as it constitutes a “hindering of a hindrance to freedom” and is thus lawful[xxi] – some questions arise concerning this concept of strict Right, in which the fully reciprocal use of coercion, the threat of or actual force, is developed to a degree at which the possibility of transgression is completely excluded. Kant himself would have to admit that we have no empirical evidence that such a ‘scientific’ legal system exists or has ever existed. Furthermore, even if it could exist, it would not be desirable. A legal system in which the methods of coercion are so extensive – by means of surveillance, deterring threats, incarceration – that any transgression has been made factually impossible would seem to necessarily involve the violation of civil rights.

Kant’s concept of strict Right is indeed merely a concept. As a matter of fact, existing legal systems contain enough room for free choice to obey or disobey the law. If this is the case, then it follows that existing legal systems are dependent on other incentives than external coercion alone. I will argue that one of these, contrary to Kant’s strict distinction between Right and virtue, must be the ethical motivation of duty.

4. Duties of Right and duties of virtue: a too rigid distinction?

An actual legal system is prescriptive, but the manner in which it prescribes, differs substantially from the way ethics commands. In fact, duties of Right are distinguished from duties of virtue on three counts: (1) there is no external lawgiving for ethical duties, which is reserved for duties of Right; (2) ethical duties do not prescribe actions, like duties of Right, but rather maxims of actions; (3) from (2) it follows that ethical duties are wide, whereas duties of Right are narrow and well-defined (MS 6:410).

Given that an external lawgiving is characterized by external coercion, one can understand why Kant refuses ethics such a lawgiving. It suffices to imagine what would
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happen if, for instance, an external lawgiving would not only regulate my external actions, but also my internal motives. For if I am not only required, by law, to refrain from shoplifting, but am above that required to do so from respect for the law, it would grant the authorities the right to coerce me into adopting a particular disposition regarding the law. State coercion to perform my duties of Right from the motive of duty would obviously constitute an illegitimate, paternalistic intrusion of the State into my private affairs, which is incompatible with fundamental civil rights. For this reason, indirect ethical duties are excluded from external lawgiving.

However, the upshot of excluding indirect ethical duties from the realm of Right is that we are left with a system of Right that is meant to be completely independent from citizens’ inner motivations for complying with it. The question is whether a legal system that relies solely on the external coercion of its subjects for compliance with its laws can be expected to last. I maintain that rather every Rechtsstaat depends on its citizens being motivated to act in accordance with its laws even when the incentive characteristic of juridical lawgiving, i.e. external coercion, is absent. If all citizens would decide to not abide by the law whenever a punishment is likely to remain absent, the rule of law would not be ensured. In other words, any legal system would be in a precarious state if the majority of the people would not act in accordance with the law from the inner motivation of duty. If this is true, then it is indeed the case that Right depends on something, which it may not demand, namely compliance motivated by duty.

It seems Kant has overlooked this paradox in The Metaphysics of Morals. In his attempt to clearly distinguish Right from ethics he has not considered if and how they interrelate. As said, it is clear why he would want to prevent ethical duties from being enforced externally, but the problem remains that without citizens complying from their own free will, and not simply from fear for punishment, any juridical system remains flawed. But how can Right depend on something it may not demand (i.e. compliance from the motive of duty)? How can this paradox be resolved?

5. “Quid leges sine moribus vanae proficiunt”?

Any legal system depends on its subjects performing their duties of Right even in the absence of coercion, solely from the idea of duty. The problem is that it cannot itself bring about such virtue by means of coercion. We are thus presented a catch-22. On the one hand, if citizens act solely from the incentive of external coercion and not from respect for the law, any juridical system remains instable. For what would happen if, which is after all a conceivable possibility, the ability to coerce would (temporarily) disappear or become ineffective? On the other hand, the State cannot and may not coerce its citizens to adopt a
particular maxim. External coercion cannot bring about inner motivations and the attempt to do so is pure paternalism. We should therefore not desire to realize either of these options. Is there a way in which acting in accordance with Right from the motive of duty can be encouraged (not coerced) without sliding into paternalism?

In *Toward Perpetual Peace* Kant famously argues that even “a nation of devils,” guided solely by selfish inclinations, is capable of establishing a State (ZeF 8:366). This passage initially seems to present another example of the independence of Right and ethics, for Kant seems to argue that, with regard to the founding of a State, it is irrelevant whether or not one is a morally good human being; all that is needed is the realization that one’s own selfish incentives and those of others are to be arranged in such a manner that constant violent collisions between them – which, after all, could be disadvantageous to oneself – are avoided. However, Kant does not think that a system of Right, consisting merely in the prevention of selfish inclinations coming into conflict with one another, is the highest we can achieve. A people of devils, endowed with understanding alone, can indeed found a State, but in order to slowly work towards the higher goal of “the best constitution in accordance with laws of right” (ZeF 8:372), it is necessary that “the people gradually become susceptible to the influence of the mere idea of the authority of law” (ZeF 8:372). The idea of law, and not merely its coercive force, must influence our behavior, “just as if it possessed physical power” (ZeF 8:372, emphasis added).

The problem we faced was that, though any legal system factually depends on the good will of its subjects, it may only rightfully demand external compliance with its laws[xxiv]. In *Toward Perpetual Peace* Kant seems to have solved this problem by arguing that the very fact of living in a *Rechtsstaat* profoundly influences not only our external behavior, but also our internal motives for that behavior. The maxim to act from respect for the law, which is crucial for any legal system, is cultivated by the rule of law itself. By preventing “the outbreak of unlawful inclinations [which is the work of Right] the development of the moral predisposition to immediate respect for right is actually greatly facilitated” (ZeF 8:376, emphasis added).

Kant recognizes that justice also requires a good disposition on the part of agents. This good disposition however, which is a matter of virtue, comes about by living under just institutions. Justice thus remains primary with respect to virtue[xxv], which it cultivates: “it is not the case that a good state constitution is to be expected from inner morality; on the contrary, the good moral education of a people is to be expected from a good state constitution” (ZeF 8:366). A morally educated people can, in turn, legislate better, resulting in a constitutional State that moves ever closer to the desired end, namely “the best constitution in accordance with laws of right” (ZEF 8:372). This improved constitutional
State, in turn, can ameliorate its people’s moral education even further, resulting in that people improving their State further still, and so on. This exchange between the objective order – the *Rechtsstaat* – and the subjective ethical development of the people is Kant’s answer to the problem that confronted us in *The Metaphysics of Morals*. Justice may not *demand* that we act in accordance with its laws from the motive of duty, but a good legal system can *cultivate* in us a respect for the law. This *Rechtsachtung* can ensure we obey the law even when external coercion is absent. The paradox thus disappears.

**PARAGRAPH C**

**Neo-Kantian epistemological assumptions**

«*Our policy is to foment wars, but by conducting Peace Conferences*».

(Mayer Amschel Rothschild)

1. **Introduction: form Kant to Kelsen**

In his essay *Das Problem der Souveränität und die Theorie des Völkerrechts*, written during the First World War and published in 1920, Kelsen tackled for the first time the theme of the nature and functions of the international legal system. With undoubted originality and impressive theoretical development, he puts forward a ‘monist’ view in opposition to the theories of the primacy of state law and of the pluralism on a parity basis of sources of law. For Kelsen there exists only one legal system, which includes in its single normative hierarchy both domestic and international law.

The starting point is radical, in that the premises Kelsen takes have their roots in general epistemology. Kelsen adopts the theory of knowledge and the philosophy of science developed by the Marburg school, deducing from them, following the teaching of Rudolf Stammler, the central assumptions of his theory of law. Hermann Cohen’s neo-Kantian Platonism instilled in him an almost obsessive methodological concern: to eliminate from the science of law all subjective elements and make it a unitary, objective and therefore ‘pure’ knowledge. The pureness of knowledge – as Cohen had maintained and Kelsen repeated – is nothing other than its ‘unity’ according to the model of the deductive sciences. Logico-mathematical knowledge, by contrast with the empirical disciplines that study
natural phenomena, is autonomous in object and method\[xxix\]. It is, moreover, transcendental knowledge in the Kantian sense\[xxx\], i.e., `original’ and valid in itself, independently of any reference whatever to content, reality or praxis\[xxxi\].

The unity and objectivity of the logico-mathematical method requires the internal unification of each cognitive sphere, including that of the `ought’. For Cohen and for Kelsen, the universe of the `ought’ – including the realms of law and the state – is inconceivable without reference to the logical idea of `unity’: here too ‘the unity of the viewpoint of knowledge imperatively requires a monist conception’\[xxxii\]. In this case the unity is represented by mankind as a whole, and it is only here that, according to Kant’s teaching, the individual finds meaning and fulfilment.

The unitary nature of the legal universe (and the primacy within it of the international law) is for Kelsen an `epistemological hypothesis’ which corresponds to a very general option supporting the objectivity of knowledge: it presupposes a `universal objective reason’ and an `objectivist world view’. In this epistemology of the unity and objectivity of the science of law, the dimension of state subjectivity, and even the individual and his or her fundamental rights – in a paradoxical equation of the individualism of states with the individualism of individuals – are subordinated to the objectivity of the universal legal system. For Kelsen “the subjects who know and will are really only ephemeral and temporary phenomenal forms, the spirits of which are co-ordinated and related only insofar as they are integral parts of the universal world spirit, the knowing reason of which is merely an emanation of the supreme universal reason. For objectivism the individual is a mere appearance. And the legal theory that takes the objectivity of law to its ultimate consequences and therefore affirms the primacy of international law, must not only remove the idea that individual state subjects are definitive and supreme entities, but ultimately must, to be consistent, reduce the `physical’ person too – the `natural’ legal subject – to its substrate, that is, to an element of the objective legal system”\[xxxi\].

On the contrary, maintains Kelsen, the subjectivism and cognitive relativism that inspire the thesis of the primacy of state sovereignty lead not only to a logic of `pure power’ in international relations, but, still more, to the denial of law and of the possibility of legal science\[xxxiv\].

Kelsen admits that the acceptance or rejection of these epistemological hypotheses are, in principle, the object of an evaluative choice involving alternative world views\[xxxv\]. Yet he nonetheless maintains that the primacy of international law is imposed by logical and conceptual (`normological’) requirements internal to the scientific, that is unitary and objective, interpretation of law: it is a hypothesis that `must be accepted if one intends to
interpret social relations as legal relations.’[xxxvi] Indeed, maintains Kelsen, ‘the binding nature of law and its entire existence lie in the objectivity of its validity.’[xxxvii]

The `monist' hypothesis of the unity of law and the primacy of the international legal system is inseparable from a series of collateral assumptions that Kelsen’s construction has recourse to. It is in any case typical of Kelsen’s style of thought to develop systematically all possible implications of the theory’s central hypotheses. In particular, it is clear that Kelsen cannot maintain the primacy of international law without committing himself to maintaining its juridical nature too. He must accordingly take a stance against the argument, going back to John Austin, which attributes to the international normative system the nature of a sort of `positive morality', rather than that of a legal system in a strict sense. As we know, doubts as to the legal nature of the international normative system have mostly been raised by pointing to the lack at the international level of sanctioning institutions or instruments, or to the decentralized, fragmentary and ineffectual nature of those which do exist[xxxix].

2. On “world citizenship” and the “League”: a Kelsen utopia?

In *Peace through Law* Kelsen, as is well known, sets forth a complete legal-institutional strategy to pursue a stable and universal peace among nations[xli]. Kelsen borrows from Kant both the ideal of perpetual peace and the federalist model, as well as the idea of a *Weltbürgerrecht*, a `world citizenship' which includes as its subjects all the members of the human species[xlii]. According to Kelsen, the royal road to achieving the aim of peace is the union of all states (or the greatest possible number of them) in a world federal state[xliii]. But to be a realist, this objective must be viewed as the outcome of a long historical process. It is only through numerous intermediate stages and on the basis of a conscious ideological, political and educational commitment that it is possible to achieve an attenuation of national feelings and a levelling out of cultural differences between the various countries[xliii]. Although it is Utopian to think of the goal of the world state as immediately possible[xliv], Kelsen declares, to create, once the war is over, a ‘Permanent League for the Maintenance of Peace’ whose members will be, first and foremost, the victor powers, including the Soviet Union[xlv].

Kelsen elaborates the project for the `League’ by incorporating some substantial innovations in the old League of Nations model. These give a central role to judicial functions by comparison with those of government or legislation. The failure of the League of Nations, Kelsen maintains, is due to the very fact that the centre of its operations was not the Court of Justice but the Council, that is, a sort of international government. This was a `fatal error of design’ since the most serious lacuna in international law is the very absence of a judicial authority. Failing this higher authority, every state has *de facto* competence to
decide who is in breach of international law and to make recourse to war or reprisals against those presumed in breach of international law[xlvi].

According to Kelsen, there was no reason to fear that the Great Powers, once the Covenant was signed, would not respect the Court’s decisions or assist it in enforcing its sentences by means of military force. Nor did it make much sense to maintain that this would amount to ratifying at legal level their political and military hegemony. In fact, the Great Powers would make themselves the guarantors of international law: they would be ‘the power behind the law’[xlvii]. By accepting the rules of the Covenant and ensuring their observation the Great Powers would commit themselves to exercising their inevitable superiority within the conventions of international law rather than in arbitrary fashion[xlviii].

3. Judicial cosmopolitanism?

One might even surmise that Kelsen’s cosmopolitanism[xlix], taken together with the proposal of the medieval doctrine of the iustum bellum and the idea of a court of justice with the power to resolve military disputes between states, evokes the image of the respublica christiana, with at its centre the undisputed spiritual and legal auctoritas of the Roman Papacy. But apart from this anachronistic aspect, Kelsen’s judicial pacifism seems to date to have been challenged in its very aspiration to present itself as an innovative and at the same time realist proposal. The bitterness with which Kelsen first denounced the partiality of the Nuremberg Tribunal[l] and then criticized the excessive political and military power granted by the United Nations Charter to the Security Council[li] is a pointer to the impracticability of Kelsen’s judicial pacifism, to its illusory nature. Kelsen's disappointment is the proof that his distinction between ‘judicial’ pacifism and ‘governmental’ pacifism is of little significance.

On the other hand, it is clear that an international court, in order to secure enforcement of its own verdicts without recourse to the military force of the Great Powers (or even against them), would have to have extremely great power at hand: it would itself have to be a (nuclear) superpower or the judicial organ of a (nuclear) superpower, endowed with overwhelming force by comparison with the other Great Powers. The consequences this would have in terms of impartiality of its verdicts are easy to conjecture. It need scarcely be added that the concentration of political and military power in the hands of an international institution – whether governmental or judicial – amounts to concentration in it of the ius ad bellum that has been taken away from nation-states. Any sort of ‘police action’ carried out by a supranational authority holding the world monopoly of force is inevitably destined to take on the more classic outlines of war, as since proved by the 1991 Gulf
4. Hart and his concept of international law: “Is international law really law?”

The question “Is international law really law?” has not proved troublesome, according to H. L. A. Hart, simply because “a trivial question about the meaning of words has been mistaken for a serious question about the nature of things.” His examination of this problem in *The Concept of Law* deserves a greater measure of critical scrutiny than it has received, partly because of the increasing recognition that his book is destined to become a milestone in jurisprudence and partly because of the way in which he reaches a generally acceptable conclusion. Unlike his predecessor Austin’s claim that international law was merely positive morality, Hart defends international law in Bentham’s terms as “sufficiently analogous” to municipal law. It is important to see in what way this analogy is viewed by Professor Hart in order to determine whether the reasoning he offers is too high a price to pay for accepting a neo-positivist into the circle of those who hold that international law is really law.

Hart’s argument deals with two principal sources of doubt arising from the claim that international law is somehow less real than municipal law. The first is easily dealt with: how international law can be binding upon sovereign states. At an early stage in his book Hart disclaims the usefulness of “sovereignty” in describing any legal system. When he turns to international law, he adds the further argument that “sovereign” means no more than “independent.” Thus we must look to the rules of international law to see just how far this independence extends. The second doubt is how international law can, in the absence of organized international sanctions, be binding in the same sense as ordinary municipal law. Hart argues that, although in any legal system obligation is generally congruent with a likelihood of sanctions for disobedience, there is no necessary relation between the two. Nor are sanctions “necessary” to a legal system, for while they may be used in municipal law against an expected minority of malefactors without too much risk, in international law sanctions may lead to widespread and self-defeating international strife.

Whatever differences exist do not overcome the fact that international law is thought and spoken of as obligatory, that it gives rise to claims and admissions couched in legal terms, and that when rules of international law are disregarded, states attempt to show that the facts are not as claimed (or, it may be added, that the rules do not apply to the alleged facts), rather than that the rules are not binding. Thus, summarized, Hart’s position appears to be one with which few would substantially disagree. Nevertheless each of his arguments entails a line of reasoning which may lead to undesirable implications for international law.
In his first line of argument, Hart finds “sovereignty” unnecessary to neo-positivism because there is a more illuminating tool of analysis which he labels the “rule of recognition.” By this he means the rule or rules in a society which confer power upon lawmakers. This rule makes it possible to identify sources of law. The rule of recognition is more fundamental than the notion of sovereignty since it tells who the sovereign is and how his power can be transferred. Yet in his consideration of international law, Professor Hart argues that there is no unifying rule of recognition specifying “sources” of law and providing general criteria for the identification of its rules. This argument runs parallel to his view that there is no proper sense of “sovereignty” in international law other than “independence.” But if international law lacks a rule of recognition, how can it still be termed “law”? Hart’s answer appears to be that international law is still primitive: it is a set of rules, not a system. Yet it is no less “law” since there is a great range of principles, concepts and methods which are common to both municipal and international law and which make a lawyer’s technique freely transferable from one to the other. Perhaps, Hart adds, if multilateral treaties were to be generally recognized as binding upon states that are not parties to them, such treaties would become legislative enactments and thus international law would be provided with a distinctive criterion of validity for its rules.

The advent of such a rule of recognition would lay to rest the skeptic’s last doubts that international law is really law. This Hart’s argument is disturbing in that international law becomes law at the price of conceding that it is a primitive kind of law lacking in “rules of recognition.” His conclusion will certainly be challenged by those who agree with his analysis of rules of recognition but consider that they are more fundamental than he does. More significantly, Hart’s argument may suggest that international law is basically incomplete and thus deserving of less respect on the part of states than ordinary municipal law. A closer look at the idea of rules of recognition is therefore in order. When does the rule of recognition arise which transforms a primitive society into a modern legal system? How does it arise? Once it has arisen, can it be revoked? Hart does not appear to give a satisfactory answer to these questions, which are analogous to questions one might ask about a theory of sovereignty. Further, how does the rule of recognition cope with the possibility of an abuse of authority on the part of the lawmakers? Hart’s answer to this appears to be that the authority conferred by the rule cannot be withdrawn even if the rule is abused. But if this is true, it would not take long for a legislator to change or manipulate the rules of recognition at whim.

Additionally, as Fuller points out, Hart seems saddled with the necessity of excluding from a rule of recognition any express or tacit provision to the effect that the authority it confers can be withdrawn for abuses of it, such a provision might seem to impose a duty
Pacta servanda sunt? Jus post-bellum and transitional (in)justice in post-war and in post-authoritarian regime context

upon the legislator – an idea contrary to Hart’s definition of the rule of recognition as solely a power-conferring rule which cannot give rise to duties.[lvii]The difficulty with the idea of a rule of recognition is that it mistakenly tries to account for sociological fact (how and why people obey laws) by the use of legal concepts which necessarily arise after such fact. This point is easily seen in international law. The practice of states which gives rise to rules of international law often reflects shared attitudes about what international law ought to be. States are aware that their actions have legal consequences – that their conduct is the raw material of custom and precedent – within a system in which it is generally accepted that their actions ought to have legal consequences. Thus there is an interrelation between law-formation and law-interpretation; the “rules of recognition” of international law, as it were, are a product of the practice of states. Why this has come about is a matter of sociology, but there is no doubt that it does occur. Hart’s own example of multilateral treaties provides a good illustration. His argument is that when multilateral treaties become generally accepted as binding upon nonparties, they will become legislative enactments and thus international law will finally have a rule of recognition. But this argument betrays a longing for a legislative system similar to that in municipal law despite Hart’s insistence that international law is “law.”

How can it be assumed that the extension of rules contained in multilateral conventions to non-parties will necessarily become a sort of “legislation?” These treaties might, on the contrary, be viewed as evidence of custom to be weighed in the balance with other evidence of usage becoming customary obligation. The treaties might be given weight according to the number of states which have ratified each convention, an idea wholly at variance with municipal legislation. But quite apart from these objections, it is apparent that if treaties become a form of international legislation, they will have done so by the operation of the practice of states hardening into law. State practice may accept a form of international legislation or it may not, but the entire legal system is not fundamentally altered thereby. Assigning international legislative consequences to multilateral conventions may be a step in the direction of simplicity, but surely cannot be held to be the revolution which transforms primitive international law into a complex system of modern law. In his second argument that international law is “binding” without organized sanctions, Hart uses the same reasoning to read out of international law any necessary connection with morality per se or with morality induced by sanctions. In addition he uses the conclusion that international law is really law to exclude the classification of international law as “morality” in any normal sense of that word.

Although neither of these arguments separating law and morality appears logically compelled by his main arguments on international law, it is nevertheless significant that
Hart has made them. They tie in with his general thesis that rules of law are often morally indifferent but are no less rules of law. While it is true that at least some rules of law in most legal systems may be morally indifferent, to emphasize this too much is to underestimate the contribution of natural law to international law or to misinterpret some of the rules deriving from natural law. Thus Hart rejects the views of Brierly and Lauterpacht that moral obligation is a foundation of international law. Yet to reject this learning may be to discard much of the structure that is common to international law and to classic theories of natural law. Two brief examples may be cited: first, it is possible to argue that the prohibition against unjust wars found in Grotius and many of his contemporaries has persisted as a rule which requires by its own terms a moral or natural-law interpretation. Even in the era of the United Nations there may still be a just war fought solely for self-defense against an armed attack or fought by the international community acting through appropriate United Nations organs against a state which has caused a threat to the peace. If in years to come the idea of threat to the peace is enlarged to include such actions as violation of an arms control treaty or even severe violations of human rights law, natural law and morality will have to be taken into account in determining whether the international community is authorized to take action. Second, the rule of pacta sunt servanda cannot always be satisfactorily applied without reference to its moral purpose. Hart suggests that a state may adhere to an onerous treaty because of a long-term interest in preserving confidence in treaties or because it considers that, having received the benefits of a treaty, it is likewise obliged to accept its present burdens. Yet such motivation – which may indeed explain the not quite analogous municipal law contract – is no help in assessing a claim of clausula rebus sic stantibus.

But attention to the substance of morality inherent in a prior promise may, in some cases where the circumstances have radically changed, indicate that the prior promise is no longer substantively applicable and that it would be unjust to insist upon strict compliance. One might tentatively conclude that the attempt to apply a positivist Occam’s razor to morality or natural law in international law may lead to considerable distortion in its interpretation.

5. **How war has changed nowadays: the human factor**

The just war tradition is comprised of *jus ad bellum*, which governs the decision to go to war, and *jus in bello*, which regulates the conduct of war. This has been the standard used by moral philosophers to examine the use of force in an international context. There exist significant disagreements within the just war tradition regarding the correct
interpretations of just war theory, for example, revisionist/traditionalist debate and so on. To avoid unnecessary confusion, my paper assumes a defence of the collective approach in war has already been given, i.e. the traditionalist reading of the tradition.

This allows me to make two claims which are relevant to this structure. First, the ethics of war is, indeed, *sui generis* and, contra revisionists, cannot be governed by any accounts of individual defensive ethics. Second, if war and personal self-defence are governed by different set of rules then it’s possible, and I shall argue necessary, that we further elaborate on the ethics of war. To this end, I explore a conceptually different form of force, or more specifically the way in which military force is used, in modern warfare and assess whether this has any implications for the Just War paradigm\[lx\]. I want to talk about ‘force short of war’/vis in this paper; what it is and whether, and how, it should be considered a distinct category from acts of war.

Wars are fought by people so it’s only logical that our discussion begins with the agents of war. There are various ways in which this issue can be unpacked but I will limit the scope of this exchange to combatants and non-combatants only.

The risk to civilians in modern warfare is heightened by the rise of non-state actors in that non-state actors make it harder to distinguish legitimate targets from illegitimate ones. To be clear, the law of armed conflict requires combatants to wear proper uniform and insignia to separate them from civilians\[lxii\]. Non-state actors, however, do not respect this. They even ignore it and use it to their own advantage. They mix in with the civilian population, dress as civilians, make no effort to distinguish themselves from others. This creates confusion for the warring parties to separate legitimate targets from civilians\[lxii\]. In response to this, the U.S. has defined *combatants* as ‘all military-age males in the strike zone, unless there is explicit intelligence posthumously proving them innocent’ \[lxiii\].

This definition of combatant is clearly troubling for several reasons. First, this presumes any targets who fit the profile are legitimate targets. But any males over the age of 16 in Yemen cannot be automatically assumed to be combatants, any more than any males over 16 year-old in Detroit are in the U.S. military. Second, this undermines the principle of discrimination. The job of soldiers on the field is to carefully distinguish combatants from non-combatants before they engage and only combatants can then be targeted. This definition of combatant runs the danger of turning the discrimination assessment from one of *ex ante* to one of *ex post*.

Furthermore, there is the question of how to classify these non-state actors. In other words, are non-state actors merely criminals, albeit their crimes are much worse than
robbing a bank or even homicide? Or are they (illegal) combatants? If they are criminals, they should be treated accordingly. They should be arrested, given a fair trial and, if guilty, given an appropriate punishment. This is how criminals ought to be treated in a just society. This view is referred to as the ‘policing paradigm’. Kenneth Roth, a U.S. attorney and executive director of “Human Rights Watch”, is a supporter of this view. He argues that the so-called *War on Terror* is not a real war and, accordingly, the U.S. criminal law should be sufficient for dealing with terrorists (Roth, quoted in Wedgwood 2004)[lxiv]. On the contrary, others such as Ruth Wedgwood (2004) oppose this view[lxv]. The main argument is that the policing paradigm cannot be applied to most, if not all, terrorists since these individuals operate in areas where the rule of law is often non-existent because the hosting states are either unable or unwilling to apply it. If this is the case, non-state actors should be regarded as combatants and, therefore, subject to the *in bello* rules[lxvi].

Thus, the reality of modern conflict is such that on both an epistemic and conceptual levels it is becoming increasingly difficult to identify legitimate targets. It is epistemic because non-state actors readily eschew the legal norms[lxvii] that would help distinguishing combatants from non-combatants. It is conceptual because the majority of non-state actors fall in the moral grey zone between criminality and warring belligerent. As the human element of war changes, the weapons used to fight also undergoes some transformations. This will be the focus just of the next lines.

6. The weapons

Drones[lxviii] proliferated under President Obama. The “Bureau of Investigative Journalism” reports that only 11 drone strikes in Pakistan were authorised under President Bush (2014). This rose to 413 drone strikes under President Obama[lxix]. The appeal of drones can, in part, be explained by their ability to be deployed for highly targeted and localised missions. This was a point raised by the ex-CIA chief John Brennan when he stated that drones can better adhere to the principles of discrimination and proportionality[lxx]. Brennan’s point is drones can be used in ways that minimise the risks to non-combatants due to their use of guided ordnance and ability to loiter over the intended targets for a long time before striking.

This notion, however, is disputable. Brunstetter and Braun, recently[lxxi], contend that while it may be true a turn to drones has reduced the number of civilian casualties, new weapons also make the use of force easier for states with the technology to deploy such weapons. The reason for this is there is virtually no risk to the drone operators. As such, drones enable governments to decrease the risk to their own soldiers. So, although each individual drone strike poses less damage to civilians than conventional weapons[lxxii],
states, overall, are tempted to enact more drone strikes, meaning the overall risk posed to civilians may be higher in the long run. In addition, the simplicity with which drones can be deployed runs the danger of political leaders foregoing other non-violent measures to adopt a policy of preventive strike. This results in the blurring roles of the principles of just cause and last resort.

To quickly summarise, the implications for warfare with the changes in the belligerents and the weapons of war are crucial in the sense that they have transformed modern warfare. The battlefield is undefined with no clearly designated zones where combat takes place and ones where civilians can find refuge. New weapons also make the use of force more accessible, particularly to strong states. This invites questions regarding the applicability of *jus ad bellum* and *jus in bello* vis-à-vis modern warfare.

Michael Walzer believes that the reality of modern warfare warrants a change in the way in which we morally think about war. He proposes we should think of *vis* actions as very different from actual warfare, even though they both involve the use of force. Walzer derived this by looking at the containment regime in Iraq from 1991 to the Second Gulf War. The containment had three elements: 1) the first was an embargo intended to prevent the importation of arms; 2) the second was an inspection system organised by the U.N. to block the domestic development of weapons of mass destruction; 3) the third was the establishment of no-fly zones in the northern and southern parts of the country. I give a definition of *vis* actions in the next lines and then proceed to separate *vis* from *bellum*.

**7. Definition and Vis/Bellum distinction**

“Vis actions” can be defined as: the use of kinetic military force to achieve a clearly defined objective. *Vis* actions are often targeted and localised in nature. Both states and/or non-state actors can deploy forces that can be considered as *vis*.

The use of military force can be precise partly because the overall aim of the operation is clearly defined at the outset. For example, *Operation Neptune Spear* to kill Osama bin Laden was executed with a team of 23 U.S Navy SEALs was over in just under forty minutes. *Operation Deliberate Force* – NATO first air campaign conducted over Bosnia in 1995 lasted two weeks and achieved its goal of protecting U.N. – designated safe zones for refugees in Bosnia. In practice, this means that *vis* can avoid the danger of mission creep – when initial military successes pave the way for more ambitious goals to be achieved.
I think this is an advantage of *vis*, namely it is, in theory at least, easy to contain and, with due cautions, have a low probability of escalation. *Vis*, Walzer argues, lack the unpredictability and often catastrophic consequences of war. They are, therefore, easier to justify than, say, a full scale attack (2006).

I acknowledge here that the definition of *vis* that I just provided is quite vague. The reason is that *vis*, it seems to me, is comprised of a range of different scenarios from quick hostage rescue to lengthier humanitarian intervention. As such, a more concrete and rigid definition of *vim* is difficult to formulate.

So how do *vis* actions differ to *bellum* actions? I propose three criteria: 1) degree of force; 2) time of operation and 3) space.

A feature in the limited literature on *vis* is that *vis* is defined negatively, that is in the absence of war. *Vis* actions are discerned from *bellum* by categorising the latter as ‘full scale’, ‘full blown’, ‘large scale’. These qualifiers seem to suggest that the distinction between the two is really ‘large scale conflicts’ – wars - and ‘not-so-large-scale conflicts’ – *vis*. I certainly think that the quantum of force plays a role in the *vis/bellum* distinction. It is intuitively implausible to think that *Operation Neptune Spears* is of the same spectrum as the Korean War. This is, as Walzer argues, a logical deduction which one arrives at by comparing the two cases. But, as Enemark [lxxix] convincingly puts, ‘for *vis* to be meaningfully distinct from *bellum*, such that *jus ad vim* can have practical purchase as a moral framework when *jus ad bellum* cannot, there has to be more to the story than quantum of force alone’. To bolster the distinction, I propose two other criteria: 1) time of operation and 2) space.

The Clausewitzian conception of war [lxxx] as not an end in itself but a means to a political end explicitly implies that war is fought to bring about an end. This idea is also implicated in the just war tradition in the doctrine of *jus post bellum* which deals with the just termination of war and facilitates the transition of society back to a peaceful order. In short, war ends when one side achieves victory over the other or, in some instances, stalemate on the battlefield leads to the termination of hostile activities on all sides, for example, the Korean War. War is, as Coady observes, political violence [lxxxi]. Fighting is never for fighting sake but, as instead, a resort to violence by one side to continue the pursuit of a political objective that cannot be, or wouldn’t be, settled through other peaceful means. It is then possible to contemplate of war in a temporal sense. Of course, war is not always fought continuously. There are moments during the course of fighting when hostilities would cease, either through a mutual agreement (e.g. ceasefire) or for some other tactical reasons. The point remains, however, that war has a beginning phase and an ending
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phase. The use of force is contained within this timeframe.

When vis is assessed temporally, it appears that similar temporal component is difficult to locate. In fact, the ending phase of certain vis actions cannot be pinpointed. Take, for example, the U.S. drone programme. The programme is nearing its 15th year in running with no end date in sight. The programme seems to have been broadened, as is evident by the increase of drone strikes year-on-year. A possible practical explanation for this is the concept of winning has changed. Here, the changing nature of threat, non-state actors in this case, means that the struggle is now perpetual. The drone programme is part of the ongoing War on Terror waged by the U.S. and allies after the 9/11 attack. However, a question which is asked as often as it is being avoided is: what does a victory in this War on Terror look like? Indeed, when al-Qaeda and Taliban were showing signs of retreat around the year 2010, ISIL cropped up and controlled vast territory in both Iraq and Syria. Now that ISIL is losing the vast majority of its strongholds like Mosul and Raqqa, the Taliban is resurging in Afghanistan (some estimate they control or contest as much as 45% of Afghanistan), al-Qaeda is gaining ground in Yemen, Libya and pockets inside Syria and Iraq. Not to mention smaller, less well-known but equally effective and dangerous groups such as al-Nusra Front. Consequently, vis can commit the users to an open-ended timeline which force is used.

I will now turn to discuss the space in which vis takes place, or the theatre of vis and how it differs from war. The Meriam-Webster dictionary defines battlefield as ‘a place where a battle is fought or an area of conflict’. This separates areas where active conflict takes place from where it does not. This was true for the Second World War with Europe, the Pacific islands, Northern China as the battlefields. This was also true for the Vietnam War with actions took place mainly in South Vietnam. Traditional wars are confined within a fixed physical space, usually within the borders of the country where the fighting takes place. By contrast, vis actions are not bound by the physical constraint of border. Vis is used in countries which are not in direct conflict with the user. The reason for this is that more often than not, those at the receiving end, namely non-state actors, are not bound by any specific geographical constraints. They move freely between countries, which is in part due to the lack of the rule of law in areas where they operate.

We can see the unrestricted battlefield of force short of war in Operation Neptune Spear. In legal terms, the U.S. is not at war with Pakistan. That is to say that the U.S. has no legal basis upon which it can justify using force within Pakistani sovereignty. In reality, however, there have been numerous occasions in which the U.S. appears to use deadly force to pursue individuals or group of individuals within the border of Pakistan. These attacks are often tacitly approved by the Pakistani government. Operation Neptune Spear, however,
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was not one such occasion. The Pakistani government was kept in the dark throughout the entire time which the operation happened and was only informed of it ex post facto.

*Operation Neptune Spear* is not the only case in which the battlefield of *vis* is difficult to pinpoint. It exemplifies the operational logic behind *vis*, namely that its battle space is rather seamless. This resembles what Noam Lubell[1xxiv] refers to as ‘the global battlefield whereby the entire planet is subject to the application of the laws of armed conflict and the consequences that flow from it’. The point here is that recent inventions of weapons such as drones and cruise missiles etc. and the increased role of non-state actors in modern day conflicts have essentially made it a reality that force can be used anywhere at any time.

8. **Between war and “juridical reasons of pacifism”**

In the last twenty years the war has (re)become a phenomenon of ordinary administration so much that it no longer requires too many efforts in the invention of new onomastic acrobatics to hide it as something different from what it really is[1xxxv]. In such a context, we can doubt that the publication of the (Italian) translation of a work such as *Law and Peace in the international relations* by H. Kelsen, of his *Holmes Lectures* held in 1940-1941 as soon as he emigrated to the United States, can really contribute to drawing attention (as his translator C. Nitsch suggests in his introductory essay and) on the terms in which the law is or can be a tool for peacekeeping, and, in particular, on the terms in which, independently of those used by Kelsen himself, it is still possible, today, to claim and defend his assumption of “peace through law”.

Nevertheless, if not to a reflection on the “juridical reasons of pacifism” which compares Kelsen’s arguments and proposals with the arguments and proposals of philosophers, jurists and political scientists that, like for example N. Bobbio, J. Habermas, L. Ferrajoli, A. Cassese, R. Falk, E. Garzón Valdés have suggested, as the case may be, a reformulation, a correction, an integration or a development, in the hope that the translation of this work contribute at least, and this would certainly be an important scientific result, to draw attention to an aspect of Kelsen’s production, that is, of the Kelsen philosopher of international and political law[1xxvii], often underestimated and considered subsidiary or marginal compared to that of the theoretical Kelsen of the *reine Rechtslehre*.

Despite, as has already been pointed out by M. Losano[1xxxvii] and by C. Nitsch[1xxviii], the official bibliography edited by the *Hans Kelsen-Institut*, consists mostly of works of international law (106) and of constitutional law (92), rather than books on general theory of law (96), Kelsen’s theses on the philosophy of international law and the politics of law of Kelsen, that, in fact, have rarely been the subject of an analysis that was
not heavily conditioned and manifestly subordinated by intent to critically examine the alleged scientficity and the appraisal of *reine Rechtslehre*; rarely, that is, they have been the object of an analysis that proposes to reconstruct the overall structure in the specificity, (in)coherence and possible problematic nature of their autonomous articulation.

Now, ten years after the publication of the volume edited by Losano, the translation of *Law and Peace in international relations* offers a new card, a card of far from secondary importance, for an analysis that aims to reconstruct the puzzle of the whole system of Kelsen’s philosophy of international law[lxxxix]. An undoubtedly complex puzzle in which some pieces appear redundantly double (even if in reality they are not always completely identical) and others, instead, mutually incompatible; a puzzle, in any case, in relation to which, to understand where and how to place some of its most important pieces, can help, although this statement may perhaps sound paradoxical, pay attention to the factors that in the last twenty years years testify to an intolerance, more and more widespread and manifest, towards the pacifist inspiration of the international law after World War II.

On November 9\textsuperscript{th}, 1989, just over twenty years ago, the collapse of the Berlin Wall symbolically marked the end of the Cold War. In those days many thought and wrote that peace had finally “broken out”. In reality, unexpectedly, even if perhaps not at all surprisingly, with the conclusion of the war there was instead a progressive reversal of the ideology that after World War II, with the UN Charter of 1945 and with the Universal Declaration of Human Rights of 1948, had proclaimed the banning of war and claimed peace through rights. With the conclusion of the Cold War, in fact, in the new (dis)international order that has emerged, a new ideology has been progressively affirmed, opposed and contrary to the previous one, based on the (re)legitimization of the war (also but not only) in the name of protecting rights; an “upside-down ideology”, as summarily summarizes M. Bovero, «from peace through rights to rights through war»[xc].

The first Gulf war, that of 1991, the Kosovo war of 1999, the wars against Afghanistan in 2001 and against Iraq in 2003 (both of which are still ongoing even though both are already a few years old) does, rashly, the conclusion was proclaimed and claimed victory), the recurrent threat of a new conflict against Iran and, according to the tensions of the moment, that of a possible conflict against Yemen and/or against North Korea[xci], testify, all of them, despite the specific diversity of the arguments used from time to time to justify them, an increasingly manifest indifference, or even an explicit disputation, of the pacifist framework of the UN Charter; an intolerance less and less disguised so much against the net and radical repudiation of the war, allowed, and at very restrictive conditions, exclusively in the case of legitimate defense (art. 51), as against the prohibition even of the threat of the use of force in international relations (Article 2).
This intolerance towards the pacifist plant of the UN Charter and, more generally, of most of international law after World War II, is not confirmed only by the choices of the governments of the countries that took part in the wars and/or which have formulated the threats of new possible armed conflicts of the last two decades (in the choices, that is, of the governments of the countries of a Nato always more hypertrophic and hegemonic alliance\[xcii\]), but also, and not less significantly, in the comments, in the reflections and in the analysis of different disciplinary fields on the scenarios of the international order following the end of the cold war.

Three, in particular, are the most important elements in this literature, which is vast and heterogeneous in itself in the plurality of disciplines of which it is an expression: (a) the casual linguistic inventions to conceal or deny that some of the armed conflicts of the last twenty years are, fully, wars; (b) the (re)proposition of the just war doctrine in its ethical variant; (c) the contestation of the banning of the war of aggression by (inter)national law and its (unwanted) outcome of a full redemption of every war as a just war.

The first element, perhaps the most disturbing and certainly the most insidious of the literature to which we are referring here, is that of the onomastic acrobatics of those who, along the lines of the neolanguage of G. Orwell in 1984, claim that some of the wars of the last two decades have been peace operations. Of those who, in particular, ignoring or even denying the vast and widespread violation of the rights of the populations involved, boast merit of the alleged peace operations in the name of protecting the rights of women, children and citizens whose complaints are that freedom and dignity be mortified by totalitarian regimes or those stigmatized as “reprehensible” cultural or religious traditions.

The reference is not only, before the 2001 attack against the Twin Towers in New York, to the Kosovo war, a war in relation to which from the outset NATO claimed an ethical justification to balance its manifestly illegitimate character; the reference is also, after the 2001 attack, to the wars against Afghanistan and against Iraq; these wars, in relation to which the call for the protection of the rights (of women, children, political dissidents) and to the “export of democracy” has played a subsidiary and reinforcing role, gradually becoming more and more decisive as the original motivations of those conflicts (the motivations, ie, the fight against terrorism and the defense of international security) have begun to appear progressively less and less founded and convincing.

