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The Borders of Justice

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Contents

The Borders of Justice

Editors' Introduction

Étienne Balibar, Sandro Mezzadra,
and Ranabir Samaddar

Although the theme of justice has occupied a high ground in philosophical discussions since the beginning of political philosophy, in terms of democracy and popular politics, its exact meaning and implications have been nebulous, in part because justice, in reality, is a meeting ground of many ideas, situations, concepts, expectations, mechanisms, and practices. Many things intersect to form the context of social justice: ethical ideas of the people, laws, the evolving nature of claims, the pattern of collective claim-making politics, institutional issues relating to the delivery mechanisms of justice, ideas about rights and entitlements, ideas among the citizens about the responsibility of the rulers, and many situations generating countless conditions of justice. All these contribute to the social context, form, and site of justice.

This book aims to explore some of the complexities of justice that emerge from its "social embeddedness." Three years ago, as part of a collective research program on social justice undertaken by the Calcutta Research Group, we had planned to deliberate on what we had conceptualized as the "other spheres of justice." As we began our discussions around a set of presentations, some of which later found their places in this volume, we realized that what we were terming "other spheres" were actually the *borders* of various conceptions, ideas, and forms of justice. "Others" anticipate the "this," "the existing," "the main," and so on, whose others are then anticipated in turn. In this sense, justice is always conceptualized as achieving the just on the borders,

and thus, justice is achieved when the situation at the margin, anticipating the other, has been addressed. Justice and marginalities or marginal situations remain integrally connected, and precisely this connection shows how central and strategic situations constructed as marginal and borderline are in the field of contentious politics. Power, force, institution, rule, law, right, virtue, or ethics cannot alone appear as a complete requirement of justice, though each of these may be a necessary element. In each of these sites justice appears as a borderline existence. The essays of this volume are dialogic—they speak to each other—and they convey a sense of fleeting glimpses, as if only when these essays have conversed among themselves can they give us a clear idea of what we wanted to address: *other spheres of justice. Justice is addressed only by addressing the other—that is, by addressing its multiple borders.* And in this perspective, justice also allows, and at times creates, the scope for a dialogue between philosophy and politics.

Bringing together the writings of scholars from different geographic and disciplinary backgrounds working on the theme of justice, this volume concentrates on finding out the reasons that make justice always a complex concept and a reality, that indeed suggest its "hidden abode," its neglected other scene, taking us unfailingly to the beyond yet calling us back as if in a circle to return to its social character. The book touches on some of the crucial issues at stake in contemporary debates on justice, combining a theoretical perspective with an engagement with specific contexts of claims, judicial administration, and experiences of injustice. The wide range of these contexts marked by several overlaps is one of the defining features of the book, which comes out of a long-lasting dialogue between scholars engaged in critical thinking in India, Europe, South America, and Australia.

All contributors share the idea, developed for instance by Jacques Derrida, among others (and discussed in this book particularly in the chapters by Balibar and Samaddar), of the structural excess of justice with respect to every historically given regime of justice administration. This leads to an emphasis on the one hand on the problematic and elusive nature of justice, and on the other hand on its dynamic moment—that is, on its relation with different forms of struggle and with conflictive processes of subjectivation. It is precisely this element of *struggles in and for justice* that builds the focus of several chapters of the book, which combines theoretical perspectives and case studies to show how the threshold between procedural justice and its excess crystallizes in the multiplication of *borders of justice*. Also shown is how struggles arising on this threshold and around these borders play a crucial role in the transformation of historically given regimes of justice and in the articulation of popular politics. Far from aiming at a new ambitious theory

of justice, the book shows the enduring relevance of the concept of justice by looking at the blind spots of existing theories of justice, at what is left outside their reach, at their margins.

The importance of struggles for any theory of justice has been widely recognized in recent debates. The great Hegelian tale of "struggles for recognition" has been tackled and developed by a wide variety of authors and approaches, deeply influencing, for instance, discussions of "multicultural" justice. The names Charles Taylor and Axel Honneth come first of all to mind here (and their works are discussed in detail in some of the chapters that follow, most notably in the essays by Naishtat, Rudanko, and Renault). In a different perspective, Charles Tilly's and Sidney Tarrow's works on "contentious politics" have also been an important source of inspiration for us. One could add to these the emphasis from the point of view of legal theory on material developments—an emphasis that has often characterized legal debates—in particular, the debates *de jure condendo* (that is, on the foundation of new law). To give some examples, one could recall the famous lecture given by the German jurist Rudolph von Jhering in 1872 (*The Struggle for Law*) or, in the U.S. context, the tradition of "civil disobedience" reelaborated by John Rawls in *A Theory of Justice* and, although on a different ground, by Ronald Dworkin in *Taking Rights Seriously*. And we should also mention here several attempts to give civil disobedience a more political (that is, not merely legal) foundation: the names Hannah Arendt and Howard Zinn immediately come to mind in this respect.

