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Hugo El Kholi

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Practice-Based Justice: An Introduction

Hugo El Kholi*

Over the last few years, an increasing number of political theorists have come to endorse the so-called "practice-dependence view" about justice. They argue that the content of the principles of justice cannot be deduced from purely *a priori* moral considerations. Rather, it depends on an interpretation of the structure and point of the practice these principles are intended to regulate. It is difficult to determine why this view, which has been in the air for at least a decade, has recently gained a wider audience. Some have suggested that practice-dependence answers a growing epistemological concern of the discipline to distance itself from purely abstract theorizing and get closer to the reality of social life. [1] This might indeed be expected from an approach that pretends to elaborate normative contents from an interpretation of the practice itself. But the main interest of the practice-dependence view lies elsewhere, namely in its potential contribution to solving the problem, central to the debates on global justice, of the proper scope of distributive justice.

The terms of the problem are well known. Whereas cosmopolitans argue that the principles of justice should be applied globally, statist thinkers persist in seeing a normative discontinuity between the national sphere, where obligations of justice prevail, and the world beyond national borders, where our duties do not exceed a humanitarian moral minimum. What may be less well appreciated are the reasons that may support each of these two positions. Cosmopolitans are usually depicted as confirmed liberals who build on the respect due to the equal moral status of all human beings. Statist thinkers, by contrast, would suffer a tendency to accord moral primacy to the national community over the individual. This picture is, however, significantly misleading. Most statist thinkers attribute no moral weight to communities as such, and they are as concerned as cosmopolitans with respecting the moral equality of individuals. Conversely, all cosmopolitans do not directly rely on a consideration for the equal moral worth of

* I am grateful to Bertrand Guillarme and Ted Lechterman for helpful written comments and suggestions. I also thank Astrid von Busekist and Thom Brooks for their support and constant advice throughout the preparation of this volume.

1 - See for example, in this volume, Malte Frøslee Ibsen, "Two Conception of Practice-Dependence", 81.

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individuals. A significant number of them endorse cosmopolitanism because they consider that the relationship of social and economic interdependence in which all individuals stand around the globe is normatively relevant to justice. [2]

One should therefore renounce accounting for the problem of the scope of justice simply in terms of an opposition between cosmopolitan liberals and statist communitarians. Instead, one can consider the way in which global justice theorists conceive of justice in general. While some of them regard justice as a virtue grounded in certain metaphysical properties of the person, others think of it as a strictly political value arising among individuals who stand in a special, practice-mediated relation to each other. This allows a more significant distinction, orthogonal to statism and cosmopolitanism, between two ways of approaching the problem of the scope of justice. Those who endorse the *metaphysical* conception hold that the principles of justice should apply to all human beings simply because they are endowed with certain moral properties. [3] In their view, the question of the scope of justice does not even arise: justice universally and unconditionally applies to all human beings. By contrast, those who subscribe to the *relational* conception can either be statist or cosmopolitan, depending on whether the practice-mediated relation they regard as relevant are themselves circumscribed to the nation-state or rather global in scope. Their main challenge is to elaborate an account that sufficiently establishes the relevance of certain practices, either local or global, to questions of distributive justice. On their capacity to provide this account depends the validity of the relational view as a rationale for determining the scope of justice.

The relational conception has been severely criticised by metaphysical cosmopolitans, who object that a view that regards justice as a value arising among certain individuals only, simply because they stand in a special relationship to each other, conflicts with the fundamental liberal commitment to the moral equality of all. In virtue of this commitment, obligations of justice should be justified in respect of the innate right of every individual to freely order his actions and dispose of his possessions. Practice-mediated relationships, such as membership in a state or the sharing of a common nationality, can play no role in this justification because they are purely contingent and therefore morally arbitrary factors. Against this background, Laura Valentini has recently suggested that the practice-dependence view, which pretends to determine the content of the principles of justice from an interpretation of the practice rather than an analysis of *a priori* moral premises, is an elaborate form of relationalism that emerged in response to the cosmopolitan objection. [4] In her account, the

2 - For example Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1979); Thomas Pogge, *Realizing Rawls* (Ithaca, N.Y.: Cornell University Press, 1989); and Darrel Moellendorf, *Cosmopolitan Justice* (Boulder, Col.: Westview Press, 2002).

3 - For example Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2004); Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004).

4 - Laura Valentini, "Global Justice and Practice-Dependence: Conventionalism, Institutionalism, Functionalism", *Journal of Political Philosophy*, 19/4 (2011), 399—418.

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whole point of the practice-dependence view is to circumvent the problem posed by the moral arbitrariness of practices by maintaining that the rationale behind reliance on the practice is, in fact, purely epistemological. The practice-dependence view would not, in other words, express substantive beliefs about the nature of justice. Instead, it would be based on the conviction that principles of justice are "constructed by interpreting the point of the specific practice they aim to regulate". [5] This reduction of the practice-dependence view to an epistemological thesis must, however, be handled with care, for at least some of the advocates of practice-dependence positively assert the substantive nature of their view. They maintain that behind the *epistemological* thesis of the priority of an interpretation of existing practices over an *a priori* justification stands the *substantial* thesis of "the priority of politics to morality". [6] This latter thesis holds that what matters normatively, when filling out the content of a particular conception of justice, are not moral reasons, such as the liberal commitment to the moral equality of persons, but rather the actual structure and point of the practice this conception is intended to regulate.

The purpose of this introduction is double. First, it is to provide readers unfamiliar with the debate on practice-dependence with the insight necessary to fully comprehend the different contributions to this volume, which engage with some of the latest developments in the literature. Second, it is to make readers already well versed in practice-dependence more sensible to the substantive nature of this view and to provide them with a workable typology of the different forms of practice-dependence. In section I, I start by further elaborating the three-fold distinction between *metaphysical*, *relational* and *practice-dependent* conceptions of justice. I continue, in section II, by showing that the two main objections raised against the latter are reducible to a fundamental concern for the way in which practice-dependence accounts for the normativity of the principles of justice. In section III, I rely on this basis to draw a line between two types of practice-dependence according to their positioning on the normativity question. *Cultural conventionalism*, on the one hand, holds that the set of cultural practices shared by the members of a community inevitably shapes their pre-theoretical judgements about justice and should therefore exert a normative influence in defining distributive obligations. *Institutionalism*, on the other hand, maintains that the content of a conception of justice depends on a consideration for the structure and point of already existing social and political institutions. I conclude the typology by differentiating, in section IV, between three forms of institutionalism according to how they regard the *institutional fact*, namely the fact that individuals are always already placed in a state of submission to an existing institution. While *de facto* institutionalism describes this fact simply as a *factual reality* that imposes itself upon human beings, *de jure* institutionalism regards it as a *practical necessity* that, though unavoidable from a pragmatic point of view, nevertheless stands in need of justification to each and every individual

5 - *Ibid.*, 400.

6 - Andrea Sangiovanni, "Justice and the Priority of Politics to Morality", *Journal of Political Philosophy*, 16/2 (2008), 137—164.

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in virtue of their possessing the inalienable right to freedom of choice. Finally, moral institutionalism conceives of the institutional fact as a *moral duty,* that is, as the necessary fulfillment of a formal condition without which one cannot even conceive of a state of affairs in which everyone's freedom is respected.

I. Metaphysical, relational and practice-dependent conceptions of justice

Distributive justice is traditionally conceived as a virtue proper to human beings insofar as they possess certain metaphysical properties. During Greek antiquity, it was regarded as one of the cardinal virtues of the human soul and, with the emergence of liberal modernity, it has come to be described as one of human beings' basic moral powers. In both accounts, justice is grounded in a conception of the person as naturally inclined, in virtue of some metaphysical features, to give everyone his fair share. This traditional approach has recently been challenged by a view that does not regard justice as a moral virtue among others, but rather as a specifically political value arising among individuals who stand in a special, practice-mediated relationship with each other. This opposition, between what I have called the *metaphysical* and *relational* conceptions of justice, differs from the well-known Rawlsian distinction between *comprehensive* and *political* views. In Rawls' account, the function of a political conception of justice is only to provide a solution to the problem of reasonable pluralism, namely the legitimate coexistence of a plurality of reasonable comprehensive doctrines among citizens living under the free institutions of a constitutional democratic regime. It requires citizens who take part in the political debate to exclusively rely on "properly public reasons" when advocating the specific principles and policies they consider just, that is to say on reasons that other citizens can share independently of their commitment to a particular comprehensive doctrine. [7] In this respect, the political conception is said to "stand free" of any reference to a particular comprehensive view, but it is crucial that citizens who endorse this conception do not renounce their moral and religious convictions. Justice remains for them a value grounded in a particular worldview, a view which, insofar as it is reasonable, provides them with good reason to endorse the political conception in the specific circumstances of a society characterised by the fact of pluralism. [8]

The function of the relational conception is different. It is to express an alternative way of conceiving justice independently of any metaphysical commitment. Relationalists thus deny that justice is a moral virtue whose origin can be traced back to a comprehensive view of the world and a metaphysical account of the person. They also deny the further claim that justice emerges

7 - John Rawls, *Collected Papers*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), 584.

8 - *Ibid.*, 615. See also John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 12.

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from the conjunction of human nature with "the requirements of our living together in society". [9] This characterization of justice as the enabling condition of the coexistence of human beings in society, that is, as the enabling condition of social cooperation regarded as the natural end of individuals, is characteristic of the metaphysical conception. The necessity to "durably unite men within cities", for the sake of their own preservation, was already regarded, during Greek antiquity, as the reason why the Gods granted human beings the virtue of justice. [10] By contrast, the distinctive insight of the relational view is to deny that justice is a value that exists prior to society itself and that emerges in relation to an *a priori* final end of human beings. Justice is said to arise instead from a special relationship in which certain individuals stand, as a value necessary for its regulation.

Now simply saying that justice holds among individuals who stand in a special relationship to each other does not make it clear that the relationship in question has to hold between individuals that are engaged together in some sort of regulated social activity. Mathias Risse, who has been among the firsts to account for the emergence of the relational view, thus immediately specifies that "paradigmatic relationalists [...] base the applicability of principles of justice [...] on shared political structures". [11] This implies that the basis from which the concept of justice arises is not the existence of a special relationship as such, but more fundamentally the pre-existence of a social practice that mediates the relationship in which individuals stand. From there, it becomes easier to understand why a majority of relationalist thinkers also subscribe to practice-dependence, understood as the additional claim that the content of the principles of justice are derived from an interpretation of the structure and point of the practice they are intended to regulate. Relationalism is a view about the nature of justice only. It says that when the relationship between individuals is direct and inter-personal in nature, it should be regulated by ethical values. However, when the relationship is mediated by a social practice, it should be regulated instead by justice understood as a strictly political value. For, in a socially mediated relationship, individuals do not get together on their own initiative in order to realize some private end that they happen to share in common. Rather, they are brought together in view of realizing some common social end that is most often imposed on them. So it makes at least intuitive sense that the structure and point of the practice in question be regarded as normatively relevant when determining the content of the principles of justice.