The second element of the literature to which we are referring here is the reaffirmation of the doctrine of the just war not in the sense of those who identify it or confuse it with the legal regulation of war (including the case in which the law forbids any form of war with the exception of that for legitimate defense), but on the contrary, in the
sense of those who, in open disagreement with the ban on war sanctioned by art. 51 of the UN Charter, claims, sometimes proposing a detailed catalog, the political, if not ethical, reasons which, notwithstanding any legal criterion of legitimacy, would not only justify but even make recourse to war necessary. Exemplary in this sense, but the literature in this regard is really vast, What We’re Fighting for, the 2002 manifesto supporting the “good reasons” of the operation Enduring Freedom, written by M. Walzer and signed by sixty of the most famous and celebrated North American intellectuals[xciii].

Finally, the third element of the literature to which we are referring is that of the clear and radical contestation of the “criminalization of the war of aggression”; of the contestation, that is, of the principle of international law (but also of the internal state law of many constitutional democracies) which in the second post-war period sanctioned the repudiation of the war. Explicit, in those who propose such a dispute, the reference to C. Schmitt and to his thesis that the «legal negation of war, without its actual limitation, has the sole result of giving life to new types of war, probably worse, to lead to relapses in the civil war or other forms of war of annihilation»[xciv]. In particular, according to D. Zolo who shares and reiterates the thesis, according to Schmitt, «the criminalization of the war of aggression is a return to the notion of bellum justum and to the entire medieval theme of the justa causa that Francisco de Vitoria had reworked to justify the conquest of the new world by the Catholic powers»[xcv].

A singular thesis, the one in question, and not only because it does not seem to pay too much attention to the distinction between juridical conception and ethical (or in any case metagiuridical) conception of bellum justum; this distinction, without which it would not even be possible to account for the position of those who, as in the aforementioned case of the Kosovo war, claim their own armed intervention as a just ethical war because, under the juridical one, it is illegitimate.

And finally, the thesis in question is particular because, in order to avoid the risk that with the criminalization of the war of aggression a (new) version of the doctrine of the just war might be proposed, it ends with the hope of a situation in which (not unlike as sanctioned by the Peace of Westphalia of 1648) every war becomes lawful and just if and insofar as the (inter)national right does not prohibit States, or their changing alliances, from making use of it whenever they consider it useful or appropriate. Explicitly recalling Kelsen’s position[xcvi], a similar relief has already been formulated by Bobbio where he writes that «the effect of abandoning the doctrine of the just war is not the principle:” All wars are unjust”, but exactly the opposite principle: “all wars are right”»[xcvii].

Both the renewed good fortune of which the doctrine of the just war has been
objetted to claim, in open contrast with any dispute, has denounced the juridically illegitimate character, the “ethical motivations” of the wars of the last twenty years, both, symmetrically, the terms in which, also because of the fear of a reaffirmation of the just war doctrine, the thesis that disputes the choice to criminalize the war of aggression, finds expression, testify, both others, of the need to distinguish two senses of “just war”, two notions radically different from each other both for their ideological connotation and, even more significantly, for the different practical outcomes that one and the other can vehicular. The distinction between these two notions, independently of the possible variants of both, is necessary not only, in general, to orient oneself among the different interpretations of the factors that historically have often contributed to challenging the “good reasons” of legal pacifism, but also, in particular here, to evaluate the (in)coherence of the terms in which Kelsen has subjected and claimed legal pacifism in his philosophy of international law.

A first notion of “just war”, a notion that corresponds to the Ciceronian use of *bellum justum*, is that according to which a war is right (that is to say correct, or just), if it is possible to indicate its legal basis, if, that is, it is declared (and fought) in accordance with to what is established by (inter)national law. In this first sense, that is, “just war” means nothing but a legally legitimate war.

A second notion of “just war”, a notion now recurrent even in common usage, is that according to which a war is right if it is possible to identify a political, moral, ethical or theological justification independent of (and in any case prominent with respect to) how much (inter)national law provides or can establish. In this sense, at the end of the nineties of the Twentieth Century, a paradigmatic case of war claimed as a just war was that of NATO in Kosovo (xcviii); a war, this, as has already been pointed out before, moved in open and conscious violation of the international law in force. In general, in this sense of the term, both the *jihad* claimed by some expressions of Islamic fundamentalism and, symmetrically, the “endless war” initiated by the US administration under the presidency of G.W. Bush offer a paradigmatic example of just war, and theorized (in the name of the need to defend the “Western” values of freedom and democracy [xcix]) from what can be considered a form of “Western fundamentalism”.

The first of the two notions of “just war”, despite the variety of its possible conceptions, identifies a legal category. The second of the two notions of “just war”, albeit in the variety of its possible conceptions, identifies, instead, a meta-juridical category. However, even if between the first and the second notion a tension can be determined or a plurality of different relations can be established, the two notions, as I have already pointed out, are distinctly distinct when not diametrically opposed as is evident in the case of whom claim criteria of (il)legitimacy of war to prevent any state from having recourse against any
other state for any reason and who, on the other hand, in the name of alleged indispensable values and self-styled ethical motivations claims to be able to wage war independently of any criterion of (il)legitimacy established by law.

In a work of not many years ago, the need to distinguish these two notions of just war was not only mentioned but strongly emphasized by B. Conforti who challenged the plausibility of the notion that identifies a legal category, and called for a more careful reflection on the second notion, which refers to a meta-juridical category. In particular, after denying that «there are really principles of international positive law governing jus ad bellum, the right to make war, in the sense of denying it or in the sense of admitting it», and after exhorting to «take notice of the impossibility for the general international law of expressing evaluations in this regard»[c], Conforti warned that «to take up the theme of the just war means to bring the subject back to its rightful place, means to bring it back into the sphere of natural law», specifying that it is a matter of «taking back, developing and adapting to our times the eternal truths that theologians, canonists and natural law first tried to indicate»[c].

Now, although not explicitly thematized or widely investigated, the distinction between the two notions of just war is no less clear in Kelsen than in Conforti. In particular, in a perspective diametrically opposed to that indicated by Conforti, Kelsen in fact deals with the just war in non-meta-juridical terms, but legal ones. The notion of just war that can be registered in Kelsen is, that is, that which identifies a juridical category, not that which refers to a meta-juridical category[cii].

Before proceeding to identify some of the arguments that confirm that in Kelsen that of “just war” is only a legal category, it may be useful to point out a lexical datum and raise a preliminary doubt, of a general nature.

The lexical datum, a linguistic spy even before a decisive confirmation of a conceptual character, is the use in Kelsen of the German term “rechtsmäßiger Krieg” (a phrase, that is, which, evidently, of the war identifies not an alleged ethical foundation but rather a legal criterion of legitimacy). And yet, a further lexical confirmation, completely coherent and consequent with the previous one, is offered in the note in which, in 1952, in Principle of International Law, after the first “just war”, “just war”, Kelsen is concerned to warn that, in the sense in which he is using it, the term “right” (“just”) means «“juridical” in the sense of positive international law “(“juridical”, or “legal” in the sense of positive international law»)[ciii].

The preliminary doubt, of a general nature, independent of any other philosophical
consideration concerning the analysis of the relationship between law and peace in its various works, concerns instead the plausibility itself of considering Kelsen a just war theorist. Doubt, this, justified by the consideration that Kelsen, ignoring the complexity and plurality of the different conceptions in which he has historically found expression, in reality neither elaborates nor proposes his own conception of the doctrine of the just war but, much more simply, uses the term “just war theory” as a term of synthesis to designate one of the two opposing interpretations of general international law; of that general international law, that is, with which, over the years and taking into account its changes, starting from the end of the World War I, it has always been confronted every time he wrote about the possible relationship between war and law. In particular, in the Holmes Lectures of 1941-1942, not unlike that in General Theory of Law and State of 1945 and in Principle of International Law of 1952, “theory of the just war” is a term used mainly, if not exclusively, to designate an interpretative thesis (or, if you prefer, a dogmatic thesis): the thesis, according to which in «general international law, war is forbidden in principle, being admissible only as a reaction against a violation of international law». This is an interpretative thesis of general international law, which Kelsen, while aware of its doubtful and problematic aspects, defends with respect to the opposite interpretative thesis (or, if you prefer, the opposing thesis of a dogmatic nature) according to which, contrary to the previous one, «war is neither an illicit nor a sanction» and «every State that is not expressly bound by a particular treaty to refrain from waging war against another can proceed to war against another State for any reason, without violating international law».

The lexical data and the preliminary general doubt do not exhaust all the arguments that allow to reply to those who dispute Kelsen because he is a theorist of the just war. In fact, besides and beyond one and the other, it is possible to propose a plurality of more specifically gius-philosophical arguments that allow not only to confirm the exclusively juridical connotation of his conception of the just war but also, and even more significantly, to affirm that this juridical connotation is marked not so much (as for centuries it has been characteristic of many theories of the just war) to the justification and legitimation (of some forms and ways) of the war, but rather to its firm condemnation and its resolute banishment (as, already starting from the end of the First World War, for a century, laboriously and today undoubtedly without appreciable results, international law has repeatedly worried about affirming: a plurality of arguments that allow us to show, that is, that for Kelsen that of the just war is nothing else, as he himself has repeatedly explicitly stated since 1942, that «the theory that constitutes the basis of numerous documents of great importance in positive international law»: the Treaty of Versailles of 1919, the Covenant of the League of Nations in 1920, the Briand-Kellogg Pact of 1928 and, since 1945, the UN Charter.
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The arguments in question can be formulated, on the one hand, starting from a (re)reading of the Kelsen philosophy of international law in the completeness of its complexity and articulation, and, on the other hand, paying more attention, in particular, to the terms in which Kelsen intends and articulates the assumption that gives the title to the second of his essays written after emigration to the United States: that is, the assumption (often quoted, resumed, paraphrased\[cxii], or, at times, critically reduced\[cxiii]) of peace through law.

In both cases, both regarding the (re)reading of the Kelsen philosophy of international law and about a more careful reflection on the terms in which Kelsen configures his own assumption of peace through law, a dual methodological warning is appropriate: (a) the first, as obvious as it is often overlooked, is that of not confusing or contaminating analysis profiles that Kelsen himself distinguishes, not to confuse, in particular, a dogmatic-recognition, theoretical-explanatory and political-normative profile; (b) the second is that of not reducing, as often happens in literature, the complex network of interactions, not always univocal and not always aproblematic, of the *reine Rechtslehre* with the overall structure of its philosophy of international law, exclusively in terms of reception of the gius-philosophical thesis of coercion as a distinctive and unavoidable trait of the concept of law itself and/or in terms of (in)coherence with respect to the two logical-epistemological theses of the validity of legal science and the necessary unity of law (national and international) which constitutes its object.

The need not to confuse orders of different considerations is clearly present in Kelsen, who, although not excessively concerned with emphasizing it, keeps not only the political-normative profile from the theoretical-explanatory profile of the relationship between law and peace carefully distinguished\[cxiv], but also each of the two profiles from a third profile, of a dogmatic-recognition nature\[cxv], from the profile, that is, in which it compares proposals for policy of law or problems of general theory of law with positive law, with norms, that is, both general international law and international treaty law\[cxvi].

In the Kelsenian analysis, among these three profiles, the preordained and hierarchically superordinate to the others is the political profile of law\[cxvii]. And it is to this first profile, of a political nature, that the claim of three assumptions, conceptually distinct but for Kelsen complementary, which inform and condition the entire system of his philosophy of international law must be traced: (a) the claim of peace as value; (b) claiming the right as an instrument (necessary but not exclusive or even sufficient) for the protection of peace; and (c) claiming the full legality of international law.

The most explicit statement of the political character of these three assumptions, in
As early as 1920, what Kelsen theorized is, therefore, a doctrine of the full juridicality of international law (and not, as it is disputed, a doctrine of just war); full legality from which Kelsen cannot and does not want to disregard because he believes that law is a necessary tool for the maintenance of peace. Kelsen theorises a doctrine of the full juridicality of international law and it is of this political assumption that he is so preoccupied with delineating a theoretical model that shows its plausibility and grounds its feasibility, and, with no less attention, to sift, under the dogmatic profile, if and in what terms the (inter)national legislator, in the succession of his various interventions, (does not) allow a (effective) realization attentive to the value of maintaining peace.

The denunciation of the inconsistency in question appears even less convincing if, in examining it, one takes into account the terms in which, in Kelsen, the institution of “a permanent international court with compulsory jurisdiction”, competent to judge not only for crimes of war but also, and not less significantly, of crimes against peace, finds its main justification in a radical criticism of both “counter-war” and retaliation as sanctions of international law[cxix]. The insistence with which, above all in Peace through Law, Kelsen claims the need to concentrate efforts to «reach an international treaty concluded by the greatest number of States, winners and losers, which establishes an international Court with a mandatory jurisdiction» in fact, it is not dictated only by institutional engineering assessments. It is not dictated, that is, exclusively by its considerations on the reasons for the failure of the League of Nations, but it is motivated also and above all by the firm conviction that «an international treaty that establishes an international Court with a jurisdiction obligatory means that all the States of the League constituted in this same treaty should be obliged to renounce war and reprisals as instruments of conflict settlement, to submit all their disputes without exception to the Court’s decision and to apply his decisions faithfully»[cxx]; it is dictated, that is, by the firm conviction that «all the states of the League should be obliged to renounce war and reprisals» because these “international sanctions are not directed against the individual whose conduct has violated the law international but they are directed against the State as such, that is against the citizens of that State, against individuals who have not committed the crime or who have not had the
A permanent International Court, competent, like the one hypothesized by Kelsen, to
decide war crimes and crimes against peace, punctuated one and the other, as criminal law
requires, in terms of personal responsibility, if realized it could achieve in fact a triple
objective: (a) the first, ethical-political, to punish not who is innocent (as happens with war
and reprisals) but, on the contrary, only who is really responsible, with his own choices of
government, to put international peace and security at risk; (b) the second, once again
ethical-political, of offering a tool to prevent war (of aggression and legitimate defense); and
(c) the third, philosophically, of confirming coercion as a distinctive feature of international
law and as the foundation of its full juridical character.

To date, Kelsen’s proposal for a permanent international court with mandatory
jurisdiction, competent to judge war crimes and crimes against peace, has not yet been fully
realized.

The last step in this direction is the establishment of the International Criminal Court
with the 1998 Treaty of Rome which entered into force on 1st July 2002, although it
represents a significant progress with respect to other forms of international criminal
justice of the second half of the Twentieth Century, has not yet exceeded many
obstacles: in particular, on the one hand, the major superpowers (China, Russian
Federation, Israel, United States) have not ratified the 1998 Treaty and have often hindered
the functioning of the Court, and, on the other hand, it does not even seem imminent
the solution of the difficulties related to the definition of the main crime on which the Court
is called to judge, that is, of the “war of aggression”.

As for the first step towards international criminal justice in the second post-war
period, that of the Nuremberg trial and of the 1945 London Agreement with
which the International Criminal Court was established that would have celebrated it, the
numerous are known criticisms of which was the subject. Among the most punctual and
the most radical ones are those of Kelsen who fail to note, as the critics of juridical pacifism
and International Criminal Justice want, the failure of his proposal but, on the contrary,
complain about the lack of recognition of essential aspects. In fact, with its criticisms,
Kelsen neither denies nor revises the terms in which in 1944 he outlined his proposal for the
establishment of a permanent International Court with compulsory jurisdiction, rather, he
denounces and disputes the way in which the London Agreement and the Nuremberg trial
ignored or misrepresented them.

Alongside and in addition to the two profiles, one of a political-normative nature, the
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other of a theoretical-explanatory nature, a third profile of central importance in the establishment of Kelsen’s philosophy of international law is that of a dogmatic-reconnaissance character, is that, that is, related to the great attention Kelsen has always paid (both in the claim of political proposals and in the affirmation of theoretical theses) to positive international law, both the general and the treaties. Attention that finds expression, in a variable combination in its different components according to the specificity of the theme or the particular motivation that solicited them, in analyzes in which they are co-present: (a) a (exegetical) recognition of the normative datum that does not neglect the plurality of his possible readings but, on the contrary, he often proposes a dialectical comparison; (b) a criticism, whatever their different readings may be or may be, of those normative data from which Kelsen disagrees with technical-juridical questions or, depending on the case, on the basis of the (ethical-political) values of which they may be an expression; and not a last (c) a constructive proposal of the terms in which to modify or (re)define the normative data of positive international law that have been subjected to criticism.

Thus, in particular, there are works, such as the imposing 1950 volume which proposes a meticulously detailed analysis of United Nations law or that of 1952 (reissued in an updated and partially modified version by R.W. Tucker) on principles of international law, in which the expositive and exegetic-recognition dimension prevails over the critical-innovative one. The “legitimacy” of the dogmatic perspective (in English the term used is “juristic”) of his own analysis of positive international law, works in which Kelsen is concerned with defending, and not at all surprisingly doing so in a political key; a perspective, that is, in which the problems of international law are addressed “from a legal point of view”[cxxviii] and not political. Despite the apparent lexical bickering (or, worse, despite the fear of a possible conceptual inconsistency), the political claim of the legitimacy of a legal analysis of positive international law in Kelsen is nothing but the iteration of the political assumption to he particularly dear to the full legality of international law and its norms. Nor, moreover, does Kelsen make it a mystery. In particular, he makes no secret of it in the Preface of the book on the principles of international law, when, controversially, he emphasizes the juridical character of his own book in open disagreement with «those who write in international law, who, while not daring to deny the character legal and therefore binding of this social order», they argue that it is more appropriate to deal with a non-legal perspective than international law because their main concern, this is Kelsen’s complaint, is to justify the possibility of not applying the international law in force where this should be in contrast with those who «the writer considers the interests of their own country»[cxxxix]. And still, Kelsen does not even make it a mystery in the opening (incipit) of the Preface of the volume on the law of the United Nations in which in clear and peremptory terms, he
points out that his book offers a «dogmatic juristic, non-political analysis of the problems of the United Nations», an analysis, that «deals with the law of the Organization and not its role, actual or desired, in the game of international powers»[cxxx].

To believe that law, almost magically, can have a decisive and decisive role in itself in guaranteeing world peace is a naivety that the (new)realists wrongly reproach the Kelsen’s juridical pacifism. Wrongly, because this belief is in fact foreign to legal pacifism, but not only in its Kelsenian variant.

In particular, there are more arguments to affirm that for Kelsen the law is not «the instrument of pacification of relations between States»[cxxxii] (as Nitsch proposes to read the incipit of the Introduction to the Holmes Lectures «Law is, essentially, an order for the promotion of peace»[cxxxii]), but rather only one of its various instruments; a tool that is undoubtedly indispensable, so much so that it can be claimed as a necessary condition, but not so decisive as to consider it also a sufficient condition.

Beyond any interpretative exercise on the possible readings of single statements or individual phrases such as “peace through law” (readings, moreover, which often do not in any way refute the reconstruction proposed here), a first confirmation that the right is considered only a necessary tool comes from the terms in which Kelsen constantly confronts himself with the different forms in which positive international law finds expression; a confrontation which, as has already been pointed out, does not elude but on the contrary often focuses precisely on the doubtful and problematic aspects which, from time to time, of positive international law justify criticism or solicit proposals for changes or reforms. A relationship, Kelsen’s critical-purpose relationship with positive international law, which neither ignores nor underestimates, but on the contrary testifies, not only to the fallibility of law (the considerations on the reasons for the failure of the League of Nations) are exemplary but also, and not less significantly, of its insidious character (think, in particular, about the radical criticisms against the London Agreement of 1945 and about the Nuremberg trial) even when (international) law is used in the name of peace or of international justice[cxxxiii].

PARAGRAPH C

Jus post-bellum (jpb) and Transitional Justice (TJ) in post-war and in post-authoritarian regime context
Pacta servanda sunt? Jus post-bellum and transitional (in)justice in post-war and in post-authoritarian regime context

«The weapons of war must be destroyed before they destroy us»!

(John Fitzgerald Kennedy)

«You can’t handle the truth! Son, we live in a world full of walls, and those walls must be guarded by men with rifles».

(From the movie "A Few Good Men")

1. Introduction

How should citizens react to the fall of a non-democratic regime? How should they initiate reconstruction in a country where conflicts are coming to an end? How can we prevent the public from taking justice into its own hands and ensure the criminal law’s goal of specific deterrence in the aftermath of a period of widespread and systematic violations?

TJ is a field involved with post-conflict reconstruction. It endeavours to understand what should be done in order to build, from the ruins of the previous society, a new society, stable enough to grant justice and just enough to grant stability, so that new legitimated institutions can be developed in the future.

Jpb is a response to the problem of conflict resolution and to the need for a proper organisation of post-conflict peace. Its main goal is to facilitate greater fairness and sustainability in conflict termination and peacemaking. Hence, the notion of jpb concerns what follows a war, focuses on the question of how to end hostilities, or to handle their aftermath.

Since both TJ and jpb aim to help move beyond a difficult past and both of them aim for stability and justice, one may argue that they are in fine identical and that those principles which are applicable to one are also applicable to the other. Now, this may not always be true. In fact, even where it is true that both of them involve reconciliation with a violent past, there remains a difference between them in terms of definition and objectives set. This is the reason why, in this paper, I show why these models should not be seen as interchangeable nor as competitors, but as two different, even if compatible, theories.

2. Transitional justice (TJ): a definition

As the name itself suggests, the field of TJ is mostly focused on “transition” and on “justice”. The conception of “justice” in the context of TJ has been clarified by the UN report that
defines justice as “an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regards for the rights of the accused, for the interests of the victims and for the well-being of the society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolutions are equally relevant” (UN Report, 2004).

How should citizens react to the fall of a non-democratic regime[cxxxv]? How should they initiate reconstruction in a country where conflicts are coming to an end? Should former enemies be exempt from ordinary trial? On what basis will they have to be judged in order to achieve justice rather than vengeance? In other words, how can we prevent the public from taking justice into its own hands and ensure the criminal law’s goal of specific deterrence in the aftermath of a period of widespread and systematic violations? The field of TJ examines such questions by creating evaluative criteria so as to establish individual responsibility behind war crimes and crimes against humanity. The underlying significance of those criteria is grounded in two main purposes: to dispense criminal justice (and so to re-establish the rule of law), and to understand those political and social processes through which the confrontations had been ignited in the first place. The past can only be relinquished through a thorough understanding of previous hostilities and of their implications. Thus, as a legal doctrine, the field of TJ “is conceptually wedded to the broad approach to human rights articulated by the Inter-American Court of Human Rights. In brief, the court held that all states have four fundamental obligations in the area of human rights. These are: to take reasonable steps to prevent human rights violations; to conduct a serious investigation of violations when they occur; to impose an appropriate punishment on those responsible for the violations; and to ensure reparation for the victims of the violations” (Stahn-Kleffner 2008, 218).

Therefore, TJ is a field involved with post-conflict reconstruction, specifically in understanding how to get over a traumatic past. It endeavours to understand what should be done in order to build, from the ruins of the previous society, a new society, stable enough to grant justice and just enough to grant stability, so that new legitimated institutions can be developed in the future. Moreover, TJ, which some already consider a normative theory in itself (inter alia, De Greiff, 2011), is a field in constant evolution. As Andrieu (2012) argues the focus of transitional justice has gradually shifted from the priority need to judge perpetrators, as it was in the aftermath of the WWII, to the need of paying attention to the victims of violence and so to find a “cure”, in order to rebuild a more just society.

In what follows, I provide and compare two definitions of TJ that have been given so
far by experts (namely the International Centre for Transitional Justice in NYC and the UN Secretary General). These definitions basically agree with each other on what TJ is, i.e. a tool used to come to terms with the legacy of the past and to rebuild a society from the ruins of a previous one, and which then aims at the creation of a lasting peace in a democratic regime. Nonetheless, each of those definitions dwells on particular aspects of TJ. Hence, by picking out the two definitions together, we can have a global overview of TJ, its main processes and principles.

The International Centre for Transitional Justice in NYC, has defined TJ as a «response to systematic or widespread violations of human rights. It seeks recognition for the victims and to promote possibilities for peace, reconciliation and democracy. Transitional Justice is not a special kind of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly, while in others they may take place over decades (ICTJ, 2008)». This definition starts by focusing on the human rights concern and so it first emphasizes the social issues arising after the fall of an authoritarian regime. This statement draws attention to the right of recognition for people as the victims. Moreover, the right of compensation for those who have endured human rights abuses seems to act as an application in practical terms of the “response” and “promote possibilities for peace reconciliation and democracy” quoted above. Hence, TJ is also mandated to assess the compensation due in time of reconstruction. Thus, this definition looks at TJ as a call for actions in support of citizens who have suffered in order to achieve reconciliation. The second part of the definition is particularly focused on the concept of rebuilding.

Therefore, TJ is meant to be a tool used to come to terms with the legacy of the past and to build a long-lasting peace with a particular attention paid to the concepts of recognizing victims’ role and giving reparation to those citizens who have endured pervasive human rights abuse in order to enable the rebuilding of society and achieving reconciliation.

The second definition, which is fairly close to the previous one, has been proposed by The Report of the UN Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies. It defines TJ in more precise terms as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation” (UN Report, 2004). This statement suggests two new aspects for TJ. First, TJ is here conceived as having the mandate to assess retribution (“to serve justice”) so that not only is it necessary to recognize who has been a victim, but also perpetrators have to be recognized as such. Therefore, this statement bestows upon TJ the responsibility to
establish who is responsible for serious wrongdoings during the former regime and then to prosecute them. Hence, since “to ensure accountability” corresponds with a full recognition of victims and perpetrators, then the accountability principle is strongly related to the retributive principle. The second aspect suggested by this statement is related to the possible approach that could be adopted for considering TJ in its various aspects and roles. In fact, the statement begins with “the full range of processes and mechanisms”. Yet, what exactly are these mechanisms and processes? What kind of relationship is more likely to exist between them? Let us first see how Kora Andrieu’s analysis of TJ categories of action purports to answer to our former question.

Andrieu (Andrieu, 2010) distinguishes TJ mechanisms and processes in the following three main categories of action:

- **legal justice**: prosecuting the perpetrators and re-establishing the rule of law, reforming the security and judicial system;
- **restorative justice**: gathering the truth about the past, healing victims and rebuilding communities through reconciliation and collective memory;
- **social justice**: settling the economic, political and social injustices that may have created the conflict and defining the basis of a just, stable society (reparations, financial or symbolic, affirmative action programs, gendered approaches, development, etc). (Andrieu, 2010).

These mechanisms constitute a practical means through which states can execute in actual facts the obligations decreed by the Inter-American Court of Human Rights in 1988. Therefore, we so far defined TJ as a conception of legal, restorative and social justice associated with periods of radical change characterized by political, legal and social responses to confront the wrongdoings of past repressive regimes. Moreover, TJ aims to promote possibilities for peace, reconciliation and democracy by re-establish the rule of the law, compensating (economically rather than by providing social and psychological support) those who have endured human abuses and helping to rebuild a society.

Yet, one may argue that it is still difficult to find substantial differences with the theoretical model of jpb and that so far, the latter could still be seen as a competitor of TJ. This is the reason why, in what follow, I show why these models should not be seen as interchangeable nor as competitors, but as two different, even if compatible, theories.

2. **Jus post bellum and Transitional Justice in post-war and in post-authoritarian regime context**
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So far, we saw that TJ can be conceived as the pursuit of justice and stability in response to a former situation, that is to say an authoritarian regime or a conflict situation, in which justice and stability were been replaced by human rights abuses and/or economic, political and social instability. Since both TJ and jpb aim to help move beyond a difficult past and both of them aim for stability and justice, one may argue that they are in fine identical and that those principles which are applicable to one are also applicable to the other. Now, this may not always be true. In fact, even where it is true that both of them involve reconciliation with a violent past, there remains a difference between them in terms of definition and objectives set.

A first difference in definition that I take into account has been given by Christian Nadeau, who argues that “Jpb, or post-war law, is a category of just war theory dealing with the moral considerations to be applied in the wake of conflicts. Transitional justice is generally considered as a legitimate response to systematic violations of human rights.” (Nadeau, 2010, 1). Hence, while the jpb belongs to the just war theory, TJ doesn’t. In spite of this, TJ applies to those situations of major political crises where radical political changes are occurring. Although some overlaps can easily be found, TJ and jpb are not identical twins.

In fact, a radical political change can occur both after a war (either civil or interstate) and after an authoritarian regime that could also come to fall in circumstances which do not require a war. Starting by this first descriptive difference between TJ and jpb, this section intends to show the characteristics of transition when occurring after a war context or in the absence of it. In a nutshell, the main challenge here will be to outline differences and similarities occurring between TJ and jpb in the matters of descriptive definition, objectives and principles that constitute them.

Since I already provided a definition of TJ in the previous paragraph, I here begin by proposing a definition of jpb starting by the etymological meaning: the term comes from Latin jus = right and post bellum = after war.

After-war could be defined as the third and final stage of war: its ending and that period immediately following the ending of a war. It could mark the cessation of the conflict entirely or the interval of peace before a putative resuming of hostilities. However one looks at it, the concept involves war. Now, a war could be internal (civil war), could involve two or more states (external, interstate war or international armed conflict) or could even be internal and involving other external states. Now, a war (external, internal or both) always involves traumatic situation to deal with at its ending[cxxxvi]. At this stage of the war, that is to say the final one, a need for re-establishing justice (Latin = iustitia) emerges. Justice is
made of rights (Latin = \textit{ius}), thus \textit{Jpb} is the field dealing with the issue of dealing justice after war, especially concerning what rules are needed for wars to end completely and fairly. Brian Orend defines it as referring “to justice during the third and final stage of war: that of war termination. It seeks to regulate the ending of wars, and to ease the transition from war back to peace.” The question arises then: when is a war ending? A war may be declared officially over, even as it continues on the ground. The official declaration of the end of the conflict in Iraq by President Bush in May 2003, as hostilities within the country mounted in intensity in the months following, is one excellent example. The notion of \textit{jpb} should thus be understood as what follows on from war, but also as what legitimately leads to the real end of war (Nadeau, 2010). Therefore, \textit{jpb} has a well established role in the just war theory, which is basically composed by three main categories: \textit{jus ad bellum} (focused on justification of intervention), \textit{jus in bello} (focused on conduct in conflict and provides only a limited gateway for ‘exit’ from conflict) and \textit{jpb}. Moreover, the relationship between these three categories is likely to be considered as three interdependent processes (the more independent seems to me to be \textit{jus ad bellum}) that enmesh with each other.

\textit{Jpb} is a response to the problem of conflict resolution and to the need for a proper organisation of post-conflict peace. Its main goal is to facilitate greater fairness and sustainability in conflict termination and peacemaking. Hence, the notion of \textit{jpb} concerns what follows a war, focuses on the question of how to end hostilities, or to handle their aftermath. It could be seen as a potential remedy to limit a future conflict which could arise by a not-proper end of war. Moreover, as the Grotius Center of Leiden highlights, it could be seen as an instrument to:

- Limit the consequences of armed force by a closer consideration of post-conflict peace in decision-making prior to intervention;
- Encourage parties not to engage in conflict, or to conduct their hostilities during conflict in a manner so as not to damage the prospects of fair and just peace;
- Facilitate a successful transition to peace, rather than a mere ‘exit’ from conflict.

It is then possible to say that the aim of \textit{jpb} is to achieve reconciliation and re-establishing the rule of law (both legal and moral).

One may still argue that the distinction between \textit{jpb} and TJ are still blurry. In order to more properly define the contours of each approach I will explore, relying on May’s work, \textit{jpb} principles which I will compare to TJ principles. In his work “\textit{After War Ends}”, May sets out a group of six normative principles of \textit{jpb}, that he defines as “moral norms that have strong force in our thinking about what norms should be enacted into international law”
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(May, 2012, 5):

- **Rebuilding**: “Rebuilding the capacity to protect human rights is crucial for there to be a just and lasting peace” so that “[t]here is an obligation to aid States to rebuild (or build) the capacity to protect human rights”. Since, to reconstruct infrastructures and, re-establish the role of law are necessary conditions to protect human rights, then the rebuilding notion is here intended to include these processes as well.

- **Retribution**: “There is an obligation to engage in actions to support institutions that promote the international rule of law, as long as such actions do not jeopardize basic human rights”. To accomplish this task, it is required to support “international and domestic legal institutions, judges, and lawyers who act as a check against arbitrary and capricious actions of those in the executive branch of government.”

- **Restitution and Reasonable Compensation**: “There is an obligation for those who have suffered losses to receive restitution in all cases where practically feasible, with the only possible exception being the case where the losses are due to the loss sufferer’s own wrongdoing”.

- **Reasonable Compensation**: “There is an obligation to engage in actions to support a “just” peace, where minimally this involves reasonable compensation to individuals for rights violations”.

- **Reparations (which could sometimes include the restitution principle within it)**: “There is an obligation for those who have sustained damages to receive reparation in all cases where practically feasible with the only possible exception being damage that is due to the loss sufferer’s own wrongdoing”.

- **Reconciliation**: “There is an obligation to treat those against whom war has been waged as deserving equal basic respect, regardless of which side of the war a person is from”.

- **Proportionality**: in its international variation “Whatever is required by the application of the other principles of jpb must not impose more harm on the population of a party to a war than the harm that is alleviated by the application of these other post war principles” and in its domestic version “whatever is required by the application of the other normative principles of jpb must not impose more harm on the population of a party to a war than the harm that is alleviated by the application of these other post war principles” (May, 2012, 15-24).

In comparing these principles with the three main categories of action and their mechanisms as exposed by Kora Andrieu (Andrieu 2010), it is fair to say that jpb shares much in common with the TJ. In both cases retribution, reparation and restitution are recognized components. Moreover, they share two fundamental goals: promotion of peace
and the protection of human rights. The following question arises then: where are the differences between *jpb* and TJ in terms of principles and aims?

First up, an evident difference is the presence of war for the *jpb*. While radical political changes may not necessarily be involved in a given war situation, the *jpb* does need a war to occur in order to be set in motion. Hence, emerging from a crisis, which is at the heart both of *jpb* and TJ, does not necessarily correspond to a post-war situation. The substantive emphasis of TJ is on justice for human rights violations. There is no assumption of armed conflict in TJ, and again, when a transition comes in absence of war (the dismantling of the Soviet bloc could be an example), the *jpb* principles cannot be of any help. As Jens Iverson highlights: “one can imagine a change in regime in which no significant human rights violations were perpetrated by the previous regime, deposed by armed conflict. Armed conflicts happen without massive human rights violations[cxxix]. Additionally, armed conflicts occur without regime change. In these instances, TJ would tend not to apply, but *jpb* would” (Iverson, 2012). Thus, *jpb* also clearly includes, *inter alia*, violations of the laws of armed conflict, the rights and privileges that spring from the laws of armed conflict, environmental law (including legal access to natural resources and regulating the toxic remnants of war), state responsibility outside of the realm of human rights (Iverson, 2012). Since all of these norms are part of the natural law of the just war, we can assume that *jpb* is also part of it, which is not the case of TJ.

In particular, one of the direct consequences of this argument is that, for instance, the acquisition of citizenship rests upon the reciprocity principle – same principle as any civil liberties that the immigrant may be granted. There is a continuity between the right of political participation and more common civil liberties[cxl]. Rights are what the immigrant is granted on the basis of them degree of membership in the state: the higher the degree, the immigrant get more rights. Political participation or citizenship[cxli] is then the right corresponding to the highest degree of membership. Where there is citizenship, the state is committed to providing the information relevant to the interests of the citizen and the citizen has recognized herself as entitled to political participation[cxlii].

It was yet to be mentioned that a few years ago, there was a development in literature which was heavily focused on its social categories on so-called ‘third-generation rights’, to quote Bobbio[cxliii], or those cosmopolitan and ecological principles which aim to regulate relationships with the natural environment[cxliv].

It has been discussed how citizenship deprivation challenges not only the idea of equality[cxlv] but also the approach to the state as a functional space for the protection of the individual. It has been argued that citizenship is limited by time and space. The time
limit arises because citizenship is a temporary status, which can be acquired, changed or revoked and citizenship is spacially limited by territory because citizenship’s bundle of rights exists almost exclusively in the home country. Citizenship brings within itself a strong attachment to a certain territory and to a certain temporality. Such strengths of citizenship in time and space decrease when referring to naturalized or dual citizens. The myth of endless citizenship collides with the possibility of citizenship revocation and in the case of citizenship deprivation the attachment to time and space is lost completely.

In order to analyze citizenship deprivation in liberal democracies, this work focused on some aspects of the relationship between state and nationality. It has been argued that in some cases the narrative about national identity embodies the idea of the state in liberal democracies and such narrative about nationality is a key factor in pursuing the possibility of citizenship deprivation.

As a conclusion, we can argue that JPB shares much in common with TJ in terms of aims and in principles, still there are some basic differences that allow us to see them as two distinct, even if compatible, theories.

CHAPTER II

Equality and the moral failure of toleration

«I only know one race: the human race».

(Albert Einstein)

1. Introduction

Western societies today are marked by a broad liberal consensus in favour of toleration. Yet, some philosophers have attacked toleration as an egalitarian ideal. They argue that toleration involves, semantically and historically, power asymmetries and hierarchical positioning; hence toleration is incompatible with one of the most fundamental principles of liberalism, namely, equality. I will call this the “inegalitarian charge” against toleration. There is a good reason to indulge in theoretical endeavours to assess the allegation brought against toleration. After all, toleration as a highly revered practice sits right at the core of liberalism and is believed to have played a major role in the unfolding of modern political
history. Surely, the findings of an investigation into the nature of the relation between
toleration and equality would be of benefit to those who are interested in the history of
liberalism in general, and the development of toleration as a liberal practice in
particular. In this chapter, in order to reconcile toleration with equality, I
investigate the validity of the inegalitarian charge. My contention is that a thorough analysis
of the concept of toleration will put the critics’ concern to rest and provide us with an
egalitarian conception of toleration. In the first part of the section, I will begin by laying out
the critics’ claim that toleration defies the egalitarian aspiration of our times. I will then
proceed to identify the source of trouble within the conceptual scheme of toleration. I will
argue that the conflict between toleration and equality begins to appear only when the
agent’s objection against a practice constitutes an unjustified power asymmetry between
the tolerator and the tolerated. This unjustified asymmetry is believed to be curbed by
putting in place a moral cap on the kind of objection that the agent is permitted to hold
against a practice.

Hence, a distinction has been made between moral and non-moral judgements by
some philosophers. In the second part, I will critically investigate whether or not this
distinction will help us to address the inegalitarian charge. After demonstrating its failure,
in the third part, I will argue that the moral delimitation of the agent’s reasons for objection
should be framed in terms of a right to interference. In the final part of the present section,
I will consider a rejoinder to my proposed solution, before concluding my discussion.

2. **Toleration and inequality: a failure of egalitarian principles?**

Toleration, generally defined, takes place when an agent decides not to interfere with a
practice deemed objectionable. It is a form of non-interference towards something that
we find wrong, abhorrent, disgusting or distasteful. Despite the repeated emphasis on its
significance for the liberal project, much to liberals’ surprise, toleration has come under
attack as an egalitarian ideal. In words of one critic, Herbert Marcuse, it has been described
as “repressive” practice that only serves the interest of the privileged and powerful in the
preservation of power asymmetries and inequalities. In words of another, Wendy Brown,
it is an act of power in disguise of magnanimity which “offers a robe of modest superiority in
exchange for yielding.” Jacques Derrida writes similarly that “tolerance is always on the
side of the ‘reason of the strongest,’ where ‘might is right’; it is a supplementary mark of
sovereignty, the good face of sovereignty, which says to other from its elevated position, I
am letting you be, you are not insufferable, I am leaving you a place in my home, but do not
forget that this is my home.”

The existence of power relations between the tolerator and the tolerated has not exclusively bothered the contemporaries alone. The roots of this criticism go back to the early days of the emergence of toleration. The emergence of this
practice as a solution to religious dissent did not occur without criticism and, in fact, troubled a various range of philosophers and humanists throughout modern history. Since it is the peculiar and “complex involvement of tolerance with power” that has rendered the critics rather uncomfortable with this notion, a further unpacking of the relation between power and toleration seems necessary. Brown identifies the different mechanisms inscribed in the notion and discourse of toleration that veil, reproduce, and stabilize inequality and domination. By appealing to the semantics of toleration, Brown argues that different definitions of toleration offered by the Oxford English Dictionary encompass three interrelated meanings of enduring, licensing and indulging. In tolerating one opts for enduring what one could otherwise suppress. By manifesting an act of indulgence, one licenses the performance of an action that she could otherwise not endure. Toleration, therefore, by definition assumes a power asymmetry; for the question of toleration to arise one should be in a position to exercise the imposition of power in the form of interference and suppression. Hierarchical power relations indeed seem inevitable when one is granting someone a permission to perform an action when one assumes a right to revoke such permission. As it is claimed by Brown “it is this positioning, power and authority that makes possible a posture of indulgence towards what permits or licenses.” Practices of toleration accordingly create two different positions of the tolerator and the tolerated, where the former assumes the higher rank in the hierarchy of power. To be tolerated means to accept one’s underprivileged and weak status in relation to the tolerator.

Moreover, not only does toleration conceptually and practically require power asymmetry to take place, but its execution does not change the status quo. It aims to sustain the power relations in the status quo, when the exercise of power may appear to be too costly. Toleration in “managing the presence of the undesirable, the tasteless, the faulty – even the revolting, repugnant, or vile” does not “offer resolution or transcendence but only a strategy of coping.” The main rationale behind toleration appears to be the pragmatic one. It is regarded as the least costly of all possible alternatives. The justification of the pragmatic rationale is grounded in the advancement of a conflict between parties, with the prospect of the total collapse of the context in which all parties involved in the conflict maintain their existence. It is the result of the incapacity of the dominating party to wholly exterminate the dominated dissents, and of the dominated party to topple the current authority.

