A Critical Theory of Transnational (In-) Justice: Realistic in the Right Way*

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1. Critical realism

Recent discussions about justice beyond borders are not just about the scope or the content of justice; in addition, they also concern how the very concept of justice should be understood in the first place, how the injustice existing in the world we live in should be understood and what function justice ought to have in this world. In what follows, I will try to shed light on the conceptual, normative and empirical issues at stake in this debate. In doing so, I want to develop further what I call a “critical theory of transnational justice.”¹ By this I understand a theory of justice as justification grounded in a constructivist conception of reason which is at the same time “realistic” when it comes to assessing the current world order as one of multiple forms of domination. There is no contradiction in combining abstract reflection in moral philosophy with sociological empirical realism in a single theory; on the contrary, that should be our aim. If we lack a clear picture of the reality of the injustices surrounding us our normative thinking is situated in a void or will lead us astray; at the same time, if we don't have a context-transcending normative idea of justice to orient us and enable us achieve distance from the status quo, realism becomes a form of thinking that affirms this status quo.

2. Avoiding parochialism and cultural positivism

It is a truism that any notion of justice that applies to transnational contexts needs to be properly universalizable, a requirement which raises the Rawlsian bar to theories based on ethically and culturally particular “comprehensive doctrines” to a higher level than that

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envisaged by Rawls himself in his reflections on liberal social pluralism in *Political Liberalism*. But we should also aim at more than what Rawls suggests in *The Law of Peoples*—namely, at more than a conception of international justice from a liberal standpoint that “tolerates” non-liberal but “decent” peoples and essentially provides the “ideals and principles of the foreign policy of a reasonably just liberal people.”

Rather, we should come to develop a non-parochial approach, that is one which avoids liberal as well as non-liberal one-sidedness and reified culturalist conceptions of “peoples.” To be fair to Rawls, it might be better to be aware of one’s parochialism than to hide or ignore it; and it is surprising how many tracts on global or international justice leave the question of universalizability and cultural pluralism out of account or marginalize it.

However, criticism of liberal theories often presents the mirror image of that mistake by embracing a certain form of positivism concerning culture, as if the world consisted of separate, identifiable ethical-cultural units—some “Western,” some “non-Western”—that need to engage in a conversation about the values they share in order to achieve an overlapping consensus on minimal notions of justice or human rights. In their most problematic versions, such approaches fall prey to the inverse form of thought that Edward Said once called “Orientalism,” that is a reification of “Non-Western” cultural wholes that do not understand or share “Western” values, just adding a positive rather than a negative, demeaning evaluation of these cultures. The irony of this is that the justified attempt to “provincialize” the West and criticize false assumptions of the universal validity of its values and institutions ends up by provincializing the “Non-West” in a non-dialectical way. Yet if we want to develop a proper notion of transnational justice, we must avoid such cultural

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5 In a powerful afterword to his *Orientalism* (London: Penguin, 2003) from 1995 (pp. 329–354), Edward Said criticizes romanticizing and essentializing readings of his argument. They celebrate the “other” of the West and wrongly combine postmodern and postcolonial thought in such a way that they no longer criticize the perversions of the “grand narratives of emancipation and enlightenment” and renounce the general imperative of emancipation. I expand on this in my article “The Justification of Progress and the Progress of Justification,” in Amy Allen and Eduardo Mendieta (eds.), *Justice and Emancipation* (University Park: Penn State UP, forthcoming).
positivisms, that is forms of thought which reify societies and regions into unified and separate systems of order and value, while disregarding the dynamics and tensions within and between such social orders as orders of justification and critique. In doing so they position themselves outside of such dynamics and try to provide an “objective” account of normative cultural differences.⁷

3. Avoiding practice positivism

Avoiding such forms of cultural positivism calls for a turn toward practice and the development of a critical notion of justice that participants in social struggles in Western or non-Western societies can and do make use of. What is required is reflection on the practical meaning of justice when used in different political and social contexts, within and beyond particular normative orders, that is orders of rule that determine the basic standing of persons and groups (or organized collectives) within a social structural framework. But the practical turn I have in mind differs from many current “practice-dependent” theories that regard legitimate justice claims as claims immanent in already established institutional contexts of social cooperation that are fixed in legal-political terms.⁸ Such theories are forms of what I call practice positivism in a fourfold sense: first, they refer to complex social relations as forms of “cooperation”—say, within the EU or the WTO—and thus run the risk of neglecting the power structures and forms of domination that characterize such institutional settings; second, they aim to reconstruct the animating “idea” or “ideal” of justice immanent in such institutional contexts, as if any such idea or ideal free from social contestation or normative ambivalence could be hermeneutically unearthed⁹; third, they lack a justifying reason for why such an immanent notion of justice, even if it could be reconstructed, would have a claim to validity, and thus potentially call might right—or, in


⁹ In this, the approach shares a lot with Michael Walzer’s Spheres of Justice (New York: Basic Books, 1983). For a critique, see Rainer Forst, Contexts of Justice (Berkeley: University of California Press, 2002), ch. IV.1.
other words, lend normative credibility to a status quo that is taken for granted; and finally, fourth, the focus on already established legal-political frameworks obscures the many informal, non-institutionalized modes of power and domination, especially of an economic or cultural nature, that may be part of or exist alongside such institutional forms.

