Three Conceptions of Global Political Justice

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ARENA Centre for European Studies at the University of Oslo promotes theoretically oriented, empirically informed studies analysing the dynamics of the evolving European political order. The research is multidisciplinary and organized along four key dimensions: A European democratic order; the EU's executive order; expertise and knowledge in the EU; and European foreign and security policy.

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Abstract

The concept of global justice implies that there are principles of justice with a global reach – that is, that the conditions of justice have been globalised in one way or another. *Reconsidering European Contributions to Global Justice* (GLOBUS) investigates the concept of justice that characterises the EU's external activities: justice as *non-domination*, as *impartiality*, or as *mutual recognition*. In this paper, these 'reasonable' conceptions of justice, which may be seen to complement each other, are outlined and assessed. They all entail serious limitations with regard to the requirements of justice at the global level. *Justice as non-domination* demands the social status of being relatively proof against arbitrary interference by others. Here, justice involves avoiding harm and establishing a fair system of (network) governance within the constraints of international law. But under such a system, how can we ensure compliance and legal certainty? According to *justice as impartiality*, preventing dominance through strong institutions is necessary for the equal protection of human rights. Law-based orders are required to banish dominance, also in external relations. However, in this scheme, who would be the arbitrator? *Justice as mutual recognition* calls for deliberation to right wrongs, prioritising the significance of belonging and respect for diversity in the resolution of matters of justice. Misrecognition or lack of recognition can also affect an individual's political status and may amount to dominance. But how can we guarantee parity of recognition without enforceable rights, and how can we promise justice without sanctioning non-compliance?

Keywords

Introduction

The world is unjust, as verified by horrific disparities in living conditions, freedom, well-being, and poverty across the globe. Injustices are not merely documented; they are also articulated. As inequality, misery, deprivation, and exploitation become more visible and the numbers of refugees and environmental threats multiply, justice claims increase. Whose fault is this, who are responsible? Guilt is the source of responsibility. Some injustices we have directly or indirectly participated in causing; others, not. Certain injustices benefit us, while others harm us – and a few do both. Injustices are structural when some lose and some benefit as a systematic effect of an enduring social arrangement. However, calls for justice do not exclusively emerge when an individual, group, or state is being blamed for causing suffering. The situation overall is dire and in breach of humanitarian principles. Regardless of guilt or innocence, we are confronted with a problem, and not only because an unjust world is unstable. There are also questions of justice that confront us as inhabitants of the world, as fellow human beings. What are the main barriers to global justice, and what should be done? [1]

The world is unjust with regard to fair shares. But it is primarily unjust in terms of the political and administrative structures that could alleviate or even out harsh material conditions and ensure the protection of basic rights. One major obstacle to global justice is the present system of states premised on sovereignty and territorial control, the system of co-existence and non-interference among sovereign states. In the so-called 'Westphalian' order, states are considered sovereign entities operating within fixed territorial boundaries and are entitled to conduct their internal and external affairs autonomously, without any possibility for external actors to sanction human-rights violations. This scheme largely reflects the post-WWII balance of power. It is blatantly unjust: might is right, as effectively symbolised by the power of the Security Council. In the intergovernmental United Nations, nothing happens unless the big states agree.

However, globalisation has changed the framing of justice in political discourses. Specifically, as Nancy Fraser explains, the frame concerning the *who* and the *what* has shifted from the Keynesian/Westphalian frame of socio-economic justice to a post-Westphalian frame of democratic justice.[2] New forms of governance and regulation are emerging in the wake of the UN, as is a new regional power that seeks to avoid the troubling effects of the Westphalian order. The European Union (EU) represents a step beyond Westphalian intergovernmentalism. As a supranational organisation

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[1] I am grateful for the intensive help of Kjartan K. Mikalsen (see the Appendix), and also for comments from participants in the opening conference of GLOBUS, from colleagues at ARENA, and from Lars Blichner and Andreas Eriksen.

[2] 'Whether the issue is distribution or recognition, disputes that used to focus exclusively on the question of *what* is owed as a matter of justice to community members now turn quickly into disputes about *who* should count as a member and *which* is the relevant community. Not just the "what" but also the "who" is up for grabs'. N. Fraser, 'Reframing Justice in a Globalizing World', *New Left Review*, 36, 2005, pp. 69-88, p. 72.

that makes its own laws through authorised institutions, from its very inception it has proclaimed an ambition to promote justice at the global level. The EU has contributed to the domestication of international relations in Europe. The EU's foreign policy is constrained by a set of fundamental principles:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[3]

What could the EU's role in the rest of the world possibly be? GLOBUS aims to identify the prerequisites for a foreign policy that successfully promotes justice in a multi-polar global order, a highly complex research task. Under modern conditions, there is both value-pluralism and justice-pluralism.[4] Furthermore, there is no agreement as to what justice entails: not only are there different conceptions of justice, but what exactly is 'just' is in dispute.[5] A conceptual framework which covers the various dimensions and normative dilemmas raised by global political justice is therefore required.

In contemporary political discourse, justice is often conceived in terms of the morally proper distribution of rights, duties, material resources, and opportunities.[6] This focus on the distribution of goods in theories of justice risks blocking out the primary question of justice, namely the political issue of how goods are produced and allocated in the first place. There is a significant difference between lacking certain goods and being deprived of them unjustly, as well as a difference between allocating goods fairly and identifying injustices.[7] In other words, a distributive understanding of justice which allocates goods according to some ideal, moral pattern overlooks the prior acquisition and distribution of power and resources, and thereby what we owe each other as a matter of justice. In order to fairly establish a distributive pattern, an institutional structure that protects basic rights must be in

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[3] Article 2, Treaty on European Union.

[4] See J. Waldron, *Law and Disagreement*, Oxford: Oxford University Press, 1999; A. MacIntyre, *Whose Justice? Which Rationality?*, Notre Dame: University of Notre Dame Press, 1988; M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, New York: Basic Books, 1983; A. Sen, *The Idea of Justice*, London: Allen Lane, 2009.

[5] Even a rational discourse cannot ensure a single correct answer to the question of how to design a just international order. Does such justice concern the distribution of material goods, recognition, or representation? Does globalisation trigger duties of justice or merely duties of beneficence (or charity)?

[6] These are so-called 'end-state' approaches to justice. See R. Nozick, *Anarchy, State, and Utopia*, Oxford: Blackwell, 1974, Ch. 7. See also I. M. Young, *Justice and the Politics of Difference*, Princeton: Princeton University Press, 1990, Ch. 1.

[7] 'The goods-fixated view of justice […] for the most part ignores the question of injustice, for by concentrating on overcoming deficiencies of goods, it treats someone who suffers a deficiency as a result of natural catastrophe as equivalent to some who suffers the same deficiency as a result of economic or political exploitation'. In R. Forst, 'Transnational Justice and Democracy', *RECON Online Working Paper 2011/12*, Oslo: ARENA, 2011.

place. This basic structure for determining which claims are justified and who is empowered to ensure justice must itself be just. Only then can a fair distribution of goods take place.

Furthermore, a distributive understanding of justice, which treats political institutions as 'goods' (things to be traded, exchanged, and allocated) misses the deontological character of this basic structure.[8] Basic institutions are not merely 'public goods' but also the conditions and necessary presuppositions for evaluating and handling justice claims. They are prior to distribution and represent an essential part of 'the circumstances of justice'.[9] The *goddess Justicia* task is thus not to allocate shares but rather to institutionalise a fair system of rule.[10] The political approach to justice is necessary because rights can be up for grabs, but also because a just distribution of goods may be accomplished through the benevolent acts of a hegemon – a dominating agent – leading to paternalism and new forms of injustice. First and foremost, global justice requires the creation and reform of institutions and the fairness of background contexts in which decisions are made. (See also the Appendix on conceptions of distributive justice).

For these reasons, GLOBUS takes a political approach to justice. It should be noted that this perspective does not diminish the importance of distributive justice. Global poverty is dire, and inequalities are gross; some of them are particularly upsetting from a justice perspective because of the asymmetries to which they give rise. Yet, in order to distribute goods fairly, there must be a just political structure.[11] In the promotion of global political justice, it is crucial that 'the rights secured by justice are not subject to political bargaining or to the calculus of social interests'.[12]

Accordingly, GLOBUS focuses on questions of structure and power, where injustice refers to relations of dominance[13] between actors – that is, their unequal status and standing. Dominance violates the basic principle of justice (equal freedom for all); consequently, establishing conditions of equal freedom is a precondition for

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[8] Rights are not merely 'goods': 'They cannot be assimilated to distributive goods without forfeiting their deontological meaning'. They cannot be possessed like things as they 'regulate relations between the actors'. Habermas, in his critique of Rawls; J. Habermas, *The Inclusion of the Other,* MIT Press, 1998, p. 54. See also I. M. Young, *Justice and the Politics of Difference*, p. 25.