The genealogy of the concept and practices of toleration is fully in line with what the semantics of toleration suggests. Toleration in its conception in early modern period was descended from religion and royal grace. In its original appearance, it is exclusively
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grounded in caritas. The fundamental motive that compelled the merciful rulers and the humanist Christians to tolerate the difference was charity or grace. Toleration, whether shown to Christian sects or to non-Christian religious minorities in a Christian polity, was primarily understood in terms of indulgence. This indulgence was modelled on the religious ideal of imitatio Christi, which was the adoption of Jesus’ charitable attitude. Toleration is in its origin is based on unilateral benevolence or privilegium.[clix]

The foregoing analysis demonstrates that the relation between equality and toleration is much more ambivalent than what usually is assumed by liberals. In recent decades, equality has become arguably the fundamental principle and aspiration of liberal democracies. Each and every individual, we believe, is entitled to be treated with “equal concern and respect.”[clx] In these contexts, equality is regarded as positive and morally dignifying attribute: hence we talk of “equal worth,” “equal dignity,” or entitlement to “equal concern and respect.” Given the principle of equality, it is hard to see how the acts of non-interference among citizens and between the state and citizens can be captured in terms of toleration, a practice which is intertwined with power relation. The inegalitarian charge can be summarized as follows. Since Toleration is not a “power-free” practice, it fails to live up to the moral demands of equality; hence, it is not “an appropriate ethics or element of a democratic politics.”[clxi]

There could be two responses to the inegalitarian charge. One response would be to totally dismiss toleration and replace it with some other theories such as rights, respect and recognition.[clxii] The other more ambitious response would be to vindicate toleration. I shall advocate the latter.[clxiii] In order to tackle the inegalitarian charge, I will proceed to identify what renders toleration to appear as inegalitarian. As I very briefly mentioned above, for the question of toleration to arise at all there is a necessary condition that needs to be obtained. There ought to be a negative judgement against a practice. That is, the agent must have an objection against a practice that is somewhat deemed immoral, disgusting, abhorrent or simply distasteful. This in the literature is known as the “objection component” of the concept of toleration.[clxiv] Although there is an increasing tendency in popular culture to associate toleration with non-judgmentalism and the suspension of moral judgement,[clxv] it should not be confused with indifference and apathy.[clxvi] Nor should toleration be confused with an agent’s positive and affirmative attitudes towards other’s practices.[clxvii] It is worth mentioning that the existence of reasons for objection is not the only necessary condition that needs to be obtained; but since it is of significant importance for the question I am addressing here, I will be exclusively focusing on this condition in the course of this paper. In fact, this paper will ultimately demonstrate what exactly this condition consists of and how it relates to power relation.
The agent’s objection against a practice is assumed to constitute a relation in which the tolerator is in a position to exercise her power that she nonetheless forebears. As D.D. Raphael noted “one can meaningfully speak of tolerating a practice or belief only if one is in a position to disallow.”[clxviii] Being in a position to disallow has been traditionally interpreted as having the power to forbid or prevent, but it could also mean that one must has a moral power, if she is to claim any credit for not exercising it. That is, one needs to have a moral/legal standing to interfere. It is this very power asymmetry that allows the agent to consider the suppression of the disapproved-of. The latter qualification is of significant importance for addressing the inegalitarian charge. The power asymmetry indicates a moral standing from which the exercise of power appears to be permissible. Since the agent’s reasons for objection are assumed to generate a moral permission for suppression, the question of having a moral standing to interfere with the object of toleration is closely related to the negative judgements one holds against that object. Not all negative judgements could endow the agent with such a moral standing from which the exercise of power, in the form of interference, is deemed morally justified. Whether in the circumstances of toleration the power asymmetry between parties is morally problematic to a large degree depends on the agent’s negative judgements which establish her reasons for interference with the tolerated’s doings. The latter demonstrates that in addition to the agent’s negative judgements there must be a specific moral delimitation of such judgements for the objection-condition to be obtained. In other words, the objection component cannot be so generally construed to include all sorts of negative judgements. It also must be determined on some basis that the agent’s negative judgements are justified or legitimate.[clxix] Toleration as a compatible ideal with equality can be defended only when the agent has proved to have a morally justified reason for interference with the disapproved-of. This requires a critical determination of what can stand as a justified objection that allows the exercise of power.

3. The moral limitation of the objection component

The conclusion reached above indicates that, prior to anything, we needs to get things clear with the objection component. There is a question that its treatment will occupy the remainder of this paper. In so far as the moral permission for interference is concerned, what constitute a morally justified reason for objection? How should we draw the line between morally justified and morally unjustified reasons for objection?

On way forward to answering this question is to draw a distinction between the moral and non-moral disapproval and hold only the former as the justified kind of objection. Let’s call this the “exclusivist position”. According to the exclusivists, there are varieties of attitudes such as dislike, distaste, disagreement, disgust, aversion, disapproval and
repulsion that count as negative judgements. Not all however could be sufficient to constitute a moral privilege in favour of interference. The scope of toleration should be limited to the act of restraint where one forebears from interference or suppression of a practice which one is morally disapproved of. That is to say, the scope of toleration should be confined to the realm of moral wrongs. It is absolutely unacceptable to assume a moral standing for interference when our negative judgement simply consists of a judgement of taste. The fact that I do not like the colour red in no ways gives me a right to ask my friends to change their red outfits. The grudging withstanding of the burden of the other, whose colour of skin or smell one dislikes or finds disgusting is rather hard to be conceived as toleration. There is certainly something perturbing about the characterisation of reluctant putting up with the disliked other as toleration. It will give rise to what is known as the paradox of the “tolerant racist.” According to this paradox someone with extreme antipathies would be described as tolerant provided she showed restraint in her actions against the object of prejudices and dislikes. The more such prejudices she had, the greater would be her scope of toleration. To call on a racist to be tolerant is a moral mistake; what is required is instead that one should repudiate this prejudice and attempt to convince the racist of its groundlessness. This somehow resonates with Thomas Paines’ worry: “tolerance is not opposite of intolerance, but it is the counterfeit, both are despotism.” That is to say, intolerance presumes the right of the intolerant to tell the object of intolerance not to be a certain way and tolerance presumes the right to allow its object to be a certain way, when the truth is that it is none of her business in the first place.

As promising as the exclusivist position may sound, I claim that the acceptance of such a position runs into a deep problem. My reasons are twofold. First of all, an objection could not be morally justified without appealing to some substantive moral principles. Yet, any particular moral principle to which one might appeal is likely to be contested in a pluralistic society. For one is perforce defending the justifiability of reasons for objection by appealing to what is inevitably just one moral view among the many that are represented in diverse societies. The question is why one’s moral view should occupy a privileged justificatory position. Surely others who adhere to rival moral outlooks may oppose the proposed justificatory force of the objections. Moral judgements are not free-standing and cannot claim to belong to a “view from nowhere”. In contemporary society where the “fact of pluralism” is a ruling reality each and every moral judgement is grounded in a “comprehensive doctrine” which itself is not accepted by all the parties involved in a disagreement. Amidst disagreement and conflict each party accuses the opponent of being parochial in moral judgements. From the perspective of the conflicting parties it is very difficult, if not impossible, to reach a common ground where they can agree upon some substantive moral position. In fact, the lack of such common ground gives rise to the fact of
pluralism and disagreement, in the first place. Any account of the objection component which appeals to a substantive moral justification will face the problem of substantive justification.\[clxxiii]\[clxxiv]

Secondly, it is highly contested whether a negative moral judgement does actually generate a justified reason for interference. Some philosophers have argued that from the judgement that X is morally wrong it does not follow that it is morally permitted to interfere with X.\[clxxiv\] Recall that at the core of the inegalitarian charge lays the critic’s questioning of the permissibility of interference with the disapproved-of. If it cannot be shown that a substantive negative moral judgement against a practice justifies the interference with the respective practice, such appeal will not help the exclusivists to address this allegation.

The difficulty that the exclusivists face cuts even deeper that what I just demonstrated. If we, for the sake of argument, accept that there can be a substantive moral judgement that justifies interference, such acceptance somehow renders toleration impossible. It would be impossible to tolerate a practice which is morally wrong, and wrong in a sense which allows interference. How could it be morally good to refrain from interference with what is morally wrong? The best course of action appears to be interference, not toleration. The “moral paradox of toleration” thus arises. It is a paradox because toleration indicates that it is morally good not to interfere with a practice that it is deemed immoral.\[clxxv\] The agent therefore seems to be required to perform two contradictory acts, namely, interference and non-interference with the disapproved-of.

The existence of a moral judgement thus cannot be said to be sufficient for the question of toleration to arise on the ground that it either does not justify interference or necessitate it. Not only is the existence of moral judgements not a sufficient condition, it is also not a necessary condition. The following example will prove this point. The fact that I very much dislike and abhor smoking cigarettes and I am disgusted by the smell of cigarettes gives me a moral ground to interfere with my friend, A, who has the annoying habit of smoking in closed area when he is invited to my place. Upon my interference, based on my dislike for smoking, no one could blame me for performing a morally unjustified action. The justifiability of my interference, based on my non-moral judgements, proves that the moral objection is not necessary. I also happen to have another friend, B, who is not particularly bothered by the smell of tobacco. B nevertheless holds strong moral disapproval against smoking and the tobacco industry. Suppose we are all together in my place, although my interference with smoking, based on my non-moral judgement, is justified, B’s strong moral objection to smoking does not justify B’s interference. And of course, neither my dislike nor B’s disapproval permits interference with A’s smoking habit whilst we are in a park for a picnic.
The smoking example proves the arbitrary and misleading nature of distinction between moral/non-moral judgements as criteria for establishing an objection reason. We therefore need to nip the binary in the bud before it brings us many unnecessary theoretical complications. However useful the divide may be for some purposes, the formulation of the morality of reasons for objection in terms of such a divide evades the problem which haunts toleration, namely, the spectre of the inegalitarian charge. The exclusionists are right to draw our attention to necessity of the moral justification of the reasons for objection, they nevertheless, I contest, fail to navigate us to a viable solution. When it comes to the moral limitation of objections the appeal to the misleading scheme of moral and non-moral judgements will not efficiently fulfil the task.

4. A right to interference

The failure of the exclusivist position highlights a dilemma. On one horn, where the agent’s objections do not justify interference with the disapproved-of, toleration appears, as I demonstrated in the first paragraph, to be at odds with equality. The problem is best reflected in the paradox of the tolerant racist. On the other horn of the dilemma, where it is assumed that moral judgements justify interference the moral paradox of toleration will appear. To defend toleration against inegalitarian charge one somehow needs to overcome this dilemma. As obstructive as these paradoxes appear to attempts at responding to the inegalitarian charge, upon a further scrutiny of their nature, a beam of hope may rise at the horizon. What is problematized by the paradox of the tolerant racist is the lack of a moral permission to interfere with the disapproved-of. When the agent lacks permission to interfere with a practice, let’s assume due to others’ trumping right to liberty, non-interference is merely what the agent is required to do as a corresponding duty to others’ rights. Surely if the agent is under obligation not to interfere with a practice, say homosexuality, she cannot at the same time have a moral permission to interfere with the respective practice. The paradox of the tolerant racist thus highlights the fact that the agent cannot tolerate something that she is anyway under an obligation not to interfere with.

On the other hand, the moral paradox arises on the ground that the agent’s moral objection against the disapproved-of is assumed to put the agent under an obligation to interfere with the disapproved-of. When the agent is under an obligation to interfere with the disapproved-of practice, say a racist comment or harmful action, the agent’s act of forbearance cannot be counted as virtuous. This is so since the agent’s non-interference indicates the agent’s failure to fulfil her moral duty to stand against the wrongful acts. The moral paradox of toleration thus highlights the fact that the agent cannot tolerate something that she is under an obligation to interfere with.
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In order to avoid the oscillation between these paradoxes a normative space needs to be carved out between the two. Toleration can only be performed in a normative space in which the agent is neither under obligation not to interfere nor to interfere with the disapproved-of. A normative space in which the agent’s objection to a practice:

- does not conflict with a moral obligation not to interfere with the disapproved-of, and
- does not generate a moral obligation to interfere with the disapproved-of. That is, toleration can only be performed when the agent is morally permitted to interfere and yet is not obligated to do so.

This can be best explained by the notion of the agent having a right. Based on what is known as Hohfeldian analysis of rights, all assertions of rights entails a “privilege” for the right holder.[clxxvii] The privilege, which is also called “liberty” or licence,” to perform certain action. The agent has a privilege to do X if the agent has no duty not do X. Thus, privilege-rights mark out what their bearer has no duty not to do. It also indicates that the agent has no duty to do X.[clxxviii] That is, rights endow the right-holder with a discretion concerning (not) performing certain actions. Let’s substitute X with interference. To say that the agent has a right to interference with the disapproved-of is to say that the agent:

- has no duty not to interfere, and
- has no duty to interfere. This fully coincides with the conditions I set out above in regards the normative space needed for the agent’s reasons for objection. Hence, the moral justification of the objection component should be framed in terms of a right to interference. Instead of considering whether agent’s objections are moral or non-moral, we should consider whether or not the agent’s objections constitute a right to interference.

The smoking example that I proposed to illuminate the futility of the moral/non-moral divide will clarify my point regarding a right to interference. My objection to A’s habit of smoking does not always locate me in a position in which tolerating is a permissible action. When A happens to be in my home or in my office, my objection to A’s smoking puts me in a power position in which I am able to ask him to either stop smoking or go outside. In other words, my objection against smoking gives me a moral standing to interfere with A’s smoking. My moral permission to interfere with A’s smoking does not conflict with any obligation I may have not to interfere with A; nor does it bring about any moral obligation for me to interfere with smoking. In my place, my ownership right permits me to determine what others are not allowed to do. When my disapproval of smoking is accompanied with the ownership of the venue in which smoking takes place, it gives me a right to interfere with my friend’s smoking habit. However, when I and A go for a walk or I am in his place my
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objection does not establish a right to interfere with A’s smoking. My objection in these occasions conflict with the obligation I have not to interfere with A’s doings via A’s right to liberty to do whatever he wishes in his own home or public spaces.

Toleration is therefore possible when the agent has a right to interference, that is, when interference is morally permitted and yet the agent is not obligated to interfere. The question of toleration does not arise when the agent’s objection does not constitute a right to interfere and toleration reaches its limit when the agent’s objection morally compels the agent to interfere with the disapproved-of.

5. A rejoinder

I shall now consider a line of criticism that may question my position concerning a right to interference as a solution to the inegalitarian charge. I concluded the previous section by postulation a right to interference as a necessary condition of the concept of toleration. Yet, one could argue that, on the ground that a morally less demanding solution is not out of reach, to overcome the egalitarian charge we may not need to concede the necessity of a right to interference. In fact, one may continue, such solution has already made available by scholars such as Rainer Forst,[clxxix] Susan Mendus[clxxx] and Catriona McKinnon.[clxxxi] In order to meet this criticism, I shall now turn into what has been proposed by the above scholars.

Forst, being fully aware of the necessity of a “normatively substantive objection” for the question of toleration to arise, argues that a “certain moral threshold” must be established. The agent’s normative negative judgement should not fall below the moral threshold; otherwise we could no longer speak of toleration as a virtue. In order to filter out the kind of objections that give rise to the problem of the tolerant racist, we must formulate the “minimal conditions for objection judgements, which, to put it in negative terms, exclude “grossly irrational and immoral prejudices.”[clxxxii] The reasons for objection, Forst claims, despite being drawn from a particular ethical belief must be nonetheless “sufficiently defensible;” although these reasons are not shared with others they must be “recognizable and intelligible as reasons” to others. Once we manage to distinguish the “meaningful negative judgement” from the morally deficient prejudice we will overcome the paradox of the tolerant racist, without needing to appeal to a right to interference that sets the moral bar too high.

I strongly doubt that a moral threshold, as understood by Forst, will properly address what is at the heart of the egalitarian charge. Forst assumes that the existence of a moral threshold would filter out the “grossly irrational and immoral prejudices” and thus “the bare
references to ‘difference in appearance’ or ‘coming from elsewhere’ could not serve as “substantive criticism.” Such exclusion, I claim, will probably rule out the appeal to frivolous considerations for interfering with others’ doings, but it will not endow the agent with a moral power that justifies the interference. The tolerant racist strips off toleration from its virtuous nature primarily on the ground that it calls toleration an act of non-interference when, in the first place, any kind of judgement concerning the skin colour does not justify the interference. Racist judgements, regardless of being a frivolous objection the agent might have by appealing to statements such as ‘different in appearance’ or ‘coming from elsewhere’, or being a much more elaborate scientific racist theory which hold the racial superiority of a particular group of people, do not morally allow interference. In fact the history of racism shows the sizable efforts that have been made to elaborate various “scientific” arguments in favour of racist claims. The fact that these claims are “scientific,” and therefore not frivolous, does not make them less problematic. The paradox of the tolerant racist highlights the agent’s lack of moral permission to interfere with the disapproved-of, and this deficit surely could not be compensated with the sort of moral threshold that Forst envisages.

In her attempt to filter out the unjustified objections from the scope of the objection component, Mendus convincingly points out that the problem only arises when the judgements of taste and personal preferences are able to constitute the reasons for objection. The solution however is not to indiscriminately sweep away all non-moral judgements, but to find a way to keep the oppressive ones at bay. From the fact that some judgements of taste and no-moral considerations are morally unjustified it should not be assumed that all non-moral judgements are to fall prey to our oppressive prejudices. Mendus accordingly argues that toleration should only be applied to the occasions where there is a possibility of change and alteration on behalf of the tolerated. We can only tolerate practices and actions which could have been otherwise. This is true both in the case of moral disapproval and non-moral dislikes. Mendus writes ‘Even if we accept the wider scope of the term toleration and take it to cover both things which are disliked and things which are disapproved of, we may nevertheless wonder whether intolerance can be rational when applied to unalterable facets of life, to things over which the agent has no control’. In the case of agents' racist, discriminatory and oppressive prejudices, Mendus contests, the interference cannot be morally justified on the grounds that they ‘are directed at a feature of the person which is unalterable’. The talk of toleration/intolerance in the racial context is in the first place misleading; regardless of whether it is based on moral or non-moral judgements, “for to speak of toleration implies that the thing tolerated can be changed.”
The failure of the alterability argument to establish a criterion for filtering out the morally unjustified objections could be simply shown by way of counter example. There are occasions where the agent’s objections pass the alterability test and yet they will remain prone to the charge of unjustifiability. For example, it could be argued that the wide range of, if not all, the cultural characteristics are alterable. It would not be impossible for, say, the advocates of a religion to alter some of their practices or their religious dress code. It is nonetheless wrong to call the forbearance from interference with their doings toleration. Moreover, even in the seemingly hard core cases of non-alterability such as sexuality and race, where the characteristics of the members are assumed to be somehow innate, it could be argued that very often it is rather the cultural manifestations of these unalterable characteristics that are opposed and not the characteristics per se. In many cases, the problem is not whether homosexuals can enjoy their sexuality in private; it is rather the public manifestation of their sexuality which is the source of objection. Some, for example, may find the homosexual expression of love and affection in the form of kissing distasteful and disgusting and ask for a restriction on the public manifestation of it. Although it is feasible to demand homosexuals to alter their way of expressing affection by way of changing the form or the special expression of it, such alterability does not remove the justifiability deficit one may find in the objection and the corresponding attempt at interference with homosexuals’ behaviour in public.

Catriona McKinnon tries to replace the moral/non-moral divide with a procedural criterion. In McKinnon’s view when it comes to the moral evaluation of the objection component “what matters is not whether opposition is constituted by dislike and disapproval per se; rather, what matters is the way in which the potential tolerator makes her judgements of dislike or disapproval.” What morally qualifies the agent’s opposition to a practice or belief to count as a legitimate objection is the agent’s “taking responsibility for the judgements constitutive of it objection”. According to the responsibility criterion, regardless of the content of the agent’s judgement, as whether they are moral or non-moral, what makes an objection legitimised and gives rise to circumstances of toleration is the agent’s showing that “she genuinely takes these judgements to be justified, which is weaker than the requirement that the opposition actually be justified.” Taking responsibility for judgements requires agents to reflect on their judgements “through exposure to sources of information and different perspectives which have the potential to alter beliefs.” The responsibly held objections therefore differ from mere ignorance, prejudices and indoctrination in so far as they come about as a result of agents’ active intellectual endeavour to render a judgement about the disputed issues. McKinnon believes that the distinction between responsibly and non-responsibly held judgements will help us to rid toleration from the paradox of the tolerant racist.
I cannot see how such a distinction will overcome the problem. Firstly, drawing the boundary between responsibly held beliefs and mere prejudices is not as easy as it is imagined by McKinnon. In fact this difficulty is much more salient in cases which are the subject of severe dispute and controversy. The opposition of a religious person who critically assesses her religious beliefs about homosexuality, McKinnon holds, passes the responsibility test and her self-restraint from acting upon those beliefs could be called toleration. However, it is not at all clear where we can draw the line.

Secondly and more importantly, the paradox of the tolerant racist arises when the agent’s objection consists of a judgement which does not morally allow the agent’s interference. In such occasions when the agent does not have the moral reason to interfere with the disapproved-of we find it problematic to call the agent’s non-interference toleration. The lack of justified reasons for interference however derives from the content of judgement, from the fact that such judgement lacks in substantial validity. Such a lacking could not be compensated by appealing to the agents’ genuine and responsible attempt at rendering the judgements.

The critical assessment of the proposed criteria for filtering out the inappropriate objections reveals that they all fail to effectively grant a moral permission for interference. Hence, we should stick to a right to interference as the best solution available to us.

CHAPTER III

PARAGRAPH A

Reasonableness within political liberalism: why it cannot serve as a politically binding distinction

«Dissolvitur lex cum fit iudex misericors».

(Publilio Siro, Sententiae)

1. Introduction
How should non-liberal people be treated in liberal societies? To which extent can illiberal views be tolerated and their holders left free to express them and proselytise in the public arena? In the recent debate, political theorists both sympathetic and critical towards the liberal political tradition have started employing the Rawlsian concept of reasonableness to address this fundamental puzzle. Reasonableness has thus turned into a ‘politically binding distinction’, a distinction among citizens that can be used to ground legitimate differential treatment. The aim of the present section is to show that reasonableness cannot serve that purpose: if liberals intend to use a concept to discriminate among tolerable and intolerable views, or among fully cooperative and non-cooperative citizens, they need to investigate more deeply, in search of the specific features that render a doctrine or the community that endorses it dangerous for the society’s stability.

I intend to reject the use of reasonableness as a ‘politically binding distinction’ on three grounds. I will first address the problem of justifying policies that create legitimate differential treatment on ground of reasonableness and I will argue that, by making use of the accounts of public justification present within the political liberal tradition, such policies are not publicly justifiable. Second, I will demonstrate that reasonableness, as Rawls has employed the concept, suffers from excessive demandingness and that this threatens both the feasibility of reasonable pluralism and the ‘political’ character of political liberalism as a theory of justice that is independent from reasonably disputable values. Finally, I will consider a possible justification of reasonableness-based differential treatment in purely consequentialist terms and argue that even this attempt is bound to fail due to the scarce relevance for a society’s stability of the existence of a specifically reasonable form of pluralism.

2. Reasonableness: its origin and its use as a politically binding distinction

In Political Liberalism, Rawls presents the existence of reasonable pluralism as one of the three ‘general facts’ that characterise the political culture of a democratic society. Rawls conceives such a fact to mean that ‘the diversity of reasonable comprehensive religious, philosophical and moral doctrines found in modern democratic societies is not a mere historical condition that may pass away; it is a permanent feature of the public culture of democracy’.

Rawls never provides a full-blown definition of what he means by reasonable doctrine, but he lists two conditions of reasonableness valid for citizens. These conditions are the understanding of political society as a fair system of social cooperation in which citizens
interact as free and equal persons, and the acknowledgement of the burdens of judgement as the sole cause of pluralism. This second condition means that reasonable citizens do not see the comprehensive doctrine they endorse as equivalent to truth, thus accepting that disagreement about fundamental questions of value is somehow irreducible, and they further acknowledge that the presence of disagreement sets limits on the arguments that can be legitimately advanced in public. Hence, reasonableness implies both epistemic requirements (the recognition of the burdens of judgements) and attitudinal ones (the cooperative attitude), the two being necessarily interconnected.

Both requirements have to obtain, in Rawls’ theory, not only within democratic citizenship, but also in the process through which democratic institutions are justified: the device of representation of the original position. As Rawls started emphasising especially in ‘Kantian Constructivism’, the participants to the original position do not merely possess and exercise rationality (that is, the capacity to ‘adopt and affirm’ individual ends and the means to realise them), but also reasonableness, which implies a form of ‘moral sensibility’, the commitment to the distinctly moral values of fairness, liberty and equality. The presence of reasonableness, other than mere rationality, is the element that ultimately guarantees the selection of the two principles of justice, rather than utilitarian maximisation or the total forfeiture of citizens’ rights in exchange for security, as the outcome of the original position.

This is, in sum, the scope and purpose of reasonableness within Rawls’ theory. Rawls himself suggest, though, a way through which the concept of reasonableness can acquire a characteristically normative use: in a footnote in Political Liberalism, he briefly addresses the question of how to deal with the unreasonable minorities that would inevitably keep existing (as a sort of residue) even in a democratic regime, stating that democratic institutions have a ‘practical task of containing them – like war or disease – so that they do not overturn political justice’. In the recent debate, a number of theorists both sympathetic and critical towards the political liberal tradition have tried substantiating that unspecified and rather ambiguous suggestion, treating that between reasonable and unreasonable as a division encompassing all democratic citizenships. The treatment of the unreasonable as a distinct and easily identifiable community becomes therefore an issue that deserves to be addressed by specific policies.

Jonathan Quong, for instance, has argued that unreasonable citizens, despite their being entitled to the same rights and benefits as their reasonable compatriots (admittedly, they are not exempted by duties and burdens either), are subject to major constraints in the claims they can advance in the public arena. First, they are legitimately excluded from what Quong calls the ‘constituency of public justification’, the set of citizens entitled to receive a
justification on the part of a coercive authority. Second, their rights can be legitimately infringed in at least two important areas: freedom of education and freedom of expression. This twofold ‘containment’ (in the inclusion of unreasonable citizens in the constituency of public justification’ and in the full respect of their rights) aims at reducing the spread of unreasonable comprehensive doctrines, so to prevent that these pose a threat to the society’s ‘normative stability’\[cxcvi\].

Quong’s main remark is therefore that the preservation of stability is the underlying reason that justifies the legitimate infringement of unreasonable citizens’ rights. Quong is also particularly committed to emphasising that the area in which the infringements are bound to occur is extremely narrow, being restricted to those respects (such as education or public speech) in which the uncontained spread of unreasonable views can indeed trigger active manifestations of either intolerance among citizens or dissent towards the authority. Quong further underlines, contra Marilyn Friedman\[cxcvii\], that the ideal of containment does not provide the authority with a reason to take any kind of measure against unreasonable citizens; the fact that the unreasonable do not participate to the signing of the social contract through which the political authority acquires its legitimacy does not imply that they are also excluded from the enjoyment of those rights that the constitution attributes to all citizens.

Quong is undoubtedly right that his solution to the question of containment is, on an exegetical point of view, more in line with Rawls’ doctrine. A number of comments in Rawls’ later works\[cxcviii\] indeed specify that the fact that political liberalism cannot feasibly aspire to universal consensus is a mere contingency with no normative implications: once the rights and liberties (as well as duties and burdens) implied by justice as fairness have been set out, they have universal application within society. Nonetheless, what I want to challenge is the next section is not the exegetical question of how to substantiate, without betraying the spirit of political liberalism, Rawls’ suggestion about the containment of unreasonable doctrines, but, rather, the substantive one about the use of the reasonable/unreasonable dichotomy as a politically binding distinction. Without objecting to the original use of reasonableness as a requirement of participation to the original position and as a partial explanation of the source of pluralism, what I intend to question is the relevance of such a concept for the debate on the attainment of political stability.

3. Public justification, demandingness and consequentialist considerations: some worries regarding the reasonableness/unreasonableness dichotomy

The first worry encountered by a public authority enacting policies that, following Quong’s suggestion, infringe the rights of unreasonable people, is that of finding a publicly
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acceptable justification. The concept of *public justification* lies at the core of the political liberal tradition. Rawls emphasises how justice as fairness itself, as a political conception of justice, is fully justified only when ‘all the *reasonable* members of political society carry out a justification of the shared political conception by embedding it in their several *reasonable* comprehensive views’[cxcix]. Rawls’ account of public justification just addresses the reasonable: justification is full only when reasonable people, holders of reasonable comprehensive doctrines, take the political conception of justice as fairness as a ‘module’ that can easily be inserted among the conceptions that form their own comprehensive doctrine. The consensus of *unreasonable* citizens, on the other hand, is not required, and, although this might be an effective solution to the problem of justificatory impasse (when no principle can be justified in absence of a universal form of consensus), it presents specific worries for the case now at hand, that of policies infringing the rights of the unreasonable.

Rawls is not alone in considering that of public justification as a major concern for political liberalism, especially for its role in ensuring the legitimacy of a coercive public authority[cc]. Among the accounts of public justification present within the political liberal tradition, Gerald Gaus’ proposal is forms an alternative model, which is here worth considering. Gaus’ model[cci] is based on what he calls the ‘principle of sincerity’, which amounts to advancing in the public arena only reasons that ‘you think are good for others to accept’. The principle of sincerity sets constraints on the arguments that can be advanced in the public arena that, unlike in Rawls’ framework, do not depend on the reasonableness of the political actors involved. Structuring Gaus’ position in epistemological terms, we can say that the ‘subjective motivational sets’, to borrow Bernard Williams’ terminology[ccii], of all citizens, reasonable and unreasonable alike, act as a possible source of vetoes for the arguments that can be legitimately advanced publicly. What must be proved, in order for an argument to be publicly justified, is that it follows, even in a way that is still covert and implicit, from premises that others accept and endorse. Only when the requirement of sincerity has been satisfied, a principle is *victoriously justified*.

If we now try to apply both models to the case of differential treatment for the unreasonable (for example, concerning legitimate infringement of their rights), we can clearly see that they both lead to shortcomings. Rawls’ model restricts the set of the entitled recipients of public justification to the reasonable; if this may not constitute a problem for the legitimacy of public institutions, it does introduce a number of problems in the case at hand. Restricting the recipients of public justification to the reasonable circle implies that the reasonable have to find a consensus exclusively among themselves about the right treatment of those who live outside the circle; of course some policies, the ones that directly contradict the principles of justice agreed upon in the original position, are necessarily
excluded from the alternative set, but the selection of the right form of differential treatment is still completely left to the reasonable. The unreasonable have no say in the judgement of policies that concern, in a potentially harmful way, them (and them alone) and can only protest that the treatment they receive contradicts principles of justice that they have not helped establishing in the first place. To summarise, they are recipients of *justice*, but not of *justification* and are therefore attributed the same moral status as animals, infants or the mentally incapacitated. Unlike the other categories, though, unreasonable people do have a say in the process through which norms are enacted in a democratic regime, and this raises a tension between Rawlsian justification and democratic participation. The tension can be settled in an unproblematic way only by assuming that the majority of the population in a democratic regime is reasonable; this empirical assumption necessarily leads, though, to questions of demandingness that will be addressed later.

On the other hand, Gaus’ account of public justification, in its addressing both the reasonable and the unreasonable, does not easily yield to a practicable solution, either. The most likely situation to come about by applying his model to the case at hand is one of justificatory impasse: policies that infringe the rights of the unreasonable can hardly be justified by using arguments that the unreasonable themselves can accept. Unlike Rawls’ one, Gaus’ model easily reconciles with democratic procedures insofar as Gaus himself claims that, in case of justificatory impasse, the solution lies in submitting to an umpire or ‘arbitrator’, who can settle the practical dispute. Such an arbitrator can be identified, in contemporary circumstances, in the democratic state. Again, the unwarranted assumption of the existence of a majority of reasonable citizens/doctrines turns out to be central to the very possibility of enacting and justifying policies that may ‘contain’ the phenomenon of unreasonable disagreement.

The assumption of the existence of a majority of reasonable citizens/doctrines presents problems of excessive demandingness that appear evident once the exact bearing of the requirements of reasonableness is cleared. Being reasonable, according to Quong, does not mean simply to possess in some degree the liberal values of freedom, equality and fairness, but to give those values absolute priority while engaging in the political sphere (by acts such as voting or participating to the public debate). This absolute prioritisation, rather than simple presence, of the traditional liberal values is much less widespread than expected even in contemporary democratic societies: empirical evidence, referenced for example in Gaus’ reply to Quong, shows how the majority of people living in contemporary democracies, despite holding these values, weigh them against non-liberal commitments such as reliance on an authority, loyalty or sanctity. In fact, the only people who seem to prioritise liberal values and to make them a sufficient reason for action...
in the political sphere are those that are happy in identifying as ‘leftist liberals’.

The excessive demandingness of reasonableness affects therefore the plausibility that a simple consensus among the reasonable can ensure the instantiation of a political stability scenario: if the reasonable do not compose, after all, a majority then policies directed at ‘containing’ unreasonable doctrines could actually trigger a situation of unrest, rather than ensuring stability. Furthermore, the apparently necessary relation exiting in actuality between being reasonable and endorsing an extremely specific political orientation creates a problem for political liberalism, which is reduced to a simple sectarian doctrine and therefore deprived of one of its most definitive characters, the independence from reasonably disputable claims.

The final objection concerns the relevance of the existence of widespread reasonableness for the attainment of political stability. For stability, I here mean, very broadly, the continuation of over time of citizens’ allegation to the political authority. What seems missing in the literature on reasonableness is a list of factors that may unarguably indicate that unreasonable people, if left free to proselytise their views, produce a threat for the stability of the society in which they happen to live. In fact, just by concentrating on some exemplar cases, we can see that the fact that the content of a view is unreasonable does not determine per se whether its holders constitute a threat. Imagine this scenario: community A rejects basic liberal values (such as the conception of political society as a system of fair cooperation), but holds among its most cherished commitments those to peace and non-violence, in community B members recognize some of the liberal values but not always give priority to them over their own communal values that in some occasions clash with the liberal ones, in community C the members never let their communal values (which very often conflict with liberal ones) be trumped by any sort of consideration, even prudential ones. All three of the communities present unreasonable characters: their members do not recognize the burdens of judgment since they believe the doctrines they endorse and the values they cherish are true (not simply reasonable) and all the other values and doctrines are unreasonable, if not false. On the other hand, only community C clearly poses a threat to the stability of the state, since community A is a peaceful unreasonable community, whereas the members of community B do hold liberal values but they simply do not always consider them as a sufficient reason for action (they fail to assign a sort of lexical priority to them).

Hence, even on a purely stability-oriented, consequentialist perspective the infringement of rights of unreasonable citizens qua unreasonable does not seem justified: political theorists cannot make use of the sole criterion of reasonableness in order to discriminate between views that constitute a threat and views that are acceptable. What
seems to be necessary is an assessment of the substantive views that a community holds, over and above its being simply reasonable. Such an assessment, though, proves impossible if political theory is deprived of the possibility to judge divergent conceptions of the good and human flourishing, beyond their possible convergence on a single conception of justice. In sum, the element that more than everything characterizes political liberalism, its differentia specifica (its abstinence or ‘restraint’ in Joseph Raz’s terms[ccviii] from the substantive evaluation of divergent conceptions of the good) constitutes a constraint in the possible justification of legitimate differential treatment.

PARAGRAPH  B

Efficiency, freedom and equality: is there a way out of the egalitarian trilemma?
The egalitarian dilemma and the difference principle

«A person may cause evil to others not only by his action but by his inaction,
and in either case he is justly accountable to them for the injury».

(John Stuart Mill)

1. Introduction

Gerry Cohen dedicated a substantial amount of his work to the criticism of Rawls’s theory of justice in general, and to the criticism of his difference principle in particular. Rawls introduces the difference principle in order to solve the dilemma of how to achieve equality and Pareto efficiency simultaneously. Rawls’s difference principle allows inequalities so long as they are needed to improve the lot of the worst off. This is often taken as a permission for giving talented people incentives to produce more, expecting that the extra product gained in such way will be used to benefit the worst off. Cohen is well known for arguing that, properly interpreted, the difference principle does not actually allow for this kind of incentive generated inequality.
2. **Cohen’s critique of the difference principle**

Cohen’s conclusion from the first egalitarian dilemma – the one that Rawls tries to deal with through the difference principle, namely, the dilemma between equality and Pareto efficiency – is that there would be no such dilemma if the talented acted from a correct moral disposition. The only thing that creates dilemma in the first place is actually their unwillingness to work unless they are provided a higher monetary compensation. Since this is the only source of the problem, not their incapability to work for the same income as the rest of the society, there is no real dilemma at all.

The talented are simply acting wrongly and unjustly when they ask for higher compensation and have no right to do it. The supposition of inefficiency is not being produced out of thin air, but by the actual wrongful acts of actual people.

Therefore, the only justifiable inequality that could possibly justify the difference in the income is the difference in arduousness of different jobs in themselves and the difference in costs of acquiring the necessary skills. Paying the more talented the same amount although they produce more would not represent the violation of the egalitarian principles, because we do not demand from them to actually work at an extraordinary rate; what we are asking from them is to provide a greater product at the ordinary working rate, which the talented can easily do so since their abilities are greater, and they will consequently be equally well off as the other, non-talented people are (Cohen, 2008:182).

However, there is another consideration that is apparently not being solved by Cohen’s argument – the consideration of occupational freedom. We could suppose that in Cohen’s world, in order to achieve both equality and wider social efficiency, talented people would not be just asked to work at their maximum capacity, but also to choose their occupation according to their biggest and socially most useful talent. This would seem to pose a large burden on the talented people and lead to something similar to what Dworkin labelled as the “slavery of the talented”. While there seems to be nothing problematic in demanding people to behave in an egalitarian manner when it comes to productivity, expecting people to use their freedom of choice in an egalitarian fashion when it comes to selection of occupation seems much more demanding. “...people may strongly prefer not to do the job to which egalitarian policy assigns them, for no higher pay” (Cohen, 2008:182). People’s preferences concerning occupation largely differ, and it seems that it is important to acknowledge this fact in an appropriate way. The question that comes to mind is whether there are some other considerations that might constrain the demands of egalitarian justice in order to allow such freedom?
In order to justify the introduction of inequalities enabled by the difference principle, the so called “Pareto argument” is usually introduced. The argument states that justice requires, or at least permits, a movement from an initially favoured state of equality to the state of inequality in which everyone is better off than in the initial situation (Cohen, 2008, chapter 2). Therefore, a strict egalitarian faces a dilemma: either he will insist on strict equality, forsaking any Pareto improvements and consequentially making everybody worse off, or he will allow the Pareto improvements by making a move from equality. In order to respond to such dilemma, egalitarians like Rawls and Barry embrace the difference principle which allows for inequalities as long as they improve the situation of the worst off. However, in his criticism of the difference principle, Cohen shows us that the trade-off between equality and efficiency is necessary only if the talented people “violate the demands of the conception of justice that supplies the grounds for starting with equality”(Cohen, 2008:115) in the first place. Therefore, for true egalitarian there is no dilemma – it is not necessary to incorporate inequalities in order to achieve Pareto optimality.

However, one might object that goals of equality and efficiency might be achieved only if we sacrifice one thing that we might also consider valuable – the freedom of occupational choice. So the egalitarian might face a trilemma: it is not possible to achieve Pareto optimality, equality and (occupational) freedom simultaneously.

Cohen illustrates the trilemma by exploring the example of a person talented for doctoring and gardening both, but who prefers gardening to doctoring for the same salary (£ 20.000). However, it has to be noted here that the person does not hate doctoring; she actually finds it quite enjoyable, but prefers to garden even more. She prefers doctoring to gardening only when the reward for doctoring raises to £ 50.000. Her doctoring for £ 20.000 would, unlike gardening, greatly benefit the rest of the society, especially the worst off, and would still make her life much better off than most of the people, although not as good as it would be if she would garden for the same salary. So in this case, the individual and the society have exactly the opposite order of preference. Therefore, we face a trilemma: if we respect equality and freedom, and decide not to increase salaries above £ 20.000 and allow the doctor-gardener to choose her job, we will violate Pareto optimality, since both the doctor-gardener and society will be at loss. If we offer her increased salary, we will preserve Pareto and freedom but move away from equality. If we finally deny her the occupational freedom and force her to doctor at £ 20.000, we are sacrificing freedom.
3. Ethical solution

The devoted egalitarian cannot sacrifice equality; therefore, he will have to choose rejecting freedom or declaring against Pareto. Cohen doesn’t want to do either and proposes the so-called “ethical solution”, inspired by the Titmuss dilemma[ccxi]. The ethical solution that Cohen proposes is relatively simple: we may have all three (equality, freedom and Pareto) if the doctor-gardener chooses to doctor against her preference to garden as a result of some combination, as in the Titmuss solution, of principled commitment and fellow-feeling (Cohen, 2008:189).

