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G. A. Cohen, Constructivism, and the Fact of Reasonable Pluralism

Abstract: In this article I argue that G.A. Cohen is mistaken in his belief that the concept of justice needs to be rescued from constructivist theorists of justice. In doing so, I rely on insights of John Rawls' later work *Political Liberalism* and Rainer Forst's discourse theory of justice. Such critical engagement with Cohen's critique of constructivism is needed, because Cohen bases his critique of constructivism almost exclusively on Rawls's arguments and positions in *A Theory of Justice*. He thus neglects—at least by and large—that Rawls had further developed his constructivist method of justification in his later work *Political Liberalism*, as well as that Forst's discourse-theoretical works offer elaborate versions of constructivism. These refined versions of constructivism recognize a plurality of reasonable conceptions of ideal justice and draw an important distinction between moral and political constructivism. Because of these features these advanced constructivist theories are not in need of Cohen's rescue.

1. Introduction

G. A. Cohen (2008) pursues two tasks in his book *Rescuing Justice and Equality*. The first task is to rescue justice from constructivist theorists of justice like John Rawls.¹ Cohen views their constructivist method of justification as problematic because it justifies principles of justice by reference to a certain selection procedure that includes several empirical facts such as human motivation as well as values other than justice such as self-realization. Cohen contends that the consideration of these facts and other values hinders the constructivist theorists to identify the pure, fact-insensitive nature of justice (cf. also Cohen 2003; 2011, ch. 12). The second task is to defend the view that an egalitarian conception of justice should apply not only to the design of basic structures within states, but also to individuals' choices. In particular, he argues that egalitarian justice demands an ethos that motivates people to employ their talents and skills in highly productive occupations (cf. also Cohen 2000, chs. 8 and 9; 2011, ch. 12).

In this article I argue that Cohen is mistaken in his belief that the concept of justice needs to be rescued from the constructivists. For that purpose I rely on insights of Rawls' (2005) later work *Political Liberalism* and Rainer Forst's

¹ I would like to thank Anton Leist and Blain Neufeld for extremely valuable comments on an earlier version of this paper; unfortunately I am unable to address all of their acute criticisms.

(2002; 2012; 2014) discourse theory of justice. Such critical engagement with Cohen's critique of constructivism is needed, because Cohen bases his critique of constructivism, as he (2008, 298) concedes himself, on Rawls's (1971) arguments and positions in *A Theory of Justice*. He thus neglects—at least by and large—that Rawls had further developed his constructivist method of justification in his later work *Political Liberalism*, as well as that Forst's discourse-theoretical works offer elaborate versions of constructivism. As I will further explain later on, these elaborate versions of constructivism recognize a plurality of reasonable conceptions of ideal justice and draw an important distinction between moral and political constructivism. Therefore they are not in need of Cohen's rescue.

This article begins by laying out in greater detail Cohen's criticism of constructivism in *section 2*. Then, in *section 3*, I argue that constructivism is a compelling method for justifying principles of justice because it recognizes that there is a plurality of reasonable conceptions of ideal justice. Constructivists therefore articulate an account of fundamental justice that specifies the conditions of appropriate political procedures for dealing with this pluralism. In *section 4*, I confront this argument with Cohen's challenge that the principles that are constructed through a just political procedure merely express what is just to enforce but not what justice is. In response, I argue that this challenge presupposes the absence of a reasonable disagreement about ideal justice and is ill founded in our world in which there exists such disagreement. In *section 5*, I consider the further objection that there is also reasonable disagreement about fundamental justice, and that this renders useless the philosophers' efforts to justify one particular conception of fundamental justice. My reply to that objection distinguishes between moral and political constructivism in order to point out that reasonable disagreement about fundamental justice exists only at the level of political constructivism, but not at the level of moral constructivism. *Section 6* concludes by summarizing my arguments.

2. G. A. Cohen's Critique of Constructivism

Cohen's critique of constructivism concerns the "identity" of justice (cf. Cohen 2011, 236). Constructivists like Rawls misunderstand justice's identity, according to Cohen (2008, ch. 7; 2011, ch. 12), because they misidentify the rules that should regulate social institutions as principles of justice. In Cohen's (2008, 317) view, such "rules of regulation" merely implement those principles of justice that truly express what justice is. In other words, constructivists commit a category mistake by viewing rules of regulation as principles of justice. This category mistake, in turn, leads constructivists to include two kinds of considerations in their justification of what they view as principles of justice that should not influence the determination of principles of justice.