[9] 'The circumstances of justice obtain whenever mutually disinterested persons put forward conflicting claims to the division of social advantages under conditions of moderate scarcity'. J. Rawls, *A Theory of Justice*, Oxford: Oxford University Press, 1971, p. 128.

[10] 'The goddess *Justitia* does not come into the world to dispense gifts; her task is instead to banish arbitrary rule, i.e., domination'. R. Forst, 'Transnational Justice and Non-Domination', in B. Buckinx, J. Trejo-Mathys, and T. Waligore (eds), *Domination and Global Political Justice*, London: Routledge, 2015, p. 98.See E. Tugenhat, *Vorlesungen über Ethik*, Frankfurt am Main: Suhrkamp, 1993, pp. 373f. See also Nozick, 1974, op. cit.

[11] Hence, the political approach should not be confused with Robert Nozick's defence of an entitlement, as opposed to Rawls' output-oriented theory of distributive justice.

[12] J. Rawls, *A Theory of Justice*, Oxford: Oxford University Press, 1971, p. 4.

[13] I use the term 'domination' when referring specifically to Pettit's theory of 'freedom as non-domination' and 'dominance' for the more general notion of arbitrary rule.

appropriately handling the associated distributional inequities. The primary concern of justice is thus not how many goods a person is entitled to, but rather the *standing* that actors have: whether they are free or subjected to the whims of others. Although the main scholars in the field agree on this point, there is still controversy over the rights and obligations which the free or autonomous standing of parties entail in a globalising world. Conceptions differ with regard to the kind of standing that various parties deserve. We must therefore consider alternative approaches to global justice and their strengths and weaknesses in order to assess the EU's putative contribution.

A set of minimal criteria with which we may assess the EU's contribution to global political justice can be established. Here, I distinguish between justice as *non-domination*, as *impartiality*, and as *mutual recognition*, assessing how each of these fares in ensuring global political justice. They are all 'reasonable' conceptions of justice which highlight important concerns and dilemmas, and they need not be mutually exclusive. However, they all come with serious limitations with regard to the requirements of justice at the global level. I will structure my discussion of the three approaches to global political justice around the types of rights and duties they involve as well as their varying conceptions of the roles of global institutions. Before presenting the three approaches, I introduce the idea of dominance, distinguish some of the forms it can take, and also discuss the idea of justice as *mutual advantage*.

Dominance as the essence of injustice

Subjection to the arbitrary wielding of power is dominance, and this is the essence of injustice: subjection and rule without justification. The dominated live at the mercy of others and are subject to arbitrary power or alien control. Inequality, vulnerability, and humiliation are all indicators of dominance. Dominance is illicit according to democratic and moral principles. However, we do not describe people as dominated when they are merely trivially affected by what others do; there must be some real element of subordination that either affects core values and life chances or deprives individuals of their power of free choice. People are more vulnerable to dominance in settings in which their basic interests are at stake. Moreover, this subjection must be such that it cannot be evaded, countervailed, mutualised, or controlled. Actors sometimes have an opportunity to 'exit', counter, or collectivise risk; they may also create rules, laws, or institutions that they recognise as fair systems of managing affectedness. None of these necessarily guarantees the elimination of risk and vulnerability, but they warrant the possibility that the actors will not be exposed to the arbitrary decisions of others. This means that not all forms of inequality or affectedness in the global context represent problems of political injustice.

Individuals may be subjected to multiple instances of dominance beyond the state. When there is a plurality of contexts of justice – that is, various contexts for justification and locations of capabilities for right-making actions – it becomes necessary to determine the actual basis for justice claims beyond the state. Responsibilities and capabilities for eliminating dominance can be assigned to both

international and domestic bodies.[14] Moreover, when there are different contexts of justice and justification, we can conceive of the state not as a dichotomous variable but in terms of degrees of 'stateness' on a continuum, with the autarchic state and world society as the endpoints.[15] The means of coercion for protecting rights and realising collective goals would then be shared between levels. But when there are reasons for justice at the global level, a theory of justice must provide an answer as to the kind of transnational and supranational institutions that are required to prevent dominance.

Dominance is thus not only a question of institutional hegemony; the absence of powerful institutions can also be a source of domination. Lack of regulation is one example: unregulated markets produce monopolies and unauthorised rule, unleashing the arbitrary power of money (i.e., those who cannot pay are excluded from the interchange).[16] Hence, non-arbitrary rule is a question of the proper authorisation and execution of political power, not the abolition of power. For some notions of justice, this is a crucial point, as the requisite institutions for preventing arbitrary rule may be weak or non-existent at the international level.

Justice demands that in a cooperative context, actors must be respected as equals; however, 'what we owe each other' varies in different contexts.[17] I understand dominance as foremost a question of *political status*, viz., as structural barriers to citizens' public autonomy and their ability to politically control their fates.[18] Freedom entails relations of mutuality and power bound by law.[19] This concept of freedom is necessary in order to establish in whose interests restrictions in the scope of freedom exist. To prevent the arbitrary wielding of power, authoritative institutions for collective opinion and will formation are required, not merely mechanisms of non-intrusion.

A global context of justice

For Hobbes, the foundation of justice is collective self-interest which applies only in situations where 'it is mutually advantageous', hence the concept of *justice as mutual*

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[14] '*Justice* is realised *in multiple relations*, in that responsibilities for promoting human capabilities are assigned to a wide range of distinct global and domestic structures'. M. C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, Cambridge, MA: Harvard University Press, 2006, p. 323.

[15] See E. O. Eriksen, *The Unfinished Democratization of Europe*, Oxford: Oxford University Press, 2009, pp. 115-117.

[16] 'Power can be democratized; money cannot'. J. Habermas, *The Postnational Constellation*, Cambridge: Polity Press, 2001, p.78.

[17] See T. M. Scanlon, *What We Owe to Each Other*, Cambridge, MA: Harvard University Press, 1998.

[18] See. I. Kant, *Groundwork of the Metaphysics of Morals*, and *The Metaphysis for Morals* in M. J. Gregor, (ed.), *Practical Philosophy*, Cambridge: Cambridge University Press, 1785/1996, pp. 43-103; pp. 353-503, and J. Habermas, *Between Facts and Norms*, Cambridge, MA: MIT Press, 1996.

[19] 'Whether men are free is determined by the rights and duties established by the major institutions of society. Liberty is a certain pattern of social forms'. Rawls, 1971, op. cit., p. 63.

advantage.[20] This conception of justice focuses on the benefits of mutual co-operation and stems from the constraints that self-interested parties may rationally impose upon themselves in order to realise their long-term interests.[21] However, moral disputes cannot be settled with reference to the relative bargaining power of the parties. Simply establishing an equilibrium outcome does not imply that the outcome is right; protection from certain externalities should be a matter of rights, not a matter of power.[22] Morality entails upholding norms for the simple reason that they are right and that violating them is wrong. Reasons based on self-interest thus do not fulfil the requirement of justice as a duty of right, as might does not make right.[23] Moreover, the utilitarian defence of this conception of justice is problematic, as this particular moral theory does not adequately take into account the distinction between persons – that is, their inviolateness.[24]

A related point is that, as Thomas Nagel argues, justice as mutual advantage does not trigger standards of egalitarian justice.[25] This approach to justice yields unstable results, as without a monopoly of force behind the law, there is no protection against defection and dominance. For justice to prevail, the coercive state form is necessary. Legal certainty and rightful assurance requires that non-compliance be sanctioned. Compliance and socio-economic justice necessitate measures which are collectively enacted and coercively imposed by a sovereignty-protecting entity, a centralised system which determines the rules and possesses a monopoly on the power of enforcement: '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'.[26]

The academic debate on justice has generally taken the state as the point of departure. According to Rawls (1993), the state is needed to ensure a *fair scheme of cooperation* in which rights are not up for grabs. Leading scholars in the field therefore hold that there is only a limited context of justice beyond the state, if any. However, there are rights and duties that are not institutionally bound.[27] There is a right not to be killed, even when no institutions are capable of enforcing this right. Asylum seekers also

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[20] B. Barry, *A Treatise on Social Justice: Theories of Justice*, vol. 1, London: Harvester-Wheatsheaf, 1989, p. 156; see also p. 255ff. For the concept of justice as mutual advantage, see D. Hume, L. A. Selby-Bigge (eds), *David Hume: A Treatise of Human Nature (1739-40)*, Oxford: Oxford University Press, 1975.

[21] See D. P. Gauthier, *Morals by Agreement*, Oxford: Clarendon Press, 1986.

[22] See R. Nozick, *Anarchy, State, and Utopia*, Oxford: Blackwell, 1974.

[23] Justice as mutual advantage may be normatively void, but we should not rule out its explanatory value in a Westphalian order.

[24] See Rawls, 1971, op. cit., p. 14.

