

Why Current Restrictions on EU immigrants' Access to Welfare Rights should be Lifted:
An Argument from International Reciprocity

Dr. Dimitrios Efthymiou
Goethe-Universität Frankfurt
efthymiou@em.uni-frankfurt.de

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Defenders of current restrictions on EU nationals' access to welfare rights, intended as basic welfare rights such as social assistance benefits, in host member-states often invoke a principle of reciprocity among member-states to justify these policies.¹ The general argument is that duties of reciprocity characteristic of welfare rights are triggered by membership to a system of social cooperation. For example, Richard Bellamy and Joseph Lacey (2018) have argued, also [here on EuVisions](#), that newly arriving EU immigrants who look for work do not meet the relevant criteria of membership because they have not yet contributed enough to qualify as members (Bellamy & Lacey 2018; Sangiovanni 2013; 2017). Therefore, current restrictions on their access to welfare rights are justified. The regulating assumption here is that the collective goods produced by cooperation among states at the level of the EU must be brought about in a way that does not undermine the ongoing production of collective goods by social cooperation within both host and sending member-states.² Therefore, freedom of movement, whatever its merits, should not undermine the welfare systems of host member-states.

In this (relatively) short essay, 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 cooperation, I will argue, is

¹ By welfare rights here I mean mainly basic basic welfare rights such as social assistance benefits (e.g. means-tested JSA and housing benefit 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 judgement in 'Dano' (C-333/13).

² See Bellamy, R. and J. Lacey (2018). "Balancing the rights and duties of European and national citizens: a democratic approach." *Journal of European public policy* 25(10): 1403-1421; Sangiovanni, A. (2013). "Solidarity in the European Union." *Oxford Journal of Legal Studies* 33(2): 213-241; Sangiovanni, A. (2017(forthcoming)). *The Bounds of Solidarity: International Justice, Reciprocity, and the European Union*. Cambridge (Mass), Harvard University Press.

what kind of policy EU member-states would choose if they were not to know whether they were net contributors or net beneficiaries to the relevant scheme of international cooperation.

As I hope it will become clearer in the rest of this essay I doubt a veil of ignorance device founded on a notion of international reciprocity could also be used to justify current restrictions on EU nationals' access to welfare rights.³ More specifically, in this essay I show how a direct appeal to *international* reciprocity is sufficient for justifying immediate and continuous 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 2017; Viehoff 2017) or, for that matter, a European Super-state (Morgan 2007).⁴ In that sense, this essay provides a positive argument as to why reciprocity grounds immediate access to welfare rights for EU nationals.⁵ 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' contribution at their host state

³ Different versions of the relevant veil of ignorance device are possible here. I follow one that is closer to Rawls (1999) 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 as well as the relevant types of policies they would be allowed to take insurance for. The focus of this paper is on a Rawlsian device but below at endnote XI I discuss briefly why I also think that the use of such an insurance scheme would not necessarily imply restrictions on EU immigrants' access to social assistance benefits.

⁴ Habermas, J. 2001. 'Why Europe Needs a Constitution' *New Left Review* 11: 5; Van Parijs, Philippe, and Yannick Vanderborght. 2017. *Basic income: a radical proposal for a free society and a sane economy*. Cambridge, Massachusetts: Harvard University Press; Viehoff, J. (2017). "Maximum convergence on a just minimum: A pluralist justification for European Social Policy." *European Journal of Political Theory* 16(2): 164-187; Morgan, Glyn. 2009. *The idea of a European superstate: public justification and European integration*. Princeton: Princeton University Press. Here I don't have the space to discuss whether a concern for international reciprocity is consistent with subscribing to an EBI without introducing ad-hoc considerations based on other principles through the back door. I discuss this issue in some detail in Eftymiou, D. *EU migration, Welfare Rights and Non-Domination* (manuscript).

⁵ 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 essay. See Bruzelius, Cecilia, Constantin Reinprecht, and Martin Seeleib-Kaiser. 2017. "Stratified Social Rights Limiting EU Citizenship." *JCMS: Journal of Common Market Studies* 55 (6):1239-53 and Ferrara, Maurizio. 2016. "The Contentious Politics of Hospitality: Intra-EU Mobility and Social Rights", *European law journal*, 22(6), 791-805.

conveniently sidesteps the international dimension of welfare rights access as an upshot of human capital exchange among self-determining member-states who have opted to reciprocally lift physical restrictions on freedom of movement. If the arguments below are sound then EU immigrants need not meet criteria of social membership, or stakeholding, to the host society's scheme of social cooperation to be granted access to welfare rights on grounds of reciprocity.⁶

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 Rawlsian formulation.⁷ They are therefore informed by two general requirements of reciprocity. First, each agent participating in cooperation should benefit on terms that are *fair* as opposed to terms that are merely mutually advantageous. Second, that the proposed terms of cooperation must be *reasonably acceptable* to others as free and equal agents, and not as manipulated, dominated, or one-sidedly (Rawls 2005, 136-7).