These four aspects are part of what I call practice positivism: giving a positive account of a social setting that should raise our hermeneutic suspicion; assuming that there could be an objective account of its normative idea, neglecting its contestedness from the perspective of social participants—including oneself, who is not an objective observer; granting the status quo a certain normative standing it may not merit; and, finally, providing a one-dimensional account of such a normative order of power relations. To avoid such forms of positivism, we should regard normative orders as contested and contestable orders of justification—where the term “justification” is used both descriptively and normatively, that is both analyzing the justifications that determine the social space of reasons (and may be bad or ideological) and asking for reciprocally and generally non-rejectable justifications and for an order of justification that could produce such justifications (or at least could be conducive to that aim).

Hence in our initial analysis of the proper location of the concept of justice we need to focus on two forms of practice different from those highlighted by practice-dependent theories—namely, firstly, on the practice of resisting injustice and on the meaning of justice in such struggles and, secondly, on the practices of rule and domination in which such struggles are located and against which they are directed. If we follow Wittgenstein in trying to determine the meaning and “grammar” of a term by its practical use, we should be aware that the question of justice is not an innocent, purely theoretical question. On the contrary, it is motivated by reflection on the relations and structures of domination characteristic of our time that people in concrete social conflicts and emancipatory struggles strive to overcome.

10 On this third point, see also Darrel Moellendorf’s critique of “justice positivism” in his book *Cosmopolitan Justice* (Boulder: Westview Press, 2002), pp. 38f. Sangiovanni, “Justice and the Priority of Politics to Morality,” addresses this critique of his view and responds in a way that a theory based on the right to justification would also suggest, namely that for “a conception of justice to get off the ground, there must be some sense in which the terms of the institution are at least capable of being justified to all persons” (p. 163). Still, he criticizes the Kantian account of the right to justification in *Humanity Without Dignity* (Cambridge, Mass.: Harvard UP, 2017) and does not follow the path toward a critical theory of justice.

11 For an account of orders of justification, see my *Normativity and Power*.

So a genuine practice-guided view focuses on these practical contexts. Assuming that such a theoretical goal can be achieved, it makes possible a critical theory in the sense in which Marx once spoke of critical philosophy as the “self-clarification of the struggles and wishes of the age.”

At the same time, since we do not have a general materialist theory to guide us, we must abstract from these contexts and struggles and reflect on which struggles for justice are emancipatory and which are not. We cannot simply read off from social facts of protest and resistance whether they express justified forms of struggle against injustice; that would amount to another form of positivism, namely “resistance positivism.” For a critical conception of justice, the question of justification as an independent, albeit contextual, normative question is indispensable. As Habermas argued, understanding the need for reflexive justification of social claims, including one’s own, is what distinguishes critical from positivist theory.

4. A reflexive and discursive conception of justice

Let us start from a reflection on the grammar of justice, taking our lead from Rawls who defined the core concept at the center of different conceptions of justice as implying 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.” The most important qualifiers here are “no arbitrary distinctions” and “proper balance,” and Rawls’s theory makes a detailed proposal as to how to spell these out. Remaining at the basic conceptual level, I think that the meaning of “proper balance” is that no arbitrary, but only reciprocally and generally justifiable, criteria for weighing claims should be used. As a result, the avoidance of arbitrariness and the idea of justifiability come to the fore in our search for a core concept of justice.

According to that concept, justice as a human virtue in a general moral sense implies that humans do not subject others to arbitrary actions and decisions, where “arbitrary” here means: not justifiable with good reasons between the subject and object of action. Hence political and social justice refers to the legitimate claim—or the basic right—of each person not to be subjected to a set of institutions, formal or informal, to rules and structures of action in an arbitrary way, such as by the powerful imposing an order on the less powerful, as in Thrasymachos’ famous definition of what justice means, realistically speaking. Again the meaning of arbitrariness is “without good reasons.” But, as I said before, what counts as a good reason here is a highly contested matter: Does one accord priority to the most talented, those who are ethically deserving, the needy, the industrious, or to all equally?

At this point, we must take a reflexive turn and work our way up from the core concept of justice to a conception of justice as containing a practice of public justification, while taking care to avoid arbitrariness. If we want to overcome arbitrary social and political relations and institutions and also exclude arbitrary justifications for such relations and institutions, and if we have no “natural” or objective candidate for what “non-arbitrary” means, then we must take the principle of justification, as a principle of reason (defined as the faculty of justification), as the core of the conception of justice—call it a conception of justice as justification. According to the principle of reasonable justification, those justifications for social relations and institutions are free from arbitrariness that can withstand the discursive test of reciprocal and general justification among free and equal persons (as members of a justification community defined in a non-arbitrary way—a problem to which I will return). We arrive at the principle of reciprocal and general justification by a reflexive and recursive consideration of the validity claim of social and political justice norms that claim to be reciprocally and generally binding on all those who are part of a normative order, that is an order that determines the basic standing within a social structural framework and is the proper context of claims to justification. Hence a conception of justice as justification relies on just those principles that are implicit in the very claim to justifiability which characterizes

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17 I develop this view in my The Right to Justification, chs. 1 and 2, and in Normativity and Power, ch. 1.
19 The notion of validity claims was developed by Jürgen Habermas and Karl-Otto Apel in their discourse ethics. See Jürgen Habermas, Moral Consciousness and Communicative Action (Cambridge, Mass.: MIT Press, 1990).
justice norms. We can call this reflection a transcendental one, because it reconstructs the conditions of the validity of claims and norms of justice. If we aim at non-arbitrariness as a conceptual core of our notion of justice, such a reflection is what we need to hold onto.

The criteria of reciprocity and generality mean that one may not make a claim on others within a context of justice that one is not willing to grant all others (reciprocity of claims); and they mean, furthermore, that the justification of such claims has to be conducted in a normative language that is open to all and is not determined by just one party (for example, by a religious majority) and that no party may impose its own contestable notion of justified needs or interests on others who could reasonably reject it (reciprocity of reasons). Generality means that no one subject to a normative order must be excluded from participation in the justificatory discourse.