[25] T. Nagel, 'The Problem of Global Justice', *Philosophy and Public Affairs*, 33(2), 2005, pp. 113-147.

[26] Ibid., p. 121.

[27] 'The protection, under sovereign power, of negative rights like bodily inviolability, freedom of expression, and freedom of religion is morally unmysterious. Those rights, if they exist, set universal and prepolitical limits to the legitimate use of power, independent of special forms of association'. Ibid., p. 127.

have rights,[28] and it is this non-associative obligation to protect life and integrity, which constitutes the moral basis for human rights, as today's global challenges bring to the fore.

In opposing Nagel and those who defend state-centred theories of justice, many have pointed to the many emerging challenges with a global reach. Migration and security issues, as well as those related to finance, trade schemes, and climate change, know no borders and affect the lives, interests, and values of human beings worldwide. All global citizens are vulnerable to climate change, and migrants and refugees are subjected to arbitrary rule because they lack the status of citizenship. Security and surveillance issues also arise in a non-state and global context. When institutions are lacking, when there is no chance of fair treatment, or when might makes right in the international domain, arbitrariness and global political injustice results. As a consequence, the basic world structure is unjust.[29] For scholars such as Beitz, Buchanan, Young, Held, Pogge, and Singer, the *circumstances of justice* (in line with Hume and Rawls) pertain to a large degree at the global level. In their view, the present levels of interdependence and affectedness testify to structural injustice and dominance.[30] Due to the fact of globalisation, the principles of justice apply to the global level.

Justice as non-domination

Justice as non-domination is, in the words of Philip Pettit, the ideal of 'the free individual […] protected against the domination of others by the undominating and undominated state'.[31] Pettit understands 'non-domination' as 'the social status of being relatively proof against arbitrary interference by others, and of being able to

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[28]Article 14 of the Universal Declaration states, 'Everyone has the right to seek and to enjoy in other countries asylum from persecution'. The 1951 Convention Relating to the Status of Refugees (later amended by the 1967 Refugee Protocol) expands upon Article 14, defining a refugee as 'a person who has a well-founded fear of being persecuted for reasons or race, religion, nationality, membership of a particular social group or political opinion'.

[29] See, e.g., L. Wenar, Blood Oil: Tyrants, Violence, and the Rules That Run the World, Oxford: Oxford University Press, 2016.

[30] See, e.g., C. R. Beitz, *Political Theory and International Relations*, Princeton: Princeton University Press, 1979; 'International Liberalism and Distributive Justice', *World Politics*, 51, 1999: pp. 269–96; A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, Oxford: Oxford University Press, 2004; O. Höffe, *Demokratie im Zeitalter der Globaliserung*, Munich: C.H. Beck, 1999; H. Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, Princeton: Princeton University Press, 1980; N. G. Onuf, *The Republican Legacy in International Thought*, Cambridge: Cambridge University Press, 1998; Nussbaum, 2006, op. cit.; T. W. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities*, Cambridge: Polity Press, 2002; P. Singer, *One World, the Ethics of Globalization*, New Haven: Yale University Press, 2002; Sen, 2009, op. cit.; A. M. Slaughter, *A New World Order*, Princeton: Princeton University Press, 2004.

[31] P. Pettit, 'A Republican Law of Peoples', *European Journal of Political Theory*, 9, 2010, p. 77.

enjoy a sense of security and standing among them'.[32] In contrast to freedom as mere 'non-interference',[33] freedom as non-domination is, according to Pettit, bound up with being and seeing oneself as someone who is not at the mercy of the arbitrary will of others – subject to their whims, pleasure, discretion – even if these others were to mostly leave one alone. Domination is the arbitrary wielding of power, and it may have institutional or non-institutional causes. It occurs in all forms of relationships: between states and within states, across borders and within them, between political and economic systems, between private power and public power, and between social groups. Although it is often associated with hierarchies, domination can also occur in networks or other less-structured forms of rule that lack proper procedures of justification or participation. Domination can thus occur in numerous ways that fall short of direct intrusion.[34]

In this approach, a person is dominated and lacks freedom to the extent that someone else has the capacity to interfere arbitrarily in his or her choice situations. Here, interference means intentionally making others worse off with respect to the range of options open to them or with respect to the potential benefits connected to the options they can access. Such negative influence on an individual's choice situations can be exercised by various means – for instance, physical coercion, threats, or manipulation.[35]

There is a certain ambiguity in the way Pettit specifies what makes interference arbitrary, and thereby also instances of domination or alien control. His most general (and uncontroversial) characterisation of arbitrary interference is the statement that it is an act 'chosen or not chosen at the agent's pleasure'.[36] In order to clarify this, Pettit describes arbitrary interference as acts that are chosen or rejected without reference to the interests or opinions of those affected.[37] According to this unusual sense of arbitrariness, 'dominating power' refers to an agent's unchecked capacity to interfere with others without being obliged to consider their legitimate interests. Conversely, non-domination reflects how well individuals are protected against harmful interventions. If agents are subject to control mechanisms that force them to consider the relevant interests of those potentially affected by their power to interfere, they do not possess dominating power.

Given the emphasis on other people's power or capacity to interfere, justice as non-domination sees a close connection between freedom and citizenship. Freedom from

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[32] See P. Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford: Oxford University Press, 1997, p. viii. Furthermore, 'Someone dominates […] another, to the extent that (1) they have the capacity to interfere (2) on an arbitrary basis, (3) in certain choices that the other is in a position to make'. In Pettit, 2010, op. cit., p. 52.

[33] See T. Hobbes, *Leviathan: Or the Matter, Form and Power of a Common Wealth Ecclesiastical and Civil*, London: Andrew Crooke, Green Dragon, St. Paul's Churchyard, 1651.

[34] Pettit, 2010, op. cit.

[35] Pettit, 1997, op. cit., pp. 52-3.

[36] Ibid., p. 55.

[37] Ibid.

domination cannot rely on the mere goodwill of others, as that would leave us at the mercy of powerful agents (i.e., we would remain dominated). In order to provide everyone with protection against potential dominators, we must establish a publicly sanctioned legal regime. A suitable system of law backed by the coercive power of the state would create conditions under which we could enjoy justice as non-domination. By preventing others from interfering arbitrarily in our affairs, public institutions safeguard non-domination among citizens, analogous to the way in which antibodies make us immune to certain diseases.[38]

As Pettit and other contemporary neo-republicans conceive it, the close connection between public institutions and non-domination is essentially a means-end relationship. Neo-republicanism, according to Frank Lovett, is 'utilitarianism with a conception of freedom from domination taking the place of utility'.[39] In this perspective, non-domination is the overarching political value that public institutions should maximise. The absence of domination involves escape from insecurity, strategic deference, and subordination to others. As such, it is what John Rawls calls a 'primary good' – that is, a good that everyone should want irrespective of what their other wants might be.[40] Public institutions should be assessed in terms of how well they realise non-domination overall.

In addition to the power of individuals and non-state groups (*dominium*), justice as non-domination considers the power of the state (*imperium*) as a potential source of domination. For this reason, state agencies must be prevented from using the state's coercive means on an arbitrary basis. A non-discriminating – non-dominating – state is needed to register citizens' preferences and hence to prevent domination among individuals. Provided it is subject to certain controls (such as checks and balances and non-majoritarian, contestatory institutions) that induce it to track citizens' interests and opinions, the state's exercise of power is non-arbitrary and therefore not a source of domination.

States can also be dominated – for instance, by other states, multinationals, or international public bodies – and such domination indirectly affects the freedom of citizens. This is why Pettit describes the free individual as protected by the undominating and undominated state.[41] Ideally, effective states that represent their citizens fairly should live in mutual respect. Although the odds of establishing effective checks on power beyond the state are meagre, some hope can be warranted with respect to international public bodies. Such bodies will not lead to effective regulation, but they can foster discussions with the power to 'establish a currency of considerations that all sides recognise as relevant to global organisation', thereby

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[38] Ibid., pp. 106-7.

[39] F. Lovett, 'Domination and Distributive Justice', *The Journal of Politics*, 71 (3), 2009, p. 817.

[40] Rawls, 1971, op. cit., p. 62.

[41] See the quote at the beginning of this section. Cf. also Q. Skinner, 'On the Slogans of Republican Liberty', *European Journal of Political Theory*, 9 (1), 2010, p. 100: 'You can hope to retain your individual freedom from dependence on the will of others if and only if you live as an active citizen of a state that is fully self-governing, and is consequently neither dominating nor dominated'.

making 'it possible for countries to relate to one another in a reasoned manner, seeking a non-alien influence on one another's positions and holding out the possibility of an unforced, cooperative solution to many problems'.[42] As discussion forums, international bodies can be important instruments for establishing a non-dominating global order based on a common understanding of the limits of states' sovereign powers and how common challenges (e.g., international terrorism or environmental degradation) should be addressed.