To illustrate: imagine two societies A and B. Now imagine they agree to freedom of movement and to allow access to their labour markets. Assume further that A is richer, on average per capita terms, than B. It therefore experiences a higher influx of inward EU migration than B and that 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 (as some reciprocity views do) 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, I will show.

⁶ 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, D. *EU Migration, Out-of-work Benefits and Reciprocity* (manuscript). On why a principle of transnational non-domination provides a more coherent justification for granting EU immigrants to welfare rights see Efthymiou, D. *EU migration, Welfare Rights and Non-Domination* (manuscript).

⁷ See Rawls, J. (2005) *Political Liberalism* (Columbia Uni. Press) at 17-8, Rawls, J. (1999) *A Theory of Justice*, (Harvard University Press) at §13, 49 and pages 414-5. See also Rawls, J. (2001) *Justice as Fairness: A Restatement* (Harvard University Press) at § 18. Hence, I use the term Rawlsian here in a methodological sense and not in order 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), 7-20.

The relevant question that a reciprocity-based approach needs to ask head on to provide an answer 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 didn't 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 veil of ignorance device, namely when member states don't know whether they will be on the sending or the receiving end of migration (VOI hereafter).⁸

Behind the Veil of Ignorance

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 a creation of an economic surplus due to the more efficient allocation of human capital.⁹ It is reasonable to also assume that less well-off member-states would have an interest in restricting emigration of high-skilled workers to (more) better-off member-states whereas more better off member states would have an interest in restricting immigration of low-skilled workers from less well-off member-states. Furthermore, and due to current inequalities among member states, it is highly likely that high-skilled workers would move from worse-off member states to better-off states, and even more so in times of economic crisis and

⁸ 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) *Economics of Monetary Union*. Oxford University Press.

⁹ 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. George Borjas, *Heaven's Door* (Princeton: Princeton University Press, 1999), pp. 88 and 99-102.

economic divergence. Thus,¹⁰ EU's member states essentially have to choose between three options behind the VOI: immigration only for low-skilled, which is reasonably rejectable if they were to end up being better-off states, immigration only for high-skilled which is reasonably rejectable if they were end up being worse-off states. Therefore, the best, and not reasonably rejectable option is immigration for both high-skilled and low-skilled.

If this is the case, then member-states, behind the veil of ignorance, that is when they don't know whether they will be on the sending or the receiving end of migration, would opt for a policy that would compensate them for losses of high-skilled labour and that would not overburden their welfare systems with disproportionate numbers of low-skilled workers.¹¹ EU immigrants' access to welfare rights is linked then to the exchange

¹⁰ On the positive fiscal impact of EU immigration see *The Fiscal Effects of Immigration to the UK* by Christian Dustmann and Tommaso Frattini (2014) and Dustmann, C. and T. Frattini (2014). "The Fiscal Effects of Immigration to the UK." *The Economic Journal* 124(580): F593-F643; Dustmann, C., et al. (2010). "Assessing the Fiscal Costs and Benefits of A8 Migration to the UK *." *Fiscal Studies* 31(1): 1-41.

See OECD's International Migration Outlook 2013: <http://www.oecd-ilibrary.org/docserver/download/8113141e.pdf?expires=1460113129&id=id&accname=ocid49014605&checksum=625356CC45A31BF3087B742BD0F1FFB7>

For the financial impact of inward EU migration to the UK from A8 countries (CZ, EE, HU, LV, LT, PL, SK, SI) see: http://www.cream-migration.org/publ_uploads/CDP_18_09.pdf

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 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/ekthdkth2016.pdf>

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

<http://blogs.lse.ac.uk/greeceatlse/2016/12/06/brain-drain-and-the-greek-crisis/>

¹¹ That is they would 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 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, if relevant at all. It concerns the overburdening of host member-states caused by EU immigrants' access to welfare rights. This proviso, however, does not necessarily entail restrictions on access. It could be operationalized 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 current EU's institutions. For example, via the use of monitoring reports concerning the progressive realisation of socioeconomic 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). 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

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.¹²

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 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.¹³ 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 veil of ignorance 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

migration and the effectiveness and coverage of a non-compliance fund, the institutionalisation of such an insurance scheme seems premature, if not unnecessary. 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 therefore unreasonable not opt for behind a veil of ignorance 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 Rawlsian device delivers with regard to immediate access to welfare rights. It only provides an alternative mechanism for its funding. An additional advantage of granting EU immigrants immediate access to social assistance schemes on Rawlsian 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, and if necessary, in the case of unreasonably costly, but also quite unlikely, scenarios. The role of an *insurance* scheme, therefore, is, at best, merely auxiliary and not central to what justice as international reciprocity requires in the case of access to welfare rights.