The move from reflection on the core concept of justice to a conception of social and political justice is not yet complete because more needs to be said (and will be said in section 8 below) about the principles of a “basic structure of justification” entailed by this conception. But here I need to say a few more words about the issue of grounding. For my last remarks led us onto Kantian terrain, and it may seem that we have lost touch not only with the social struggles of various actors and groups but also with our earlier discussion of cultural pluralism.

However, this is not the case. Just as the outworn distinction between “ideal” and “non-ideal” (or “realist”) theory should not irritate us, so too we should not let ourselves be irritated by the distinction between a transcendental and a context-immanent mode of theorizing. To begin with the latter: as I argued above, we need to focus on the right practice rather than taking pre-given institutional contexts for granted; and the focus on resistance to injustice is essential in this regard. In a discursive conception of justice, the proper authority for determining what justice means are the subjects who participate in a normative order themselves—empirically speaking, these are not generally equals but find themselves in very different situations of subjection. Thus struggles for justice within such a scheme aim first and foremost to achieve a higher level of justificatory quality and equality, that is to secure a better legal, political and social standing for groups who have been marginalized and who struggle to become well-respected subjects of justification.
Given such a context of social and political justice, the question whether the principle of reciprocal and general justification is a transcendental one—as a principle of practical reason—or is immanent in such contexts does not really constitute an alternative, for it is both simultaneously. And that is how it should be. For how could a principle of practical reason not be implicit in practice, at least as a principle to which social agents adhere in their struggles for justification, and how could a principle of practical reason not transcend social practice in which the right to justification is all too often violated?

The topic of ideal-based versus realist approaches has attracted a lot of attention in recent debates. But it is a false opposition that haunts philosophical thinking. A critical conception of justice cannot get off the ground without principled argument, although it neither needs to nor ought to design an “ideal” model of the well-ordered society that would only have to be “realized” by intelligent and well-meaning politicians, which is at best a naïve, and at worst a technocratic, conception. A discursive conception of justice as justification is not compatible with such ideas. But, at the same time, as much as we need critical realism in order to understand and assess our social reality as one involving multiple forms of domination (though also as one that hopefully harbors the potential for critique and emancipation), there is nothing “realistic” about looking at the world as an endless Nietzschean game of Thrasymachean actors, such that every struggle for justice becomes just another struggle for the power to determine social structures your way. From the perspective of a critical theory of justice, there either is what Marx called Unrecht schlechthin—injustice as such—or there is not; but if you believe the latter, then normative reflection on justice or emancipation lacks any point. Still, it is important to keep in mind that a conception of political and social justice is not a form of ethical thought that needs to be “applied,” because it is an imperative of political autonomy and justice that those who are subject to a normative order should become its collective authors. The authority of

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23 This is a point of agreement with Geuss, Philosophy and Real Politics; Amy Allen, The End of Progress (New York: Columbia UP, 2016), ch. 4, criticizes my view as one of applied ethics, which I think is a misinterpretation.
justice is theirs—but in the form of a collective project of emancipation bound to principles of justification and equal respect.

The question of authority is important here, since on a truly emancipatory conception of justice the definition of justice is a matter for the participants themselves—but of course in a fashion that excludes justificatory arbitrariness, according to the critical theory principle that Williams, following Habermas, expresses adequately when he says that “the acceptance of a justification does not count if the acceptance itself is produced by the coercive power which is supposedly being justified.”24 Hence the need for a basic structure of justification that overcomes the danger that social forces and privileges are merely reproducing themselves within asymmetrical and dominating discursive relations. The authority to define justice rests with those subjected to a normative order; but they need to be, and to respect each other as, equal justificatory authorities if such justification is to be authoritative. Otherwise, it might just be another form of majoritarian domination.

The Kantian groundwork I have been laying down is based on a fundamental moral claim of free and equal persons to be respected as autonomous normative authorities when it comes to the normative orders to which they are subject. This is my version of the Kantian idea of respecting others as “ends in themselves.” Their “dignity” means that they are such justificatory authorities,25 and it implies a basic moral right to justification. It is a right to justification with respect to all morally relevant actions in moral contexts of interaction, and in contexts of social and political justice it is a right to participate fully in justificatory discourses about the normative order to which you are subject, so that in such contexts it becomes a legal and political right.26

5. Struggles for justice and the problem of universality

Struggles for justice aim at social changes that ensure that those who are subject to a normative order become the social and political authorities who co-determine the essential

aspects of that order. As Barrington Moore argued in his historical and cross-cultural study of social resistance, the sense of injustice that motivates people to revolt against a social order always focuses on particular social injustices; but its essential core is what he calls a “pan-human sense of injustice”27 that leads to moral outrage and anger when persons have the impression that an implicit social contract has been broken by the authorities or powerful groups in society. To affirm their moral and social self-respect, people resist forms of rule that lack proper justification; and, as Moore stresses, what makes people stop complying within a normative order is not so much a certain level of pain or suffering but the moral sense of being dominated or ignored by others. The “iron in the soul”28 that makes them feel insulted and leads them to resist requires a certain form of moral courage and a sense of self-respect; the language of injustice is directed against man-made situations of domination as violations of basic expectations of reciprocity and social cooperation that individuals “need not, cannot and ought not to endure”29 as human beings and members of a particular society.

