

Rainer Forst

## **Transnational Justice, Democracy and Human Rights**

Draft, January 2011

### 1. A Global Normative Order

We live in a global normative order characterized by a complex plurality of political, social, cultural and economic relations between and beyond states and societies. And as in any normative order, we ask what it would mean to speak of a *just* order of these relations. But what are the banisters we ought to hold onto when we ask that question? Human Rights? A liberal idea of global justice, possibly based on a globalized thought experiment like Rawls' "original position"? Or rather the vision of an international order of autonomous states regulated by international law? In the following, I want to approach the question of a just global order by suggesting a critical discourse-theory of transnational justice that enables us to locate the concepts of democracy and human rights properly. For I think that we are doomed to hold onto one-sided interpretations of justice and human rights if we do not see the central place that political self-government plays with respect to both of them.

### 2. Two Pictures of Justice

Let me begin with a brief reference to Wittgenstein. In the *Philosophical Investigations*, he writes: 'A picture held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably.'<sup>1</sup> I believe that reflection on justice is all too often held captive by a specific, *unpolitical* picture which rests on a particular interpretation of the ancient principle 'To each his own' (*suum cuique*). This principle, which has been central to our understanding of justice since Plato, is interpreted in such a way that the primary issue is what goods individuals receive or deserve as a matter of justice – in other words, the primary issue is who 'gets' what. The search for answers leads either to comparisons between the collections of goods people possess and points to relative conclusions; or one asks whether individuals have 'enough' of the goods which are vital for leading a good life or one befitting a human being, irrespective of comparisons. Granted, these goods- and distribution-centred, *recipient-oriented* points of view have their merits, for distributive justice is, of course, a matter of allocating goods; nevertheless this picture

---

<sup>1</sup> Ludwig Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe (Oxford: Blackwell, 1978), p. 48e (§ 115).

conceals essential aspects of justice – in the first place, the question of how the goods to be distributed come ‘into the world’, thus questions of production and its just organization. Furthermore, in the second place, this picture ignores the *political* question of who determines the structures of production and distribution and how, as if there could be a huge distribution machine which only needed to be programmed correctly.<sup>2</sup> But not only should there not be such a machine, because it would mean that justice would no longer be understood as an accomplishment of the subjects themselves but turn them instead into passive recipients; this thought also neglects, in the third place, the fact that justified claims to goods do not simply ‘exist’ but can be only be ascertained discursively through corresponding justification procedures in which – and this is the *fundamental requirement of justice* – all are *involved* as free and equal individuals.

Finally, in the fourth place, the goods-fixated view of justice also for the most part ignores the question of injustice; for, by concentrating on overcoming deficiencies of goods, it treats someone who suffers a deficiency as a result of a natural catastrophe as equivalent to someone who suffers the same deficiency as a result of economic or political exploitation. It is true that help is required in both cases. However, as I understand the grammar of justice, in the one case it is required as an act of moral solidarity, but in the other as an act of justice conditioned by the nature of one’s involvement in relations of exploitation and injustice<sup>3</sup> and the specific wrong in question. Ignoring this difference can lead to regarding what is actually a requirement of justice as an act of generous ‘assistance’ or “aid.”

For these reasons, it is particularly necessary when dealing with questions of distributive justice to recognize the *political* point of justice and to liberate oneself from a false and reified picture which is fixated solely on quantities of goods. According to a second, more appropriate picture, by contrast, justice should aim at *intersubjective relations and structures*, not at *subjective or supposedly objective states* of the provision of goods. Only by taking into consideration the *first question of justice* – namely, the justifiability of social relations and, correspondingly, of the distribution of ‘justification power’ in a political context – does a radical, critical conception of justice become possible, one which gets at the roots of relations of injustice.

---

<sup>2</sup> Young

<sup>3</sup> Here we should distinguish a whole range of cases, in particular: direct participation in or (joint) causation of injustice; indirect participation in injustice by profiting from it, without oneself actively contributing to relations of exploitation; and the duty to put an end to unjust relations, even if one does not profit from them but possesses the means of overcoming them.

### 3. The Right to Justification

Here we must first ask what justifies us in speaking of a ‘false’ as opposed to a more ‘appropriate’ picture of justice; after all, the goods- or recipient-centred understanding can appeal to the time-honoured principle *suum cuique*. Is there a more original, deeper meaning of justice than this? In my opinion there is; the concept of justice possesses a core meaning to which the essential contrasting concept is that of arbitrariness,<sup>4</sup> understood in a social sense, whether in the form of arbitrary rule by individuals or by part of the community (for example, a class) over others, or in the form of the acceptance of social contingencies which lead to asymmetrical positions or relations of domination and are accepted as an unalterable fate even though they are nothing of the sort. Arbitrary rule is the rule of some people over others without legitimate reason, i.e., *domination*, and where struggles against injustice occur they are directed against forms of domination of this sort. The underlying impulse that opposes injustice is not primarily that of wanting something, or more of something, but of not wanting to be dominated, harassed, or overruled any longer in one’s claim and *basic right to justification*. This claim involves the demand that no political or social relations should exist which cannot be adequately justified towards those involved. Herein resides the profoundly *political* essence of justice which the principle *suum cuique* not only fails to grasp but tends to conceal; for justice concerns *who determines who receives what* – thus the dimension which in Plato is represented by the idea of the Good or by the philosopher king. In my picture, the demand for justice is an emancipatory one; reflexively speaking, it rests on the claim to be respected as a subject of justification, that is, to be respected in one’s dignity as a being who can provide and demand justifications. The primary victim of injustice is not the person who *lacks* certain goods but the one who does not ‘*count*’ in the production and allocation of goods.