This approach is negative: it is directed against the potential of arbitrary interference, and it favours the rule of law and counter-majoritarian institutions as means of ensuring that the interests and opinions of those affected are taken into account. The model aims at securing a pre-politically defined idea of freedom as non-domination, rather than at authorising citizens' self-legislation: 'Democratic participation or representation' is a 'safeguard of liberty, not […] its defining core'.[43] Non-dominance can be ensured through possibilities for control and contestation by argument. Decisions are non-arbitrary when they are chosen with a view to the interests and opinions of the affected parties. The role of global institutions is thus to promote common global reasons and to foster deliberation and critical dialogue, not to legally sanction non-compliance.[44]

Much like the positions of Rawls[45] and Nagel,[46] Pettit's concept of justice is associative: it is limited to the basic structure of an individual state. In line with Rawls, the rights and obligations of citizens stem from their membership in a state and its 'fair scheme of cooperation'; they are institution-dependent. We have special obligations towards our compatriots that we do not have towards other people and groups. The primary agent responsible for non-compatriots is their own state, and we can fulfil our obligations towards them by supporting an international regime which hinders alien control over representative states. Specifically, this means supporting international bodies and public international law, as well as initiatives uniting smaller states in common causes against stronger states.

According to justice as non-domination, the basis for comprehensive claims of justice beyond borders is rather weak, as the concept takes the current system of states as the point of departure. In the international realm, this implies a claim to respect the

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[42] See Pettit, 2010, op. cit., pp. 82-3.

[43] Pettit, 1997, op. cit., p. 30.

[44] See Pettit, 2010, op. cit. 'The normative core of the individual claim against domination lies in this denial of discursive standing and the resulting asymmetry in status: Domination is bad because it constitutes an imposition of the will of one person on another'. D. Gädeke, 'The Domination of States: Towards an Inclusive Republican Law of Peoples', *Global Justice: Theory Practice Rhetoric*, 9(1), 2016, pp. 1-27, p. 9; P. Pettit, 'Keeping Republican Freedom Simple: On a Difference with Quentin Skinner', *Political Theory*, 30, 2002, pp. 339-356, p. 350. See also Pettit, 1997, op cit., p. 91; P. Pettit, 'The Domination Complaint', in M. Williams and S. Macedo (eds), *Nomos XLVI: Political Exclusion and Domination*, New York: New York University Press, 2005, pp. 87-117, here pp. 102-106.

[45] See in particular J. Rawls, *The Law of Peoples*, Cambridge, MA: Harvard University Press, 1999.

[46] See Nagel, 2005, op. cit.

integrity and sovereignty of states and their systems for protecting rights. Injustice and illicit rule are instances of dominance, but this perspective emphasises the normative and nominal equality of states. To put it bluntly, human rights do not trump sovereignty.[47] The Westphalian principles of co-existence and non-interference among sovereign states apply. To make interference non-arbitrary and control non-alien, what this perspective can offer is deliberative justification and the moral condemnation (naming, shaming and blaming) of breaches of civil and political liberties.

When freedom is understood as non-domination, when rights are seen merely as instruments for preventing interference by others, there is a weak basis for enforcing the rights of individuals beyond the state.[48] Here, there are no duties of 'Right' (*Recht*, cp., Kant). Although Pettit allows for non-associative duties and even accepts humanitarian interventions in extreme cases,[49] what follows from the overarching principle of non-domination at the international level is a *duty of beneficence* which stems from the pleas of the deprived for help from the well-off, help without which they will perish.[50] Some form of humane assistance from the wealthy to those in dire need is clearly called for, quite apart from any demand of justice.[51]

The EU's approach to global justice in line with the principles of justice as non-domination would be focused on avoiding harm and establishing a fair system of governance. Under this perspective, the EU's policy would be not to harm others and to help states and individuals as a duty of beneficence (charity), not a duty based on rights or as a duty of justice. Its foreign policy would be restricted to upholding the institutions of international law, criticising illicit interference in spheres of sovereignty and state autonomy, and seeking fair terms for cooperation with states external to the EU within the framework of international law.

Justice as non-domination would not challenge the international system per se; rather, it would seek to improve the working of 'the system of states' and help to deter dominance, ensuring just outcomes.[52] To some extent, this gives the approach a certain air of realism, as the world is likely to be divided into bounded state units for the foreseeable future. However, it is not clear that its recommended strategy for preventing the dominance of representative states could handle the need for

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[47] 'Even though it would be clearly inappropriate for the international order to allow states, as of recognized right, to have liberties inimical to the liberties of their members'. Ibid., p. 89.

[48] See C. Larmore, *The Autonomy of Morality*, Cambridge: Cambridge University Press, 2008, p. 189.

[49] See Pettit, 2010, op. cit., p. 89.

[50] Or, as Kant writes, 'The law of world citizenship shall be limited to conditions of universal hospitality'. The stranger can be turned away and cannot claim the right of a guest. 'One may refuse to receive him when this can be done without causing his destruction'. In 'Toward Perpetual Peace', in Gregor (ed.), 1795/1996, op. cit., pp. 328-29.

[51] See also Nagel, 2005, op. cit.

[52] See also P. Markell, 'The Insufficiency of Non-Domination', *Political Theory*, 36(9), 2008, pp. 9-36; A. Niederberger, 'Republicanism and Transnational Democracy', in A. Niederberger and P. Schink (eds), *Republican Democracy: Liberty, Law, and Politics*, Edinburgh: Edinburgh University Press, 2013.

collective action beyond the nation-state required by global problems such as uncontrollable migration streams, security issues related to the threat of terrorism, or concerns raised by globalisation related to trade between states, global warming, and poverty – which, as noted above, cross borders and raise questions of global political injustice. Justice as non-domination has limited capacity to eliminate dominance globally, as there is no duty of justice beyond borders that can be legally enforced.

In addition to these concerns regarding the effectiveness of justice as non-domination in dealing with pressing global challenges, one might also question how this model conceives of domination and non-domination. Some would argue that understanding non-domination in terms of serving one's legitimate interests opens up a path for unacceptable paternalism.[53] If non-domination is ultimately about protection from interference that does not track one's interests, then it seems that acts of interference such as forced medication would not compromise our standing as free persons as long as they are 'for our own good'.[54] This undesirable consequence is avoided by the next model of global political justice, which also highlights the need for stronger institutional provisions.

Justice as impartiality

Strong institutions are necessary for the equal protection of human rights according to 'Kantians', natural law theorists, and rights consequentialists. . Domestically, law-based orders are needed to prevent dominance – that is, to ensure moral equality, legal certainty, and rightful assurance. However, also in external relations, conflicts between states should be settled as legal disputes by an impartial and powerful third party. Just as a neutral arbitrator (a non-discriminating state) is required to prevent dominance among individuals domestically, the same is needed at the global level to prevent dominance among states. Norm violations should be treated as criminal offences. Hence there is need for a law-based order beyond the state and this is prior to solving the domestic problem of order. 'The problem of establishing a perfect civil constitution is subordinate to the problem of a law-governed external relationship with other states, and cannot be solved unless the latter is also solved'.[55] In this perspective, we find a basis for a stronger concept of justice: *justice as impartiality*, whereby a foundation for agreement is established, which is 'acceptable from all points of view'. That is, 'justice should be the content of an agreement that would be reached by rational people under conditions that do not allow for bargaining power

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[53] L.-P. Hodgson, 'Kant on the Right to Freedom: A Defense', *Ethics*, 120, 2010, pp. 791-819, here pp. 809-10. F. Neuhouser, 'Rousseau's Critique of Economic Inequality', *Philosophy & Public Affairs*, 41 (3), pp.193-225, p. 200.

[54] '[…] if non-domination is pushed too far it could end up intruding so much of our lives that what ordinary people called freedom […] will be seriously compromised'. J. Ferejohn, 'Pettit's Republic', *The Monist*, 84(1), pp. 77-97, p. 85.

[55] I. Kant, 'Idea for a Universal History with a Cosmopolitan Purpose', in H. Reiss (ed.), *Kant*, Cambridge: Cambridge University Press, 1991, p. 47.

to be translated into advantage'.[56] Like justice as non-domination, this model considers dependence on an arbitrary will as the core of dominance and the main contrast to freedom: '*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 [...]'.[57]

Freedom is the capacity to make choices without deference to the opinions or wants of others, provided our choices are compatible with other people making free choices on the same terms. Yet, even if justice as non-domination and justice as impartiality agree that dominance involves some form of dependency on the arbitrariness of others, they specify this general idea in different ways.

