Domination and Global Political Justice
Conceptual, Historical, and Institutional Perspectives

Edited by Barbara Buckinx, Jonathan Trejo-Mathys, and Timothy Waligore
4 Transnational Justice and Non-Domination
A Discourse-Theoretical Approach
Rainer Forst

The title of my contribution could have also been “transnational injustice and domination,” since we cannot make progress with respect to thinking about justice beyond the state unless we develop a realistic and critical view of the many and complex relations of domination within, between, and beyond states that mark our current global predicament. But in order to identify this predicament as one of “injustice,” we are in need of a proper conception of justice as non-domination.1 So let me turn to this first. In a second step, I will explain the difference between my Kantian, discourse-theoretical conception of non-domination and Philip Pettit’s neo-republican conception of non-domination. In a third step, I will apply my conception of justice as non-domination to transnational contexts. Finally, I explain the difference between my view and Pettit’s notion of international justice.

1 JUSTICE AND NON-DOMINATION

Let me start with a brief reflection on the notion of injustice. In my view, injustice means more than a person lacking certain important or even essential goods for a “decent” life. For if we were to only focus on deficiencies of goods, someone who is deprived of possibilities and resources as a result of a natural catastrophe would seem to be in the same situation as someone who experiences the same kind of deprivation as a result of economic or political exploitation. It is true that assistance is required in both cases. However, as

---


2 Here a range of cases should be distinguished, in particular: directly participating in or contributing to injustice; indirectly participating in it but without actively contributing to relations of exploitation; finally, the “natural” duty to put an end to unjust relations, even if one does not profit from them but is in a position to put an end to them. I cannot go into these distinctions further here.

3 I discuss this as a “dialectics of morality” in Forst, The Right to Justification: Elements of a Constructivist Theory of Justice, trans. Jeffrey Flynn (New York: Columbia University Press, 2012), ch. 11. See also the following quote by Immanuel Kant: “Having the resources to practice such beneficence as depends on the goods of fortune is, for the most part, a result of certain human beings being favored through the injustice of the government, which introduces an inequality of wealth that makes others need their beneficence. Under such circumstances, does a rich man’s help to the needy, on which he so readily prides himself as something meritorious, really deserve to be called beneficence at all?” from Kant, Metaphysics of Morals, in Practical Philosophy, ed. and trans. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), 353–603, 573, 6:454. Page numbers referencing the English language editions of Kant will be followed by the Academy edition pagination.

4 For a contrasting view, see Stefan Gosepath, “Deprivation and Institutionally Based Duties to Aid” (this volume).

5 John Rawls also argues that the concept of justice is opposed to arbitrariness: “Those who hold different conceptions of justice can, then, still agree that institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life” from Rawls, A Theory of Justice, revised ed. (Cambridge, MA: Harvard University Press, 1999), 5.
by a part of the community (for example, by a class), or the acceptance of social contingencies that lead to asymmetrical social positions or relations of domination 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—what I call domination—and where struggles are conducted against injustice, they are directed against forms of domination of this kind. The underlying impulse that opposes injustice is not primarily that of wanting something, or more of something, but of no longer wanting to be dominated, harassed, or overruled in one's claim and basic right to justification. In contexts of justice, this claim involves the demand that no political or social relations should exist that cannot be adequately justified toward those subjected to them. Herein resides the profoundly political essence of justice that a purely goods or recipient-oriented view fails to grasp; for justice concerns **who determines who receives what** and not only or primarily who should receive what. The demand for justice as I conceive it is an emancipatory one. Expressed in reflexive terms, it rests on the claim to be respected as an autonomous subject of justification; that is, to be respected in one's dignity as a being who can provide and demand justifications and who is to have a status as a free and equal normative authority within a normative order of binding rules and institutions. The person who lacks certain goods should not be regarded as the primary victim of injustice. Instead, the primary victim is the person who does not "count" in the production and allocation of goods. Justice requires that those who belong to a structured social context be respected as equals. This means that they should enjoy equal rights to participate in the social and political order of justification in which they are involved in determining the conditions under which goods are produced and distributed, and in which they ought to have a standing as justificatory equals.

Justice, then, is the human virtue of opposing relations of arbitrary rule. "Arbitrariness" is the term for "groundless" rule; that is, insufficiently justified rule that assumes the form of domination, presupposing 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 institutionalized justification procedures. So two aspects of a political notion of domination are relevant here: rule of some over others without justifiable reasons, and rule over others in a normative order which lacks sufficient institutional or social preconditions and possibilities of justification in the first place. The latter is the more severe form of domination.

That the basic claim of justice is to have a social and political standing as a free and equal agent of justification is a recursive implication of the fact that political and social justice is a matter of norms of an institutional basic structure that claim to be reciprocally and generally valid. Thus **a supreme principle** holds within such a framework—namely, the principle of general and reciprocal justification—which states that every putatively valid claim to goods, rights, or liberties must be justified and justifiable in a reciprocal and general manner, where one side may not make claims that they deny to others and no side may simply project its reasons onto others. Instead all must justify their claims discursively—without excluding involved parties. The criteria of reciprocity (of claims as well as reasons) and generality are reconstructed as criteria of the validity of justice norms, and then interpreted as criteria of justifiable norms of justice and of the procedural quality of justice-generating discourses and discursive structures.