The ethical solution is possible because citizens truly believe in equality; in this case, our doctor-gardener will voluntarily doctor for £ 20,000 because of her feeling of commitment to fellow citizens and egalitarian convictions. The trilemma therefore proves false: it is not true that equality and Pareto can be achieved only if people act unfreely. Although the doctor-gardener is worse off with her choice[ccxii], the Pareto is preserved because the society at large is better off. Unless we want to stipulate that it is impossible for people to act conscientiously or that moral constraints represent the constraints on freedom (which would be awkward), we would have to admit that the ethical solution indeed resolves the trilemma. “Liberty, Pareto and equality join a happy quartet when we add inspiration by principle and/or fellow feeling to the trio” (Cohen, 2008:193). The trilemma is present only in a society in which people are not truly devoted to equality, and would therefore rather sacrifice it to reach Pareto and freedom.

4. Liberty objection and personal prerogative

Cohen further examines another powerful criticism: what we mean when we discuss occupational freedom is not a freedom to choose one’s occupation, but the freedom in occupation. When a conscientious person chooses to doctor instead of garden, what she sacrifices is not her freedom of choice, but a possibility of self-realization. What this person is giving up is something so significant that it is not possible to consider her life to be free to its fullest. Our occupation makes a significant part of our lives and who we are as a person, and it is not comparable to blood donation which simply poses an inconvenience now and
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then. The sacrifice that is (self)imposed is so serious that it cannot be justified by simply invoking the free act of choice. Therefore, the freedom horn of the trilemma emerges again. Cohen acknowledges the importance of this criticism and gives two solutions that might accommodate it (although not really accepting it himself).

First, we can consider self-realization to be just one good among others, which in that case might be somehow traded off and simply included in our calculus. The fact that the talented get less freedom than they would get under less equalizing conditions does not make them worse off than anyone else.

Second, we might suppose that self-realization presents something so valuable that it is incommensurable with other goods, and should therefore have a lexical priority. Cohen points out that even if we accept this premise, it will be inappropriate to simply trade it off for some more income. It would be wrong to assume that we could ever lure a gardener into doctoring by offering him monetary compensation. “We cannot appeal to self-realization to vindicate the doctorgardener’s moral right to choose gardening, and then use that appeal to justify paying her more to follow an occupation in which she violates her self-realization” (Cohen, 2008:210). Cohen concludes that each individual has a so-called personal prerogative to pursue his/her own projects and aims, to some extent, and not act always as to promote equality. Therefore, you do not have to doctor if you do not want to, but if you do, you must do so to serve society, and not to gain an additional wealth. Whatever position on the issue of self-realization we take, we cannot justify monetary compensation for the talented.

5. Why not a return to the Stalinist system? Or, rather, a criticism to the same?

Although not entirely convinced that the talented should not be forced to take socially desirable occupations, Cohen provides several reasons for not undertaking what he calls a “Stalinist plunge”: counterproductive deterrence, information deficits, doing things in the right spirit (right things should be done for the right reason) and not using a person as means. The first reason expresses a practical concern that people will be deterred from acquiring knowledge and skills that would make them exposed to the forced labour conscription, which would in turn have a devastating consequence on the supply of certain vocations. This could be somehow overridden by a state conscription to a particular education based on the knowledge of their talents, preferences and propensities, but that would be impossible due to our lack of knowledge on these issues (epistemic problem). But
even if we disregard those more practical reasons, we could still claim that there is simply something wrong in forcing a person to give certain goods, simply because we treat these goods to be somehow special and inviolable, and therefore a part of a personal prerogative that every person holds and that is so powerful that it can sometimes constrain the demands of justice. In this sense, we can see how labour and, for example, love and sex are comparable to organ or blood donation: they should not be forcibly taken or sold on the market. This is the reason why forced labour is not on par with progressive taxation, as claimed by Nozick. We can easily see how there is a huge difference between asking someone to renounce a part of her revenue, while it is completely different to ask the same person to renounce the freedom of occupational choice which plays a significant role in her conception of the good life. We do, after all, have our own lives to live.

6. Did Cohen truly solve the trilemma?

There are several things that I find problematic in Cohen’s account on occupational freedom. Due to the limitations of my paper, I will not be able to explore all of them. I will point out two objections that I find to be the most serious ones. My first objection considers what I find to be an overly simplistic view on how the social incentives mechanism works and how this view on incentives fits poorly into Cohen’s own view on the metric of justice. My second, and more important criticism is that Cohen fails to resolve properly the above mentioned trilemma and subsequently, has to renounce one of its elements, presumably, freedom. Finally, I conclude that Cohen’s weak regard for the personal prerogative stems from the fact that he does not, after all, acknowledge the fact of value pluralism, the task that I believe is more successfully undertaken by Rawls.

6.1. The conflict between the “metric of justice” and conception of incentives

While considering incentives, Cohen addresses only material incentives. However, it would be too simplistic to associate the prestige that certain occupations enjoy in our present, unjust societies only with the material rewards that these occupations include. We should not underestimate the power of non-material social incentives. In the case of the blood donation, Cohen does not acknowledge the possibility that people include the non-material incentives in their calculus, such as social reputation. Hence, it is possible that people at
least sometimes behave morally from instrumental reasons— in order to gain the approval of others, as stipulated in the article by Sperber and Baumard (2012). Cohen could argue that these incentives are not so morally blameworthy or they have not such serious consequences on equality as the material incentives.

However, following Cohen’s line, doing something out of one’s own self-interest, although it does not include a material compensation, should be equally bad from the point of view of equality as the one including material incentives. In this case, equality is violated because I want more social respect, admiration, friendship or whatever than others, although I didn’t do anything besides what my egalitarian duty requested. Since Cohen’s metric of justice is not limited simply on resources, under his welfarist conception of the metric of justice, he should not be making such a strict difference between material and non-material incentives. Both kinds of incentives should be understood as wrong because they stem from the same wrongful (or at least blameworthy) selfish moral disposition and they both cannot be justified by invoking a personal prerogative.

6.2. What about efficiency?

Now I turn to my second criticism. I believe Rawls and Cohen have different societies in mind: while Rawls conceives of capitalist democracy, Cohen conceives of socialist society. In so far as he thinks that salaries should be centrally assigned, with regards to people needs and additional effort that they in fact had to invest in order to achieve the level of education necessary to perform in their occupation, I also assume that what he has in mind is centrally planned production. Otherwise, it would be hard to imagine having a market without having a job market in the same time. In a Cohenite society with a universal ethos of justice, workers would choose their occupational preferences motivated on the one hand, by their talents and interests, and the amount and demandingness of the education required to perform it, and on the other hand, the needs of wider society. As Roemer points out, in such society, the supply of workers for occupations is entirely inelastic with respect to the wage structure (Roemer, 2010:261). Although Roemer expresses his conviction that such society could have and would still need a market as the mechanism for coordinating economic decisions, I believe Cohenite society could not leave the production to the companies and allocation to the market, while completely controlling the labour market and wages in the same time. How could producers produce without a discretion to hire the number and type of workers they need? How would they attract a sufficient amount of labour without offering incentives or forcibly conscripting? Cohenite society cannot allow for a market in any case, as Cohen admits himself (he claims that market induces greed and selfishness).
Cohen expresses his inspiration with the old Marxist maxim: “From each according to his ability, to each according to his needs.” Labour has to be completely divorced of economic incentives, and occupation has to be chosen based on personal non-material interests and social needs. Salaries would be distributed based on need (or some welfarist conception of justice) and would differ only with respect to different educational efforts and arduousness of each occupation. However, due to personal prerogative that he acknowledges as an important part of individual’s life, Cohen rejects the first part of the socialist maxim by recognizing its implications on the occupational freedom- it would demand more talented to work at what they are the best at regardless of their personal desires and needs. This would indeed include the enslavement of the talented and therefore has to be mitigated by the second part of the slogan, which he interprets as “no one should be expected to serve in a fashion that will unduly depress her position, in comparison with others, with respect to what she needs to have to live a fulfilling life” (Cohen, 2008:209).

Even in the case we accept Cohen’s apparent reconciliation of the values of equality and (occupational) freedom through introduction of personal prerogative, I believe that Cohen failed to notice that in his solution, the third horn of the trilemma emerges again- the problem of achieving Pareto efficiency. In a society where everyone would receive as much as he needs but not in the same time, work and produce as much as they could, the social product would simply be too low to satisfy all the needs. Of course, Cohen’s answer would be simple: the solution is not to incentivise the talented to produce more, but to self-impose a limitation on (every)one’s needs so to correspond to the egalitarian ethos. I do not wish to discuss here the empirical plausibility of such claim. The moral outlooks on human nature and human possibilities are diverse, opposing and hardly empirically tested. Cohen probably has as many examples of cases in which people were capable for following “ethical solutions”, as I would have for the instances of selfish behaviour. In the same manner, I do not want to discuss the empirical issue whether markets are successful or unsuccessful way to coordinate collective actions.

CHAPTER IV

PARAGRAPH A

On the unfairness of benefitting from injustice
Pacta servanda sunt? Jus post-bellum and transitional (in)justice in post-war and in post-authoritarian regime context

«Now let us pray for peace to be restored throughout the world and for God to always protect us».

(Gen. Douglas MacArthur)

«I saw the war; I hate war. More than the end of the war, we turn the end of the principles of all wars».

(Franklin Delano Roosevelt)

1. Introduction

In recent years there has emerged an important literature analysing the duties that arise in virtue of benefiting from injustice[ccxiv]. To be sure, this literature is not concerned with the duties of wrongdoers; rather, it examines the duties that arise through innocently benefiting from acts of injustice. The types of cases considered are thus ones in which an injustice occurs, and the benefit accrues to an innocent third party.

According to a highly influential account advanced by Daniel Butt, the fact of innocently benefiting from injustice is normatively significant in a way that can give rise to ‘a duty to disgorge (in compensation) the benefits one gains as a result of injustice’. More specifically, on Butt’s account, the duty that arises is one of corrective justice – that is, it is a rectificatory duty owed specifically to the victim(s) of injustice.[ccxv] The mere fact that I innocently benefit from injustice, that is, can be sufficient to generate a duty to compensate the victim(s) of that injustice.

In this section I do not attempt to refute Butt’s arguments. Rather, my purpose is to offer an alternative, and supplementary, account of what is morally problematic about innocently benefiting from injustice. Whereas Butt focuses on the duties of corrective justice that can arise from innocently benefiting from injustice, I focus on the duties of distributive justice that may arise. The core advantage of this approach is that we are able to consider a larger range of cases, including cases in which there can be no corrective duties because, say, the victim(s) of injustice have already been adequately compensated.

These pages unfolds as follows. In section 2 I engage in some definitional preliminaries: here, I offer several clarifications about what it means to benefit innocently from acts of injustice. Then, in section 3, I sketch the central features of Butt’s argument and thereby outline his reasons for thinking that beneficiaries of injustice owe rectificatory duties to the victim(s) of injustice. In section 4 I then consider a range of cases in which
Butt’s arguments seem to be impotent. To deal with these cases I propose an alternative account of the normative significance of innocently benefiting from injustice. This account highlights the unfairness of innocently benefiting from injustice. Finally, in section 5, I conclude with some general remarks on the relationship between my argument and Butt’s. In particular, I consider cases in which mine and Butt’s arguments would seem to pull in different directions.

2. On innocently benefiting from injustice

My interest in this chapter is in the duties that arise through innocently benefiting from acts of injustice. In order to get clear about the details of such duties it is first necessary to clarify what it means to benefit innocently from injustice. This involves making three clarifications. These are the tasks to which I attend in this section.

First, our understanding of benefit ought to be a counterfactual one. In a nutshell, this means that an agent benefits from injustice only if, had the injustice not occurred, their interests would in comparison be set back. This has the implication that furthering an agent’s interests is insufficient to qualify as benefiting them; rather, benefiting them requiring furthering their interests more so than would be done were the injustice not to occur.

Secondly, when introducing the topic, Butt claims that his interest is in the duties that may arise through ‘involuntarily benefiting from acts of injustice’. According to Butt, agents involuntarily benefit from injustice when ‘the benefits in question are not voluntarily acquired or accepted, in that they are conferred upon those who receive the benefits without an exercise of the will on the part of the beneficiaries’. As an example of the kind of benefits Butt has in mind, let us consider the benefits that have accrued to those white males, who, though themselves have not acted wrongfully, have benefited from racism and sexism.

One feature of Butt’s definitions, however, is that they seem somewhat arbitrarily to exclude a range of cases that seem to be of interest. These are cases in which the beneficiary acts voluntarily, but innocently. For example, let us consider a case in which you purchase, and hence benefit from, goods that, unbeknownst to you, turn out to be stolen. Assuming that you are not culpable for your ignorance, it seems reasonable to say that you have benefited voluntarily, but innocently from injustice. More importantly, cases like
this seem not, on the surface at least, to differ too greatly from cases of involuntary. This suggests that our interest ought to be in the broader issue of innocently benefiting from injustice, rather than the narrow issue of involuntarily benefiting from injustice.

Let me now turn to issue a third clarification. Though there is at least some intuitive plausibility to the idea that duties may arise through benefiting from unjust discrimination or from stolen goods, for example, there seem to be other cases in which innocently benefiting from injustice seems clearly not to give rise to further duties.

Let us consider two examples. First, let us take the case of lawyers, whose careers depend in part upon agents acting unjustly. Here, surely it is not plausible to claim that lawyers incur some additional duties in virtue of the fact that they benefit from injustice? Similarly, let us consider the case of artists, such as Banksy, who have found success in producing art that highlights injustice. In this case, too, surely it is not plausible to claim that additional duties arise from innocently benefiting from injustice.

To be sure, these cases do not refute the claim that duties can arise from innocently benefiting from injustice; rather, they merely highlight the need to limit the scope of our investigation. That is, it is plausible to claim only that such duties can arise in certain instances of innocently benefiting from injustice. The task, then, is to develop criteria by which to determine whether a given case is one in which, in principle, duties may arise. This seems to me to be an under-explored area in the literature and, somewhat unsatisfactorily, I myself have no firm answer to that question. Rather, for the purposes of this paper, I shall have to distinguish between such cases on a purely intuitive basis.

3. The beneficiary pays principle

Butt’s analysis of the normative significance of innocently benefiting from injustice can be understood as proceeding in two stages. First, he attempts to distil certain normative principles (that may explain our intuitions) from a range of cases in which agents innocently benefit from injustice. Second, he tests the plausibility of these normative principles by examining whether they could have any philosophical justification.

Butt’s central case, which is adapted from one devised by Robert Fullwinder, is as follows:

“My neighbour and I each have a large hedge in the front of our gardens. While I am on
holiday, my neighbour hires a topiarist to cut her hedge into the shape of an ornamental peacock. She leaves a note of the work to be done, along with £1000. However, an enemy of my neighbour substitutes the note with an alternative note instructing the neighbour to cut my hedge. The topiarist arrives and follows the instructions, thus leaving my neighbour £1000 down and me with an ornamental peacock in my garden”.

In order to make it clear that I have benefited from the injustice, let us also assume that I had decided that, when I return from my holiday, I would ring the local topiarist and arrange for my hedge to be cut into the shape of an ornamental peacock, at the cost of £1000.

Now we should ask the following question: If my neighbour knocks at my door and asks me to compensate her by an amount equal in size to the benefit I received from the injustice – in this case, £1000 – ought I to do so? Butt thinks that I clearly ought to compensate her, and, if I fail to do so, then I act wrongfully. After all, paying the compensation would leave me no worse off than if the injustice had not occurred (since I would have hired the topiarist myself), but failing to pay the compensation would leave my neighbour worse off by the sum of £1000.

The explanation for this conclusion, Butt thinks, comes from the beneficiary pays principle (BPP). In its most general form, the BPP states that agents can come to possess obligations to lessen or rectify the effects of wrongdoing perpetrated by other agents by benefiting, innocently, from the wrongdoing in question. We ought to note that the duties sanctioned by the BPP are duties of corrective justice – that is to say that they are compensatory or rectificatory duties owed specifically to the victim(s) of injustice.

Butt’s second task is to examine the possible philosophical justification of the BPP. Here, Butt invokes a connection theory whereby particular types of relationship ‘may establish a sufficiently strong link between parties to allocate remedial responsibility’. The claim, in short, is that being connected with an injustice in certain ways grounds increased liability (when compared with by-standers) to correct for that injustice.

In the case of innocently benefiting from injustice, the reason is as follows: “My claim is that taking our nature as moral agents seriously requires not only that we be willing not to commit acts of injustice ourselves, but that we hold a genuine aversion to injustice and its lasting effects. We make a conceptual error if we condemn a given action as unjust, but are not willing to reverse or mitigate its effects on the grounds that it has benefited us. The refusal undermines the condemnation”. [ccxvii]
Butt’s central contention is that injustice requires condemnation and this, in turn, requires that we mitigate the effects of wrongdoing. Though we may all have some duty to mitigate the effects of wrongdoing, this duty is particularly stringent for those connected to the injustice, such as the beneficiaries. For them, condemnation requires that they be willing either to compensate fully the victim(s) of injustice or to compensate the victim(s) of injustice by an amount equal in size to the benefit received (whichever is the smaller).

This brief sketch of Butt’s position is sufficient for my purposes and I do not need, therefore, to examine the account in further detail. Instead, I shall proceed in the next section to consider a range of cases that Butt’s arguments seem not to be able to speak to. Consideration of these cases also allows me the opportunity to develop a supplementary account of the normative significance of innocently benefiting from injustice.

4. The importance of fairness

The BPP yields duties of corrective justice. The implication of this is that the BPP is capable of generating duties only in cases where there is an injustice that needs correcting for. Importantly, however, there are some cases in which the injustice may not need correcting for. These are cases in which the victim(s) of injustice are already fully compensated, say, for example, because the wrongdoer is made to compensate fully the victim(s) of injustice. As Butt notes, in these types of cases, there is “no work for the beneficiary to do” and hence the BPP will generate no duties. In this section I explore how we ought to respond to these cases.

Let me begin by elaborating on three types of cases in which the BPP is redundant. Each case corresponds to a separate way in which adequate compensation for the victim(s) of injustice can be brought about.

First, there are a small number of cases in which the victim(s) of injustice die or, more generally, cease to be able to make claims for compensation. If, for example, my neighbour was to die and had neither an identifiable next-of-kin nor prepared a will, then surely it can make no sense to talk of my neighbour being entitled to compensation. Though the injustice would not have been corrected, it would have been terminated in a way that would preclude the possibility of corrective duties arising. Accordingly, the BPP would not require me to offer the £1000 to my neighbour.

Second, there are a large number of cases in which the wrongdoer – or, for that
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matter, any other agent – adequately compensates the victim(s) of the injustice. Perhaps, in the example above, my neighbour’s enemy (voluntarily or not) stumps up the £1000, thereby adequately compensating my neighbour. If so, then the injustice will have been corrected and hence the BPP cannot require me to hand over the £1000.

Third, there are cases of non-harmful wrongdoing – that is, cases where the act of injustice benefits or makes no worse off the victim(s) of injustice. For example, let us suppose that, having seen the ridiculousness of the ornamental peacock, my neighbour was relieved that it was in my garden rather than hers. In short, she feels that the injustice benefited, rather than harmed, her. In this case, my neighbour can surely claim no compensation for the harm she has suffered since, after all, she has suffered no harm. We should surely thus regard my neighbour as in need of no further compensation and hence the BPP will not require me to hand over the £1000.[ccxxix]

In each of these cases the BPP cannot require innocent beneficiaries of injustice to disgorge the fruits of injustice. I want, however, to suggest that this is not the complete picture, and that we should invoke a further principle that tells against the permissibility of beneficiaries retaining the benefits that innocently accrue to them through wrongdoing.

My argument appeals centrally to the unfairness to being permitted to retain benefits that accrue unjustly. The point, in short, is that innocent beneficiaries of injustice can make no good faith argument showing why they, as opposed to anyone else, should retain the benefits that unjustly fell into their hands. After all, they did not earn or do anything to deserve the benefits; the benefits are simply the product of good brute luck. The upshot is that the fruits of injustice are best thought of as a kind of ‘neutral resource’[ccxxx] that need not necessarily be left to lie where they fall.

Whilst this is correct, it is insufficient to show that innocent beneficiaries of injustice ought to disgorge the fruits of injustice. This is because of the common law presumption in favour of the status quo. Within the analogous case of loss-sharing, Peter Cane notes that, in virtue of the administrative costs of loss-shifting, “the onus is on those who wish to shift a loss to justify the shift. Unless there is some good reason for shifting a loss, it should be left to lie where it falls”’.[ccxxxi] Similarly, in our case, it may be thought that the onus is on those who wish to shift a benefit to justify the shift. Unless there is some good reason for shifting the benefit, it should be left to lie where it falls.

In response to this, we can note that there surely are decisive reasons against letting the benefits lie where they fall. These are the reasons that derive from the important of distributive justice. That is, rather than allowing the benefits lie where they fall, surely they
ought instead to be distributed in accordance with the principles of distributive justice. Depending upon which theory of distributive justice we adopt, this will probably require the fruits of injustice being distributed either between all citizens equally or to the worst off. Taking this thought seriously motivates a prima facie duty to disgorge the fruits of injustice in accordance with the principles of distributive justice, even when the victim(s) of injustice have been adequately compensated. To do otherwise would be to exploit unfairly one’s good brute luck.

In this section I have sketched the skeleton of a fairness-based account of the normative significance of innocently benefiting from injustice. A full defence of the account will have to fill in many of the details, including, for example, an account of how we are to calculate what full disgorgement means. For the present purposes, however, this account is sufficient to make clear my argument.

Importantly, the argument I have offered is supplementary to the BPP, rather than an alternative to it. Its principal strength is that it is able to explain why innocent beneficiaries of injustice ought to disgorge the fruits of injustice in cases where the victim(s) have been adequately compensated. In the final section I examine in further detail the relationship between the BPP and the fairness argument I have defended.

5. Corrective and distributive duties

In cases of non-harmful wrongdoing the BPP fails to impose any duties on innocent beneficiaries of injustice and we are therefore left with the fairness argument only. Importantly, however, many cases are not like this – many cases, that is, involve harmful wrongdoing. In these cases both the BPP and the fairness argument seem relevant. How, then, are innocent beneficiaries of injustice required to act? Or, in other words, which of the two duties ought to win?

To clarify this issue, let us return again to our topiary case. Here, the BPP requires that I meet my neighbour’s demands and pay her £1000, but the fairness argument seems to suggest that I ought to disgorge the £1000 in accordance with the principles of distributive justice. Given that I cannot do both, I must chose between the two. In this case it seems clear to me that the demands of corrective justice are the weightier and that, therefore, I must be prepared to offer the £1000 to my neighbour before I consider disgorging any remaining benefit in accordance with the principles of distributive justice. To see why this is so, let us consider a clearer example. Let us imagine that my neighbour’s enemy has broken into and stolen goods from my neighbour’s house. On his way out, my neighbour’s enemy thrusts these stolen things through the window of my house such that, once again, I have benefited from
the injustice. When my neighbour comes knocking at my door for her goods, what ought I to do? Ought I to meet my neighbour’s demands, as the BPP requires, or ought I to disgorge the fruits of injustice in accordance with the principles of distributive justice, as the fairness argument requires?

Clearly, I take it, I ought to ignore the fairness argument and, instead, simply return the goods to my neighbour as the BPP requires. Only once my neighbour has been adequately compensated, ought I then to consider disgorging the benefits in accordance with the principles of distributive justice.

These conclusions are important as they show that the BPP ought to take priority over the fairness argument in case of harmful wrongdoing, and that therefore the applicability of the fairness argument is limited to cases of non-harmful wrongdoing. This, in turn, is of import as it illustrates the way in which the fairness argument supplements, rather than replaces, Butt’s argument in defence of the BPP. Thus, though the fairness argument developed in the paper is an important one, we must remember that its role is limited.

**PARAGRAPH B**

*On coercion, egalitarianism, and global public goods*

«War cannot be humanized,

*it can only be abolished*».

(Albert Einstein)

«When the rich make war, it is the poor who die».

(Jean Paul Sartre)

1. **Introduction**
It is commonly thought that a well-functioning state must have coercive power. A number of theorists have thought that this sort of coercion potentially gives rise to egalitarian principles of distributive justice within the state. For some, like Michael Blake and Thomas Nagel, this is because acts of coercion need to be justified to those coerced, and the only way of justifying state coercion to its citizens is to use it to create an egalitarian distribution among them. For others, republicans like Philip Pettit, it is because reducing inequality may remove unjust forms of domination which the existence of a coercive entity like the modern state invites.

When these theorists turn to discussions of global distributive justice, however, they become much less concerned with inequality. This is because nothing like the coercive state exists on a global scale, and so the relevant sort of coercion is thought to be absent. A common objection to these arguments is that, although nothing like the world state exists, the relevant forms of coercion are present internationally. In this part of my research, instead of asking whether or not the relevant sort of coercion exists, I question whether it should do. In section 1, I claim that justice requires the supply of various global public goods. In section 2, I suggest that these cannot be supplied without international coercion. Finally, in section 3, I sketch some implications of this for theories of global distributive justice.

2. Global public goods

Public goods are goods that are non-excludable (nobody in a relevant population can be excluded from the benefits) and non-rival (one person’s consumption does not reduce the amount for others). Because of this, if left up to voluntary contributions public goods are vulnerable to the “free-rider problem”. If one individual’s contribution will not make a noticeable difference to the level of supply, she will have an incentive not to contribute, as she will receive the benefits anyway. If everyone acts on this logic, however, nobody will contribute, the good will not be supplied, and everyone will lose out. The importance of a number of these goods has often been seen as a justification for the state using coercive means to ensure individuals contribute.

Discussions of public goods have traditionally taken the population in question to be citizens of a state; the textbook example is national defence. Amid growing globalisation and international interdependence, however, the importance of supplying some public goods whose beneficiaries extend across state borders has increasingly been recognised. In an age of international terrorism, individuals’ security needs cannot simply be met through national defence. This must be supplemented by international collective security arrangements - they must also rely on the cooperation of outsiders in intelligence sharing and joint security
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operations. Other examples of these “global public goods” include the control of dangerous pandemics and the prevention of catastrophic climate change.

My starting point is the assertion that justice requires supply of a number of important global public goods. I do not argue for this here, but I believe that it has considerable intuitive appeal. Climate change and international terrorism threaten individuals’ basic needs, and preventing these will necessitate supplying global public goods, not simply national solutions. Given the importance of this, I believe that it makes sense to talk of a requirement of justice to produce these goods. However, global public goods, like public goods more generally, may be susceptible to the free-rider problem.

3. Voluntary supply

An increasing awareness of the importance of global, as well as domestic, public goods, however, has not led to a corresponding acceptance of coercive means to ensure that global public goods are supplied. Scott Barrett, echoing many others, claims that ‘sovereignty essentially implies that they must be supplied voluntarily’. But just how workable is this suggestion? In this section, I outline three ways in which public goods may be supplied through voluntary means. While we may be optimistic that some public goods can be supplied without coercion, I suggest that we have little reason for optimism in the case of global public goods.

3.1. Fair-mindedness

Firstly, individuals may be morally motivated to voluntarily contribute to public goods; they might be driven by a sense of fair-mindedness. An individual who benefits from a public good may want to voluntarily pick up her fair share of the costs. However, a fair-minded individual is only likely to be so motivated if she has sufficient assurance that others are also doing their fair share. If she lacks this assurance, she may not contribute, firstly, because her contribution may be for nothing (if she is the only individual contributing to national defence, for example, it will not be effective) and, secondly, simply because she does not want to be taken advantage of. Note that even if everyone were equally fair-minded, the public good may still not be supplied without each having assurance that the others are also fair-minded. In what circumstances, then, would there be sufficient assurance?

David Miller highlights the need for trust among the group. He points to experimental
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evidence which shows that such trust emerges when people are able to communicate with each other prior to deciding whether or not to contribute to public goods.\[ccxxxvii\] On a larger scale, though, when the public good requires contributions of millions of people, such face-to-face communication is infeasible. But if there are other mechanisms for inducing trust, perhaps public goods could at least in part be produced through voluntary action even on this scale. Elsewhere, Miller argues that shred group identity, particularly national identity, could be one such mechanism.\[ccxxxviii\] Individuals may have the requisite level of trust if they see themselves as sharing nationality with the other contributors.

Could similar mechanisms be used to ensure voluntary contributions towards global public goods? It appears not. On the one hand, different national communities often need to cooperate in producing these goods. Shared nationality would not be present, and it is difficult to see what identity could fill the gap. On the other hand, although direct communication is often carried out in international negotiations, since the agents involved are acting in official capacities as representatives of countries, not as private individuals, the prerequisites for trust to be created through communication appears to be absent.

3.2. Small groups

Mancur Olsen has offered another explanation of why public goods may be supplied through voluntary compliance by groups. He argues that as the group size gets smaller, public goods are more likely to be supplied. This is because, in small groups, there may be an inequality of interests in particular public goods being supplied. In these groups, it is may be the case that one individual will stand to benefit significantly more than others by the supply of a public good, and so will be motivated to take it upon himself to take a lead in supplying the good (or, at the extreme, supply the good solely himself). Everyone else, who has less of an interest in the good, would then benefit from it being supplied. Olsen called this phenomenon ‘a systematic tendency for “exploitation” of the great by the small’.\[ccxxxix\]

Can the international community of states form a small group in a similar way? Although the individuals who benefit from public goods here is going to be large (potentially six billion people), it is the agents involved in supplying the goods – normally states – which we should look at. There is normally, at a maximum, 192 such agents (the number of members of the UN). This is significantly larger than the size of groups which Olsen had in mind, but Olsen is also aware that there is not a straightforward relationship between group size and inequality of interests. And in the case at hand it seems as if one country might have a sufficiently stronger interest than the others to take a lead in supplying public goods.
The USA’s relatively large population, combined with its relative wealth, for example, might lead it to take up the slack in the production of global public goods. And there is some evidence that this has happened in the past; Charles P. Kindleberger points out that global public goods have generally been supplied when there is clear leadership, usually from the USA.

However, although this mechanism may be sufficient to produce some public goods, it is unlikely to be so to produce all the global public goods which justice requires. One of the lessons from the Kyoto Protocol, as we will see, is that as well as one country having a greater interest in a public good being supplied, they must also not be put at a distinct disadvantage when they take a lead in supplying it.

4. Assurance contracts

David Schmidtz argues that “assurance contracts” can solve the free-rider problem. The idea here is that private entrepreneurs would ask all individuals in a group to sign a pledge to pay towards a public good. Their pledge, however, is conditional; they will only be held liable for paying if everyone else has also signed. This supposedly removes the free-riding instinct of individuals: each person will be assured that others are not free-riding on their contribution, and they will also not be incentivised to free-ride, since if they attempt to do so, the good will not be supplied.

The main problem with the use of assurance contracts is that the incentive to free-ride may re-emerge in the decision of whether to sign up to it in the first place. As David Miller notes, if a single individual did not sign up, others may be tempted to pick up the slack and each agree to pay a little more in order to avoid the good in question not being supplied. Or perhaps they would be happy with a lower quality public good if the required money is not raised. If everyone knows that the others will be prepared to do something like this, however, each may attempt to free-ride by not signing up in the first place, thus undermining supply in a way which Schmitz was trying to avoid. Nonetheless, it does appear that something approximating assurance contracts have been used to ensure supply of some global public goods. The Montreal Protocol (which set limits on CFC emissions to prevent ozone depletion) built in a clause which meant that it only became binding once the countries which signed up to it accounted for two thirds of worldwide CFC emissions. States which would otherwise be worried that their own cuts in CFC emissions would be pointless without the compliance of others were offered assurance that at least most of those others would make similar cuts.

But there were other fortunate factors which were present in the case of the Montreal
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Protocol. There were ready alternatives available to CFC-intensive products, and once a sufficient number of countries agreed to switch, it became worthwhile even for non-signatories to also do so, in order to keep trading with signatories. In contrast to this, there are no readily-available alternatives to a number of products made by carbon-intensive methods; the most we can hope for in the short term is simply less carbon-intensive methods. But given the difficulties in distinguishing between less and more carbon-intensive products for the purposes of trade, we cannot hope for any agreement to be self-enforcing in the way the Kyoto Protocol was. Since countries and firms who use carbon-intensive methods may be at a competitive advantage, the free-riding incentive will re-emerge here. This arguably explains the failure of the Kyoto Protocol.[ccxiv]

I conclude that there are a number of important global public goods which cannot be supplied through voluntary agreements. We need to rely on coercive mechanisms to ensure their supply. This, of course, does not mean that something like a world state is required. Instead, international institutions could instead play a coordinating role in organising sanctions against non-compliers, much like the WTO currently operates.

5. Coercion and global inequality

To meet the requirements of justice, and supply important global public goods, coercive international institutions are required. This, as I shall argue here, may affect our views on global distributive justice.

5.1. Justifying coercion

Michael Blake and Thomas Nagel have argued that the coercion a state carries out against its citizens, for example in upholding a system of property, grounds egalitarian principles of justice within a state. The fact that state coercion affects the pattern of holdings of individuals subject to it (for Blake) or is “co-authored” by them (for Nagel) means that it can only be justified to citizens if it creates an egalitarian distribution among them. Similar concerns do not arise globally, however, since although there is undoubtedly coercion carried out in the international sphere, it is thought to be not of the relevant sort.[ccxlv]

Blake, for example, although accepting that there is international coercion which affects the pattern of holdings, thinks that this coercion is “non-ideal”. Unlike a state coercing its citizens, which is necessary to avoid the inconveniences of the state of nature, the sort of coercion we find internationally ‘is not a necessary part of the institutional
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makeup of our world; the ideal would not be a particular vision of this coercion, but the absence of that coercion itself’. The idea here is that, instead of justifying this coercion to those coerced through arranging it in line with egalitarian principles, we should instead do away with this coercion altogether.

However, if what I have said in this paper is correct, some form of international coercion must form part of our ideal: it is required to ensure the supply of many important global public goods. Instead of attempting to do away with coercion beyond state borders, we should instead seek to limit it to coercively upheld global public good regimes. This line of argument, however, puts pressure on Blake and Nagel’s limiting of egalitarian principles to the domestic state.

5.2. Non-domination

Republicans are concerned with ensuring non-domination. Not only must individuals be free from arbitrary interference by others, they claim, but they should also be free from the possibility of such interference. Philip Pettit emphasises two forms which domination can take: dominium and imperium. While a republican state should take measures to ensure that individuals do not dominate each other in private life (dominium), by investing too much power in the state to perform this function we open the possibility of the machinery of the state itself becoming a tool for domination (imperium). Pettit thinks that constitutional limits and democratic contestability will be key in preventing imperium, but he also notes that when material inequalities in society become too great, the rich may gain control over the machinery of government, thereby dominating others. This creates at least a prima facie case for limiting inequality (in addition to the case for doing so to prevent dominium).

When Pettit turns his attention to questions of global justice, however, things look different. Since there is no analogue to the domestic state globally, and therefore no possibility for imperium, inequality as such becomes less of an issue. The primary concern here ‘is to identify the different dispositions under which states operate and relate to one another’. In other words, we should only worry about dominium. And he is fairly optimistic that the possibility for dominium can be overcome without resorting to the kind of redistributive measures which doing so domestically requires. Instead, we can rely on coalitions of weaker states forming to resist domination by stronger states, as well as existing international bodies becoming forums for deliberation and contestation. While acknowledging the possibility of domination through these international institutions, such as the UN, the WTO, or the World Bank, he thinks that ‘only a perverted sense of priority would suggest that they are the principal problems in the area’.
If what I have said in this paper is correct, though, republicans need to worry about *imperium* here as well. If justice requires the supply of a number of global public goods, and if these can only be supplied through coercive means, the international bodies which are granted such coercive power may, if unchecked, become dominating entities. In advancing towards global justice, we need more coercive entities, but we also need to ensure that their use of coercive power does not become arbitrary. While we may be able to check domestic coercive power through well-structured constitutions and contestability in democratic forums, I doubt that these will be very effective in global settings. Instead, we may need to look at the underlying material inequalities which lead to arbitrary power being exercised in international institutions. We may think that weaker states need greater resources - both in terms of knowledge and expertise in international negotiations, but also perhaps to ensure that they are less reliant on other countries for trade and development assistance - in order to ensure that they can effectively contest decisions made by international bodies.

I have argued that we need coercive institutions in order to meet the demands of justice in producing a number of global public goods. I claimed that this will have important implications for certain theories of global distributive justice. However, it may be objected, until these institutions are actually in place, why should this be of any interest? In closing, I offer the beginnings of a response to this.

Firstly note that, just as the theories discussed in this paper have the resources to welcome the existence of the coercive state, they may also have the resources to welcome the creation of coercive global public good regimes. Just as, for example, republicans can support the creation of a state if it reduces the *dominium* in private life, they may also support coercive global public good regimes if these lead to a reduction of inter-state domination. Catastrophic climate change, for instance, may affect some states more than others, and those it affects most (usually poorer countries) may become reliant on others aid, being forced to accept whatever arbitrary conditions are placed upon it.

Still, it may be claimed, the priority for the moment should be in getting the necessary institutions set up; only after this is done do we need to worry about their effects as coercive entities. The second point to note, though, is that by showing how concerns about coercion and domination occurring in international institutions can be met, we may go some way towards answering the challenge of those who resist the creation of such institutions on the grounds of national sovereignty. By presenting a picture of an international order which both produces important global public goods, but at the same time minimises the amount of unjust coercion or arbitrary power, we can begin to overcome these objections.
6. The problem of ius migrandi, between citizenship and the “Round-Trip-Principle”

Delpla, on the basis of the results of her field survey, offered a thought experiment based on Rawls’ veil of ignorance[cclvii]. People should choose the constitutive principles of their state without knowing where they are, whether they are in their state or out of its borders[cclviii]. In particular, the key concept of the Rawlsian justice as fairness is the idea of original position where initially self-interested parties are located behind the veil of ignorance. The veil of ignorance is to ensure that the individuals making decisions on the future terms of cooperation are not biased. It is an assumption that certain particular knowledge on the actual position of parties is to be “ignored”: “Since all are similarly situated and no one is able to design principles to favour his particular condition, the principles of justice are the result of a fair agreement or bargain”[cclix].

Residence in the state would obviously be a pointless criterion to determine someone’s membership to the state as it could be the case that they are living in another state[cclx]. Basing her analysis on the actual back and forth dynamics that characterizes migrations, Delpla suggested that citizenship should be established as what is translated as “the round-trip principle”. The idea is to enable people to be citizens of a state on the possibility that they live outside of it. Delpla proposes a general principle to grant citizenship that goes against the state-based way of thinking citizenship. This means that not only does she challenges residence as a good ground for the acquisition of citizenship for immigrants but also does she challenges the fact the citizenship is automatically given to children born in the state (jus soli) or from citizens of the state (jus sanguinis). Her argument will be only used in the case of immigrants’ citizenship, as the author does intend to challenge the whole concept of citizenship only to find a principle that does not unfairly exclude immigrants from citizenship.

Citizenship is immediately international instead of being fixed to permanent residence in the state. Indeed, the field survey revealed that returnees’ living strategy consists in dividing tasks between the different members of the family. Some return to their former home state[cclxi], some settle definitely in the host state and others do not settle, they move back and forth between the two countries and therefore live in both. Founding citizenship in the “round trip principle” enables immigrants to move out of their state of origin and to keep their citizenship even if they do not come back to their state. It also enables immigrants to acquire citizenship in their host state even if they do not permanently reside there.

The “round trip principle” is appealing in that it reduces the importance of the
borders\textsuperscript{cclxii} of state in the acquisition of citizenship – one does not have to live inside that state to be citizen of the state. Full membership is not defined by residence anymore. However, the notion of full membership is based on a restrictive principle that unfairly excludes some immigrants from citizenship as full membership is still attached to territories\textsuperscript{cclxiii}. Indeed, Delpla’s concept of full membership is attached to the refugees’ back and forth dynamics and it is unfair that the refugees are not granted with citizenship of both their host country and the newly born state where they used to live in because they are full members of the two states even if they do not reside in the two states. On one hand, they rebuilt their entire life in the host country. On the other hand, the newly born state is their former home, it is the root of their identity. What characterizes the refugees’ back and forth dynamics is that they have strong ties in each state and they are bound to the territory of these communities. Their full membership is strictly speaking linked to a \textit{jus soli}, even if the immigrant does not live in the state anymore or if the state disappears they keeps their full membership\textsuperscript{cclxiv} over time because they are attached to the ground of this territory before being attached to the state that sits on it. Delpla reproduces the residence principle in that full membership is still fixed to a territory of present or former residence. The immigrant does not have to live in the state but has to be connected to its territory and community. The direct consequence of the “round trip principle” is that is excludes from citizenship immigrants who have never lived in their host state such as frontier workers who reside near the border of one state but work in another state.

However, the theory of narrative identity shows that migrants’ membership is cumulative as it is built by the various experiences that they have in both their home state and their host state\textsuperscript{cclxv}. Their sense of belonging to one or the other country is continuous with their displacements\textsuperscript{cclxvi}. The more time migrants spend in a territory, the more experiences they share with people and the host state results in their membership being more rooted in the host state. Membership is best described as an interactional process that refers to how migrants multiply their connections with the host state in function of their numerous displacements rather than as a fixed concept based on the territory. Residence can of course help creating links between migrants and their host state. Residing in one state reinforces the sense of belonging to one community but, residence is not necessary to make someone a member of a society. Only multiple and repetitive experiences are necessary to enable migrants to build some connections with their host state. Bolzman and Vial\textsuperscript{cclxvii} showed that frontiers workers who work between France and the canton of Geneva develop a cross-border way of life with double membership to both states even though they only reside in one of them. Indeed, their place of residence is dissociated from their place of work but their social activities occur in a space without borders\textsuperscript{cclxviii}. 
To sum up, the example of frontiers workers shows that full membership is not necessarily linked to a territory but to degrees of connections that you share with the state. Delpla’s principle is underinclusive as it excludes some immigrants who are full members from citizenship and political agency.