According to justice as impartiality, the question of how free a person is should be distinguished from how well his or her interests are served.[58] From this perspective, dominance has less to do with the power to negatively affect an individual's choice-situations than with depriving others of their power to make free choices. Non-dominating relations are those in which the involved parties can decide for themselves how to act, whereas dominance implies obedience to a foreign will, regardless of whether such obedience serves one's interests or not. In recognising a universal equal right to freedom, justice as impartiality only considers interference with the exercise of free choice to be non-arbitrary if it secures the mutual independence of interacting parties. The authorisation to coerce is based on the idea of 'hindering a hindrance to freedom'.[59] Acts of interference that do not aim at ensuring equal freedom for all are necessarily instances of dominance, even if they are 'for our own good'.[60] Such acts are unjust because they compromise the right to determine one's own ends. In this approach, justice represents a *context-transcending principle*, establishing a neutral standard for dealing with colliding interests, values, and norms. The approach thus acknowledges rights that 'trump not merely collective goals but also national sovereignty understood in particular way'.[61] Individual human beings are the ultimate units of moral concern; sovereignty still matters, but only to the extent that it is necessary for the protection of human rights.

The basis for this notion of justice is the idea that an individual's dignity is intrinsically bound up with his or her autonomy; of being able to give themselves the laws they are to obey. Freedom relates to the full legal standing of the individual,

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[56] Barry, op. cit., 1989, p. 7.

[57] I. Kant, *The Metaphysics of Morals*, in Gregor (ed.), 1797/1996, op. cit., 30.

[58] L.-P. Hodgson, 2010, p. 810.

[59] I. Kant, *The Metaphysics of Morals*, in Gregor (ed.), 1797/1996, op. cit., p. 388.

[60] Accordingly, justice as impartiality is not vulnerable to the criticism that it might open up a path for unacceptable paternalism. As long as forced medication cannot be justified in terms of equal freedom for all, it is illegitimate.

[61] R. Dworkin, *Justice for Hedgehogs*, Cambridge, MA: Harvard University Press, 2011, p. 333.

which requires equal basic rights and liberties.[62] We should always act in a manner compatible with human dignity, and public power should only be exercised in order to make it possible for interacting individuals to pursue their ends freely as long they do not undermine the freedom of others. Political authority is based 'on the principle of it being possible to use external constraint that can coexist with the freedom of everyone in accordance with universal laws'.[63] Freedom can only be restricted for the sake of freedom itself; the ends do not justify the means!

Justifying political authority in terms of freedom does not amount to an argument against social rights or welfare measures. The protection of a wider set of rights (both civil and social) need not result in paternalism and dominance, as libertarians claim.[64] Such protection does not interfere with the recipients' right to seek happiness as they see fit, since certain minimal standards of well-being – such as basic capabilities or basic need satisfaction – constitute preconditions for exercising free choice.[65] 'Basic capabilities and functionings, such as life, health, bodily integrity, social and economic opportunity, social bases of self-respect, cognitive skills and abilities (etc.) are of undoubted importance in determining the extent of actual political freedoms'.[66] Although there is a danger of paternalism involved in constitutionalising a set of capabilities,[67] this may be compatible with a Kantian perspective, as the dependence of the poor on the rich is subjection and therefore a government is 'authorised to constrain the wealthy'.[68] 'Equal capability for public functioning' is crucial for democracy.[69]

As a restraint on legitimate coercion, freedom is not a goal that political and legal institutions should promote; rather, it is an imperative constraint. Without freedom, such institutions would cease to be what they are intended to be. At the same time, justice as impartiality underscores the need for authoritative institutions that interpret and enforce valid norms. Without a higher-ranking third party that can

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[62] The legal standing of the individual requires 'a full adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties […] are to be guaranteed their fair value'. J. Rawls, *Political Liberalism*, New York: Columbia University Press, 1993, p. 5.

[63] I. Kant, *The Metaphysics of Morals*, in Gregor (ed.), 1797/1996, op.cit., p. 389.

[64] That is, as long as it is clarified and does not interfere with what belongs to everyone; that we have not been unjust towards them. See I. Kant, 'Toward Perpetual Peace', in Gregor (ed.), 1795/1996, op. cit., p. 351.

[65] See Sen, 2009, op. cit.; M. C. Nussbaum, *Women and Human Development: The Capabilities Approach*, Cambridge: Cambridge University Press, 2000.

[66] S. Srinivasan, 'No Democracy without Justice: Political Freedom in Amartya Sen's Capability Approach', *Journal of Human Development and Capabilities*, 2007, pp. 457–80, p. 475.

[67] See J. S. Dryzek, 'The Deliberative Democrat's Idea of Justice', *European Journal of Political Theory*, 12(4), 2013, pp. 329–346, p. 332.

[68] I. Kant, *The Metaphysics of Morals*, in Gregor (ed.), 1797/1996, op.cit., p. 468.

[69] J. Bohman, 'Deliberative Democracy and Effective Social Freedom: Capabilities, Resources and Opportunities', in J. Bohman and W. Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics*, Cambridge, MA: MIT Press, 1997, p. 322.

interpret and make the abstract idea of equal freedom effective, dominance is unavoidable. Absent public institutions that establish, apply, and enforce laws, all cases of conflict regulation must be resolved on the basis of a particular agent's private judgement. This, in turn, means that individuals will be subjected to arbitrary decisions rather than legal norms reflecting the idea of equal freedom. Only under the review of a norm trying *Vernunft* can one know whether or not specific actions are normatively defensible. Negative duties (such as the duty not to harm others) are by definition duties of justice and can be backed by force. Justice as impartiality can be viewed as providing a basis for the justification of humanitarian intervention – military intrusions and economic sanctions[70] – but on what grounds? How far can the international community go in ensuring global justice?

As noted above, some hold that there are no circumstances of justice that create obligations in a non-state context. This claim that we do not inhabit a globalised world, that there are no circumstances of justice beyond state borders is hotly contested.[71] The mutual affectedness and the intense interdependence created by globalisation have broadened and intensified sufficiently to trigger significant relations of justice across borders. These new circumstances transform duties of beneficence into obligations of justice. The global context has become a setting for justice in which obligations of beneficence generate certain kinds of special positive duties.[72] A justice relation between states arises when their interactions are intense and affect their citizens' interests and autonomy.

Due to the fact of globalisation, a scheme of social and economic cooperation is developing beyond the state, comparable to what is seen as necessary for justice claims to apply domestically – that is, the requirements of distributive justice also apply beyond borders. Productive cooperation is not limited to the state, and the international system is itself coercive. Membership in organisations like the International Monetary Fund (IMF) and the World Trade Organization (WTO) is not merely optional. Migration, international trade, and climate change are all governed

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[70] On the conditions for military incursions or severe economic sanctions from this perspective, see Dworkin, 2011, op. cit., p. 333ff.

[71] Cp. Forst, 2012, op. cit. On the fact that a global basic structure already exists, see, e. g., Beitz, op. cit.; T. Pogge, *Realizing Rawls*, Ithaca: Cornell University Press, 1989; D. Held, A. McGrew, D. Goldblatt, and J. Perraton, *Global Transformations*, London: Polity Press, 2000; I. M. Young, 'Responsibility and Global Justice: A Social Connection Model', *Social Philosophy & Policy*, 23, 1 (2006): pp. 102–130. O. O'Neill, *Toward Justice and Virtue*, Cambridge: Cambridge University Press, 1996, Ch. 4. Cf. R. Goodin, *Protecting the Vulnerable*, Chicago: University of Chicago Press, 1985; J. E. Stiglitz, *Making Globalization Work,* W. W. Northon & Company, 2006; J. Cohen and C. Sabel, 'Extra Rempublicam Nulla Justitia?', *Philosophy & Public Affairs*, 34(2), 2006, pp. 147-175; R. Dworkin, 'A New Philosophy of International Law', *Philosophy and Public Affairs,* 41(1), 2013; J. L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*, Cambridge: Cambridge University Press, 2012; M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* [reprint], Cambridge: Cambridge University Press, 1989/2005.