The normative grounding of such a conception of justice as non-domination does not rest on any values or norms other than the principle of justification itself as a principle of practical reason (saying that normative claims always have to be justified according to their immanent validity criteria). Thus, the discourse-theoretical conception of justice is **autonomous** with respect to other values or comprehensive doctrines in Rawls's sense, but it also has a moral force of its own, since it rests on an undeniable claim to be respected as a normative agent or authority when it comes to the norms that claim validity over a person. The principle of justification is thus a principle of practical reason in the Kantian sense, as it does not merely imply what it means to justify as a claim to justice, but also that one has a duty of justice when one is part of a context of justice. Contexts of justice are particular forms of moral contexts. A moral context is one where others are affected by my actions in a relevant way, whereas a context of justice is one where we are participants in an order of rule and/or domination—in other words, one where we are subjected to a social normative order. The grounding of the theory of justice as non-domination is therefore "thin" when compared to other ones which use substantive values of liberty or equality, or well-being or the good, as it only relies on the principle of justification or critique itself. However, it is also "thick," as it interprets this principle to ground a categorical and overriding right and duty of justification between those subjected to a normative order of rule and/or domination. And to add another short parenthetical remark on a complex issue, it is a grounding that is as "immanent" to social practices of justification and critique as it is "transcendental" in reconstructing a principle that inheres in and transcends all particular forms of practices of justification, thus opening up the possibility of testing their justificatory quality in radicalizing the criteria of reciprocity.

---


8 See Forst, *Right to Justification*, chs. 1–2.

9 I explain the difference with Rawls in ibid., ch. 4.

10 I will later come back to the question of locating such contexts at the transnational level.
and generality. This transcending force is appealed to by those who say "no" to given orders of justification and demand better ones.

Turning to social and political theory on that basis, we arrive at a 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 which reasons, and in what amounts should legitimately be allocated to whom, but specifically how these goods come into the world in the first place, who decides on their allocation, and how this allocation is made. Theories of a predominantly allocative kind are "oblivious to power" insofar as they conceive of justice only from the "recipient side," without raising the political question of how the structures of production and allocation of goods are determined. The claim that the question of power is the first question of justice means that the constitutive places of justice are to be sought where the central justifications for a social basic structure must be provided and the institutional ground rules are laid down that 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 "justificatory power" of individuals, is the higher-level good of justice; it is the "discursive" power to demand and provide justifications and to repudiate false legitimations—whether as single false legitimations, or as systemic discursive complexes or languages of justification.11 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.

A comprehensive theory of political and social justice can be constructed on this basis, something I can only hint at in the present context.12 First, we must make a conceptual distinction between fundamental (minimal) and full (maximal) justice. Whereas the task of fundamental justice is to construct a basic structure of justification, the task of full justice is to construct a fully justified basic structure. In order to pursue the latter, the former is necessary; that is, a "putting into effect" of justification through constructive, discursive democratic procedures in which justificatory power is distributed as evenly as possible among the citizens. To put it in (only seemingly) paradoxical terms, this means that fundamental justice is a substantive starting point of procedural justice. Based on a moral right to justification, arguments are presented for a basic structure in which individual members have real opportunities to codetermine the institutions of this structure in a reciprocal and general manner. Fundamental justice guarantees all citizens an effective status as justificatory equals.13

11 I develop the notion of power relevant here in my "Noumenal Power," The Journal of Political Philosophy, forthcoming.
12 For a more detailed treatment, see Forst, Right to Justification; Forst, Justiceification and Critique.
13 This concerns a set of rights as well as institutional and social preconditions I cannot elaborate on here. See Forst, The Right to Justification, part 2.

2 NON-DOMINATION: NEO-REPUBLICANISM VERSUS KANTIAN REPUBLICANISM

The view I have presented is of a Kantian nature, and it provides the basis for what I call Kantian republicanism—though not "Kant's republicanism," since I elaborate on his views. For Kantian republicanism, a particular notion of autonomy in the moral and political realm is foundational. Its main point is to avoid a one-sided focus on the freedom of persons as "users" or "receivers" of legal freedom, or as protected in their legal status as persons with sufficient freedom of choice. After all, Kant insists on the freedom of persons also as lawgivers, as producers and guarantors of freedom; in short, as politically autonomous citizens. The dignity of a free person can never merely be understood as "enjoyment" of freedom or certain liberties—it is also always the freedom of giving laws to oneself, the freedom of normative self-determination. This is a kind of freedom that comes in two modes, one moral and one political, but its modus operandi is, despite the difference between these modes, the same. It is a practice of reciprocal and general justification, or a practice of practical reason, if you like, one moral and one political (but both intertwined). The laws that constitute this and those that are generated in that practice do not just protect freedom—rather, they express it.

