



EU Citizens' Access to Welfare Rights: How (not) to Think About Unreasonable Burdens?

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Abstract

Defenders of current restrictions on EU immigrants' access to welfare rights in host member states often invoke a principle of reciprocity among member states to justify these policies. The argument is that membership of a system of social cooperation triggers duties of reciprocity characteristic of welfare rights. Newly arriving EU immigrants who look for work do not meet the relevant criteria of membership, the argument goes, because they have not yet contributed enough to qualify as members on the grounds of reciprocity. Therefore, current restrictions on their access to welfare rights are justified. In this article, I challenge this argument by showing how restrictions on EU immigrants' access to welfare rights are inconsistent with duties of international reciprocity. There are different variations of this challenge, but my focus here will be on one that uses a veil of ignorance device to support this claim. What matters from a perspective concerned with international reciprocity, I will argue, is what kind of welfare policy EU member states would choose were they not to know whether those receiving EU migrants were net contributors or net beneficiaries to the relevant scheme of international cooperation made possible by the four freedoms, and freedom of movement in particular. I argue that framing the requirement of reciprocity in this way provides a more comprehensive understanding of what should count as an 'unreasonable burden' on the welfare systems of host member states. The paper also examines alternative accounts of 'unreasonable burdens'. It shows when and how the current institutional structure of the EU could take steps to deal with such burdens by preventing member states from gaming a comprehensive system of welfare rights protections across member states and by recognising the achievements of those member states that best serve them.

Keywords European Union · Migration · Welfare state · Social justice · Unreasonable burden · Reciprocity

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‘...there is no reason why European treaties could not be amended to eliminate the waiting period for social assistance. But in that case, there would have to be agreement on mutualizing the corresponding social costs.’ (Piketty 2020, p. 1029)

Introduction

This paper aims to show that current and similar restrictions on EU immigrants’ access to social assistance benefits are both normatively unjust and practically unnecessary. In the language of EU policy and law, I aim to show that lifting current restrictions does not constitute an unreasonable burden if we take an impartial and reciprocal perspective that considers the concerns not just of host member states but also of home member states.¹ The paper also proposes ways to fairly share the unreasonable burdens of such immediate access between host and sending states, where, if ever, that becomes relevant.

To add some determinacy to the term ‘unreasonable burdens’, I use the tools of normative political theory to help me demonstrate how we should conceptualise ‘reasonable’ and ‘unreasonable’. I proceed in the following steps. First, I define as reasonable any agreement reached by reasonable rather than unreasonable parties. I use a Rawlsian veil of ignorance (VOI) device to illustrate how reasonable member states would impartially regulate freedom of movement in a reciprocal manner.

I show that behind such a VOI device, member states would choose a policy of freedom of movement for both high-skilled and low-skilled workers provided two conditions were met, each catering to the concerns of sending and host states respectively and ensuring that:

Condition A: Immediate access to social assistance benefits is granted to *all* mobile EU citizens.²

Condition B: Immediate access for all mobile EU citizens does not constitute an *unreasonable burden* to their welfare systems.³

I then argue that it is wrong to understand A as being necessarily in tension with B—to think that immediate access is *always* unreasonably burdensome for host states. I show that even when, if ever, immediate access *does* become unreasonably burdensome, measures could be taken to ensure *both* immediate access to social

¹ For a discussion of the term ‘unreasonable burden’ in the context of recent ECJ’s judgments on EU immigrants’ access to social benefits, see Verschuere (2014). See also section VI below for a more detailed discussion.

² Reasonable is understood in Condition A as meaning reciprocally endorsable by symmetrically positioned parties (behind a VOI) motivated to reach an agreement that is impartial to their position as sending states and not solely based on their self-interest as better-off or worse-off member states (see also section IV).

³ ‘Reasonable’ is understood in Condition B as meaning ‘willingly supportable by symmetrically positioned parties (behind a VOI)’. This second contractual step informed by what could be taken to be the relevant strains of commitment for member states: that is, member states will be willing to enter and uphold the terms of the contract they agree to behind the VOI only if the contract serves a concern for safeguarding their domestic achievements of social justice (See also section IV).

assistance benefits for mobile EU citizens and robust domestic social justice in both host and home member states. Finally, I discuss what these measures could be and why they are preferable to restrictions on access. Finally, I examine some objections and conclude.

Before proceeding, two clarifications are in order. First, the article's focus is on theories of social justice and welfare rights based on the principle of reciprocity. This is not to deny that other normative principles have an equally if not more central role in granting or denying access to welfare rights. The aim of the article is merely to show what the implications for access to welfare rights are when starting from a principle of reciprocity among member states. Second, for reasons of space, the argument proceeds by bracketing issues of historical injustice among member states.⁴

The Case for and against Restrictions

Defenders of current restrictions on mobile EU nationals' access to welfare rights in host member states often invoke a principle of reciprocity among member states to justify these restrictions.⁵ The general argument is that duties of reciprocity characteristic of welfare rights are triggered by membership to a system of social cooperation. For example, Bellamy and Lacey (2018) have argued that newly arriving EU immigrants who look for work do not meet the relevant membership criteria because they have not yet contributed enough (Bellamy and Lacey 2018; see also Sangiovanni 2013; 2017).⁶ Therefore, current restrictions on their access to welfare rights are justified. The prevailing assumption here is that the collective goods produced by cooperation among states at the level of the EU must be brought about

⁴ In sum, I bracket for the sake of argument whether past injustices have been dealt with as well as whether existing inequalities among member states are justified or not.

⁵ By welfare rights here I mean mainly basic welfare rights such as social assistance benefits (e.g. means-tested JSA and housing benefits in the UK or Arbeitslosengeld II in Germany) as current restrictions concern those welfare rights, as well as the preconditions and the duration of access to such rights (e.g. see EU directive 2004/38 and ECJ's relatively recent judgment in 'Dano' (C-333/13)).