A last point has to be clarified in order to prevent confusion as to the kind of practices that matter normatively with respect to justice. Referring with Risse to "shared political structures" suggests that the normatively relevant practices

9 - *Ibid.*, xxvi.

10 - See for instance Plato's account of the myth of Prometheus, in *Protagoras*, 320a—321c.

11 - Mathias Risse, *On Global Justice* (Princeton: Princeton University Press, 2012), chap. 1, §3, 18. See also Andrea Sangiovanni, "Global Justice, Reciprocity, and the State", *Philosophy & Public Affairs*, 35/1 (2007), 3—39; and Laura Valentini, *Justice in a Globalized World. A Normative Framework* (Oxford: Oxford University Press, 2011), 92 ff.

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are necessarily political in nature, whereas it is rather the basic practices that enable life in community that should be here regarded as meaningful. These might not be straightforwardly political. Though most practice theorists maintain that obligations of justice hold when social and political institutions impose on citizens a pattern of interactions that interferes with their basic freedom of choice, some rather base the applicability of the principles of justice on shared cultural practices, insofar as the moral significance of social goods for individuals depends on the cultural practices that form the context of their distribution. In section III, I will examine in more detail these two types of practice-dependence views, respectively called *institutionalism* and *cultural conventionalism*. But in order to best prepare for this task, I first would like to say a word about what I consider to be the fundamental objection to the practice-dependence approach.

II. Normative concern and practice-dependence

Two main objections have been raised against the practice-dependence approach. The first, which I call the *indeterminacy objection*, is that there exists very different, though equally consistent ways to make sense of a given practice. Thus political theorists may agree on the description of the practice while disagreeing about the interpretation of its underlying values. In that case they will put forward diverging conceptions of justice from which there seems to be no justifiable way to choose. The fact that they agree, for example, to describe domestic society as a fair system of cooperation among equals does not imply that they agree on the meaning of the value of fairness central to this definition. To use a well-know Rawlsian distinction, we could say that they share the same *concept*, though not the same *conception* of the practice in question. [12] There might be no way, for example, to determine which of Michael Walzer's decentralized form of socialism or Robert Nozick's possessive libertarianism (assuming that these are two equally consistent and coherent political doctrines) best matches the fundamental beliefs of American citizens about the nature and point of their domestic institutions. [13] Practice theorists must therefore not only provide a consensual description of the practice, as having a specific structure and point. They also have to justify their interpretation of the values that the practice is supposed to instantiate.

Confronted with the problem of conflicting interpretations, Michael Walzer argues that the only way to sanction the validity of a given interpretation is to make sure that the participants in the practice regard it as accurately representing their activity in common. It is indeed necessary, insofar as the interpretation is intended for those who participate in the practice, that they all

12 - John Rawls, *A Theory of Justice*, 5 and 9. See also Andrea Sangiovanni, "Justice and The Priority of Politics over Morality", 2008, 164.

13 - I borrow this example from David Miller, "Introduction", in *Pluralism, Justice, and Equality*, ed. David Miller and Michael Walzer (Oxford: Oxford University Press, 1995), 8—9.

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"recognize themselves in it". [14] But self-identification is not sufficient to regard an interpretation as objectively valid. One must also explain why the considered convictions of individuals about the point and purpose of the practice in which they participate should be regarded as relevant in fixing the objectivity of a particular interpretation. To satisfactorily answer the indeterminacy objection and the problem of conflicting interpretations therefore requires a full-blown account of social and political objectivity. This account will explore the tripartite relationship between the reality of the practice, the subjective beliefs of individuals, and the interpretation supposed to serve as a basis for elaborating the most appropriate conception of justice for its regulation. One who does not provide such an account can never completely dispel the doubt that there might be a better alternative to the interpretation he favours.

A second common objection to practice-dependence is that making the content of a conception of justice dependent upon the interpretation of an existing practice *ipso facto* limits the critical potential of this conception with respect to that practice. Charles Beitz, for example, admits in this vein that, "if a theory begins with the practice as we find it, it is hard to see how the theory can be critical". [15] Along the same lines, Valentini claims that "[t]here is indeed no way in which interpreting the practices of, say, a caste society will lead to defend a liberal egalitarian account of justice". [16] The practice-dependence approach to justice would, in other words, suffer a conservative bias toward the *status quo*. [17] This is not to deny any critical potential to this approach, which obviously does not have to take the details of a given practice as beyond criticism. The participants in the practice may well judge that some of its norms are ill-suited to advance its aims and advocate accordingly a modification of its structure. What is at stake in the *status quo* objection is only the capacity of the practice-dependence approach for *radical* criticism, that is to say its capacity to put into question the very purpose and point of the practice.

The most immediate answer to this objection is that such limitation should not be regarded as a cause for concern. For, by contrast with a metaphysical view, a practice-dependent conception of justice does not pretend to tell us what justice is, by reference to an independent ideal of justice, but only to spell out the most appropriate principles in relation to a specific interpretation of the point and structure of a given practice – typically, the point and structure of social cooperation. The role of a practice-dependent conception of justice is only, to use Rawls' words, to "enable all members of society to make mutually acceptable to one another their shared institutions and basic

14 - Michael Walzer, *Interpretation and Social Criticism* (Cambridge: MA, Harvard University Press, 1987), 28, n. 22.

15 - Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), 105.

16 - Laura Valentini, "Global Justice and Practice-Dependence", 408.

17 - See also Kok-Chor Tan, *Justice without Borders: Cosmopolitanism, Nationalism*, and Patriotism (Cambridge: Cambridge University Press, 2004) 59; and Andrea Sangiovanni, "Justice and The Priority of Politics to Morality", *Journal of Political Philosophy,* 16/2 (2008), 161.

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arrangements”. [18] It fulfils this role by identifying on the principles that are the most reasonable for citizens given “how they conceive of their persons and construe the general features of social cooperation among persons so regarded”. [19] Now it is crucial that one cannot justify such a redefinition of the role traditionally ascribed to political theory without drawing on a redefinition of the notion of political objectivity analogous to that offered by Rawls in *Political Liberalism*.

Remember that, as soon as 1985, Rawls abandons the traditional, epistemological approach defining objectivity in terms of truth of a specific comprehensive doctrine in favour of a practical account in which objective principles are supported by an overlapping consensus of different comprehensive doctrines over a certain idea of social cooperation deemed as reasonable. This implies a restriction in the scope of objectivity, which is no more regarded as holding absolutely, in all circumstances, but only among individuals sharing the same interpretation of the purpose and point of social cooperation. Only when objectivity is so conceived, as having a restricted scope, can one justify a redefinition of the traditional role of political theory. Instead of spelling out an ideal of justice having absolute objective validity, political theory merely offers the most reasonable conception of justice for those sharing the same interpretation of the nature of the practice under consideration. Of course, the conception of social and political objectivity that the practice theorists may choose to endorse need not to follow the lines of Rawls’s account. However, it must necessarily incorporate an analogous restriction of the scope of political objectivity if it is to support a modification in the role of political theory and thus answer the *status quo* objection.

Finally, it appears that both the indeterminacy objection and the *status quo* objection are reducible to a more fundamental concern about the account of political objectivity that underlies the practice-dependence view. Beitz echoes this concern when he notes that a practice-dependent theory that understands statements about justice as “nothing more than complicated references to sociological facts” cannot provide a satisfactory account of the normativity attached to the principles of justice. A principle is normative when it provides a valid reason for action, but a practice-dependent argument in support of a particular principle of justice seems to be “simply shorthand for a complex description of regularities in behavior and belief observed among the members of some group”. [20] This argument does not really tell us why these regularities constitute valid reasons for action.

To better comprehend the nature of this concern, consider more closely the kind of interpretative work required by the practice-dependence approach, namely, the interpretation of the structure and point of a given practice. The

18 - John Rawls, *Collected Papers*, 305; see also *Political Liberalism*, 368.

19 - John Rawls, *Collected Papers*, 305.

20 - Charles Beitz, *The Idea of Human Rights*, 104 who partly relies on Joseph Raz, *Practical Reason and Norms* (Princeton: Princeton University Press, 1990), 57—58.

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theorist starts by observing the behavior of the participants in the practice and might find that, in certain circumstances, they tend to perform certain actions rather than others. He might also find that they perform these actions because they *believe* that there exists a norm prescribing that anyone placed in these particular circumstances should perform these actions. But how can he conclude from this belief to the existence of a normative principle contributing to define the structure and point of the practice? At first sight, the ground for this belief is purely *subjective*, and the practice theorist cannot conclude from it to the existence of a norm having *objective* validity. All he can say is that a group of individuals regards this norm as objective.

The fundamental concern that underlies the two main objections to practice-dependence therefore relates to the process of objectivation through which what is initially nothing more than an observed regularity in behavior is made an objective norm tolerating no unjustified exception. [21] Such process is questionable and practice-dependent theories must pay special attention to account for what they regard as the source of objectivity. In the following section, I present in more detail the two main types of practice-dependence approach with a particular emphasis on the specific account of objectivity that underlies them.

III. Two forms of practice-dependence

Cultural conventionalism

Cultural conventionalism rests on the conviction that the moral identity of individuals is at least partly constituted by their membership in a community having distinct cultural practices. Authors such as Alasdair McIntyre, Michael Walzer, and David Miller share in this epistemological commitment to the "moral resources of the culture". [22] They consider that the everyday involvement of a group of individuals in shared cultural practices inevitably shapes their pre-theoretical judgements about right and wrong, the moral categories through which they assess the world, and their moral aspirations. This may not be a very controversial position, but the specific insight of cultural conventionalism is to bridge the gap between the mere acknowledgment of the normative potential of culture for morality in general and the more targeted claim that culture should have a decisive influence on questions of distributive justice.

Among the advocates of cultural conventionalism, Walzer is probably the one who more convincingly takes up this challenge by drawing on the notion of *communal autonomy*. In his view, a political community is a group of individuals who share, in addition to a special commitment to each other, a

21 - Saladin Meckled-Garcia, "The Practice-Dependance Red Herring and Better Reasons for Restricting the Scope of Justice", 105—106.

22 - Alasdair McIntyre, *After Virtue. A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1981), 252. See also David Miller, "The Ethical Significance of Nationality", *Ethics*, 98/4 (1988), 647—662, and Michael Walzer, *Interpretation and Social Criticism*.

