**Democratic Justice and the Boundaries Problem**

Albert Weale’s *Democratic Justice and the Social Contract* represents an ambitious and insightful contribution to both theories of justice and democratic theory. In particular, it provides a highly original way of framing and understanding their often under-theorized relationship. By posing a democratic contract for mutual advantage among self-interested political equals as the source of principles of justice, Weale pushes us to reflect on whether social justice is at all possible without democracy. He also creates an interesting line of continuity between three different and potentially conflicting commitments. First, a commitment to *procedural* *social justice* -- to find justifiable principles of political association for societies that should be understood *as though* they were social contracts (Weale 2013, p. 19). Second, a commitment to *democratic equality* -- the parties in the social contract are equals, insofar as they *de facto* enjoy rough equality of power (p. 23). Finally, a contractarian commitment to *prudential rationality,* which provides agents with *reasons* to form a contract for mutual advantage in the first place (pp. 12-13). Whether these three commitments can stand together in harmony is, I believe, the central challenge the book faces.

Weale’s social contract theory is original also for its method. It adopts an empiricalmethod of contractual reasoning as opposed to a hypothetical one (pp. 33-40). When building the procedure and modeling the contract, Weale does not construct an hypothetical situation according to some moralized and idealized understanding of how the parties ought to relate to each other as free and equal, along the lines of Rawls’s Original Position. He rather models the conditions of the social contract on the basis of existing, well-functioning systems of cooperation in which conditions of equal power are, *de facto*, roughly realized (p. 14). Further, Weale rejects the moralized constructivist assumption that parties ought to be motivated by a desire to justify their claims to others on the basis of reasons that others could not reasonably reject or could reasonably be expected to endorse. All that is required, in his theory, is that the parties are rationally motivated to find a mutually advantageous agreement on the terms of their common, political association. As long as the members of a polity *de facto* enjoy equality of power and can thus threaten each other interests, they will have sufficient, prudential reasons to form a contract and agree on common principles of justice that will bring them above the non-agreement point. In this respect, Weale’s empirical-contractarian method - if successful - would have the advantage, as Weale himself puts it, of enabling us to “resolve questions about what justice requires without reference to prior assumptions of a strongly moralized nature.” (p. 13). This would not only avoid the (arguable) circularity of Rawls’s constructivism but would also have the benefit of making justice more “down to earth” – an agreement on justifiable principles of political association, including principles of distributive justice, could be rationally achieved even in societies where not only altruism, but also the more modest virtue of reciprocity, are initially absent.

In spite of the many virtues of Weale’s project, I believe that his democratic-contractarian theory of justice encounters some problems. In this paper, I wish to focus my comments and criticisms on one particular aspect of the theory: the way in which it draws the boundaries of the democratic contract, and of political societies that should be understood *as though* they were social contracts, as well as the boundaries of justice. I shall start by observing that Weale’s theory presupposes and postulates three different types of boundaries, that is to say lines of inclusion and exclusion.

First, methodologically, it postulates a very clear boundary between what is inside and what is outside of the procedure (the contract). No substantive principle of justice or prior assumption of a strongly moralized nature externally limits or predetermines the outcome of the procedure. The content of justice is all-internal to the procedure. The boundaries of the procedure – hereafter, *procedural boundaries -* are in this respect all-inclusive (at least in relation to justice).

 Second, the democratic contract presupposes also clear boundaries in terms of the scope of participants that it is meant to include or exclude – hereafter I will refer to these as the *boundaries of the demos*. Those for whom it is not advantageous to cooperate with us, those with whom it is not advantageous for us to cooperate, and those who do not *de facto* enjoy equal power, would seem to be all automatically excluded from the scope of the contract and thus from the demos entitled to determine what justice demands. In the case of political democracies used as empirical models of social contracts, all those who are not formally subject to the same democratic institutions granting equal political rights would seem to be excluded. In this sense the procedure is quite exclusive.

Finally, and as a consequence of this last point, the scope of the resulting principles, that is, the scope of the entitlements and obligations of justice is likely to be defined by exclusive boundaries as well. I shall refer to these as the *boundaries of justice*. Unless, for some special reason, those included in the contract find it mutually advantageous for themselves to extend entitlements of justice to those positioned outside of the contract, there is little reason why obligations of justice should extend beyond the participants in the contract. In other words, the scope of justice is likely to be *coextensive* with the scope of the democratic demos whose boundaries are exclusive. The scope of justice is therefore also likely to be exclusive in important ways (i.e. to apply to the internal organization of democratic societies only).