⁶ More specifically, Sangiovanni (2013) sees the EU as a joint project for the production of goods that cannot be brought about without the international cooperation of its member states. Freedom of movement is treated by Sangiovanni as one of the agreed aims and restrictions on it, in the form of restrictions on access to social assistance benefits, depending on whether an individual has contributed enough to the domestic system of social cooperation of the host member state. Similarly, Bellamy and Lacey appeal to a criterion of membership that is informed by a more demanding stakeholder criterion that includes but is not restricted to criteria of contribution (Bellamy 2019, p. 139). Against both Sangiovanni and Bellamy I show how using a VOI device can render such criteria of membership unnecessary for granting access to social assistance benefits due to the relevant facts concerning the very characteristics of human capital flows in the EU that member states must take under consideration in their choice of a relevant scheme, as well as showing how they are unnecessary for protecting domestic achievements of social justice and the sustainability of domestic welfare systems. The emphasis on these relevant facts of EU immigration largely explains why I draw a different conclusion to that of Sangiovanni and Bellamy on this issue (see also Behind the Veil of Ignorance below on the motivation, interests and relevant facts of parties behind the VOI). Please also note that I do not deny here the sufficiency of such conceptions of contribution, or of other relevant considerations, for granting EU immigrants access to social assistance benefits, but merely reject their necessity.

in a way that does not undermine the ongoing production of collective goods by social cooperation within both host and sending member states.⁷ Therefore, freedom of movement, whatever its merits, should not undermine the welfare systems of host member states.

In this paper, I challenge this argument by showing how restrictions on EU immigrants' access to welfare rights are inconsistent with duties of *international* reciprocity. There are different variations of this challenge, but my focus here will be on one that uses a VOI device. What matters from a perspective concerned with international cooperation, I argue, is what kind of policy EU member states would choose if they did not know whether they were net contributors or net beneficiaries of the relevant scheme of international cooperation.

As I hope it will become clearer in the rest of this article, I doubt a VOI device founded on a notion of international reciprocity could justify current restrictions on EU nationals' access to welfare rights.⁸ More specifically, in this essay, I show how a direct appeal to *international* reciprocity is sufficient for justifying immediate, continuous and equal access to welfare rights for EU immigrants without the need for instituting a European federal welfare state (Habermas 2001), a European Basic Income scheme (Van Parijs and Vanderborght 2017; Viehoff 2017) or, for that matter, a European super-state (Morgan 2009).⁹ In that sense, this essay provides a positive argument as to why reciprocity grounds immediate access to welfare rights for EU nationals here and now.¹⁰ It does so by moving the level of the analysis from the transnational level (i.e. from the analysis of relationships between individuals of different nationalities within host member states) to the international level (i.e. to an analysis of relationships between member states). This is in order to highlight how a focus on EU immigrants' contributions within their host state conveniently sidesteps the international dimension of welfare rights access as an upshot of human capital exchange among self-determining member states that have opted to lift physical restrictions on freedom of movement reciprocally. If the arguments below are sound, then EU immigrants need not meet criteria of social membership such as

⁷ See Bellamy, R. and J. Lacey (2018) and Sangiovanni, A. (2013).

⁸ Different versions of the relevant veil of ignorance device are possible here. I follow one that is closer to Rawls (1999a, b) than Dworkin (2002). Andrea Sangiovanni follows a more Dworkinian approach. What matters essentially for him is what kind of insurance EU member states would buy as members of such a group of states if they were not to know whether they were net contributors or net beneficiaries to the relevant scheme of social cooperation. The focus of this paper is on a Rawlsian device but below (in footnote 21) I discuss briefly why a Dworkinian insurance scheme also would not necessarily imply restrictions on EU immigrants' access to social assistance benefits.

⁹ Habermas, J. (2001); Van Parijs, P. and Vanderborght, Y. (2017); Viehoff, J. (2017); Morgan, G. (2009).

¹⁰ There is a growing literature on the importance of immediate access to welfare rights for EU nationals seeking work in other member states (Bruzelius et al. 2017; Ferrara 2016), but most of that literature only advocates access for a limited period of time (usually no more than six months) rather than continuous access for the full residency period as advocated in this paper.

those commonly associated with naturalisation to be granted access to welfare rights on grounds of reciprocity.¹¹

The Idea of Reciprocity

It is important for the development of the argument to explain what reciprocity entails when it is placed at the centre of a theory of international justice. Reciprocity-based views can be developed in a variety of ways but usually take a Rawlsean formulation.¹² They are therefore informed by two general requirements. First, each agent participating in cooperation should benefit from terms that are *fair*, as opposed to terms that are merely mutually advantageous. Second, the proposed terms of cooperation must be *reasonably acceptable* to others as free and equal agents, and not as manipulated, dominated or under the pressure of an inferior political and social position (Rawls 2005, pp. 136–137, 446).

To illustrate: imagine that two societies, A and B, agree to freedom of movement and to allow mutual access to their labour markets. Assume further that A is richer than B. A, therefore, experiences a higher influx of inward EU migration than B, and some of these immigrants apply for benefits. Should society A restrict access to welfare rights to those coming from society B? It seems to me that an answer can be given without looking into a variety of different types and degrees of contribution to society A by an individual EU immigrant. Furthermore, this answer need not appeal to principles of transnational justice but merely to principles of international justice.

The relevant question that a reciprocity-based approach needs to ask head-on is the following: what restrictions, if any, would representative member states opt for with respect to access to their welfare systems if they were to opt for freedom of movement but did not know how the benefits and costs of freedom of movement would be distributed among them? I will argue that if freedom of movement is opted for, and therefore restrictions both to immigration and emigration are lifted, then the fair policy would be the one that would grant both high-skilled and low-skilled immigrants immediate access to welfare rights. We may call this, following Rawls, an example of fair terms of cooperation among presumably, or at least relatively, well-ordered liberal democratic member states. It, therefore, renders the EU a special case of international cooperation among liberal democratic states. Below I explain why this rule would have been opted for behind a VOI device, namely when

¹¹ On when and how a concern for reciprocity is sufficient for grounding access to welfare rights on grounds of membership to a system of social cooperation, see: Efthymiou (2020, 2021). For a thorough discussion of the relevant EU legislation and case law, as well as relevant and competing considerations, see De Witte (2015). See also De Witte, Bauböck, Shaw (2016) and Lacroix (2015).