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common way of life with distinct moral and cultural practices forged over generations. This way of life is not a mere historical artefact passively inherited from the past, but a present reality that rests on an implicit contract binding "the living, the dead, and those who are yet to be born", a contract whose terms have to be constantly and actively supported through appropriate social and political practices. The notion of communal autonomy expresses this necessary relationship of appropriateness between a certain way of life, as informed by a cultural substrate, and the form of the social and political practices regulating the community. A political community is locally or communally autonomous when the principles that regulate its social and political practices can be regarded by citizens as adequately representing the basic moral and cultural values that shape their identity as a group rather than as proceeding from an independent political morality.

Communal autonomy, regarded from a political point of view, leads to a specific understanding of the right to self-determination as the right of a group of individuals to express a distinct social and cultural heritage through self-authorized political practices. In Walzer's own words, the notion of communal autonomy supports "the rights of contemporary men and women to live as members of a historic community and to express their inherited culture through political forms worked out among themselves".[23] To respect this understanding of the right to political self-determination would create a world of *diversity* in which each community is free to determine, in light of its own distinctive culture, the principles of justice that are to govern its social and political institutions. This would be a world in which a multiplicity of cultures finds expression in a multiplicity of equally valuable schemes of social justice. Cooperation at a global level would be limited to making sure that every community respects the basic human rights of its members and does not infringe on the equal right of others to pursue their own form of justice.[24] Crucially, there would be no attempt to bring *uniformity* by promoting a cosmopolitan conception of justice whose *a priori* nature would impose itself to the contingency of different cultures.[25] The ascription of a key role to moral and cultural practices in the justification of the content of justice thus naturally leads the advocates of cultural conventionalism to endorse a statist position in the debates on global justice.

Now the strength of cultural conventionalism, by contrast with other statist accounts, lies in its being supported by a detailed account of social and political objectivity. To see this, consider Walzer's theory of distributive justice, which

23 - Michael Walzer, "The Moral Standing of States: A Response to Four Critics", *Philosophy & Public Affairs*, 9/3 (1980), 211. See also Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), 90 and 104.

24 - David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), 83—84, n. 22.

25 - On how the opposition of these two competing visions of the world continues to underpin the debates of global justice despite recent attempts to overcome it, see David Miller, "Caney's 'International Distributive Justice': A Response", *Political Studies*, 50 (2002), 974—977.

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accounts for the allocation of goods and services in society in terms of spheres of social meanings. This theory must explain why social meanings matter normatively when it comes to questions of distributive justice. It must explain what makes social meanings *objective* in the relevant sense. To that end, Walzer does not rely on the traditional philosophical approach, which accounts for objectivity in general in terms of *a priori* truth, but rather on a commonsensical approach limited to these objects to which we attribute social significance. It is excluded, on this approach, that the specific kind of objectivity attached to objects of social significance lies entirely on the side of the object, without regards for the subject's specificity. It is also excluded that objectivity essentially depends on the particular nature of the subject's faculties of perception. To be sure, the actual nature of the object and the subjective nature of perception play a *certain* role in fixing objectivity, but it is more decisive, in this view, that the subject always comes to objects of social significance with certain cognitive interests and certain mental categories that influence what he perceives as objective. As Walzer explains, "what we see, recognize and understand depends [...] on what we are looking for, our cognitive *concerns*, and the way we have of describing what we find, our conceptual *schemes*". [26]

The distinctively conventionalist flavor of this account is to maintain that the cognitive concerns that drive the subject's interest in a specific object, and the conceptual schemes through which he grasps this object, are themselves shaped by the specific cultural practices of the community to which he belongs. Accordingly, the subject and the other members of his community share the same set of cognitive concerns and conceptual schemes. They are consequently able to see, recognize and understand the same thing when considering the same object. This group of similarly situated people forms what Walzer calls "the normal subject", namely a group of individuals whose convergence of interests and viewpoints makes it possible to objectively determine the social meaning of an object. In this account, a perception is objective when it is shared by a group of subjects that constitutes the normal subject and the scope of objectivity is consequently limited to the subjects that comprise the group.

Walzer admits that the complex processes that lead to the emergence of a normal subject capable of fixing the objectivity of an object remain, overall, "mysterious". [27] All we can say is that the objective determination of a social meaning is the result of a social construction that holds "only for those men and women who join in the construction or acknowledge its results". [28] This limitation in the scope of objectivity is not, however, for the political theorist to regret, for it allows him to conceive of his work in isolation from moral theory. Instead of relying on a general and necessarily controversial account of moral objectivity, he can draw on an account limited to objects of social

26 - Michael Walzer, "Objectivity and Social Meaning", in *The Quality of Life*, ed. Martha Nussbaum and Amartya Sen (Oxford: Clarendon Press, 1993), 165.

27 - *Ibid.*, 167.

28 - *Ibid.*, 168.

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and political significance, an account which simply acknowledges that the shared cultural practices that structure the everyday life of a group of individuals over long periods of time creates genuinely moral values. These values comprise what might be called a “social morality” from which political theorists should be able to extract a consistent conception of justice. In this account, the purpose of political theorists is not “invention *de novo*”, but rather “to construct an account or a model of some existing morality that gives us a clear and comprehensive view of the critical force of its own principles, without the intervening confusion of prejudice or self-interest”. [29]

This is not to deny that it may be possible to invent or discover principles of justice purely *a priori*, independently of any moral culture. However, one might legitimately wonder why such abstract principles should be regarded as having superior normative value and as applying to people whose everyday practices are already infused with a distinct moral culture. “Why, Walzer asks, should newly-invented principles govern the lives of people who already share a moral culture and speak a natural language?”. [30] Newly-discovered principles might have a heuristic value and define a certain “way of life”, but they cannot embody a “way of living” that goes beyond a simple *modus vivendi* and expresses substantive moral values. The main strength of cultural conventionalism lies in that it provides individuals with an *intuitively plausible* account of why certain principles of justice rather than others are to regulate their social interactions. These principles appear intuitively plausible to individuals insofar as they find echo in their deepest moral convictions forged over time through involvement in common cultural practices. Though individuals may be unable to express these convictions in an articulate conception of justice, they are at least able to intuitively recognize, among different principles of justice, those that are in accordance with them. These principles strike a chord in them, as it were, and directly speak to their most intimate moral convictions.

Institutionalism

Having briefly described cultural conventionalism and the specific mode of objectivity attached to it, we are now in a position to contrast it with a second form of practice dependence, which focuses on institutions rather than cultural practices. Institutionalism grants cultural conventionalism that the cultural substrate, insofar as it contributes to shaping the moral identity of the members of the community, should have a *certain* influence on the structure and form of its social and political practices. It denies, however, that this influence should be *decisive* and points instead at another normatively relevant factor, totally absent from the conventionalist account, namely a concern for the structure and point of already existing social and political institutions. It is by considering how these institutions are structured and what function they fulfil,

29 - Michael Walzer, *Interpretation and Social Criticism*, 15.

30 - *Ibid.*, 14.

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institutionalism argues, that we can identify the principles of justice appropriate for their regulation.

This divergence with cultural conventionalism constitutes a reversal of the normative relationship between the daily communal interactions of individuals and social and political practices. It is no longer the particular way in which individuals interact within the community that gives rise, through the notion of a shared moral and cultural substrate, to social and political practices having a related form and structure. It is rather the way in which existing institutions are structured, according to a specific purpose, that creates "a set of background conditions which alters the way in which people interact". [31] The normatively relevant factor, in this instance, is the influence of existing institutions over the interactions of individuals within the community. Now, just as cultural conventionalism with respect to cultural practices, institutionalism has to explain why existing social and political practices matter normatively when it comes to questions of distributive justice; why these practices should be regarded as "shaping the reasons we might have" to endorse certain principles of justice rather than others. [32] It has to explain, in other words, what makes existing practices *objective* in the relevant sense. Objectivity here can no longer lie in the convergence, within a group of individuals, of certain cognitive concerns and conceptual schemes shaped by common cultural practices. Another factor must be brought to light that accounts for the decisive influence of existing institutions in fixing social and political objectivity.

Rawls' political constructivism can be regarded as incorporating such an account. It is well know that, in *Political Liberalism*, Rawls rejects the traditional philosophical approach to objectivity in favour of a new, practical account that does not sanction the truth of a specific comprehensive view, but rather the capacity of certain principles to gain support from individuals holding diverging comprehensive doctrines. Objectivity, in this account, is supported by an overlapping consensus of comprehensive views over a shared conception of social cooperation recognized by all as reasonable. The notion of truth is set aside to draw instead on the idea of a reasonable conception of social cooperation regarded as the only suitable criterion for fixing the objectivity of political principles. [33] As Rawls puts it, "to say that a political conviction is objective is to say that there are reasons, specified by a reasonable and mutually recognizable political conception [...], sufficient to convince all reasonable persons that it is reasonable". [34]

Just as Walzer's account in terms of "normal subject", this new rendering of objectivity has deep consequences for the nature and scope of justification. The idea of a shared reasonable conception of social cooperation, as opposed

31 - Andrea Sangiovanni, "Justice and the Priority of Politics to Morality", 11.

32 - *Ibid.*, 2 and 11.

33 - John Rawls, *Political Liberalism*, 89—125. See also *Collected Papers*, 356.

34 - John Rawls, *Political Liberalism*, 119.

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to the concept of truth, does not provide a transcendent criterion, but only a public foundation for the justification of political principles. The scope of political justification is therefore limited to people sharing the same public political culture, insofar as this culture incorporates both a particular conception of society and a conception of the person's role and status as a member of this society. It also implies that the principles of justice are not regarded as true *in themselves*, but rather as "the principles most reasonable *for us*, given our conception of persons as free and equal, and full cooperating members of a democratic society".[35] The question of the source of political objectivity thus becomes the question of the source of these two public conceptions of social cooperation. Rawls maintains that every citizen has a certain understanding of the institutions that comprise the basic structure of the society in which he lives, as well as an understanding of the role he is meant to play within them.[36] This is true of those who take a direct part in the functioning of these institutions, such as politicians, officials and judges, but also of ordinary citizens who gain from civic education and everyday involvement in public debates an intuitive understanding of both the basic function of society and their basic rights and liberties. This implicit understanding translates into a particular conception of social cooperation that lies at the heart of the society's public political culture. Within Western democratic societies, for example, the way in which ordinary citizens regard the liberal society and their place within it shapes the conception of society as a fair system of cooperation between equals, a conception Rawls himself describes as the "central organizing idea" of justice as fairness.[37]

To make an institutionalist reading of Rawls' political constructivism means to regard this particular conception of society as an interpretation of the structure and point of the current practice of liberal democracy in Western societies. Whoever follows Rawls in making this conception the source of political objectivity can then be seen, in line with this reading, as acknowledging the normative relevance of existing institutions in the determination of the most appropriate conception of justice. The recent surge in interest in the institutionalist approach among political theorists has been partly triggered by this reading of political constructivism, and partly by a reading that goes one step further by ascribing an institutionalist dimension to Rawlsian constructivism in general, even before its political recasting.[38] Aaron James, in particular, maintains that, in *A Theory of Justice* already, Rawls proceeds to an interpretation of existing social and political practices *before* setting up the original position. This preliminary and unspoken interpretative work consists in determining the purpose and identifying the participants of the liberal democracy as practiced in contemporary Western countries. Only with these elements in

35 - John Rawls, *Collected Papers*, 340. My emphasis.