I cannot go into the details of the Kantian view I have in mind here.14 Suffice it to say that I translate the idea of the basic respect for autonomous persons into the language of a moral "right to justification," because, according to a Kantian conception, a person has a categorically undeniable subjective claim to be respected as a normative authority who is free and equal to all others. I call such a non-rejectable claim based on the very principle of justification a moral right, binding every other moral person, thus implying a categorical duty of justification. It is not a right to some good or a right based on some interest. Rather, it is based on the status of the person as a reason-giving and reason-receiving being and authority in the space of reasons. It is therefore the ground of all further claims to moral respect and to the validity of more specific moral norms which need to be justified by reciprocally and generally non-rejectable reasons. I call this form of justification moral constructivism. It is a discursive and recursive enterprise: It is discursive since justification needs to be a practice between free and equal persons, even if this is only counterfactually possible in an imagined discourse (to the best of our abilities). It is recursive since no other content or value is given than that of the agents and criteria of construction through justification.15

14 But see ibid., chs. 1–2.
To apply this to contexts of law and politics, we need to take a closer look at Kant’s doctrine of right, which provides the principles that help us understand the justifiable forms of freedom under law as well as the political justification of law that establishes that kind of freedom. Kant contrasts law as regards its content with all ethical doctrines of happiness and as regards its form with moral imperatives, because positive law refers only to external actions and not to inner motivation. The essential difference between legality and morality resides less in the content of the respective laws than in the “incentives”: positive law is external coercive law and constrains freedom of choice, whereas moral laws determine the moral will.\textsuperscript{16} Thus, the supreme principle of law specifies that restrictions on freedom are in need of universal justification: “Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.”\textsuperscript{17} The foundation of this definition of law, according to which all forms of legal coercion are in need of reciprocal and general justification among free and equal persons, is a basic moral human right to lawful freedom prior to any positive law: “Freedom (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.”\textsuperscript{18} Kant’s “innate right” is the implication that (to use my terminology) moral basic right to justification has with respect to law, as it is the universal right for human beings to be respected as “ends in themselves.”

According to the principle of right, only ‘general laws’ can be laws of freedom, and they can be general only if they are in accordance with the “united will of the people.”\textsuperscript{19} The citizen can be politically autonomous—and here Kant takes up Rousseau’s notion of autonomy—if he obeys only laws that he has given himself. He obeys no law other “than that to which he has given his consent.”\textsuperscript{20} “For it is only to oneself that one can never do wrong.”\textsuperscript{21} As an active member of the polity, as a voting citizen, the person is a citoyen, not just a bourgeois: She\textsuperscript{22} or he is simultaneously author and addressee of the law. Hence, generally and reciprocally binding law can be legitimate only if it can stand the test of being agreed upon in procedures of general and reciprocal justification. The mere “idea of reason, which, however, has its undeniable practical reality,” states that “the touchstone of any public law’s conformity with right” is its ability to command general agreement.\textsuperscript{23} In short, just as the moral principle which makes it a duty to justify morally relevant actions and norms in a particular way becomes the foundation of the original right to freedom, in the same way it here becomes the foundation of the requirement to justify coercive laws in the medium of “public reason.” Where there is no adequate possibility to generate such discursively justified norms in democratic practice, the first duty of justice is to establish such institutions.

In Kantian republicanism, freedom in the state can only be fully realized if it is the freedom “of obeying no other law than that to which [the citizen] has given his consent.”\textsuperscript{24} This is the real meaning of legal independence or political-legal non-domination: you are only independent, or non-dominated, if you are at the same time subject and author of the law. Otherwise your right to freedom—or your right to justification—is only half realized. You might receive freedom or some justification. But if you cannot be the author of the laws of freedom, you are not offered real freedom. The laws securing freedom must be reciprocally and generally justifiable, but no one has the authority to fabricate these justifications for you, as you are an autonomous agent of justification.\textsuperscript{25}

This I take to be the essence of Kantian republicanism, which stresses independence as a basic moral principle of right for rational, end-setting beings who inhabit a social space together.\textsuperscript{26} It implies the right to have all other rights (and duties) justified strictly reciprocally and generally, and thus the right to justification of independent agents grounds all other rights. It does this in a discursive, reflexive way, not by way of a deduction. In the mode of moral constructivism, this leads to a conception of moral rights. In the mode of political constructivism, this leads to a conception of human rights, as well as to a conception of democratic political and social justice. Human rights are all the rights that persons who respect each other as free and equal cannot deny each other within a normative order of legal, political, and social life. The main point is again a reflexive one: no one must be subjected to a normative order that cannot be adequately justified to him or her. This is the basic human right and the basic claim of justice.\textsuperscript{27}

