

1

Two Pictures of Justice

1

At various times, human beings have made depictions of justice. She appears as the goddess *dikē* or *justitia*, sometimes with, sometimes without a blindfold, though invariably with the sword and symbols of even-handedness and non-partisanship; one need only think, for example, of Lorenzetti's "Allegory of Good Government" in the Palazzo Pubblico in Siena. Mostly she is depicted as beautiful and sublime, yet at other times also as hard and cruel, as in Klimt's famous paintings for Vienna University (which were destroyed during the war).

Studying such representations is a fascinating enterprise.¹ However, the understanding of "picture" which informs my remarks is a different, linguistic, one. In his *Philosophical Investigations*, Wittgenstein writes: "A picture held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably."² A picture of this kind shapes our language in a particular way, brings together the various usages of a word, and thus constitutes its "grammar." But such pictures can also point our understanding in the wrong direction, much as, in

¹Kissel, *Die Justitia: Reflexionen über ein Symbol und seine Darstellung in der bildenden Kunst*; Curtis and Resnik, "Images of justice."

²Wittgenstein, *Philosophical Investigations*, p. 48, §115; on this, see Pitkin, *Wittgenstein and Justice*, pp. 91f., 287ff. An interesting application of the idea of "being held captive by an aspect" can be found in Owen, "Criticism and captivity: On genealogy and critical theory."

viewing the famous picture puzzle of a duck and a rabbit, one can see only one aspect at a time,³ or as our thinking is held captive by particular examples that lead us to make false generalizations.⁴

In what follows, I would like to discuss two ways of thinking about justice, one of which I want to argue inadmissibly limits and simplifies our understanding of justice, and indeed leads it in a wrong direction. I prefer to regard these two competing notions of justice as “pictures” because they bring together a wealth of conceptions and images, and not only of justice, but also in particular of injustice. The latter seems to be the more concrete, immediate phenomenon, being associated with stories and images of the oppressed, the wretched, and the downtrodden. Thus a “picture of justice” stands for a very general and at the same time “thick” and concrete way of thinking about justice and injustice.

2

The picture that holds our thinking concerning social or distributive justice “captive” is the result of a particular interpretation of the ancient principle *suum cuique* – “To each (or from each) his own” – which has been central to our understanding of justice since Plato and is interpreted in such a way that the primary issue is what goods individuals justly receive or deserve – in other words, who “gets” what. This then leads either to comparisons between people’s sets of goods, and thus to relative conclusions, or to the question of whether individuals have “enough” of the essential goods, regardless of comparative considerations. Granted, these goods- and distribution-centred, *recipient-oriented* points of view have their merits, for distributive justice is, of course, concerned with the goods individuals can appropriately claim. Nevertheless this picture obscures essential aspects of justice. In the first place, the question of how the goods to be distributed come into existence is neglected in a purely goods-focused view; hence issues of production and its just organization are largely ignored. Furthermore, there is the second problem that the *political* question of who determines the structures of production and distribution and in what ways is disregarded or downplayed, as though a great distribution

³ Wittgenstein, *Philosophical Investigations*, p. 194.

⁴ “A main cause of philosophical disease – a one-sided diet: one nourishes one’s thinking with only one kind of example.” *Ibid.*, p. 155 (§593).

machine – a neutral “distributor”⁵ – could exist that only needs to be programmed correctly using the right “metric” of justice.⁶ But, according to the picture of justice I propose, it is not only essential that there should not be such a machine, because it would mean that justice would no longer be understood as a political accomplishment of the subjects themselves but would turn them into passive recipients of goods – but not of justice. This thought also neglects, in the third place, the fact that justified claims to goods do not simply “exist” but can be arrived at only through discourse in the context of corresponding procedures of justification in which – and this is the *fundamental requirement of justice* – all can in principle participate as free and equal individuals (as I will argue below on the basis of a discourse-theoretical interpretation of the alternative picture of justice).

Finally, in the fourth place, the goods-fixated view of justice also largely leaves the question of injustice out of account; for, by concentrating on overcoming deficiencies in the distribution of goods, someone who suffers deprivation as a result of a natural catastrophe is equivalent to someone who suffers deprivation as a result of economic or political exploitation. Although it is correct that help is required in both cases, according to my understanding of the grammar of justice it is required in the one case as an act of *moral solidarity*, in the other as an act of *justice* conditioned by the nature of one’s involvement in relations of exploitation and injustice and the specific wrong in question.⁷ Hence there are different grounds for action as well as different kinds of action which are required. Ignoring this difference can lead to a situation where – in a dialectic of morality, as it were⁸ – what is actually a requirement of justice

⁵ In a telling phrase of Cohen, “Afterword to chapters one and two,” p. 61.

⁶ For the first two points, see esp. Young, *Justice and the Politics of Difference*, and my “Radical justice: On Iris Marion Young’s critique of the ‘distributive paradigm’.” Young’s decision to call the criticized paradigm “distributive” often leads to the misunderstanding that she was concerned with “political” rather than “social” or distributive justice, which is not the case.