36 - John Rawls, *Justice as Fairness. A Restatement*, ed. Erin Kelly (Harvard: Harvard University Press, 2001), 5—6; John Rawls, *Political Liberalism*, 13—14.

37 - John Rawls, *Political Liberalism*, 9.

38 - Aaron James, "Constructing Justice for Existing Practices: Rawls and the *Status Quo*", *Philosophy & Public Affairs*, 33/3 (2005), 281—316.

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hand would Rawls be able to design a suitable original position intended to spell out the principles that the identified agents, when situated in favourable conditions, would choose to regulate the practice under consideration. Though James' analysis concerns Rawlsian constructivism in general, one does not need to endorse it to acknowledge at least the institutionalist dimension of political constructivism.

Beyond Rawls' case, the decisive question for us is whether institutionalism in general enjoys the same kind of intuitive plausibility that makes the strength of cultural conventionalism as an approach in political theory. We have seen that, in cultural conventionalism, intuitive plausibility arises from the match between the principles of justice and the set of intimate moral convictions forged over time by individuals through common cultural practices. In institutionalism, plausibility rather emerges from the match of the principles of justice with a conception of social cooperation integral to the public political culture shared by a group of individuals. But one cannot expect ordinary citizens to entertain the same degree of familiarity with the moral intuitions that underlie this public conception as with their most intimate moral convictions. Whereas the latter are forged from early childhood through cultural practices, the former are progressively and sometimes only imperfectly acquired through civic education, public information, and everyday involvement in social and political practices. Institutionalism must therefore compensate for this deficit of plausibility by offering a comprehensive account of the reasons why the public conceptions of social cooperation, and the moral intuitions underlying them, should be regarded as morally relevant when it comes to determining the content of the principles of justice.

The specificity of institutionalism

In order to get a better grasp on what distinguishes institutionalism from cultural conventionalism, it is helpful to assess these two positions in light of the more familiar distinction between universalism and contextualism.[39] Whereas it is clear that practice-independence theories all fall decisively on the universalist side, insofar as they consider that individuals possess an *a priori* moral knowledge that can be used to formulate invariant basic principles of justice, it is less straightforward whether all practice-dependence theories fall on the contextualist side. This can only be elucidated by examining in more detail the respective positioning of cultural conventionalism and institutionalism *vis-à-vis* contextualism.

Cultural conventionalism holds that our knowledge of justice originates in, and remains dependent on, the *context* of distribution, namely the different cultural practices constitutive of a community's particular way of living. One

39 - On the terms of the opposition of universalism and contextualism as two competing approaches to justice, see David Miller, "Two Way to Think about Justice", *Politics, Philosophy & Economics*, 1/1 (2002), 5—28; and Thomas Pogge, "Moral Universalism and Global Economic Justice", *Politics, Philosophy & Economics*, 1/1 (2002), 29—58.

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has to interpret this context in a certain way in order to decide what principles of justice are the most appropriate for governing the social practices of the community in question. [40] The main challenge then consists in explaining *why* certain principles are more appropriate to certain practices than others. The explanation cannot appeal to more fundamental, *a priori* principles from which the practice-specific principles would be derived, or practice-dependence would ultimately collapse into practice-independence. The only way to justify the appropriateness of a given principle is to resort to the idea that individuals develop, through their daily participation in moral and cultural practices, pre-theoretical judgements about justice that should somehow match with the principles of justice in reflective equilibrium. This is the very meaning of the idea of communal autonomy, which clearly places cultural conventionalism on the contextualist side.

The situation is more ambiguous regarding the institutionalist approach, which seems to stand on a middle-ground between universalism and contextualism. [41] Institutionalism is not a full-blown universalism insofar as it does not pretend to capture the essence of justice in general, but only to account for a particular aspect of justice relevant to practices of a certain type. Some may argue that the mere fact of holding that certain principles hold for all practices of a certain type is already a form of universalism but, in that case, cultural conventionalism, which identifies certain principles of justice as appropriate to certain cultural substrates, would also qualify as universalism. Institutionalism is not a full-blown contextualism either, because it can appeal to *a priori* principles when accounting for the specificity of the practices it regards as relevant to justice. In fact, what makes institutionalism a *distinct* approach in political theory and prevents it from collapsing into both universalism and contextualism precisely is the account it incorporates of the special relevance of the practice under consideration. Institutionalist thinkers may have diverging views as to the kind of practices likely to trigger special obligations of justice, but they all satisfy the basic requirement of accounting for the specificity of the practices that they regard as creating special obligations of justice. This account must explain what is so special about these practices that it justifies regarding them as normatively relevant when it comes to matters of justice – it must clarify what justifies that people do not simply rely on their pre-theoretical judgement about right and wrong when dealing with institutional questions.

To illustrate this point, let's briefly come back to justice as fairness and Rawls' claim that it applies to the basic structure of society only. The reason why justice should be limited to the basic structure, defined as the set of social and political institutions that regulate the allocation of goods and services, is that it has specially deep and pervasive social and psychological effects on

40 - David Miller, "Two Way to Think about Justice", 11.

41 - On the possibility of holding a middle-ground, see Thomas Pogge, "Moral Universalism and Global Economic Justice", 39; David Miller, "Two Way to Think about Justice", 18.

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individuals. Not only does the basic structure shape their moral identity, namely their "character", their "aims" and "the kind of person they aspire to be", but it also limits their opportunities to realize their character, meet their aims and fulfil their aspirations.[42] Admittedly, one does not have to prove that the basic structure of society has such effects on individuals. It can simply be acknowledged as a fact of "commonsense political sociology".[43] What needs to be strongly justified, however, is the claim that the basic structure, insofar as it has these deep and pervasive effects on individuals, triggers special obligations of justice. Unfortunately, this justification is missing from Rawls' work, who only suggests that "taking seriously" the idea of society and the idea of the person inherited from our public political culture "implies" not to let inequalities grow within society beyond a reasonable extent.[44]

In absence of a more detailed account, questions have arisen on whether the global order, which also has undeniable social and psychological effects on individuals, would qualify as a global basic structure and consequently give rise to global principles of justice.[45] These questions have increased institutionalist thinkers' awareness of the necessity to provide a comprehensive account of that which, within the kind of practice they consider relevant, triggers the need for justice. The question remains however open of whether such an account can be provided, that would satisfactorily circumscribe justice in a particular practice. David Miller, for example, regards this possibility as "very doubtful" as it would suppose that individuals not only prove able to formally distinguish between moral and political questions, but more decisively that they resort to different moral categories when assessing them.[46] Empirical studies tend to show, on the contrary, that people's moral thinking does not present the kind of discontinuity that would make it possible to isolate a specifically *political* morality from everyday morality.[47] That is why Miller and other cultural conventionalists remains firmly committed to the epistemological role of people's ordinary judgements about right and wrong in considerations of justice.

Overcoming this common-sense commitment implies to provide a *general* account of why the mediation of a practice in the relation in which a group of individuals stands should shape the reasons they have to endorse a certain

42 - John Rawls, *A Theory of Justice*, 78—85; *Political Liberalism*, 58; *Justice as Fairness*, 10.

43 - John Rawls, *Political Liberalism*, 193.

44 - *Ibid.*, 56, see also 39.

45 - Simon Caney, "The Global Basic Structure: Its Nature and Moral Relevance", paper delivered at the 2004 Annual Meeting of the American Political Science Association (September 2004). Miriam Ronzoni, "Two Concepts of the Basic Structure, and Their Relevance to Global Justice", *Global Justice: Theory and Practices*, 1 (2007), 68—85; Miriam Ronzoni, "The Global Order: A Case of Background Injustice? A Practice-Dependent Account", *Philosophy & Public Affairs*, 37/3 (2009), 229—256.

46 - David Miller, "Two Ways to Think about Justice", 18.

47 - David Miller, "Distributive Justice: What the People Think", *Ethics*, 102/3 (1992), 555—593; David Miller, *Principles of Social Justice* (Cambridge: Cambridge University Press, 1999), 43—60.

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conception of justice. Unfortunately, such an account is still missing from the literature.[48] The advocates of institutionalism seem to believe that it falls on each particular institutionalist view to account in its own way for the specificity of the practices it takes to be relevant *vis-à-vis* questions of justice. But if institutionalism is to count as a self-standing approach in political theory, it must be possible to uncover a common ground in the explanation of *why* at least certain kinds of practices are relevant to justice. Missing this, one cannot defend this approach as constituting a theoretically sound and potentially fruitful alternative to classical, practice-independence views on the one hand, and cultural conventionalism, on the other.[49]

The beginning of an insight into this crucial question might be found in Sangiovanni's suggestion that the first function of political institutions is to solve what he calls the "primary political problem", namely securing among human beings the basic "conditions of order, trust, [...] and security" necessary to "the further development and protection of capabilities for developing and acting on a plan of life".[50] Institutions so understood are practices intended to overcome violence potentially resulting from political disagreement and thereby enable the individual fulfillment of personal autonomy. In the next section, I will try to flesh out this postulated relationship between institutionalism and a fundamental concern for the protection of autonomy through a critical analysis of the most influential institutionalist accounts that have so far been offered, namely those of Michael Blake, Thomas Nagel, and Andrea Sangiovanni.

IV. Two forms of institutionalism, plus a third one

Nonvoluntarism and reciprocity-based institutionalism

In line with the liberal tradition, Blake holds that state coercion is justified only when it creates favourable conditions for the fulfilment of personal autonomy understood as the freedom of every individual to pursue a self-chosen conception of the good.[51] This specifically liberal concern for the protection of personal autonomy implies that state coercion does not have to be justified to society as a whole, but rather to "each and every one of those who are coerced".[52] Now the only way to obtain consent from every citizen, including the worst off, is to introduce a consideration for fairness into the legal system coercively enforced. For the least advantaged would only consent

48 - We find no mention of such account in Sangiovanni, "Justice and the Priority of Politics to Morality", or Valentini, "Global Justice and Practice-Dependence".

49 - Andrea Sangiovanni, "Global Justice, Reciprocity and the State", 36; Michael Blake, "Distributive Justice, State Coercion, and Autonomy", *Philosophy & Public Affairs*, 30/3 (2001), 261—264.