\textsuperscript{16} Kant, \textit{Metaphysics of Morals}, 383-84, 6:220.
\textsuperscript{17} Ibid., 387, 6:230.
\textsuperscript{18} Ibid., 393, 6:237.
\textsuperscript{19} Ibid., 457, 6:313.
\textsuperscript{20} Ibid., 457, 6:314.
\textsuperscript{22} As I am phrasing it as a general point, I include both gender terms—which Kant did not.
\textsuperscript{23} Kant, “On the Common Saying,” 296-97, 8:297 (emphasis omitted).
\textsuperscript{24} Kant, \textit{Metaphysics of Morals}, 457, 6:314.
\textsuperscript{25} This is why I do not think that Kantian republicanism, especially in its discourse-theoretical version, is subject to the critique that it relies on a purely counterfactual notion of justifiability; for this critique, see Philip Pettit, \textit{On the People’s Terms: A Republican Theory and Model of Democracy} (Cambridge: Cambridge University Press, 2012), 147ff.
\textsuperscript{26} In line with Arthur Ripstein, \textit{Force and Freedom: Kant’s Legal and Political Philosophy} (Cambridge, MA: Harvard University Press, 2009), 16f, 371.
\textsuperscript{27} See Forst, \textit{Justification and Critique}, ch. 2.
The Kantian republican conception I have sketched uses a discourse-theoretical notion of non-domination. Domination, to repeat, has two aspects; namely, being subjected to a normative order that cannot properly be justified to you, and being subjected to a normative order where no proper institutions and possibilities of justification are in place to begin with. The second is the more severe form of domination, as it structurally takes away the possibility of codetermining the normative order.

How does this relate to Philip Pettit’s version of republicanism? For Pettit, republicanism is essentially a theory of legitimate government grounded in a particular idea of freedom as “non-domination,” understood as “the social status of being relatively proof against arbitrary interference by others, and of being able to enjoy a sense of security and standing among them.” In contrast to freedom as mere “non-interference,” non-domination is bound up with being and seeing oneself as someone who is not at the mercy of others’ arbitrary will, even if these others were to mostly leave you alone. The republican notion of self-respect and freedom is directed against the potential of arbitrary interference. The rule of law is thus important, as is a social status protecting persons “robustly” against social and political vulnerability to the possibility of arbitrary interference. Slavery is the counterpart of the notion of freedom used here, with the slave as the extreme version of a dominated person. Even though Pettit correctly emphasizes that freedom as non-interference is distinct from freedom as non-domination, a negative conception of liberty lies at the center of his view: the argument for non-domination it attempts to secure the realm of freedom of choice of persons against arbitrary interference. This is why I refer to this view as negative republicanism: the republican infrastructure is primarily a sheltering mechanism for individual liberty understood in this way. In his republican theory, citizens are “law-checkers” interested in their secure freedom of choice, not “law-makers” as in a Rousseauian or Kantian scheme.

So how distinct is my Kantian conception of republican justice as non-domination from Pettit’s conception of republican freedom as non-domination? In answering this question, I would like to offer a (somewhat revisionary) reading of Pettit that brings him closer to the Kantian family. My reason for doing so is that, as I see it, the real force of freedom as non-domination derives from a notion of justice as justification that both grounds and defines it. It grounds it because the basic claim of republican citizens is not one of freedom generally, but one of freedom from arbitrary—i.e., unjust and unjustifiable—interference or rule (that is, domination). The claim is based on one’s standing as a free and equal agent of justification. It is a claim to a kind of liberty (and liberties) defined by what oneself and others can justifiably and justly ask from one another in a basic social structure. As Pettit explains in the course of discussing Quentin Skinner’s view championing non-interference, justifiable rule is not seen as domination. Only arbitrary rule is seen as domination, and that means unjustifiable rule over others, denying their standing as free and equal agents as normative authorities. Being denied such standing leads to the “grievance... of having to live at the mercy of another,” which Pettit isolates as the main social and political evil. If interference or rule by others is justifiable between equals, it is not seen as an infringement of freedom. The notion of justice referring to the quality of the relations between free and equal participants in a basic structure of justification is thus central and normatively prior to that of freedom of choice. Justice as justification determines which freedoms are justified and what an arbitrary interference is in the first place.

This might seem to read into Pettit’s approach a Kantian notion of freedom, but this is only a concern if one overlooks the implications of how Pettit distinguishes between the non-arbitrary or “controlled” rule of law, which does not compromise freedom, and domination, which does compromise freedom. The rule of law is seen as “conditioning” freedom, and this is close to Kant’s view. Republican freedom is about the “full standing of a person among persons,” and, explicitly referencing Kant, Pettit goes on to explain: “The terrible evil brought about by domination, over and beyond the evil of restricting choice, and inducing a distinctive uncertainty is that it deprives a person of the ability to command attention and respect and so of his or her standing among persons.” Thus the main evil is that of not being regarded as “a voice worth hearing and an ear worth addressing”—that is, in my words, as a person with a right to justification. As Pettit formulates it: “To be a person is to be a voice that cannot properly be ignored, a voice which speaks to issues raised in common with others and which speaks with

28 I will be brief here. For a more extensive discussion, see my “A Kantian Republican Conception of Justice as Nondomination.”
32 Pettit, On the People’s Terms, 15.
34 Pettit, “Keeping Republican Freedom Simple.”
35 Ibid., 342.
36 Ibid., 350.
37 Ibid., 351.
38 Ibid., 350.
39 Ibid., 350.
a certain authority: enough authority, certainly, for discord with that voice to give others reason to pause and think.\textsuperscript{40} Every person is to be respected as a justificatory authority in this way, and this is the essential meaning of freedom as autonomy: to have a categorical right not to be subjected to norms that cannot reciprocally be justified.\textsuperscript{41}