Exclusion and inclusion are, *per se*, neither good nor bad. In what follows, however, I shall argue that the above boundaries are morally problematic in some important respects. This fact becomes particularly evident when we apply the theory to large democratic societies like our own that, albeit granting equal political rights to all their citizens, experience vast inequalities of power.

I will first point out that the procedural boundaries, as drawn by Weale, are too *inclusive*. The democratic contract, in order to be possible and to count as “democratic,” must pre-suppose some independent standards “of a strongly moralized nature” that are external to the procedure and that will inevitably constrain its outcomes.

By contrast, the boundaries of the demos would seem to be too *exclusive*. In particular, Weale’s empirical method, trough which those boundaries are drawn, either (a) justifies the undesirable exclusion of certain vulnerable groups from the democratic contract, or it is (b) not as empiricalasWeale wants it to be, insofar as in order to evaluate those exclusions as arbitrary and to prevent them, the theory needs, inescapably, to postulate thick moral standards that, again, are independent from, and external to, democratic procedures.

Finally, the boundaries of justice resulting from Weale’s empirical-contractarian theory are also too *exclusive*, insofar as justice tends to remain absent where it is most needed, especially at the international level. This is because the theory posits equality of power as an empirical *circumstance* of justice, whereas, at least in some cases, it should be regarded as a *demand* of justice.

**Procedural Boundaries**

On the one hand, Weale argues that the empirical-contractarian view (unlike constructivism) enables us to resolve questions about what justice requires without reference to prior moralized assumptions of a substantive kind (p. 13). He adds that, within a contractarian account, there is no *a priori* commitment as to what the content of the principles of justice will be, e.g. as to the limits on the accumulation of property. (p. 24) On the other hand, Weale also argues (pp. 23-24) that equality of status within a political society is the pre-condition of a democratic contract and thus of democratic justice. Weale (p. 248, 47n) draws his conception of equal status from Elizabeth Anderson’s (1999) well-known conception of democratic equality.

At first, these two presuppositions would seem to be incompatible. Equality of status understood as democratic equality *is*, in and of itself, a strongly moralized assumption that lies outside of the procedure and that, in and of itself, necessarily sets *a priori* limits to the content of justice. Enjoying equal status as a citizen presupposes a moralized conception of how my fellow citizens *ought to* relate to me and treat me as an equal, even if *de facto* they are much wealthier or enjoy more influence. It also presupposes certain background distributive conditions.

However, Weale wants to reassure us that equal status can and should be understood in purely procedural and non-moralized terms, as having equal political rights and equal political power. The basic idea being that all participants should have “sufficient power to block an agreement that their opponents might otherwise wish to impose, unless it marks a sufficient advance over the status quo” for all. (p. 224). If each participant has some ability to impose threats to the interests of others, those who lack the power to seize the advantage or to escape the potential harm have an incentive to form a contract for mutual advantage. (pp. 57-58). This is what to relate as equals means. No more, no less.

Yet, at this point a problem arises. If we endorse this descriptive understanding of equality of status, it is unclear how a democratic society, understood as though it was a social contract, could avoid the exclusion from the contract (and thus, potentially, the exploitation) of small minorities who, in spite of being subject to the *same* political institutions to which the majority is subject, lack the power to impose harmful threats to the interests of their fellow citizens (perhaps because the minority is very small in size or because its members are marginalized or uneducated to a level that compromises the equal worth of their political liberties). In this case, without some previous, independent moral standard that says that the majority *ought to* treat the minority as an equal, even if the minority is *de facto* powerless, there is no guarantee against arbitrary exclusion. And yet, this “ought” would seem to imply precisely the kind of moralized understanding of equality that Weale wants to avoid. Indeed, it would seem to indicate that it is unfair or morally wrong to exclude the marginalized, *because* this exclusion would violate the autonomy of the minority’s members or their moral status as free and equal persons.