¹² See Rawls, J. (2005, pp. 17–18) and Rawls, J. (1999, pp. 13, 49, 414–415) as well as Rawls, J. (2001, p. 18). I use the term 'Rawlsean' here in a methodological sense and not to refer to Rawls's own views on the EU. For an illuminating exchange on Rawls's views see Van Parijs, P. (2003) 'Three Letters on the Law of the Peoples and the European Union', *Revue de philosophie économique* (7), pp. 7–20.

member states do not know whether they will be on the sending or the receiving end of migration.¹³

Behind the Veil of Ignorance

To be able to set a VOI device, we need to know three things. First, the parties' motivation to enter the VOI device; second, the interests they have; and, third, the relevant facts affecting their decision. With regard to motivation, in the Rawlsian approach, a judgement or principle aiming to guide policy is unreasonable when it is partial to the interests of one party. This typically happens when the agreed terms merely mirror the bargaining power of the more powerful agents acting solely on the basis of their self-interest. To control for such biases, and hence to render the terms reasonable, Rawls argues that the terms should be reached from conditions of equal bargaining strength ensured by a VOI. Only then would they be reasonable.¹⁴

With regard to interests, we may say that member states have at least an instrumental interest in permitting freedom of movement among member states in order to improve the overall position of their worse-off citizens.¹⁵ Hence, they have a core interest in protecting the domestic achievements of social justice. That is, their acceptance of a freedom of movement policy cannot be instant and unconditional, as it needs to be shown to them that the proposed policy is consistent with their aforementioned interests as relatively well-ordered states.¹⁶

What are the relevant facts that we must allow behind the veil before we choose a principle to regulate access to welfare rights as an aftermath of labour migration? First of all, there is evidence that opening borders allows for the creation of an economic surplus due to the more efficient allocation of human capital.¹⁷ Therefore, all member states have an interest in creating the conditions necessary for the creation of a surplus that they could use to improve the overall position of their worse-off citizens. It is reasonable also to assume that less well-off member states would have an interest in restricting emigration of high-skilled workers to better-off member-states,

¹³ Recall also that for a currency union to be an optimal currency area there must be labour mobility, i.e. freedom of movement of labour. For a good discussion of the conditions necessary for creation of an optimal currency area see De Grauwe, P. (2012).

¹⁴ Rawls (2001, p.18).

¹⁵ The argument presented here gives freedom of movement merely instrumental value as a means to promoting and protecting domestic achievements of social justice. This is not to deny that freedom of movement could be valued for other instrumental or intrinsic reasons. See Efthymiou (2022) for an argument as to how access to welfare rights serves to link freedom of movement to freedom as non-domination. See also section VI for how valuing solidarity could affect the sharing of unreasonable burdens among member states.

¹⁶ Hence, the proposed scheme does not appeal, or require, a cosmopolitan account of the EU as it is compatible with a statist account of the EU. See Bellamy (2019, p. 49) for a helpful discussion and typology of variations of cosmopolitan and statist accounts of the EU.

¹⁷ Immigration produces such a surplus by mechanisms such as meeting shortages in labour supply as well as increasing productivity by complementarities with the skills of nationals and existing capital stock (Borjas 1999, pp. 99–102).

whereas better off member states would have an interest in restricting immigration of low-skilled workers from less well-off member states.¹⁸ Furthermore, and due to current inequalities among member states, it is highly likely that many high-skilled workers would move from worse-off member states to better-off states, and even more in times of economic crisis and economic divergence. Thus,¹⁹ EU member states essentially have to choose between three options behind the VOI: first, immigration only for the low-skilled, which is reasonably rejectable if they were to end up being better-off states; second, immigration only for the high-skilled, which is reasonably rejectable if they were to end up being worse-off states; and a third, not reasonably rejectable option for both better-off and worse-off states, which is immigration for both the high-skilled and low-skilled.²⁰

If this is the case, and immigration for both the high-skilled and low-skilled is the only option that is not reasonably rejectable, then member states behind the VOI—that is, when they do not know whether they will be on the sending or the receiving end of migration—would also opt for a policy that would compensate them for disproportionate losses of high-skilled labour and that would not over-burden their welfare systems with disproportionate numbers of low-skilled workers. That is, they would additionally opt for provisos that member states should be provided with assistance in order to maintain the overall position of their least advantaged citizens where that is necessary due to unreasonable costs associated with freedom of movement. The relevant two provisos here are: first, a proviso concerning compensation for asymmetrical human capital flows from less well-off to better-off members. This is the focus of the analysis below in this section, given the overall positive fiscal effect of EU immigration on host member states and its overall negative fiscal effect on sending member states.

A second proviso is also relevant here, although in practice less urgent. It concerns the over-burdening of host member states caused by EU immigrants' access to welfare rights. This proviso, however, does not necessarily entail restrictions on access, as we shall see later. It could be operationalised in the form of a fund to which member states non-compliant with best practices concerning welfare rights have to contribute. This fund could be established within the EU's current

¹⁸ The aim here is not to deny that most low-skilled workers contribute significantly to their host member states, especially in care work that is often undervalued and underpaid. The aim rather is to emphasise that host member states have an interest in restricting the access of those workers to their welfare systems, despite their contributions.

¹⁹ On the positive fiscal impact of EU immigration see *The Fiscal Effects of Immigration to the UK* by Dustmann and Frattini (2014) and Dustmann and Frattini (2014). See also OECD's International Migration Outlook 2013: <http://www.oecd-ilibrary.org/docserver/download/8113141e.pdf?expires=1460113129&id=id&acname=ocid49014605&checksum=625356CC45A31BF3087B742BD0F1FFB7>

A study of the Bank of Greece on emigration found that nearly 70% of Greek citizens who emigrated between 2010 and 2015 have a bachelor's degree compared to 27% and 42% of the general population in the two most popular destination member states of the EU, Germany and the UK respectively.