In my view and in my preferred Kantian reading of Pettit, we have gone quite a bit beyond a negative conception of freedom without also adopting a controversial positive conception of freedom. Thus, what matters in a republican account of non-domination is freedom as autonomy; that is, freedom from unjustifiable subjection or coercion and freedom as a self-determining agent of (moral, as well as political) justification. Only where practices of justification exist that prevent some from dominating others is freedom as non-domination guaranteed. Rather than focusing on the “robust” legal state of enjoying freedom of choice, we should focus on the relational freedom of being a codetermining agent of justification within the normative order that binds us.

3 TRANSNATIONAL CONTEXTS OF JUSTICE

If we want to locate the Kantian, discourse-theoretical view of justice as non-domination in contexts beyond the state, we must use a broader definition of a context of justice than Kant’s, which focuses on subjection to legal coercion within a state. What we have to hold onto, however, is the insight that justice, whether “political” or “social,” presupposes in the first instance specific practices of justification—that is, a basic structure of justification—and this political praxis of reciprocal and general justification is essentially what we mean by ‘democracy’; those who are subjected to general and binding norms should also be the authority who 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; her task is instead to banish arbitrary rule, i.e., domination. Democracy is the form of political order capable of accomplishing this in the right way. The task of democracy is to secure the political autonomy of those who are supposed to be both subjected to and authors of binding norms.

How can this be extended to transnational contexts? Until now, I have stressed that the aim of justice is to create justified social relations and political structures, and to this effect it first calls, reflexively speaking, for the creation of a basic structure of justification. It follows that justice has its proper place wherever a threat of arbitrary rule exists, where a social context is degenerating, or where it could degenerate into a context of domination. One might conclude from this that the existence of a specific social context of cooperation is a necessary presupposition of a context of justice.

A number of theories have drawn this conclusion. In the first place, we must mention that of John Rawls. Rawls locates social justice in the national sphere and views the international domain as one in which merely a minimal list of human rights is valid and otherwise only duties of assistance exist.\textsuperscript{42} This is not so much a state-centered as a specifically cooperation-centered view. Interpreters often mistakenly underestimate 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 center of his theory.\textsuperscript{43} According to Rawls, only such a society provides the resources—in the twofold sense of material and normative resources—that a “well-ordered society” presupposes. Here alone are to be found the reciprocity conditions and the economic, political, and moral cohesion that a just society requires.

Some theorists develop this idea in a communitarian direction so that “common sentiments”\textsuperscript{44} or “shared understandings”\textsuperscript{45} within a nation, understood as a political and cultural community, become a necessary presupposition for a complete context of justice. Others, by contrast, adopt an institutionalist perspective that emphasizes the state as the central context of justice. Thomas Nagel expresses that 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.”\textsuperscript{46} The essential aspects of such a “strong political relation” are the existence of a collectively authorized source of law and the fact that the relation is not voluntary—that is, that the relation expresses the will of those involved as citizens and that this must also be so if they are not to be subjected to illegitimate coercion.\textsuperscript{47} Positive normative authority and factual coercion must coexist in order to form a context of justice—as a context of law.

Rawls and Nagel’s arguments carry considerable weight because a social context of justice is in fact a demanding one and presupposes certain relations among those involved. Nevertheless, these arguments are problematic because they employ a conclusion as a premise when they argue that a

\textsuperscript{40} Pettit, \textit{Republicanism}, 91.

\textsuperscript{41} I will not go into a discussion of whether that kind of basic moral-political status can be grounded in a consequentialist theory, which I doubt.


\textsuperscript{44} David Miller, \textit{National Responsibility and Global Justice} (Oxford: Oxford University Press, 2007).


particular social or legal institutional context of cooperation or legal force is a necessary precondition of justice. For, as explained above, Justitia is a man-made deity who comes into the world to banish social arbitrariness, and this means that she has her (combative) place wherever arbitrariness prevails (or poses a threat) among human beings. In such cases, she calls for specific institutions—for example, for the rule of law where a "state of nature" of arbitrariness existed—but then she cannot presuppose that these institutions are already in place. She presupposes that persons have the status of beings who have a right to justification and she calls for the creation of a basic structure of justification wherever arbitrary rule prevails; but her calling for this cannot be contingent on a basic structure already existing. Thus, the objection to Rawls, as certain globalist cosmopolitans assume, need not claim that a "global basic structure" already in fact exists,\(^48\) because the comparison between national contexts and a global basic structure is untenable when it comes to the "thickness" of the relevant social relations. And although one can point out, contra Nagel, that certain global institutions also exercise state-like legal coercion and claim authority for this,\(^49\) there remains a striking difference from national law here as well. It is instead important to move beyond thinking in terms of the dichotomy between "state" and "world" and to assume a plurality of contexts of (in)justice that differ with regard to their relational quality, so that justice can be correctly located or "grounded" specifically, in a way informed by an appropriate social-scientific analysis of actually existing social relations.\(^50\)