In order to avoid this moralized assumption, Weale would argue that excluding minorities because one simply has the power to exclude is unjust *not* because of the autonomy or dignity of the members of the minority but because it would contravene what would be agreed to, within a stylized contractual situation, by agents with equal power. However, it is difficult to see why, in the absence of a veil of ignorance, it would be in the mutual advantage of agents who do have equal power to agree that *de facto* powerless minorities ought *always* to be treated as equals, even when treating them as such would make the other members of a society worse-off than they would be if the members of those minorities were excluded or marginalized.

But let us grant, for the sake of the argument, that we can understand a relation of equal status in purely non-moralized terms. At this point a second problem arises. What is it that people need in order to have and maintain roughly equal powerso as to block an agreement that their opponents might otherwise wish to impose? It is reasonable to think that in order for equal status to be preserved, both *relative* distributive inequalities need to be limited and *adequate* access to certain specific goods need to be secured. The first condition is necessary in order to maintain rough equality in bargaining power among citizens (something that Weale himself recognizes). The sufficientarian condition requires, instead, that people have the level of resources, including education, necessary to be able to stand up and voice their concerns.

However, this inevitably entails that there are *a priori* limits to the outcomes of the procedure. Presumably, the contract cannot generate principles that render impossible the maintenance of conditions of equal status, which, in turn, make the contract possible in the first place. This imposes substantive, *a priori* limits on the distributive principles that can derive from the procedure.

Further, even a contract for mutual advantage would seem to presuppose some kind of reciprocal trust. People must believe that the other parties respect the terms of the agreement and are willing to do their fair share within the system of cooperation, even when doing their fair share does not go to their immediate advantage. Since in complex societies like our own, it is impossible to grant that each party will always end up with exactly her due, people must also believe that the other parties are willing to respect the terms of the contract also in those cases where free-riding would be more advantageous. Yet, in order for people to gain this kind of trust, they must already live in societies where what Brian Barry (1982, p. 27) calls “justice as requital” (fair return) in exchanges and trade relations is respected. Why should I trust people to pay their fair share *after* the contract if they fail to pay their fair return in daily exchanges and transaction *before* the contract? The problem however is that, as Rawls (1971, p. 112) noted, it is not possible to define fair returns and thus to ensure trust-generating fair transactions in the absence of background justice. For individual transactions and exchanges to be fair, and thus for individuals to be able to enter in trust-generating free and fair transactions, we already need principles in place that secure the conditions of free and fair association and exchange. But if this is correct, we need at least *some* background principles of justice to precede and to be applied prior to the contract. Without these principles, the very conditions (e.g. trust) that make the contract possible cannot be achieved.

Because of these reasons, the procedural boundaries, as drawn in Weale’s account, strike me as too inclusive. We need at least *some* moral principles, including (1) a moralized conception of equality and (2) some background principles of justice, to remain outside of the procedure, in order to both (1a) avoid problematic exclusions and (2a) support the procedure itself. I shall now turn to argue that the boundaries of the demos -- the lines that delimit who is a legitimate participant in the democratic social contract and who is not -- are too exclusive.

 **The Boundaries of The Demos**

How should entitlements to be included in a democratic contract be assigned? According to Weale, only within a democratic society is power likely to be distributed in a roughly equal way among its members – citizens in a democracy enjoy equal political rights (p. 14). Since rough equality of power, understood in purely procedural terms, is a necessary condition for people to have prudential reasons to enter in a contract of mutual advantage (because only when this condition is met agents can effectively threaten each other interests), only the members of a democratic demos can regard each other as being part of a social contract. (p. 15). But how should a democratic *demos* be defined or identified in the first place? According to Weale, in order to identify the boundaries of the demos we must look at who is *de facto* subject to common democratic institutions (p. 15).

It is first worth noticing an asymmetry in this way of identifying the demos and thus the parties in a democratic contract. If equality matters in determining who should participate in the contract *because* it is in a society of persons with relatively equal strength that people can threaten each other’s interests, then there might be cases in which we ought to exclude from the contract (and thus potentially from the scope of justice) people who are subject to the same democratic institutions but who nevertheless lack the power to substantively threaten each other interests, and instead include peoplewho are *not* subject to the same democratic institutions but who have the power to threaten each other interests. In other words, the “democratic criterion” to identify the parties in the contract does not necessarily coincide with the “mutual advantage criterion.”