It is important to maintain a firm grasp of the connection between the sense of justice and the sense of self-respect as an autonomous, non-dominated being.30 For the essential impulse of resistance based on demands of justice is not the particularist desire to have more of certain social goods but instead the general desire to be a subject of justification, that is, a normative authority and not a justificatory “nullity” in the order of which one is part. If that sense of being “someone” and of being a justificatory subject in the first place is violated, the result is often rebellion—as an act of self-defense, that is, of the defense of a basic moral and political sense of self. To call this the claim to have one’s basic right to justification fulfilled is indeed to use an abstract language; but it is an abstraction that captures the structure of emancipatory demands of justice. They are demands not to be governed “like that,” as Foucault31 famously put it, i.e. the demand—in negative terms—not to be subject to normative imposition or—in positive terms—to be a justificatory agent on

28 Ibid., p. 90.
29 Ibid., p. 459.
30 See my “Noumenal Alienation: Rousseau, Kant and Marx on the Dialectics of Self-Determination,” Kantian Review, forthcoming
an equal footing with others when it comes to determining the social structures to which one is subject, be they of a national or transnational nature. The demand in question is one of autonomy, where autonomy is not understood in liberal terms as the freedom and capacity to pursue one’s conception of the good, but in a republican, Rousseauean-Kantian fashion as the autonomy to be the co-author of the norms that bind you. It is here that we find the difference from a neo-republican notion of non-domination. So, to put it in a nutshell, if we understand the normative grammar of resistance properly as a struggle for emancipation, then we discover the normative core and grammar of a critical theory of justice.

Again, one might object that it is questionable how a reflection that started from cultural pluralism and deep disagreement about conceptions of justice could have ended up within a discourse-theoretical, Kantian framework. But the worry that hereby controversial normative assumptions about subjective freedom or collective self-determination are being slipped in by the back door is unfounded, because the framework I am suggesting is in no way an imposition of a selective and partial normative framework but is instead a matter of countering normative imposition. It is not based on any values or principles other than that of critique among free and equal persons who are themselves justificatory authorities; therefore, it contains the core of any valid—justifiable—critique of the imposition of norms or values, be it within a state or beyond it. In fact, the normative core of the critique of colonial or neocolonial impositions as a critique of domination rests on the right to justification, that is the right not to be subject to a normative order that has not been and cannot be justified to all as equal autonomous subjects. Whether this is expressed in the language of a right or not is not essential here; what is important is the position of not being willing to accept a normative language and order being imposed on you that you cannot share as a justificatory authority.

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33 For this worry, see Allen, The End of Progress, and my reply in “The Justification of Progress and the Progress of Justification.”
34 See the classic by Frantz Fanon, The Wretched of the Earth (New York: Grove, 2004), and, recently, Lea Ypi, “What’s Wrong with Colonialism?,” Philosophy and Public Affairs 41:2 (2013): 158–191.
35 See Franziska Düngen, Was ist gerecht? (Frankfurt: Campus, 2014); Gädeke, Politik der Beherrschung.
As I argued above, non-Western normative perspectives should neither be “Westernized” nor “Orientalized” in an essentialist way. Liberal parochialism must be avoided as much as other forms of cultural positivism—for example, the unquestioned assumption that certain societies are unified cultural wholes that can be determined by, say, their dominant religious traditions, ignoring the dissent of possibly marginalized groups within such contexts. As Uma Narayan forcefully argues with respect to the rejection of gender as well as cultural essentialism, one needs to avoid both forms of identity and norm imposition:

“Postcolonial feminists have good reason to oppose many of the legacies of colonialism, as well as ongoing forms of economic exploitation and political domination by Western nations at the international level. However, I do not think that such an agenda is well served either by uncritically denigrating values and practices that appear to be in some sense ‘Western’ or by indiscriminately valorizing values and practices that appear ‘Non-Western.’ Political rhetoric that polarizes ‘Western’ and ‘Non-Western’ values risks obscuring the degree to which economic and political agendas, carried out in collaboration between particular Western and Third World elites, work to erode the rights and quality of life for many citizens in both Western and Third World Contexts.”36

Narayan not only points to the realities of multiple domination that need to be captured in ways that avoid one-sided social analyses; she also shows why false universalisms that impose a notion of “sameness” on others, and thus lead to the imposition of Western normative orders on other societies in order to dominate them, have to be rejected. The same applies to false notions of “difference” that essentialize and unify other societies and thus silence critical voices within them, as if to call for respect for women’s rights were an “alien” and alienating claim in a non-Western society, “leaving feminists susceptible to attacks as ‘Westernized cultural traitors’ who suffer from a lack of appreciation for ‘their traditions’ and respect for ‘their culture.’”37 Narayan argues against both what Foucault once called “Enlightenment blackmail”38 and the reverse, orientalist form of blackmail: either to be uncritically for “enlightened” forms of modern political and social life while

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37 Ibid., p. 102.  
ignoring their dominating aspects, or to be against them and thus ignore the dominating effects of traditional forms of life.

Reflexive universalism, as I call it, avoids such one-dimensional reductions and essentialist forms of cultural positivism by providing a normative yardstick that consists in the very idea and structure of questioning any form of domination or normative imposition. The principle of critique, of challenging normative orders, is at the core of such questioning, and thus any concrete narrative or structure of justification can be made the subject of radical questioning that asks whether the structure in question is truly reciprocally and generally justifiable. The principle of asking for better justifications and of asking for structures of justification in the first place is as immanent to normative orders as it transcends their historical and social forms if they are repressive, narrow, exclusionary or in other ways deficient. Since the principle leaves the authority to determine justice with those who participate in discourses among free and equal persons and thus aim to establish such discursive structures in the first place, it never speaks a language of justice that is alien to them. Rather, it locates the power to define that language with the participants and their discursive constructions. Keeping in mind the critical theory principle that Habermas and Williams remind us of, such discourses can only claim to construct justice if they do not structurally reproduce the social asymmetries and forms of power that define a given normative order. Social critique can never do without a counterfactual standard of reciprocal and general justifiability; in other words, the principle of critique that grounds critical theory is never exhausted by the existing social forms of justifiability. Thus the first task of justice is to establish a basic structure of justification that facilitates a reflexive practice of critique and construction by according roughly equal justificatory power to all those subjected to it.