⁷ Here a whole series of cases would have to be distinguished: direct participation in or (joint) causation of injustice; indirect participation in injustice by profiting from it without oneself actively contributing to relations of exploitation; and the (“natural”) duty to put an end to unjust relations, even if one does not benefit from them but possesses the means to overcome them.

⁸ See my *The Right to Justification*, ch. 11.

is seen as an act of generous assistance or “aid.” A critique of such a dialectic can already be found in Kant:

Having the resources to practice such benevolence as depends on the goods of fortune is, for the most part, a result of certain human beings favoured through the injustice of the government, which introduces an inequality of wealth that makes others need their beneficence. Under such circumstances, does a rich man’s help to the needy, on which he so readily prides himself as something meritorious, really deserve to be called beneficence at all?⁹

For all of these reasons, it is especially important when dealing with questions of distributive justice to recognize the *political* point of justice and to liberate oneself from a one-sided picture fixated on quantities of goods (or on a measure of well-being to be produced by them). On a second, fuller and more apt picture, by contrast, justice must be geared to *intersubjective relations and structures*, not to *subjective* or *putatively objective states* of the provision of goods or of well-being. Only in this way, by taking into consideration the *first question of justice* – namely, the question of the justifiability of social relations and, correspondingly, how much “justification power” individuals or groups have in a political context – can a radical, critical conception of justice be developed, one which gets at the roots of relations of injustice. In short, the basic question of justice is not *what you have* but *how you are treated*.¹⁰

3

What might justify one in speaking of a misleading or “false” as opposed to a more “apt” picture of justice, given that the goods- or recipient-centred notion can appeal to the time-honoured principle of *suum cuique*? Is there, in contrast to this, a more original, deeper meaning of justice which the alternative picture captures more fully? In my opinion there is. Consider the very concept of justice.

⁹Kant, *The Metaphysics of Morals*, p. 203.

¹⁰Parfit’s distinction between a “telic” and a “deontic” egalitarian view captures important aspects of these different ways of thinking about justice, and it is interesting to note that – without commenting explicitly on this – he uses the term justice only in connection with the deontic view. See his “Equality or priority?,” p. 90.

That concept possesses a core meaning to which the essential contrasting concept is that of *arbitrariness*,¹¹ understood in a social and political but not a metaphysical sense – that is, assuming the form of arbitrary rule by individuals or by a part of the community (for example, a class) over others, or of the acceptance of social contingencies which lead to social subordination and domination and are rationalized as an unalterable fate, even though they are nothing of the sort. A metaphysical conception of arbitrariness in the context of social justice would go further and aim to eradicate or compensate for all differences between persons that give them an advantage over others due to brute luck, regardless of whether these differences lead to social domination.¹² This goes too far according to the second picture of justice; justice must remain a human task aiming at non-domination, not one for the gods aiming at a world free from natural or historical contingency. Arbitrariness as domination is a human vice of injustice, contingency in general is a fact of life.

The term “domination” is important in this context, for it signifies the arbitrary rule of some over others – that is, rule without proper reasons and justifications and (possibly) without proper structures of justification existing in the first place,¹³ and when people engage in struggles against injustice they are combating forms of domination of this kind. The basic impulse that opposes injustice is not primarily one of wanting something, or more of something, but is instead that of not wanting to be dominated, harassed, or overruled in one’s claim to a *basic right to justification*.¹⁴

¹¹See also Rawls’s definition in *A Theory of Justice*, p. 5.

¹²Without being able to go into details here, I concur with the critiques of “luck egalitarianism” by Anderson, “What is the point of equality?,” and Scheffler, “What is egalitarianism?,” ch. 7. As both of them show, luck egalitarianism is a cousin of libertarianism in that it accepts the results of free choice (or “option luck”) as just, while “victims” of “misfortune” are seen as (passive and needy) recipients of compensation. I do not think, however, that the major difference between these views is to be located in the concept of equality; rather, it stems from two very different ways of thinking about justice.

¹³I explain the difference between such a discourse-theoretical understanding of domination and a neo-republican one based on freedom of choice in my “A Kantian republican conception of justice as non-domination.”

¹⁴I explain this more fully in Forst, *The Right to Justification*.

This *moral* right expresses the demand that no political or social relations should exist that cannot be adequately justified toward those involved. This constitutes the profoundly *political* essence of justice, which is not captured, but is suppressed, by the recipient-focused interpretations of the principle *suum cuique*. The core issue of justice is who determines who receives what, that is, the question answered in Plato in terms of the ideas of the supreme good and the philosopher king.¹⁵ In my picture, the demand for justice is an emancipatory one; reflexively speaking, it rests on the claim to be respected as a subject of justification, that is, to be respected in one's dignity as a being who offers and demands justifications.¹⁶ The person who lacks certain goods should not be regarded as the primary victim of injustice but instead the one who does not "count" when it comes to deciding about the process of producing and allocating of goods.