<http://www.bankofgreece.gr/BogEkdoseis/ekthdth2016.pdf>
<http://www.bankofgreece.gr/BogEkdoseis/oikodelt201607.pdf>

²⁰ A fourth option is no immigration for either low-skilled or high-skilled workers, but this would deprive all member states of the creation of an economic surplus due to more efficient allocation of human capital and hence it is an option contrary to their stipulated interests.

institutions as well as with the help of institutions with a European focus. For example, via the use of monitoring reports concerning the progressive realisation of socio-economic rights in member states (that are already issued by the council of Europe) and corresponding penalties (that are not currently imposed but can be imposed by the European Court of Justice).²¹

Let us focus on the first proviso then. EU immigrants' access to welfare rights is linked to the exchange of human capital across a region made possible by freedom of movement. It is an upshot of a form of economic cooperation with a significant impact on the welfare systems of *both* host and home states. It is these relations that trigger a need for justification. In this case, justice as reciprocity is a demand for fair terms of cooperation among member states that agree to open their labour markets to each other.

If these facts are generally known, what is the relevant normative baseline by which we could judge whether proposed and existing restrictions on access to welfare rights are justified? A good place to start is to recognise the fact that the significant inequalities in bargaining power found among the EU's member states could play a distorting role and suppress the price that worse-off states could reasonably demand for opening up their labour markets to migration.²² Therefore, any regulations concerning the movement of human capital across the EU calls for fair terms of cooperation that respect each party to the agreement as equal. A VOI device, by bracketing inequalities of bargaining power, helps us to tease out in more detail those fair terms of cooperation by modelling that concern for equal respect. The key point here is that freedom of movement of human capital constitutes a sufficient condition for triggering duties of reciprocity *as fair cooperation* among participant states and that the further determination of those terms must be carried out in a way that would ensure that those terms are *reasonably acceptable* to others as free and equal agents, and not as manipulated, dominated or one-sided.

²¹ See the section titled 'unreasonable burdens' below. Where such a fund proves insufficient to top up the ensuing costs, an insurance scheme could be considered. Given, however, the high probability of overall fiscal benefits to better-off host member states from EU migration and the effectiveness and coverage of a non-compliance fund, the institutionalisation of such an insurance scheme seems premature. Further, due to the nature and profile of EU migration, the premiums paid to such an insurance fund are very likely to be very low, and are therefore unreasonable not to opt for behind a VOI device. Therefore, a Dworkinian VOI device (that takes under consideration the relevant facts about EU migration) does not deliver a different conclusion to the one that the proposed Rawlsean device delivers with regard to immediate access to welfare rights. It only provides an alternative mechanism for its funding based on insurance premiums paid by all member states rather than on penalties and rewards for compliance with best practices (see also section 'From Reasonable Agreements to Reasonable Burdens' on this point). An additional advantage of granting EU immigrants immediate access to social assistance schemes on Rawlsean grounds is that it does not make the institutionalisation of such a complex Dworkinian insurance scheme a prerequisite for justifying access, but rather treats such schemes as assurance devices to be used only in the case of unreasonably costly scenarios notwithstanding full compliance with best practices. The role of an insurance scheme, therefore, is at best auxiliary and not central to what justice as international reciprocity requires in the case of access to welfare rights.

²² The alternative to an agreement behind a VOI for such states is not a closed-borders policy but de facto freedom of movement for its high-skilled workforce and de facto unfreedom of movement for its low skilled workers (see also footnote 20 above). Any improvement to that non-agreement baseline is one that they could be compelled to agree to outside a VOI.

What Policy Would Suit Best the Discharge of These Duties of Reciprocity?

There are five reasons to think that the fair sharing of the benefits and costs of freedom of movement must primarily take the form of immediate access to welfare rights.²³ To begin with, worse-off member states must be compensated for the costs of training human capital and any opportunity costs they may have to face due to high-skilled emigration. One potential problem here is that trained high-skilled labour, and talent, is not easily replaceable and hence not directly compensable (Brock and Blake 2014).²⁴ Investment of more resources in education and training does not necessarily result in equally good outcomes if the most talented and the most ambitious leave. A better policy, therefore, to opt for behind the VOI, is a guarantee of open borders for all EU immigrants: not just for the high-skilled immigrants that every better-off state has reasons to want, but also for the low-skilled that might need or want to follow them. Seen in that light, access to welfare rights serves as an enabling condition, in the form of welfare payments, that makes transition costs of immigration lower, not just for high-skilled but also for low-skilled EU immigration.²⁵ In this way, immediate access to welfare rights balances the outflow of high-skilled labour with a greater outflow of low-skilled workers and reduces the pressure on the welfare system of sending member states.²⁶

A second reason is that immediate access to welfare rights could serve as a buffer both against social dumping and its consequences on migration. In the context of a multilateral institution such as the EU, if EU immigrants have immediate access to welfare rights, then better-off states have an incentive to ensure that worse-off member states observe welfare rights, since non-compliance with such standards on the part of the latter will result in a greater number of migrants accessing their welfare systems. At the same time, citizens of worse-off member states are given an assurance mechanism by having their interest in comprehensive access to welfare rights protected against domestic social injustices aligned to the interests of other member states.

Third, representatives of member states behind a VOI device have reasons to prefer immediate access to welfare rights for all EU immigrants to a reparation fund or a similar policy. If member states have a legitimate claim to some of the gross

²³ For example, that alternative could be an EU fund that would collect the relevant payments and compensation and then redistribute them to all member states that suffer losses of human capital and tax revenue that undermine their welfare systems. For a similar proposal concerning brain-drain, see Brock, G. (2009) p. 202. The above reasons suggest that such a fund must be given a peripheral and supplementary rather than central role in the discharge of duties of reciprocity.

²⁴ Brock, G. (2014, pp. 46–47). See also Kollar (2017).

²⁵ Empirical evidence (see footnotes 19 above and 34 below) suggests such incentives are currently low. Therefore, there is plenty of room for strengthening such pulling factors where it is actually required by justice as reciprocity.