 To provide an example: it may be more advantageous for the members of polity A to form (to regard themselves as being part of) a social contract with the members of polity B, with whom they share intense and reciprocally advantageous economic relationships, as well as the *de facto* capacity to threat each other interests, than to form (to regard themselves as being part of) a social contract with the members of their own colonies who, in spite of being subject to the *same* rules of polity A, are not given equal political rights and are so poor and marginalized that they are unable to pose a real threat to the members of polity A. This strikes me as a puzzling conclusion.

There is, however, a point in the book at which Weale affirms that “all those who fall within the authority of the collective self-determination of the polity *should* have the same standing as to how that collective self-determination is exercised.” (p. 44, *emphasis mine*). So perhaps Weale would argue that the inhabitants of the colonies in the above example *ought to* be given equal political rights and included in the demos of polity A and thus be regarded as parties in the social contract. The principles of justice that bind polity A would then take into account their interests as well and would apply to them. But the question is *why*, from the perspective of an empirical-contractarian theory, ought the citizens of polity A to treat the inhabitants of their colonies as equal? Where does this moral requirement of political inclusion come from?

Given the fact that it is *not* advantageous for the members of polity A to extend equal political rights to the colonies in the way suggested, the excluded parties seem to have no standing to demand that, *as a matter of justice*, their equality be publicly recognized. The same problem applies today to guest-workers and permanent immigrants and a few centuries ago applied to women and slaves. These are all categories of people who are/were *de facto* directly subject to the same laws and institutions that bind citizens as well, but that it might not be/it was not in the mutual advantage of citizens to recognize as a part of their democratic demos. In all these cases, the contractarian-empirical account would seem to fail to condemn as unjust exclusions from the democratic contract that strike many as unfair or morally problematic.

Now, Weale (p. 44) has a response also to this problem. He argues that there are at least two reasons for why those who are subject to the authority of a polity *ought to* have the same standing (even if their inclusion in the demos may not be advantageous to all). The first reason is that, in these cases, equality of status is necessary to avoid *exploitation* or oppression. The second reason is based on a rich idea of what it means to be a *member of a polity* – equal status is constitutive of this idea. Weale then argues: “Where there are exceptions made to the principle of inclusion, those exceptions should rely upon reasons that can be justified.” (Ibid.) But justified *to whom*? Presumably, to those who enjoy equal political rights, since only these are included in the democratic contract. But if that is the case we owe *no* justification for excluding people who do not formally enjoy equal status (Mexican guest-workers in contemporary US or women in the 19th century).

Even if we assume that the principle of inclusion could provide an answer to the problem of arbitrary exclusions from the boundaries of the demos, the question is whether Weale can justify this *external* principle without pre-supposing a moralized conception of equality or some tick standard of fairness, which is precisely what Weale’s empirical method wants to avoid. Consider the anti-exploitation rationale for avoiding arbitrary exclusions of members of colonies or guest-workers from the demos of a polity. Assume that, it is economically advantageous for the large majority of Americans to exclude a minority of Mexican guest-workers from their demos, even if this could lead to some form of exploitation. Why should this exclusion be regarded as *unjust*? A simple and plausible answer is that it is because exploitation is morally wrong, insofar as it compromises the immigrants’ human dignity, their autonomy and their self-respect. To exploit means to treat people as means when they ought to be treated as ends in themselves. However, this answer is not available to Weale because his contractarian method explicitly rejects “a strong principle of equality understood, for example, in terms of human dignity…we need instead -- Weale argues -- to relate the idea of political equality to the practice of democracy understood as a set of procedure.” (p. 46). But I do not see how a purely procedural, non-moralized understanding of equality could support the principle of inclusion that Weale wants to support, since claims of inclusion come precisely from those who have been excluded from democratic procedures. In order for the excluded to be able to claim an entitlement to be included within democratic procedures - to be treated as an equal member -- the excluded needs an *independent* moral standard that proves that her exclusion from the procedure is unfair or arbitrary. This standard, it seems to me, cannot be itself a purely procedural one.