4

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

An example is provided by the recent debate concerning equality. By this is actually meant two points of discussion: on the one hand, the question "Equality of what?" – of resources, welfare, or capabilities¹⁷ – and, on the other, the question "Why equality at all?" From the perspective of the difference between the two pictures of justice, however, it becomes apparent that both the advocates

¹⁵On this, see Pitkin's critique of Plato's apolitical notion of justice in *Wittgenstein and Justice*, p. 306: "A distribution imposed by fiat from above, on creatures with no claim of their own, programmed to accept as their own what the system assigns, cannot really illustrate the problems of justice but only avoid them."

¹⁶On the notion of dignity, see my "The ground of critique: On the concept of human dignity in social orders of justification," ch. 4 in this volume.

¹⁷See, especially, Cohen, "Equality of what? On welfare, goods, and capabilities"; Dworkin, *Sovereign Virtue. The Theory and Practice of Equality*, part I; Brighouse and Robeyns (eds.), *Measuring Justice: Primary Goods and Capabilities*.

and the opponents of equality frequently operate with the same understanding, and this often finds expression in a specific image, that of the mother who has to divide up a cake and asks herself how this should be done.¹⁸ Egalitarians argue for the primacy of the equal distribution of goods, according to which other arguments for legitimate unequal distributions – for instance, ones based on need, merit or prior claims – then have to be treated as special reasons. Alternatively, an egalitarian calculus of need satisfaction – a measure of welfare – is posited which serves as the goal of distribution.¹⁹ However, in the process the questions of how the cake was produced and, even more importantly, of who gets to play the role of the mother, remain largely unthematized. Yet that is the primary question of justice. Attempts are made to answer it in terms of the distribution of a "good" of "power."²⁰ But no such "good" exists as something to be distributed; on the contrary, power comes about in a different way – namely, through processes of recognition without a prior distributive authority.²¹

5

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

¹⁸See, for example, Tugendhat, *Vorlesungen über Ethik*, pp. 373f.; Hinsch, *Gerechtfertigte Ungleichheiten*, pp. 169f.; Gosepath, *Gleiche Gerechtigkeit*, pp. 250ff. The cake example, though without the mother, can also be found in Berlin, "Equality." See also Rawls in *A Theory of Justice*, p. 74.

¹⁹For a paradigmatic expression, see Arneson, "Luck and equality," and "Luck egalitarianism: An interpretation and defense."

²⁰Tugendhat, *Vorlesungen*, p. 379; Gosepath, *Gleiche Gerechtigkeit*, p. 90.

²¹Young, *Justice and the Politics of Difference*; Habermas, *Between Facts and Norms*. On the importance of the issue of power for questions of justice see also Shapiro, *Democratic Justice*. – The fact that no general "good" of power exists does not mean that the resources necessary to generate power cannot be the object of distributions. I try to show that power should be situated in the space of justifications in "Noumenal power."

life.²² What is bad about such a life is supposed to be that the people in question lack essential goods, not that others are better off.²³

So-called “sufficientarians”²⁴ have taken up these arguments and argue that “at least the especially important, elementary standards of justice are of a nonrelational kind,”²⁵ and that justice is concerned with creating “conditions of life befitting human beings” that can be measured according to “absolute standards of fulfilment,” not according to what others have. On this view, a universal conception of the goods “necessary for a good life” should be produced with reference to particular lists of basic goods or capabilities.

These approaches are also vulnerable to serious objections. Thus Frankfurt’s assertion that the pivotal issue is not how much others have but only whether I have “enough” is valid *only when* conditions of background justice pertain, that is, only when others have not previously taken advantage of me. Otherwise it could not be reconciled with my dignity as a being who is in principle worthy of equal moral respect (a standard that Frankfurt emphasizes). Hence we must look for reasons for such background justice elsewhere.

But, in addition, the idea of “having enough” or “getting enough” does not get at the essence of justice, that is, the prevention of social domination. Justice is always a “relational” matter; it does not first inquire into subjective or objective *states of affairs* but into *relations between human beings* and what they owe to each other for what reasons. In particular, we do not explain the requirements of justice on the model of morally required aid in specific situations of want or need; instead they come into play in situations where what is at stake are relations between human beings that are fundamentally in need of justification, where those involved are connected by political relations of rule or by social relations of cooperation in the production and distribution of goods – or, as is often the case, by relations of “negative cooperation,” of coercion or domination (whether by legal, economic or political means). It makes a huge difference whether someone is *deprived of* certain goods and opportunities unjustly and without justification or whether he or she *lacks* certain goods for whatever reason (for example, as a result of a

²² Frankfurt, “Equality as a moral ideal” and “Equality and respect.”

²³ Thus also Raz, *The Morality of Freedom*, ch. 9.

²⁴ Crisp, “Equality, priority, and compassion.”