### 4. Egalitarian Theories

One can cut different paths through contemporary discussions on justice. However the one opened up by the question of the two pictures of justice is especially instructive, for from this perspective certain adversaries unexpectedly find themselves in the same boat.

An example is provided by the recent debate concerning equality. By this is actually meant two points of discussion: on the one hand, the question ‘*Equality of what?*’ – of

---

<sup>4</sup> See also Rawls’s definition in *A Theory of Justice*, rev. ed. (Cambridge, Mass.: Harvard University Press, 1999), p. 5.

resources, welfare, or capabilities<sup>5</sup> – and, on the other, the question ‘*Why equality at all?*’ From the perspective of the difference between the two pictures of justice, however, it becomes apparent that both the advocates and the opponents of equality are often working with the same understanding. This understanding often even finds expression in a specific picture, that of the goddess Justitia as a mother who has to divide up the cake and asks herself how this should be done.<sup>6</sup> Egalitarians argue for the primacy of the equal distribution of goods, following which other arguments for legitimate unequal distributions – for instance, ones based on need, merit or prior claims – then have to be treated as special reasons. Alternatively, an egalitarian calculus of need satisfaction – welfare – is posited which serves as the goal of distribution.<sup>7</sup> However in the process the question of how the cake was produced and, even more important, who gets to play the role of the mother remains largely unthematized. Yet that is the principal question of justice.

## 5. Critics of Equality

Corresponding problems are encountered on the side of the critics of equality. In Harry Frankfurt’s view, for example, the defenders of egalitarian conceptions of justice cannot be concerned with the value of equality at all; for if you ask them what is so bad about inequality, they respond by pointing to the negative consequences of living conditions in a society of inequality, in particular to the fact that certain people lack important goods for a satisfactory life.<sup>8</sup>

So-called “sufficientarians” have taken up these arguments and argue that ‘at least the especially important, elementary standards of justice are of a nonrelational kind’,<sup>9</sup> and that justice is concerned with creating ‘conditions of life befitting human beings’ that can be measured according to ‘absolute standards of fulfilment’, not according to what others have. According to this view, a universal concept of the goods ‘necessary for a good life’ should be produced with reference to particular lists of basic goods.

---

<sup>5</sup> See Gerald Cohen, ‘Equality of What? On Welfare, Goods, and Capabilities’, in Martha Nussbaum und Amartya Sen (eds.), *The Quality of Life* (Oxford: Oxford University Press, 1993), pp. 9-29.

<sup>6</sup> Ernst Tugendhat, *Vorlesungen über Ethik* (Frankfurt am Main: Suhrkamp, 1993), pp. 373f.; Wilfried Hirsch, *Gerechtfertigte Ungleichheiten* (Berlin, 2002), p. 169f.; Stefan Gosepath, *Gleiche Gerechtigkeit* (Frankfurt am Main, 2004), p. 250ff. The cake example, though without the mother, can also be found in Isaiah Berlin, ‘Equality’, in *Concepts and Categories*, H. Hardy (ed.) (Harmondsworth, 1981), p. 84.

<sup>7</sup> This is particularly the case in ‘luck egalitarianism’. For a paradigmatic expression see Richard Arneson, ‘Luck Egalitarianism: An Interpretation and Defense’, *Philosophical Topics* 32 (2004): 1-20 and ‘Luck and Equality’, *Proceedings of the Aristotelian Society*, suppl. vol. (2001), 73-90. For a critique see Elisabeth Anderson, ‘What is the Point of Equality?’, *Ethics* 109 (1999): 287-337.

<sup>8</sup> Harry Frankfurt, ‘Equality as a Moral Ideal’, in *The Importance of What we Care About* (Cambridge, 1988), pp. 143-58, and ‘Equality and Respect’, in *Necessity, Volition, and Love* (Cambridge, 1999), pp. 146-54.

<sup>9</sup> Angelika Krebs, ‘Einleitung: Die neue Egalitarismuskritik im Überblick’, in Krebs (ed.), *Gleichheit oder Gerechtigkeit*, pp. 17f.

These approaches are also open to serious objections. For example, Frankfurt's assertion that the point is not how much others have but only whether I have 'enough', is valid *only when* conditions of background justice pertain, that is only when others have not previously taken advantage of me. But in that case we must look for reasons for such background justice elsewhere.