Firstly, constructivists justify principles of justice on the basis of different kinds of values, including non-justice values such as human welfare or self-realization (cf. Cohen 2008, 277), and not just on the basis of the value of justice alone. Since Cohen (cf. 2008, 279) is committed to the view that justice

consists in a certain form of distributive equality, these other values like human welfare or self-realization cannot be viewed plausibly as aspects of what justice is. And secondly, in their endeavor to justify certain principles of justice, the constructivists also take into consideration various empirical facts like those, for example, about the effects of complying with a certain set of rules of regulation rather than another set of such rules. By relying on such facts about the effects of adopting certain sets of rules of regulation, constructivists can only ascertain which set is most conducive for realizing certain values—the value of justice as well as other values. For what can be justified on the basis of facts are rules of regulation that one must not regard as principles of justice. This is because, according to Cohen (2008, 309), “facts cast normative light only by reflecting the light that fact-free first principles shine on them”. Thus, in Cohen’s view, Rawls’s (1971, 454) affirmation that “[c]onceptions of justice must be justified by the conditions of our life as we know it or not at all” is deeply flawed.

To clarify, note that Cohen’s point is not that it is inappropriate to regulate social institutions on the basis of such empirical considerations or on the basis of values other than justice. Rather, his point is that it is misguided to hold that by determining the correct answer to the question of how to regulate social institutions, one would be able to identify what justice *is*. In other words, both considerations are relevant for determining how to arrange social institutions, but irrelevant and, even worse, misleading for determining what justice is.

3. Reasonable Pluralism about Ideal Justice

A crucial problem of Cohen’s criticism of constructivism is that it neglects the fact of reasonable pluralism about ideal justice. By ‘ideal justice’ I mean perfect or flawless justice. A theory of ideal justice specifies and vindicates the principles whose fulfillment would render the subject matter of the theory, such as the state, perfectly just. Rawls’s theory of justice as fairness, as laid out in *A Theory of Justice*, is an example of a theory of ideal justice of a society’s basic structure. Cohen neglects that there is a plurality of reasonable conceptions of ideal justice, and that there is no way in which a theorist could determine decisively which one of these reasonable conceptions ascertains most correctly what ideal justice is. The reason for this is what Rawls (2005, 56–7) calls “the burdens of judgment”. These burdens of judgment state that people live through distinct experiences, differ on which empirical information they deem relevant for practical judgment, and have to rely on interpretation of moral and political concepts that are necessarily underspecified. It is because of these burdens that within social and political practices that allow their members to think and judge in the way that they see fit, the exercise of reason makes the plurality of reasonable views as to what ideal justice is become a permanent feature of our social and political world.

Therefore Cohen’s endeavor to justify a theory of ideal justice that would be capable of identifying what ideal justice is in a way that could not be reasonably contested fails to appreciate the limits of practical reason that these burdens of

judgment express. Cohen may be able to come up with *one* reasonable understanding of what ideal justice is. Indeed, he holds that ideal justice consists in a ‘luck-egalitarian’ form of equality among people according to which equality is obtained when no person is worse off than another person through no fault of her own.² The point that my insistence on what Rawls calls the burdens of judgment is meant to bring out is that while this might represent *one* reasonable conception of ideal justice, there is no way in which Cohen could establish that this is the only reasonable or the most reasonable conception of ideal justice.³ For example, the prioritarian view of ideal justice expressed by Rawls’s difference principle, which holds that socio-economic inequalities are justified only to the extent that they are to the greatest advantage of the least well off, is another reasonable view of what ideal justice is (cf. Rawls 2001, 42–3).

Thus Cohen’s idea as to what it means to justify a conception of ideal justice rests on the problematic assumption that there is but one reasonable conception of ideal justice. Cohen is searching for a conception of ideal justice that—if he were to find it, the possibility of which he might deny—renders all alternative conceptions of ideal justice unreasonable. However, this betrays the fact that in our world, due to the burdens of judgment, there is a lasting, reasonable disagreement about the question what ideal justice is. Hence, in the world that we know, which is inhabited by people who disagree reasonably about what ideal justice is, the kind of conception of ideal justice that Cohen is looking for does not exist. Cohen’s search for ideal justice is in vain.

This does not mean, however, that there would not be any sensible task for theorists of justice in a world that is characterized by such reasonable disagreement. But it does mean that the task that philosophers have to pursue—so as to determine what justice is in a world in which there is this reasonable disagreement about ideal justice—is a different one. In such a world, justice consists primarily in arranging our social and political relations in ways so that the way in which we go about addressing our reasonable disagreement about ideal justice is just. In other words, in our world theorists of justice need to focus on a conception of *fundamental justice*, which determines which conditions need to be met so that how we deal with our disagreement about ideal justice is just. A conception of fundamental justice aims at determining the most essential conditions whose fulfillment is a primary demand of justice. Different from the fulfillment of the conditions of a conception of ideal justice, thus, the satisfaction of these essential conditions does not render the social and political order fully or completely just (cf. Forst 2001, 172).⁴

Cohen would protest against this way of re-describing the task of a theorist of justice by arguing that it renders justice fact-sensitive, and that this would be implausible because principles of justice are fact-insensitive principles. Justice has only one meaning no matter what the facts are that constitute our world. In

² Anderson 1999 coined the term ‘luck-egalitarianism’. See also Anderson 2010.

³ Heath 2006 also emphasizes this point.