[72] Beitz, 1999, op. cit.

by a world basic structure. Redistribution on a global scale is 'an obligation incurred in institutionally routinised interaction'.[73]

An EU foreign policy in line with justice as impartiality would mean upholding human rights and promoting an international order in compliance with the cosmopolitan law of the people. A foreign policy under this perspective would entail securing a fair scheme of cooperation and the promotion of stronger supranational institutions to meet the demands of justice in the advent of a cosmopolitan world order. Global duties can only become perfect provided that they are institutionally entrenched – that is, provided that global institutions are available that can specify, apply, and enforce them, and that the implementing agencies possess allocative competences, responsibilities, and resources. Promoting such institutions could involve advocacy for a strong human-rights regime and support for humanitarian interventions and global rights to political, social, and economic justice. Given the emphasis on human rights and their priority vis-à-vis state sovereignty, an EU policy guided by justice as impartiality might also imply pioneering and advocacy for an international system which discriminates between states on the basis of their internal features. For instance, the EU could support restricting representation in the UN to democratic states that respect human rights.[74] It could also work towards the establishment of a coalition of democratic states that under certain circumstances could override the UN Security Council with regard to the authorisation of the preventive use of force.[75] Alternatively, it could seek to acknowledge regime change and justice in the basic structure of states as just causes for military intervention.[76]

Justice as impartiality is an ambitious concept which emphasises principles that no one can reasonably reject. One problem with this conception is its relatively abstract and vague nature, which increases the risk of glossing over relevant distinctions and differences. Another problem is the democratic objection: who is the legislator – the citizenry as a whole, the judges, or the international lawyers?[77] The problem here is that justice as impartiality depends on the integrity of the *complete interpreter*, the (fictional) Judge Hercules who relies 'upon his own convictions in matters of morality'.[78] Such a judge supposedly has a complete overview of all the valued principles and policies necessary for justification, as well as a handle on the complex set of arguments underpinning the far-flung elements of existing law. Here, we find the ideal of a judge who proceeds in monologue and is distinguished by virtue and

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[73] A. J. Julius, 'Nagel's Atlas', *Philosophy & Public Affairs*, 34(2), 2006, pp. 176-193, p. 178.

[74] F. Tesón, *A Philosophy of International Law*, Boulder: Westview Press, 1997, p. 25.

[75] A. Buchanan and R. O. Keohane, 'The Preventive Use of Force: A Cosmopolitan Institutional Proposal', in C. Barry and T. Pogge (eds), *Global Institutions and Responsibilities*, Oxford: Blackwell Publishing, 2005, p. 274ff.

[76] D. Moellendorf, *Cosmopolitan Justice*, Boulder, CO: Westview Press, 2002, pp. 104, 118, and 159f.; F. Tesón, 'Ending Tyranny in Iraq', *Ethics & International Affairs*, 19(2), 2005, pp. 1-20.

[77] See also E. O. Eriksen, 'Democratic or Jurist Made Law', in E. O. Eriksen and A. J. Menéndez (eds), *Arguing Fundamental Rights*, Dordrecht: Springer, 2006.

[78] R. Dworkin, *Taking Rights Seriously*, 5th edition, London: Duckworth, 1987, p. 123.

privileged access to the truth: Judge Hercules takes it upon himself to arbitrate in the name of all.[79]

Another problem with justice as impartiality concerns its feasibility: given that it requires the establishment and enforcement of rules for all, including those who disagree, and given that any agents sufficiently powerful to carry out these duties are likely to be biased if not corrupt, does this concept have any hope of being realised? Moreover, the politics of human rights can easily become imperialistic in the name of morality, and the risk of arbitrariness is inevitable, since some may continue to violate human rights with impunity at this stage of institutionalisation.[80] Justice as impartiality may give rise to new forms of injustice and arbitrary power, and it might not ensure balanced, reciprocal relationships, raising allegations of monological moralism and/or authoritarianism in the form of a world state. These problems highlight the fact that when it comes to agents of justice,[81] there is also agency related to the generative or formative aspect of justice – that is, those who define what justice should mean.[82]

Justice as mutual recognition

A hegemon is an enforcer of what Kant calls a 'unilateral will', and such a will cannot establish a system of reciprocal restrictions. This will is arbitrary from the perspective of others. Seemingly valid moral norms might in fact be mistaken and can clash or be counterproductive in certain contexts. Rights are contested and require argumentation and interpretation with regard to particular interests and values in order to be explained and justified, and they must be firmly institutionalised, specified, and operationalised to have a bearing on actions. To be properly applied, they must also be rooted in a concrete practice. According to communitarians, these 'roots' – their 'home' - are lacking at the global level.[83] The requisite *sameness*, the substantial equality necessary for citizens to see themselves as members of a

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[79] For a critique of Dworkin's solipsism, see Habermas, 1996, op. cit., p. 212ff. However, see Dworkin, 2013, op. cit., p. 28, for the idea of a 'four-majorities system of international legislation'.

[80] Human-rights politics is power politics in disguise, according to C. Schmitt, *The Concept of the Political*, Chicago: University of Chicago Press, 1996.

[81] See O. O'Neill, 'Agents of Justice', *Metaphilosophy*, 32, 2001, pp. 180-195.

[82] J. S. Dryzek, 'Democratic Agents of Justice', *The Journal of Political Philosophy*, 23(4), 2015, pp. 361-384.

[83] See Beitz, 1999, op. cit., pp. 290-291: 'Cosmopolitanism misunderstands people's local affiliations – that is, attachments to various communities that are typically experienced as imposing responsibilities different in kind and degree from those imposed on us by our common humanity'.

'community of obligations', is not in place.[84] We have special obligations to fellow members of our society and to the specific individuals who are close to us, and these obligations cannot be grounded in our common humanity or abstract principles of equal freedom. They stem from our belonging to a society and are socially ascribed and substantively underpinned, even though responsibilities do not stop at borders when the consequences of commerce and states' actions are far-reaching.

Pace communitarianism, humans may not have much more in common than their humanness, but they are socially connected. For some issues, obligations of justice extend beyond borders. As people increasingly engage in dense relationships outside of political communities, and as their actions come to have consequences for others outside a shared political-institutional context, non-associative obligations emerge. These relationships form the foundation for claims 'that people have obligations of justice to one another. It is not enough to say that the others are human'.[85]

A related point which brings *justice as mutual recognition* to the fore is that in the real world, there are structural forms of injustice which extend beyond states as well as injustices which fly under the radar of formal justice. Framing effects arising from the unconscious assumptions of well-intentioned people, cultural stereotypes, market mechanisms, and other processes of ordinary life affect the standings of individuals.[86] Misrecognition or the lack of recognition when particular agents determine the definition of justice can affect one's political status and may amount to dominance. Justice as mutual recognition makes us aware of the fact that people may be treated unfairly under just formal procedures:[87] *inequities* can persist even in a formally just order. The concept of inequities points to inequalities that go beyond garden-variety inequalities stemming from personal preferences and choices. 'Such inequalities are not inequities. Inequity occurs when an institution fails to give persons their due regard as equal citizens, or denies them a fair hearing. Such inequities are bound to occur even under just institutions, if only because laws are made for the general case but each person's circumstances are unique'.[88]

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[84] There is no particular context of values and obligations that makes rights intelligible at the global level. See D. Miller, *On Nationality*, Oxford: Oxford University Press, 1995; D. Miller, 'Cosmopolitanism', in G. W. Brown and D. Held (eds), *The Cosmopolitanism Reader*, Cambridge: Polity Press, 2010. See also W. Kymlicka, *Liberalism, Community and Culture*, Oxford: Oxford University Press, 1989; C. Taylor 'The Politics of recognition' in A. Gutmann (ed.), *Multiculturalism and the Politics of Recognition*, Princeton: Princeton University Press, 1992, pp 25-73; G. W. F. Hegel, *Philosophy of Right* [reprint], Oxford: Oxford University Press, 1821/1967; '§209: The world state raises the danger of *soulless despotism* and peaceful slavery', in I. Kant, 'Theory and Practice', in H. Reiss (ed.), *Kant's Political Writings*, Cambridge: Cambridge University Press, 1970, p. 90.

[85] Young, 2006, op. cit., p. 105.

[86] See I. M. Young, *Inclusion and Democracy*, Oxford: Oxford University Press, 2000.

[87] '[…] the just and the equitable are the same thing, […] while both are good, the equitable is better'. See Aristotle, *The Nicomachean Ethics*, New York: Prometheus Books, 1987, p. 79. See also Kant, *The Metaphysics for Morals*, in Gregor (ed.), 1797/1996, op. cit., pp. 390-91.

[88] A. Kolers, 'The Priority of Solidarity to Justice', *Journal of Applied Philosophy*, 31(4), 2014, pp. 420-433, here pp. 430-431.

When particular individuals are disfavoured in a distributive scheme on the basis of morally arbitrary features (such as when a particular group is overrepresented, when the least well-off cohort has less say in determining political outcomes, or when cultural stereotypes and status hierarchies determine who gets what), there is dominance. A regular second look at outcomes must be ensured in order for the system to adjust for unintended consequences and to correct wrongs; it is necessary that everyone have their say in a reason-giving process.[89]Thus, justice as mutual recognition points to the need for actual deliberation. It highlights the fact that justice is not the origin of social relations but the product of practical interaction and contestation over how to regulate common affairs. A deliberative setting is required to right the wrongs of the actual formative agency of justice. Deliberation takes inequities into consideration as it gives each participant a due hearing. This concept of justice lends additional weight to the credo that we cannot know what is just unless all affected are heard.