¹² These are not the only conceptions of reciprocity available. Another way one can approach this issue is to argue that a weaker principle of reciprocity as fair play is at work in such cases. More specifically, if we accept that it is permissible that you lose certain rights when you benefit from the actions of others then it is possible to argue that the least advantaged of the host member-state lose the right to restrict access to welfare rights for EU immigrants as soon as their overall position improves as a result of EU migration. This is not, however, the conception of reciprocity discussed here. See Klosko, G. (2005) *Political Obligations*. Oxford: Oxford University Press.

¹³ The alternative to an agreement behind a veil of ignorance 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. Any minor improvement to that non-agreement baseline is one that they could be compelled to agree to outside a veil of ignorance.

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-sidedly.

What policy would suit best the discharge of these duties of reciprocity?

There are five reasons to think that the fair sharing of these benefits and costs must primarily take the form of immediate access to welfare rights over alternatives.¹⁴ 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 as a result of high-skilled emigration. One potential problem here is that trained high-skilled labour, and talent, is not easily replaceable and hence directly compensatable (Brock and Blake 2014).¹⁵ Investment of more resources to education and training does not necessarily result in equally good outcomes if the most talented and the most ambitious leave the country in significant numbers. A better policy, therefore, to opt for behind the VOI is a guarantee for 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 from 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.¹⁶ 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-

¹⁴ 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 who 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 five reasons suggest that such a fund must be given a peripheral and supplementary rather than central role in the discharge of duties of reciprocity.

¹⁵ Brock, G. (2014) *Debating Brain Drain*, p.46-7.

¹⁶ Empirical evidence (see link to EU Commission's report 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.

http://ec.europa.eu/employment_social/empl_portal/facebook/20131014%20GHK%20study%20web_EU%20migration.pdf

system of sending member-states.¹⁷

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 as non-compliance with such standards on the part of the latter will result in 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 access to welfare rights protected against domestic social justices by 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 legitimately own some of the gross value of high-skilled human capital that emigrates to other member-states then they are to decide whether they want compensation in form of annuity payments or in the form of increased opportunities for immigration.¹⁸ Given that immediate access to welfare rights expands the range of choices all immigrants have over where to work and live it looks like members-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 is surely a tie-breaker 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-off some of their compensation for better terms of migration in the case they decide or need to exercise that option *due to* freedom of movement.

Fourth, moving to a state of affairs with immediate access to welfare rights entails lower transition costs than instituting a fund for international transfers

¹⁷ This argument also shows why it would be unfair for sending states to cover the costs of welfare rights during transitional 'waiting periods'. First, because they would shoulder a double burden: covering the costs of access to welfare rights for 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. Second, a focus on the net member claimants as the basis for the accrued liability of better-off host member-states is rather misleading 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'.

¹⁸ 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) *Global Justice*, p. 155.

across EU members. Such a fund would require the founding of an EU body that would have to regularly process all the relevant info 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 (ECJ).¹⁹ Furthermore, the current political choice that 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 institutional map of the EU. Therefore, freedom of movement with immediate access is more in line with the EU institutions that are already in place. In a world where significant international transfers are unlikely, freedom of movement with access to welfare rights seems like the best, even if second-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.²⁰

Finally, what 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.²¹ It requires that EU citizens treat others as addressees of reason and not merely as means to self-enrichment that can be shovelled around like objects whenever that is convenient to the more advantaged.²² Within a given member-state a policy meets this criterion of reciprocity by placing behind a veil of ignorance whether an individual within a society's

¹⁹ See e.g. ECJ's judgment in 'Collins' (C-138/02).

<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>

²⁰ On the criterion of comparative effectiveness see Rawls, J. *The Law of Peoples*, p.89 and for a scalar account of political feasibility see Lawford-Smith, H. (2013) "Understanding Political Feasibility," *Journal of Political Philosophy*, 21, pp. 243-59.

²¹ 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. See Freeman, S. R. (2007). Rawls. London; New York, Routledge and Reidy, D. A. (2007). "Reciprocity and Reasonable Disagreement: From Liberal to Democratic Legitimacy." *Philosophical Studies* 132(2): 243-291.

²² See Rainer Forst (2017). *Normativity and Power*. Oxford: Oxford University Press.

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 veil of ignorance whether an individual member-state is a net-contributor or a net-beneficiary of movements of human capital and therefore it 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.