But, in addition, the idea of 'having enough' or 'getting enough' does not get at the essence of justice, the prevention of social domination. Justice is always a 'relational' matter; it does not first inquire into subjective or objective *states of affairs* but into just *relations between human beings* and what they owe to each other for what reasons. In particular, we do not explain the requirements of justice on the model of morally required aid in specific situations of want or need; instead they come into play in situations where what is at stake are relations between human beings that are fundamentally in need of justification, where those involved are linked by social relations of cooperation in the production and distribution of goods – or, as is most often the case, by relations of 'negative cooperation', of coercion or domination (whether by legal, economic or political means). It makes a world of difference whether someone is *deprived of* certain goods and opportunities unjustly and without justification or whether he or she, for whatever reason, *lacks* certain goods (for example, as a result of a natural catastrophe, as mentioned above). By losing sight of the former context, one misses or conceals the problem of justice as well as that of injustice. Justice requires that those involved in a context of cooperation should be respected as equals. That means that they should enjoy equal rights to take part in the social and political *order of justification* in which the conditions under which goods are produced and distributed are determined.

## 6. The First Question of Justice

Let us review the essential points thus far from a constructive perspective. I have defined justice as the human capacity to oppose relations of arbitrary rule or domination. Domination is rule 'without justification', and it is assumed that a just social order is one to which free and equal persons could give their assent – not just counterfactual assent but assent based on institutionalised justification procedures. This follows *recursively* from the fact that what is at stake in political and social justice is norms of an institutional basic structure which claims reciprocal and universal validity. Thus a *supreme principle* holds within such a framework, namely the *principle of general-reciprocal justification*, which states that every claim to

goods, rights or liberties must be justified in a reciprocal and general manner, where one side may not simply project its reasons onto the other but has to justify itself discursively.<sup>10</sup>

This brings us to the central insight for the problem of political and social justice, namely that *the first question of justice is the question of power*. For justice is not only a matter of which goods, for what reasons and in which amounts should legitimately be allocated to whom, but in particular of *how* these goods come into the world in the first place and of *who* decides on their allocation and *how* this allocation is made. Theories of a predominantly allocative-distributive kind are accordingly ‘oblivious to power’ insofar as they conceive of justice exclusively from the ‘recipient side’, and if necessary call for ‘redistributions’, without raising the political question of how the structures of production and allocation of goods are determined in the first place. The claim that the question of power is the first question of justice means that justice has its proper place where the central justifications for a social basic structure must be provided and the institutional ground rules are laid down which determine social life from the bottom up. Everything depends, if you will, on the relations of justification within a society. Power, understood as the effective ‘power of justification’ of individuals, is the higher-order good of justice.<sup>11</sup> It is the ‘discursive’ power to demand and provide justifications and to challenge false legitimations. This amounts to an argument for a ‘political turn’ in the debate concerning justice and for a *critical theory of justice as a critique of relations of justification*.<sup>12</sup>

A comprehensive theory of political and social justice should be constructed on this basis, something at which I can only hint here.<sup>13</sup> First we must make a conceptual distinction between *fundamental* and *maximal justice*. Whereas the task of fundamental justice is to construct a *basic structure of justification*, the task of maximal justice is to construct a *justified basic structure*. In order to pursue the latter, the former is necessary, that is, a ‘putting-into-effect’ of justification through discursive-constructive, democratic procedures in which the ‘power of justification’ is distributed as evenly as possible among the citizens. To put it in apparently paradoxical terms, fundamental justice becomes a substantive starting point of procedural justice. Based on a moral right to justification, arguments are presented for the basic structure in which individuals themselves have real opportunities to codetermine

---

<sup>10</sup> For an elaboration, see Forst, *The Right to Justification*, Part One.

<sup>11</sup> It is a kind of good that cannot be distributed like a material good, as Iris Young argued (...). But resources that help to generate power can be distributed, such as means of education and information and access to public communication; other such goods are social and political positions that have a public role and influence.

<sup>12</sup> See Forst, *Justification and Critique* (forthcoming).

<sup>13</sup> For a more detailed discussion see Forst, *Contexts of Justice* and *The Right to Justification*, Parts Two and Three.

the institutions of this structure in a reciprocal-general manner. Fundamental justice guarantees all citizens an effective status ‘as equals’.

## 7. Transnational Contexts of Justice and Justification

Once the picture of purely recipient- and outcome-centred justice has been overcome, the path to a proper understanding of transnational justice is prepared. For I argue that justice presupposes in the first instance specific practices of justification – a basic structure of justification – and that this *praxis* is what we call democracy: those who are subject to norms should also be the authority which justifies these very norms, as active subjects of justification and not just *in mente* or in proxy or expert discourses. The goddess *Justitia* does not come into the world to dispense gifts or goods; her task is instead to banish arbitrary rule. Democracy is the best possible form of political order to accomplish this and to secure the political autonomy of those who are supposed to be both subjects and authors of law – in accordance with their dignity as autonomous subjects of justification.

How should this result be interpreted in the transnational context? Let us first consider the position which asserts that only a state context can provide the preconditions for localising - i.e., grounding and realizing - justice. As I said, the proper place of justice is where a threat of arbitrary rule exists, where a context of *cooperation* could be or is degenerating into a context of *domination*. Thus, one might conclude, the existence of a certain context of social cooperation is an unavoidable precondition for a context of justice.