²⁵ Krebs, “Einleitung: Die neue Egalitarismuskritik im Überblick,” pp. 17f.

natural catastrophe, as mentioned above). By losing sight of the former context, one misses or conceals the problem of justice as well as that of injustice. Justice requires that those involved in a context of (positive or negative) cooperation should be respected as equals. That means that they should enjoy equal rights to take part in the social and political *order of justification* in which the conditions under which goods are produced and distributed are determined. The state-mandated assignment of goods in accordance with “absolute” standards that abstract from the real context of justice or injustice is far from doing justice to the “dignity” of the individual who seeks justice.

6

But what exactly is supposed to be wrong with taking a sufficiently nuanced theory of *basic capabilities* as the basis for a theory of justice that would put an end to discussions concerning basic goods, resources, welfare, etc.? Isn’t justice after all concerned with the satisfaction of the basic claim to be able to live an autonomous good life? Isn’t a theory that disregards the results of distribution blind, indeed blinder than any depiction of *Justitia*? Martha Nussbaum argues thus in her study *Frontiers of Justice* against Rawls and for a “minimal level of justice” in accordance with a list of basic capabilities and faculties that must be secured.²⁶ A results-oriented view of justice knows the correct outcome and then looks for the necessary procedure leading to it in the best way possible (in Rawls’s terms, “imperfect procedural justice”).²⁷ The procedures themselves are secondary. Against the Rawlsian idea of “pure procedural justice,” in which the acceptability of the result depends on the quality of the procedure, Nussbaum argues as follows:

Defenders of outcome-oriented views are likely to feel that procedural views put the cart before the horse: for surely what matters for justice is the quality of life for people, and we are ultimately going to reject any procedure, however elegant, if it doesn’t give us an outcome that squares well with our intuitions about dignity and fairness. . . . it seems to the outcome-oriented

²⁶ Nussbaum, *Frontiers of Justice*, p. 74.

²⁷ Rawls, *A Theory of Justice*, pp. 74f.

theorist as if a cook has a fancy, sophisticated pasta-maker, and assures her guests that the pasta made in this machine will be by definition good, since it is the best machine on the market.²⁸

Here, too, the pictures are revealing. The idea of a “machine” signals an exclusive orientation to results: “The capabilities approach goes straight to the content of the outcome, looks at it, and asks whether it seems compatible with a life in accordance with human . . . dignity.”²⁹ Justice is an instrument that produces something, and the result counts, not the internal workings of the machine. But this misses the political point of justice. Political and social justice is a matter of how a context of political rule and social cooperation is constituted; and the first question in this regard is how individuals are involved in political and social relations generally and in the production of material and immaterial goods in particular, so that a result is just only if it is produced under conditions that can be accepted by all, that is, conditions of non-domination.³⁰ From a relational point of view, it might be a “good” thing if a great Leviathan were to hand out manna as an all-purpose good (in comparison to a situation of dire need), but that would have little to do with political and social justice. Were a dictatorship to ensure that basic capabilities were largely assured, that would indeed be “better” by certain standards than a destitute democracy, but it would not be more just. Justice is not a criterion for universal levels of goods or for all efforts to overcome privation

²⁸ Nussbaum, *Frontiers*, p. 82.

²⁹ *Ibid.*, p. 87.

³⁰ The meaning of “cooperation” in this context should not be understood in such a way that it prescribes certain stereotypical or economic ideals of the ability to cooperate and excludes persons who, for example, are not yet or are no longer able to participate in the “normal” labour market. What is meant is a form of social cooperation in a wider sense of sharing a social and political order. Nussbaum, *Frontiers*, p. 121, correctly stresses the need for such a broad concept of cooperation. In contrast to her, however, I do not think that this extension is a matter of benevolence (*ibid.*, p. 122) because the claim to non-domination also holds for those who are denied the opportunity of full social membership and participation within a basic structure due to a disability – a participation which should also be defined in reciprocal and general terms in the light of their abilities. The terms of cooperation must be determined in a discursive manner. A community of justification is not a community of “mutual advantage” in the narrow sense.

but for quite specific ones, namely, those which eliminate arbitrary rule – that is, domination and exploitation. The primary demand of justice is not that human beings should obtain certain goods but that they should be agents equipped with equal rights within a social context – whether national or transnational³¹ – who can raise specific claims to goods on this basis.

7

A number of theories are ambivalent with respect to the two pictures of justice and contain aspects of both.³² Amartya Sen’s interpretation of the idea of justice is an example. He makes a different distinction between two basic ways of reasoning about justice from the one I suggest. Whereas in his view “transcendental institutionalism” concentrates on an ideal of perfect justice and on institutions rather than on actual behaviours of persons, “realization-focused comparison,” the approach which Sen favours, emphasizes comparative assessments of states of affairs and of “the kind of lives that people can actually lead.”³³ Against ideal theories, Sen argues that comparative assessments of the quality of life and the justice of a society can be made even when there is disagreement over “perfect” justice, and he proposes the capability approach as explaining the “material of justice” and an account of public reason as the medium of judgment.