7. Citizenship and the “All affected interests principle”

An alternative approach would be to focus on immigrants’ interests and to verify immigrants’ membership in function of the “all affected interests principle”\[cclxix\]. The reasoning is that if immigrants find their interests interlinked with some political decisions, they should be included in the making of these decisions\[cclxx\]. Indeed, it was shown earlier that full membership is essentially defined as interlinked interests and that full membership is what makes someone eligible to political participation. So, every immigrant who shares reciprocal interests with some members of the democratic society\[cclxxi\] is defined as a member of that same democratic society and is eligible to take part in collective decision-makings that affect them. As a matter of fact, it makes sense to think that as soon as you are bound to a decision by your interest, you are part of that decision and are entitled to participate to it.

Goodin’s all affected interest principle received a fair amount of scholarly discussion\[cclxxii\]. The discussion consists in defining who are the affected people because it was said that the principle could be both overinclusive including people whose interests are not really affected by the decision, and underinclusive, excluding people whose interests are definitely affected by the decision\[cclxxiii\]. There is not the space to develop the different arguments so Owen’s view will be taken as the most complete. He argued that “all those whose legitimate interests are actually affected by a choice between any of the range of plausible options open to the collective decision-making body should have their interests taken into account in the decision-making process” where plausible options mean “options compatible with the nexus of purposes, functions and capacities constitutive of a polity’s decision-making in the given circumstances and history of its agency”\[cclxxiv\].

However, it seems that his view is still overinclusive in that it includes in the decision-making group immigrants who are clearly not full members of the society. If all immigrants whose interest is plausibly interlinked with a political decision can have a say in this decision then all immigrants, visitors included, should be granted with political agency in a democratic society\[cclxxv\]. Indeed, any immigrants, temporary or not, are linked to political regulations but the fact that these political decisions have effects on them and that they have to adjust their actions in function of these decisions does not make them full members of the democratic society\[cclxxvi\]. For example, any visitor has to obey the speed limit.
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regulation of the host country but it does not mean that she can participate in the decision-making group that decides on the speed limit of the state. Being affected by a few decisions is not sufficient to make one a full member of a democratic society[cclxxvii].

The all affected interests principle take into account too many people who would be objectively affected by some political decisions. Bauböck[cclxxviii] proposes to reverse the point of view of the “all affected interests” principle and to focus on how subjectively people feel affected by some political decisions and calls this view the “stakeholder citizenship”[cclxxix]. He only takes into account that full members of a democratic society can be granted with political agency: only immigrants who claim and recognize themselves as being full members of the society can be granted with citizenship. Some immigrants could be objectively granted with citizenship because of their affiliations with the state – Owen calls them the “pre-political demos”[cclxxx]. However, if they do not judge themselves as being part of the society and do not ask for political participation then they cannot be citizens of the state and be part of the demos of their host state. Full membership is a condition to political agency but only conscious and intellectual awareness of one’s full membership can grant citizenship[cclxxxi].

In the case of the “all affected interests” principle, full membership is a status given by the state who judge the immigrant as being sufficiently integrated in the society. The “stakeholder” principle reverses this tendency with full membership being a status that the immigrant claims to the state. On the one hand, citizenship is a passive status that is given by the state and on the other hand, citizenship is an active status that the immigrant demands to the state[cclxxxii].

Giving the voice to the immigrant to verify her full membership to the state seems ideal as the immigrant is undoubtedly the one to know her interests are intertwined with the rest of the democratic society. There are doubts regarding the practicality of Bauböck’s principle. He assumes that immigrants will recognize themselves as belonging to the democratic society. However, it could be the case that they do not perceive themselves as full members even if they are as it is not obvious that immigrants have a clear view of the public affairs of their host state. The situation faced by denizenship subjects excluded from political participation is a thorn in the side in the forms of liberal democratic government as these political systems lack incentives to promote rights of those who have no “voice”, and not only their political rights. For example, the phrase “denizen” is reactivated by the Swedish scholar Thomas Hammar, where denotes the legal status reinforced (enhanced) of resident immigrants[cclxxxiii].

They are many reasons why one would not recognize themself as being legitimate for
citizenship. One was raised by Lippmann in that political decisions are often formulated by administrators in technical terms such that only politicians can understand them and that others do not feel concerned by these political decisions because they can not see themselves and their interests represented[cclxxxiv]. For immigrants to feel included in some political decisions to know what is at stake in these decisions requires the decision process to be made accessible to their knowledge and understanding. This operation cannot come from the immigrants themselves and they need external help to understand their membership and what to expect from it. If immigrants can not identify their interests as being affected by some decisions, they will not claim for political agency. This could result into political apathy with immigrants not asking for political participation[cclxxxv].

To sum up[cclxxxvi], the all affected interests principle and the stakeholder principle offer a real alternative to the failure of the state-based principles to include all full members of the society into citizenship because they focus on people’s degree of affiliations with the state instead of thinking of full membership as all or nothing status[cclxxxvii]. However, both fail to propose a fair principle to enable immigrants to access citizenship on a fair basis with the former is overincluse whereas the latter is underincluse. The last challenge is then to look for an in-between principle that includes fairly all immigrants that are actually full members of the democratic society of their host state. For example, “although citizenship is the lingua franca of socialization in civic classes, as well as the cornerstone of many social movements seeking basic rights, and a key phrase in speeches by politicians on ceremonial occasions, oddly enough, citizenship has not been a central idea in social sciences”[cclxxxviii].

8. Citizenship and the reciprocity principle

The stakeholder principle is complementary to the all affected interest principle. The two views are not contradictory and their unification would solve their respective vulnerability. Indeed, both have at stake people’s intertwined interests, that is, the relationship between the immigrant and the state[cclxxxix]. However, they define full membership from the perspective of only one side of that relationship. The all affected interests principle focuses one what the state recognizes as intertwined interests whereas the stakeholder principle focuses one what people recognize as intertwined interests. In both cases, the relationship is foreseen by one side without consulting the other part. Ideally, if both parts are fair they should recognize the same intertwined interests and therefore agree on who is a full member but the last section showed that it is not the case as both are easily mistaken by some parameters that they are enable to see and take into account in their analysis. The author suggests that the relationship between the immigrant and the state should be determined on the basis of their mutual agreement[ccxc]. Intertwined interests between the
immigrant and the state can be recognized only if they together agree on being involved in a reciprocal relationship on certain affairs. John Dewey’s notion of the public corresponds to such a unified view. To him, a public is a collective formation that is confronted with a social and political problem. In the course of daily life, individuals encounter problematic decisions made by others and that directly affect the course of their actions. All those who are affected by the indirect consequences of social transactions to such an extent that it is deemed necessary to have those consequences systematically cared for. The public exists as soon as individuals concerned by these decisions recognize themselves as being involved in a group decision and start to work together to find the best comprise. In the case of the immigrant’s full membership, the state and its political decisions directly affect the course of the immigrants’ actions. The immigrants recognizing that their interests depend on the state’s political decisions constitute the public and only their political inclusion that is their contribution to the state’s decisions can guarantee that they are treated fairly. The notion of the public matches the intertwined interests relationship between the immigrants and the state. On the one hand, the state’s goal is to make decisions that provide equality among its citizens and, on other the immigrants’ aim is to participate to the decisions that affect them.

Dewey was aware that the prime difficulty is the discovering the means by which a scattered, mobile, and manifold public may so recognize itself as to define and express its interests. The political condition for the public to be operative is its contribution to political decisions by its awareness of its interests. Intertwined interests and mutual dependence are not sufficient, political participation is necessary for a public to be formed. The problem of the public is then to recognize itself as being part of the state’s decisions. For Dewey, communication is then the precondition to political participation. Awareness cannot come from the public alone and the challenge of democracy is to make it possible for the public to have access to information about its interests. The state ought to provide means of knowledge to the publics. The aim of the state is to make it possible for people to identify what kinds of decisions are being made by political bodies and how those decisions might affect their interests. Official representatives should inform the public on those decisions and organizations and various resources should improve the conditions of debate and discussion to help the public to recognize itself. A necessary communication between the state and the people must exist so that the people understand its legitimacy to participate to political decisions and ask for this political agency. In the case of the immigrants, it means that as soon as they enter in the state, not only does the state have to grant them with the civil liberties that correspond to their visas, it must also enable them to access information about policy decisions related to their interests.
At this final step of this argument, the author returns to the reciprocity principle and notes that applying Dewey’s notion of the public to a cosmopolitan view of citizenship, where the immigrant claims her citizenship on the basis that the state provides them with the means to recognize herself as a full member of the democratic society, amounts to the same as applying the reciprocity principle to the right of political participation[ccxcii]. Indeed, the reciprocity principle states that rights are granted to immigrants on a give and take agreement between the immigrant and the state. To recall that the immigrant commits themself to work in the state and the state guarantees them in return the rights related to working conditions. The reciprocity principle works as a recognition of the immigrant’s degree of membership in the democratic society. Dewey’s notion of the public rests on that same mutually beneficial agreement between the state and the immigrant; the immigrant commits themself to participate to the public affairs if the state guarantees to provide them information about their interests and their rights. The state and the immigrant agree that citizenship is a matter of self-involvement that the immigrant can claim on the basis that the state includes the immigrant in the communication of its affairs[ccxciii].

CHAPTER V

PARAGRAPH A

**Constructive interpretation and the status quo: the case against practice-dependence**

«War is over. If you want it».

(John Lennon, “Happy Christmas”)

1. **Introduction**

The notion of practice-dependent theorizing has played a central role in what may be described as the ‘methodological turn’ that the global justice debate has undergone in recent years.[ccxciv] While there are some differences in the ways in which the concept of practice-dependence has come to be understood by different authors, one of the central defining characteristics of the position defended by the original proponents of practice-dependence is a methodological commitment to the Dworkinian model of constructive
interpretation. The purpose of this paper is to provide a critique of this commitment. More specifically, my aim is to show that the systematic role that the model of constructive interpretation assigns to the features of existing practice has significant substantive implications that, upon reflection, turn out to lack the required justification. As a consequence, the methodological approach defended by the proponents of practice-dependence entails an undue bias in favor of the status quo.

The structure of the present section is as follows. First, I am going to provide a summary of the core features of the model of constructive interpretation. Second, I am going to show that the model of constructive interpretation entails what I will refer to as the presumption in favor of interpretation, in virtue of which the features of existing practice act as a systematic and strict constraint on our reasoning about moral principles. In light of the substantive implications of this constraint, the presumption in favor of interpretation is in need of justification, lest the model of constructive interpretation be vulnerable to the charge of being unduly biased in favor of the status quo. Third, I am going to consider two possible bases for a justification of the presumption in favor of interpretation, namely a concern for political stability and a concern for equal respect, and show that neither concern succeeds in providing the required justification. Lastly, I am going to discuss two possible ways in which proponents of practice-dependence may react to the lack of an ultimate justification for the presumption in favor of interpretation. I conclude that a defense against the charge of being unduly biased in favor of the status quo comes at the expense of either depriving the approach of its methodological distinctiveness or restricting its normative aspiration to an exercise in non-ideal theory.

2. The model of constructive interpretation as a methodological basis for practice-dependence

In elaborating on the methodological underpinnings of their respective positions, Andrea Sangiovanni and Aaron James – whom, for the purpose of this paper, I take to be the main proponents of practice-dependence – both rely on the model of constructive interpretation, originally proposed by Ronald Dworkin. According to Dworkin’s account, in order to identify the norms that ought to regulate a given practice, constructive interpretation proceeds in three ‘stages of interpretation’. These are characterized as follows. The first, ‘pre-interpretive’ stage serves to identify a practice as a distinct object of interpretation. Its purpose is to isolate the practice in question from other elements of our social world in as uncontroversial a way as possible. This is achieved through an account of the core features of the practice in primarily descriptive terms. The pre-interpretive stage is followed by the
second, ‘interpretive’ stage the aim of which is to identify a general purpose for the practice in question that may serve as a justification for the main features identified at the pre-interpretive stage. In pursuit of this aim, reflection at the interpretive stage is guided by two desiderata. On the one hand, the purpose to be identified is supposed to show the practice in its morally ‘best light’. On the other hand, the identification of a purpose is constrained by the requirement that the purpose ‘fit’ with the main features of the practice as identified at the pre-interpretive stage. Satisfying this criterion of fit is a necessary condition for a purpose to qualify as an interpretation of the purpose of existing practice rather than as invention of a new purpose. Finally, the interpretive stage is followed by the third, ‘post-interpretive’ or ‘reforming’ stage which serves to determine which concrete moral principles ought to regulate the practice in question in order for it to best serve the purpose identified at the interpretive stage.\[ccxcvi\]

It is worth noting that, while Sangiovanni and James both explicitly refer to Dworkin’s account of the model of constructive interpretation in *Law’s Empire*, their characterization of the interpretive stage occasionally seems to deviate from Dworkin’s original account.\[ccxcvii\] This apparent deviation may reflect a genuine methodological difference, or it may be the inconsequential result of using a different terminology for spelling out the requirement of fit. For the purpose of the present paper, I am going to set this question aside. My argument is aimed at what I take to be at least a common denominator of the accounts offered by Dworkin, Sangiovanni, and James, namely the distinction between *interpretation* and *invention* in conjunction with a presumption that favors interpretation over invention.

3. **The presumption in favor of interpretation and its need for justification**

As just mentioned, in identifying a purpose that serves as a frame or basis for the justification of more specific moral principles at the post-interpretive stage, the interpretive stage is constrained by the requirement of fit. This requirement is not to be understood to mean that a suggested purpose must be able to account for every feature of a practice as it exists, nor does it require that the suggested purpose reflect the highest possible degree of fit. What matters is that the degree of fit be *sufficient* for the purpose to count as an *interpretation* of existing practice rather than the invention of a new practice.\[ccxcviii\] Any purpose that is not intelligible as the result of an act of interpretation will *ipso facto* be ruled out as a possible outcome of the interpretive stage. I am going to refer to this feature of the model of constructive interpretation as the *presumption in favor of interpretation*. 
The presumption in favor of interpretation has the significant substantive implication that potential purposes are not solely assessed on the basis of their independent moral merit. Instead, even the most morally worthy purpose will be excluded from consideration at the interpretive stage as long as it does not meet the requirement of fit. In light of this potentially far-reaching implication, the presumption appears to be in need of justification. Why should the contingent features of existing practice impose a strict constraint on our reflection about the purposes that our moral principles serve to realize? Unless we have good reasons for making our moral reasoning dependent on existing practices in such a direct and systematic way, the presumption in favor of interpretation will be vulnerable to the charge of rendering the model of constructive interpretation unduly biased in favor of the status quo.[ccxcix]

In order to avoid misunderstanding, it may be helpful to further clarify the exact point of the status quo bias charge that may be leveled against the presumption in favor of interpretation if its need of justification is unmet. It is worth noting that the practice-dependent approach, on Sangiovanni’s and James’ accounts, does offer some space for a critical assessment of the purposes that may be thought to provide a potential basis for the justification of a given practice. Both authors acknowledge that the ultimate justifiability of a given purpose is subject to certain constraints that take the form of a principle of equal moral concern and a requirement of mutual justifiability, respectively.[ccc] In the case of some practices – such as the institution of slavery – it will be impossible to identify a purpose that satisfies these constraints, rendering the practice unjustifiable as a matter of principle.[ccci] What matters, as far as the status quo bias charge is concerned, is that the mentioned constraints represent a minimum threshold for the justifiability of any given purpose, rather than a criterion for its overall comparative assessment in relation to potential alternative purposes. Most notably, they take effect only after potential purposes have been filtered according to their fit with the core features of existing practice. The upshot of this is that, while the ultimate justification of a practice depends on there being a purpose that passes the test posed by the mentioned threshold criteria, only purposes that qualify as the result of successful acts of interpretation will be considered as candidates for being put to this test to begin with.

To see the implications of this, consider the following example. Discussing the case of the WTO, Sangiovanni observes that the purpose of the World Trade Organization cannot be interpreted as aiming at the institutionalization of a conception of justice, given that its existing institutional features lack any reflection of this purpose. Instead, these features support an interpretation of its purpose as limited to the reduction of trade barriers in reciprocal and non-discriminatory ways – a purpose that presumably is consistent with the
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principle of equal moral concern. While this may be an adequate observation from an interpretive point of view, using it as a basis for a normative conclusion in the way Sangiovanni suggests precludes any theoretical space to reflect about whether there may be reasons to reform the WTO in a way that would incorporate considerations of justice into its fundamental purpose. The point of the status quo bias charge is not that there is necessarily a case for such fundamental reform – in many cases (including the WTO) there may not be. Rather, it is the idea that an appropriately neutral methodological framework should provide the theoretical space for assessing whether such a need for reform exists. In order to do so, it should include a comparative evaluation of any potential purposes the pursuit of which may appear morally worthy, irrespective of whether they satisfy the requirement of fit or not.

The most straightforward way of defending the practice-dependence approach against the charge of being unduly status quo biased on the grounds just mentioned would consist of providing a normative justification for the presumption in favor of interpretation. In the following section, I am going to consider two distinct normative considerations that may be thought to provide a basis for such a justification. Having shown that neither consideration is successful in delivering the required justification, I am subsequently going to discuss two possible alternative ways in which proponents of practice-dependence may defend their approach in the absence of an independent justification of the presumption in favor of interpretation.

As a final preliminary note, it is worth noting that, independent of its need of justification, the presumption in favor of interpretation may appear problematic for separate methodological reasons. For example, the presumption inevitably raises the question of how a sufficient degree of fit is defined, and it is not clear what a concrete answer to this question could look like. Lacking a clear methodological criterion for distinguishing between instances of successful interpretation and instances of invention, the application of the model of constructive interpretation to specific cases will inevitably lead to disagreements about which features of existing practice may properly constrain the identification of the purpose at the interpretive stage, creating a problem of methodological indeterminacy. (For the purpose of this paper, I am going to set aside methodological worries of this kind, concentrating instead on an assessment of the model of constructive interpretation on normative grounds).

4. Two responses to the need of justification
For the most part, expositions of the practice-dependence approach tend not to directly or explicitly address the need to justify the presumption in favor of interpretation. There are, however, at least two normative considerations that proponents of practice-dependence have appealed to that may appear to provide a basis for a response to the need of justification, namely a concern for political stability and a concern for equal respect. I am going to consider the justificatory potential of these two considerations in turn.

4.1. Political stability

In the context of the first statement of his approach, Sangiovanni suggests that practice-dependent theorizing derives plausibility from the fact that it accommodates ‘the idea that politics is prior to morality’. According to this idea, ‘the first aim of any social or political institution is to secure conditions of order, trust, cooperation, and security’. Political theory should reflect this fact by ensuring that the recommendations it makes guarantee that this aim is met. Another way to capture the idea of the priority of politics, I take it, is in terms of a primary concern for political stability that acts as a constraint on the realization of moral ideals: However worthy a moral ideal may be, it will only be justifiable provided that its realization is consistent with the maintenance of basic conditions of stability.

The justificatory potential of a primary concern for political stability of course fundamentally depends on whether this concern itself is justified. I am not going to address this question here. Let us assume, for the sake of argument, that there is a justified primary concern with political stability. Could this concern serve as a basis for a justification of the presumption in favor of interpretation?

It is not too difficult to see the way in which the presumption in favor of interpretation may be considered a response to a primary concern with political stability. As Sangiovanni suggests, actually existing practices and institutions can be seen as historical solutions to the problem of political stability. The fact that a given practice has existed over time may be a reason for thinking that it will be successful at securing conditions of order, trust, cooperation and security in the future. To the extent to which a theory is committed to the idea of the priority of politics to morality, then, the interpretation of existing practice, rather than the invention of new practices, may appear to be the place to start.

Nevertheless, a primary concern for political stability falls short of providing a ground of justification for the principled presumption in favor of interpretation. This is so for two reasons. First, while the continuation of existing practices may, in certain contexts, be a sufficient condition to ensure political stability, there is no reason to think that it will always
be a *necessary* condition. In fact, historical examples of fundamental political reform or revolution show that the replacement of established practices through new practices is not necessarily accompanied by a loss in political stability. As a consequence, an appeal to the concern for political stability is insufficient for a principled presumption in favor of interpretation that systematically excludes new practices from the scope of theoretical consideration. Second, not only may the continuation of a given existing practice not be necessary to ensure political stability – it may, depending on the context, actually threaten political stability and thus not even constitute a sufficient condition for stability. To see this, think, for example, of the practice of slavery in the context of the American Civil War, or the practice of colonial government in the context of struggles for national independence. Given that the continuation of existing practices in such cases may actually pose a threat to political stability, the concern for political stability is not only insufficient to justify a principled presumption in favor of interpretation but turns out to be in theoretical contradiction to such a presumption. By limiting the scope of theoretical consideration to existing practices, the presumption in favor of interpretation may lead to conclusions the implementation of which may well promote instability.

4.2. Equal respect

More recent work on practice-dependence points to another normative consideration that may serve as a basis for the justification of the presumption in favor of interpretation. This consideration takes the form of a concern for *equal respect* as a constraint on the justification of moral ideals. According to the idea of equal respect, in the sense relevant to the present context, any ideal conception of politics is subject to the requirement of being justifiable to the persons to whom it is intended to apply. Given this requirement, it is faced with the fact that these persons are engaged in existing practices, practices that are the result of and are being maintained through the autonomous choice of their participants. Equal respect for the autonomy of the participants in existing practices, the line of thought continues, requires us to take their reasons for engaging in these practices seriously, thus imposing a constraint on the justifiability of proposals that would require a fundamental revision or discontinuation of these practices.

In a way similar to the concern for political stability, it is easy to see how the concern for equal respect may be thought to provide a rationale for the presumption in favor of interpretation. By excluding ideals the realization of which would require the discontinuation of existing practices, the presumption ensures that any reforms that a practice-dependent account may require will, at a fundamental level, be intelligible as a continuation of the practices that the persons concerned are already engaged in. On the assumption that persons are engaged in these practices as a result of autonomous choice,
the presumption would in this way act as a safeguard for the due respect of these choices.

As attractive as this rationale may initially appear, an adequate understanding of the concern for equal respect ultimately fails to justify the presumption in favor of interpretation. This conclusion is supported by at least two types of considerations. On the one hand, there are reasons to doubt that existing practices and the exercise of autonomous agency are necessarily related in the way that the argument from equal respect assumes. On the other hand, even to the extent to which the assumed connection obtains, it is unclear why the concern for equal respect, adequately understood, should require, or even be consistent with the presumption in favor of interpretation. I am going to consider both types of considerations in turn.

The argument from equal respect, as we have seen, rests on the thesis that existing practices represent an expression of the autonomous agency of the persons participating in them. It is not obvious, however, that existing practices and the exercise of autonomous agency are necessarily related in the way that this thesis assumes.

First, there are reasons to doubt that existing practices necessarily need to be of any relevance at all to the autonomous agency of the persons participating in them. To begin with, existing practices may be conceptually prior, rather than posterior, to the exercise of autonomous agency. Instead of viewing a given practice she is engaged in as the result of her choice, a person may view this practice as a contingent backdrop against which she forms her choices in the first place. In this case, this practice would more appropriately be described as a background condition for autonomous agency, rather than an expression thereof. What is more, a practice in which a person is engaged may, from that person’s point of view, in fact be entirely unrelated to the meaningful exercise of her autonomous agency – not even performing the role of a background condition for her choices in any significant sense. For the purpose of illustration, consider the previous example of the World Trade Organization. The question of whether the WTO is to be guided solely by the purpose of cooperation to mutual advantage or whether it its mission should be understood as incorporating considerations of distributive justice may have such minor implications for the lives of individual citizens of economically advanced countries that they would consider possible answers to this question to not be in any way related to the autonomous pursuit of their goals.

Second, in addition to the mentioned doubts about the relevance of existing practices to the exercise of autonomous agency, the argument from equal respect seems to rely on the unwarranted generalization that to the extent to which existing practices are relevant to the exercise of autonomous agency, they necessarily are so in a positive way. It may well be the
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case that some persons view a given existing practice as an expression of their autonomous agency. Assuming a realistic degree of social pluralism, however, it is just as likely that other persons will regard the same practice as an obstacle to the exercise of their autonomous agency. In such cases, persons may participate in a practice based on the lack of a better alternative, or even – in the case of domestic basic structures for example – based on mere coercion, while having a clear preference for the replacement of the existing practice by a new alternative. In light of this consideration, it is not clear why a principled presumption in favor of the continuation of existing practices should be considered as reflecting a concern for equal respect, rather than the very lack of it.

Let us, for the sake of the argument, set aside doubts about the connection between the features of existing practices and the autonomous choices of the persons participating in them and assume that existing practices may plausibly be regarded as the expression of the autonomous agency of their participants. Would this fact provide a reason for restricting the scope of normative theorizing to the interpretation of these existing practices in a principled manner? It is not clear why this should be the case. Indeed, the idea that equal respect requires the principled exclusion of the establishment of new practices appears to rest on a truncated conception of autonomous agency.

One of the essential aspects of the concept of autonomous agency consists of a person’s ability to adopt a reflective attitude with regard to her practical commitments. This includes the ability to take an evaluative stance with regard to the reasons she has (or assumes to have) to engage in a certain practice and, where appropriate, to revise these reasons. Given the ability of participants in existing practices to autonomously revise their reasons for action, the assumption that the continuation of these practices is a necessary condition to ensure equal respect appears unnecessarily conservative. To be sure, respect for autonomy is incompatible with coercing persons to give up their existing autonomous commitments. This does not, however, imply a reason to systematically exclude the possibility of replacing existing practices through new ones from the scope of theoretical consideration. In fact, we may think that to assume otherwise amounts to a failure to respect autonomy, in particular in its reflective dimension. On the one hand, persons participating in an existing practice may give up their commitment to this practice for reasons of their own. On the other hand, the purpose of political theory itself may be considered to consist of offering the very reasons that the persons to whom it is intended to apply may autonomously endorse.

5. **Constructive interpretation without ultimate justification**
As the discussion in the previous section has shown, considerations of political stability and equal respect, however justified they may be in themselves, fall short of providing the required justificatory support for the presumption in favor of interpretation. Lacking any alternative basis, which would yet have to be presented, the presumption thus turns out to be unjustified. This, as we have seen above, appears to render the practice-dependence approach vulnerable to the charge of being unduly biased in favor of the status quo.

Short of providing an independent justification for the presumption in favor of interpretation, there are two ways in which proponents of practice-dependence may react to this preliminary result in order to defend their approach against the status quo bias charge. These reactions, however, come at the expense of either depriving the approach of its methodological distinctiveness (in the first case) or significantly limiting its normative aspiration (in the second case).

5.1. Relinquishing the presumption in favor of interpretation

The first strategy consists of denying that the desideratum of fit is of the categorical importance that our discussion of the model of constructive interpretation has assumed so far. While accepting that the presumption in favor of interpretation would indeed entail an undue bias in favor of the status quo, proponents of practice-dependence may deny that their approach in fact entails this presumption. Rather than providing fixed points that constrain the range of independent moral reasoning, it may be argued, the desideratum of fit merely has the function of identifying a purpose that serves as a starting point for our reasoning. By tracking the existing features of the practice in question, the thought may be, this initial purpose captures historical and sociological information that is potentially relevant to our reasoning about the justification of the practice. It thus plays a valid role in our model of reasoning. This does not mean, however, that this initial purpose and the considerations it captures enjoy a privileged status in comparison to other considerations that enter into our overall system of reasoning. Instead, guided by the goal of achieving a holistic reflective equilibrium, our reasoning treats any consideration as potentially subject to revision in the light of the balance of reasons.[cccxi]

While this strategy would be successful in halting the status quo bias objection, it comes at the expense of depriving the practice-dependence approach of its supposed methodological distinctiveness. If the interpretive stage merely provides a starting point that may be subject to revision, the model of constructive interpretation appears to collapse into a more traditional model of holistic reflective equilibrium.[cccxii]
5.2. Practice-dependence as non-ideal theory

A second conceivable strategy of defense would consist in maintaining that the presumption in favor interpretation forms an adequate basis for identifying the moral principles that should guide a given practice as it exists, without seeking to thereby vindicate or justify this practice as a whole. Instead of thinking of constructive interpretation as delivering an ultimate justification for the pursuit of the purpose reflected in a given existing practice in comparison to the possibility of replacing this practice through the pursuit of alternative purposes, we may think of it as providing a hypothetical or conditional justification of the following form: ‘If the pursuit of a given purpose is justified, then the practice in question should be regulated in the following way…’ Whether the antecedent of this kind of conditional justification is satisfied is a question that, on this reading, cannot be addressed within the frame of practice-dependent theorizing itself. Instead, in order to answer this question, the purpose of a practice as it is identified at the interpretive stage would have to be evaluated in comparison to any hypothetical alternative purposes that we may think of in relation to the practice in question, as well as any actual or hypothetical purposes of other practices that may conflict with the pursuit of this purpose. This evaluation, however, could not itself take place within an interpretivist framework but again would mostly plausibly take the shape of a general search for reflective equilibrium.[cccxiii]

Following this strategy, the fact that the identification of the purpose that provides the basis for the regulation of a practice is constrained by its fit with the present features of this practice is rendered morally unproblematic, since the theory is open to the possibility that there are reasons for giving up the practice in question altogether, replacing it with an alternative practice that lacks the relevant features. In contrast to the first strategy, this does not mean that practice-dependent theorizing necessarily loses its distinctive methodological point. It may be considered a stable distinctive position in relation to the confined project of identifying moral principles for existing practices. As such, however, its normative force would be insufficient to justify the existence of the relevant practices itself.[cccxiv] As a consequence, the practice-dependent approach may be considered to have a proper place in the context of non-ideal theory. To the extent to which we are interested in the ultimate justifiability of practices, however, the approach would fall short of being action-guiding. It would thus not appear to be a serious competitor to more traditional methodological approaches designed to address concerns of ultimate justification.

PARAGRAPH B
On the logical priority of justice over legitimacy. The case of political (in)equality

1. Introduction

In this section I argue against a recent proceduralist approach to political theory which urges us to focus on questions of legitimacy - the moral rightness of political procedures - while bracketing questions of justice - the moral rightness of political outcomes. The major motivation behind this approach is to contain our reasonable disagreement on substantive issues of justice by focusing instead on legitimate ways of deciding between them (Valentini 2013, 2013; Waldron 1999, Rawls 1993). Yet my aim is to show that this approach is misguided, as it falsely assumes that we can specify requirements of legitimacy independently of requirements of justice. Specifically, I show that this assumption is mistaken because some aspects of political equality, a necessary condition of the legitimacy of political deliberation and decision-making procedures, cannot be specified without reliance on a particular theory of distributive justice.

First, I distinguish between the formal and the substantive aspects of political equality. Second, for illustrative purposes, I briefly elaborate on a roughly Dworkinian account of political equality to show that the content of the substantive aspect of political equality depends on the content of the theory of distributive justice you endorse. Third, I provide a formal argument concluding that requirements of legitimacy are logically dependent on requirements of justice. Finally, I address and rebut an objection from legitimacy minimalism or political libertarianism: namely, that we should decide what substantive political equality requires in majoritarian ways, and consider only formal political equality as a necessary condition of legitimacy.

I conclude that when we are looking for the right political procedures, we cannot bracket questions of substantive justice and our disagreements concerning what justice requires. My argument shows that disagreement over the right principles and requirements of justice escalates into a disagreement over what political equality, and a fortiori, over what legitimacy requires.

The project of proposing and defending theories of substantive justice is sometimes clouded by the recognition that we seem to hopelessly disagree about our reasoned convictions about justice — the moral evaluation of political outcomes. This recognition fuels a strategy common to many contemporary liberals: let’s take a step back and try to work out the morally satisfying ways of dissolving these moral disagreements in politics. In other
words, let us concentrate on the legitimacy of the political decision-making procedures, rather than any particular result of these procedures, in liberal philosophical theory. In this paper, I present an argument against this approach. Against this proceduralist move, I argue that the inquiry into what justice requires is methodologically (specifically, logically) prior to the inquiry into what legitimacy requires.

The proceduralist argument presupposes what I will refer to as the Independence Assumption: the claim that requirements of legitimacy can be sufficiently spelled out without reference to requirements of justice. The argument must presuppose this assumption, since the inquiry into the requirements of political legitimacy instead of (or rather than) justice would not be an effective way to contain the disagreement surrounding requirements of justice if we could not specify the former requirements without referring to anyone’s views concerning the latter requirements.

The appeal of the Independence Assumption presumably derives from the intuition that legitimacy judgments ultimately target procedures, while evaluations by justice ultimately target outcomes of procedures. As it is possible to characterize procedures in part independently of their outcomes, it is logically possible to restrict evaluations by legitimacy to outcome-independently individuated properties of procedures. The proponent of the proceduralist argument wants exactly this. She may still believe that in an ideal or utopian world without reasonable moral disagreement, the legitimacy of political decision-making procedures would be at least dependent on, if not entirely determined by, the outcomes they deliver. But she also believes that this dependence relation does not hold in circumstances of reasonable disagreement.

My aim in this paper, however, is to show that the Independence Assumption is false. My argumentative strategy is, essentially, refutation by counterexample. I argue that at least one consensually necessary condition of political legitimacy, namely, the requirement of political equality, cannot be specified without reference to any substantive theory of justice. What we believe to be just outcomes — specifically, just distributions — crucially determines what we believe to be legitimate procedures. So, the normatively significant disagreement about matters of justice may not be contained by focusing on procedural legitimacy instead. On the contrary, my argument establishes that requirements of justice are logically prior to requirements of legitimacy: so, if we want to learn or agree about the latter, we must first learn or agree about the former.

My argument proceeds as follows. First, I elaborate on the relation between political equality and legitimacy, and distinguish between the formal and the substantive aspects of political equality. Second, for illustrative purposes, I briefly elaborate on a Dworkinian
account of political equality to show that the content of the substantive aspect of political equality depends on the content of the theory of distributive justice you endorse. Third, I provide a formal argument concluding that requirements of legitimacy are logically dependent on requirements of justice, hence refuting the Independence Assumption. Finally, I address and rebut an objection from legitimacy minimalism or political libertarianism: namely, that we should decide what substantive political equality requires in majoritarian ways, and consider only formal political equality as a necessary condition of legitimacy.

2. Legitimacy and the ideal of political equality

It is one of the most consensual assumptions of liberal political philosophy that the procedural legitimacy of coercively enforced political decision-making entails some moral requirements concerning the distribution of political power, both in deliberation and decision-making. The ideal of political equality, very roughly, holds that this distribution should be egalitarian. Of course, specifying the ideal is itself a challenging task with many controversial answers available. My argument does not require a precise specification of the requirement, yet it is certainly useful to provide an all too brief overview of what kind of inequalities are typically judged permissible, on the one hand, and what kind of inequalities are objectionable, on the other hand, on grounds of political equality.

Let us then start with inequalities that are permissible. First, we do not normally object to office-holders having more political impact than ordinary citizens. Second, it seems perfectly acceptable that citizens better at rational argumentation may have a greater influence on political outcomes than their fellow-citizens who are less capable in that respect. (This is so even if we rarely testify to this greater influence, nor is it clear at all that an ideal democracy would empirically exhibit such an asymmetry of influence.)

Impermissible inequalities are familiar from political history. First, political equality forbids invidious formal exclusions from political participation: it rules out, for instance, the extension of the franchise to men but not to women, to Caucasians but not to other races and so on. Roughly, every citizen should have the vote. Second, it also rules out formally unequal opportunities to participate: for example, that university graduates should have two votes, while all other citizens should have only one. Third, political equality, crucially to my argument, is often thought to forbid the undue dependence of political power on economic power: for instance, by requiring the imposition of limits on campaign financing.

What these examples show is that political equality can be applauded and criticized along two dimensions. On the one hand, it involves what I will call *formal political equality*: the formally egalitarian aspects of an opportunity to exert political influence. This aspect
includes the requirement of “one person-one vote”, the requirement that every individual within the relevant scope should be granted that one vote, the requirement that everyone should be allowed to freely express their political opinions etc. On the other hand, debates about political equality often focus on a second aspect that I will call *substantive political equality*: those aspects of the ideal which regulate or guarantee the exercise of the rights in which formal political equality consists. In the following section I briefly introduce a particular account of substantive political equality. This illustration will prepare my argument about the logical dependency of requirements of legitimacy on requirements of justice.

3. **The insulation account: justice and political equality**

In this section I sketch up what I will refer to as the “insulation account” of substantive political equality: a theory which offers an answer to the question as to what else we need in addition to properly inclusive and equally distributed political liberties to realize the value of political equality in political institutions. The account is strongly inspired by Ronald Dworkin’s theory of political equality (indeed uses mostly elements taken from his work), but I am not offering it as an interpretation of his theory, with the intention to preclude exegetical debates. The aim of my discussion of the insulation account is not to defend it — although I do believe it is the right theory of political equality — but to use it as a very clear illustration of the problematic relation between justice and legitimacy that is my primary focus.

The main thesis of the insulation account is that political equality requires the insulation of the opportunity to exert political influence from unjust inequalities in the distribution of resources. The clearest policy implication of this requirement concerns campaign finance regulations and consequent limitations of the right to free speech. On the insulation account, it violates political equality if there is no ceiling for campaign support, and thus individuals can exert disproportionate influence on fellow-citizens’ political opinion by using their unjust share of resources.[cccxvii]

What is the justification for such a ceiling? The main reason has to do with the normative role of (equal) resource distribution. On the Dworkinian account, resource equality determines the means with which we can permissibly influence each other’s life within our liberties[cccxviii]. Contributions to political campaigns that exceed one’s just share of resources consequently constitute an impermissible influence on others’ lives. An analogy with market behavior helps here: the resource egalitarian thinks that even heavily influencing each others’ lives by means of market behavior is permissible as long as we use our just share of resources to induce market effects. For instance, we may start a business
in the same sector in which our neighbor started a business: if we are so successful that our neighbor goes bankrupt in the competition, she might suffer a considerable setback to her interests, but our behavior was permissible as long as we achieved this effect by the smart use of our fair share of resources. For the proponent of the insulation account, the same argument applies to the political market: there is nothing wrong with promoting one party or ideology as much as we wish by means of our fair share of resources - but we have no right to influence others’ lives through political means if we go beyond our permissible economic means in doing so.

The insulation account defends resource equality as an account of substantive political equality for its interest-promoting instrumental value. Interest-promoting instrumental theories think of political equality as a necessary instrument of the equal promotion of citizens’ interests, regardless of whether this results in a specific set of outcomes. Without resource equality or the insulation of its effects on political influence opportunities, we cannot plausibly say that citizens have an equal opportunity to promote their interests in general: some will be unable to promote their political interests on an equal footing since their message will not go through simply due to the fact that others can utilize unfairly owned resource to effectively neutralize the messages of the worse off. If citizens cannot produce or contribute to political speech only as far as their fair shares allow them, they are not equally situated to promote their interests.

Now it is not only the case that justice on the resource egalitarian conception has the same aim as political equality-namely, the equal promotion of individuals’ interests. It is also true that merely formal political equality cannot serve this aim unless either the distribution of recourses is equal, or only the use of resources to which we are entitled according to resource egalitarianism is allowed for political purposes. Either solution requires the specification of the just distribution of resources. So, we can only specify the requirements of political equality by first specifying what justice requires.

To sum up: the most plausible justification of political equality on the insulation account requires substantial political equality in addition to formal political equality. And what substantial equality requires is, in turn, spelt out by a theory of substantive distributive justice: resource equality. But this entails that the asymmetry view is false: in order to find out what is required by a necessary condition of legitimacy, we cannot but first find out what justice requires.

4. The logical priority argument
Let me formalize the argument I want to press against the proponent of the view that procedural legitimacy in politics can be characterized without reference to justice.

(P1)  **Distributive Requirement**  
Resource equality is a requirement of justice.

(P2)  **The Substantive Political Equality Requirement**  
Resource equality is necessary to fulfill a requirement of legitimacy.

(C1)  [From P1&P2]  
Not all requirements of legitimacy can be specified without specifying requirements of justice.

(P3)  **Reasonable Disagreement Assumption about Justice**  
We normatively significantly disagree about requirements of justice.

(C2)  [from C1, P3]  
Our normatively significant disagreement about requirements of justice also results in normatively significant disagreement about some requirements of legitimacy.

(C)  [from C2]  
The asymmetry view is false: normatively significant disagreement is not limited to requirements of justice, but it extends to requirements of legitimacy.

According to the proceduralist view I criticize here, we need to fall back on legitimacy requirements because we do not know what justice requires. Yet, we cannot tell what legitimacy requires without first knowing what justice requires: the former is conditional on the latter. Therefore, we have no motivation to fall back on inquiry into legitimacy as a second-best methodology where inquiry into justice is pointless or at least always more controversial than inquiry into legitimacy or abstract equality due to our epistemic deficiencies. The proceduralist argument puts the cart in front of the horse: in fact, we have reason to think that inquiry into justice has methodological priority, because at least some requirements of justice are logically prior to some requirements of legitimacy.