A number of theories have drawn this conclusion. In the first place, we must mention that of John Rawls. For his point of view – which leads him to locate social justice in the national sphere and to regard the international domain as one in which certain human rights are valid and otherwise only duties of assistance – is not a state-centred, but a cooperation-centred one. It is often underestimated how much weight Rawls attaches to the ‘most fundamental’ idea of a ‘society as a fair system of social cooperation over time from one generation to the next’, which he consistently situates at the centre of his theory.<sup>14</sup> According to Rawls, only such a society provides the resources – in the twofold sense of *material* and *normative* resources – which are the presupposition for a ‘well-ordered society’. Only here are the reciprocity conditions and the social cohesion – economic, political and moral – which a just society requires to be found.<sup>15</sup>

---

<sup>14</sup> Rawls, ‘Justice as Fairness’, p. 5.

<sup>15</sup> Sangiovanni about reciprocity

Other theories develop this idea in a more communitarian direction, so that ‘common sentiments’ or ‘shared understandings’ within a *nation* become the essential presupposition for a context of justice;<sup>16</sup> others, by contrast, highlight the *state* as the central context. Thomas Nagel expresses this as follows: ‘Justice is something we owe through our shared institutions only to those with whom we stand in a strong political relation. It is, in the standard terminology, an associative obligation’.<sup>17</sup> The essential aspects of such a ‘strong political relation’ are the existence of an authorised source of law and the non-voluntariness of the relation – that is, that the law expresses the will of the citizens (or at least claims to do so) and that this must also be the case if citizens are not to be subjected to external constraints. Positive normative authority and factual coercion must coexist in order to give rise to a context of justice.

The arguments of Rawls and Nagel carry considerable weight because a context of justice is in fact a demanding phenomenon. Nevertheless they are problematic because they employ a *conclusion* as a *premise* when they argue that a particular *positive* institutional – social or legal – context is a necessary precondition of a context of justice. As explained above, *Justitia* is a man-made goddess who comes into the world to banish arbitrariness, and this means that she has her (combative) place where arbitrariness reigns among human beings or where the possibility of it resides. In such cases she calls for specific institutions, for example for the rule of law where the ‘state of nature’ existed; but then she cannot already presuppose these institutions to become active. She presupposes the status of persons as beings who have a right to justification and she demands that a basic structure of justification be constructed where arbitrariness reigns; but she does not demand this only where an institutional basic structure of cooperation already exists.<sup>18</sup> Thus we do not have to object to Rawls, as certain globalist cosmopolitans assume, that a ‘global basic structure’ already in fact exists comparable to a national one,<sup>19</sup> since this is a competition that cosmopolitans can hardly win; nor do we need to object to Nagel that global institutions also exercise state-like legal coercion and claim authority for this (though this is an important argument to make).<sup>20</sup> Instead we have to go beyond this dichotomous thinking in terms of “state” vs. “world” and accept the existence of a plurality of different contexts of social and structural *justice* (as contexts of political or social rule) or *injustice* (as contexts of domination) and thereby

---

<sup>16</sup> Miller, Walzer

<sup>17</sup> Nagel, ‘The Problem of Global Justice’, p. 121.

<sup>18</sup> Rawls on duty of justice

<sup>19</sup> Beitz and Pogge at some point

<sup>20</sup> Cohen and Sabel

correctly situate or ‘ground’ justice – informed by an appropriate social-scientific analysis of ‘what is’.<sup>21</sup>

Such a “practice-dependent” approach to justice,<sup>22</sup> to use Andrea Sangiovanni’s apt phrase, but in a way that differs from his, would mean that a context of political or social justice exists wherever social cooperation in some minimally stable form takes place. But this includes, besides *positive* cooperation, *negative* cooperation, i.e. forms of unjustifiable coercion and of exploitation; and it is hard to dispute that such forms of social or political domination exist at the transnational level.<sup>23</sup> Here a complex system of asymmetry and its reproduction exists which is in need of justification; this is why, reflexively speaking, the first task of justice would be to construct transnational structures of justification - which would hold even if the above assertion concerning negative cooperation could be seriously disputed.<sup>24</sup> Justice tracks, as it were, arbitrariness and forms of domination and coercion wherever they occur. The assumption that this would first require an already existing positive social or legal context fails to appreciate the correct order of things: the first thing is injustice in the world and then justice calls for structures of justification and banishes human arbitrariness. Political and social justice is a relational as well as an institutional virtue; it does not refer to all relations between human beings, but to those which exhibit forms of positive rule or forms of domination – whether in the ‘state of nature’ or in the state, the international or the transnational domain in general. With respect to “practice-dependence,” we thus need to distinguish between *positive* and *negative* practice-dependence: the positive version refers to already established forms of rule and coercion by the state or at by least legal institutions which claim normative authority and which always harbour the danger of arbitrariness; the negative version refers to forms of domination in need of justification and institutional “taming.” Positive practice-dependence comes in degrees, depending on the thickness of already institutionalized political and legal contexts, and so does domination, whether it is of an economic, cultural or political kind. But *both* practices mark contexts of justice. Connected with the distinction between positive and negative practice-dependence is another important one which Nagel and Sangiovanni do not sufficiently pay tribute to, though it plays a role in their argument: there are institutions *necessary to realize justice*, depending on context, and there are practices and institutions which *make justice necessary* - in a way, they