6. Contexts of (In-) Justice

The focus on a grammar of justice as expressed by the resistance to injustice provides us with orientation with regard to a number of further distinctions that need to be questioned: relational versus non-relational approaches to justice; the question of the “all affected” versus the “all subjected” principle; and the difference between internationalist and cosmopolitan approaches to the question of the duties and institutions of justice.
If we follow Sangiovanni’s view that relational conceptions of distributive justice consider certain social relations—relations of cooperation or institutions of coercion, for example—as the proper “ground”\(^{39}\) of justice duties, while non-relational conceptions locate the grounds of justice claims in general considerations of human dignity or human needs, the position laid out so far does not clearly fall on either side. The basic right to justification is an unconditional moral claim of respect based on the dignity of human beings as equal normative authorities. In moral, interactional contexts, this means that each person is owed reciprocal and general justifications for any actions that affect him or her in a relevant way, while in social and political contexts this means that no one should be subjected to a normative order in which he or she has no standing as a justificatory equal. Thus the moral grounds of this right are both relational, since moral persons are always regarded as co-authorities of valid norms, and non-relational, since the right to justification does not depend on a particular social context in order to constitute a valid moral claim. Still, only when situated in contexts of justice (i.e. concrete contexts of rule and/or domination) does this general “ground” of justice claims “ground” particular claims to justice, depending on the nature of the rule or domination to which one is subjected.

Normatively speaking, a context of social or political justice is one in which one’s moral status of being an equal normative authority needs to be transformed into a social and political status of being a justificatory agent because one is subjected to a normative order of rule and/or domination in need of reciprocal and general justification. This is a relational view, but not of the positivistic sort criticized earlier that focuses on (what it sees as) relations of cooperation or positive institutions of (intrastate or superstate) coercion. If we develop a critical theory of justice from the situated perspective of social agents struggling against injustice, we should avoid positivistic restrictions on the kinds of context we focus on, and we should especially avoid calling a context of asymmetrical social relations a context of “cooperation.” A social and political status of normative co-authorship and non-domination (understood in that way) is not only required where one is part of a social (economic) and political scheme of reciprocity and cooperation or where one is subject to state power and coercion, but also more generally where power is exercised over persons as a kind of rule within a certain framework of justification or as a kind of domination lacking a

proper scheme of justification. These forms of rule or domination can be formal and legally constituted, but they can also be of a rather informal nature, like economic forms of power and domination where persons or groups are subjected to a general normative order of production and exchange on a global scale which is not as tightly legally regulated and institutionalized as the market within a state. A normative order is any order of social norms and rules that governs persons and collectives with regard to their social and political status and determines their options as members of a social framework. We live in multiple orders of such a kind, and a theory of transnational justice requires a nuanced view of these different orders of subjection (a point to which I will return).

From a critical perspective, the argument by Nagel, for example, that “justice is something we owe through our shared institutions only to those with whom we stand in a strong political relation”\(^{40}\) of state power mistakes a conclusion for a premise, because such strong political relations should not be seen as an \textit{a priori} condition, but instead as an \textit{a posteriori}, conclusion of justice duties—that is, such political relations are required to overcome certain forms of unregulated and arbitrary rule, whether it be formal or informal.\(^{41}\) State-like forms of regulation, viewed from a normative point of view, can be demanded by justice when arbitrary rule violates the—in a moral perspective pre-political, in a political perspective contextual—rights to justification of persons not to be subjected to domination (defined as arbitrary rule in its two forms: rule without proper structures of justification being in place and rule that is not properly, i.e. reciprocally and generally, justified). In this way, the right to justification precedes institutional contexts but only gains specific traction and form in being directed against certain forms of domination calling for the establishment of structures of justification necessary to ban arbitrary rule. Such a right to justice has its place in political relations, but the right to have such relations, as a right to non-domination, precedes them. And whether the political relations demanded by justice are to be strong or weak depends on the nature of the arbitrariness to be overcome.


Similarly, Sangiovanni’s claim that “we owe obligations of egalitarian reciprocity to fellow citizens and residents in the state, who provide us with the basic conditions and guarantees necessary to develop and act on a plan of life, but not to noncitizens, who do not”42 is too restrictive. It does not sufficiently take into account the many ways in which the welfare of one society (or of parts of one society) often thrives by benefitting from a system of unequal exchange and dominated markets that make it impossible for certain societies to reach a level of cooperation and productivity that Sangiovanni regards as essential for a context of justice to exist. Furthermore, it is true that “the global order does not have the financial, legal, administrative, or sociological means to provide and guarantee the goods and services necessary to sustain and reproduce a stable market and legal system”43; but there is no reason not to regard this as a failure rather than as a normatively relevant fact that constrains duties of justice. Such duties cannot be restricted to the existing frameworks of political life; rather, they call for the establishment of new ones.