50 - Andrea Sangiovanni, "Justice and the Priority of Politics to Morality", 157.

51 - Michael Blake, "Distributive Justice, State Coercion, and Autonomy", 267.

52 - *Ibid.*, 282.

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to being subjected to a determinate system of norms if they are convinced not only that this system is beneficial to them, but that no other system would make them better off. This is how a relation emerges, in this account, between state coercion and egalitarian justice. Egalitarian justice, understood as expressing a special consideration for fairness, is a necessary feature of any legal system legitimately enforceable by a liberal state.

This liberal account implies that not all types of coercive practices give rise to egalitarian obligations. Only those which threaten the basic conditions of personal autonomy stand in need of a special justification directed at each and every individual, and must therefore incorporate a consideration for fairness. One might think, in particular, of international institutions, which are undeniably coercive in their practices but do not trigger special duties of justice. The case of the World Trade Organization is especially telling. The WTO undeniably acts coercively when threatening the states whose national legislation is not compliant with its general agreements to restrict their access to certain foreign markets. The members of the WTO cannot be said, however, to stand in a relationship that justifies the rise of special duties of egalitarian justice. What gives rise to such duties, Blake specifies, is only *immediate coercion* over the private life of individuals through criminal and private law, because these two branches of law contribute to securing the basic conditions of personal autonomy. While criminal law protects individuals against threats and physical aggressions, private law protects them from offence against property. [53] International institutions do not wield comparable means of direct coercion over individuals. It remains the prerogative of states to exert control over the body and assets of their citizens, a prerogative that is only justified in light of their special function of securing the conditions of personal autonomy.

In parallel with this account in terms of respect for personal autonomy, Nagel emphasizes another, complementary aspect of the relationship in which citizens stand to the modern democratic state. If the fellow citizens of a state are subject to a coercively imposed legal system with which they individually have no choice but comply, they are also regarded as the "putative joint authors" of those norms, which can therefore be said to be enforced in their name. Fellow citizens are, in other words, at the same time *subject to* and *author of* the legal system to which they comply and which they support in common. Accordingly, the state should not be conceived as a purely coercive entity, but also as that citizens *voluntarily* and *actively* engage in supporting the legal system through which they are coerced. [54] This voluntary engagement is distinct both from the willingness to be and remain a member of society, for most citizens have no choice in this regard, and from the *regular* type of engagement involved in subscription to voluntary association. Voluntary engagement in a nonvoluntary form of association such as the state requires a *special* engagement

53 - *Ibid.*, 281.

54 - Thomas Nagel, "The Problem of Global Justice", *Philosophy & Public Affairs*, 33/2 (2005), 128—129.

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of the will whose exact nature, in the absence of further specifications from Nagel, has been interpreted as a form of "tacit consent". [55] By acknowledging the state's claims as being made in their name, citizens would tacitly consent to give up all their prior entitlements as well as their right to complain against any future disposition they deem unjust.

Blake's *coercion* view, in which individuals comply with the legal system because they are threatened with sanctions, and Nagel's *imposition* view, in which they rather comply because norms are imposed in their name, have been grouped under the heading of *nonvoluntarism*. [56] Both views hold that individuals whose compliance with the system of norms is "nonvoluntary in some relevant sense" are owed a special justification and that this justification cannot be brought to completion unless a consideration for fairness is introduced in the system. This has been for long the dominant understanding of the central thesis of institutionalism, but it has recently came under criticism. Sangiovanni, in particular, has developed an alternative account of institutionalism out of penetrating critique of nonvoluntarism. His position is more subtle than outright rejection. He agrees with Blake that immediate coercion over the private life of individuals gives rise to special duties of egalitarian justice. He also concedes to Nagel that recognizing a legal system as being imposed in your own name creates egalitarian obligations. What he denies is the stronger claim that either coercion or imposition would be "the sine qua non of distributive justice". [57] In his view, it is the *de facto* authority of a legal system, not the coercion or imposition mechanism used to enforce it, which constitutes the necessary and sufficient condition of egalitarian justice. This can be brought to light simply by imagining a state deprived of all means of coercion over its citizens, but nevertheless continuing to run the legal system. At first sight, membership in such a state is voluntary since citizens are free to break the law and withdraw from the political community. But this apparently voluntary membership remains purely theoretical so long as citizens do not have at their disposal a viable alternative which would allow them to continue satisfactorily fulfilling the same essential functions that they can perform within the state. In absence of such alternative, the theoretically *voluntary* membership in the non-coercive state is in reality *nonvoluntary* insofar as individuals have no choice but remain citizens if they want to retain access to the basic goods and services necessary for performing their essential functions. [58]

The fiction of the non-coercive state allows drawing a line between the *de facto* authority of a legal system, on the one hand, and both coercion and imposition, on the other. Individuals do not comply with *de facto* authority because they are threatened with sanctions or because this authority is exercised

55 - Andrea Sangiovanni, "The Irrelevance of Coercion, Imposition, and Framing to Distributive Justice", *Philosophy & Public Affairs*, 40/2 (2012), 109.

56 - I draw here on Sangiovanni's typology in "The Irrelevance of Coercion".

57 - Michael Blake, "Distributive Justice, State Coercion, and Autonomy", 289.

58 - Andrea Sangiovanni, "Global Justice, Reciprocity, and the State", 12.

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in their name, but only because it is the most reasonable thing to do. It is most reasonable for them, given their concern for the fulfilment of their essential functions, to comply with the institutions of the state, which provides them with the conditions necessary to this fulfilment. Neither coercion nor imposition would therefore be necessary for special duties of justice to emerge. Even in their absence, a legal system can exercise authority over those who participate in it and possibly subject them to egalitarian obligations. Now, to convert this mere possibility into a reality requires explaining how the *de facto* authority of a legal system can give rise to obligations of justice among the individuals who are subject to it. This implies that the fellow participants in a system of legal norms all contribute to support the institutional framework in which they live simply by fulfilling their duty as participants. Each of them is consequently indebted to others for their contribution in supporting the legal framework in which everyone lives, a framework whose point is to provide everyone with the conditions necessary to an autonomous life. As Sangiovanni puts it, "those who have submitted themselves to a system of laws and social rules in ways necessary to sustain our life as citizens [...] are owed a fair return for what those who have benefited from their submission have received". [59] Every subject of a legal system is thus tied by a duty of *reciprocity* by the mere fact of being involved in an existing practice whose purpose is to provide favourable conditions for acting on the plan of life. Obligations of egalitarian justice are based on this duty of reciprocity among those who support the state's capacity to provide the basic goods and services necessary to the fulfilment of their essential functions.

The claim that the emergence of special obligations of justice is dependent upon the existence of a practice, defined as a social activity regulated by a system of rules, [60] certainly deserves to be discussed for its own sake. It lies at the heart of Sangiovanni's reciprocity-based internationalism. For our present purpose, however, it is more crucial to question the background against which this claim arises, namely Sangiovanni's criticism of nonvoluntarism. This criticism is based on the formal distinction of coercion and imposition from another, supposedly more relevant way in which one can be said to be nonvoluntarily subjected to a system of norms. One can be forced to comply with norms either *directly*, because his will is thwarted by coercive measures or because he is subject to an authority ruling in his name, but he can also be forced to comply *indirectly*, insofar as he does not have at his disposal another non-excessively cumbersome alternative. [61] Such distinction cannot, however, be purely *formal*. It necessarily unfolds against the background of a *substantive* conception of what an individual might legitimately will. For it is only after one has defined what it is legitimate for an individual to will that one can identify the different ways in which his will can be bound or thwarted. Now

59 - *Ibid.*, 26.

60 - John Rawls, *Collected Papers*, 20.

61 - Andrea Sangiovanni, "Justice and the Priority of Politics to Morality", 9.

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there are at least two ways of conceiving of what individuals can legitimately will. The first is to regard the person as prior to his nonvoluntary submission to the practice and start from a conception of autonomy as the legitimate capacity of the person to form and pursue a determinate conception of the good life. In this view, it is legitimate for an individual to will all that which is likely to contribute to the realization of his own conception of the good. The second way is to take seriously the claim that the person is *de facto* always already subjected to the authority of a practice and to start accordingly from a conception of autonomy as a function of the practice. In this case, what an individual can legitimately will depends on what the practice requires from him, which in turn depends on what we regard as the function of the practice.

The distinction between immediate coercion and imposition, on the one hand, *de facto* authority, on the other, is therefore underlined by how one conceives of autonomy, either as a capacity of the person or a function of the practice. The reason why Blake and Nagel conceive of nonvoluntariness exclusively as coercion or imposition simply is that they regard autonomy as a *capacity of the person* and reduce it accordingly to freedom of choice. In line with this conception, to respect autonomy only entails refraining from directly binding people's will through coercive measures or by merging it into a general will. Only when one conceives of autonomy primarily as a *function of a practice* does respecting autonomy also require creating the conditions appropriate to the fulfilment of this conception by all the participants. This seems to be Sangiovanni's understanding. Though he does not explicitly reject the conception of autonomy as a capacity of the person, he never describes individuals as being fundamentally motivated by the fulfilment of their capacity for personal autonomy. He prefers to depict them as being concerned instead with the protection of what he describes as their capacity to "develop and act on the plan of life". [62] It is only indirectly that the notion of autonomy is introduced in his account, through the contribution owed by every member of a modern state to all others simply as a matter of reciprocity. Insofar as the contribution in question is a contribution to the proper functioning of the practice, it has to be defined in relation to its function, which is precisely to produce of the collective goods and services without which individuals would "lack the individual capabilities to function as citizens, producers, and biological beings". [63] Setting aside the biological function, which does not directly fall under the scope of justice, one might wonder what it means to function as a producer and citizen. Though Sangiovanni does not provide further clarifications, we can gain indirect insight from his claim that properly functioning as producer and citizen can only be achieved within a state that possesses armed forces and that incorporates both a system of property rights and an exchange market. [64] The function of these two sets of institutions obviously is to protect

62 - Andrea Sangiovanni, "Global Justice, Reciprocity, and the State", 4, 12, 20, 35, 37, 38.

63 - *Ibid.*, 21.

64 - *Ibid.*, 19—20.

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the conditions generally regarded as essential to the proper fulfilment of personal autonomy, namely the assurance of bodily integrity and the protection of private property. So even if Sangiovanni carefully avoids referring to the concept of personal autonomy and prefers to allude instead to a certain capacity to "act of the plan of life", it is transparent that the notion of autonomy secretly underpins his account of the state's function.