²⁶ This argument also shows why it would be unfair for sending states to cover the costs of welfare rights during transitional 'waiting periods', as they would shoulder a *double burden*: covering the costs of access to welfare rights for their low-skilled workers who offer their labour power to another labour market while also losing revenue and invested funds from the outflow of high-skilled workers.

value of high-skilled human capital that emigrates to other member states, then they are to decide whether they want compensation in the form of annuity payments or in the form of increased opportunities for immigration.²⁷ Given that immediate access to welfare rights expands the range of choices all immigrants have concerning where to work and live, it looks like member states, behind the VOI, have a good reason to demand that at least part (if not all) of their compensation is paid in that currency. More freedom of choice for a greater number of EU immigrants can serve as a tiebreaker between two equally good policies from the perspective of fair terms of exchange. Even if most people prefer to stay where they are, there is still a good chance they are willing to trade some of their compensation for better terms of migration in the event that they decide or need to exercise that option.

Fourth, moving to a state of affairs with immediate access to welfare rights entails lower transition costs than instituting a fund for international transfers across EU member states. Such a fund would require the founding of an EU body that would have to process all the relevant information regularly and determine the relevant annuities. Instead, immediate access requires only minor revisions to regulation 2004/38 in light of earlier decisions of the European Court of Justice.²⁸ Furthermore, the current political choice we are facing in the EU is not between closed borders with no compensation paid and closed borders with compensation paid, but freedom of movement with or without (or with more or less) access to welfare rights. Both a closed-borders 'utopia' and a utopian Eurocosmopolis with a federal transfer fund are off the current institutional map of the EU. In a world where significant international transfers are unlikely, freedom of movement with access to welfare rights seems like the best approximation for realising justice as reciprocity internationally. All of the above reasons suggest that immediate access is a comparatively effective policy that is not only normatively desirable, but also both technically and politically more feasible than alternatives due to its lower transition costs.²⁹

A final reason that speaks in favour of this proposal is its direct linkage to the criterion of justificatory reciprocity as an impartial standpoint that shows equal respect to all agents involved. This is, recall, the requirement that terms of cooperation that are proposed must be reasonably acceptable to others as free and equal, and not as manipulated, dominated or under pressure of being socially or politically inferior.³⁰ It requires that EU citizens treat others as addressees of reason and not merely as a means to self-enrichment that can be shovelled around like objects whenever

²⁷ This argument is somewhat analogous to one that Mathias Risse puts forward with regard to the underuse and overuse of territory in his Risse, M. (2012, p. 155).

²⁸ See e.g. ECJ's judgment in 'Collins' (C-138/02), Collins (2004).

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF>
<http://curia.europa.eu/juris/showPdf.jsf?docid=61560&doclang=en>

²⁹ On the criterion of comparative effectiveness see Rawls, J. (1999, p. 89) and for a scalar account of political feasibility see Lawford-Smith, H. (2013).

³⁰ For a defence of this interpretation of Rawls see Samuel Freeman (2007) and David Reidy (2007) who also draw an additional and relevant distinction between reciprocity of advantage and reciprocity of justification.

convenient to the more advantaged.³¹ Within a given member state, a policy meets this criterion of reciprocity by placing behind a VOI whether an individual within a society's basic structure is a net-contributor or a net-beneficiary to the welfare system, and therefore it treats everyone as an equal addressee of reasons. International reciprocity among different member states meets the same criterion of reciprocity by placing behind a VOI whether an individual member state is a net-contributor or a net-beneficiary of movements of human capital; it, therefore, treats every member state as an equal addressee of reasons when it comes to choosing an appropriate EU policy concerning EU nationals' access to welfare rights. And such equal concern is difficult to square with policies that restrict rather than secure equal access to basic welfare rights for all EU citizens, not just for the few and privileged ones.

From Reasonable Agreements to Reasonable Burdens

The international reciprocity approach outlined above shows why it is reasonable to accept free movement for both high- and low-skilled in unequally developed states, provided two provisos are met. It also shows why no restrictions should apply when the two provisos are met, such as when both the host and sending EU member states either benefit or are not unreasonably burdened.³² The provisos behind the VOI serve effectively as safeguards against policies that maximise benefits for host states at the expense of sending states. Further, the two provisos are linked to the fact that there are significant socioeconomic inequalities among member states. The first proviso sufficiently safeguards the interests of sending member states that would like to make sure that freedom of movement of all mobile EU nationals is adequately resourced via access to social assistance benefits so that an outflow of low-skilled persons balances the outflow of high-skilled persons. The second proviso serves the interests of home member states that would like to make sure that the resourcing of freedom of movement via social assistance benefits and welfare rights, in general, does not unreasonably burden their welfare budgets and their domestic achievements of social justice.

It is the second proviso that I would like to discuss here in more detail. One of the objections often raised against the lifting of current restrictions on access to social assistance benefits is that the lifting of such restrictions will unreasonably burden host member states. Moreover, it was briefly mentioned above that it would be reasonable for home member states to opt for a policy of immediate access to social assistance *as long as* such access did not constitute an unreasonable burden on their welfare systems. On the view that I have just described, whether EU immigrants are granted immediate access to social assistance benefits depends on how the term 'unreasonable' is defined. Some clarifications, therefore, are in order.

³¹ See Rainer Forst (2017).

³² The term 'unreasonable burden' suggests here that the parties do not aim to benefit from freedom of movement maximally, but to cooperate in a way that does not significantly disadvantage both host and home member states in terms of their achievements of social justice.