5. An objection to the logical priority argument: legitimacy minimalism (political libertarianism)

Even if you accept that some requirements of legitimacy are conditional on some requirements of justice, you might object that I neglected the significance of the fact that not *all* requirements of legitimacy are conditioned that way. Because this is so, my objector
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would claim that C does not follow from C2: we need not give up on the asymmetry view, we just have to concentrate on a specific subset of legitimacy requirements. The methodologically prior task, she might insist, is to find the unconditional requirements of legitimacy. It is this minimal set that we should find out and try to enforce, as this specifies the right procedural conditions of deliberation and decision-making. Then, just as we can negotiate and decide in a procedurally legitimate way which views of justice we will enforce together, we can also extend our deliberations and decisions, regulated by a minimalistic conception of legitimacy, to justice-conditioned requirements of legitimacy, and only then enforce the latter too. Gerald Gaus (1996), for instance, seems to endorse such a view: «Because the justification of political inequality arising from diffuse background conditions invokes contentious claims about liberal principles, such justification involves political issues, and must be resolved by political institutions. Thus, for instance, regulation of media ownership, campaign financing, and controlling the behavior of interest-groups seem essentially political issues; the precise nature of the problems they present cannot be anticipated ahead of time, nor are conclusive justifications for particular policies forthcoming».

Yet the burden of proof now seems to be on the objector to show that whatever is left of legitimacy after purging it from requirements conditional on justice is still meaningful as a conception of legitimacy. For a judgment that a state is legitimate is synonymous with the judgment that the given state’s use of coercion is morally permissible. But, for instance, the minimalistic or political libertarian conception of legitimacy judges that a state uses coercion permissibly even if in the given polity, despite the equal distribution of political liberties, a majority have close to no means to contribute to political deliberation and agenda-setting while an oligarchic minority possesses and uses all such means due to its vast unjust economic advantages. This in itself seems to question why a conception of legitimacy that permits this is the right threshold of the moral permissibility of state coercion at all.

Note however, that my reply does not strictly depend on substantive intuitions about whether the above scenario is an instance of permissible coercion or not. Rather, it depends on the kind of argument the political libertarian can offer in favor of her account of legitimacy. Once asked why she finds the above example an instance of legitimate state coercion, the political libertarian faces a dilemma.

On the first horn, the political libertarian probably replies by providing a libertarian account of substantive political equality. The imagined scenario is not morally objectionable, on this reply, simply because everyone is using the resources they are entitled to on a libertarian conception of distributive justice. Yet as soon as the political libertarian provides
that sort of reply, she can no longer endorse legitimacy minimalism – for she has appealed in justifying the institutional design to an element of legitimacy that is clearly dependent on a substantive theory of justice. In other words, on this horn of the dilemma, political liberalism collapses into substantive libertarianism, and hence it is incoherent with the very point of legitimacy minimalism, which is to decide in political (majoritarian) ways on the account of substantive political equality to be enforced rather than just assuming one to be right and enforcing it.

On the second horn of the dilemma, if the political libertarian thinks that she need not rely on a substantive theory of justice in justifying her account of substantive political equality, she must assume that her account is neutral between competing accounts of substantive political equality. The political libertarian’s point, then, is that state coercion is justified precisely because of its neutrality between different conceptions of justice. Yet this assumption of neutrality is false. The political libertarian falsely assumes that accepting the status quo concerning the effects of background distribution on individuals’ opportunities to exert political influence does not favor a particular conception of justice. When this watered-down conception of legitimacy advises us to leave for majoritarian political procedures to decide which effects of background distribution may impact individuals’ opportunities to exert political influence, then it advises that we should put matters concerning campaign financing, ownership and use of media and so on into the hands of the same oligarchic minority that dominates political deliberation and agenda-setting. In other words, the account in fact assumes that it is morally permissible to allow citizens’ vastly unequal opportunities to influence deliberation and decisions on matters of substantive political equality. This is exactly what substantive libertarianism concludes. Yet it is not only the case that we have reached the same conclusion by a different justificatory route. The legitimacy minimalist has to justify why we should accept the effects of the status quo in any political decision, but she has no justification to offer, independently from substantive libertarianism. So, on the second horn of the dilemma, legitimacy minimalism offers no argument for why we should consider our collective choice of a given account of substantive political equality legitimate, given the effects of the status quo on our relevant deliberation and policy choices.

To clarify, note that I am not saying that the minimalistic, unconditional conception of legitimacy is not an aim worth pursuing. But the question of legitimacy is not about which moral aims are worth pursuing. (The answer to this latter question is probably that all moral aims are worth pursuing, ceteris paribus.) The question of legitimacy is the question as to what the threshold is for judging state coercion to be morally permissible. And any theory that sets that threshold too low immediately becomes highly counterintuitive as a theory of
how to realize the value of equality; and any theory that is unwilling to provide a justification for why a given threshold is *not* too low thereby fails to discharge its normative role as a theory of legitimacy.

6. **Personal conclusions**

1A) To conclude and to summarize, I have presented here a quickly overview of the relation between conflict and institutional evolution, through the analysis of the interactive strategies developed by included and excluded groups. To light up these dynamics, several patterns of interactive mechanisms and strategies have been analyzed, identifying three different outputs: competition, cooptation and cooperation. Thanks to these conflicting strategies, the different groups are able to give shape to the institutions, influencing their level of inclusion or exclusion.

To better contextualize this analytical framework, I have also considered the environment where this relation operates – characterized by complexity and panarchic approaches; the agency capacity of the actors – characterized by feedback mechanisms and emergent patterns; and the consolidation process of ideas into institutions.

1B) Much work in contemporary liberal thought relies on a strict distinction between justice and virtue. In formulating the demands of these two domains (i.e. perfect duties of justice and imperfect duties of virtue), scholars often refer back to Kant’s distinction between duties of Right and duties of virtue. The two main contentions of the present paper however, are, first, that such a strict separation of justice from virtue is not tenable and, second, that although Kant did indeed strictly separate the sphere of Right from the sphere of virtue in *The Metaphysics of Morals*, he appeared to be aware of the problems to which such a rigid distinction could lead in some of his other works, most notably in *Toward Perpetual Peace*.

According to Kant, justice merely demands the compliance of my external actions with its laws, which it may impose through external force, but it may *not* compel me to adopt a particular maxim for acting. I will argue however, that *in practice* any legal system *does* depend on at least a majority of its subjects acting in accordance with its laws from the motive of duty, i.e. from *respect* for the law. This, however, leads to the following paradox: how can Right depend on something – i.e. its subjects acting from the motive of duty – that it may not demand?

In order to provide a solution to this paradox, I will turn to *Toward Perpetual Peace*, in which Kant argues that the very act of living in a good *Rechtsstaat* develops one’s virtue by instilling respect for the law in its subjects. This exchange between the objective order –
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the Rechtsstaat – and the subjective ethical development of the people is Kant’s answer to our paradox: Right may not demand virtue, but it can help cultivate it, thus undoing the paradox.

Even the harshest critics have acknowledged Kelsen’s great historical merit: to have brought about a decisive change in direction in the study of international law, moving away from the narrow perspective of statist legal positivism towards a presentation of the problem of the world order in radically new terms. There is no doubt that Kelsen, fifty years ago, anticipated many of the legal and institutional problems that have emerged at the international level in the second half of our century. Consider the processes of globalization that have dramatically raised the issue of the crisis of nation-states and of the Westphalian system founded on their sovereignty. Consider the growing assertion of the doctrine of human rights and the new practice of ‘humanitarian intervention’ to protect them, phenomena that have both contributed de facto to extending the subjectivity of international law to individuals. Consider, over and above all, the recent creation of the International Criminal Tribunals for the former Yugoslavia and for Rwanda – mandated to judge war crimes and crimes against humanity committed by individuals – which are very likely preludes to the creation before too long of a permanent international criminal court.

Moreover, one cannot fail to recognize the profound originality and theoretical greatness of Kelsen’s internationalist constructions, supported by many, among whom Norberto Bobbio, Richard Falk and Antonio Cassese. Finally, one cannot but recognize that, despite the proclaimed purity of his theory – indeed, incorporating in it, with systematic inconsistency, a quantity of value assumptions and historical and empirical references – Kelsen has proved himself a jurist attentive like few others to the international events of his time: from the ‘nationalist madness’ that invaded European culture with the failure of the League of Nations, to the primary imperative of the construction of a more ordered, peaceful pattern for the world after the scourge of the two world wars.

To conclude, the final part of chapter n. I argues that vis actions should be considered a distinct form of force from acts of war. The vis/bellum distinction can be maintained by the difference in the degree of force used, the timeline of the operation and the theatre of operation. I think that even though changes in modern warfare, namely the introduction of new weapons such as drones or the evolving nature of threat are crucial to bring vis actions to the forefront of academic attention, vis actions are not particularly a new feature of modern war. This is why it’s even more urgent to recognise vim force as morally distinctive from bellum. Only when this is applied can we move on to the legal and moral implications of such a separation.
1C) As to Transitional Justice and Jus post-bellum, I demonstrated that while radical political changes may not necessarily be involved in a given war situation, the *jpb* does need a war to occur in order to be set in motion. Hence, emerging from a crisis, which is at the heart both of *jpb* and TJ, does not necessarily correspond to a post-war situation. The substantive emphasis of TJ is on justice for human rights violations. There is no assumption of armed conflict in TJ, and again, when a transition comes in absence of war (the dismantling of the Soviet bloc could be an example), the *jpb* principles cannot be of any help. As Jens Iverson highlights: “one can imagine a change in regime in which no significant human rights violations were perpetrated by the previous regime, deposed by armed conflict. Armed conflicts happen without massive human rights violations. Additionally, armed conflicts occur without regime change. In these instances, TJ would tend not to apply, but *jpb* would”. Thus, *jpb* also clearly includes, *inter alia*, violations of the laws of armed conflict, the rights and privileges that spring from the laws of armed conflict, environmental law (including legal access to natural resources and regulating the toxic remnants of war), state responsibility outside of the realm of human rights. Since all of these norms are part of the natural law of the just war, we can assume that *jpb* is also part of it, which is not the case of TJ.

As a conclusion, we can argue that *jpb* shares much in common with TJ in terms of aims and in principles, still there are some basic differences that allow us to see them as two distinct, even if compatible, theories.

2) The vindication of toleration comes with a price. Toleration, in order to retain its highly revered and admired status as a specifically moral virtue in the liberal tradition, needs to be circumscribed. For an act to be considered one of egalitarian toleration the initial objection must be morally of the right kind. In other words, it is appropriate to speak of egalitarian toleration only where the objection to the conduct or practice tolerated is not itself morally inappropriate and does not establish an illegitimate power relation. When power asymmetries occur within the legitimate normative space of the objection component, the tolerating party’s assumed moral standing for interference renders toleration compatible with the principle of equality.

After considering various attempts at establishing what morally appropriate and justifiable reasons for objection are, I concluded that none of the proposed criteria and moral standards successfully fulfils the task. I subsequently argued that the appropriateness and justifiability of the objection component should be morally assessed by appealing to “right to interference” criterion. Toleration accordingly should be defined as the agent’s act of non-interference with the disapproved-of when the agent has a right to interference. Once the objection component is formulated in terms of a right to interference toleration
could be claimed to be fully compatible with equality and mutual respect. The egalitarian conception of toleration would no longer be insensitive to the power asymmetries that may be caused by acts of toleration. It strives to exclude the morally unjustified power relations between the tolerating and tolerated parties. In fact, not only is it compatible with equality, it is demanded in addressing the equal concern for individual rights and entitlements. Within the confines of the egalitarian conception of toleration, the tolerating party’s moral standing is established by a right to interference which should be respected by the tolerated.

An individual in Cohen’s society would be constantly met with the conflict between her (perceived) individual needs and the ones prescribed by the egalitarian ethos. In order to act justly, she would have to necessarily adjust her individual needs, because under Cohen’s understanding, the concessions to justice, even the permissible ones (such as the
personal prerogatives), represent a departure from justice. On the other hand, as Tan (2012) suggests, the personal prerogatives and incentives of the difference principle in Rawls’s theory represent an integral part of justice, which seems to be more than just equality (although it is primarily egalitarian). Therefore, while Cohen’s theory of justice merely acknowledges the existence of moral reasons that can override the primacy of claims of egalitarian justice, Rawls’s conception truly incorporates the fact of value pluralism as a default feature of human societies which has to be not merely tolerated, but sustained as something intrinsically valuable. Justice is not merely a virtue of social institutions; it can be assessed in interpersonal relations as well. However, the way we assess it is different, and it has to stay like that in order to preserve justice itself. Freedom of personal pursuits has to be conceived as a part of justice, not as the obstacle on our road to justice.

4) It is commonly thought that a well-functioning state must have coercive power. A number of theorists have seen this sort of coercion as giving rise to egalitarian principles of distributive justice within a state. For some statists like Michael Blake and Thomas Nagel, this is because acts of coercion need to be justified to the coerced, and the only way of justifying state coercion to its citizens is to use it to create an egalitarian distribution among them. For republicans like Philip Pettit, it is because reducing inequality may remove unjust forms of domination which the existence of a coercive entity like the modern state invites.

When these theorists turn to discussions of global distributive justice, however, they become much less concerned with inequality. This is because nothing like the coercive state exists on a global scale, and so the relevant sort of coercion is thought to be absent. A common objection to these arguments is that, although nothing like the world state exists, the relevant forms of coercion are present internationally. In this paper, instead of asking whether or not the relevant sort of coercion exists, I question whether it should do. I argue justice requires us to supply a number of important global public goods, and that this requires the creation of coercive international institutions. This will have important implications for the theories of both the statists and the republicans. Global inequalities, I will suggest, should become more of a concern for these theorists.

Another topic I analyzed was the so-called ‘all affected interests’ principle, that provides a good account to know objectively which immigrants’ interests are concerned by some political decisions but it fails to determine the immigrant’s full membership. Full membership depends primarily on the immigrant’s recognition of her entitlement to citizenship. The argument leaves open the risk that the immigrant might not perceive their full membership. It has been stressed that this is especially likely unless the state provide
immigrants with access to information regarding the political decisions that affect their interests. The appropriate principle for the determination of the immigrants’ full membership is the reciprocity principle drawn on Dewey’s notion of the public which holds that any immigrant whose interests are intertwined with the state’s political decisions and who is able to perceive themselves as being fully part of the democratic society, thanks to the mediation of the state, is entitled to inclusion within the citizens of this state. The direct consequence of this argument is that the acquisition of citizenship rests upon the reciprocity principle – same principle as any civil liberties that the immigrant may be granted. There is a continuity between the right of political participation and more common civil liberties. Rights are what the immigrant is granted on the basis of them degree of membership in the state: the higher the degree, the immigrant get more rights. Political participation or citizenship is then the right corresponding to the highest degree of membership.

Where there is citizenship, the state is committed to providing the information relevant to the interests of the citizen and the citizen has recognized herself as entitled to political participation. It was yet to be mentioned that a few years ago, there was a development in literature which was heavily focused on its social categories on so-called ‘third-generation rights’, to quote Bobbio, or those cosmopolitan and ecological principles which aim to regulate relationships with the natural environment.

5A) We started by identifying the presumption in favor of interpretation as a central defining feature of the model of constructive interpretation. The role that the presumption in favor of interpretation assigns to the features of existing practice has significant substantive implications and therefore requires justification. As the discussion has shown, considerations of political stability and of equal respect, whatever their moral merit may be, fail to provide the required principled support for the presumption in favor of interpretation. Lacking any alternative basis, the presumption thus appears to be unjustified, rendering the model of constructive interpretation vulnerable to the charge of being unduly status quo biased. This charge directly affects the practice-dependence approach as defined by Andrea Sangiovanni and Aaron James, which rests on a methodological commitment to the model of constructive interpretation.

The most straightforward way to defend the practice-dependence approach against the status quo bias charge would be to renounce the presumption in favor of interpretation. This, however, would appear to deprive the model of constructive interpretation of its distinctive methodological characteristic, rendering the practice-dependence approach indistinguishable from more prominent approaches that rely on a holistic reflective equilibrium model. Alternatively, proponents of practice-dependence may attempt to defend their approach while maintaining its methodological distinctiveness by limiting its normative
aspiration to the justification of regulatory principles for existing practices, without justifying the existence of these practices itself. Doing so, in turn, would relegate the role of practice-dependent theorizing to purposes of non-ideal theory, removing it from competition with alternative methodological frameworks that are aimed at addressing concerns of ultimate justification.

5B) In the final paragraph I have provided an argument against a recent proceduralist approach to political theory, which urges us to focus on questions of legitimacy — the moral rightness of political procedures — while bracketing questions of justice — the moral rightness of political outcomes. I have argued that this approach is mistaken in assuming that we can specify requirements of legitimacy independently of requirements of justice.

Political equality, a necessary condition of the legitimacy of political procedures, cannot be specified without reliance on a particular theory of distributive justice. Hence when we are looking for the right political procedures, we cannot bracket questions of substantive justice and our disagreements concerning what justice requires.

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On the issue of historicism, see the framework defined by Gramsci (Thomas, 2009; Morton, 2007), Focault (Focault, 1976; Bevir, 2010) and Polany (2010).

For the analysis of the “age of technique”, see Schmitt (1972) and Galli (2008).

Quoting Byrne (1998, pag. 22), “what happens is that at these crucial transformation points the system seems to have two possible trajectories into which it can move and it ‘chooses’ between them on the basis of very small differences in the values of controlling parameters at the point of change”.

For the concept of historical juncture, see Acemoglu and Robinson (2012).

To understand this difference, we can consider, for example, the different effects of the Arab spring on the Egyptian and Moroccan regime between 2010 and 2011: the first has been unable to open its structures reducing the disruptive force of several components of the citizenship and it has dramatically collapsed, while the second has been able to partially adapt to the popular request, reducing the dangers and surviving to the clashes and demonstration of its citizenship.

Explaining the evolution of the neo-liberal construction, they analyze very well the process of transformation and consolidation of the ideas – produced by Hayek and Friedman between the ‘50s and ‘60s, and improved by other scholars in the following years -, in concrete and durable institutions and hard norms – implemented by Regan and Thatcher twenty years later -.

Here, I’m not defining these agencies as public or private, because their intrinsic form is strongly related to the context, socio-economic relations and specific structures characterizing a society. Reached this point, it is possible to concretely analyze the role of conflict in the institutional evolution. So, in the next paragraph I pay attention to the reciprocal and conflicting interactions operating between insider and outsider groups.

For this paragraph, and particularly for the analysis of the role of social sanction and punishment on the cooperation between groups, I have taken inspiration by Binmore (2005, 2006, 2010), Gintis (2010) and Fehr and Gintis (2007). Also Fischbacher et al. (2009) is important, because it specifically analyses the role of conflict in the promotion of cooperation.

Morton (2007) – moving in the Gramscian perspective defined by Cox – analyses the relations existing between the social relations of production, the social forces and the form of state. In its perspective, the social classes are strongly historicized, related to the shape of the production structures, technologies and processes.
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In a certain way, I have been inspired by the theoretical background of the paradigm change defined by Hall (1993).

I want to underline I don’t use here a mechanical and deterministic model: i.e., the context, the concrete actions of the actors or the effectiveness of the external events could strongly modify the evolutionary patterns of the relation between included and excluded groups.

I consider here the definition of absolute enemy proposed by Schmitt (2008): when the absolutization of values become central to the social and political life, the absolute enemy could be destroyed through a justified conflicting dynamic.

I identify this process with the concept of “passive revolution” defined by Gramsci (Morton, 2007).

For a reflection on this issue, see Franzini (2004).

Here and in the remainder of the following pages of the present section I use “Right” with a capital ‘R’ when I refer to the juridical realm as such, whereas I speak of “right(s)” with a lowercase ‘r’ when speaking of specific subjective rights. In Kant’s German both are termed Recht.

All references to Kant’s work are to the Prussian Academy pagination. The translations provided throughout the text are from The Cambridge Edition of the Works of Immanuel Kant (Ca) (Cambridge: Cambridge University Press, 1992–). I will use the following abbreviations:

MS Die Metaphysik der Sitten, Ak 6
The Metaphysics of Morals, Ca Practical Philosophy;
VE Vorlesungen über Ethik, Ak 27
Lectures on Ethics, Ca Lectures on Ethics;
ZeF Zum Ewigen Frieden. Ein philosophischer Entwurf, Ak 8
Toward Perpetual Peace. A Philosophical Project, Ca Practical Philosophy.

I must pass by the question concerning the type of freedom that is to be protected
by Right – merely negative freedom, or rather positive freedom understood as autonomy, or perhaps republican freedom conceived as non-domination – as it goes well beyond the scope of the present article, which is concerned with how compliance with Right can be ensured.


[xxi] Right is concerned with ensuring equal shares of freedom for all. It is clear that the coexistence of one’s freedom with the freedom of everybody else necessarily implies limits to one’s freedom. Therefore, the limitation of freedom is a necessary precondition for its existence.

[xxii] Indeed, this intuition is confirmed by studies in the field of social sciences, concerned with compliance with legal norms, such as Tom R. Tyler’s classic *Why People Obey the Law.* He distinguishes *instrumental* reasons for complying with the law, which amount to a weighing of the probability that one will be punished if one does not comply, from *normative commitments.* These, in turn, can be divided between *personal morality* (obeying the law, because one considers it just) and *legitimacy* (obeying the law, because one retains that the law enforcing authority has the right to prescribe actions). Tyler’s research clearly points out that relying on coercive measures alone (and thus on instrumental reasons) is not at all conducive to the stability of a State. His findings are backed up by an entire body of existing research indicating “that in democratic societies the legal system cannot function if it can influence people only by manipulating rewards and costs:” Tyler, Tom R. *Why People Obey the Law.* Princeton: Princeton University Press, 2006. 22. Such societies are, furthermore, under constant threat of instability. This point is also commonly made in legal theory, as exemplified by H.L.A. Hart when he maintains that the legal system will be most stable when people conceive of themselves as morally bound to accept the legal rules voluntarily: Hart, H.L.A. *The Concept of Law.* Oxford: Oxford University Press, 2012. 203. Cf. 201.

[xxiii] Here and in the following I presuppose that the laws the citizens are meant to obey are not unjust.


Kant clearly places himself in the republican tradition here. The dynamic between the people and the State is reminiscent of the republican ideal, here expressed by Machiavelli: “Just as good morals, if they are to be maintained, have need of the laws, so the laws, if they are to be observed, have need of good morals” (as cited in Pettit, Philip. *Republicanism: A Theory of Freedom and Government*. Oxford: Oxford University Press, 1997. 242).


For a critique of the excessive normative ambitions of Kelsen’s conception see Bull, ´Hans Kelsen and International Law´, in R. Tur and W. Twining (eds.), *Essays on Kelsen* (1986); see also Lauterpacht, ´Kelsen’s Pure Science of Law´, in *Modern Theories of Law* (1933); G. Sperduti, ´Le principe de souveraineté et le problème des rapports entre le droit international et le droit interne´, 153 *RdC* (1983).


In 1795 Immanuel Kant published an essay entitled *Toward Perpetual Peace: A Philosophical Sketch*. The immediate occasion for the essay was the March 1795 signing of the Treaty of Basel by Prussia and revolutionary France, which Kant condemned as only
“the suspension of hostilities, not a peace.” In the essay, Kant argues that it is humankind’s immediate duty to solve the problem of violence and enter into the cosmopolitan ideal of a universal community of all peoples governed by the rule of law. The essay’s two-hundredth anniversary, 1995, also marked the fiftieth anniversary of the end of World War II and of the establishment of the Charter of the United Nations. As recent events have shown, we certainly have not emerged from the violence of the state of nature. Accelerating globalization also gives these reconstructions and reappraisals of Kant’s cosmopolitan ideal a new urgency.

Kant’s Perpetual peace has had significant influence upon modern politics. Perpetual peace has been the foundation for peace and conflict studies, a relatively newly laid field which started in Europe around the 1950s and 1960s.

In this essay, Kant described his proposed peace program. Perpetual peace is arguably seen as the starting point of contemporary liberal thought.

Perpetual Peace is structured in two parts. The Preliminary Articles described the steps that should be taken immediately, or with all deliberate speed:

- “No secret treaty of peace shall be held valid in which there is tacitly reserved matter for a future war”;
- “No independent states, large or small, shall come under the dominion of another state by inheritance, exchange, purchase, or donation”;
- “Standing armies shall in time be totally abolished”;
- “National debts shall not be contracted with a view to the external friction of states”;
- “No state shall by force interfere with the constitution or government of another state”;
- “No state shall, during war, permit such acts of hostility which would make mutual confidence in the subsequent peace impossible: such are the employment of assassins (percussores), poisoners (venefici), breach of capitulation, and incitement to treason (perduellio) in the opposing state”.

Three Definitive Articles would provide not merely a cessation of hostilities, but a foundation on which to build a peace:

- “The civil constitution of every state should be republican”;
- “The law of nations shall be founded on a federation of free states”;
- “The law of world citizenship shall be limited to conditions of universal hospitality”;
Kant’s essay in some ways resembles modern democratic peace theory, though it also differs significantly from it. He speaks of republican (Republikanisch) states (rather than of democratic ones), which he defines to have representative governments, in which the legislature is separated from the executive. He does not discuss universal suffrage, which is vital to modern democracy and quite important to some modern theorists; his commentators dispute whether it is implied by his language. Most importantly, he does not regard republican governments as sufficient by themselves to produce peace: freedom of travel, though not necessarily migration, (hospitality); and a league of nations are necessary to consciously enact his six-point program.

Unlike some modern theorists, Kant claims not that republics will be at peace only with each other, but are more pacific than other forms of government in general.

The general idea that popular and responsible governments would be more inclined to promote peace and commerce became one current in the stream of European thought and political practice. It was one element of the American policy of George Canning and the foreign policy of Lord Palmertson. It was also represented in the liberal internationalism of Woodrow Wilson, George Creel, and H.G. Wells, although other planks in Kant’s platform had even more influence. In the next generation, Kant’s program was represented by the Four Freedoms and the United Nations.

Kant’s essay is a three-legged stool (besides the preliminary disarmament). Various projects for perpetual peace have relied on one leg - either claiming that it is sufficient to produce peace, or that it will create the other two.

In “A Plan for an Universal and Perpetual Peace”, part IV of Principles of International Law (1786–89), Jeremy Bentham proposed that disarmament, arbitration, and the renunciation of colonies would produce perpetual peace, thus relying merely on Kant’s preliminary articles and on none of the three main points; contrary to the modern theorists, he relied on public opinion, even against the absolute monarchy in Sweden.

Since 2008, the Perpetual Peace Project - a partnership between the European Union National Institutes for Culture (EUNIC), the International Peace Institute (IPI), the United Nations University, and Syracuse University - is engaging Kant’s essay in an ongoing philosophical and curatorial initiative that is conceptualized around ultimately “re-writing” Kant’s 1795 treatise, as well as a republication of the essay. Thinking through the ideas behind the project and its links to Kant, Gregg Lambert, Aaron Levy, and Martin Rauchbauer rely on the secret article contained in the second supplement which “is detached from the main body of the public treatise that outlines the preliminary and
definitive articles, and offered as a secret pact”. They draw on the ironic tone of Kant’s writing to argue that the treatise performs the idea that the conditions for peace are best considered silently. Secretly, that is, statesmen and politicians can take the idea of peace seriously, since it will never be associated with them. As such, the project brings together theorists and practitioners, such as diplomats, policy experts, philosophers, and artists, in order to revisit 21st century prospects for international peace through Kant’s essay, in order to change people’s minds, get them to take the idea seriously, start to imagine what it would be like to live in a peaceful society.


[xxx] See the illuminating pages of the Vorrede in *Das Problem der Souveränität,* at v-ix.


[xxxiii] Das Problem der Souveränität, at 316-317. Again, with rigorous legal positivism: ‘the only rights that exist are those deriving from the legal system or conferred by the state. The “personalities inserted in the state” have their rights (and their obligations) not ... “as
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bearers of rights, as persons”. They are persons only to the extent that the state or the legal order sanction their rights and obligations, or recognize them as persons. Just as the state confers personhood on them, so it can take this quality away from them too. The introduction of slavery as a legal institution is entirely within the possibilities of a legal system or state’ (ibid, at 45).

[xxxiv] See Das Problem der Souveränität, at 317. ‘Just as the egocentric position of a subjectivist theory of knowledge is bound up with an ethical egoism, so the legal cognitive hypothesis of the primacy of the particular state legal system is coupled with the state egoism of an imperialist policy' (ibid).


[xxxvi] Principles, at 587. Kelsen’s position on this crucial point nonetheless fluctuates. In Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik (1934) [hereinafter Reine Rechtslehre], the primacy of international law and the dissolution of the ‘dogma of sovereignty’ are presented as a technical outcome of the pure theory of law (English trans. Introduction to the Problems of Legal Theory (1992), at 124-125). In the second edition of Reine Rechtslehre (1960), at 343-345, Kelsen maintains that only the monist conception is laid down by theoretical requirement, whereas the choice between the primacy of international law and the primacy of domestic law can be based only on preferences of an ideological or political nature (English trans. Pure Theory of Law (1967), at 344-347. On this point see in general H. Hart, ‘Kelsen’s Doctrine of the Unity of Law’, in H. Hart, Essays in Jurisprudence and Philosophy (1983).


[xxxviii] The idea of law as a coercive social system tending towards increasingly centralized forms through historical evolution is one that Kelsen increasingly returns to in his writings: cf. esp. H. Kelsen, Law and Peace in International Relations, The Oliver Wendell Holmes Lectures 1940-41 (1952), at 48-51, 56-81.

Kelsen was writing *Peace through Law* in the very years that the Allies’ ‘just’ war was ending with the ‘terrorist bombings’ (as Michael Walzer calls them in his *Just and Unjust Wars* (1992), at 263-268), of such German cities as Dresden, Hamburg and Berlin, then the dropping of the atom bombs on Japan.

As we know, however, by contrast with Kelsen, Kant in *Zum ewigen Frieden* rules out the possibility of speaking, in the absence of an international political order, of a ‘just war’: for Kant, a state embarking on war is acting as judge in its own case. On the debate between ‘cosmopolitan’ (H. Bull, M. Wight, T. Schlereth) and ‘statist’ (F. H. Hinsley, W. B. Gallie, I. Clark, P. Riley, H. L. Williams) interpreters of Kantian pacifism, see Hurrell, ‘Kant and the Kantian Paradigm in International Relations’, 16 *Review of International Studies* (1990) 3, at 183-205.

Cf. *Peace through Law*, at 3-9, 11-13; *Law and Peace*, at 142-144.

Cf. *Peace through Law*, at 72-73 ('That an individual is to be punished although he has not acted wilfully and maliciously or with culpable negligence, so-called “absolute liability”, is not completely excluded, even in modern criminal law'). On the theme of ‘absolute liability’ in domestic and international law see also *Law and Peace*, at 96-106. On the same theme see the recent essay by Parisoli, ‘Soggetto responsabile, sanzione collettiva e principi morali: suggestioni kelseniane in tema di politica internazionale’, 11 *Filosofia politica* (1997) 3, at 471-489.


Cf. *ibid*, at 14-15. In the early 1940s Kelsen devoted a long series of essays and articles to this proposal, which he cites in a long footnote together with testimony of assent from numerous political and religious associations in the United States (*ibid*).


Cf. *ibid*, at 87-88. Here too Kelsen displays a normative contamination between morality and law from which he should have been barred by the assumption of the ‘purity’
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of his theory of law. In general, in relation to the international criminal court’s competence to judge individual liability for war crimes Bull, supra note 16, at 89, has noted that their symbolic function has been obfuscated by the selective nature of their pronouncements. It has been the `victors’ that have promoted these tribunals and without exception acted as judges there, while those who appeared in the dock were normally a few scapegoats representing the defeated.


[xlix] Kelsen traced the failure of modern institutional pacifism back to the primacy given to the executive functions over judicial ones. For Kelsen, peace could be guaranteed only by an international court of justice operating in relation to disputes between states as a higher, impartial third party, with an international police force under its command. The theme of the `third party’ as a guarantee of international peace was developed by Norberto Bobbio in the collection of articles Il terzo assente (1989). More generally, see also P. P. Portinaro, Il terzo. Una figura del politico, Milano, Franco Angeli (1986).

[1] Kelsen’s demand for the victor states of the Second World War to subject their own soldiers to the verdict of the same courts as those set up to judge the enemy seems to ignore the radically partisan, destructive logic of war.

[li] In Principles Kelsen emphatically stresses the fact that the United Nations Charter finally introduces ‘a system of international security marked by a high degree of centralization’ (at 40), but nonetheless complains that the excessive discretionality of the power conferred on the Security Council prevents it from acting as a `legal’ body, that is, as a source of centralized, equal and universal jurisdiction able to give rise to an effective system of sanctions alternative to war, especially “defensive war” (at 47-51).


[liv] Hart, cit., 231.

[lv] In making this claim, Hart is aware of the theories advanced for “basic norm” in international law. Of the two serious candidates, pacta sunt servanda does not account for all obligations under international law, however widely the term “pacta” is construed, while the rule that “States should behave as they customarily behave” says nothing more than
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that “those who accept certain rules must also observe a rule that the rules ought to be observed,” which is only another way saying that these rules are accepted as binding.

[lvi] Hart, cit., 323.


[lviii] See K. Popper, *The Lesson of This Century: With Two Takes On Freedom and The Democratic State*, Venezia, Tascabili Marsilio, 1992. One of the century’s greatest and most influential thinkers, Karl Popper reminds us that we must recognize our responsibilities in preserving the democratic system we enjoy: it is our actions which will create the world of tomorrow. In these interviews with journalist Giancarlo Bosetti, Karl Popper ranges widely over contemporary political and social issues. He reflects on many topics, from the decline of the Soviet Union and the danger of a Third World War, to our obligations to children and the potentially harmful influence of television. He warns us that the increasing violence and egotism of our society, if unchecked, will imperil our civilisation. The volume also contains two talks on the theory of democracy, arguing that democracy has never been the rule of the people (nor can or should it be), but only the best method we know for preventing tyranny.

Popper’s purpose is to warn us against the increasing violence and egoism of our society. What solutions can we offer to the problems of the environment, demography and corruption? How can we prevent the violence our society engenders? How can we preserve our democratic system while at the same time paving the way for global peace? Popper believes that the philosopher has a duty to intervene in politics and he utters a clear call to all of us to recognise our responsibilities. He reminds us that it is our actions which will create the world of tomorrow.

“The lesson of this century is an exhortation to realize that it is foolish to compromise the inestimable good of peace in the state of law to seek illusory paradises that lead, as history has shown, to war and tyranny” (Maurizio Viroli).

See also R. Dahrendorf, *Economic Opportunity, Civil Society and Political Liberty*, Roma-bari, Laterza, 1996. This essay explores the dilemmas associated with ‘squaring the circle’ of wealth creation, social cohesion and political freedom in the OECD countries. As the metaphor of square and circle implies, these three essential goals of development are not necessarily compatible and may even conflict with each other, particularly at a time when advancing globalization creates perverse choices. To become and remain competitive in international markets requires a flexible use of resources which threatens social cohesion
and political freedom in a number of ways. After analysing these tensions, the essay concludes with six proposals for improving the likelihood that a workable balance between prosperity, democracy and social cohesion can be maintained in advanced industrial societies.

“The OECD countries, to put it in a very direct and hasty way, have reached a level of development in which the economic opportunities of their citizens lead to dramatic choices. To remain competitive in a growing world market must take measures to irreparably damage the cohesion of the respective civil societies. If they are unprepared to take these measures, they have to resort to restrictions on civil liberties and political participation that even shape a new authoritarianism, or at least that seems to be the dilemma. In the next decade or so it is to square the circle between creation of wealth, social cohesion and political freedom. The quadrature of the circle is impossible, but we can perhaps approach it, and a realistic project of social welfare promotion probably can not have goals more ambitious” (Ralf Dahrendorf, 1995).


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[lxii] See D. Zolo, *Sulla paura. Fragilità, aggressività, potere*. Feltrinelli, Milano, 2011. The author said: “I wrote this book because I felt like a grain of sand at the mercy of the wind, at my age, I was afraid of not resisting, but before I gave in I wanted to understand why I was afraid in my life. of my fear, but also of the fear of others, and I finally wanted to understand why so often fear made me aggressive and because my aggression and the arrogance of others were closely intertwined.I asked myself, in essence, what was the relationship between fear, aggression and violence unleashed by my peers over the millennia. “A book written by Danilo Zolo to understand where and when fear is born, if the struggle for existence always involves conflict and conflict, which is the place occupied by politics in the management of fear and insecurity of men, and finally the role of fear in the globalized world, with its wars and the spread in every corner of the earth of a c rescinding precariousness and the overwhelming of the rich and powerful on the poor and weak. But
Zolo’s gaze is not of resignation, of surrender, but of “active pessimism”: he teaches us that to the end we must not renounce fighting against the boundless universe of human folly.


[ lxv ]  Wedgwood, Ruth, “Just War and the War on Terror” (2004). Saint Pope John XXIII Lecture Series. 9, Columbus School of Law, 2004. For months, the candidates for president of the United States have pushed back and forth over the appropriate role of the United Nations and the international community as a whole, in the current conflict in Iraq. The election may well hinge on how voters respond to each man’s argument. One of the nation’s most prominent international scholars, Professor Ruth Wedgwood of Johns Hopkins University, frames the question differently. As she sees it, the question is more fundamental. Can the U.N., with its carefully promulgated rules about when and under what circumstances military solutions are permissible, even cope with what’s really happening in the world today?

[ lxvi ]  This is the view taken by the U.S.

[ lxvii ]  See Barberis, M., Non c’è sicurezza senza libertà. Il fallimento delle politiche antiterrorismo, il Mulino, Bologna, 2017. What if all we know about security is false? This is the question to which the book confronts us, in its stringent analysis of the anti-terrorist policies adopted by the major Western powers since September 11, 2001. Subjected to the controls of adequacy, necessity and proportionality, commonly used by the great constitutional and international courts, most measures against terrorism prove to be useless or counterproductive. The same irrationality, moreover, pervades even most of the current opinions on the subject of emergency, public order and self-defense.

[ lxviii ]  Or Unmanned Aircraft Vehicle (UAV).

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This is, at least, in theory.

Walzer, M. (2006). *Just and unjust wars*. 4th ed. New York: Basic Books, p. xvi. *Just and Unjust Wars* forever changed the way we think about the ethics of conflict. First published in 1977 and now brought up to the present with a new preface and postscript, this classic work by political philosopher Michael Walzer examines the moral issues that arise before, during, and after the wars we fight. Reaching from the Athenian attack on Melos, to the Mai Lai massacre, to Afghanistan and beyond (e.g. from the wars in the Balkans through the first war in Iraq, as well as from the invasion of Czechoslovakia and Poland, the six-day war of Israel against the Arabs, the American war in Vietnam, but also Cuba, the Korean War, the war of Spain, the Mao campaign to seize China, the terrorism of Wrath, the French war in Algeria, Beirut, the Nuremberg trial), Walzer mines historical accounts and the testimony of participants, decision makers, and victims to explain when war is justified and what ethical limitations apply to those who wage it. The author examines the moral issues surrounding military theory, war crimes, and the spoils of war. He studies a variety of conflicts over the course of history, as well as the testimony of those who have been most directly involved - participants, decision makers, and victims. In his introduction to this new edition, Walzer specifically addresses the moral issues surrounding the war in and occupation of Iraq, reminding us once again that “the argument about war and justice is still a political and moral necessity.”

“Even just talking about the morality of war is not an easy task, because war is ‘a hell’, as Walzer says, and in any case an evil in itself. Even if granted, we can recognize that two are the typical problems of morality in war. Evaluate whether and when to resort to it is fair and the moral lawfulness of the means used to obtain victory (regardless of the correctness or otherwise of recourse to war) “Walzer starts from the assumption that war and military actions are justifiable in some cases and not in others in the practice of collective moral discourse, ‘just and unjust wars’ can be read as a repertoire of cases on which the philosopher uses his theoretical imagination and his ethical capacity”, said Sebastiano Maffettone, one of the most important Italian legal philosophers.

Here I would like to describe the importance of the First Gulf War, as well as the
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Operation Desert Storm by some steps:

A fearsome scenario: with the occupation of Kuwait and its annexation to Iraq, the free world found itself facing a crisis of vast proportions, not so much and not only because of the delicate economic issues related to oil, but for the precarious balance of political-institutional structures of the Middle Eastern countries.

By orchestrating a wise and cynical propaganda, Saddam Hussein succeeded in leveraging the most naive spirit of anti-western revanche of the Muslim populations, from Morocco to Pakistan, which initially saw him as the defender and avenger of the offenses suffered since the end of World War I to today.

All the political and border structures of the Middle East, the legitimacy of governments, the same basic rules of coexistence could thus be re-discussed, opening up a season of hatred and violence far worse than that inaugurated only a few years before by the Iranian fundamentalist revolution. the position of neighboring States, the Bahreim, Qatar, Saudi Arabia, Jordan, Syria, became very delicate immediately.

From Riyadh immediately a request for help was sent to the United States, which already on 7th August had the first planes taking off destined to create that enormous complex of men and means which was entrusted to General Norman Schwarzkopf, and which would take the name of Desert Shield.