Finally, I wonder whether it really is the case that *direct subjection* to rules should be regarded as a necessary condition for being included within the boundaries of a demos and thus within the group of participants in the social contract (those who at the end will determine the content of justice). Shouldn’t those who are not directly subject to certain rules but who are nevertheless profoundly and continuously affected by them be allowed to participate in the making of those rules as well? Weale’s concerns about exploitation should lead him to provide a positive answer to this question. However, Weale answers negatively. He argues that “even in situations of interdependence there is a significant difference between a situation in which a polity has formal authority to decide on important matters of public policy and situations in which it does not.” (p. 40) The demos should be limited to those who collectively exercise that formal authority. But this answer says nothing about who *should* enjoy formal authority to decide on certain issues in the first place. Yet, without a way of answering this more fundamental question in a principled way, a theory appears arbitrarily biased towards the status quo.

 Too see why, consider the following case. Society A must decide to invest money in either expensive green technologies that would eventually reduce polluting emissions or in much less expensive machines that would eventually enable it to direct most of its own polluting emissions to country B. The result is that people in country B would be more impacted by the emission policies decided in society A than the members of A themselves. Through an appropriate democratic deliberation among equals, members of country A decide that it is in their own mutual advantage to opt for the second option. Cheap machines to divert pollution outside of national borders are bought. Shouldn’t members of country B be given a say in that decision or a chance to veto it? Shouldn’t they participate in the deliberation the outcome of which determines whether that policy is indeed just? To answer “no, members of country B ought not to be given a say in that decision because they do not have formal authority to set the political agenda in country A” would seem to beg the question. It is precisely *because* members of country B are powerless with respect to A’s decision, while being affected by it, that they *ought to* be given formal authority to participate in that decision. Justice (or at least fairness) demands that country A extends its franchise to members of B even if it is not in the mutual advantage of its own members to do so.

To sum up, it seems that the empirical-contractarian method is either (a) *status quo biased* in a problematic way -- it justifies arbitrary exclusions from the democratic *demos* and thus from the contract -- or the method is (b) *not* fully *empirical*, insofar as, in order to evaluate those exclusions as unfair, and to redress them, it needs to postulate thick moral standards that are independent from and external to democratic procedures (and which limit the scope and potentially the outcomes of those procedures).

I will now turn to argue that the problematic exclusiveness of democratic boundaries leads to an equally problematic exclusiveness of the boundaries of justice.

**The Boundaries of Justice**

At the very core of “democratic justice” lies the idea that the *content* of justice – the substantive principles that establish entitlements and obligations of justice – is what results from a democratic social contract among parties having roughly equal power. Since, as previously mentioned, people generally enjoy equality of power only if and when subject to the same democratic institutions, it follows that those who decide on what justice requires are coextensive with those who are subject to the same political authority. Further, since agents will have reasons to enter the contract and to agree to its terms if doing so is mutually advantageous for them, it is very likely that the *scope* of the resulting principles of justice -i.e. the scope of justice-based obligations - will be limited to the members of the political society within which the contract happens. Indeed, Weale argues, “it is difficult, if not impossible, to have social justice outside of a democratic society because it is only in democracies that power is allocated on an inclusive basis.” (p. 58) In our contemporary world, this would seem to imply that *extra Rempublicam*, *nulla justicia* (Cohen and Sabel, 2006).

It is worth noting that Weale’s contractarian theory may have some internal resources to extend justice beyond state borders, at least partially. Weale argues that the circumstances of justice arise in situations in which resources are scarce, altruism is limited and where the parties enjoy rough equality of power (pp. 57-58).

If so understood, the circumstances of justice are not necessarily *coextensive* with the scope of democratic institutions or political authority. Indeed, it is not difficult to think of situations at the international level where the circumstances of justice are met (even if there is no political authority of the kind present at the domestic level). When roughly equally powerful countries (say, industrialized economies) negotiate on who should be entitled to extract natural resources or how trade rules ought to be designed, in these cases the three circumstances of justice could easily be met. Of course, these circumstances do not arise between powerful countries and powerless ones for the latter may lack the power to impose relevant threats to the interests of the former. Yet, powerful countries may have reasons to form a contract for mutual advantage with other equally powerful countries.

If my reasoning so far is sound, it has important implications for Weale’s theory.

First, if (1) the circumstances of justice can and do arise beyond democratic borders and (2) principles of justice can only be derived procedurally from a democratic social contract, it follows that (3) we should extend the boundaries of democracy so as to make them coextensive with the circumstances of justice. Failing to extend democracy beyond borders, would amount, in these cases, to a failure to provide a solution to problems of justice where these problems arise.