⁴ In a similar fashion Nussbaum (2011, 19) defends a conception of “basic social justice”, which contains a list of “fundamental political entitlements”, and does not specify what ideal justice requires.

Cohen's view, thus, justice is a value that possesses the same meaning throughout time and in all possible empirical contexts.

By contrast, on the—arguably epistemically more modest—view that I am suggesting, a conception of justice is indexed to a particular empirical context in and through which we have to understand what justice is in a specific way. In other words, we need to recognize the situated, contextual character of any conception of justice. The way of understanding justice differs from Cohen's view can be brought out more clearly by the following juxtaposition of Thomas Pogge. For Cohen, the relation between the principles of justice 'M', rules of regulation 'R' and context 'C', as Pogge (2008, 475) explains, is the following:

“Using our ultimate principles M as the basis of assessment, we find that rules R_1 work best in context C_1 and rules R_2 best in context C_2 . We thought we were living in context C_1 but find that our world is actually in condition C_2 . So we revise our rules from R_1 to R_2 , without any revision of M and hence without any revision of our belief that R_1 is appropriate for C_1 .”

Some 'ultimate principles M' should express what ideal justice is. These principles should not be indexed to any context C_1 or C_2 . Still, depending on the context—e.g. C_1 or C_2 —in which we find ourselves, different kinds of rules of regulation—e.g. R_1 or R_2 —are best for realizing ideal justice. Hence in Cohen's view, it is beside the point that we live in a world in which there is reasonable disagreement about what ideal justice is. What ideal justice is does not change simply because we come to understand that we live in such a world.

On the contrary view that Rawls endorses, using again Pogge's (2008, 475) characterization, the relation between principles of justice and alternative empirical contexts is the following.

“[W]e should stand ready to revise even the very foundation (or 'summit') of our morality. [...] Finding ourselves in context C^* rather than C, we may revise from M to M^* without retaining the commitment that M holds in C.”

So in Rawls's view, which I share, what justice is depends on how the actual world is like. This is because, as Arthur Ripstein (2010, 678) puts it, “the factual situation poses a *problem* to which justice is the solution”. Accordingly, once we discover that there is reasonable disagreement about some “ultimate principles M”, we recognize that we find ourselves in C^* rather than in C. Given that the problem that we face in C^* is different from the one that we face in C, we are thus willing to accept that in C^* principles M do not express properly what justice is, and instead view as valid principles M^* .

In order to illustrate further this shift in thinking about justice, it may be helpful to recall that in *A Theory of Justice* Rawls (2005, xvi) regards his conception of justice as fairness as a “comprehensive philosophical doctrine” that represents the only reasonable conception of ideal justice. Later on in *Political Liberalism*, however, Rawls regards justice as fairness as *merely one* of a number of conceptions that are part of a family of reasonably just conceptions of

ideal justice. All of these conceptions of ideal justice that are part of this family of reasonable conceptions of justice, as Rawls (2005, 6) explains, share three features;

“first, a specification of certain basic rights, liberties and opportunities [...]; second, an assignment of special priority to those rights, liberties, and opportunities [...]; and third, measures assuring to all citizens adequate all-purpose means to make effective use of their liberties and opportunities.”

To the extent that these features can be filled out very differently, there is a broad variety of more specific, reasonable conceptions of ideal justice and justice as fairness—which Rawls still views as the most reasonable one—is just one of them. The way in which political practices substantially fill out these three features and further specify what ideal justice is, is left to the members of these practices who can and must engage reasonably with one another. This is to say that a plurality of political processes, all of which would have to share the three features mentioned by Rawls, would be suitable for vindicating a much more complex account of ideal justice. As a result, although Rawls still believes that the political process should lead to an endorsement of justice as fairness, it is also possible that it will lead to a different result. This is because conceptions of ideal justice other than justice as fairness can also count as reasonable.

To frame this discussion in yet another manner, it may be helpful to distinguish between ideal distributive or substantive justice on the one hand, and fundamental political or procedural justice on the other. As I will explain in greater detail below, conceptions of fundamental political or procedural justice also possess distributive or substantive aspects. Thus the difference between distributive or substantive conceptions and political or procedural conceptions should not be understood in a dichotomous manner. Yet, nevertheless, there is a certain tendency among those theorists who focus on questions of distributive or substantive justice to develop theories of ideal justice.⁵ By contrast, theorists that lay greater emphasis on political or procedural justice tend to refrain from defending a conception of ideal justice and restrict themselves to determining what fundamental justice requires.⁶ Cohen is concerned, as his strong commitment to a certain form of luck-egalitarianism demonstrates, with ideal distributive or substantive justice. To the extent that there is reasonable pluralism about ideal distributive or substantive justice, however, we need to re-orient our attention towards fundamental political or procedural justice. The fact of reasonable disagreement about ideal distributive or substantive justice, that is,

⁵ This holds true not only for Cohen, but also for theorists like Gosepath 2004.