(Norman Schwarzkopf (1934), or Stormin Norman was the greatest architect of the brilliant and rapid victory of the Allies against Iraq. Prompted by journalists, he did not say that his opponent’s encirclement and attrition strategy was inspired by the Scipio African expedition, in Africa against Carthage and Hannibal. Chosen as Commander-in-chief of the allied forces for the experience gained during the war in Vietnam, and for the great organizational capacity demonstrated as deputy head of the US General Staff for Operations and Programming, he was immediately well received by the opinion public for his personal style, which immediately earned him the nickname “Bear”.

Careful scholar of the world of the Arabic language, Schwarzkopf had the courage to declare, commenting on his conduct in the Gulf War: «I was tricked by Saddam», admitting with this that he had overestimated the combativeness and abilities, in reality scarce indeed, of the Iraqi Army).

Meanwhile, for the first time, the UN voted a large number of Resolutions (from 661 to 678) between 6th August and 29th November, condemning the aggression and calling on
Iraq to withdraw from Kuwait. Resolution 678 established the deadline for collection on January 15\textsuperscript{th}, 1991.

**Desert Shield**

With the Desert Shield operation, the UN countries built an immense constrictive belt around Iraq. This device started from the southern offshoots of the Caucasus and continued along the borders of Turkey, Syria, Saudi Arabia and the Persian Gulf. To guard this “belt” the “ready-to-use” departments (commonly known as *Rapid Deployment Forces*), essentially paratroopers and Marines, and massive naval and air vehicles were immediately engaged by the US.

In the following days and months, other US and different departments and numerous contingents from other nations joined these first forces. Never, for a joint international operation, a more coordinated, complex and colossal logistical effort had been put in place, despite this demonstration and despite the international isolation in which the dictator had forced his country, Saddam Hussein rejected any attempt at an agreed solution.

The air-to-land offensive to liberate Kuwait was therefore unavoidable. Overall it would have lasted forty days (January 17\textsuperscript{th} – February 27\textsuperscript{th}) and it can be said that the war was won because the organizational machine, especially the US one, worked perfectly. By way of example, it is sufficient to recall here a curious detail of American efficiency, which came to order the confectionery factories of particular chocolate bars, which did not melt in the desert heat.

**The air and missile offensive**

When the deadline for withdrawal from Kuwait set by the UN expired on January 15\textsuperscript{th}, 1991, the mediation activity was still in turmoil, the pacifists were demonstrating in Germany and Radio Bagdad, as usual, praising the condottiero invitto and waving the question anti-Israeli, promising apocalyptic lightning of war.

The soldiers of the giant Allied expeditionary corps, on the other hand, were silent so as not to discover their cards, but the machine was already in motion: on the evening of the 16\textsuperscript{th} the weather conditions were favorable, the weapons ready.

British Premier John Major informed the Queen of the imminence of the attack; immediately after the White House issued the order and at 9.50 pm on the American battleships the ramps of the *Tomahawks* were lit.
While the stupid missile intelligence guided them on a flight down to the ground, impossible to intercept for the radars, hundreds of planes took off for the collection and refueling points, made in flight by special tankers.

At 0.41 pm, Baghdad time, on October 17th, CNN showed the incandescent fountains of anti-aircraft bullets in search of the incursors, beautiful but useless, since they were missiles. Meanwhile, a BBC reporter excitedly reported that he had seen a Tomahawk walk the straight road in front of his hotel window at no more than twenty meters above the ground.

Immediately after the missiles, with chronometric timing, the ground attack planes arrived, which stormed the radar stations, the connecting apparatus and the bunkers of the military commands, the power stations and the electricity grids, the airports, the bridges, the railways and the road network.

Blinded and upset the air defenses, on October 18th it was the turn of the enormous B-52G of the strategic Aviation, which hammered the concentration of troops; also the French planes and the Italian Tornados that attack the Bassra region are flying; in Kuwait; the plane of Maurizio Cociolone and Gianfranco Bellini is shot down, and the two Italian officers are taken prisoner.

In this offensive the F-117A Stealth bombers (whose fuselage structure and absorbent radar coating make them invisible to the defenses), were used for the first time: among the first shots scored is the one on the headquarters of the Iraqi Air Force.

**Saddam’s reaction**

Much more problematic is the identification of mobile missile ramps, which from October 19th begin to strike with terrorist purposes, and indeed with much imprecision, Tel Aviv, Haifa and Riyadh.

The spasmodic and often unsuccessful search for these goals is made imperative by the declaration of the Iraqi Ambassador in Tokyo, which warns that his country reserves the right to use chemical and bacteriological weapons, and from the desire to protect neutral Israel, to avoid that it also enters the conflict, leading to the exit or protests of the Arab States united.

Several Iraqi Scuds are intercepted by the American anti-missile Patriot, others throw their load of death away from the inhabited centers, thus obtaining very modest
results; what is more important, however, is that, by the admission of the Allies themselves, the Scuds’ mobile batteries were only minimally neutralized.

Meanwhile, on the 22nd, Saddam set fire to the first of a long series of Kuwaiti oil wells and on the 25th began to pour oil into the sea, implementing an ecological terrorism plan that proceeded hand in hand with the psychological terrorism which he showed by showing sadistically on the television the swollen faces of the downed and captured pilots.

**The terrestrial offensive: Desert Storm**

On February 24th at 4 am local time, the Allies set up the *Operation Desert Storm*.

The coalition front was divided into three sectors: in the East there were concentrated Kuwaiti troops, Saudis and American marines (attacking director towards Kuwait City from al-Khafji); in the center were British, Saudi and Syrian armored and mechanized infantry units (attacking director still Kuwait and southern Iraq); to the west, in the middle of the desert, the XVIII Army Corps, eminently constituted by Americans, Egyptians and, more to the west of all, by the French of the Foreign Legion and by the 82nd American Airborne (attacking the Tigris river).

Iraq had withdrawn the Republican Guard brigades from Kuwait and left second-rate units, recruited partly from the Kurds. The southern Iraqi borders, as well as the Kuwaiti ones and the coasts, had been fortified in depth, with numerous underground tanks in front of which anti-tank traps filled with fuel had been placed. Close to the lines of the static defense and of the entrenched troops were the mobile armored forces of the reserve and the artillery, aimed at areas considered obligatory for the advance of the enemy, and called “annihilation zones”.

The one that saddam had pompously called “the mother of all battles” and that instead was, for his unfortunate army, the mother of all defeats, was preceded by a terrifying aerial and artillery bombardment. The hundreds of underground tanks, which kept the engines running at night to charge the batteries, were identified and destroyed by helicopters and by the A-10s with infrared missiles, which were directed towards the heat of the exhaust pipes. Most of the tankers died in the same darkness that seemed to be their best defense. The Allied armored units then moved forward on a front of 500 km, overwhelming everything. The first prisoners were made only after a penetration of 24 km beyond the defensive lines.

On February 25th, the offensive developed in all its grandeur. In the evening the
Kuwaiti and Saudi troops arrived a few kilometers from the capital, while the 1st Marines division, which had proceeded along the coast, was preparing to conquer the airport of Kuwait City. In the center sector, the 101st American and the 1st British bypassed the Republican Guard troops deployed on Iraqi territory on the border with Kuwait. However, the defense was strengthened and there were two tank battles: one against armored units of the Guard near the Kuwaiti border and another at 58 km south of the capital. With minimal losses among the allies, the Iraqis lost 270 vehicles. On the far left the 82nd American and the 6th French already ran towards the Tigris. The Foreign Legion alone was enough to convince the surrender of an entire opposing division!

On February 26th, Kuwait City fell after Saddam gave the order for a general retreat in the direction of Basra. The allied troops found a city battered and sacked by fleeing soldiers, who had taken with them everything that could be transported, from jewels, to carpets, to toys. Furthermore, there was not a single citizen who did not mourn a friend or murdered relative.

On the 27th, finally, the tragedy takes place: the Iraqi Army is on its way along the main road leading to Basra, and the Allied Air Force slaughtered that easy and defenseless target. Striking the engorged fender vehicles against fender was, according to the testimony of a pilot of the USAF, like “harpooning fish in a barrel”. The carnage is particularly horrible at Mutla Ridge, where thousands of soldiers – the exact number will probably always remain unknown – died charred among their vehicles. None of the fugitives will ever reach Basra. On February 28th, the Desert Storm had ended: the “mother of all battles” had lasted 100 hours.

A thousand voices have been raised to reproach President Bush for stopping the tanks on the road to Baghdad. In reality, the choice of the President of the United States responded to two reasons: first, the Gulf war had as its declared objective the liberation of an unjustly assaulted autonomous state, not the invasion of Iraq; moreover, the occupation of Baghdad would have caused, with the disappearance of Saddam Hussein, a very serious imbalance of powers in the Gulf area and perhaps led to the disintegration of Iraq and the birth of new and more complex problems. If Bush had an alternative candidate for Saddam available, he probably would have taken the step; but he didn’t, and decided not to risk it.

The document *What We’re Fighting For*, written in February 2002 by a large group of American intellectuals – among them Michael Walzer, Samuel Huntington, Samuel G. Freedman, Francis Fukuyama, Amitai Etzioni, Jean B. Elshstain, Theda Skocpol – pronounced in the name of “American values”, proposed as universal, and presents the war decided by the US administration against terrorism as a “just war”. The ethical justification concerns the war in Afghanistan, and even without direct references, even possible future wars, including the attack on Iraq. The document makes no mention of either international law or the functions of international institutions such as the United Nations. See [http://www.americanvalues.org/html/wwff.html](http://www.americanvalues.org/html/wwff.html).


Although Navi SEALs and Marines (or better: Unites States Marine Corps – U.S.M.C.) belong to two different Armed Forces, I would like to mention here that the latter are often quoted and remembered – even in Hollywood films – for their “prayer” or “creed”. *The Rifleman’s Creed* (also known as *My Rifle* and *The Creed of the United States Marine*) is a part of basic United States Marine Corps doctrine. Major General William H. Rupertus wrote it during World War II, probably in late 1941 or early 1942. In the past, all enlisted Marines would learn the creed at recruit training. However, in recent years the creed has been relegated to the back pages of the standard recruit training guide book and its memorization is no longer considered doctrine for recruits. Different, more concise versions of the creed have developed since its early days, but those closest to the original version remain the most widely accepted.

“This is my rifle. There are many like it, but this one is mine.

My rifle is my best friend. It is my life. I must master it as I must master my life.
Without me, my rifle is useless. Without my rifle, I am useless. I must fire my rifle true. I must shoot straighter than my enemy who is trying to kill me. I must shoot him before he shoots me. I will ...

My rifle and I know that what counts in war is not the rounds we fire, the noise of our burst, nor the smoke we make. We know that it is the hits that count. We will hit ...

My rifle is human, even as I, because it is my life. Thus, I will learn it as a brother. I will learn its weaknesses, its strength, its parts, its accessories, its sights and its barrel. I will keep my rifle clean and ready, even as I am clean and ready. We will become part of each other. We will ...

Before God, I swear this creed. My rifle and I are the defenders of my country. We are the masters of our enemy. We are the saviors of my life.

So be it, until victory is America's and there is no enemy, but peace. Amen”!

(See the movie Full Metal Jacket, directed by Stanley Kubrick, 1987, in which this Creed is enunciated by a group of young recruits of the U.S. Marines).


[1xxx] Western strategic thought is still heavily conditioned by the work of the Prussian soldier-scholar Carl von Clausewitz. In his main work, On War, he sets out a theory of war and a theory of warfare. The two are intrinsically related; his theory of warfare is designed to work within his theory of war. This article considers first how far Clausewitz’s theory of war applies today, and then, considers the applicability of the idea of victory within his theory of warfare. (One can identify this approach as Kantian or Hegelian. See Antulio J. Echevarria II, Clausewitz and Contemporary War, Oxford: Oxford University Press, 2007).

To assess both continuity and change in war, a standard distinction in contemporary debate is drawn between the nature (permanent features) and character (context dependent features) of war. Although this distinction is commonly misattributed to Clausewitz, he did not use the term “nature” in quite this way. Hence at the end of book 1, chapter 1, he writes: “War is thus more than a mere chameleon, because it changes its nature (seine natur) to some extent in each concrete case.” If nature is supposed to be unchanging, how can we make sense of this passage? As Antulio J. Echevarria II sets out, Clausewitz followed a dialectical analytical framework in which the world could be seen either in the abstract,
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through the lens of reasoning based on pure logic, or in reality, through the lens of reasoning based on practical experience. To understand the nature of a given phenomenon through this dialectical analysis, the abstract perspective is tested against practical reality. In On War, this dialectical analysis produces a narrow and a broad account of what war is. Both are set out in book 1, chapter 1, which opens with this definition of war as an abstract phenomenon: “War is thus an act of force to compel our enemy to do our will. To secure that object we must render the enemy powerless; and that, in theory, is the true aim of warfare. That aim takes the place of the object, discarding it as something not actually part of war itself”.

What Clausewitz does here is to delimit a narrow account of war as a purely military act in which the military objective takes the place of the political aim, which is then classified as being outside war itself. This idealized, abstract view of war is sequential: the focus during war – the true aim of warfare – is on the military objective; only when the military objective is satisfied does the political objective once again come to the fore. In other words, there is a clear line between military action in war and political action in peace.

Clausewitz posits how in the abstract: “If you want to overcome your enemy you must match your effort against his power of resistance. But the enemy will do the same; competition will again result and, in pure theory, it must again force you both to extremes.” Crucially, however, Clausewitz notes that a war would only conform to the ideal if it was a single decisive act isolated from its political context, which for that reason, means that no war in reality has ever met this ideal.

In summary, to understand what Clausewitz means by the nature of war, it is necessary to recognize that there are two ideas of war at play in On War. One is the abstract version found in the realm of logic, which Clausewitz identifies as the nature of war. As Clausewitz stresses, “it must be observed that the phrase the natural tendency of war, is used in its philosophical, strictly logical sense alone and does not refer to the tendencies of the forces that are actually engaged in fighting – including – for instance, the morale and emotions of the combatants.”

The other idea of war is the phenomenon produced when the abstract concept of war is modified by reality, to give us real war. This is the idea of war that we reach at the end of book 1, chapter 1, in which Clausewitz presents his well-known image of the “total phenomenon” of war as it appears in reality as a “trinity” comprised of three “dominant tendencies.” These three tendencies effectively provide categorical buckets within which to place the various reasons listed above for why war in reality moderates the abstract
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[lxxxii] For America, the September 11 attacks underscored the danger of allowing threats to linger unresolved. Saddam Hussein’s continued defiance of 16 UNSC resolutions over 12 years, combined with his record of invading neighboring countries, supporting terrorists, tyrannizing his own people, and using chemical weapons, presented a threat we could no longer ignore. The UNSC unanimously passed Resolution 1441 on November 8, 2002, calling for full and immediate compliance by the Iraqi regime with its disarmament obligations. Once again, Saddam defied the international community. According to the Iraq Survey Group, the team of inspectors that went into Iraq after Saddam Hussein was toppled and whose report provides the fullest accounting of the Iraqi regime’s illicit activities: “Saddam continued to see the utility of WMD. He explained that he purposely gave an ambiguous impression about possession as a deterrent to Iran. He gave explicit direction to maintain the intellectual capabilities. As U.N. sanctions eroded there was a concomitant expansion of activities that could support full WMD reactivation. He directed that ballistic missile work continue that would support long-range missile development. Virtually no senior Iraqi believed that Saddam had forsaken WMD forever. Evidence suggests that, as resources became available and the constraints of sanctions decayed, there was a direct expansion of activity that would have the effect of supporting future WMD reconstitution.” With the elimination of Saddam’s regime, this threat has been addressed, once and for all. The Iraq Survey Group also found that pre-war intelligence estimates of Iraqi WMD stockpiles were wrong – a conclusion that has been confirmed by a bipartisan commission and congressional investigations. We must learn from this experience if we are to counter successfully the very real threat of proliferation. First, our intelligence must improve. The President and the Congress have taken steps to reorganize and strengthen the U.S. intelligence community. A single, accountable leader of the intelligence community with authorities to match his responsibilities, and increased sharing of information and increased resources, are helping realize this objective. Second, there will always be some uncertainty about the status of hidden programs since proliferators are often brutal regimes that go to great lengths to conceal their activities. Indeed, prior to the 1991 Gulf War, many intelligence analysts underestimated the WMD threat posed by the Iraqi regime. After that conflict, they were surprised to learn how far Iraq had progressed along various pathways to try to produce fissile material. Third, Saddam’s strategy of bluff, denial, and deception is a dangerous game that dictators play at their peril. The world offered Saddam a clear choice: effect full and immediate compliance with his disarmament obligations or face
serious consequences. Saddam chose the latter course and is now facing judgment in an Iraqi court. It was Saddam’s reckless behavior that demanded the world’s attention, and it was his refusal to remove the ambiguity that he created that forced the United States and its allies to act. We have no doubt that the world is a better place for the removal of this dangerous and unpredictable tyrant, and we have no doubt that the world is better off if tyrants know that they pursue WMD at their own peril. See A.M. Dershowitz, *cit.* The central chapter of *Terrorism* is dedicated to proving that the benefits that the European allies and the United Nations have granted to the Palestinian people since 1968 “have made it inevitable on September 11th”.

[xxxiii] See The White House, *National Security Strategy of The United States of America*, Washington D.C., 17 settembre 2002; sect. III, in “Guerra, diritto e ordine globale”, at Jura Gentium, jhttp://www.juragentium.unifi.it. (“While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right to selfdefense by acting preemptively against such terrorism”). On June 1th, 2003, President Bush confirms this doctrine: “We must take the battle to enemy, disrupt his plans and confront the worst threats before they emerge. In the world we have entered the only path to safety is the path of action. And this nation will act”. (*The National Strategy for Combatting Terrorism*, Washington, 2003, p. 11).

About the distinction between *preventive war* and *preemptive war* see R. Falk, *Why International Law Matters*, at the on-line web site Jura Gentium, http://www.juragentium.unifi.it.


[xxxv] This statement finds an eloquent confirmation in the terms in which, unlike what was still happening in the early 2000s, today, in Italy, since 2012, politicians and the media comment on the events in which, from time to time, they are involved Italian soldiers who integrate the contingent of international armed forces currently engaged in various armed conflicts: abandoned the concern to present and justify the interventions in which they participate as “peace operations”, more and more often it is admitted and openly acknowledges that those in which Italian soldiers are engaged in, are “war scenarios”. In particular, “war scenarios” no longer evoked, as happened in past years, to stigmatize (even if not only) the violation of Article 11 of the Italian Constitution, but, on the contrary, if not to request a change at least to propose a (re)reading that does not preclude the adoption of the military war penal code. Thus, for example, A. Cassese [2009], in relation to some
controversial statements by Defense Minister Ignazio La Russa concerning the Italian armed forces in Afghanistan, writes: «La Russa has rightly maintained that it is time to recognize that our military participate in an internationalized armed conflict. And therefore it is hypocritical to apply the military penal code to them». According to Cassese, in particular, the Italian Constitution «does not pursue an “imbelle pacifismo” (cowardly pacifism)» and, in addition to participation «in a war of legitimate individual or collective defense», allows «the use of war violence authorized by the Security Council which aims to restore peace, democracy and respect for human rights»; this, given that the war in Afghanistan is “a war in war”, Cassese shares, «in the interest of our military but also of the populations of the territories in which they are fighting», the proposal of the Minister La Russa of «a new organic law that regulates both the conduct of the war and the penal consequences of the violation of war laws by our soldiers».

[1xxxvi] And, in this direction, thanks to Nitsch is not only that of a careful translation of the Holmes Lectures but also that of two essays (also but not only very documented): one, from 2005, on the theme of the just war in Kelsen; the second, of 2009, which introduces the translation of the volume, more specifically focused on the editing of the Holmes Lectures and on the (academic) adventures that accompanied Kelsen’s decision, now in danger even in Geneva, to emigrate to the United States.


[1xxxix] It should also be pointed out, as a further contribution to the reconstruction of this puzzle, U. Campagnolo [2010], an interesting volume in which Losano (who conceived it even before the curator) collected «the notes taken by Umberto Campagnolo during the lessons and conversations in Geneva with Kelsen, as well as the reading notes that were inspired by that context»; volume, as further specified in his introductory essay M. Losano [2010, p. 7], «useful also to see which themes, in the early years of the Geneva exile, were the center of attention of the internationalists who were part of Kelsen in the Institut Universitaire de Hautes Études Internationales of Geneva».

[xc] M. Bovero [2006].

[xci] Despite the Nobel Peace Prize awarded in 2009, a few months after his election as President of the United States, B. Obama has not yet succeeded, in fact, in taking a clear distance from the foreign policy lines of his predecessor G.W. Bush. And, although some encouraging signs have not been missed, such as the withdrawal of US troops from Iraq in
August 2010 and the new commitment to peace in the Middle East, the current US foreign policy does not yet seem able to contribute to a full reaffirmation of the pacifist plant of the UN Charter of 1945.

Increasingly hypertrophic because, with the dissolution of the Soviet Union, NATO has progressively incorporated many of the countries that were previously members of the Warsaw Pact; more and more hegemonic because, after the end of the cold war, NATO gradually redefined its role and its function by superimposing them, in an antagonism not always dissimulated, on those of the UN. With different tones and evaluations, on this point they call attention, for example, I. Mortellaro [1999] and M. Clementi [2002].

Recurrent, in Walzer, the attention for what he himself calls “the moral status of the war” not only after the September 11th attack, as evidenced for example by the essays published in the volume *Arguing about War* (2004), but, as is known, starting from his very successful *Just and Unjust Wars* (1977).

Thus, for example, in D. Zolo [2006 a, p. 4] from which I recall the quotation from C. Schmitt [1974, trans. It. p. 351].

D. Zolo [2006 a, p. 4]. With explicit reference to Zolo and his numerous works on the subject of war and law, a critical reading of the protest against the criminalization of war is proposed by P. Parolari [2007, pp. 588-591].

The reference, in particular, is to H. Kelsen [1944] and [1945].

N. Bobbio [1991, pp. 55-56].

On the Kosovo war, not unlike the war against Afghanistan and Iraq, literature is ever more extensive; the thematic bibliographies of the Italian section “Guerra, diritto e ordine globale” bear witness to this (despite their inevitable incompleteness).

That both are “Western” values is doubtful both because, historically, the “West” has repeatedly violated them no less often than it has celebrated them, and because, as among others it has claimed A. Sen [2002] and [2006], freedom and democracy are by no means exclusively “western” values.
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[cii] From here, perhaps, precisely because it is indifferent to a foundation and to a discussion in metajuridical terms, the hastily negative judgment that B. Conforti [2003, p. 584] gives to Kelsen’s analysis (rectius: of the Kelsenian normativists): «The treatment of jus ad bellum in positivists of all kinds and species, including Kelsenian normativists, to suffer from the end of the nineteenth century and up to beyond half of the XX is extremely poor».

[ciii] H. Kelsen [1952, pp. 34, n. 16]; it is interesting to note that the same notation is also repeated in 1967, in the second updated edition and revised by R.W. Tucker, at n° 22 on p. 29.

[civ] Different is the position of C. Nitsch [2005, p. 574], which focuses instead on the “Kelsen’s re-elaboration of the traditional doctrine of the bellum iustum”, a thematization which is also used in [2009, pp. XLIX-LII].

[cv] In recalling some of the most significant formulations of the theory of bellum justum starting from ancient Greece, H. Kelsen [1942, pp. 43-45, trans. It. pp. 44-45] does not pay excessive attention either to the distinction, or to the risk of possible confusion, between the two concepts, juridical and meta-juridical, of bellum justum: thus, for example, of the conceptions of Saint Augustine and Isidore of Seville, Kelsen indicates the Ciceronian influence but does not indicate what its distinctive and innovative features are. And again, the same notations of 1942, not very attentive to a real historical-philosophical study of bellum justum, return, and only in some works that appeared between the early forties and the early fifties of the twentieth century, in H. Kelsen [1945, trans. It. p. 340] and [1952, pp. 34-35; second ed. 1967, pp. 30-31].


[cvii] H. Kelsen [1942, trans. It., p. 34].

[cviii] Thus, for example, D. Zolo [2000, p. 112] when he writes: «Hans Kelsen welcomes the theory of “just war” in a context that would like to be inspired by pacifism. The Kantian formalist and pacifist Hans Kelsen does not renounce to making the ethical doctrine of the “just war” the condition of the juridical nature of the international order».

[cix] Although the consequence of its denial, claimed by those who refer to political realism, is (not only logically and legally but also politically) undue, nevertheless it is an irrefutable fact that the thesis of peace through law was repeatedly denied in the twentieth century: the Treaty of Versailles of 1919, the establishment of the League of Nations in 1920 and the Briand-Kellogg Pact of 1928 failed in fact to avert the Second World War, just as the
establishment of the UN in 1945 proved to be so powerless against the proliferation of the
innumerable local and regional wars of the second post-war period and, after the end of the
cold war, against the increasingly frequent international wars that continue to take place
since the first Gulf War in 1991.

[cx] In a context in which Kelsen is not referred to, the distinction mentioned in the
has fulfilled two different functions in history: now it has been accepted to deny the validity
of war theories, now it has been accepted to deny the validity of pacifist theories. In
Catholic theology, beginning with St. Augustine, he fulfilled the first function: it was then a
question of refuting the thesis, attributed to the first fathers of the church that every war
was always illicit. In the revival of natural law after the First World War, the just war theory
was resurrected to fulfill the opposite function: this time it was a question of refuting the
realistic theories of history and politics which had come to the conclusion that all wars are
lawful».

[cxi] H. Kelsen [1942, p. 38]. Repeatedly affirmed in different works, the reduction of
the doctrine of the just war to the prohibition of the international treaties of the twentieth
century of moving war if not in very particular cases, also occurs in H. Kelsen [1960, trans.
It. p. 354] and [1979, trans. It. p. 14]. In particular, in this last and posthumous volume,
commenting on the essay by F.S.C. Northrop [1959], with regard to the influence of the
development of natural sciences on law, Kelsen writes: «Northrop says: “In the atomic age
civilized men cannot clearly afford to make war”. But already long before the discovery of
atomic energy the war had been forbidden by international law (Pact Briand-Kellogg: the
principle of bellum justum)».

[cxii] Consider, for example, “Democracy through law”, the name taken by the Venice
Commission, established on May 10, 1990, by the Council of Europe, to discuss and suggest
possible solutions to the problems of institutional engineering that were submitted by the
countries (in particular those of the Asian area of the former Soviet Union) who intended to
adapt their form of government to the standards of constitutional democracies. Works, those
carried out by the Venice Commission, little known and, above all, little valued by an
international community often distracted if not even intolerant towards the precepts of
international law (no less than against the episodic attempts of their possible
implementation); an international community that, since the first Gulf War of 1991, has
shown itself to be more prone to the arrogance of “democracy through war” than to a
careful and prudent strategy of “democracy through law”.

[cxiii] Thus, for example, D. Zolo [2006 a] when polemically writes about “peace through
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"criminal law" to stigmatize, in the Kelsenian assumption, the profile relating to the establishment of an International Criminal Court with compulsory jurisdiction and, above all, to challenge who, with or without reference to Kelsen and his assumption, in recent decades has been attributing an increasingly important role to international criminal justice.

[cxiv] With specific reference to Holmes Lectures, the distinction between a political profile and a theoretical profile in Kelsen’s analysis is explicitly traced by C. Nitsch [2009, p. XXXIX].

[cxv] To the distinction between a political profile and a dogmatic profile in Kelsen’s analysis mentions, for example, Ch. Leben [1996, p. 108].

[cxvi] Great emphasis both on the complementary character and on the need to keep the three profiles of: a) analysis of the politics of law distinct; b) of the general theory; of c) law and of legal dogmatics, has recently been set, for example, by L. Ferrajoli [2007].

[cxvii] Surprisingly, or perhaps more simply, it confirms the lack of attention in literature for its philosophy of international law, which in S.L. Paulson [1990, pp. 81-82], in the proposed list of the main themes of “political theory” in Kelsen’s work, no mention is made of his proposals and claims relating to legal pacifism. According to Paulson, as we know one of the most authoritative experts of his work, there are in fact four themes of political law that “perhaps can be distinguished” in Kelsen: (a) the theory of democracy; (b) analyzes relating to the main political and juridical institutions, including parliamentarism, federalism, constitutional revision and electoral reform; (c) the critique of ideologies also but not only with reference to the theory of justice and that of natural law; (d) the critique of Austrian Marxism and more generally of socialism.

[cxviii] H. Kelsen [1944, trans. It., pp. 35-36]. Thus, for example, we can consider surprising the H. Bull’s statement, [1986, p. 330] according to which: «throughout his life Kelsen opposed attempts to contaminate the exposition of law with natural law or sociological jurisprudence, reaffirming that law is a scientific and technical discipline». It is surprising, and justifies the doubt of the possible mixture indicated in the text, because, according to Kelsen, to (be) able to have a scientific character is not the right, but the pure doctrine of law; to have a scientific character is the pure doctrine of law if and in so far as it abstracts from what the law and its norms can (contingently) prescribe and from the values of which one and the other can be expression.

Symmetrically, always confusing the (alleged) appropriateness of legal science and full-blown adiaphoricity of law and its norms, the reine Rechtslehre has reproached herself
for lending herself to “legitimize” and grant juridical dignity to any legal system, even to the orders of totalitarian regimes like those Fascist and Nazi.

[cxix] M. Jori does not seem to take this argument into account [2008, pp. 60-61] when he states that «according to Kelsen, international law is a primitive right and war is the only conceivable compulsory sanction of this right»; and again, by showing that he shares the reasons for this position he ascribes to Kelsen, Jori further points out that «whoever rejects the thesis of war-sanction-juridical seems not to consider the cost of a model or concept of international law detached from any application of the coercive force and therefore non-law or in any case an unarmed right, as it would regulate all international relations, except for the compulsory ones».

1. Ferrajoli is critic against the reading proposed in the text [2007, vol. II, p. 502] that, by adopting the thesis of L. Gianformaggio [1992], according to which war is always and in any case “denial of law”, claims that, in the event of a war of aggression, the reaction admitted by the UN Charter (no mention is made of the international treaties of the early twentieth century) is not «qualifiable, strictly speaking, as “war”, but rather as a legitimate defense against war».


[cxxii] In literature there are recurrent criticisms and reservations not only regarding the Nuremberg, Tokyo and the trials, held in Jerusalem in 1961, against Otto Adolf Eichmann, but also with regard to the two ad hoc tribunals of the Hague and Arusha established, respectively the first, in 1993, to judge the crimes committed since 1991 in the conflicts of the former Yugoslavia, and, the second, in 1994, to judge the crimes committed, always in 1994, during the inter-ethnic clashes in Rwanda. Thus, for example, despite the diversity of tones and accents, in D. Zolo [2000, pp. 124-168] and [2006 a], A. Cassese [2002], S. Zappalà [2002, pp. 1321-1340], E. Orrù [2010].

[cxxiii] Some initial indications on this problem are in T. Mazzarese [2003 a, p. 36, n. 12]; for an updated survey and for valuable bibliographical references, see E. Orrù [2010, pp. 33-35].

[cxxiv] The first paragraph of Article 5 of its Statute indicates aggression along with three other types of crimes over which the Court has jurisdiction: crimes of genocide, crimes against humanity and war crimes. Unlike these last three types of crimes of which, in its
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subsequent articles, the Statute offers a fairly detailed characterization of the crime of aggression, instead, the second paragraph of article 5 states that it will begin to be the object of the jurisdiction of the Court only when, seven years after the entry into force of the Statute, its definition will be specified and the conditions under which it can be pursued will be indicated. To date, however, despite the fact that the Statute entered into force on 1st July 2002, more than eight years ago, an agreement on its definition has not yet been reached. On the reasons and terms of this problem, see, for example, W.A. Schabas [2001, pp. 26-28], G. Gaja [2002], D. Zolo [2007].

[cxxv] Antecedent to that marked by the Nuremberg (1945-46) and Tokyo (1946-48) trials, a first turning point towards the affirmation of an international criminal justice, attentive to the personal responsibility for war crimes and crimes against peace, at the conclusion of the First World War, with the indictment of Emperor William II of Hoenzollern, enshrined in Article 227 of the Treaty of Versailles of 1919, for «supreme outrage against the morality of the treaties». Strongly criticized by C. Schmitt [1974, trans. it., pp. 339-346], of this precedent there is often mention in literature; so, for example, in A. Cassese [2002, pp., 4-5] and D. Zolo [2006 a, pp. 24-25].

[cxxvi] C.S. Nino Introducción al análisis del derecho, [1° ed., 1973; 12° ed., 2003; Editorial Astrea, Buenos Aires], 74 editions published between 1980 and 2014 in 4 languages and held by 248 WorldCat member libraries worldwide. Trans. En. Introduction to the analysis of Law, this book analyzes the classical themes of traditional dogmatic theory from the new perspective opened by the philosophy of natural language. It is a work that differs from most manuals for use, as one of its great virtues is that it helps the reader to find the solutions to the problems that arise. It also stands out for the attention given to authors such as Rawls, Calabresi, Posner, Dworkin or Raz, which make it a classic still in force.

Note, in particular, the different position of the three judges before the Supreme Court in Nuremberg: the first adopts an Enlightenment position, inspired by natural law; the second instead adopts a legal and normativistic position of law; the latter, on the other hand, an intermediate conception, today, if anything, defined as “including positivism”, since it includes, in the legal positivistic sphere, in fact, also some form of natural law.

[cxxvii] Four, in particular, the main limits of the London Agreement denounced by H. Kelsen [1947]: a) the first is that of the exceptions to the application of the principle of personal criminal responsibility in the case of defendants belonging to “groups or organizations “that the Court declares” criminals “; b) the second is the failure to ratify the London Agreement by the countries whose citizens were the accused because, according to
Kelsen, «if a court is set up to make some individuals criminally responsible for the violation of a treaty by part of their state, does not exactly represent a progression of general international law to establish such a tribunal without the consent of the state accused of violating the treaty» (trans. It., p. 113); c) the third is that «the principle of individual criminal responsibility for the violation of the rules of international law prohibiting war has not been affirmed as a general principle of law, but as a rule applicable only to states defeated by part of the winners the principle stated in the London Agreement for the punishment of war criminals belonging to the European Axis was not included in fact in the Charter of the United Nations» (trans. It., p. 114); d) the fourth limit, according to Kelsen «even more debatable», is, finally, that «the tribunal established by the London Agreement was composed exclusively of the representatives of the victorious States» (trans. It., p. 115).

[cxxviii] As stated in H. Kelsen [1952, p. viii]: «a treatise on International law deals with the problems concerned only from a juristic, and that means from a legal point of view».


[cxxx] H. Kelsen [1950, 2000 edition, p. xiii,] even more effective, however, in the original version: «This book is a juristic – not a political – approach to the problems of the United Nations. It deals with the law of the Organisation, not with its actual or desired role in the international play of powers».

[cxxxi] Thus, C. Nitsch [2005, p. 541].


[cxxxiii] Note the statement by H. Kelsen [1945, p. 161] according to which as King Midas transformed everything he touched into gold, so law transforms into juridical (that is, gives a specific value and juridical connotation to) all that is the object of its own discipline and regulation.

Critical towards the qualification of war not only as illicit but also as a “sanction” of international law, are, for example, F. Rigaux [1996] and L. Ferrajoli [2007, vol. I, p. 502, and vol. II, p. 621, n. 40].

[cxxxiv] See the Workshop I attended, called “Dimension of Transitional Justice”, held in Pavia, Collegio Ghislieri, 21st March 2019. Moreover, see Ceva, Emanuela, Interactive Justice, New York: Routledge, 2016; as well Murphy, Colleen, The Conceptual Foundations
The term “transitional justice” refers to the ways countries emerging from periods of conflict and repression address large-scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response.

Transitional justice is rooted in accountability and redress for victims. It recognizes their dignity as citizens and as human beings. Ignoring massive abuses is an easy way out but it destroys the values on which any decent society can be built. Transitional justice asks the most difficult questions imaginable about law and politics. By putting victims and their dignity first, it signals the way forward for a renewed commitment to make sure ordinary citizens are safe in their own countries – safe from the abuses of their own authorities and effectively protected from violations by others.

Mass atrocities and systematic abuses devastate societies and their legacy is likely to make conditions of the country fragile: Political and legal institutions like parliament, the judiciary, the police and the prosecution service may be weak, unstable, politicized, and under-resourced. The violations themselves will have severely damaged whatever confidence might have existed in the state to guarantee the rights and safety of citizens. And communities will often have been ripped asunder in the process and social or political organizations greatly weakened.

Finding legitimate responses to massive violations under these real constraints of scale and societal fragility is what defines transitional justice and distinguishes it from human rights promotion and defense in general.

The aims of transitional justice will vary depending on the context but these features are constant: the recognition of the dignity of individuals, the redress and acknowledgment of violations, and the aim to prevent them from happening again.

In the 1990s various American academics coined the term to describe the different ways that countries had approached the problems of new regimes coming to power faced with massive violations by their predecessors.

It was simply a descriptive term. It did not suggest that there was a standard approach or even common principles, as can be seen from the huge variety of ways different countries did or did not try to address violations.
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The term took hold, especially in the United States, due to the great interest in the way former Soviet Bloc countries were dealing with the legacy of totalitarianism.

The term originally described different approaches in different places, not a coherent notion or practice. In the 1990s and 2000s, approaches were developed based on recognition of human rights principles and the insistence that violated rights could not be ignored. Associated with this was the idea of particular kinds of mechanisms, such as prosecutions, fact-finding (or “truth seeking”) inquiries, reparations programs, and reform initiatives as the most effective means to give effect to those human rights principles.

Where are we now? Best understood, the practice of transitional justice today is the attempt to confront impunity, seek effective redress, and prevent recurrence, not in the routine application of normative standards, but in the careful and conscious appreciation of the contexts where it is to be done.

It is not the way to fix everything that is wrong with society. The long-term social and political struggles for justice and equal opportunities might be assisted by measure of transitional justice but not solved by it.

It is not a particular type of justice like restorative justice, distributive justice, or retributive justice. It is the application of a human rights policy in particular circumstances.

It is not “soft” justice. It is the attempt to provide the most meaningful justice possible in the political conditions at the time. If it is simply an effort to evade meaningful measures of justice, it is sophisticated impunity.

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[cxxxvi] The difference between an external and an internal war lies basically in the causes that have ignited the conflict in the first place. Since my intention here is to analyze whether there is a difference in responding to a post-war context depending on the framework, I will not go further in discussing the possible reasons for a country to declare war against another nor the reasons for organized groups within the same nation to declare war to each other. My purpose here is not focused on the jus ad bellum, which pertains to the Just War theory and that requires and deserves a separate study.


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– As to Kelsen, among the proposals explicitly put forward by H. Kelsen in Peace through Law, cit.:

(a) the establishment of an international criminal court with mandatory jurisdiction;

(b) the creation of «an international police force which is different and independent of the armed forces of the member states» to implement any sanctions;

1. c) the drafting of an international criminal law carefully declined in terms of personal responsibility not only in the case of war crimes (that is, in the case of violation of jus in bello) but also in the case of crimes against peace (in the case, that is, of violations of the jus ad bellum).

Of these proposals, the one on which Kelsen has mostly insisted seems to be finally starting to be implemented: on 1st July 2002 the International Criminal Court officially entered into operation. However, his fate does not lack already founded fears. And not only because the Treaty of Rome with which it was established in 1998 was signed by 120 states, but ratified, as of July 1st, 2002, only by 74 states among which neither China, nor the Russian Federation, nor Israel are listed, in the United States. His fate is not lacking in founded fears also and above all for the open hostility of the United States. Significantly, on the very day of its actual entry into operation, the United States, in fact, threatened its veto to continue the peace-keeping action in Bosnia in the event that its soldiers had not been
removed from the jurisdiction of the Court. The compromise agreement reached two weeks later in the judgment of Amnesty International, to avert the boycott of this and future peace-keeping actions: the Onu Security Council has in fact decided that US soldiers (as well as those of all countries involved in peace-keeping operations) are exempted from the jurisdiction of the Court for one year. Exemption which, upon its expiry, may, however, be renewed.

In many central themes of the Kelsenian Reine Rechtslehre it is possible to distinguish different formulations in different periods of its decades-long (re)elaboration from 1911, the year of the publication of Hauptprobleme der Staatsrechtslehre Entwickelt aus der Lehre vom Rechtssatz, Tübingen, to 1979, the year of the posthumous publication of Allgemeine Theorie der Normen, Wien, (trans. It. by M.G. Losano: Teoria generale delle norme, Turin, 1985). Particularly punctual and detailed, despite the non-coincidence of the proposed reconstructions, the periodizations suggested by M.G. Losano, Saggio introduttivo, in H. Kelsen, La dottrina pura del diritto, Turin, 1964, pp. xiii-cv, and Id., The Periodization of Kelsen Proposed by S.L. Paulson, in L. Gianformaggio (ed.), Hans Kelsen’s Legal Theory. A Diachronic Point of View, Torino, 1990, pp. 111-121, and by S.L. Paulson, Toward a Periodization of the Pure Theory of Law, in L. Gianformaggio (ed.), Hans Kelsen’s Legal Theory, cit., pp. 11-47. And again, numerous scholars who have been interested in the various formulations of particular assumptions or themes of the Reine Rechtslehre such as, for example, the relationship between law and logic, the distinction between primary norms and secondary norms, the concept of ‘fundamental norm’, the forms of legal interpretation, the modes of science and/or legal knowledge. Surprisingly, on the other hand, there is not much attention in the literature for a periodization of the treatment of internationalistic themes and, in particular, for the terms of the (re)proposition of the just war theory.