First, and in line with VOI mechanism proposed above, what facts are allowed behind the VOI device matter as to whether a burden is deemed reasonable (or not) from an impartial point of view. For example, a focus on the net member claimants as the basis for the accrued liability of better-off host member states is rather misleading, as a relevant fact, because the benefits and costs of schemes of labour exchange depend on the average skill profile of the immigrant group as a whole and not on whether a given member state ‘imports’ more claimants than it ‘exports’. The scheme I proposed above controls for such possible biases and takes under consideration positive externalities that benefit worse-off nationals when restrictions on EU immigrants’ access to social assistance benefits are lifted.³³

Second, it is important to differentiate between a burden and an *unreasonable* burden when it comes to the resourcing of social assistance benefits. I take a burden to be a net cost. To begin with, note that the cost of granting access to such rights to EU immigrants, as a group, is not necessarily *additionally* burdensome. To see this, one has only to think that newly arriving EU immigrants in work pay for the non-contributory social assistance benefits of EU migrants out of work via their taxes in the very same way that nationals in work pay for the non-contributory social benefits of non-economically active nationals via their taxes. EU migrants, conceptually speaking, are no more, and no less, of a burden than nationals are. Only if EU immigrants, as a group, contribute relatively less to the funding of welfare rights than nationals could we speak of a (financial) burden. If they contribute relatively equally or more, then the discussion ends here, and there is no need to look further at whether access constitutes an *unreasonable* burden, as there is no burden to begin with.³⁴

Third, the term ‘*unreasonable* burden’ implies that the burden in question should be significant rather than trivial or moderate in weight. An example of a trivial burden is a net cost at t_1 that is reversible at t_2 . In this case, it is clearly premature to consider the burden unreasonable at t_1 . An example of a moderate burden is a modest net cost that nonetheless does not significantly undermine the ability of the state in question to continue providing the kind of public services that it typically provides. Contrast now these cases of trivial and moderate burdens with a case where the host state is *irreversibly* obstructed from delivering welfare provisions that are typical to the type of welfare regime to which it belongs.³⁵ In this case, it is easier

³³ See Efthymiou (2022).

³⁴ Empirical studies suggest that EU immigrants contribute more to the welfare budget of the UK than UK nationals. http://ec.europa.eu/employment_social/empl_portal/facebook/20131014%20GHK%20study%20web_EU%20migration.pdf.

See also Dustmann and Frattini (2014), Dustmann, Frattini and Halls (2010), Dustmann, Frattini, and Preston (2012). ‘The Effect of Immigration along the Distribution of Wages’, *The Review of Economic Studies*, 80(1), pp. 145–173. Immigrants in general tend to contribute to the host state dynamically and they are therefore more likely to make a positive fiscal contribution over time. See Bank of Greece (2016) <http://www.bankofgreece.gr/BogEkdoseis/ekthdkth2016.pdf>

³⁵ For example, if the evidence were to suggest that is very likely that Sweden will, over time, irreversibly turn into a UK-type welfare regime solely due to EU immigrants’ access to welfare rights. Even though the aforementioned studies suggest that EU immigration does not constitute a net burden even in the short-term, a long-term perspective that is more sensitive to the fact that immigrants tend to make

to argue that the burden in question is unreasonably high. By agreeing to shoulder moderate costs, rather than *no costs*, member states help bring about and communicate a sense of trust and solidarity among EU citizens and member states. This sense of trust and solidarity would be undermined if member states were to opt not to endure any burdens, however trivial or modest.

Fourth, and perhaps more importantly for the topic of this article, from the fact that a burden is unreasonable, it does not necessarily logically follow that EU immigrants should be subject to restrictions on their access to social assistance benefits. There could be ways to compensate host member states that face burdens that are clearly well above moderate and therefore unreasonable while safeguarding EU immigrants' access to welfare rights. One way is to set up an EU-wide compensation fund to which *every* member state has to contribute in the form of an insurance or contribution premium. The problem here is that such a scheme would require similar contributions from all member states and hence not differentiate between sending states that are compliant with best practices concerning welfare rights and those that are not and that might try to game the proposed scheme to minimise their social spending and lower labour costs.³⁶ Therefore, a better scheme would be one that requires non-compliant or worse-performing member states (e.g. with the provisions of the social charter) to pay penalties, and that uses those payments to compensate member states that face unreasonable costs. For example, monitoring reports concerning the progressive realisation of socioeconomic rights in member states (that are already issued by the council of Europe) could be used, and corresponding penalties (that are not currently imposed but can be imposed by the European Court of Justice) applied.³⁷ The revenues from such penalties can be used to compensate for unreasonable costs that the most comprehensive welfare systems may face, or even to reward such member states for incentivising a 'race to the top'.³⁸ Therefore, a promising route to take in such a scenario is to ask all member states to observe the highest possible level of social spending for their level of per capita GDP. This is the idea that every country of the EU has to observe a maximum level of social spending as a percentage of its GDP and that every member state must progressively realise socioeconomic rights in a sequencing manner according to its level of economic development.³⁹

Footnote 35 (continued)

even higher contributions at a later point in time (e.g. after 20–30 years) might be more appropriate as the relevant baseline for testing claims of irreversible costs.

³⁶ See also footnote 21.

³⁷ With minor, if any, revisions to the TEU. See here for the relevant reports of the Council of Europe (2020): <http://www.coe.int/en/web/turin-european-social-charter/national-reports>

³⁸ The issue of rewarding well-performing member state is also key here. It is possible that increasingly, and over time, member states with more comprehensive social welfare systems and higher taxes (e.g. Sweden) will attract low-earners, whereas countries with less comprehensive welfare states and lower taxes (e.g. UK) will attract more high-earners. This will result in different profiles of EU immigrants, as groups, from one member state to another. In this scenario, EU immigration could have a negative impact on the welfare system of some host countries, whereas it could have a positive impact on others. See Milanovic (2016).

³⁹ On the idea of sequencing see Barry and Reddy (2008).

Fifth, unreasonably high costs could be the outcome of the asymmetric distribution of benefits and burdens from EU integration over time due to the very nature and design of the common market. The less socioeconomic convergence there is among the EU's member states, the more appealing, for example, the transnational exercise of freedom of occupational choice becomes. This issue is undoubtedly a more complex one to tackle fully as it is likely to require significant institutional reforms at the level of the EU, and it clearly goes beyond the scope of this paper. Nevertheless, what one needs to keep in mind here is that the current flow of human capital in the EU is such that it deprives less well-off member states of valuable human capital. Any scheme that does not further burden sending countries (e.g. by asking them to finance the access of its citizens to welfare rights at the host country) de facto can also serve to ameliorate current asymmetries of human capital flows in the EU. As said earlier, a more comprehensive set of policies is also needed for greater socioeconomic convergence among member states of the EU, but small and incremental changes to existing policies are both desirable and feasible in the current institutional framework of the EU. Otherwise, increased EU immigration and increased levels of access to social assistance benefits are merely the price to pay for the absence of such policies.