⁶ Broadly speaking, this holds true, for example, of Fraser 2009 and Sen 2008. Nussbaum (2006; 2011) is an exception, as she defends a theory of fundamental justice that prioritizes just outcomes—and thus distributive or substantive justice—over political or procedural justice. The price she pays for this prioritization is an excessively restricted understanding of political or procedural justice. This is because on her account a just political process must result in constitutional guarantees such as the effective freedom to enjoy reproductive health, which a more open-ended but nevertheless sufficiently just political process may not end up guaranteeing (cf. Culp 2014, ch. 6, section 5).

affects our understanding of what justice is, because it changes the context in and for which we aim at identifying justice.

Arguably, some theorists would criticize this way of conceiving what justice means in a world in which there is reasonable pluralism about ideal distributive or substantive justice. They would point out that the concept of justice, which expresses the core meaning of justice and represents the shared understanding of what justice is, concerns distributive or substantive justice proper. Hence as long as we do not want to change the core meaning of justice, we need to focus on issues of distributive or substantive justice and cannot simply move towards theorizing political or procedural justice—even if that seems to push us in the direction of a conception of ideal rather than of fundamental justice. My conceptualization of what justice is, the objection says, betrays the core meaning of justice—to wit, distributive or substantive justice. Any theory that is developed on the basis of such a misguided conceptualization, therefore, is not a coherent theory of justice proper.

In response to this objection, consider how Rawls (1971, 5) elaborates on the concept of justice in the beginning of *A Theory of Justice*:

“[I]nstitutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life. Men [sic] can agree to this description of just institutions since the notions of an arbitrary distinction and of a proper balance [...] are included in the concept of justice.”⁷

Note that Rawls’s definition captures distributive or substantive concerns about the “proper balance” of benefits and burdens *and* procedural or political concerns about the non-arbitrary assignment of ‘basic rights and duties’.⁸ Indeed, most theorists focus exclusively on the distributive or substantive aspect of the concept of justice. They concentrate, for example, on socio-economic questions concerning the proper distribution of income and wealth or, more broadly conceived, the proper distribution of benefits and burdens. This is evidenced, for instance, by the heavy weight that distributive issues have in Richard Arneson’s (2006) overview of theories of justice after Rawls in his entry to the *Oxford Handbook of Political Theory*. This holds also true for most theories of global justice, which, according to Chandran Kukathas (2006, 1), “address two main issues. First, what would a just distribution of benefits and burdens across the world look like? Second, what sorts of institutions would be required to secure such a just distribution?”

However, not all too long ago, Young’s important book *Justice and the Politics of Difference* (1990, ch. 1) set out a fundamental challenge to what she refers to as the ‘distributive paradigm’. In effect, her critique of this paradigm urges theorists of justice to direct their attention towards the other aspect of the concept of justice, namely that of avoiding “arbitrary distinctions [...] in

⁷ For the distinction between concept and conception, see also Hart 1961, 156.

⁸ This and the next three paragraphs follow my discussion in Culp 2014, ch. 5.

the assigning of basic rights and duties". Her central argument is that theorists within the distributive paradigm overlook the question as to how a certain assignment of basic rights and duties has given rise to a particular distribution of goods—via political processes that deem a certain scheme of production and distribution as justified. Therefore Young (1990, 37) urges to displace "the distributive paradigm in favor of a wider, process-oriented understanding of society, which focuses on power, decision-making structures, and so on". Hence she argues in favor of modifying the terms of reference of a theory of justice from a predominantly distribution-oriented and thus goods-centered normative analysis to an examination of the relations of power within social and political contexts. Relations of power do not only determine how much of which goods persons possess and who produces which goods, but also who decides who receives and contributes what.

It is certainly debatable whether the main target of Young's critique, namely Rawls's ideal theory of justice as fairness, as laid out in *A Theory of Justice*, falls within the distributive paradigm. After all, Rawls's account of primary goods includes political liberties and opportunities to access positions of political authority. Thus Rawls pays attention to the process-oriented question who will decide who receives and contributes what. Yet because Rawls articulates a theory of ideal justice, his theory determines definitely which basic structure must be viewed as the most just in distributive terms. Rawls' theory of ideal justice, that is, offers a "complete ordering" and not just a "partial ordering" of alternative arrangements of the basic structure (cf. Sen 1988, 18). Thus one may wonder whether Rawls's theory of ideal justice grants sufficient room for processes of political deliberation about ideal distributive justice. Be that as it may, Young underlines very clearly the importance of the first aspect of the concept of justice, which focuses on the ascription of basic rights and duties that should guarantee just political procedures.