If we compare Sen’s distinction with the one between the two pictures, it becomes apparent that the relational and

³¹ See my discussion of transnational contexts of justice in *The Right to Justification*, Part III.

³² In the German version of this chapter I discussed Axel Honneth’s theory of recognition as likewise ambivalent in this sense; see “Zwei Bilder der Gerechtigkeit,” pp. 47–51. However, given that this analysis did not refer to the new, more complex approach developed in Honneth, *Das Recht der Freiheit*, I have not included it in the English version.

³³ Sen, *The Idea of Justice*, pp. 7, 10. I cannot discuss here the issue of whether Sen correctly interprets Rawls’s theory as a model of “transcendental institutionalism.” Briefly, I do not see Rawls as focusing exclusively on institutions rather than on persons and their lives, and, since Rawls leaves open such basic institutional questions as whether the well-ordered society has a written constitution or whether there will be a private right of ownership of means of production, I believe one should instead speak of “institutional agnosticism” in Rawls.

structure-oriented picture of justice which I favour does not pursue an abstract “ideal theory” but inquires instead into the social relations of rule or domination that exist and need to be transformed into justifiable relations. Also, the relational picture does not just take institutions into account but also social relations in a more comprehensive sense, though it sees institutions as essential for realizing justice. Finally, the second picture of justice shares with Sen the critique of a “goods-centred”³⁴ view when it comes to the material of justice.

Still, despite these parallels, the approach favoured by Sen, viewed from a relational or practice-oriented perspective on justice, neglects important considerations of justice – namely, the question of *injustice*, the question of *obligations*, the question of *principles* and the question of *institutions* of justice. With regard to injustice, as explained above, how asymmetries of capabilities, if we take that as the material of justice, actually came about makes an essential difference. Are they the result of deliberate action, of structures that benefit some rather than others and are upheld deliberately, or are they the result of circumstances the responsibility for which cannot be ascertained? For any theory that, like Sen’s, aims to eradicate or at least reduce concrete forms of injustice, it is essential to have a clear focus on these injustices and their historical and structural background. To be sure, a lack of basic capabilities due to hunger or bad health needs to be overcome whatever story is told about how it arose; but for a theory of *justice* it is essential to ask the genealogical question. Sen is aware of that point when, for example, he asserts that “there is a real difference between some people dying of starvation due to circumstances beyond anyone’s control and those people being starved to death through the design of those wanting to bring about that outcome.”³⁵ But because the capability approach is primarily focused on outcomes, its ability to integrate such distinctions into its basic framework is limited.

This has implications for its account of *obligations*. Justice, according to the relational view, inquires into the relations between persons in order to ascertain responsibilities of justice, ranging from those who wilfully committed an injustice, to those who merely benefit, up to those who are only involved insofar as they have the means to change things for the better. According to the

³⁴See especially his critique of Rawls, as developed in Sen, *Inequality Reexamined*, pp. 79–85.

³⁵Sen, *The Idea of Justice*, p. 23.

second picture, locating these responsibilities in the right way is *itself* a demand of justice. Sen, however, has a more consequentialist conception of obligation, one based on capacities and powers of effective action.³⁶ Although he accepts the Kantian distinction between perfect and imperfect obligations,³⁷ the thrust of his argument about power-based obligations of justice is that they are conceived as imperfect obligations directed at certain outcomes.

Sen defends the thesis of a plurality of valid *principles* of justice, be they principles of need, contribution, or utility, as expressed in the example of the distribution of a flute among children who have different types of claims to it.³⁸ Moreover, he makes a strong case for the possibility of judgments of justice within the framework of public reason even in the absence of any consensus on perfect justice. Yet, at this point, the argument for a “plural grounding”³⁹ of judgments of justice and for a “plurality of robust and impartial reasons”⁴⁰ in a given case is too strong, for it leads to an essential vagueness and contestedness as to the issue of trumping principles of justice. This is not just the case when it comes to an equivalent of the Rawlsian first principle of justice; with regard to that, Sen affirms that the capability perspective cannot provide any such principle.⁴¹ But also with respect to judgments of social justice – such as priorities among capabilities and among persons with different deficiencies in capabilities – Sen’s approach does not provide any general principles of assessment.

As far the question of *institutions* is concerned, Sen’s critique of “transcendental institutionalism” leaves little room for a positive theory of institutions. Yet institutions represent essential expressions of social life and they are the primary objects of assessment when it comes to issues of social justice. Individual actions are also important objects of assessment in this regard, though often as part of institutional structures. Most importantly, institutions serve as the guarantors for the realization of principles of equal respect, especially in the guise of institutions of discursive justification. Institutions give expression to these principles, and how institutions work can violate them, not just with respect to outcomes, but

³⁶*Ibid.*, pp. 205, 271.

³⁷*Ibid.*, pp. 372ff.

³⁸*Ibid.*, pp. 12f., 201, 396f.

³⁹*Ibid.*, p. 2.

⁴⁰*Ibid.*, p. 205.