Viewed from a critical perspective, to assume that a context of justice exists only where norms of law and justice are already institutionalized in positive law, or on any where positive, mutually beneficial forms and institutions of cooperation already exist,\(^31\) would amount to a twofold "practice positivism." These two forms of positivism can be called "positive institutionalism" and "positive cooperativeism." Against this, it must be objected that a context of justice exists wherever relations of political rule and social cooperation exist and wherever forms of domination exist, whether or not they are legally institutionalized. The latter include various relations of negative cooperation; i.e., forms of (legal, political, economic, or cultural) coercion and/or exploitation. This provides the entry point for a critical and "realist" theory of justice, and such a theory presupposes an informed social-scientific analysis.\(^52\) It recognizes a complex system of rule and of forms of domination at the national, international, and transnational levels. As a result, it sees the primary task of justice as the creation of corresponding transnational and supranational structures of justification. Such structures must be capable of converting complex relations of domination into relations of reciprocal justification not marked by grave power asymmetries, and they must open up space for discourses, and above all for critique, where the nature of existing conditions and appropriate responses are matters of dispute.\(^53\) Justice tracks, as it were, arbitrariness in forms of domination and coercion wherever they occur. The assumption that this would first require an already existing, positive social or legal context of cooperation fails to appreciate the correct order of things: first and foremost, there is concrete injustice in the world, and justice calls for structures of justification and banishes human arbitrariness. Justice is a relational, as well as an institutional, virtue; it does not refer to all asymmetrical relations between human beings without discrimination, but it does refer to those exhibiting forms of domination and social arbitrariness—whether in contexts involving only sparse legal regulation or in thicker institutional contexts, within and beyond the state.

The question of the extent to which a relational, discursive conception of justice can be described as "practice-dependent" must therefore be answered in a differentiated manner. "Practice-dependence" is the term used by Andrea Sangiovanni to describe approaches that, in contrast to "practice-independent" definitions of justice (such as those of luck egalitarianism or the universal provision of goods),\(^44\) assume that the "content, scope and justification" of norms of justice depend on the concrete practices these norms are supposed to regulate. These practices thus enjoy normative priority and provide the context of interpretation for what justice requires.\(^55\) Yet which practices these are and how they should be interpreted, it must be pointed out by way of criticism, is not revealed by these practices themselves, but is a prior requirement in need

---


\(^{50}\) See my original argument for a critical theory of transnational justice, now in *Forst, The Right to Justification*, ch. 12.


\(^{53}\) I agree with Nancy Fraser that the latter condition is important; see Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (New York: Columbia University Press, 2009), esp. chs. 2 and 4. Nevertheless I believe that a critical social-scientific analysis is capable of adequately describing existing relations and structures and their need for justification in order to mark the entry point for discursive justification.


\(^{55}\) Thus also Aaron James, "Constructing Justice for Existing Practice: Rawls and the Status Quo," *Philosophy & Public Affairs* 33, no. 3 (2005): 281–316.
of justification—they could be legally regulated, democratic, or cooperative practices, for instance, but they could also be practices of domination or negative cooperation. Hence the identification and interpretation of the practices to be regulated in accordance with justice must occur in light of principles of justice themselves, where these principles cannot follow from specific social practices alone but must be related to these practices in the right way. Otherwise there would be a threat of regress that could be broken off only in an arbitrary way through an abstract definition of which actual concrete practices are practices of justice.

Hence, a non-positivist approach that avoids a status quo bias which threatens to insulate existing contexts from external demands of justice (and often idealizes them into contexts of cooperation or self-determination) must distinguish between different notions of "practice." The higher-order principle of justification, which gives rise to the principle of reciprocal and general justification in contexts of social rule and domination, is itself a principle of practical reason which states that intersubjective validity claims must be justified in an appropriate way. This principle is thus practical in nature (because immanent to the practice of justification), yet it also transcends concrete practices. Only in this way can the necessary proximity and distance to existing practices be generated by referring to the fundamental practice of justification.

Besides the basic notion of the practice of justification, various other notions of "practice" must be distinguished: practices of legal regulation, of political codification, and of economic and general social cooperation. Each of these can assume a positive or a negative form. Here it is a mistake to opt for a positive or a negative version of "practice-dependence," for both positive and negative practices give rise to duties of justification and justice. Contexts and practices of justice exist wherever there are—more or less institutionalized—forms of collective rule or domination that are

---

56 See on this also the critique of "justice positivism" in Darrel Moellendorf, Global Inequality Matters (New York: Palgrave Macmillan, 2009). 36. Miriam Ronzoni tries to avoid a national status quo bias by criticizing international asymmetrical relations that arose in the context of positively established practices of economic exchange and of international commerce and no longer fulfill the internal purpose of these practices, as long as new global regulatory structures have not been erected: Ronzoni, "The Global Order: A Case of Background Injustice? A Practice-Dependent Account," Philosophy & Public Affairs 37, no. 3 (2009): 229-56. It should be noted, however, that without a higher-order principle of discursive justice it would remain open how to resolve disputes over the meaning of certain exchange practices, for example, and whether justice is done to this meaning and how one should respond to it—if one thinks, for example, of conflicting libertarian and egalitarian interpretations of current practices. Also, the question of whether individual practices of this kind are even worth preserving would lack any basis. However, Ronzoni rejects a higher-order principle (244), so that the view remains fixated on positive practices, and thus the analysis of injustice remains confined to a conventional analysis and interpretation of these principles.