In a manner similar in spirit Forst (2014, ch. 1) carves out the fundamental philosophical importance of avoiding a purely distributive 'picture' of justice and of recognizing as well a different, political 'picture' that concentrates on power relations. He (2007a, 300) aptly labels this necessary transition the "political turn" in the debate about how to theorize justice. Thus, Forst (2007b, 260) argues that theories of justice must not primarily scrutinize the distribution of goods, but "the relationship between the persons involved [in a context of justice] and their relative standing within a scheme of exercising power". On Forst's (2007b, 260) account, this implies that those who participate in a social and political order should not solely be viewed as recipients of goods, but as agents that call for justifications of the social order in which they participate. Justice primarily centers on "*how you are treated*" and not solely on "*what you have*" (260).⁹

⁹ Even if Young and Forst concentrate on the political power that people have to participate in and challenge the dominant sites of decision-making, there remain, of course, considerable differences between them. Among other things, while Young seems to emphasize the necessity of creating fair conditions for political bargaining, Forst holds that reasonable political deliberation helps creating a more reasonable, shared understanding of justice.

The insights and theories that Young and Forst provide in their works show that it is implausible to assume that the core meaning of justice refers solely to distributive or substantive issues. Theories of justice should also focus on the political or procedural aspect of the concept of justice. Indeed, Rawls's elaboration of the concept of justice, as quoted above, contains a political or procedural as well as a distributive or substantive aspect.¹⁰

Some procedure-oriented theories like that of Young, however, also appear to fail to take seriously enough the distributive or substantive aspect of the concept of justice. She seems to go so far as to suggest that the other, distribution-oriented aspect of the concept of justice could be neglected. This is problematic, however, given that any plausible conception of political or procedural justice will include considerations of distributive or substantive justice. By contrast, Forst seems to occupy a more attractive middle ground. While he seems to believe that the political or procedural aspect of the concept of justice is the more fundamental one, he (2012, 5–7) nevertheless concedes that any plausible conception of justice must also include an account of what distributive or substantive justice requires. For clearly any institutionalization of a certain political procedure will have considerable, distributive or substantive presuppositions. For example, people need resources to enjoy the health care that is necessary in order to be able to make good use of their cognitive and communicative abilities. They also require a certain degree of material security in order to avoid being forced to consent to the view of the more powerful agents within political procedures for the lack of reasonable alternatives. In these ways a sound conception of justice must bring into a coherent perspective as to how political or procedural considerations on the one hand, and distributive or substantive considerations on the other, have to complement each other. Otherwise a conception of justice pays insufficient attention to one of these two crucial aspects of the concept of justice.

To sum up my central points of this section, I have argued that recognizing the normative importance of the fact of reasonable pluralism about ideal justice allows responding to Cohen's two criticisms of constructivism in the following way. Given the burdens of judgment, there is no way in which one could plausibly defend a certain form of distributive equality as the only, reasonable way in which one ought to conceive what ideal justice is. It is very well possible, that is, that values such as self-realization and human welfare may represent certain aspects of what ideal justice is, at least on some reasonable conception of ideal justice. Thinking otherwise neglects the fact of reasonable pluralism about ideal justice. If that is the case, then we must also recognize that certain empirical facts, such as the fact of reasonable pluralism about ideal justice, affect our understanding of what justice is. Perhaps we would be justified in viewing ideal justice as a form of distributive equality in a world in which we could establish that all other ways of expressing ideal justice are unreasonable. But we do not need to take a stand as to what ideal justice would consist of in a world in which this kind of reasonable pluralism would not exist. We do not have to endorse a 'cosmic' or

¹⁰ This very brief illustration of the contribution of Young and Forst fails to specify what Young and Forst mean by 'power', and the way in which claims of justice can be expressed in terms of demands for more power. See Forst 2015 on his conception of power.

‘metaphysical’ view of justice that is capable of informing us not only what ideal justice is in our world but also in alternative worlds that are very different from our world. It suffices to recognize that in our world there are a number of other, reasonable conceptions of ideal justice and that this makes it unreasonable to insist that there is only one reasonable conception of ideal justice that a certain idea of distributive equality expresses.

4. Legitimate Rule as an Expression of Political Justice

How might Cohen respond to the argument laid out so far? In *Rescuing Justice and Equality*, Cohen focuses almost exclusively on Rawls’s conception of ideal justice as laid out in *A Theory of Justice*. At several points, however, Cohen also remarks very briefly on Rawls’s later conception of justice, as Rawls construes it in *Political Liberalism*—and which is where Rawls’ constructivist method has come to greater fruition.

The most elaborate of these remarks appears in a passage in *Rescuing Justice and Equality* in which Cohen (2008, 296–98) responds to Joshua Cohen’s objection that Rawls’s political conception of justice as fairness offers an account of how a certain fact may justify principles of justice.¹¹ In Joshua Cohen’s view, this is because the political conception of justice as fairness is justified on the ground of the social fact that it represents an overlapping consensus among citizens of a liberal society who differ in their reasonable comprehensive doctrines. That is, although these citizens differ in their religious and non-religious, philosophical views on issues that are not preponderantly political—such as the question of life after death—they may nevertheless come to agree on justice as fairness as a political conception. Such an overlapping consensus on justice as fairness as a political conception, in turn, means that its subject matter is restricted to the political sphere and that its justification does not rely on a single reasonable comprehensive doctrine. Nevertheless the political conception is compatible with all reasonable comprehensive doctrines and these doctrines also support—each in distinctive ways—the political conception of justice as fairness.