In this perspective, justice is not a pre-political value or a substantive principle, but an inter-subjective category in which the status of the member counts in its construction. Rights, as central elements of justice, should not be conceived of as possessions or as innate protections of private interests, but rather as what compatriots grant each other mutually when they govern their co-existence by means of law:[90] 'Rights are relationships, not things; they are institutionally defined rules specifying what people can do in relation to one another'.[91] To put it sharp: Rights are not a gun or a one-man show! Rather, they are inter-subjective entities which entail the recognition of reciprocity and depend on successful processes of socialisation and individuation. Individuals capable of respecting the rights of others and of using their own rights in a responsible way are the prerequisites for rights to function properly.

According to Iris Young, what is just is decided in processes of deliberation and contestation among affected parties in which the status order is called into question; hence, justice as mutual recognition is premised on reciprocal justification. States, *demoi*, and groups are all legitimate claimants and must be respected in processes of justification. Full public recognition as an equal citizen requires respect for the unique identities of each individual as well as for the practices and activities that are particularly valued.[92] Here, the point of human rights is not to identify interference - justifying reasons but 'reasons for arranging a basic social and political structure in the right way' – that is, 'the essential conditions of the possibility of establishing

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[89] According to Aristotle, deliberation 'occurs in cases which fall under a general rule, if it is uncertain what the issue will be, and in cases which do not admit of an absolute decision'. Aristotle, 1987, op. cit., p. 77.

[90] See Habermas, 1996, op. cit., pp. 118-131.

[91] Young, 1990, op. cit., p. 25.

[92] A. Gutmann, 'Introduction', in Ch. Taylor et al, *Multiculturalism and the Politics of Recognition*, Princeton: Princeton University Press, 1992, p. 8.

legitimate political authority. International law and a politics of intervention have to follow a particular logic of human rights, not the converse'.[93]

If the EU were to pursue such a notion of justice, it would seek to establish cooperative arrangements and active dialogues with affected parties in order to determine what would be the right or best thing to do in any given circumstance. It would attempt to ensure reciprocity or the capacity to seek fair terms of social cooperation, as well as publicity and accountability to constituents and other citizens, to citizens of other political systems, and to long-term interests. Reciprocity entails the act of explaining your reasoning to those who do not share your framework.[94] Some elements required by this approach are already in place in the institutions, networks, and collaborative arrangements which exist on a global scale.[95] Because it is respectful of belonging and difference, justice as mutual recognition would lead to an EU foreign policy responsive to the claims of culturally defined groups living within the territorial borders of sovereign states. It would necessitate the promotion of collaborative arrangements whereby affected parties would be given an effective voice, as well as the establishment of forums for transnational deliberation on the meaning of global justice. It would also involve support for mechanisms to ensure the capacity to seek fair terms of social cooperation for their own sake.

The added value of justice as mutual recognition should be granted: the status of the member count in deciding what is right and inequities may persist in a formally just system. However, from the post-modernists come allegations of the compulsive universalism involved in these formal notions of justice, as they ignore the particularity of the other. Recognitional justice highlights the fact that modern constitutions grant a right not to be rational and that 'a high level of moral sensitivity is always needed in order to grasp the injustice done to the suppressed in the society'.[96] According to Adorno, injustice is the medium of real justice and requires the 'mimetic' attitude of disclosing the other in the complete differentiae of one's person.[97]

In this regard, justice as mutual recognition represents a context of discovery for detecting injustice and misrecognition. However, must any attempt to address

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[93] R. Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach', in *Ethics* 120 (4), pp. 711-74, here pp. 726-27.

[94] A. Gutmann and D. F. Thompson, *Democracy and Disagreement*, Cambridge, MA: Harvard University Press, 1996. See also J. S. Dryzek, *Deliberative Democracy and Beyond*, Oxford: Oxford University Press, 2000; J. S. Dryzek, *Deliberative Global Politics: Discourse and Democracy in a Divided World*, Cambridge: Polity Press, 2006.

[95] See footnotes 30 and 71.

[96] A. Honneth, 'The Other of Justice: Habermas and the Ethical Challenge of Postmodernism', in S. K. White (ed.), *The Cambridge Companion to Habermas,* Cambridge: Cambridge University Press, 1995, p. 297. See also S. White, *Political theory and Post-modernism*, Cambridge: Cambridge University Press, 1991. See additionally the works of Lyotard and Derrida.

[97] This includes the type of human suffering against which enlightenment closes itself off. T. W. Adorno, *Aesthetic Theory*, 1997, London: Bloomsbury Press. Only in dealing with the non-identical can the claim to human justice be redeemed. See also H. Honneth, *Leiden an Unbestimmtheit*, Stuttgart: Reclam, 2001.

differences under the liberal ideal of equality, impartially, and toleration necessarily perpetuate injustices?[98] It is an unavoidable presupposition of communication "that the speaker qua speaker lays claim to recognition both as an autonomous will and as an individual being'. According to the logic of personal pronouns, the speaker 'cannot *in actu* rid himself of his irreplaceability', but 'identity claims aiming at recognition must not be confused with the validity claims that the actor raises with his speech acts'.[99] There is an analytical distinction between identity claims and validity claims; hence, we do not refer to incommensurable standards here, but rather to different standards tailored to different questions. Still, in justice as mutual recognition, there is the problem of squaring the standpoint of the *concrete other*[100] (which requires consideration of all individuals with their unique histories and affective emotional constitutions) with that of the *generalised other*, who deserve equal concern and respect. This approach faces not only the problem of relativism but also that of essentialism raised by multi-culturalism. This issue refers to the idea of innate cultural values, of a right to culture: 'Just as all must have equal rights, and equal voting rights, regardless of culture, so all should enjoy the presumption that their traditional culture has value'.[101] How are we to ensure equal rights for all if there is also a right for one's culture to be protected? Culture itself can be a source of dominance. The problems of identity politics and 'group rights' – and thus the absence of exit options from political or social relationships which actors can exercise at a reasonable cost – thereby raise the spectre of arbitrary rule.

Although this account of justice may fare better than the previous accounts on some scores, two significant problems remain: the parity of relations necessary for deliberation is not in place, and there is a widespread underestimation of the need for strong institutions to eliminate dominance. How can we ensure parity of recognition without enforceable rights and ensure justice without the sanctioning of non-compliance?

Conclusion

The three-dimensional analytical scheme presented above allows us to address the pertinent concerns that emerge when we seek to identify problems of justice and the normative dilemmas involved. The three conceptions all entail strengths and weaknesses. For GLOBUS, they represent heuristic devises for analysing the dilemmas and concerns that arise when dealing with global justice and for handling the plurality of reasons behind and solutions to the problems of a just global order. These concepts relate to predicaments between universal and national duties, general

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[98] See the 'dilemma of difference', M. Minow, *Making all the Difference*, New York: Cornell University Press, 1990.

[99] See J. Habermas, *Postmetaphysical Thinking*, Cambridge: Cambridge University Press. 1992. p. 191 and 190.

[100] Cp. C. Gilligan, *In a Different Voice*, Cambridge, MA: Harvard University Press, 1982. On the Kohlberg-Gilligan controversy, see S. Benhabib, *Situating the Self*, London: Routledge, 1992.

[101] See Taylor, 1992, op. cit., p. 68.

and special obligations, absolute and differentiated responsibilities, distribution and recognition, local and global justice, thick and thin morality, moral and instrumental concerns, and so on.[102] All of the approaches would support engagement in human-rights politics, development programmes in poor and inefficient states, and attempts to create strategic alliances of weak states in international forums.

The three conceptions of justice are preparatory steps in the process of establishing an integrated theory – a *reflexive theory of global justice* – but such a theory requires empirical analysis to overcome 'the impotence of the ought', as well as the problem of unintended consequences.[103] The challenge of establishing a theory of global justice is that apart from certain basic human-rights deficits, which can be identified and which give rise to universal obligations (the prevention of war, crimes against humanity, and violations of human rights), the context of justice is mixed and cannot be settled solely with reference to moral responsibility – to duties of right. Many questions related to global political justice must instead be resolved through a blend of empirical social science and political philosophy, as they stem from the increasing level of interdependence and affectedness. Consequently, there is a need for an approach and a method that can integrate empirical analyses with normative, conceptual analyses.

There is no blueprint for what the EU's approach to a just global order should be. Justice entails relations of mutuality and parity of power. It requires the existence of authoritative institutions for collective opinion and will formation, not merely mechanisms of non-intrusion. Justice beyond the state is difficult to realise, as the existing structure of power and knowledge disparities inhibit rather than facilitate reciprocal relations. Under present conditions, there is no 'parity of participation'.[104] However, without a normative script, there can be no template for reform. GLOBUS therefore sets out to establish a reflexive theory of global justice, which will provide guidelines for a viable European approach to a fair global order. This is a theory of justice which builds on the idea that in order to prevent dominance in the international realm, both institutional provisions and deliberative practices must be subjected to discursive examination. A system of rule which involves some form of 'recognitional parity' for national communities at different levels of governance is required. This perspective provides 'support for a multi-level system of governance in which supra-state authorities monitor the conduct of states (and powerful

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[102] On these dimensions, see the positions represented in G. W. Brown and D. Held (eds), *The Cosmopolitan Reader*, Cambridge: Polity Press, 2010; see also N. Fraser and A. Honneth, *Redistribution or Recognition*, London: Verso, 2003; A. Hurrell, *On Global Order: Power, Values, and the Constitution of International Society*, Oxford: Oxford University Press, 2007; P. Singer, *One World, the Ethics of Globalization*, New Haven: Yale University Press, 2002.