A critical theory of (in-)justice needs to avoid such restrictive, positivistic views and locate contexts of injustice wherever forms of rule within a normative order exist or wherever forms of domination within such an order exist, be it an order of the state or of economic exchange. Thus we need a nuanced view of such normative orders that avoids a non-dialectical opposition between the state, on the one side, and a system of voluntary international cooperation, on the other, such as we also find in Rawls.44 Relational views should focus exclusively neither on positive relations of cooperation nor on relations of coercion within a state; rather, they must also focus on the negative and structural forms of domination that characterize global and national realities.45 What we need is a negative version of relationism that can then provide the starting point for a theory of a basic structure of justification to address and overcome relations of domination.

42 Sangiovanni, “Global Justice, Reciprocity, and the State,” p. 20.
43 Ibid., p. 21.
A proper conception of transnational justice tracks forms of rule and domination where they exist. It need not reduce contexts of (in-)justice to contexts of legal coercion, for that criterion tends to be too rigid. To overcome the state-centeredness of such views, Valentini, for example, argues for a notion of systemic coercion designed to capture structural justice-relevant relations beyond the state. According to her definition, “a system of rules S is coercive if it foreseeably and avoidably places non-trivial constraints on some agents’ freedom, compared to their freedom in the absence of that system.”

But take the case of a country that is dependent upon the global market in order to exchange of its resources for other goods but is too poor and dependent to alter the rules of that exchange and has to accept its asymmetries which disproportionately benefit other partners in the exchange. Thus the country is forced to accept the arrangement in question if it wants to exchange its resources; yet by doing so it acquires essential goods and market recognition and thus also achieves greater freedom as compared to the absence of the exchange and its possibility. Thus the system is one of domination, but not of coercion in Valentini’s sense. It is a system of domination that imposes a set of norms that cannot be justified among equals. So, rather than freedom in the absence of a coercive system of rules, the proper baseline for a system of domination is justifiability among equals.

7. The nature of injustice

However, the critique of positivistic or coercion-based forms of relationism that do not use a proper conception of domination does not vindicate non-relational accounts of justice. For their basic notion of justice is incompatible with the grammar of justice as shown through the lens of the practice of resistance and the ideas of justice as justifiability and discursive non-domination. According to non-relational views, we ought to focus on the well-being of persons in a cosmopolitan perspective, disregarding more specific contexts of cooperation or domination. These theories start from a normative theory of basic global entitlements of every human being, since, as Caney argues, persons “throughout the world have some common needs, common capacities, and common ends.”

According to such

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considerations, persons should be seen on a global scale as “rightful recipients of goods”\(^48\) of a certain kind and in arguing for a level of entitlement to certain goods, “it is hard to see why economic interaction has any moral relevance from the point of view of distributive justice.”\(^49\) To be sure, Caney is right to criticize the priority that some relational accounts of distributive justice give to members of a state or context of cooperation, but his non-contextual view of what justice demands is problematic in a number of ways.\(^50\) First, by denying the positive relevance of particular social relations, Caney also disregards the negative relevance of relations of domination, say, of economic exploitation and political oppression. Thus, the victim of a natural disaster appears to be similar to the victim of exploitation if they lack the same material means. But the difference in question is important from the perspective of justice, and especially from that of struggles for justice. For the social movements Moore and others analyze do not protest against natural or cosmic forces that distributed the “luck” of being born here or there, with these or other resources and talents, in an arbitrary and unequal way and call for compensation for bad luck. Rather, they oppose man-made injustice, that is particular relations and structures of domination within and/or beyond their society. So for them, and for the grammar of justice generally, relations and contexts matter: in a structural view, one cannot easily pinpoint concrete responsibilities for generating and reproducing injustice,\(^51\) but one can reconstruct the development of social asymmetries, how they function and who benefits from them in what ways. Otherwise, what is a human structural context of domination gets anonymized and naturalized as something that simply happened as a matter of contingent luck or, in an older language, divine whim. Luck egalitarian accounts of injustice, in particular, which argue that ambition and desert count as criteria of distribution but brute luck, whether positive or negative, does not, are out of tune with a practical and emancipatory account of injustice in so far as they reconstruct justice claims as claims for compensation for anonymous bad luck. Such a view turns a narrative of injustice into a narrative of fate, albeit a fate that grounds claims for compensation. The result is a distorted picture of injustice. The struggle against

\(^{48}\) Ibid., p. 103.

\(^{49}\) Ibid., p. 111.

\(^{50}\) For the following, see my debate with Caney, “Justice and the Basic Right to Justification,” in Rainer Forst, Justice, Democracy and the Right to Justification (London: Bloomsbury, 2014), pp. 147–166, and my “Justifying Justification: Reply to My Critics”, ibid., pp. 169–216.

injustice is a struggle against concrete forms of domination, not a struggle against the forces of contingency. Injustice is one thing, fate and fortune another.

Consequentialist accounts of justice thus understood not only provide a misleading picture of injustice but also, secondly, a one-dimensional account of responsibilities for justice. As difficult as an account of structural responsibility is in a postcolonial age,52 a proper understanding of the history and current system of social and transnational forms of economic, legal or cultural domination (e.g. with respect to race and gender) matters from the perspective of justice. Otherwise, political action lacks orientation. Furthermore, in a dialectic of morality richer states could offer generous “aid” to poor countries as an act of benevolence while in reality they owe the latter major structural changes in a global asymmetrical economic system from which they derive unjust benefits. As Kant and, following him, Pogge have argued,53 one must not mistake duties of justice for duties of benevolence.54

This does not mean that there are no general duties of moral solidarity with people in need apart from existing contexts of relational (in-)justice, and it does not mean that duties of justice always take priority over duties of solidarity and assistance, especially in times of grave need and misery when urgent help is called for. The conceptual distinction between such duties does not accord priority to the one or the other, it just helps us to understand the world we live in and the particular reasons for moral and political action. One owes it to victims of domination not to treat them as “weak” and miserable human beings in need of “help.”