And yet, the way this theory would extend justice at the international level raises some worrisome issues. In particular, justice would seem toremain absent when it is most needed. First, in those contexts where inequalities of power between countries are so large that some countries lack the power to constitute a threat to others, the more powerful countries cannot be said to have duties of justice towards the more vulnerable ones. Consider notorious cases of imbalances of decision-making power within intragovernamental organizations such as the WTO or the IMF. Within these organizations, equally powerful state members may have a reason to form a democratic contract between themselves, since this agreement would likely bring them above the non-agreement point. But they may have no reason to start cooperating with less powerful countries on more equal terms. If perpetrating current exploitative relationships turns out to be more advantageous for the wealthy countries than an inclusive democratic contract, there is nothing within the empirical-contractarian view that would enable us to define this situation as unjust or to command reforming it. Powerful countries could only acquire obligations of justice towards equally powerful countries. This would obviously accentuate existing inequalities of power rather than reducing them. This outcome, which is in and of itself problematic, becomes even more worrisome if we consider cases in which powerless countries lack equality of power precisely *because* (or at least in part because) of past exploitation by more affluent countries. For example, according to the empirical-contractarian model, ex-colonies would not be able to claim, on ground of justice, a right to be included in an international democratic contract *because,* as a consequence of pastinjustice, they are *de facto* powerless. If colonization had not happen, they might now enjoy sufficient equal power so as to claim inclusion in an international democratic contract. This conclusion strikes me as counterintuitive. Generally, we think that we have *more stringent* obligations of justice towards those whose powerlessness is in part a consequence of our own doing (Pogge, 2008).

A first reason for why, in Weale’s theory, justice risks to remain absent where it is most needed is that the theory posits as an *empirical circumstance* of justice what would instead seem to be a *substantive demand* of justice. In Weale’s theory a more equal distribution of bargaining power between countries would be needed as a pre-condition for questions of justice to arise. Yet, this view, to use Arash Abizadech’s (2007, p. 330) words, “implies that demands of distributive justice arise only between persons whose social interactions are already conducted on fair terms, i.e. that demands of justice would not arise for persons whose social interactions are unjust.” This way of inverting the order between circumstances and requirements of justice tends to deprive the very idea of justice of its transformative power.

A second reason for why justice remains absent where it is needed, is that Weale’s theory, like all contractarian theories, struggles to justify obligations towards those we do not interact with and who cannot therefore threaten or affect our interests. For example, there seems to be no place for justice towards future generations in Weale’s theory, since it is very difficult to see how not-yet-existing people could threaten our interests. It would not help to argue that we have prudential reasons to collectively insure against the burdens imposed on us by non-existing-future generations because we will not be the ones bearing those burdens.

Finally, in cases of pervasive inequalities of power between countries, the contractarian account cannot even demand that affluent countries *start* interacting or cooperating with other countries so as to progressively reduce those inequalities, since the empirical-contractarian view cannot demand, morally, that we bring about forms of social cooperation when they are not in place, so as to create the circumstances in which justice can be realized. On the contrary, justice can only make sense when social cooperation among equals already exists. As previously mentioned, this way of understanding the relationship between the empirical circumstances and the moral demands of justice deprives the very notion of justice of much of its emancipatory and reformist character. Justice does not drive change. It follows it.

**Conclusion**

In this article, I expressed some concerns about the way in which Weale’s social contract theory draws the boundaries of the democratic contract, as well as the boundaries of justice. My first worry is that Weale’s empirical method either (a) ends up justifying the problematic exclusion of certain vulnerable groups from the democratic contract and thus potentially from the scope of justice, or this method is (b) not as empiricalasWeale wants it to be, insofar as in order to evaluate those exclusions as unjust and to prevent them, the theory needs, inescapably, to postulate thick moral standards that must be independent from, and external to, democratic procedures. A second worry is that *the boundaries of justice* resulting from Weale’s empirical-contractarian theory are likely to lead to the absence of justice where justice would be most needed, especially at the international level. These concerns notwithstanding, Weale’s book remains an invaluable contribution to both democratic theory and theories of justice, as well as to our understanding of their often under-theorized relationship.

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