Importantly, Joshua Cohen adds that the principle based upon which said overlapping consensus is deemed to render justice as fairness valid is merely a fact-insensitive *methodological* principle, but no fact-insensitive principle of justice (cf. also Ronzoni/Valentini 2008, 408). There may also be further fact-insensitive normative principles within each citizen’s comprehensive doctrine, which explain as to why the principles of justice as fairness constitute valid principles of justice. For example, a certain theological, normative principle may favor a conception of justice that assigns special priority to the least advantaged group within society. Hence, Rawls’ *Political Liberalism*, Joshua Cohen argues, shows that the principles of justice as fairness need not rely on any fact-insensitive principle of justice.

¹¹ Cohen 2008, 296 reports that Joshua Cohen has expressed this criticism in private communication to Cohen; to the best of my knowledge there is no publication in which Joshua Cohen puts forward this criticism.

Cohen's response to this criticism is twofold. First, he (2008, 297) argues that the methodological "meta-principle about the proper source of principles of justice—the overlapping-consensus principle" constitutes a principle of justice proper rather than merely a methodological principle. This methodological principle, Cohen argues, is a principle of legitimacy; it states that one must not enforce laws by the means of state coercion whenever the principles underlying these laws could not be reasonably accepted by those who are subject to these laws. The overlapping-consensus principle guarantees that this is the case, because it singles out as principles of a political conception of justice only those principles that fall in the intersection of all citizens' reasonable comprehensive doctrines.

But such a principle of legitimacy, Cohen insists, must be viewed as an expression of justice. For Cohen (2008, 298) holds that this principle "directly prohibits a certain form of injustice", as it would be unjust to exercise coercive rule over citizens on the basis of reasons that these citizens cannot share. Hence the overlapping-consensus principle is not a non-normative methodological principle, but a principle of justice.

Second, Cohen claims as well that the principles within the overlapping consensus should not count as principles of justice, but solely as principles that it is just to enforce by state coercion. Cohen (2008, 297) claims that "the legitimated principles are *just principles*, principles that it is just to impose, but they are not necessarily *principles of justice*". This is because, Cohen argues, such "*just principles*" are not justified relative to the content that they express. Instead, they are grounded solely on the basis of the procedural consideration inherent in the overlapping-consensus principle.

Putting these two aspects of Cohen's critique together, he views the late Rawlsian overlapping-consensus principle as a principle of justice rather than as a mere methodological principle, but believes that the principles it generates are not principles of justice, but solely principles which it is 'just to impose'. Joshua Cohen's objection thus fails to show that Rawls' *Political Liberalism* explains how there could be fact-sensitive principles of justice that are grounded on the basis of a fact-insensitive methodological principle.

Cohen's reply to Joshua Cohen's critique is problematic in two respects, although—indeed—it also contains a kernel of truth. First of all, consider Cohen's concession that it is a matter of justice that the coercive order that the state imposes should rest on principles that can be accepted by all who endorse reasonable comprehensive doctrines. This concession shows that it is not at all clear which values should be viewed as considerations of justice proper. While in his critique of constructivism Cohen claims that values such as self-realization or human welfare should not enter into the determination of what justice is, in his reply to Joshua Cohen he recognizes that the protection of autonomy—and thus, perhaps, self-realization as well—is a matter of justice. After all, to the extent that he acknowledges that it would be unjust if the state would employ coercion on grounds that cannot be shared by all reasonable citizens, he accepts citizens' autonomy—or if you will, the value of their self-realization—as value of justice. In particular, he recognizes that a non-distributive value, such as

autonomy or self-realization, which is not reducible to the value of equality in distributive terms, may count as value of justice.

This indicates, in support of my argument of the previous section, that there is a reasonable plurality of understandings of ideal justice. Hence it seems to be a virtue rather than a vice of constructivism that it is open to the possibility that certain values that some people otherwise would not view as values of justice may turn out to be relevant considerations of ideal justice. There is no good reason as to why certain values should be excluded from the construction procedure *ab initio* before all people have actually had the opportunity of laying out what they view and do not view as values of ideal justice. Excluding people's views on what the value of ideal justice is would fail to show proper respect to people's autonomy which Cohen, at least in his response to Joshua Cohen, takes seriously.

In addition, it is unclear why the principles falling in the intersection of the overlapping consensus should not count as principles of justice. Of course, if there were no reasonable disagreement about what ideal justice is, then it would appear redundant to justify principles through the overlapping-consensus principle. Why should one focus on such an overlapping-consensus principle if ideal justice can be identified more directly, alone by certain arguments in favor of certain fact-insensitive principles? Likewise, however, if there would be no reasonable disagreement about what ideal justice is, then the overlapping-consensus principle would most likely generate the same—luck-egalitarian—principles that Cohen would want to ground by different means. However, if that would be the case and the overlapping-consensus principle would also recognize some form of distributive equality as ideal of justice, then Cohen would be unable to explain why this should *not* be viewed as principle of ideal justice, but solely as a '*just principle*' that expresses what just rule consists in.