The view defended here also does not deny that there is a “natural duty of justice” with respect to victims of domination elsewhere to which, on a counterfactual assumption, one’s society has no relevant relation. Every human being has a right to justification and must not be subjected to domination, and every other human being in a position to help has a natural duty to do so—in addition to the more concrete relational duties of those who benefit from or uphold a system of domination—though in complex political structures the conclusion about the right course of action is very difficult to draw and any intervention needs to

53 Pogge, *World Poverty and Human Rights*.
54 This is the problem of consequentialist approaches like that of Peter Singer, *One World* (Melbourne: Text, 2002).
observe strict criteria of justifiability. Although I cannot go into this here, this natural duty of justice highlights a kind of solidarity based on justice, while the solidarity mentioned above with people in need and misery, even though not victims of domination, also rests on respect for the right to justification, but in a larger moral sense, since nobody has good reasons to deny others in severe need necessary and possible help. The right to justification grounds many moral duties, not just duties of justice, but it is important to sort these duties out, because they all respond to moral evils of different kinds and it is required to respond in the right way.

Thirdly, we should also regard those who suffer from injustice as persons whose political agency is being denied; but viewing them primarily as subjects who should receive certain goods does not adequately take this into account. Those who suffer from economic exploitation suffer as much from political exclusion and powerlessness as do those who are oppressed politically, because the key to improving economic conditions of production and distribution is the opportunity to change an economic system by political means. So the question of social and political power is the first question of justice, whether we are speaking about political or distributive justice. There is no distribution machine that would only need to be reprogrammed; there only are normative orders in need of political transformation. Justice is a political construction by way of procedures and practices of justification—a construction by those who are subject to a normative order themselves. Theories which disregard this constructive aspect and leap to conclusions about the right patterns of the distribution of goods ignore this essentially political character of justice. The struggle for effective political agency and for sufficient justification power within a normative order is the first and major struggle for justice. That is also the right way to contextualize claims for justice and not to predetermine what people in societies very different from Western ones “really” want or can justifiably claim.

In sum, a critical theory of justice avoids positivistic and reductive forms of relationism as well as non-contextual non-relationism. It starts from an account of existing structures of rule and/or domination in various normative orders, ranging from the national to the international and the global, and thus develops a critical form of relationism based on a general moral right to justification. In concrete social contexts, this translates into the right to be an equal justificatory authority within the normative orders to which one is subject—
either as a subject of justified rule or of domination. Thus there is a single normative ground of justice but a range of different contexts of justice according to the nature of the subjection in question.55

In this section, I highlighted the notion of subjection rather than that of being “affected” by certain norms and structures. In contexts of justice, subjection is the proper term, whereas the notion of being affected is too broad.56 Still, just as different people are differently affected by certain normative structures, so too people are subjected in different ways to certain normative orders—if one compares, for example, the level of subjection to a state with that of subjection to the rules of a global market. So what we require is a nuanced view of relations of subjection; but at the same time we must resist the tendency to say that tighter, state-like normative orders have priority as contexts of justice over loser, transnational contexts. For the domination exercised, say, in a neocolonial international relation may be so severe that overcoming it should have priority as a matter of justice. The strength of duties of justice depends on the nature of the domination to be overcome; the more extreme it is, the more stringent are the relevant duties of justice. As I will show in the next section, a critical analysis of contexts of subjection will also take us beyond another overworked distinction, namely that between a cosmopolitan and an international normative order of justice as an alternative. A theory of transnational justice must combine aspects of both.

8. Constructing transnational justice

A critical analysis of contexts of subjection shows how intertwined several normative orders are, and how much different dimensions of power intersect. Subnational, national, regional, international, supranational and global contexts of rule and domination overlap, as do economic, racial, gender-based, citizenship-based, religious and other dimensions of

55 This is the essential difference from Mathias Risse, On Global Justice (Princeton: Princeton UP, 2012). Risse distinguishes various “grounds” of justice which have distributive relevance, some relational, some non-relational. I think there is only one ground of justice but various contexts of justice marked by different forms of domination. I used that notion of “context” for the first time in my “Towards a Critical Theory of Transnational Justice”, Metaphilosophy 32:1/2 (2001) (special issue on global justice edited by Thomas Pogge): pp. 160–179 (reprinted in my The Right to Justification, ch. 12), and it differs from the use I make of it in my book Contexts of Justice.

56 See also Nancy Fraser, Scales of Justice (New York: Columbia UP, 2009), ch. 4.
domination. I call this the fact of *multiple domination*; as an illustration, think of all the forms of domination to which a low-paid woman from a low social rank in a poor country with authoritarian rule and gendered structures of the division of labor is subjected. We will only find an answer to the question of transnational justice if we address the situation of such persons in the right way.

For that, a critical theory of justice does not start with an internationalist or cosmopolitan thought experiment, but with a realistic view tracking the relevant structures of domination and/or rule and how they interrelate and reinforce each other. The aim of justice is to overcome relations of domination where they exist and to establish structures of justification for that purpose; in contexts of justified rule and government its aim is to prevent structures of rule from degenerating into contexts of domination by strengthening and equalizing relations of justification.

In reconstructing these different contexts as contexts of domination and rule, we have to follow a principle of proportionality which states that the required structures of justification have to be sufficiently strong to overcome or avoid the kind arbitrary rule (i.e. domination) that exists or threatens to appear. This must be combined with the main principle of justice as justifiability, namely that the construction of norms of justice has to be a common, autonomous practice of reciprocal and general justification. This means that the first task of justice is to establish basic structures of justification in which the “force toward the better argument” can be generated and exercised by those subject to a normative order—especially those who are in danger of marginalization. I call the establishment of basic structures of justification the achievement of “fundamental justice,” while on that basis constructions of “full justice” can be achieved by way of discursive, democratic practice.