57 On this, see Forst, The Right to Justification, chs. 10–12.

58 On this, see the corresponding proposal of Michael Zürn in the context of international institutions; Zürn, Regieren Jensitses des Nationalstaats (Frankfurt am Main: Suhrkamp, 1998), 332.
transformed from an unregulated form of domination into a regulated form of justification or rule.63

Understanding democracy in processual terms, it expresses the collective aspiration to subsume the exercise of rule under relations of effective justification and authorization of norms by those who are subjected to them. To assume that this requires a demos defined in terms of the state (or nation) would be to reify democracy. After all, the demos that are constituted as states are already integrated into such diverse networks of international and transnational arbitrary rule (including non-state actors) that the “congruence condition”64 of the authorization and exercise of rule is no longer satisfied. In a world scarred by colonialism and grave social asymmetries, there are demos that, to simplify, are subjected to external power in different ways, nationally and transnationally, as well as internationally and supranationally, and there are demos that profit from such subjugation—and there are hybrid forms of the two.65 Justice and democracy are primarily recuperative and processual in nature and are not justified ex nihilo. Demos generally take shape through prior social relations that stand in need of justification. Jürgen Habermas once coined the image of “besiegement” for the exercise of communicative power: public discourses generate justifying reasons that the political system cannot ignore.66 The concept of “justificatory power” that takes up these reflections, by contrast, is agnostic when it comes to the question of whether the mode of producing and exercising communicative power is an institutionalized one or not. What is essential, however, is that the force toward the better argument that challenges privileges and domination can in this way be exerted.

63 Jürgen Habermas proposes a division of labor between a supranational world organization that would be authorized to deal with questions of international security and human rights within the framework of a global constitution, and a transnational “global domestic policy” that would presuppose negotiation systems in which questions of the global economy and the environment would feature centrally. See Jürgen Habermas, “Does the Constitutionalization of International Law Still Have a Chance?” in The Divided West, ed. and trans. Ciaran Cronin (Cambridge: Polity, 2006), 115–93, 136–37; and The Crisis of the European Union: A Response, trans. Ciaran Cronin (Cambridge: Polity, 2012), 56ff. In the more recent version, Habermas emphasizes that institutions are needed to prevent such negotiation systems from reproducing existing asymmetries of power, and he proposes oversight by a “world parliament” (67ff). That is one possible way to bring about more symmetric relations of justification, but other possibilities for representing those affected or subjected are also conceivable.

64 Zürn, Regieren jenseits des Nationalstaats, 17.


66 Jürgen Habermas, “Popular Sovereignty as Procedure,” in Between Facts and Norms, trans. William Rehg (Cambridge, MA: MIT Press, 1996), 463–90, 486–87; Habermas subsequently revised this conception in favor of a more institutionally mediated one. However, it is especially applicable at the transnational level.

59 Corresponding modes of participation based on relevant involvement or subjugation must be sought in this context, though I cannot discuss this further in the present context.


62 On this, see James Bohman, Democracy Across Borders: From Demos to Démocratie (Cambridge, MA: MIT Press, 2007). However, Bohman does not define his concept of the demos in the sense I propose.
The recuperation of relations of rule and domination and their transformation into relations of justification is rightly called "democratization" when it succeeds in generating structures that put a brake on arbitrary rule, for instance through effective "contestation." This is so even if there is still a long way to go to their complete recuperation and containment. Whenever privileged actors are forced to surrender their prerogatives because these lose their legitimation—after exposure within a system of justification and the formation of counter-power—this represents an increase in democracy. Democracy progresses—often only in modest steps—where non-legitimized rule, be it political, legal, or economic, is subjected to the justificatory authority of those affected. Democracy as practice is always a matter of democratization, of expanding and equalizing justificatory power.

4 TWO KINDS OF REALISM

In a number of recent texts, Philip Pettit has developed a republican conception of international justice. At its core we find an ideal of "globalized sovereignty" that is animated by the idea of non-domination among states and that shares major assumptions with Rawls's account of a law of peoples. In the first place, it is based on a respect for peoples as separate and autonomous political units (ideally forming representative states, the first part of the construction of international justice, as in Rawls) and it thus entails a rejection of political cosmopolitanism and far-reaching arguments for global distributive justice. Pettit's approach takes the different forms of domination that exist or are possible at the international level into account, but believes that the dominating effects of a highly integrated, global political and legal structure would be higher than the dominating effects of an international system that leaves states and their different powers mostly intact, though bound by an entrenched, internationally-recognized set of rights and obligations of states and human beings. Above all, Pettit is a political realist who does not believe that it is possible, given the fact of global cultural plurality, to move further beyond distinct political communities. Furthermore, he makes the normative argument that citizens of a state have obligations toward one another that they do not have towards outsiders.