Sixth, when considering whether a burden is unreasonably high or not, it is also important that one takes into consideration the positive effects of such policies on nationals as well as on the stability of the EU as an institutional structure that provides several other collective goods. On the one hand, it is important to keep in mind that exporting social assistance benefits from sending member states, even if permissible and possible, would in practice be insufficient to protect both EU citizens and nationals from the relevant social vulnerabilities. This is because a significant part of EU migration takes place from less well-off states with lower levels of coverage to better-off states with higher levels of coverage. In those cases, that is if sending member states have to pay social assistance benefits directly to mobile EU citizens living abroad, then the level of coverage will be lower than the level provided to nationals. This policy will therefore de facto result in a two-tiered workforce with different reservation wages and thereby make easier the exploitation of both nationals and EU workers in that labour market. On the other hand, the stability of EU institutions depends on the reasons that sustain it. The stability of the EU should not rely on a *modus vivendi* based on a fragile equilibrium of fear among competing member states seeking to serve their national interests maximally. If the EU is to be stable, it should remain stable for the right reasons. It is when member states behave as reasonable rather than as self-interested agents that a sense of solidarity and trust is brought about. And such stability is better served by a sense of trust and solidarity than by an equilibrium of brinkmanship. Immediate access to social assistance benefits could further buttress such a sense of a common purpose and of a shared community of faith.

Objections

There are several objections to the argument put forward in this paper, but here I have the space to consider four. The first objection has to do with the focus of the argument: why should one focus on social assistance benefits and not outline a more

comprehensive model of Eurozone justice? The answer is that Eurozone justice theories (as in Sangiovanni's (2013) and Viehoff's (2017) work) essentially aim to control for exogenous factors that influence the ability of a given member state to pursue social policy goals. But they have little to say over endogenous factors that influence the ability of a state to pursue social policies. Hence, they say little on how European institutions could help to combat the capture of the state by local economic elites and aspiring tin-pot dictators. In other words, even in the current (un)just Eurozone, non-compliance due to state capture and collaboration is also a problem of domestic social justice. However, the solution is not to institute policies that punish all citizens of non- or less-compliant states but to put policies in place that target only those that benefit and that choose to collaborate with unjust authorities. This is not to say that immediate access will provide all victims of injustice with an exit option from such regimes but only that it will strengthen their bargaining position versus local oligarchs and corrupt officials.⁴⁰

A second objection, related to the first, is that immediate access will favour only young and healthy potential workers but do little for those who are 'too old' or 'too sick' to move. In reply, one needs to concede that it is true that those too old or too sick will not benefit as much from immediate access to welfare rights, but we have to keep in mind that the primary victims of austerity are the young, with unemployment rates twice as high as the national average.⁴¹ To ask them to endure a corrupt and unjust regime is simply too much to ask from victims of domestic injustices. Immediate access for mobile EU nationals via funding for non-compliance with best practices of social justice could help improve the overall position of those who truly cannot move and give a robust exit option to those who wish to move but cannot afford it. If penalties are effectively administered to increase the compliance of member states, then everyone could benefit from such a scheme.

A third objection could be dubbed the 'solidarity preconditions objection'. One could object here that the argument puts the cart before the horse. What the EU lacks is a sense of solidarity and the shared political institutions that generate it.⁴² I am quite sympathetic to the view that a sense of solidarity matters when it comes to thinking about social justice obligations and especially social assistance benefits. However, I am sceptical as to whether a sense of solidarity based on shared political practices could be given that role. This is because I believe that solidarity is not derived from shared democratic practices, but only, at best, indirectly supported by them. This is why I can feel solidarity with workers at my university regardless of

⁴⁰ The idea here is that any compensation paid to sending states should be conditional on how these states perform with regard to best practices in protecting and promoting civil, political and socio-economic rights. Such safeguards are needed in order to prevent relatively illiberal and inegalitarian member states from using immigration as a means to their ends. A mixture of economic and political sanctions can also be more effective in targeting corrupt officials and those who collaborate with them. Further, the EU could also fund civil society organisations that monitor the implementation and compliance with social rights legislation (for a discussion of such mechanisms see Theuns (2020)).

⁴¹ See Eurostat (2021) https://ec.europa.eu/eurostat/statistics-explained/index.php/Unemployment_statistics#Youth_unemployment

⁴² See e.g. Habermas (2015). See also Eberl (2018). For a good discussion of this solidarity approach see Seubert (2020). For a thorough discussion of the nature and demands of solidarity see Kolers (2016).

their national citizenship, as well as with those workers in other EU countries who are in similar working conditions. Solidarity is a disposition to resource others' projects, the aims of which we endorse. But it is not a necessary disposition for resourcing others' welfare rights or social rights in general (i.e. I can resource others' welfare rights out of a sense of justice) and certainly not necessarily a disposition that overlaps with national or democratic geographical boundaries.⁴³ Therefore, I remain sceptical of views about welfare rights that treat shared political membership as a necessary condition for solidarity. Further, shared political membership is also not a sufficient condition for solidarity because I could share political membership with A or B yet not be motivated to act in solidarity with them. Therefore, shared political membership, at best, facilitates a sense of solidarity, but is neither necessary nor sufficient for policies associated with solidarity.