---

<sup>21</sup> Forst, Critical Theory of Tn Justice

<sup>22</sup> Sangiovanni

<sup>23</sup> Risse

<sup>24</sup> Fraser, disputes of theory and practice

“call for” justice.<sup>25</sup> Call these justice-realizing and justice-necessitating practices and institutions. It is a mistake to identify the two, for that would mean that we could not refer to injustice or the demand for justice outside of already established institutions of justice (or the state or the law). As the classic theorists of natural right argued, the injustice of the “state of nature” - i.e. the arbitrary rule of some over others - *or* of the already established state - such as a monarchy according to Filmer’s patriarchal view<sup>26</sup> or the rule of the rich in Rousseau’s Second Discourse<sup>27</sup> - both needed to be overcome by the establishment of a just and legitimate political order, and the first task towards that needs to be the establishment of a sufficient *order of justification* such that those subjected by positive forms of rule or “wild” forms of domination are no longer just objects but subjects, i.e. become autonomous normative authorities. Following Kant and at the same time going beyond his idea of the “angeborenes Recht der Menschheit,”<sup>28</sup> the “ultimate” ground for this idea of justice-grounding practices of justification is the basic human right to justification - i.e. the right which protects against being forced to live under institutions or to be subjected to norms that cannot properly be justified towards those subjected as free and equal agents of justification. This is a reflexive right which calls for certain practices of justification as *justice-grounding and justice-realizing practices*.

If it were possible to reconstruct the respective existing positive and negative contexts of rule, domination and coercion adequately, the question concerning the contexts of justice would have already been answered for the most part. However, the complexity of *Justitia* would then become especially apparent because the corresponding basic structures of justification - from the state to the globe - would have to track these different contexts. This is why justice still, in some sense, is a Goddess, or a context-transcending idea. But one which does not do the work for us; we have to do it ourselves, as political agents.

#### 8. *Demoi* of subjection and justification

A *critical* theory of transnational justice does not paint an ideal image of perfect global distribution as an ‘end state’ (Nozick), nor does it proceed from an ‘original position’ involving all human beings. Instead it has a contextual starting point, it traces the really existing relations of positive rule and of domination and exploitation, of structural asymmetries and arbitrary rule, in order to call for the establishment of relations of

---

<sup>25</sup> Nagel and Sangiovanni (2008, p. 137).

<sup>26</sup> Locke

<sup>27</sup> Rousseau

<sup>28</sup> Kant, MdS

justification, and hence of justifiability, wherever it encounters them. This opens up a complex panorama of relations, structures, actors and necessary institutions which appears highly confusing. The important point, however, is that justice tracks injustice, and hence the question “‘world state” or “world of states”?” is not the primary concern from the perspective of justice. At some point we need to consider what form the structures of justification would have to assume in order to team domination through transnational and international institutions, but before that kind of construction the first task is the reconstruction of relations of domination.

As a consequence, the first constructive task of justice is to produce structures in which arbitrary rule is banished and fair relations of justification are realised – structures in which those who are exposed to rule or domination, whether of an economic, a political or a legal kind, can bring the ‘coercion to the better argument’ (to change a formulation by Habermas) to bear against those who exercise such rule or domination. This is where democracy comes into play. Democracy, as I said above, is the term for a normative order in which those who are subject to norms should also be the normative authority, in an active sense in the context of a practice of justification. We are acquainted with democratic normative orders within which different forms of such practices of justification exist, and we also know that they are sites of incessant conflicts over whether they can redeem their claim to justification. One need only think of issues like campaign financing, the 5% hurdle, plebiscites, and the like. Such sites and institutions also exist at the transnational and international levels, though they mostly remain at levels of development which, as in the case of the UN, reflect the post-war balance of power or simply global relations of economic power.

If we understand democracy in such a way that it seeks to subsume the exercise of rule or domination under relations of effective justification and authorisation of norms by those who are subject to them, then the assumption that this requires a definite and single *demos* is problematic. For the *demoi* which are constituted as states are already integrated into such diverse networks of international and transnational rule or domination, formal and informal, that the ‘congruence condition’ (Zürn)<sup>29</sup> of the authorisation and legitimate exercise of rule is no longer satisfied in a number of ways. There are *demoi* which, to simplify, are subjected to external power in different ways, and there are *demoi* which profit from such subjection – and there are hybrid forms of the two.<sup>30</sup> Justice, and with it democracy, are recuperative

---

<sup>29</sup> Zürn

<sup>30</sup> Bohman, difference to his view of *demoi*; Benhabib on cosmopolitanism

institutions, not ones which found institutions *ex nihilo*; *demoi* constitute themselves through existing relations of rule or domination.