⁴¹*Ibid.*, p. 299.

also and especially when it comes to processes. Sen is alert to the challenge posed by a process-oriented picture of justice to his view, and that is why he suggests the notion of “comprehensive outcomes” rather than mere “culmination outcomes,” for the former take procedural issues into account.⁴² From the perspective of comprehensive outcomes, it is important how a result came about – who participated in a decision, which interests were taken into account, which considerations were decisive, what kind of possibilities there were for contestation, to mention just a few. All of these questions reflect criteria for the justice of institutions, and thus any comprehensive theory must take them into account. But, as Sen admits, the capability approach “cannot pay adequate attention to fairness and equity involved in procedures that have relevance to the idea of justice.”⁴³ I would go even further and suggest that the approach, since it focuses on outcomes and states of affairs, is not only incapable of generating an account of fairness by its own means, but it also needs to accept the priority of the process aspects when it comes to the question of justice.⁴⁴ For justice is about who determines (and with what justification) the basic structure of society as well as its essential institutional workings; and if we want to rule out the great benevolent Leviathan mentioned above as realizing justice by distributing means of well-being, we need to argue for the priority of principles of equal respect, participation and non-domination within the basic structure of a society or across polities in a transnational context. Conceptually speaking, it is one thing to argue for a better distribution and realization of basic capabilities by way of a theory of social *development* and progress, and it is another thing to argue for a comprehensive conception of social and political *justice*. If we focus primarily on realizations, then important aspects of (in)justice will be overlooked.⁴⁵ The most important of all principles of distribution, therefore, is the one which determines who has the authority to decide about who gets a good like the flute (in Sen’s example) in the first place.

⁴²Ibid., p. 22. See also his “Consequential Evaluation and Practical Reason.”

⁴³Sen, *The Idea of Justice*, p. 295.

⁴⁴This is reflected in Sen’s stress on democracy as the basic institution of political justice – an argument that is not used, however, as the basis for a relational and structural, higher-order conception of democratic justice (which I will elaborate on below).

⁴⁵In section 10, I will come back to the question of capabilities and a possible place for them within the relational picture of justice.

8

Here I would like to offer a brief discussion of Rawls’s theory of justice. Since Robert Nozick’s influential critique, Rawls’s theory is generally interpreted as belonging to the first, allocative-distributive and recipient-oriented understanding of justice. Nozick criticizes Rawls’s principles of justice as “end-state principles” which correspond to pre-given patterns which illegitimately constrain the liberty of market participants.⁴⁶ But Rawls’s theory is also regarded from an entirely different perspective such as that of Thomas Pogge, which is far removed from libertarian approaches, as a “purely recipient-oriented approach,” because it concentrates on comparisons between distributive results as regards basic goods which correspond to certain higher-level interests of persons in such goods.⁴⁷ This assessment has a certain justification, given the importance of primary goods in Rawls’s theory. Nevertheless, in my view, Rawls does not share the first but the second picture of justice, the one which accords priority to social structures and relations and the social status of the individual. Let me explain this briefly.

In the first place, the Kantian character of Rawls’s theory implies that the autonomy of free and equal persons, which is at the normative heart of the approach, is not the autonomy of individuals who are primarily conceived as recipients of goods which they would need in order to lead a “good life.” It is rather the constructive autonomy of free and equal subjects of justification which manifests itself in the fact that the persons are able to regard the principles of justice as morally self-given; hence, the citizens view the social basic structure which is grounded in this way as the social expression of their self-determination.⁴⁸ The essential conception of autonomy is the autonomy to actively determine the basic structure, not the autonomy to enjoy its goods (even though this is also important). The emphasis on public reason in the later works underscores this because public reason represents the medium of discursive justification in which an autonomous conception of justice is grounded that all can accept as free and equal: “In

⁴⁶Nozick, *Anarchy, State, and Utopia*, pp. 149ff. Young, *Justice and the Politics of Difference*, p. 28, is in agreement with Nozick in criticizing end-state theories (to which in her view the Rawlsian belongs).

⁴⁷Pogge, “The incoherence between Rawls’s theories of justice,” p. 1739.

⁴⁸Rawls, *A Theory of Justice*, §40.

affirming the political doctrine as a whole we, as citizens, are ourselves autonomous, politically speaking."⁴⁹

An important aspect of the Kantian background of the theory consists in the fact that its central concern is to exclude the aspects of the social world "that seem arbitrary from a moral point of view" both in justifying the principles and in the institutions of the basic structure.⁵⁰ In this way differences in natural endowments and social inequalities should not lead to advantages that cannot be legitimized, especially towards the worst off. This is a criterion for social relations between citizens of a "well-ordered society," not primarily a criterion for determining the amounts of goods to which everyone can lay claim.⁵¹ That the pivotal issue here is the absence of relations of unjustifiable social rule – hence, expressed in a different language, *non-domination* – is in my view the most appropriate interpretation of this idea of avoiding social arbitrariness.