The status of the institutional fact

At this stage, it becomes possible to differentiate between two types of institutionalism according to the status they grant to what we might call the *institutional fact* – the fact that individuals are always already placed in a state of submission to an existing institution. Blake regards this fact as standing in need of justification to each and every individual and conceives of institutionalism accordingly as an approach that goes beyond the mere acknowledgement of the institutional reality to ask "what the institutions we currently have would have to do to be justified". [65] In this view, the existence of a coercive practice does not have, strictly speaking, any normative implications in determining whether special obligations of justice obtain. What is normatively relevant is the set of conditions under which individuals might consent to the norms regulating the practice. The institutional fact is not, in other words, regarded as *valid objectively*. Its validity remains dependent upon consent by individuals, who cannot have imposed on them an institutional reality that threatens their capacity for personal autonomy. What remains prior is therefore the fundamental liberal concern for the protection of personal autonomy, and reality continues to be regarded as having to conform to this concern.

Contrary to Blake, Sangiovanni regards the institutional fact as *objectively valid* – not as a fact standing in need of justification, but rather as a fact having certain measurable consequences on individuals. Accordingly, he conceives of institutionalism as an approach that focuses on "*what* [...] institutions do rather than on *how* they do it". [66] This approach seems to be at odd with the liberal tradition insofar as it does not try to provide an *a priori* justification to maintaining individuals in a state of nonvoluntary submission. It starts instead by acknowledging as an objective fact that individuals are always already placed in a state of nonvoluntary submission to some existing social and political practices. The main concern is therefore to account for the specific form of submission individuals have to face and to determine the type of obligations this form of submission entails. In the case of the state, regarded as a particular form of submission imposed on citizens, the question is not whether state coercion is justified with respect to every citizen, but rather "how the relations in which we stand as subjects of a nonvoluntary, authoritative system of legal

65 - Michael Blake, "Distributive Justice, State Coercion, and the State", 262.

66 - Andrea Sangiovanni, "The Irrelevance of Coercion", 110. See also "Global Justice, Reciprocity, and the State", 19.

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norms is normatively relevant in conditioning the content, scope, and justification of a conception of distributive justice".[67] Sangiovanni's answer is, as we have seen, that every citizen has a duty of reciprocity toward all other participants in the legal system, simply because they all contribute to maintaining the conditions of fulfilment of their capacity for personal autonomy.

This divergence in the interpretation of the institutional fact throws a new light on the difference already noticed in the conception of the specific kind of authority attached to the state. According to Sangiovanni, institutions in general enjoy *de facto* authority insofar as individuals are always already subject to them and the question of whether the exercise of this authority constitutes a legitimate right is regarded as *subsidiary*. Blake, by contrast, regards institutions as endowed with *de jure* authority insofar as the legitimacy of their right to impose norms always has to be supported by a full-blown justification addressed to each and every individual subjected to it.[68] Let's call *de jure* institutionalism the particular version of institutionalism that regards institutions as exercising *de jure* authority and *de facto* institutionalism the version that holds that institutions enjoy *de facto* authority. While *de jure* institutionalism can easily be situated within the tradition of liberal political theory, *de facto* institutionalism claims proximity with the tradition of political realism and its central epistemological premise which states that certain political facts are to be regarded as permanent and impassable features political theory has to accommodate. To acknowledge the existence of such facts should not, however, lead political theorists to renounce their pretention to develop a normative theory carrying genuine moral aspirations for the future. The distinctive insight of *de facto* institutionalism, by contrast with political realism proper, is to consider that these factual elements can be "embedded into the very structure of a theory of justice without posing any direct threat to it".[69]

It is nevertheless somewhat incorrectly that *de facto* institutionalism pretends to incorporate the realist premise and regard politics as "prior to morality".[70] The realist premise properly defined consists in unconditionally acknowledging the objective nature of certain political facts, that is to say in declaring them immune to any request for justification. In *de facto* institutionalism, however, the necessity to justify the right of such institutions, to coercively impose norms on individuals does not disappear altogether. It is only made *subsidiary* and arises anew when the norms enforced do not enjoy *prima facie* legitimacy in the eyes of those who are subject to them. Certain institutions lack both *prima facie* and *all-things-considered* legitimacy. The practice of slavery and the concentration camp are obvious examples of institutions which lack *prima facie* legitimacy and cannot be supported either by a reasonable account likely to gain consent from all those who participate in it. These

67 - Andrea Sangiovanni, "Global Justice, Reciprocity, and the State", 14.

68 - Andrea Sangiovanni, "Justice and the Priority of Politics to Morality", 142.

69 - *Ibid.*, 141.

70 - *Ibid.*, 156 and 161, n. 50.

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practices cannot carry on if not backed up by strong coercive means. Apart from these extreme cases, there also exists institutions whose authority may lack the *prima facie* legitimacy necessary for obtaining immediate consent from all participants, but that can nevertheless be supported by an appropriate justification. It is the case of states, whose prerogative of direct coercion over the bodies and assets of citizens needs to rest, as Sangiovanni admits, on an account of the way in which such coercion contributes to the fulfillment of personal autonomy. Thus, despite his criticism of the "spurious role of consent" and his refusal to base his own account of justice on the ascription of *de jure* authority to institutions, Sangiovanni finally has to concede that "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". [71]

This concession leads Sangiovanni to offer a full-blown account of the rise of political institutions, instead of simply acknowledging their *de facto* existence. It should come as no surprise that this account borrows from the social contract tradition and the fiction of the state of nature. Sangiovanni describes the rise of political institutions as the only way to enable cooperation between individuals initially unrelated and naturally inclined to distrust and violence. Interestingly, the enabling of human cooperation through institutions is not conceived as an end in itself, but rather, in an instrumental fashion, as a means to ensure the further development of certain non-political spheres of human activity regarded as essential to individuals. [72] It is, Sangiovanni tells us, a basic interest of individuals that these non-political spheres of activity are enabled through political institutions, institutions that are therefore justified only insofar as they contribute to the protection of these essential spheres of activity.

One should not be misled here by the fact that Sangiovanni does not justify the special status of these non-political spheres of activity in light of a conception of the person as being endowed with personal autonomy, such as, typically, the liberal conception according to which individuals enjoy the moral power to elaborate and pursue their own conception of the good life. Such a conception necessarily lies in the background of his account, for it is otherwise hard to see why these spheres should be regarded as essential. Just as *de jure* institutionalism, the version of *de facto* institutionalism developed by Sangiovanni therefore ultimately relies on *personal autonomy* as the foundational value justifying the exercise of political authority. In this view, no political authority can impose itself absolutely *de facto* insofar as political legitimacy always remains conditioned to the respect of personal autonomy. This concession does not, however, totally erase the specificity of *de facto* institutionalism, which can still resist being reduced to an indirect form of *de jure* institutionalism by maintaining that its difference lies in the way in which it accounts for the transition from the acknowledgement of the absolute value of personal

71 - *Ibid.*, 163.

72 - *Ibid.*, 157.

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autonomy to the necessity of establishing social and political institutions. Whereas *de jure* institutionalism regards the institutional fact as a *practical necessity* justified in light of personal autonomy, *de facto* institutionalism regards it as a *factual reality* that has to be subsequently justified to individuals in order to enjoy a lawful status.

Arguably, this difference boils down to an epistemological disagreement as to which of the actual reality of the world or the moral conception of the person should constitute the starting point of our theorizing about justice. A legitimate question would then be whether we can expect both types of institutionalism to reach the same substantive conclusions – in which case, the distinction would lose a great deal of interest. Though the question is certainly worth asking, I do not wish to further discuss it here. Instead, I would like to conclude this introduction by bringing to light a third version of institutionalism which has been present in the literature from the start, but which has been so far surprisingly neglected. What is more, its main proponent, Thomas Nagel, has been mistakenly regarded as defending a version of *de jure* institutionalism when he was actually laying the basis necessary to the further development of this alternative approach.

Moral Institutionalism

I want to suggest that, in his seminal essay on the problem of global justice, Nagel provides a contractualist account of the institutional fact as a *moral fact* – namely, as the fact that individuals are always already subject to the *moral duty* to enter the political condition. Most readers fail to fully appreciate the distinctiveness of this account in terms of moral obligation because they are not fully aware of the difference between the contractualist account of the duty to enter the political condition and the consciousness shared by most liberal theorists of the practical necessity of state coercion for the protection of personal autonomy. When Blake, for example, recognizes that "without some sort of state coercion, the very ability to pursue our projects and plans seems impossible", he refers to the adverse empirical conditions which, in the world as we know it, prevent individuals from consistently fulfilling their capacity for personal autonomy – conditions which, after all, could be different from what they are.[73] By contrast, when contractualists allude to the necessity to enter the political condition, what they mean is that the realization of justice requires, whatever the empirical conditions under consideration, that the conduct of individuals be *externally* coordinated by the creation of a coercive political power. Their claim is not that political institutions are necessary for efficiently carrying out personal autonomy. Rather, it is that the exercise of autonomy by a plurality of individuals cannot even be *conceived* apart from political institutions.

The specific kind of rational necessity attached by moral institutionalism to the institutional fact is particularly well accounted for in terms of the Kantian

73 - Michael Blake, "Distributive Justice, State Coercion, and Autonomy", 280.

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distinction between *internal* and *external* freedom. Internal freedom is the power of individuals to make a conscious choice between different maxims of action. While ethics investigates the conditions of exercise of this power, questions of justice more specifically concern the conditions of a possible employment of this power by all human beings considered in common – that is, the conditions of possibility of a state of affairs in which the freedom of each is respected. External freedom is the concept necessary to think of freedom of choice in this way, as an equal right harmoniously shared by all human beings in virtue of their very nature. External freedom is defined *negatively* as independence from any constraint imposed by other human beings, or institutions, on the individual exercise of the power of choice. But this negative definition does not specify the conditions of possibility of such independence. It does not specify, in particular, the conditions of a consistent use of freedom by *all* human beings. The negative definition must therefore be supplemented by a *positive* definition of external freedom as special involvement of the will in view of the establishment of a rightful coercive power capable of fulfilling these conditions. This last move, from the negative definition of external freedom as independence to its positive definition as special involvement of the will, is typical of moral institutionalism.