In my view, processes of political recuperation already deserve the name “democratic” when they succeed in creating effective relations of justification that curb domination, for instance through effective ‘contestation,’<sup>31</sup> even if they remain a step removed from complete recuperation and containment. A global constitutionalisation such as that proposed by Jürgen Habermas is not global democracy, much less deliberative democracy, in the guise of a world state.<sup>32</sup> But wherever the privileged are forced to renounce their prerogatives because, having been exposed, the ground has been pulled out from under them and justifiable counterpower is being mobilised – wherever this occurs and relations of justification are established which reclaim normative authority there is an increase in democracy. The difference from attempts at democratization within societies such as ours is great, but it seems to me to be a matter of degree, not of kind. Democracy progresses – often only in modest steps – where arbitrary and insufficiently justified rule, whether it be political, legal or economic, is exposed to the justificatory authority of those affected. This is a question of justice – *the* question of justice.

## 9. Human Rights<sup>33</sup>

Let me now locate human rights both normatively and institutionally within this framework I set out. The normative basis for a conception of human rights is the *moral* right of every moral person to be respected as someone who has a right to justification, such that any action or norm that claims to be morally justified, as well as any social order or institution that claims to be legitimate, has to be justifiable in an adequate way. This means that moral actions or norms have to be justifiable with moral reasons in moral discourse (free from coercion or delusion) and that political or social structures or laws have to be based on or (at least) to be compatible with moral norms applicable to them and must be justifiable within appropriate legal and political structures (and practices) of justification. The criteria of justification for moral norms are those of reciprocity and generality in a strict sense, for, recursively speaking, such norms claim to be strictly mutually and universally binding. The criteria for legal norms are those of reciprocity and generality within political structures of justification, thereby presupposing the possibility of free and equal participation and adherence to proper procedures of deliberation and decision making.

---

<sup>31</sup> Pettit

<sup>32</sup> Habermas

<sup>33</sup> For the following, see my „The Justification of Human Rights and the Basic Right to Justification,“ *Ethics* 120, 2010.

Hence, the notion of “dignity” that lies at the heart of the conception of human rights I propose is not a metaphysical or ethical one, combined with a doctrine about the good life. Rather, dignity means that a person is to be respected as someone who is worthy of being given adequate reasons for actions or norms that affect him or her in a relevant way. And this kind of respect requires us to regard others as autonomous sources of normative claims within a justificatory practice. Each person is an “authority” in the space of reasons, so to speak.<sup>34</sup> Dignity is thus a relational term; its concrete implications can be ascertained only by way of discursive justification.<sup>35</sup>

With respect to human rights we need to distinguish between what I call “moral constructivism” and “political constructivism” (using Rawls’s terminology in a different way).<sup>36</sup> Both are forms of discursive constructivism, in contrast to the idea of “deriving” rights from the basic right to justification. Every content of human rights is to be justified discursively, yet one needs to be aware of the twofold nature of human rights as general *moral* rights and as concrete *legal* rights. At the moral level, the construction leads to a list of those basic rights that persons who respect one another as equals with rights to justification cannot properly deny each other. That kind of list is to some extent general and subject to further elaboration, but it expresses basic standards of respect that must be secured in the form of rights, given that this form has proven historically to be the appropriate one for safeguarding individual claims and entitlements. It is important to emphasize that the basic right to justification is not only conducive to rights that secure the political standing of persons as citizens in a narrow sense; it is also the basis of rights to bodily security, personal liberties, and secure equal social status. To put it in negative terms, human rights are those rights which cannot be rejected with reciprocally and generally valid reasons among free and equal persons,<sup>37</sup> and that requirement opens up the normative space for claims that secure a person’s status as an agent with equal social standing. That implies rights against the violation of physical or psychological integrity as well as rights against social discrimination. The right to justification is not just a right to political justification; rather, it is a right to be respected as an

---

<sup>34</sup> This also holds true for persons who cannot use their right to justification in an active sense, such as (to some extent) children or mentally disabled persons; the passive status of having that right does not depend on its active exercise.

<sup>35</sup> I differ from Ken Baynes, “Discourse Ethics and the Political Conception of Human Rights” in thinking that a moral (not metaphysical) conception of dignity is unavoidable in grounding human rights claims.

<sup>36</sup> I explain the difference to Rawls in “The Basic Right to Justification,” 45f.

<sup>37</sup> I modify here the “not reasonable to reject”- formulation of Scanlon’s contractualist theory of justification; see Thomas Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Harvard University Press, 1998), esp. ch. 5. I discuss the differences between Scanlon’s contractualism and discursive constructivism in my *Das Recht auf Rechtfertigung*, chs. 1 and 2.

independent social agent who at the same time codetermines the social structure of which he or she is a part.

Using the right to justification as an anchor does not involve any narrowing of focus of human rights, as one may fear, for there are *two ways to substantiate human rights* on that basis, first by spelling out the requirements - and powers, so to speak - attached to the status of a socially and politically recognized agent of justification, and, second, via a consideration of the aspects of human life to be protected or enabled by basic rights that no person can morally deny to equal others with good reasons. At this point, claims about the importance of certain goods and about basic social interests reappear, though not as ethical values or interests from which certain rights claims can be derived, but as *discursively justifiable* claims to *reciprocal* respect between persons who recognize one another as autonomous and, at the same time, vulnerable and needy social beings. Human rights materialize and protect that status, and it is by way of procedures of reciprocal and general justification that claims based on human interests can be transformed into rights claims.