This leads to the most important concept in this regard, one which marks the difference from libertarianism most clearly – namely, that of social cooperation. Rawls's conception of "procedural justice" is geared to social relations and structures such that it leads to a system of social cooperation which expresses the "sociability of human beings" in such a way that they complement each other in productive ways and participate in a context of cooperation which includes all as politically and socially autonomous members – think of the picture of the orchestra employed by Rawls.⁵² It is particularly significant in this regard how Rawls contrasts his conception of justice as fairness with a conception of "allocative justice":

The problem of distributive justice in justice as fairness is always this: How are the institutions of the basic structure to be regulated as one unified scheme of institutions so that a fair, efficient, and productive system of social cooperation can be maintained over time, from one generation to the next? Contrast this with the very different problem of how a given bundle of commodities is to be distributed, or allocated, among various individuals

⁴⁹Rawls, *Political Liberalism*, p. 98.

⁵⁰Rawls, *A Theory of Justice*, p. 14.

⁵¹See also Scheffler, "What is egalitarianism?," pp. 195f.

⁵²Rawls, *A Theory of Justice*, pp. 458ff. On the notion of cooperation, see fn. 30 above.

whose particular needs, desires, and preferences are known to us, and who have not cooperated in any way to produce those commodities. This second problem is that of allocative justice. [...] We reject the idea of allocative justice as incompatible with the fundamental idea by which justice as fairness is organised ... Citizens are seen as cooperating to produce the social resources on which their claims are made. In a well ordered society ... the distribution of income and wealth illustrates what we may call pure background procedural justice. The basic structure is arranged so that when everyone follows the publicly recognised rules of cooperation, and honours the claims the rules specify, the particular distributions of goods that result are acceptable as just ... whatever these distributions turn out to be.⁵³

The overriding issue within such a context of production and distribution is who the individuals "are," and not primarily what they receive according to an independent yardstick. The decisive point is that the institutions function in accordance with justified principles, such as the difference principle, and do not involve any social privileges, and that they do not lead to the creation and cementing of groups which are largely excluded from the system of cooperation and permanently depend on allocative transfers of goods. This is also what underlies Rawls's emphatic criticism of the capitalist welfare state model, because this, in contrast to a "property-owning democracy," does not ensure that the ownership of wealth and capital is sufficiently dispersed and as a result cannot prevent "a small part of society from controlling the economy, and indirectly, political life as well."⁵⁴ Here I cannot explore further to what extent Rawls's theory sufficiently accommodates the principle that social asymmetries are in need of justification and provides for corresponding institutional practices of justification. The remarks below show how a discourse-theoretical conception differs in fundamental ways from the Rawlsian conception.

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Let us review the essential points made thus far from a constructive perspective. I have defined justice as the human virtue and

⁵³Rawls, *Justice As Fairness: A Restatement*, p. 50.

⁵⁴*Ibid.*, p. 139.

moral-political imperative to oppose relations of arbitrary rule or domination. Domination is rule “without justification” and it is assumed that a just social order is one to which free and equal persons could give their assent – not just their counterfactual assent but assent based on institutionalized justification procedures. This is a *recursive* implication of the fact that what is at stake in political and social justice is norms of an institutional basic structure which lays claim to reciprocal and general validity. Thus a *supreme principle* holds within such a framework – namely, the *principle of general and reciprocal justification* – which states that every claim to goods, rights, or liberties must be justified in a reciprocal and general manner, where one side may not simply project its reasons onto the other but has to justify itself discursively.

According to this principle, as I remarked above, each member of a context of justice has a fundamental *right to justification*, that is, a right to be offered appropriate reasons for the norms of justice that are supposed to hold generally. Respect for this right is a universal requirement, and the moral equality expressed by it provides the foundation for farther-reaching claims to political and social justice.⁵⁵ Every further norm of justice is relational in the sense that it must be constructed via a procedure of reciprocal-general justification. Then requirements of justice are not moral acts of assistance but obligatory acts within a social system of rule and cooperation.

The decisive criteria of justice, therefore, are those of reciprocity and generality, notwithstanding the plurality of goods and normative viewpoints concerning the distribution of educational opportunities, health care goods, etc. These criteria serve to filter out unacceptable claims to privilege, for the intrinsic social dynamic of justice is always geared in the first instance to the question: Which positions of advantage are not justifiable towards those who do not enjoy these advantages but are nevertheless supposed to recognize them?