[103] Any viable concept of global political justice must be applicable in the real world of European decision-making, according to the credo that 'ought implies can'.

[104] See N. Fraser, 'Re-framing Justice in a Globalizing World', in T. Lovell (ed.), *(Mis)recognition, Social Inequality and Social Justice*, London: Routledge, 2007.

economic and social institutions) and seek to ensure their compliance with cosmopolitan ideals of justice'. [105]

In this approach, the higher-order principle of general and reciprocal justification is seen as embodied not in concrete supranational institutions, but in the principles and standards to which actors subscribe when dealing with international and global affairs. Because human rights straddle the line between morality and justice, they enable us to clarify the conditions under which we can judge the legitimacy of the law. Human rights articulate the moral principles protecting the communicative freedom of individuals.[106] The principle of *reciprocal justification* is an intrinsic part of public reason, as it rules out political and moral arguments that reflect interests, values, or worldviews for which there are good reasons for rejection.[107] These moral principles are intrinsic to existing social practices, but they transcend concrete practices.[108] They also specify some minimal requirements for a fair scheme of justification. Hence, this theory subjects the context of interpretation to certain demanding criteria of what justice requires. The moral claims that citizens and other agents make must be justifiable with reference to principles and reasons that in theory are mutually acceptable – that is, they can be defended in a free, open, and inclusive public debate.

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[105] S. Caney, *Justice Beyond Borders: A Global Political Theory*, Oxford: Oxford University Press, 2005, p. 182.

[106] See S. Benhabib, *Dignity in Adversity, Human Rights in Troubled Times*, Cambridge: Polity Press, 2011.

[107] R. Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice*, New York: Columbia University Press, 2012.

[108] See J. Habermas, 'Does the Constitutionalization of International Law Still Have a Chance?', in C. Cronin (ed.), *The Divided West*, Cambridge: Polity Press, 2006. See also J. Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights', in J. Habermas, *The Crisis of the European Union: A Response*, Cambridge, MA: Polity Press, 2012.

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Appendix on distributive conceptions of justice[109]

By Kjartan K. Mikalsen

Iris Marion Young has pointed to a 'distributive paradigm' running through contemporary discourse about justice, which conceptualises justice in terms of the fair allocation of certain outputs. Characteristic of this paradigm is the definition of justice in terms of 'the morally proper distribution of social benefits and burdens among society's members'.[110] Precisely what counts as a morally relevant output varies between different authors, but typical examples are civil and political rights, duties, material resources, and opportunities.

For the present purposes, it is a matter of secondary importance whether Young provides adequate examples of distributive approaches to justice,[111] but it is of special interest to GLOBUS that many cosmopolitans tend to identify justice with a certain kind of distribution. According to cosmopolitans such as Allen Buchanan, Simon Caney, Brian Barry, Charles Beitz, and Fernando Tesón, the output of justice is basic human rights grounded in certain fundamental human interests. In their view, 'justice' refers to the realisation of a set of rights justified as the protection of interests assumed to be of fundamental importance to human beings (e.g., autonomy, well-being, and human flourishing). Although they have distinct positions on many issues, they share the idea that human rights are protections of certain morally significant interests universal to all humans, and that those who are seriously committed to justice should seek to establish conditions that secure the non-violation of these rights.

The distributive framework for thinking about justice is problematic. By conceptualising justice within such a framework, one tends to lose sight of the fact that justice only applies to interpersonal relations. Whatever the demands and entitlements of justice may be, they can never apply to individuals living isolated from others. I believe few people would deny this. Yet, the relational nature of justice is played down to the extent that justice is conceptualised in terms of the distribution of outputs. If justice is understood primarily as a question of the proper allocation of goods or rights, people are viewed primarily as the recipients of justice. What a person has a right to is specified independent of his or her relations to others. Only in a second step, after clarifying the output to which each person can rightfully lay claim, do other people come into the picture as those against whom claims of justice can be made. This has the effect of distorting the phenomenon at hand; it is a misrepresentation that tends to result in erroneous reasoning about justice.

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[109] The following appendix provides additional background to GLOBUS' political approach to justice. The text presented here is an abridged version of K. K. Mikalsen, *Justice Among States – Four Essays*, Trondheim: NTNU, PhD Thesis, 2012, pp. 85-89.

[110] Young, 1990, op. cit., p. 16.

[111] Young mentions, among others, John Rawls, W. G. Runciman, Bruce Ackerman, William Galston, and David Miller; op. cit., pp. 16-17.

One kind of distortion resulting from the conceptualisation of justice in distributive terms is the blurring of important distinctions in a way that severs the link between demands for justice and actual injustice. A primary focus on outputs does not seem to allow us to adequately distinguish between cases in which people suffer as a consequence of natural events and cases in which people suffer as a consequence of what other people do to them. Nor does it allow us to adequately distinguish between cases of rights violations due to the exploitative acts or practices of other people and cases of rights violations due to our own acts and practices. This is not to say that someone adhering to a distributive view cannot recognise these distinctions, but insofar as justice is identified with a specific output, it seems to follow that all the cases raise justice-based demands on the 'supply-side', so to speak. Because what matters is the realisation of a certain pattern of distribution, it is in each case required that we remedy the suffering in order to fulfil our duties of justice. This seems to conflate what we owe to others as a matter of solidarity with what we owe to others as a matter of justice.[112] It is a confusion of aid to others out of sympathy for their suffering with acts that aim at righting wrongs for which we are directly or indirectly responsible. The confusion is reflected in the view that we have a duty to militarily assist those who are denied basic human rights by their governments, a view defended by many cosmopolitans.[113] It is also reflected in Allen Buchanan's claim that we have a 'natural duty of justice' to ensure that all people have access to institutions protecting their basic rights even if we do not interact directly or indirectly (via institutional schemes) with these people.[114]

Another (and, in this context, more important) distortion caused by adherence to a distributive understanding of justice is insufficient attention to the issue of who can legitimately decide how abstract principles of justice should be specified, applied, and implemented in particular cases. In line with Raymond Geuss, one could describe distributive approaches as approaches that 'complete the work of ethics first, attaining an ideal theory of how we should act, and then in a second step […] apply that ideal theory to the action of political agents'.[115] Here, a primary focus on the appropriate principles of justice is characteristic. What matters is that justice is done. The questions of 'Who is to determine what justified claims are?' and 'Who is entitled to ensure that justice is done?' are either not addressed or else are thought to rely on the extent to which the relevant agent meets objective criteria of justice.[116]

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[112] R. Forst, 'Transnational Justice and Democracy', p. 2.

[113] See, for instance, Caney, 2005, op. cit., p. 235; Moellendorf, 2002, op. cit., p. 123; and F. Tesón, 'The Liberal Case for Humanitarian Intervention', in J. L. Holzgrefe and R. O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, Cambridge: Cambridge University Press, 2003, p. 103. My suspicion is that the cosmopolitans here are jumping to conclusions as a result of their adherence to an outcome-oriented conception of human rights. It should, however, be mentioned that Allen Buchanan rejects the idea that there is a duty to intervene militarily and thus to risk violent death. Buchanan, 2004, op. cit., p. 470.

[114] Ibid., pp. 85 ff. See also Caney, 2005, op. cit., pp. 111 ff.

[115] R. Geuss, *Philosophy and Real Politics*, Princeton and Oxford: Princeton University Press, 2008, p. 8.

[116] The latter part of this disjunction is intended to cover the view defended by Buchanan, 2004, op. cit., pp. 233 ff.

This is particularly unsatisfactory in that the demand for justice is linked to the use of coercive means, as in the case of military intervention. For instance, some cosmopolitans find it hard to identify any normatively significant difference between coercion by domestic political authorities and coercion by foreign governments.[117] Yet, this ignores the domestic context as the most important arena for specifying and concretising what should be considered each individual's legitimate rights.[118] It implies a form of expert rule whereby political processes and decision-making involving the rights-holders themselves are replaced by normative reflection carried out by the moral philosopher.

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[117] C. Beitz, *Political Theory and International Relations* (with a new afterword by the author), Princeton: Princeton University Press, 1999, pp. 80 and 87.

[118] Cf. Cohen, 'Sovereign Equality vs. Imperial Right: The Battle over the "New World Order"', *Constellations* 13(4), 2006, pp. 485-504, here p. 488.

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