Hence, the political point of the right to justification is especially important, for there is a particular institutional implication of this moral argument for human rights. They are moral rights of a specific kind which are directed to a political-legal authority and have to be secured in a *legally* binding form; hence they are an important part of what I call “fundamental justice.” As I said, a fundamentally just basic political and legal structure is a “basic structure of justification” in which the members have the means to deliberate and decide in common about the social institutions that apply to them, and about the interpretation and concrete realization of their rights. Human rights in that sense have a reflexive nature: they are basic rights to be part of the processes in which the basic rights of citizens are given concrete and legally binding shape. They are rights of a higher order, namely rights not to be subjected to social institutions or legal norms that cannot be properly justified towards those affected, and rights to be equal participants in such procedures of justification. *Political constructivism* thus has moral constructivism as its core, for there can be no legitimate interpretation and institutionalization of basic human rights that violates their moral core as explained above, but it is also an autonomous discursive *practice* of citizens who are engaged in establishing a legitimate social and political order. There are certain core rights presupposed by that political construction, hence the idea of *fundamental justice* in a “basic structure of justification,” but an essential point of the construction is to establish a contextualized structure of rights and institutions worthy of acceptance by a political

community.<sup>38</sup> The ultimate aim, ideally speaking, is *maximal justice*, i.e. a “fully justified basic structure.”

It must be added that human rights are more wedded to fundamental than to maximal justice; the task of establishing a justified - and just - basic structure is more comprehensive and complex than that of establishing an acceptable and legitimate structure of basic human rights. Human rights are an essential part of the full picture of social and political justice, but they are only a part. As the realm of moral rights is larger than that of moral human rights, so is the realm of political and social justice larger than that of legally established human rights.<sup>39</sup> It is important to stress in this connection that political constructivism is not simply a “realization” of fixed moral human rights; rather, it is a discursive exercise within proper procedures of justification.

Human rights, to sum up, are those basic rights without which the status of a being with a right to justification is not socially secured. They entail the essential personal, political, and social rights necessary to establish what I call a social structure of justification, and second, they entail those substantive rights which no one within such a structure of justification can reasonably deny to others without violating the demands of reciprocity and generality.

Recursively speaking, and that is my central idea, the point of human rights is that persons have the basic right to live in a society where they themselves are the social and political agents who determine which rights they can claim and have to recognize. This is the autonomous agency highlighted by human rights, today as well as in earlier times.<sup>40</sup> To put the double, reflexive character of human rights in a nutshell: they are rights that protect against an array of social harms the infliction of which no one can justify to others who are moral and social equals, thus presupposing the basic right to justification - but above that, they protect against the harm of not being part of the political determination of what counts as such harms.

## 10. Statism or Cosmopolitanism?

I have argued that human rights are an important component of an account of political and social justice. But some authors further argue that they are “basic requirements of global

---

<sup>38</sup> Benhabib, “democratic iterations”

<sup>39</sup> I agree with Griffin, *On Human Rights*, 41, on that point.

<sup>40</sup> In an important sense, I share Habermas’s idea of the “equiprimordiality” of personal and political autonomy as well as of human rights and popular sovereignty, as explained in Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, tr. William Rehg (Cambridge, Mass.: MIT Press, 1996), esp. ch. 3. In another sense, however, I diverge from it, for my notion of equiprimordiality sees the right to justification as *one* source for both, while Habermas sees different sources at work. In addition, none of these has the moral status of the right to justification for which I argue. For a discussion of this see my “The Justification of Justice: Rawls’s Political Liberalism and Habermas’s Discourse Theory in Dialogue,” in *The Right to Justification*, ch. 4.

justice,”<sup>41</sup> and so here again the question arises as to whether my account falls into a “statist” or a “cosmopolitan” category. Yet, here too, I would suggest avoiding these categories. Undoubtedly, the basic right to justification is a universalist starting point, and so is the result of the list of human rights by way of moral constructivism. Still, the account of political constructivism sketched above does not predetermine whether the political community that interprets and institutionalizes these rights is a particular or a global one. Thus, the questions at issue between globalists and statistes have to be decided elsewhere, namely with reference to a conception of transnational justice which aims at establishing a transnational order of justification based on considerations of the relevant contexts of justice.<sup>42</sup> In a sense, then, human rights are part of an account of transnational justice, but just a part of it, and they are agnostic with respect to the question of the proper political context for their realization. A full-blown conception of transnational justice is more comprehensive than a conception of human rights can be, and it entails numerous aspects of political and economic, as well as historical, justice. And even though the conception of human rights implies rights to the necessary means for an adequate standard of living which cannot be denied to any person to whom reasons are owed for the social structures to which they belong, this in no way satisfies the demands of justice, either nationally or transnationally, given the world as we know it.