In sum, I agree with Cohen's reply to the extent that the principle which says that the use of state coercion must be grounded on normative principles that all of its citizens can accept is a principle of justice. *Pace* Joshua Cohen—as well as Ronzoni and Valentini—this principle is not merely a methodological principle. Cohen neglects, however, that his reply puts into question his neat separation between values of justice and other non-justice values; it undermines the idea that one could establish which value belongs to which of these two categories. One important implication of the difficulty to separate justice from non-justice values, in turn, is that this affirms, once again, the reasonable pluralism of conceptions of ideal justice. Yet once the fact of this reasonable pluralism is recognized, it becomes more difficult to contest that whatever principles citizens reasonably agree on within reasonably arranged political procedures identifies correctly principles of ideal justice proper that are valid within their concrete political contexts in and for which they have been constructed.

5. Moral and Political Constructivism

This way of re-configuring our understanding of what the major concern of a theorist of justice should be—given the fact of reasonable pluralism about ideal

justice—invites the criticism that there is as well reasonable disagreement about fundamental justice. Recall that an account of fundamental justice determines which basic or essential conditions of justice need to be met first. Such an account offers merely a ‘partial’ but no ‘complete’ justice-based ordering of alternative social and political arrangements. Beyond justice’s basic or essential conditions, which are of primary importance, a conception of fundamental makes no claims as to how to evaluate such arrangements. On a discourse-theoretic conception of fundamental justice, these conditions of fundamental justice consist of political procedures that enable its members to justify vis-à-vis each other additional conditions of ideal justice.

A critic of the endeavor to justify such a predominantly political conception of fundamental justice may therefore put forward the following *tu quoque* objection. In the same way in which there is no point in singling out one reasonable conception of ideal justice if there is a plurality of reasonable conceptions of this kind, there is no point in defending one specific political or procedural conception of fundamental justice if there is reasonable disagreement as well about this kind of conception of justice.

This criticism that a conception of fundamental justice is subject to the same kind of reasonable disagreement as any conception of ideal justice can be avoided, however, by differentiating between moral and political constructivism (cf. Forst 2012, 175). Whereas a moral construction of justice is not restricted in its scope and claims validity for all contexts in which moral persons interact, a political construction is limited to a more narrowly defined scope and claims validity for a particular political context, for example a state, a city, or a region. Often a political context, like a state, is characterized by the use of coercion as a means to impose order. By contrast, at least on most understandings of coercion, the interactions among all moral persons, for which morally constructed principles claim validity, are not characterized by coercion.¹²

The basic idea of differentiating between the moral and political construction of norms like justice is that depending on the kinds of claims of validity that particular norms raise, different kinds of justification are appropriate for redeeming these norms’ validity (Habermas 1991, 301–2). Such an idea is a key feature of a discourse theory of justification, according to which the justification of norms proceeds differently depending on the practical context for which one seeks to justify these norms. As Forst (2012, 18) puts it: “[N]ormative answers to practical questions are to be justified in precisely the manner referred to by their validity claims.”

A moral norm holds that every person has the duty to follow it, because there are no good reasons for violating the norm. Moral norms claim to be generally and reciprocally binding (cf. Forst 2012, 80–1; 2002, 68–9, 133–4). Redeeming the claim of moral validity of a norm, that is, consists in justifying these norms on grounds that cannot be reciprocally and generally rejected. Moral norms that cannot be rejected in this way are reasonable, whereas moral norms that can be

¹² A moral construction is nevertheless context-specific, in line with Pogge’s explanation of a contextual meaning of justice in section 3, because it refers to the concrete context of all interactions among all moral persons.

thus rejected are unreasonable. Principles of fundamental and ideal justice are moral norms and thus have to live up to these criteria of validity.

The distinction between moral and political constructivism allows identifying an important difference between the ways in which ideal justice, on the one hand, and fundamental justice, on the other hand, can and cannot be justified. There is reasonable disagreement about both fundamental and ideal justice when it comes to the political construction of justice through an actual political process. There is reasonable disagreement as to how to interpret and institutionalize within a concrete political context abstract moral ideas of both fundamental and ideal justice. By contrast, however, there is no reasonable disagreement with regard to the moral, philosophical justification of fundamental justice, although there is reasonable disagreement with regard to such a justification of ideal justice. This means that it would be unreasonable to deny the validity of a certain, relatively abstract moral conception of fundamental justice, but not unreasonable to deny the validity of such a conception of ideal justice.

To elaborate, consider that principles of fundamental and ideal justice that members of a particular political context construct politically claim validity for their particular political context—most commonly, a particular state—in which the members of this context actually justify these principles. This means that in different political contexts, for example in two different states, two distinct sets of such principles of justice may be justified in ways that redeem the criteria of reciprocity and generality. These principles of justice may refer to fundamental or to ideal justice. Hence which particular political procedures as well as which particular distribution of goods will be accepted on the basis of a context-specific formulation of the principles of generality and reciprocity may differ in two political contexts. The two political contexts would nevertheless have to be judged as equally just because they would both satisfy, although in different ways, the context-specific formulation of the criteria of generality and reciprocity. Hence the political construction of principles of fundamental and ideal justice is sensitive to and accommodates plausibly this kind of reasonable pluralism about both fundamental and ideal justice.