In order to better understand this transition, consider the problem of freedom from the subject's point of view. Submitting all his subjective maxims to the requirements of pure practical reason, that is, to a procedure of ideal reflection such as the categorical imperative or the original position, does not guarantee the free exercise of choice against hindrances by other, non-complying subjects. However respectful one is of the requirements of reason, his moral virtue cannot protect him against the potential weakness of other human beings. Now, insofar as individuals have a duty to work, within the limits of their power, toward the realization of such a state of affairs in which everyone's freedom of choice is respected, they also have a duty to provide for the formal conditions necessary to its being simply possible. The formal conditions of possibility of such a state of affairs include the existence of a coercive power capable of externally enforcing on everyone's will the same conditions of universalization that everyone ought to respect internally. In the absence of specific rights and obligations enforced by a rightful political power, that is, in the absence of lawful public institutions, one can never be totally assured of the possibility of an exercise of his freedom of choice that would be consistent with the freedom of others. Note that this is not a condition of the *concrete* realization of external freedom in the world, but only a *formal* condition of its being simply possible. Whatever sensible conditions under consideration, the respect of external freedom necessarily requires an external coercive power capable of preventing imperfectly rational wills from encroaching upon each other.[74] This requirement of *external* necessitation, just as the requirement of *internal* necessitation in the case of personal ethics, follows from the imperfect

74 - For a similar interpretation of Kant's account of the duty to enter the political condition, see Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA:

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character of the human will. Because human beings have a natural tendency to be affected by sensible impulses, conformity to the law can only be achieved by coercion, both internal, through the respect for a procedure of ideal reflection, and external, through the establishment of a coercive political power.[75]

In this account, the institutional fact is a *moral fact* whose objectivity rests on the duty of every individual to promote a state of affairs in which the external freedom of each is respected. At first sight, it might seem that we are back to some version of *de jure* institutionalism, insofar as the necessity of institutions is based on the innate right of individuals to freedom of choice. But these two types of institutionalisms diverge in the way in which they account for the transition from the mere acknowledgement of freedom to the establishment of a state of affairs respecting everyone's right to external freedom. While *de jure* institutionalism presents this transition as a practical necessity, moral institutionalism sees it as a *moral duty* – namely, as the necessary fulfillment of a formal condition without which one cannot even conceive of such a state of affairs. Admittedly, the boundary between *de jure* institutionalism and *moral* institutionalism, just as the boundary between *de jure* institutionalism and *de facto* institutionalism in the previous section, remains at this stage somewhat blurry. A good way of clarifying the distinction is to examine in more detail the reasons why Nagel has been mistakenly interpreted as advocating a version of *de jure* institutionalism, supposedly based on an acknowledgement of the practical necessity of institutions, when he was actually offering the basis necessary for developing a full-blown version of moral institutionalism.

In "The Problem of Global Justice", Nagel starts by defining the so-called "political" conception of justice by drawing on Rawls and Dworkin as two paradigmatic examples. Rawls famously holds that egalitarian obligations only arise among individuals engaged in social cooperation under a basic structure having deep and pervasive effects on their life prospects.[76] The sharing of a basic structure, insofar as it puts individuals into a special relationship they do not share with the rest of humanity, justifies the rise of justice, which is therefore better understood as a virtue specific to political institutions rather than a pre-institutional virtue derived from a comprehensive moral doctrine. Along the same lines, Dworkin maintains that it is the special relationship created among the fellow members of a state subjected to laws enacted in their name that creates obligations of justice. Justice, here again, is not regarded as a general virtue, but rather as the specific "virtue of sovereigns".[77] In both cases, justice is described as an "associative duty" grounded in the special demands

Harvard University Press, 2009) and Miriam Ronzoni, "Politics and the Contingent: A Plea for A More Embedded Account of Freedom as Independence", *European Journal of Philosophy*, 20/3 (2012), 470—478.

75 - Thomas Nagel, "The Problem of Global Justice", 116.

76 - John Rawls, *A Theory of Justice*, 7 and 82.

77 - Ronald Dworkin, *Sovereign Virtue* (Cambridge, MA: Harvard University Press, 2000), 5.

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that the follow members of a state impose on each other through their common institutions. A duty of justice so conceived is not "an indirect consequence of any other duty that may be owed to everyone in the world". [78] It arises instead from the contingent existence of an institutional relationship within a group of individuals. Accordingly, there is in principle no obligation, on the side of those who are engaged in that relationship, to extend the scope of institutional cooperation to those who are left over; and there is no obligation either, on the side of those who do not partake in any institutional relation, to enter in a special relationship and thereby contract special obligations of justice.

On the basis of this account, many take Nagel to defend a version of *non-volutarism* according to which special obligations of justice arise between individuals subject to a legal system that both speaks in their name and has deep and pervasive effects on their life prospects. [79] They overlook that, immediately after setting the terms of the opposition between political and cosmopolitan conceptions of justice, Nagel refines his own position by situating it in the broader moral outlook of what he calls a "multi-layered conception of morality". [80] This moral outlook clearly diverges from that of Rawls and Dworkin, who both conceive of justice as independent from morality in general. On a multi-layered conception, on the contrary, justice is one of several moral strata that cannot be considered independently of a more fundamental layer grounding morality in general. This fundamental layer, which underlies all others, arises from the universal relation in which all human beings stand "simply in virtue of their humanity". This relation consists in the necessary recognition, by every human being, of the absolute worth of the rational dimension of human nature, which both grounds the concept of autonomy and the moral duty to regard every individual as an end in itself. On the one hand, the subject's acknowledgement of the absolute worth of reason *in himself* is the condition that legitimates his otherwise unsupported capacity for autonomy. For only insofar as rational nature has an absolute worth does it make sense to consider principles given entirely *a priori* by reason as the only legitimate determining ground of the will. On the other hand, the subject's acknowledgement of the absolute worth of reason *in others* is what justifies his acting only on those of his subjective maxims which regard them not simply as means, but always at the same time as ends. For only insofar as rational nature in others has an absolute worth does it make sense to limit his subjective maxims of self-interest by submitting them to the requirement of universalizability. Thus, the recognition of the absolute worth of rational nature in general not only grounds the principles of autonomy, understood as self-determination of the will, but also creates a fundamental relational duty, governing all human interactions, to pursue this conception within boundaries that leave others free to pursue their own conception of the good.

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78 - Thomas Nagel, "The Problem of Global Justice", 121.

79 - See for example Andrea Sangiovanni, "The Irrelevance of Coercion, Imposition, and Framing to Distributive Justice", *Philosophy & Public Affairs*, 40/2 (2012), 79—110, at 80, 84, and 88.

80 - Thomas Nagel, "The Problem of Global Justice", 132.

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This account of the fundamental layer that underlies justice, as well as all other levels of moral concern, distances Nagel from the other forms of institutionalism, exclusively based on a consideration for personal autonomy. Nagel's institutionalism rather belongs to the Kantian social contract tradition. [81] The basic duty to limit one's actions out of respect for others' equal right to freedom, Nagel specifies, emerges from "the type of contractualist standard expressed by Kant's categorical imperative and developed in one version by Scanlon". [82] By contrast with contemporary liberal contractualism, this contractualist standard does not consist in an agreement between self-interested parties seeking to promote their own conception of the good. Rather, it implies an agreement between agents "moved by the aim of finding principles that others, similarly motivated, could not reasonably reject" and sharing a "willingness to modify [their] private demands in order to find a basis of justification that others also have reason to accept". [83] It is a version of contractualism that goes beyond the mere claim that the content of morality can be determined through a procedure of ideal reflection incorporating all the constraints of rationality – that is to say, by asking questions about what it is rational to will. This version of contractualism also makes the unconditional acknowledgement of others as ends in themselves an essential dimension of the procedure. [84]

A way to better understand the specificity of this contractualist view is to contrast Nagel's and Blake's respective understandings of the original position. In Blake's reading, the parties are moved to protect the interests of the least advantaged because the individuals they represent may well belong to this group. The concern for egalitarian justice arises out of the parties' fundamental interest in the personal ends they make their own. It is not the case in Nagel's reading. Though the parties remain guided by mutual disinterest and tend to favor principles that advance their own system of private ends, irrespective of others' happiness, they are not drawn to egalitarian principles of justice directly, for egoistic reasons. Rather, they reject any maxim that would be detrimental to others' happiness insofar as such maxims cannot pretend to universal validity. Kant would say that mutually disinterested parties facilitate other's happiness "out of respect for the pure form of universal lawgiving". [85] Principles of justice selected on such basis apply to all individuals, whatever their particular ideal of life, and they represent legitimate *a priori* restrictions imposed on everyone's freedom when elaborating this ideal. The outcome of the original position is, in both cases, the same, but the *rationale* behind this outcome is clearly different. In the former case, the parties are animated by pure egoism

81 - *Ibid.*, 126, n. 11.

82 - *Ibid.*, 131.

83 - Thomas Scanlon, *What We Owe to Each Other* (Cambridge, MA: The Belknap Press of Harvard University Press, 2000), 5.

84 - *Ibid.*, 190.

85 - Immanuel Kant, *Groundwork for the Metaphysic of Morals*, IV: 441.

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and regard others simply as means. In the latter, they regard others at the same time as ends in themselves that impose *a priori* limits to their internal freedom of choice.

What makes Nagel's contractualist view a form of institutionalism is the further claim that additional moral layers, triggered by special institutional relationships, can potentially emerge on top of the fundamental moral basis provided by the recognition of all human beings as ends in themselves. These additional layers, which carry special obligations, can either arise from the *voluntary* association of a group of individuals in the pursuit of some private ends that they happen to share in common, or from their *nonvoluntary* association in the pursuit of an absolute social end. Only associations of the latter type, Nagel argues, give rise to genuine obligations of justice. Now what distinguishes this view from other forms of institutionalism is the way in which it accounts for the transition from the fundamental *moral* basis to supervenient *political* layers imposing special obligations of justice. We have seen that the advocates of institutionalism usually account for this transition by acknowledging the existence of certain political practices either as a *factual reality* or as a *practical necessity* without which the liberal demand for justifiability to all cannot be satisfied. They further argue that these practices create a duty of fair reciprocity among participants: as soon as one is involved in a practice that contributes to the furthering of his capacity for an autonomous life, one has to contribute a fair share in return. Distancing himself from this strategy, Nagel suggests that:

> this move to a new moral level can be best understood as a consequence of the more basic obligation, emphasized by [...] Kant, that all humans have to create and support a state of some kind – to leave and stay out of the state of nature. It is not an obligation to all other persons, in fact it has no clear boundaries; it is merely an obligation to create the conditions of peace and a legal order, with whatever community offers itself". [86]

One can easily recognize in this passage the influence of Kantian contractualism, in which the necessity to enter the political condition does not rest on the fact that, in absence of coercive legislation, human beings naturally tend to be violent and infringe on each other's capacity for personal autonomy. Instead, this necessity lies *a priori* in the very idea of a state of nature, as a state in which, by definition, violence always remains not only possible, but also legitimate insofar as every individual has a right to do whatever seems right to him. [87] Whatever the actual disposition of individuals involved in the state of nature, one can never in principle be secure against the risk of subjection to the violence of others. It is therefore one's *duty*, in order to prevent that risk, to enter the political condition, in which coercion through public institutions will secure everyone's right to freedom of choice, not directly by

86 - Thomas Nagel, "The Problem of Global Justice", 133.

87 - Immanuel Kant, *The Metaphysics of Morals*, VI: 312.