What is important, however, is that the primary addressee of human rights claims is a political and legal basic structure with the form of a state. In that respect, a conception of human rights needs to combine moral-universalist and institutional aspects, even though I disagree with an institutional view which not merely argues that the state is the central institution for securing human rights but also contends that it is only violations perpetrated by official actors that count as human rights violations.<sup>43</sup> That is too narrow a connection. It is the task of a state to secure human rights and to protect citizens from human rights violations by private actors such as large companies, for example. Failure to do so, either because the state decides not to act even though it could or because it is too weak,<sup>44</sup> constitutes insufficient protection of human rights, though their violation is not the work of the state but of other agents. So the state is the main addressee of claims to protect rights, even though it is not the only agent who can violate them.

---

<sup>41</sup> Charles Beitz, „What Human Rights Mean,“ *Daedalus*, Winter 2003, 44. In his *The Idea of Human Rights*, 142f., Beitz distances himself from this view, however. For another example of that position, see Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity, 2002), ch. 1.

<sup>42</sup> See Forst, „Towards a Critical Theory of Transnational Justice,“ in Thomas Pogge (ed.), *Global Justice* (Oxford: Blackwell, 2001), 169-187.

<sup>43</sup> See Pogge’s argument in *World Poverty and Human Rights*, 58.

<sup>44</sup> Pogge discusses the case in which the state is not willing to act and categorizes it as a kind of „official disrespect,“ *ibid.*, 61.

Human rights do, of course, have a transnational moral as well as a legal meaning. Their moral meaning is that a violation of human rights is a breach of standards which the human community in general believes should be respected; thus, in case states prove to be either the perpetrators of such crimes or unable to stop them, the “world community” is called upon to react not just morally but also politically. That, however, calls for a “mediation” of such duties to avoid or put a stop to violations of human rights in the form of proper institutions, not just because it needs to be determined who has what kind of duty to assist those in need but also because a structure of justification needs to be established to avoid arbitrary judgments concerning cases of aid or of intervention.<sup>45</sup> Hence, the moral meaning again has to be transformed on a legal and political level in order to establish credible and legitimate international institutions to prevent, judge, stop, or sanction human rights violations. There is another form of political constructivism called for here whose task is to codify transnationally and internationally binding human rights in political and legal terms.<sup>46</sup> What is politically valid and legitimate always needs to be generated by way of appropriate institutions.

There are further aspects of the legal existence of human rights in international declarations and covenants that I cannot go into here. There are duties to establish institutions for those who had to flee their states because of human rights violations, or for other reasons such as economic deprivation. The “right to have rights”<sup>47</sup> and to belong to a political community where one is protected from rightlessness is an important issue in a world of forced migration; so, too, is the duty to avoid the creation of zones of lawlessness, such as extraterritorial detention camps, in international conflicts.

Human rights are essential and fundamental standards of the legitimacy of a social and political order; even though such an order is their primary context and addressee, there are a number of reasons for an international order that aims to secure these rights. But their main point remains that, insofar as these rights are to establish the core of a justified social order, their normative ground is the basic claim to be respected as an agent who has a right to justification. The logic of justification combines reflexive, procedural as well as substantive, arguments for human rights, and every such right is to be seen as a claim that cannot be

---

<sup>45</sup> For the notion of „mediation“ here see Henry Shue, „Mediating Duties“, *Ethics* 98 (1988), 687-704.

<sup>46</sup> This point is stressed by Jürgen Habermas in his “Remarks on Legitimation through Human Rights,” in: *The Postnational Constellation*, tr. Max Pensky (Cambridge, Mass.: MIT Press, 2001), 113-130, and “Does the Constitutionalization of International Law Still Have a Chance?,” in: *The Divided West*, tr. Ciaran Cronin (Cambridge: Polity Press, 2006), 113-193.

<sup>47</sup> See Hannah Arendt, *The Origins of Totalitarianism* (San Diego and New York: HBJ, 1979), ch. 9; for an interpretation and application of this thought, see Seyla Benhabib, *The Rights of Others* (Cambridge: Cambridge University Press, 2004), ch. 2.

reciprocally rejected between persons who recognize that they owe one another a legal and political protection of their right to be a socially and politically autonomous agent of justification. Rights have to be understood horizontally, so to speak, as reciprocally justified and binding claims to a certain moral, as well as a legal, a political, and a social, status. They express forms of mutual recognition, and in their concrete form they are results of procedures of discursive construction. Rights are not goods received from some higher authority; rather, they are expressions of reciprocal respect between persons who accept that, whatever form these rights take, everyone to whom they apply has a basic right to be an agent of justification, such that no set of rights can be determined without adequate justification.

The view I have explained is at odds with two rival ones. The first is a teleological view which grounds human rights in basic interests in well-being and derives basic rights to certain protections and realizations of these interests from them. The second regards human rights as having primarily a legal international existence, leaving their moral justification open. It seems to me these two views downplay the social and political point of human rights. They are not simply means to achieve or enjoy certain goods, and they are not primarily means to evaluate social structures from the outside in the international arena; rather, they are autonomous achievements of those who regard themselves and others as agents who resist being “mere” subjects of norms or institutions that are not responsive towards them. Their basic claim is one of status, but of a dynamic kind, namely no longer to be treated as a justificatory nullity, and thus the claim to “count” socially and politically. Rights confer upon agents social and political power, in the sense of “normative power”: the power to codetermine the conditions of one's social and political life. Human beings have a claim to such power, and human rights are a way to express that.