A fourth objection runs as follows: if immigration is a form of interaction among states that involves human capital exchange and is consequential enough to trigger a concern for duties of international reciprocity, then all states willing to reciprocally lift such immigration restrictions, and not just EU member states, should also be part of the same scheme of reciprocity and grant immigrants from all participating states access to basic welfare rights such as social assistance benefits, provided the two provisos are met. What is so special about the EU as a case, then? To this objection, there are four replies. First, the starting point for this essay is the observation that some of the literature on EU immigrants' basic welfare rights tends to downplay the degree of interaction and cooperation among European countries associated with freedom of movement. Hence, unlike Rawls (Rawls 1999a, b), and Rawlseans (Freeman 2007), I do not have to treat duties of social justice, and questions around access to relevant welfare rights as a consequence, as tied to conditions of membership to the system of social cooperation of a given state. One of the core components of the argument advanced in this paper is that international cooperation in a particular policy domain, that is immigration, is sufficient to trigger a concern for reciprocity in welfare rights provisions. Hence, in this paper, I adopt a minimalist account of cooperation as the relevant condition that triggers social justice concerns. More specifically, my argument departs from the premise that migration between two states constitutes a condition that triggers social justice concerns because of its potential fiscal effect on welfare provisions in both states. This is not to say that fiscal effect is the only condition triggering such social justice concerns, but to point out that it is significant enough to raise the need to justify restrictions on access to welfare rights in the absence of additional considerations typically associated with naturalisation and citizenship.

⁴³ Studies in social psychology suggest that social priming of exclusive identities is the primary driver behind in-group favour and that social priming of inclusive identities can have the opposite effect on those who see out-groups less favourably than in-groups (Dovidio, J. F., et al. 1997). Further, studies in political science suggest that the prospects for inclusive solidarity depend less on prior feelings of solidarity and more on political elites' ability and willingness to create and support policies that can over time nurture the very solidarity needed to sustain them (Rothstein and Bloemraad in Banting and Kymlicka 2017).

This is important, not just normatively but also policy-wise, due to the ambiguous role that such fiscal effects are given within EU law and policy. On the one hand, EU immigration that results in a significant negative fiscal effect is taken as a reason to absolve host member states from the responsibility to fund EU immigrants' access to basic welfare rights; but, on the other hand, a positive fiscal effect is not treated as a reason for states to acquire a responsibility to fund access to such basic welfare rights. The paper aimed to show that this asymmetry cannot be justified when we ask member states to choose an appropriate scheme of access to welfare rights for EU immigrants that protects as well as facilitates their domestic achievements of social justice behind a VOI ignorance device that controls for differences in bargaining power between better-off and worse-off member states. If the proposed argument and the associated scheme are sound, then these considerations suffice for granting EU immigrants access to basic welfare rights and additional membership criteria are rendered redundant. Hence, the scheme proposed need not be confined to the case of the EU as it is relevant to all states willing to cooperate in instituting and participating in such a freedom of movement scheme regardless of whether they are member states of the EU or not.

There are, however, reasons to treat the EU as a pertinent case for the analysis, and this brings us to the other three reasons. The second reason is that the degree and nature of social cooperation among the EU's member states is definitely denser and goes beyond the domain of immigration. The EU, therefore, as a case, places a heavier burden of proof on the shoulders of those who argue that even denser forms of international cooperation do not justify granting EU immigrants access to basic welfare rights before they satisfy social membership criteria. This brings us to the third reason. Condition B, concerning unreasonable burdens, and the associated proviso, is easier to satisfy in practice when the countries involved do not differ significantly in terms of social welfare institutions, GDP per capita or population size. The EU, therefore, is fertile ground for the realisation of the proposed scheme and its provisos. Fourth, the existing institutional structure of the EU makes both the implementation of such a scheme as well as compliance with it easier. If we have to choose between cases, then we should prioritise a case that for reasons of political feasibility is closer to our reach and that could serve as a blueprint for further international cooperation in the same policy domain. The EU is such a case and is out there.

Conclusion

If the argument presented in this paper is sound, then there is much that can be achieved concerning social justice via reasonable international cooperation among the EU's member states. This is an optimistic conclusion as it brings social justice in Europe closer to our reach. It does not call for pan-European solidarity founded on a (yet to emerge) European demos nor for complex Dworkinian insurance premiums paid by all member states, nor for that matter for a pan-European unemployment scheme funded by all member states nor for a new politics of hospitality in welfare rights. All that it calls for is that member states accept that

EU citizens, as a group, are *a priori* no more of a net ‘burden’ to their welfare systems than their own citizens and that they take steps, if ever it becomes necessary, to compensate member states that bear unreasonable costs.

Needless to say, carrying out the proposed scheme of compensation of host member states would probably require some changes to member states’ competencies concerning welfare policy. Leaving, however, member state competencies unrestricted in the area of welfare policy is more likely to allow for moral hazard and to a levelling down of welfare provisions. Instead, the principle of non-discrimination should be extended to social assistance benefits and acquire a higher degree of coordination to promote best practices. Admittedly, this is a rather piecemeal reform in comparison to a pan-European welfare state. But it is a reform worth fighting for here and now to ensure that best practices of social justice are observed in all member states without having first to turn the EU into a federal state. It puts forward a policy proposal that deals with any unreasonable burdens that host member states may face, preserves the benefits of immediate access for mobile EU nationals as well as nationals, and improves social justice domestically in every member state—*desiderata* that a policy of access based on current or similar restrictions cannot meet.

The paper also possibly has direct implications for public policy in the current institutional framework of the EU. It provides an argument against current (or similar) restrictions when host member states face no reasonable burdens *as well as* when they do face such burdens. It also sets itself against so-called ‘modest proposals’ that aim to provide EU immigrants with access to social assistance benefits for a limited period via a common European fund that could doubly burden both sending and compliant states. Finally, the article provides an alternative to approaches that focus almost exclusively on historical and background injustices in the EU, as it deliberately brackets these issues. This is not because these issues are not central to debates on the scope and nature of social justice, welfare rights and freedom of movement in the EU. The rationale is both a practical and a principled one. The paper aims to be applicable even when a reasonable or unbridgeable disagreement over such injustices persists. More provocatively, it also allows for the conclusion that even if the very structure and history of the EU are fully just, then restrictions on access to social assistance benefits do not necessarily follow, as asymmetrical human capital flows can also take place among fully well-ordered societies. All that follows is that we need, here and now, as well as in the foreseeable future, a compliance mechanism for intra-member state justice to safeguard against both moral hazard and inter-member state injustices that brute self-interest makes possible.

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