If in the literature the periodization of the themes of an internationalist matrix is not the object of great attention, on the contrary, the problem of the possible (in)coherence of the treatment of these issues with respect to the overall structure of the Reine Rechtslehre is, instead, the object of numerous analyzes. See, for instance, H. Bull, Hans Kelsen and International Law, in R. Tur e W. Twining (ed.), Essays on Kelsen, Oxford, 1986, pp. 323-336; L. Ciaurro, Un diritto internazionale per la pace, in H. Kelsen, La pace attraverso il diritto, Turin, 1990, pp. 1-33; Ch. Leben, Un commento a Rigaux, in Ragion Pratica, 4, 6, 1996, pp. 105-120; F. Rigaux, Hans Kelsen e il diritto internazionale, in Ragion Pratica, 4, 6, 1996, pp. 79-103; D. Zolo, Il globalismo giudiziario di Hans Kelsen, cit.; M.G. Losano, Pace, guerra e diritto internazionale: una controversia fra Kelsen e Campagnolo, in Materiali per una storia della cultura giuridica, 31, 1, 2001, pp. 111-130.

Recalling some of the most significant formulations of the theory of bellum justum
starting from ancient Greece, H. Kelsen, *Law and Peace in International Relations*, Harvard, 1942, second ed. 1948, pp. 43-45, does not pay too much attention either to the distinction, or to the risk of possible confusion, between the two notions: thus, for example, of the conceptions of Saint Augustine and Isidore of Seville, Kelsen indicates the Ciceronian influence, but does not indicate what are its distinctive and innovative features. The same relief applies to *Principles of International Law*, New York, 1952, pp. 34-35, although, in this work, at the first recurrence of the phrase ‘just war’, in a note, Kelsen warns that «The term ‘just’ meaning ‘legal’ in the sense of positive international law». However, Kelsen’s not excessive attention to the point in itself does not jeopardize neither the opportunity of the distinction under consideration, nor the characterization of his notion of *bellum justum* as a juridical category and not a meta-juridical one. See H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre*, Tübingen, 1920; trans It. by A. Carrino: *Il problema della sovranità e la teoria del diritto internazionale*, Milan, 1989; H. Kelsen, *Reine Rechtslehre*, Wien, 1960; trans. It. by M.G. Losano: *La dottrina pura del diritto*, Turin, 1966.

Kelsen, in particular, in *Law and Peace*, cit., p. 34, highlights that: «is it possible to say that according to international law war is permitted only as a sanction, and any war which has not the character of a sanction is forbidden by international law, is a delict? According to one opinion, war is neither a delict nor a sanction. Any state that is not expressly bound by special treaty to refrain from warring upon another state, or to resort to war only under certain definite conditions, may proceed to war against any other state on any ground without violating international law. The opposite opinion holds that according to general international law war is forbidden in principle. It is permitted only as a reaction against an illegal act, a delict, and only when directed against the state responsible for this delict».

The second of the two questions that, as already mentioned, constitutes one of the main objects of this work is: the affirmation of the principle of “peace through the law” can, contrary to what Kelsen seems to believe, disregard identification and definition of cases in which a war can be said to be (il)legitimate?

The negative answer that can be deduced from Kelsen’s work is obvious. Negative answer that seems to find confirmation in what Kelsen himself indicates as the acceptance of the principle of *bellum justum* in the international law of the twentieth century. Thus, already in 1942, Kelsen recorded that: «It is easy to prove that the theory of *bellum justum* forms the basis of a number of highly important documents in positive international law, namely, the Treaty of Versailles, the Covenant of the League of Nations, the Kellog Pact». (H. Kelsen, *Law and Peace*, cit., p. 35).
This statement, dating back to 1942, which will find further significant confirmation in the drafting of the Onu Charter of 1945 where both in the preamble and in the art. 51 refers to the cases in which, although quite exceptionally, recourse to war is permitted. Kelsen himself, in 1960, returning to this point, writes: «The opinion that the principle of *bellum justum* is a constitutive part of international law, was already placed at the foundation of the peace treaties that concluded the first world war and that contained the statute of the League of Nations. Subsequently, by means of the Briand-Kellog Pact and the United Nations statute, the principle has become, without the possibility of doubt, the content of treaties, one of which (the Briand-Kellog Pact) has as its contracting parties almost all the states, while the other (the statute of the United Nations) claims in this regard to be valid for all the states of the world. In light of these facts, it is now practically impossible to believe that, according to current international law, a state can for any reason declare war on any other state, without thereby violating international law, without denying the general validity of the principle of *bellum justum*. Thus the opinion that both war and retaliation are sanctions of international law appears firmly founded». (H. Kelsen, *Reine Rechtslehre*, cit., p. 354. And again, the equation of the principle of *bellum justum* with the prohibition, recurrent in the international treaties of the twentieth century, of waging war if not in very particular cases also occurs in the posthumous *Allgemeine Theorie der Normen*, cit., and precisely, commenting on F.S.C. Northrop’s essay, *The Complexity of Legal and Ethical Experience*, Boston-Toronto, 1959, on the influence of the development of natural sciences on law, Kelsen writes: «Northrop declares: “In the atomic age, civilized men cannot clearly afford to make war.” But long before the discovery of atomic energy, the war had been forbidden by international law (*see in Briand-Kellog Pact, the principle of *bellum justum*)». Not a mere equation between the principle of *bellum justum* and the prohibition of indiscriminate recourse to war, but a precise analysis of the various formulations of this prohibition already from its prefigurazion and in the Versailles Peace Treaty until the drafting of the Onu Charter is offered by Kelsen in the *Principles of International Law*, cit., pp. 38-64).

To sum up, Kelsen is a theorist of the lawfulness/obligatoriness of international law, not of just war. Kelsen is a theorist of the lawfulness/obligatoriness nature of international law and of a monistic conception of law in which international law is hierarchically superior to the domestic law of individual states. (Beyond any exegetical-philological concern, this is, according to A. Cassese, *Il diritto internazionale nel mondo contemporaneo*, Bologna, 1984, p. 29, the greatest merit of the Kelsenian position: «Whatever its inconsistencies are logics and practices, it has helpfully contributed to consolidating the idea that state bodies must respect international law, making international precepts prevail over national values». *See* also A. Carrino, *Presentazione*, in H. Kelsen, *Il problema della sovranità*, cit., 1989, pp. V-
Note that the affirmation of the lawfulness/obligatoriness of international law and criticism of the traditional conception of the absolute sovereignty of states as complementary and symmetrical moments, both functional not so much for the needs of the theoretical system of the *Reine Rechtslehre*, but rather for the realization of what already starting from 1920 Kelsen himself identified as an unscientific but political ideal: pacifism. (In the theoretical-conceptual framework of *Reine Rechtslehre*, a necessary condition for having knowledge of law is its unity; a logical-epistemological condition for the development of a true legal science is, that is, the possibility of reducing its object: the law. This reduction, from a logical-epistemological point of view, is possible both in the case of assuming the hierarchical superiority of international law with respect to national domestic law, and, on the contrary, in the case of assuming, instead, the hierarchical superiority of the national domestic law with respect to international law. The choice between these two alternatives, which are in themselves indifferent from a logical-epistemological point of view, cannot, according to Kelsen, be dictated and conditioned by considerations of a political, if not ethical, nature. With a happy summary, M.G. Losano, *Pace, guerra e diritto internazionale*, cit., pp. 117-118, summarizes the terms of the question in this way: «Within the pyramid descending from a single fundamental norm, domestic law and international law can never be equal: one must be superior to the other. Here is the real problem: which one should be considered superior? The solution to this problem depends on what answer is given to the question: what is the supreme value or good to which the society must tend and, consequently, its instrument which is the State? For Kelsen, this ultimate value of society, of the State and of the law is constituted by the peace». And again, on the political character of the Kelsenian choice in favor of the superiority of international law over national domestic law, see, for example, N. Bobbio, *Nazioni e diritto: Umberto Campagnolo allievo e critico di Hans Kelsen*, in *Diritto e cultura*, 1993, pp. 117-132; second ed. in H. Kelsen and U. Campagnolo, *Diritto internazionale e Stato sovrano*, Milan, 1999, pp. 81-98, on p. 91, and M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960*, Cambridge, 2002, pp. 238-249).

In *Das Problem der Souveränität*, p. 69, Kelsen writes: «Only temporarily and by no means forever does humanity divide into states, formed moreover in a more or less arbitrary manner. Its legal unit, the *civitas maxima* as the organization of the world: this is the political core of the juridical hypothesis of the primacy of international law, which is at the same time the fundamental idea of that pacifism which in the context of international politics, constitutes the ‘reversed image of imperialism’».

The ideal of pacifism was therefore openly political. But not only. In 1920, Kelsen
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goes further, and even affirms the ethical nature of this political ideal. In fact, Kelsen writes: «As with an objectivist conception of life, the ethical concept of man is humanity, so for an objectivist theory of law the concept of law is identified with that of international law and therefore is at the same time an ethical concept». (H. Kelsen, *Das Problem der Souveränität*, cit., p. 103).

The ethical nature is claimed, therefore, for the value of pacifism, not for the doctrine of just war. The doctrine of just war is in fact explicitly circumscribed, and, as already pointed out, in consciously problematic terms too, to the few exceptional cases explicitly indicated, although not always in univocal and coincident forms, in the international treaties of the twentieth century.

The doctrine of just war is considered only as a tool, not as a purpose. The aim (the one according to Kelsen of an ethical nature) always remains that of pacifism and the doctrine of just war is only a tool to limit the power of the sovereign state, otherwise free to wage war at will.

- As to Bobbio: in more recent years, this Kelsenian notion of ‘just war’ has been recalled by Norberto Bobbio. (In these pages the different references to Bobbio have a very limited intent: to corroborate a reading of the (re)affirmation of the just war theory in Kelsen that clarifies the value regarding the claim both of pacifism and of the juridical and obligatory nature of international law. The various references to Bobbio on these pages, on the other hand, have no claim to grasp and/or account for some of the ultimate nucleus of Bobbio’s thought on the themes of war and peace, thought of Bobbio, developed over several decades in a vast production that, as perhaps is inevitable, does not lack any rethinking, which is not without, that is, cues, reflections and evaluations that are not always coincidental. On this point see, in particular, N. Bobbio, *Autobiografia. A cura di Alberto Papuzzi*, Roma-Bari, 1997, pp. 217-246, and D. Zolo, *Il pacifismo cosmopolitico di Norberto Bobbio*, in D. Zolo, *I signori della pace*, cit., pp. 71-83).

- As to Bobbio v. Zolo: replying to the severe criticisms addressed to him by Massimo Cacciari, Cesare Luporini and Danilo Zolo for having claimed that the Gulf War was a just war, Bobbio writes: «contrary to what my critics seem to believe, the effect of the abandonment of the just war doctrine was not the principle: “All wars are unjust”, but exactly the opposite principle: “all wars are right”. The *jus ad bellum*, that is the right to make war, was considered a prerogative of sovereign power. Only at the end of the first European war, which paved the way for an attempt to strengthen the system of law among states with that embryo of international organization that was the League of Nations, did we begin again to discuss the problem of the lawfulness of war, and the need to distinguish just
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wars from unjust wars, i.e. between the force used to violate the law and the force used as a sanction». (N. Bobbio, *Una guerra giusta? Sul conflitto del Golfo*, Venice, 1991, pp. 55-56).

At the conclusion of these statements Bobbio refers significantly to two works by Kelsen: *General Theory of Law and State*, (Cambridge (Massachusetts), 1945; trans. It. by S. Cotta and G. Treves: *Teoria generale del diritto e dello stato*, Milan, 1952); and *Peace through law*, 1944, the latter work appeared in Italian translation right in 1990. (Still with regard to the problem of terms in which to combine war and international law, Kelsen’s influence on Bobbio appears evident even in the absence of explicit references, such as, for example, when N. Bobbio, *Teoria della norma giuridica*, Turin, 1958, pp. 215-216 states: «Perhaps in the international order a crime does not matter any consequence? What are the reprisals and, in extreme cases, the war if not a response to the violation, that is, the response to the violation that is possible and legitimate in that particular society that is the society of the states? Now with respect to this response to the violation there are only two possibilities: or the answer is free or is in turn regulated and controlled by other rules belonging to the system. The first possibility is that which takes place in the hypothetical state of nature, the second is that which finds application in the international community through the regulation of the right of retaliation and war». See N. Bobbio, *Il positivismo giuridico. Lezioni di Filosofia del diritto raccolte dal Dott. Nello Morra*, Torino, 1979, p. 186 (second ed. 1996, pp. 160-161), and the Lettera di Norberto Bobbio a Nicola Matteucci del 25.7.1963, published in *Materiali per una storia della cultura giuridica*, 30, 2, 2000, pp. 416-425).

Once again, Bobbio expresses his closeness to Kelsen’s position, when he states: «A fortiori the theme of the distinction between lawful use or illicit use of force, in which the traditional theme of the just war is resolved, returns to be current in the international system after the founding of the United Nations, whose statute provides for a war of legitimate defense and the formation of armed forces to take measures to restore international order, after the Security Council has decided to use force». (N. Bobbio, *Una guerra giusta?*, cit., p. 56). Bobbio therefore seems to share the Kelsenian position according to which the principle of *bellum justum*, as it finds expression in current international law, is an important tool for deciding on the (il)legitimacy of war and, therefore, an important instrument, as far as for itself insufficient, to stem the recurring and increasingly frequent threats to peace.

- As to Ferrajoli and Rigaux: unlike Bobbio, they do not share and strongly criticize the position of Kelsen both Danilo Zolo, and, as for very different positions, Luigi Ferrajoli and François Rigaux. In particular, Danilo Zolo opposes Kelsen’s thesis and, claiming a position of “political realism”, denies that (international) law has and/or can have a decisive
function for the maintenance of peace. There are two reasons for this denial:

1. a) The first, which explicitly takes up the position expressed by Bobbio in the sixties (N. Bobbio, *Il problema della guerra e le vie della pace*, in *Nuovi Argomenti* 1, 3-4, 1966, pp. 29-90), is that, in the nuclear age, the war «has set itself outside any possible criterion of legitimation and legalization: it is uncontrolled and uncontrollable by law as an earthquake, and as a storm has returned to being the antithesis of the law». (D. Zolo, *Chi dice umanità*, cit., p. 113, but also *I signori della pace*, cit., p. 143).

2. b) The second order of reasons that leads Zolo to deny the thesis of peace through law is dictated, instead, by a profound and generalized diffidence, towards international law. And it is precisely on this point that his clearest and most radical opposition to Kelsen’s thought is revealed: Kelsen’s concern has always been to attack the principle of state sovereignty, claiming legal dignity and mandatory character for international law, rather, on the contrary, Zolo’s recurring concern is to warn against the erosion of the principle of sovereignty and the principle of domestic jurisdiction denouncing the inefficiency and at the same time the inevitable political exploitation of supranational institutions, especially those with judicial functions. (Taking up the terms of the critique of the ideology of the *Western globalists* of H. Bull, *The Anarchical Society*, London, 1977, D. Zolo, *I signori della pace*, cit., p. 146, contrasts with that labeled as the Kelsenian claim of an “excellent political order”, the goal of a “minimum political order”, an objective to be pursued by replacing international law with a “minimum supranational right”, a right, that is, that «according to a federalist logic applied to the relationship between normative competences of the National states and regulatory competences of supranational bodies would leave full play for the functions of domestic jurisdiction, without pretending to replace it or to suffocate it with supranational regulatory or judicial bodies. In other words, the “minimum order” should be based on a sort of “regionalization” polycentric “of international law, rather than on a hierarchical structure that would risk, if nothing else, to provoke the revolt of the “peripheries”»).

how, to date, it is still a very weak instrument, international law nevertheless remains the
only instrument that allows us to denounce the legitimacy of a war conflict. And Zolo himself
has used this very tool to deny the legitimacy of each of the three conflicts that have
occurred in the last ten years (Significant, in particular, the arguments in Chi dice umanità,
cit., pp. 80-123, on the illegitimate nature of the war in Kosovo, war icastically characterized
as a «war against the law». And yet again, just as clear the judgment on the illegitimate
character of the armed intervention in Afghanistan in the interview with E. Milanesi,
L’illegalità del conflitto, appeared in il Manifesto, November 8, 2001, page 2. On the other
hand, the doubts and perplexities on the legitimacy of the Gulf war are mentioned in
Cosmopolis, cit., page 48). A very little thing, of course. But undeniably worse would be a
situation in which even this should be precluded by a further weakening of international
law.

Different from those of Zolo, the reasons for criticism of Kelsen’s position advanced
by Luigi Ferrajoli and François Rigaux. In particular, the two scholars do not criticize, in
fact, the Kelsen’s position because they do not share, as well as Zolo, the assumption of the
juridical and obligatory character of international law, but because they believe that to
affirm it is not necessary to go through the characterization of the war as a sanction. They
believe, that is, that the affirmation of the lawfulness/obligatoriness of international law
does not entail the price of having to recognize war as a sanction, albeit only in exceptional
cases provided for by international law. The opinion of Ferrajoli and Rigaux is that the
precepts of international law, including the general prohibition of waging war, can be
asserted with other sanctions than the authorization of recourse to war.

In particular, it is Ferrajoli’s argument that: «Kelsen, to argue that war is (at least in
most cases) an offense, is forced to seek a sanction anyway, and therefore to support – due
to the lack in other international law sanctioning techniques capable of countering it – that
the bellum justum, or war in response to a previous violation of international law, is itself a
sanction. And this in spite of the current law which, in the Onu Charter, allows war only in
the more restricted cases of legitimate defense, prohibiting it in any other case. Vice versa,
the definition of an offense simply as a prohibited informal act, while allowing it to be
recognized even in the absence of sanctions, configures this lack as a gap in the legal
system, be it state or international. It is not a question of words: the qualification as war
crimes and violations of fundamental rights committed by states is the legal prerequisite for
the construction of an international democracy; while the configuration of the penalties of
such offenses as so many guarantee techniques allows us to conceive the absence as “gaps”,
which is the obligation of the international community to fill». (L. Ferrajoli, Principia Juris,
cap. 9, § 9.4., manuscript. See, further, F. Rigaux, Hans Kelsen e il diritto internazionale,
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cit.).

But, according to Ferrajoli, these are the terms in which to rethink and/or reformulate the legal discipline of war, then the points of consensus with Kelsen’s theory prove to be more numerous and more significant than the reasons for the declared dissent. And precisely, the consensus with Kelsen’s theory turns out to be greater than one might think, both because Ferrajoli, like Kelsen, is a firm supporter of the lawfulness/obligatoriness nature of international law, and because, on closer examination, even the three points of declared dissent they are revealed, perhaps, apparent.

1) In particular, Ferrajoli’s first point of dissent is related to the Kelsenian characterization of war (not only as an offence, but also) as a sanction. Nevertheless, with reference to the Onu Charter, Ferrajoli himself cannot fail to mention legitimate defense as a case of legitimate war (in the Kelsen lexicon ‘right’).

2) Ferrajoli’s second point of dissent which, like the previous observation, attenuates the radicalism of the first, is related to the too wide scope of the possible cases in which the Kelsenian revival of the doctrine of the just war would seem to authorize the recourse to war as sanction.

The generic and indeterminate character of the language used in this regard by Kelsen is undeniable: «no war is permissible save as a reaction against a wrong suffered, against a delict». Nevertheless, although this formulation is undeniably disturbing due to the wide range of cases that it allows to understand, and Kelsen himself is aware of it and does not avoid highlighting it. (See, ad esempio, H. Kelsen, Law and Peace, cit., p. 37: «An examination of the various justifications for resorting to war reveals that it is usually contended that the other state has done wrong». And again, considering the possible objections to the theory of bellum justum, Kelsen admits: «Who is to decide the disputed issue as to whether one state actually has violated a right of another state? General international law knows no tribunal to decide this question. If no agreement be reached between the parties to the conflict, the questions of whether or not international law has actually been violated and who is responsible for the violation cannot be uniformly decided. If there is no uniform answer to the question of whether in a given case there has been a delict, then there can be no uniform answer to the question of whether the war waged as a reaction against what is claimed to have been a delict is actually a “just war”»), we can not remember, as it has already been reported, as has already been reported, that according to Kelsen the principle of bellum justum is the one that found expression in the Covenant of the League of Nations, first, and then in the Onu Charter. Charter, this, which affirms the value of peace as the constitutive and founding value of the new international order the day
after the conclusion of the World War II, which puts a ban on war except in the case of legitimate defense (Article 51), but which, in language as uncomfortably generic as that used by Kelsen, also states in its preamble that the «Peoples of the United Nations» are: «Determined to ensure, through the acceptance of principles and the establishment of systems, that the strength of the weapons will not be used, except in the common interest».

3) Ferrajoli’s third point of dissent relates to the failure to identify and/or indicate sanctions other than war (and retaliation) to react to war crimes and violations of fundamental rights committed by states. Once again, however, dissent turns out to be less radical than it may appear. If in fact in 1920 in The problem of sovereignty, Kelsen does not imagine and does not suggest sanctions of international law other than reprisals and war, in 1944, instead, as already mentioned, in Peace through law, beside and in addition to reprisals and the war Kelsen proposes what still today continues to be to a large extent a difficult goal to achieve: the elaboration of an international criminal law articulated in terms of individual responsibility not only in the case of crimes attributable to jus in bello, but (unquestionably innovative in 1944) also for crimes against peace, for crimes, that is, attributable to jus ad bellum. An international criminal law articulated in terms of individual responsibility also towards those who, with government responsibilities, endanger peace, because: «The specific sanctions of international law, reprisals and war are not directed against the individual whose conduct has violated international law; the reprisals and the war are directed against the State as such, that is against the citizens of that State, against individuals who have not committed the crime or who have not had the ability to prevent it».

(H. Kelsen, Peace through Law, cit.).


[cxl] 1) As for “General Theories of Justice”: John Rawls, “Justice as Fairness”, in
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A large part of the debate on ecological citizenship today has shifted to issues related to global justice and the forced migration of climate refugees. For the state, please refer to studies of
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B.S. Turner, Contemporary Problems in the Theory of Citizenship, cit., p. 4: “My intention in developing this particular perspective on citizenship is to avoid this opposition between the two notions of civil society and citizenship. I have already suggested one way in which this hiatus could be avoided, namely by defining citizenship as a set of social practices which define the nature of social membership”.

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I use the term “practice” generically to refer to any act, behaviour, institution and way of life, and of course a belief or a system of beliefs that motivate them.


For a discussion of the criticisms levelled against toleration by prominent figures in the modern history, see: Rainer Forst, “To Tolerate Means To Insult”: Toleration, Recognition, and Emancipation,” in Recognition and Power, ed. Bert van den Brik and David Owen (Cambridge: Cambridge University Press, 2007).


Ibid., p. 28.

Ibid.
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[clxiii]  The vindication of toleration is not merely motivated by theoretical ambition and curiosity. The ultimate goal would be to show that toleration could not be reduced to other forms of non-interference motivated by rights, recognition and respect. Although a full-fledged defence of the latter cannot be offered here, I will show briefly how toleration is distinct from right-based non-interferences.


D. D Raphael, “The Intolerable,” in *Justifying toleration: Conceptual and Historical Perspectives*, ed. Susan Mendus (Cambridge: Cambridge University Press, 1988), 139. Similar point is raised by Steven Lukes: ‘if I tolerate something or someone, I am claiming that my disapproval is legitimate, that I have a right not only to feel it but to express it in action’. See also Steven Lukes, “Social and Moral Tolerance,” *Government and Opposition* 6, no. 2 (1971): 224.


Bernard Williams, highlighting the substantive justification problem, targets appealing to autonomy as underling value. “The practice of toleration cannot be based on a value such as individual autonomy and also hope to escape from substantive disagreements about the good. This really is a contradiction, because it is only a substantive view of goods such as autonomy that could yield the value that is expressed by the practice of toleration.” Bernard Williams, “Toleration: An Impossible Virtue?,” in *Toleration: An Elusive Virtue*, ed. David Heyd (Princeton, N.J: Princeton University Press, 1996), 25.

Jeremy Waldron, “Toleration: Is There a Paradox?,” in *Toleration, Supererogation and Moral Duties: Conference in Honor of David Heyd* (NYU School of Law2012); Jeremy
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[clxxviii] Leif Wenar calls a right assertion that entails both not a duty to X and not a duty not to X a paired privilege right. L. Wenar, “The nature of rights,” *Philosophy & Public Affairs* 33, no. 3 (2005).


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As to the Italian legal debate, see M. Barberis, *Populismo digitale. Come Internet sta uccidendo la democrazia*, Milano, Chiarelettere, 2020. The author advances a diagnosis of digital populism: today politics is now done on smartphones, with shots of alarmist posts, morning tweets and selfies with voters. The people thus have the illusion of being able to directly influence public affairs, but this disintermediation is nothing but a new mediation. Barberis analyzes the phenomenon in all its aspects, but not only: it indicates specific, constitutional, political and media remedies. Instead of disconnecting from the network, as many are now tempted to do, it is necessary to act like Ulysses with the sirens: to remain closely tied to the tree of rationality.

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[cxc] The burdens of judgement can be defined as those ‘hazards’ involved in the ‘correct (and conscientious) exercise of our powers of reason and judgement’ (ibid., p. 56) that prevent even competent and mutually well-disposed agents to agree on some fundamental questions of value. It is worth emphasising that when Rawls lists some of the burdens of judgement (in ibid., pp. 56-57) he does not intend to provide an exhaustive epistemological argument about the origin of disagreement.


[cxcv] For sympathetic arguments, see mainly Quong (2011), and then Kelly and McPherson (2001) and Gursozlu (2014); for more critical accounts, Friedman (2000).

[cxcvi] For ‘normative stability’, Quong means something similar to Rawls’ ideal of ‘stability for the right reason’, that is, stability as grounded in a widespread perception, among citizens, of the legitimacy of political institutions.


[cxcviii] See Gursozlu (2014) for an accurate identification of the passages, both in *Theory and Political Liberalism* in which Rawls expresses this contention.


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[cciii] See Gaus (1999), pp. 279-80. ‘Democracy can itself be understood as an umpiring mechanism.’

[cciv] See the definition above.

[ccv] See the way in which Quong overturns of the relation between *pro tanto* and public justification in Rawls’ theory in Quong (2011), Chapter 6.


[ccvii] See Gaus (2012), p. 10, for a definition of sectarianism that I take as sufficiently broad to cover most instances of it: ‘β is an illiberal sectarian doctrine in population $P$ if (1) β is held only by $S$, a proper subset of $P$, (2), the members of $S$ justify moral and political regulations $R$ for the entire $P$ population (3) by appeal to $β$ and (4) only $β$ could justify $R$.


[ccix] In this case, we do not create inequality, but merely rectify the one that would be created if we didn’t compensate people with more arduous education and work properly.

[ccx] Cohen claims that Pareto justification of unequal reward, as stated in the difference principle, cannot resolve the trilemma either, because the incentives argument works (if we assume that it works at all) even in the example where there is only one type of work involved. «The problem of asking people to choose, for no enhanced reward, a type of work, or a number of hours of work, that they disprefer cannot vindicate the Pareto argument in the entirely general form in which it is actually presented, even if it suggests that the Pareto argument is potent in a more restricted form, that is, in the presence of different types of work (that is, of course, the real world, but that the Pareto justification recommends what it does for the unreal and simpler one-type-of-work world nevertheless illuminates, and discredits, it.)» [emphasis added] (Cohen, 2008:182). Hence, he acknowledges that Pareto justification as expressed through difference principle might indeed hold solution for the trilemma, but rejects it because of it is grounded in the fact-dependent principle which therefore, cannot be considered to be a pure principle of justice. However, it seems that the difference principle exactly aims at providing us with the guidance in the light of the facts of our social life, trying to be sensitive to the kind of beings we are. I will discuss this issue further in the last part of the section.

[ccxi] Richard Titmuss was a British social researcher whose work was mostly focused on
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the issues of social justice. He favoured a system of blood donation in which three conditions will be satisfied: people will not get paid in order to be incentivised to donate (equality) but they will not be forced to donate either; in the same time, there should be an adequate supply of blood (Pareto). In this example, we encounter a similar type of trilemma as Cohen’s: what if people are unwilling to provide enough blood unless they are incentivised with monetary compensation? If we do not offer incentives, we will either have to compel people to give blood or cope with the consequences of the reduced blood supply. As a solution for his dilemma, Titmuss predicted that a sufficient number of people will donate blood, moved by feelings of commitment or sense of solidarity with the fellow citizens (and this is what was actually happening in United Kingdom in the time when Titmuss wrote).

[ccxii] According to Cohen, if we add her pleasure with acting from equality into the calculus, maybe she doesn’t even end up being worse off.


[ccxvii] This is account of benefiting is structurally identical to counterfactual accounts of harm. For a defence of counterfactual accounts of harm, and thereby an implicit defence of this account of benefiting, see Victor Tadros, ‘What Might Have Been’, (unpublished manuscript).


[ccxx] Judith Jarvis Thompson, ‘Preferential Hiring’ in Rights, Restitution and Risk: Essays
It may be claimed that you have not acted innocently since, after all, you are now an accessory to the injustice. This objection proceeds by defending a fact-relative (as opposed to evidence-relative) account of duties such that, in virtue of the facts of the situation, you had a duty not purchase the stolen goods, *even though you could not have known this*. This objection, however, seems to me to be mistaken. This is because, even if our duties are fact-relative, our judgments about blame and innocence must be evidence-relative. Even if you have acted wrongfully, you will surely be *excused* in virtue of the lack of evidence suggesting that you ought not to have purchased the goods. This excuse amounts to an affirmation of your (moral) innocence. For more on the difference between fact- and evidence-relative claims, see Derek Parfit, *On What Matters* (Oxford: Oxford University Press, 2011), ch. 7.


Butt, ‘“A Doctrine Quite New and Altogether Untenable”’. The example is also given in a slightly revised form in Butt, ‘On Benefiting from Injustice’, 140.

Butt, ‘“A Doctrine Quite New and Altogether Untenable”’. I have replaced ‘involuntarily’ with ‘innocently’ for reasons made clear in section 2.


Butt, ‘On Benefiting from Injustice’, 143.

Butt, ‘On Benefiting from Injustice’, 142.

In these pages I want to include a short discussion that makes reference to the non-identity problem. The idea, in short, is that many agents whose ancestors suffered injustice cannot be said to have been harmed by that injustice since the presence of that injustice was necessary for their existence. These agents cannot, therefore, make claims for
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compensation on corrective grounds.

[ccxxx] It may be thought that this characterisation of the normative significance of innocently benefiting from injustice flatly contradicts Butt’s account. He writes: ‘It is not so much that they represent a class of neutral resources which can be safely redistributed, as that, insofar as they represent the “fruits of injustice,” they may be seen as distortions within the overall scheme of distribution’. Butt, ‘On Benefiting from Injustice’, 133-4. This apparent disagreement between us is problematic in so far as I aim to offer an account that supplements, rather than replaces, Butt’s. The disagreement is illusory, however. This is because the quote from Butt should be understood strictly within the context of a discussion about the BPP.


[ccxxxii] It is, of course, conceivable that the principles of distributive justice will permit the innocent beneficiary of injustice to retain the benefits in question. For example, if we are convinced by Ronald Dworkin’s model of hypothetical insurance, perhaps an innocent beneficiary of injustice could make the following case: ‘I am entitled to retain the fruits of injustice since you had the option of taking out (hypothetical) insurance against me being permitted to do so, but declined that option. My retention of the fruits of injustice is thus a matter of option, not brute, luck’. For more on hypothetical insurance, see Ronald Dworkin, ‘What is Equality? Part 2: Equality of Resources’, Philosophy & Public Affairs, 10 (1981), 283-345.

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[ccxxxvi] Miller (1993) and Andreoni (1990) suggest that altruism may also serve this function. Although I believe that altruism cannot motivate contributions to many global public goods, I cannot argue for this here.


[ccxl] UNEP (1987), article 16(1).


I do not have space to go into why here. Suffice to note that, given the nebulous nature of international law, constitutional constraints are likely to be largely ineffective. And on scepticism of the efficacy of global deliberative democracy, see Kymlicka (2001), pp.323-326. For a more optimistic account, see Dryzek (2002), pp.115-140.

On the need for this in existing international institutions, see Birdsall & Lawrence (1999), p.140.

Note also the observation in Pettit (1997), pp.135-138, that the mere capacity to degrade the environment may constitute a form of domination, may also apply here.


Sandel, M., Liberalism and the Limits of Justice (New York: Cambridge University Press, 1982), 87, 179.[cclix]

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*Psychology*, 5 (2), pp. 100-122.


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2012.


Sangiovanni (2008): 148-150; James (2005): 301; James (2012): 27-28. Following the publication of the quoted contributions, the term ‘practice-dependence’ has come to be used by some authors in ways that do not necessarily reflect this relatively narrow methodological commitment to constructive interpretation (see, for example, Ronzoni 2009 and Valentini 2011). A discussion of these alternative versions of practice-dependent methodology is beyond the scope of this paper.

This summary of the model of constructive interpretation is based the account offered in Ronald Dworkin (1986). Law’s Empire. Cambridge, MA: Harvard University Press. This is the account that Sangiovanni and James rely on. As far as Dworkin’s own work is concerned, there is an exegetical question as to whether the methodological framework developed for the purpose of legal interpretation is intended to apply in the same way to contexts of moral reasoning. Some of Dworkin’s later work appears to suggest that in contexts of moral reasoning, the criterion of ‘fit’ is supposed to play a more subordinate role, if any at all. This would blur the distinction between interpretation and invention, or render it entirely irrelevant. As a consequence, the points of critique advanced in this paper, based on the presumption in favor of interpretation over invention, would no longer apply. I am going remain agnostic as to whether the critique offered in this paper actually applies to Dworkin’s own position. Instead, my argument is aimed at the position defended by the proponents of practice-dependence who unambiguously rely on Dworkin’s account of legal interpretation and the associated presumption in favor of interpretation.

On Dworkin’s account, features of existing practice enter the interpretive stage in a rather indirect way, in the form of the core features identified at the pre-interpretive stage acting as a constraint on the purposes that may plausibly count as interpretation of existing practice rather than as invention. As far as the reflection about possible purposes itself is concerned, Dworkin appears to allow for a certain degree of independent moral reasoning. (At least, Dworkin grants that the interpretive stage requires a lesser degree of consensus within the interpretive community than the pre-interpretive stage. (1986: 68)). Sangiovanni and James, in contrast, seem to suggest that the identification of the purpose of a practice should itself be directly informed by an interpretation of the norms and values reflected in
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the form of the practice as it exists. This is reflected in the references made by both authors to Rawls’ later work as an illustration of constructive interpretation (Sangiovanni 2008: 150-152; James 2005: 298-308). On Rawls’ account, the point and purpose of domestic society (social cooperation for mutual advantage) or the international system (sovereign rule within the constraints of basic norms of legitimacy) are arrived at through interpretation of the norms and values embedded in Western liberal democracies and international law, respectively.


[ccxcix] It may be objected at this point that it is beside the point to ask for a justification for the presumption in favor of interpretation since any defensible methodological approach to moral theorizing will at some level rely on interpretive elements. Surely, the line of objection goes, it is prima facie plausible that a theory about what practices and institutions we should have should start from an interpretation of the practices and institutions that already exist; rather than with the proponents of practice-dependence, the burden of justification should therefore lie with proponents of approaches that deny the presumption in favor of interpretation. Irrespective of the merits of its initial premise, however, this objection does not succeed. The reason for this is that while there may indeed be a sense in which any plausible approach will include a commitment to interpretation of some form or another, this cannot be the sense that captures the methodological point of the practice-dependence approach. First, if the point of practice-dependence was a commitment to interpretation of a form that trivially applied to any remotely plausible approach, contrasting practice-dependent and practice-independent approaches would no longer provide a way to motivate the former. Second, it is easy to imagine ways in which alternative approaches may include elements of interpretation without relying on a strict requirement of fit, the method of reflective equilibrium being the most prominent example for such an approach. This shows that the interpretive commitment behind the practice-dependent approach is of a non-trivial kind.


[ccci] The commitment to these general constraints may be considered a deviation from Dworkin’s original account of the method of constructive interpretation. Sangiovanni (2007): 163; James (2012): 29.


[ccciii] I take it that the question of whether a practice is ultimately justifiable is
independent of whether its general purpose consists of the promotion of a conception of justice or not. The following explanation for the rejection of slavery may appear to suggest the opposite. In this case, however, it would be unclear why the incompatibility of a practice with a conception of justice should count as a reason for rejecting the practice in the case of slavery without equally doing so in the case of the WTO. «Does this mean that there is no way for the institutionalist to advocate the abolition of an entire set of institutions? No. For a conception of justice to get off the ground, there must be some sense in which the terms of the institution are at least capable of being justified to all participants; if the institution must depend on systematic and unmediated coercion to reproduce and sustain itself, then the institution is incapable of such a justification and must therefore be rejected» (Sangiovanni 2008: 163).


[cccvi] Think, for example, of the establishment of the European Union or successful movements of peaceful territorial secession.

[cccvi] Proponents of practice-dependence may react to the latter type of examples by pointing out that they represent practices that are unjust (in the sense of violating the relevant general constraining principle – of equal moral concern or mutual justifiability – mentioned above) and that this provides an independent reason against their continuation. I am not sure whether this applies to all cases in which the continuation of a practice is at odds with concerns for political stability. In any case, given that this would appear to be an empirical question, the conceptual possibility of just practices that may pose a threat to political stability would still provide a reason against a principled presumption in favor of interpretation. In addition, however one may try to reconcile the presumption in favor of interpretation with the possibility of stability-undermining practices, the fact that the prior existence of a practice is not a necessary condition to ensure political stability remains.

[cccvi] See the materials provided during a session of the Political Philosophy Research Seminar at the London School of Economics on February 28, 2018.

[cccix] What is more, persons may in this case show a much lower degree of conscious reflection about the form of the practices they are engaged in than the argument assumes. Indeed, a reflective stance may be entirely lacking.

[cccx] See Gardner, John Offences and Defences: Selected Essays in the Philosophy of
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[cccxi] While I do not think that this is actually Sangiovanni’s position, the following quote is ambiguous in this respect: «The aim of the interpretative stage is to establish the parameters and fixed points which a full-blown conception of justice must take into account. But it is not yet meant to connect or explain their place in a systematic theory. It only begins, we might say, the search for reflective equilibrium” (2008: 149, italics added). A similar ambiguity may be seen in James assertion that the order of the three stages of interpretation is “irrelevant within a holistic ‘reflective equilibrium’ methodology» (2012: 28).

[cccxii] It may be objected that a traditional reflective equilibrium framework represents an instance of practice-dependent theorizing. In the present context, however, this can be regarded as a secondary question, since Sangiovanni and James appear to present their positions as alternatives to a traditional reflective equilibrium approach. If a traditional reflective equilibrium approach is to count as a type of practice-dependent theorizing, it would be distinct of the type of practice-dependence, defined by the presumption in favour of interpretation, proposed by Sangiovanni and James.

[cccxiii] This view may be taken to be suggested by Dworkin himself in the following characterization of the interpretative stage: “This will consist of an argument why a practice of that general shape is worth pursuing, if it is” (1986: 66, italics added). Similarly, James, in presenting his theory of fairness in the global economy as an “internal” account, notes: «None of this is to reject cosmopolitan views per se. Indeed, cosmopolitans can welcome an account of economic fairness in international political morality as part of the ‘morality of transition’ to something better, as part of ‘non-ideal’ rather than ‘ideal’ theory» (2012: 13). This may be interpreted as suggesting that the ultimate justifiability of a practice as a whole (in this case the ‘global economy as we know it’) cannot be established by internal argument.

[cccxiv] This reading appears to be reflected in Aaron James’ reconstruction of Rawls’ work as relying on the model of constructive interpretation. According to James, the justification of the existence of a practice is a question that Rawls’ approach is not intended to address. James also acknowledges the possibility of this being a reason to consider Rawls’ approach as an instance of non-ideal theorizing, albeit not according to the way in which Rawls himself conceives of the distinction between ideal and non-ideal theory (James 2005).
This might not be true, though, on a very stringent requirement of majoritarian representation: if politicians do nothing but statistically precisely reflect the views and preferences of their voters, then their influence is exactly as great as that of their voters’ (see Dworkin, Ronald. (2000). *Sovereign Virtue: The Theory and Practice of Equality*. Cambridge, MA, London, UK: The Belknap Press of Harvard University Press).

I do not think most people accept such a stringent requirement upon reflection: it ignores that politicians may need to enter compromises to serve the interests of their voters at all, and thereby somewhat deflect from the preferences of their voters; or that (in better cases) they have access to expert input or are in a position of higher quality deliberation than their voters, and so might develop views about how to satisfy voters’ intrinsic preferences that go against their voters’ own expressed instrumental preferences. These considerations strongly suggest that even a committed majoritarian, preference-satisfaction-based conception of political representation need not endorse a requirement of equal impact as between politicians and their voters.

I ignore here the issue of corporate financial support (cf. e.g. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)), which is highly problematic, but raises entirely different concerns.


To clarify, this is true even if you have a different theory of what the just distribution of resources is – libertarians, for instance, may be against campaign finance limits not because they have no account of substantive political equality, but because their account of substantive political equality is a libertarian theory of distributive justice. That is, it supposes that political equality requires that we use only those resources to promote our interests in politics that we acquired in adequate transactions or adequate procedures of original property acquisition.
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