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force, but rather by law as adequately supported by public power. It is crucial, in this account, that the state of nature cannot be a state of justice, even if, through the establishment of a system of private laws supported by adequate power, it might be, in practice, a state temporarily deprived of injustice. Contracts of private law can only temporarily guarantee protection against violations of external freedom. This guarantee remains merely provisional so long as it is not sanctioned by a system of public laws, whose rightful authority can legitimately adjudicate conflicting claims among individuals.

Just as the other forms of institutionalism, Nagel's contractualist account thus denies that the virtue of justice exists prior to the emergence of the state. Instead, justice is said to arise out of a concern for establishing the conditions of the possible coexistence of everyone's right to freedom of choice, a concern that grounds a duty to establish a coercive political power conceived as the only means to legitimately and permanently guarantee these conditions. As Nagel points out, such a duty has "no clear boundary" and does not carry strong requirements as to the form or scope of the institutions it calls for. It only specifies that these institutions must be "rightful", which means that the legislative authority presiding over their creation can be no other than the general united will of citizens, who all share in both the responsibility of authorship of the law and the willingness to abide by it. [88] The special involvement of the will by which these citizens create a coercive political institution, namely the sealing of an original contract, is a positive act of self-legislation through which everyone gives up his *lawless* external freedom to immediately take up in return *lawful* external freedom – that is, domesticated freedom that has been made dependent upon laws arising from everyone's capacity for autonomous lawgiving. [89] Now the rightful process of establishing a coercive institution can in principle be thought to have presided over the creation of "whatever community offers itself". There is not one specific form of community and one specific form of institution that would alone be fit for this process. Different institutional structures can be analyzed along these lines, hence the necessity of an interpretation of their structure and point to determine the content of the most appropriate principles of justice.

V. The different contributions to the volume

This brief account of moral institutionalism, as being based on a Kantian contractualist standard, completes the picture of institutionalism and gives us a more comprehensive overview of practice-dependence as a self-standing approach in political theory. As such, it serves the general purpose of this volume, which is to contribute to improve our general understanding of practice-dependence. To that effect, priority has been given to articles that either clarify the methodology and the reasons we might have to endorse

88 - Thomas Nagel, "The Problem of Global Justice", 128.

89 - Immanuel Kant, *The Metaphysics of Morals*, VI: 316.

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practice-dependence, or that tackles some of the main objections that have been raised against this approach. In his contribution to this issue, Aaron James thus tackles two key methodological questions the practice theorist has to face when trying to identify the kind of practices he can legitimately take as object of analysis. The first question is whether the practice can be purely imaginary or whether it should be, if not already in existence, at least feasible for human beings to engage in under certain conditions. The second is whether the claims and beliefs of the participants should be granted special importance, or whether the theorist can feel free to use his own moral and sociological knowledge when describing the practice in question. James argues that the answers to these two questions – the question of realism and the question of sociological accuracy – depend on the theorist's motivational concerns and explanatory aims. It depends on the reasons why he undertakes his analysis and the results he expects from it. Though normative considerations are undeniably central to political theory in general, at least two equally valuable classes of concerns can be identified that trigger different requirements in terms of realism and sociological accuracy. But James' main point, beyond the specification of these requirements, might simply be that "what generally matters, from a practice-based perspective, is getting the requirements of realism and accuracy right for the particular justificatory purpose at hand". [90]

This first methodological contribution is complemented by two articles that offer to revise our conception of practice-dependence in order to accommodate some of the legitimate concerns raised by its initial formulation. A first widely shared worry is the incapacity of the practice-dependence view to engage in a reappraisal of state's institutions, a reappraisal that seems however inevitable in light of the new forms of injustices triggered by globalization. Indeed most contemporary practice theorists derive the content of the principles of justice from an interpretation of the "institutionalised practices" that structure the social and political world as we know it. This derivation implies a form of epistemological dependence with respect to these culturally and historically contingent practices that limits, according to some critics, the critical capacity of the approach. Malte Frøslee Ibsen overcomes this objection by pointing out that some practice theorists rather draw the content of the principles of justice from an interpretation of the "basic practices" inherent in human nature, such as language or rational justification. These practices arise in one form or another in all cultures and all times, and the principles derived from them are therefore both necessary and universal in scope. Jürgen Habermas' discourse ethics, whose two fundamental operative principles are directly derived from an interpretation of the basic practices that govern language and communicative interactions, is a prime example of this latter approach. The political doctrine based on it is better suited, according to Ibsen, to face the challenges of globalisation. It has the added merit of allowing for an external reassessment of the institutions of the nation-state in order to determine whether they can successfully address injustices at a global scale.

90 - Aaron James, "Why Practices?", 43.

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A second concern common among critics of practice-dependence is whether this view can successfully preserve the universality of justice while relying on an interpretation of socially situated practices. Drawing on Gidden's idea of "institutional reflexivity", James Gledhill argues that it is possible provided that we do not conceive of practices simply as fulfilling a function pre-determined in relation to certain social contexts, but rather as continuously reassessing and redefining the function they serve. This reflexive conception of practices would already be at work in Habermas' and Rawls' respective appropriations of the Kantian idea of *foedus pacificum*. Remember that Habermas describes the progressive constitutionalization of post-national practices as a process in which a system of constitutional rights, insofar as it incorporates democratic rights to political participation, entitles citizens to reflexively influence the nature of those rights according to their own interpretation of the constitution. Similarly, the second original position in Rawls' two-level international procedure can be interpreted as a reflexive process, for it takes the domestic conception of justice as a starting point and makes sure that the principles constitutive of the Law of Peoples match with the domestic principles in reflective equilibrium. To consciously incorporate this reflexive dimension in our conception of practice-dependence, Gledhill argues, would help reconcile the cosmopolitan concern for the universality of justice with the statist concern that justice nevertheless remains in touch with the reality of social life.

These three contributions sympathetic to practice-dependence are ideally counter-balanced by Saladin Meckled-Garcia's article, which claims that talk about this approach is in fact nothing more than a "red herring" in the debates on global justice. To grasp the proper significance of this claim, a line must be clearly drawn from the outset between two kinds of view that tend to be indistinctively regarded as practice-dependent. Views of the first kind, which are the proper target of Meckled-Garcia's criticism, simply hold that the content of a conception of justice depends on an interpretation of the structure and point of the practice it is intended to regulate. One consequence of this claim is to limit the scope of justice to the practice under consideration, but no explicit reason is given of *why* such limitation is legitimate. Views of the second kind also pretend to limit the applicability of justice to certain practices, but support this claim with a substantive argument resorting to genuinely moral reasons. In so doing, they comply with the fundamental liberal principle according to which any norm coercively imposed on individuals that limit their basic freedom must be justified to them by reference to a moral value. Not only do practice-dependence views of the first kind fail to meet this requirement, but in the end they cannot avoid appealing to moral reasons when pushed to justify the limitation of scope they advocate. This makes them no more than a subtle methodological diversion leading the actors of the debates on global justice astray from more pressing issues.

A last contribution by Isaac Taylor casts more targeted doubts on institutionalism. Taylor maintains that none of the features commonly regarded as typical of institutions are, in fact, necessary for obligations of justice to arise.

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There seems to be cases, which institutionalism is unable to accommodate, where injustices occur outside of any institutional framework and new institutions must precisely be created as a means to address them. Consider, for example, the case of basic needs and the essential public goods that states must provide to meet them. The mere existence of a plurality of states may limit the capacity of some of them to meet the basic needs of their own citizens, such as when the global production of greenhouse gases and the induced rise in sea level threatens to submerge their territory. In such cases, international interaction itself creates a need for global essential public goods and this need generates in turn a correlative duty to provide for these goods through the creation of a regime of global public goods. According to Taylor, this calls into question the comprehensiveness of institutionalism as an approach that can successfully account for all forms of justice. It also cast doubts on the central epistemological principle that recommends regarding institutions as the only legitimate basis for grounding obligations of justice.

HUGO EL KHOLI

Hugo El Kholi is a Doctoral Candidate in Political Theory at Sciences Po Paris. He previously held visiting positions at the University of Newcastle, the University of Oxford, and Princeton University. His dissertation, under the supervision of Professor Astrid von Busekist and Doctor Thom Brooks, explores the problem of global justice from the perspective of a new form of constructivism regarding the notion of practical teleology as central. His other research interests include the theories of domestic justice, the morality of war, and the epistemology of political theory.

ABSTRACT

Practice-based Justice: An Introduction

The purpose of this introduction is two-fold. First, it is to provide readers unfamiliar with the debates on practice-dependence with the insight necessary to fully comprehend the different contributions to this volume. Second, it is to make readers already well versed in practice-dependence more sensible to the substantive nature of this view and to provide them with a workable typology. After establishing a first distinction between metaphysical, relational and practice-dependent conceptions of justice, I draw a line, among practice-dependent views, between institutionalism and cultural conventionalism. I complete the typology by differentiating between three forms of institutionalism according to how they regard the institutional fact, namely the fact that individuals are always already placed in a state of submission to existing institutions. Whereas de facto *institutionalism describes this fact as a mere* factual reality *which imposes itself upon human beings,* de jure *institutionalism regards it as a* practical necessity *which stands in need of justification to each and every individual. Finally, moral institutionalism accounts for the institutional fact in terms of* moral duty, *namely the duty to contribute to the emergence of a state of affairs in which everyone's freedom of choice is respected.*

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RÉSUMÉ

La justice fondée sur les pratiques: une introduction

L'objet de cette introduction est double. Elle consiste, tout d'abord, à fournir aux lecteurs qui n'ont pas de connaissance préalable au débat sur la dépendance aux pratiques l'aperçu nécessaire à une compréhension pleine et entière des contributions de ce volume. Elle vise, ensuite, à rendre les lecteurs déjà familiers de la dépendance aux pratiques plus sensibles à la nature substantielle de cette approche et à leur fournir une typologie pratique. Apres avoir opéré une première distinction entre conceptions métaphysiques, conceptions relationnelles et conceptions dépendant de la pratique, je différencie, parmi ces dernières, entre institutionnalisme et conventionnalisme culturel. J'achève cette typologie en distinguant entre trois types d'institutionnalisme selon le statut accordé au *fait institutionnel*, à savoir le fait que les individus sont toujours déjà placés dans une situation de soumission par rapport aux institutions existantes. Tandis que l'institutionnalisme *de fait* décrit cette situation comme une simple *réalité factuelle* qui s'impose à tous les êtres humains, l'institutionnalisme *de droit* la considère comme une *nécessite pratique* devant être justifiée à chaque individu. L'institutionnalisme moral, enfin, rend compte du fait institutionnel dans les termes d'un *devoir moral*, à savoir le devoir de contribuer à l'émergence d'un état de fait dans lequel la liberté de choix de chacun est respectée.

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