I suggest that we call this form of realism Realism 1. It places certain constraints on the normative horizon of thinking about global justice, restricting it to international justice as a law of sovereign peoples. I believe, however, that some of the conclusions that follow from these constraints are in tension with another kind of realism that is also implicit in Pettit's republicanism. This form, Realism 2, is the source of much of the strengths of Pettit's view, as far as I see it. Realism 2 details the actual and possible forces of social and political domination and tracks domination wherever it occurs or can realistically occur; i.e., in asymmetries of power that lead to unjustifiable interferences with the liberty of subjects, persons, or states. As one can see, these two realisms might pull in different directions. While Realist 1 constructs a limited form of international republican justice as globalized sovereignty, Realist 2 identifies domination in its many international, transnational, or supranational forms—just as he or she would within a state—and demands "robust" structures of the rule of law, democratic legitimacy, or distributive justice to overcome and safeguard against political or social domination in contexts beyond the state. Obviously, a lot depends on an evaluation of the existence or threats of domination at these levels beyond the state, and empirical considerations play a major role. Still, this assessment is guided by normative evaluations. For a non-domination republican, there are difficult questions here: is the proposed realistic (in the sense of realism 1) account of international justice sufficient to secure non-domination given what we realistically (in the sense of realism 2) know about domination beyond the state?

As Pettit's work shows, he is in many ways a Realist 2. He spells out the many dangers and forms of domination of states by other states, in many dimensions of power—economic, political, military, as well as by international agencies and multinational corporations that "beggar the economy" of weaker states. As a result, a system of entrenched protections is required, "entrenched in quite a deep manner," as Pettit adds. Realist 2 thus argues that there must be mutually justifiable "suitable rules" for the exploration of resources, for trade as well as climate policy, and for limiting the power of multinational corporations and banks. Yet Realist 1 then seems to counter that such rules and "universal standards" must be "negotiated in international forums." However, here, Realist 2, who knows about the reproduction of power asymmetries in such contexts, asks about the justificatory standing of weaker states (as well as oppositional groups of states) in these negotiations—and I am not sure whether the notion of justice in negotiations of Realist 1 is sufficient to answer that.

When it comes to the question of implementation, Pettit argues that the recognition of the proposed general liberties by some states will motivate

---

69 Pettit, Just Freedom, 158f.
70 Ibid., 162.
71 Ibid.
72 Ibid., 164.
73 Ibid., 164f.
others to follow suit, aspiring to be well recognized and in good standing internationally—or trying to avoid pressure and criticism. Apart from such esteem-based motivations, pure self-interest will also help, as states would have reason to want to be treated according to such norms. There will not be, as exists in a state, a robust system of sanctioning institutions—rather, a system of institutions through cooperation will emerge. But here Realist 2 wonders whether Realist 1 would truly want to describe international institutions like the World Trade Organization or the International Monetary Fund as such cooperative schemes, and to what extent they reproduce structural asymmetries and forms of international domination. And if they do, would we not argue for a thorough reform that transformed them into institutions of justice?

In the section where Pettit discusses the relevance of interstate inequality, he stresses what he calls the “norm of norms,” i.e., that of discursive equality and justificatory generality and reciprocity (as I would phrase it). However, he does not conceive of a stronger form of democratic order that could impose such reciprocity (as Realist 2 would prefer). Instead, he argues that it is a “lesson of history” that stronger states will only use “soft power” of persuasion and no other means to influence such rule-making and implementation. Again, Realist 2 wonders whether that is realistic.

When it comes to dealing with impoverished states, Pettit argues for a policy of solidarity and help according to the principle “pouvoir oblige,” though states are not allowed to force their citizens into “involuntary beneficence” or “one-sided philanthropy.” At this point Realist 2 objects, as he sees a global system of economic interdependence with a significant amount of power asymmetries, forced cooperation, and exploitation which create duties of justice on the side of the powerful and dominating agents instead of duties of beneficence. A lot depends, of course, on how we describe global economic relations, but Realist 2 here is of the opinion that Realist 1 is unrealistic and that he gets the demands of justice wrong.

In sum, critical Realist 2 does not argue against Pettit (or Nagel) that dominant states, multinational corporations, or international organizations have “the same” power over other states or peoples, such that there already exists a basic structure of domination that must be turned into the basic structure of non-domination of a world state. But Realist 2 is convinced that there is sufficient domination inter- and transnational-ally that must be tracked, and that it must be overcome by establishing appropriately robust structures of justification that can curb such power asymmetries and realize basic forms of justice. This kind of realism strikes me as being more in tune with the basic republican idea of non-domination, but the theory of transnational justice that would result is different than the ideal of globalized sovereignty.

---

29 Ibid., 175.
30 Ibid., 184.

**BIBLIOGRAPHY**