This brings us to the central insight for the problem of political and social justice – namely, that *the first question of justice is the question of power*. For justice is not only a matter of which goods, for which reasons and in what amounts, should legitimately be allocated to whom, but in particular of *how* these goods come into the

⁵⁵ Having this right does not depend on a particular capacity to exercise it; it is a right of persons in a deontological sense. Acquiring the means to use this right effectively, however, is a matter of justice.

world in the first place and of *who* decides on their allocation and *how* this allocation is made. Theories of a predominantly allocative-distributive kind are accordingly “oblivious to power” insofar as they conceive of justice exclusively from the “recipient side,” and if necessary call for “redistributions,” without emphasizing the political question of how the structures of production and allocation of goods are determined in the first place. The claim that the question of power is the first question of justice means that justice has its proper place where the central justifications for a social basic structure must be provided and the institutional ground rules are laid down which determine social life from the bottom up. Everything depends, if you will, on the relations of justification within a society. Power, understood as the effective “justificatory power” of individuals, is the higher-level good of justice. It is the “discursive” power to demand and provide justifications and to challenge false legitimations. This amounts to an argument for a “political turn” in the debate concerning justice and for a *critical theory of justice as a critique of relations of justification*.

The argument outlined makes possible an *autonomous*, reflexively grounded theory of justice that rests on no other values or truths than the principle of justification itself. The principle in question, however, is not merely a principle of discursive reason but is itself a moral principle.⁵⁶ This constitutes the Kantian character of the approach, which means that it emphasizes the autonomy of those for whom certain norms of justice are supposed to be binding – in other words, the autonomy and dignity that consists in being subject to no norms or structures other than those which can be justified toward the individual. This dignity is violated when individuals are regarded merely as recipients of redistributive measures and not as independent agents of justice.

10

A comprehensive theory of political and social justice can be constructed on this basis, something at which I can only hint here.⁵⁷ First we must make a conceptual distinction between *fundamental (minimal)* and *full (maximal) justice*. Whereas the task

⁵⁶ See Forst, *The Right to Justification*, Part I.

⁵⁷ For a more detailed discussion, see Forst, *Contexts of Justice* and *The Right to Justification*.

of fundamental justice is to construct a *basic structure of justification*, the task of full justice is to construct a *justified basic structure*. The former is necessary in order to pursue the latter, that is, a “putting-into-effect” of justification through constructive, discursive democratic procedures in which the “justificatory power” is distributed as evenly as possible among the citizens. This calls for certain rights and institutions and a multiplicity of means and specific capabilities⁵⁸ and information, including real opportunities to intervene and exercise control within the basic structure – hence, not a “minimalist” structure, yet one justified in material terms solely on the basis of the principle of justification. The question of what is included in this minimum must be legitimized and assessed in accordance with the criteria of reciprocity and generality. The result is a higher-level, discursive version of the Rawlsian “difference principle,” which, according to Rawls, confers a “veto” on those who are worst off: “those who have gained more must do so on terms that are justifiable to those who have gained the least.”⁵⁹ This principle does not as a result itself become a particular principle of distribution (as in Rawls), however, but a higher-level principle of justification of possible distributions.⁶⁰

To put it in apparently paradoxical terms, fundamental justice is thus a substantive starting point of procedural justice. Arguments for a basic structure are based on a moral right to justification in which individuals themselves have real political and social opportunities to determine the institutions of this structure in a reciprocal-general, autonomous manner. Fundamental justice assures all citizens an effective status “as equals,” as citizens with opportunities to participate and wield influence. Fundamental justice is violated when primary justification power is not secured for all equally in the most important institutions.

On this basis it becomes possible to strive for a differentiated, justified basic structure, that is, full justice. Democratic procedures

⁵⁸ Here the “capabilities” approach has a justification, though one associated with the task of constructing fundamental justice.

⁵⁹ Rawls, *A Theory of Justice*, p. 131.

⁶⁰ Here we must be alert to the fact that the group of the “worst off” can change according to which good is to be allocated. The unemployed, single parents, the elderly, the sick, or ethnic minorities, to mention just a few, could have priority in a given instance and combinations of these characteristics, in particular, aggravate the problem (especially in the light of the history of gender relations).

must determine which goods are to be allocated to whom by whom on what scale and for what reasons. Whereas fundamental justice must be laid down in a recursive and discursive manner by reference to the necessary conditions of fair justification opportunities, other substantive considerations, and certainly also social-relative considerations (in Michael Walzer’s sense), also enter into considerations of full justice.⁶¹ For example, how goods, such as health, work, leisure, etc., should be distributed must on this approach always be determined first in the light of the functional requirements of fundamental justice, and then, in addition, with a view to the corresponding goods and the reasons that favour one or the other distributive scheme (which are also subject to change). As long as fundamental justice pertains, such discourses will not fall prey to illegitimate inequalities of power. Once again it becomes apparent why the first question of justice is the question of power.

11

What, then, is the ultimate difference between the two pictures of justice that I have differentiated? Perhaps it resides in two different moral ideas of human beings, as beings who should not lack certain goods that are necessary for a “good” life or one “befitting a human being,” on the one hand, and as beings whose dignity consists in not being subject to domination, on the other. Both are important ideas, and any comprehensive moral theory has to include them properly. But on my understanding, the second idea is central for the grammar of *justice*.

⁶¹ Walzer, *Spheres of Justice*. In later writings, Walzer has modified his approach in such a way that the principle of “democratic citizenship” plays the leading role in all spheres. See his “Response,” especially pp. 286ff.