There is an important difference, however, when it comes to the moral construction of principles of fundamental and ideal justice. The claim of validity of these principles is not restricted to a particular political context. Rather, these principles claim validity within all political contexts. Therefore a moral justification of ideal or fundamental justice could not result in the view that different principles of justice are valid within the same kind of political context. A moral justification could not hold that in state A principles X are valid and in state B principles Y are valid. Rather, a moral justification would hold that in all states *either* principles X *or* principles Y—*or* principles Z—are valid. Of course the political and legal instantiation or transformation of such morally justified principles may turn out to be very different depending on the particular political context in which it actually takes place. This is precisely the point of the plurality of reasonable principles of justice that can be justified politically via some concrete political construction, as the previous paragraph has emphasized.

Yet the morally constructed principles of fundamental or ideal justice could not allow for such variation.

This, in turn, makes it necessary to pay attention to the difference between the moral justification of a conception of fundamental justice and the moral justification of a conception of ideal justice. For there is no reasonable disagreement that there should be political procedures through which people themselves should be able to justify politically vis-à-vis each other how to realize fundamental justice and which conception of ideal justice they can reasonably view as justified for their specific political context.¹³ So there is no reasonable moral disagreement about certain features of a conception of fundamental justice. It is this absence of reasonable moral disagreement about fundamental justice, which allows Rawls to list three features that all reasonable conceptions of liberal justice must share.¹⁴ By contrast, there is reasonable moral disagreement regarding which conception of ideal justice should be accepted. There is no—morally justifiable—conception of ideal justice that could plausibly claim exclusive validity across all political contexts.

Again, this marks an important difference to fundamental justice, because while there is reasonable disagreement about the political justification of such a conception, there is no reasonable disagreement about its moral justification. There is no reasonable moral disagreement, that is, that it would be unjust if people would not be able to participate in the political justification of principles of justice. Members of any political context possess a moral right to participate in the political construction of principles of both fundamental and ideal justice—an entitlement that Forst (2012, 177) calls the “*basic moral right to justification*”. Due to this entitlement people could not accept the imposition of a political order that would not allow them to challenge the justifications that those in power provide for the normative validity of that order. Any justification of such a political order would violate the principles of generality and reciprocity, because it would ascribe only to some but not to all the moral right to engage in the discursive articulation of the guiding normative principles of their political order. This would morally privilege some over others, and could hence be reasonably rejected on the ground of a violation of the norm of reciprocity. So to the extent that a “basic moral right to justification” cannot be reasonably contested, there is a moral justification of fundamental justice, even if reasonable political

¹³ Of course someone might object that it is possible to deny reasonably that there should be political procedures that afford all members of a given political context meaningful participation in the mutual justification of the normative order of that context. A slaveholder, for example, may be regarded as immoral if he denies slaves such kind of participation, but he should not be viewed as unreasonable. It remains unclear to me, however, how any of the reasons that the slaveholder might provide for the justification of his view could possibly be recognized as reasonable. On my view, for which I cannot argue here, any proposition that denies the equal moral standing of all moral persons as sources of normative claims must be viewed as unreasonable (cf. Culp 2014, ch. 5, section 4).

¹⁴ As I have argued elsewhere, however, it is problematic that Rawls (1999; 2005) restricts the validity of these features to conceptions of *liberal* justice, and concedes that non-liberal conceptions of justice, which do not share these features, need not be viewed as unreasonable (cf. Culp 2014, ch. 5, section 4).

disagreement about the context-specific meaning of fundamental justice remains. Hence said *tu quoque* objection fails.

6. Conclusion

Cohen is a harsh and sophisticated opponent of the constructivist method of justifying principles of justice. Unfortunately, however, Cohen focuses almost exclusively on the way in which Rawls employs this method in *A Theory of Justice*. He thereby neglects the important modifications of this method in *Political Liberalism* that flow from the recognition of a plurality of reasonable conceptions of ideal justice, and which have led Rawls to concede that his conception of justice as fairness is merely one conception of a family of reasonable conceptions of ideal justice. It is similarly unfortunate that Cohen does not take into account the extent to which Forst's discourse theory of justice might be able to respond to his critique of constructivism. Otherwise, Cohen would have had to engage more seriously with the difference between moral and political constructivism. As I have argued in the previous section, this difference affects our understanding of the (im)possibility of a moral and political construction of a certain conception of fundamental justice, on the one hand, and of a certain conception of ideal justice, on the other. A more thorough appreciation of the fact of reasonable disagreement about not only the political but also the moral justification of a conception of ideal justice would have posed a considerable challenge to Cohen's creed in the fact-insensitivity of justice.

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