I cannot lay out such a theory at this point. Instead I will sketch a few major lines of argument concerning an account of *fundamental transnational justice*. It aims to create structures of participation and justification that can perform the tasks of opening and critique in various contexts of justice, pointing to structures of asymmetrical rule and exchange, culminating in the justification and adoption of binding national, transnational

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57 See, for example, the complex analyses to be found in Deborah D. Avant, Martha Finnemore and Susan K. Sell (eds.), *Who Governs the Globe?* (Cambridge: Cambridge UP, 2010), and Thomas Hale, David Held and Kevin Young, *Gridlock: Why Global Cooperation is Failing When We Need it Most* (Cambridge: Polity, 2013).

58 For the following, see also my *Normativity and Power*, ch. 10.
and international norms. The guiding principle is that of political autonomy and equality, both within, between and beyond states, which point to the three main dynamics of domination to be addressed and overcome: domination within states, domination between states and domination beyond states, such as in a global economic order characterized by an unjustifiable distribution of opportunities and benefits with lots of powerful non-state actors involved.

Realistically and politically speaking, the most important agents in this process are in the first instance states, since these constitute the main normative order capable of generating democratic power both within their borders and beyond, in international and supranational contexts. A transnational basic structure of justification with sufficient critical force to address current relations of domination will not arise if it is not supported by a relevant number of democratic states. But being aware of the many forms of domination of which states are part, internally and externally, reflexive forms of participation must be found that prevent governments from continuing to dominate parts of their own population or other states or transnational normative orders. Principles of fundamental transnational justice give every political community the right to participate in cross-border normative discourses on an equal footing, and affected parties below the state level simultaneously have the right to demand participation in such discourses—think, again, of issues of class, gender or racial injustice. This means that corresponding fora must be opened up to opposition parties from states, though also to civil society actors as organized, for example, in the World Social Forum. To start with states as the main—but not the only—political units of agency for a politics of transnational justice is not to conserve or strengthen the existing state-centered international system; rather, it is to overcome the latter by generating political power within, between and beyond political communities which understand that globalized forms of politics represent the only way to address and overcome global injustice. But there is a paradox here, insofar as the more powerful of states often use their position to prevent the construction of more emancipatory political structures. That is why internal and

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transnational social movements are essential when it comes to generating the public power required to motivate structural change.\textsuperscript{61}

Democracy as the main practice of justice acquires special importance in this context. In the first place, it must be liberated from the narrow choice between a “world state or world of states.” It is best understood as a normative order in which those who are subject to rule or norms should also be the normative authority, and should exercise it in an active sense within a practice of justification. Thus the question of the relevant \textit{demoi} is answered in a non-arbitrary way in terms of the existing structures of rule and/or domination, and the requisite institutional form depends on the degree of subjection. This idea of “\textit{demoi} of subjection” extends the question of democratic rule conceptually beyond national borders according to the relations of rule or domination in which a state is actively or passively embedded.\textsuperscript{62} The principle of political proportionality asserts that structures of justification must be sufficiently open to participation and sufficiently effective to react to a given situation of domination. However, this principle does not determine which model of order—ranging from federalist internationalism to global supranationalism—follows. That must be decided with a view to the situation that is supposed to be transformed from an unregulated form of domination into a regulated form of justification or rule; sometimes this can only be done through supranational institutions, sometimes through international contracts.\textsuperscript{63} With respect to the global economic order, proportionality calls for relatively strong supranational institutions for regulating production, exchange and distribution. The point of this regulation is not only, as an internationalist neo-republican theory would assert,\textsuperscript{64} to protect and enable particular political self-determination within states, important as that is; rather, the main point is to establish distributive justice on a transnational level by political means, because nation-states have lost the capacity to do so in a fundamental, system-transforming way. The same holds for the question of regulating migration.


\textsuperscript{62} See also James Bohman, \textit{Democracy cross Borders} (Cambridge, Mass.: MIT Press, 2010).

\textsuperscript{63} See, for example, the suggestions by Jürgen Habermas, “Does the Constitutionalization of International Law Still Have a Chance?” in Habermas, \textit{The Divided West} (Cambridge: Polity, 2006), pp. 115–93, and \textit{The Crisis of the European Union: A Response} (Cambridge: Polity, 2012), pp. 56ff.

Insofar as democratic justice is understood in processual terms as a practice of justification, 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. Justice and democracy are primarily recuperative and processual in nature, because they aim to transform existing forms of rule or domination into structures of justification. Habermas once coined the image of “besiegement” for the exercise of communicative, democratic power: public discourses generate justifying reasons that the political system cannot ignore. The concept of “justificatory power” that takes up these reflections is open when it comes to the question of whether the mode of producing and exercising communicative power is an institutionalized one or not. Democratic justice as a practice is always a matter of democratization, of expanding and equalizing justificatory power. However, the construction of justice is eventually to become reality within binding institutions of justification in which those who are subject to rule become the authors of their normative orders—and the first struggle for justice is the struggle for the establishment of such basic structures of justification. Thus to be theoretically agnostic with respect to the institutional forms that transnational justice should take is not just a reflection of sociological realism; rather, it follows from an understanding of the autonomous and constructive character of a politics of discursive non-domination.

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66 See my concept of “noumenal power” in Forst, Normativity and Power, ch. 2.