While we keep all these approaches (and many others) in mind, what distinguishes the approach followed in this book is a more direct focus on the connection between the moment of *claim* and the processes of subjectivation that give rise to the justice-seeking subject. On the one hand, this means opening up the space for a programmatic intertwining between theoretical reflection and ethnographic account of specific contexts of injustice and struggles for justice; the chapters by Renault and Sinha are particularly effective in this regard, but the "methodological" point is shared by all contributors. On the other hand, it means that this book challenges and problematizes the very idea of a purely normative theory of justice by bringing material conditions "back in" (among the chapters that address the limits of a merely normative theory of justice, see the essay by Das).

When we started the conversation that eventually resulted in this book, a further important point of reference and departure was Michael Walzer's now-famous book *Spheres of Justice*. It was clear to us since the beginning, however, that we were trying to shed light on "other" spheres of justice. As Mezzadra and Neilson in particular show in their chapter, the mere fact that

for Walzer the decision on "membership" in the political community must precede all other decisions on the "just" distribution of social goods bears the risk of *neutralizing* the strategic element of the *border* between members and nonmembers (that means citizens and noncitizens) around which some of the most intense struggles for justice arise in the contemporary world (see, for instance, the chapter by Halpérin). The "other" scenes of justice investigated in this book (from a wide variety of "borderscapes" to the debate on abortion in India and in the United States; from the movements for the rights to coastal waters in the southern Indian state of Kerala to the uprisings in the French *banlieues* or to the claims for justice of Australian Aboriginal communities) are therefore defined not only in terms of institutional and anthropological functions but also in terms of social and geographic loci, including the "paradoxical" loci, of which the border itself, in its multiple aspects, is one of the most significant instances.

Therefore justice will be always burdened with our notions of the social and thus clouded with too many ideas, realities, and expectations. Even when the reality of justice in our time is continuously transformed with the Midas touch of money, the society of the subjects weighs everything with the criterion of justice—law, government, delivery mechanisms of administration, punishment, peace, war, reconciliation, revenge, reproof, relation with the rulers, historical memory: everything that affects the subject's individual-collective life fraught with different sociopolitical issues. The idea of justice, we can therefore say, is the great supplement of our time. Hence, any theoretical and empirical inquiry into the idea of justice remains tantalizing.

The idea of justice approaches various spheres of justice yet recoils from finally defining, once and for all, what justice is. The question therefore cannot be fully answered: Is justice then fundamentally a response to what is perceived as injustice, a reaction, an idea better understood as a negative notion (the *other* of injustice) and understood properly only when taken as response to injustice? The essays we present here suggest to a certain extent that the answer is yes; hence, there is the prominent idea of the inexhaustible nature of the phenomenon, as various ethnographic accounts of popular life and even analytic commentaries testify. Yet there is something more to this manifold nature of justice, which we can attach concretely only to its forms, such as attainment of dignity, reconciliation, retribution, instant and restorative restitution, pardon, sentencing, or redress of historic injustice. These forms indicate the particular ways in which ideas of justice respond to various conceivable situations; these ideas bring to mind certain injustices committed as well as some positive principles and practices that build the foundations of

these forms. In popular politics justice remains a contentious phenomenon. In philosophy it always appears as a paradox.

One of the significant themes addressed in various chapters (most notably those by Halpérin and Samaddar) is the relation between law and justice. Once again, the strategy has been to go into specifics that will tell us of the formations in which justice and law have hitherto related to each other—in philosophical discourses and in public politics. A constitution, insofar as it lays down the profile of fundamental legal justice in course, appears as the other scene of that reality, in which political justice makes sense only when it has addressed issues of *social justice*, and politics makes sense only in the mirror of popular perceptions of justice. All of these speak of what we discuss above as the "excess" of justice. This phenomenon can also be termed a "justice gap," which means the gap between claims for justice and the governmental (including legal and juridical) regime of justice. Thus, this volume, as if in a continuing narrative, operates on two registers—one that is linked with the context of political contentions, mass politics, judicial activism, and policy games, and the other that shows how the policy game goes on in the language of courts and law.

Yet both of these registers indicate how the issue of justice remains inextricably bound up with the issue of expansion of democracy, because democracy widens not as we are told historically through calls for liberty or laissez-faire or economic liberalism or individual freedom or even nationalism but through calls and claims for attaining or ensuring *justice*. Can we say then that the *gap* is never fully bridgeable? And to the question of what constitutes the *social* in social justice, can we say then that the social (in the context of justice) is what remains beyond what is governmentally and administratively constituted, or constituted by considerations of rule (that is, considerations of territory, security, and streamlining of people into population groups)? Maybe that, too, is social justice, yet clearly, in the domain of social justice, we have no consensus. Conflicts abound.

Finally, and by way of concluding, we are once again seized with borders of justice—that is, justice that addresses borderline existences, borderland existences. Migration is a great indicator of marginalities, and more often than not, in this nationally constituted universe and capital-constructed market, migration indicates marginal situations, marginal actors. It also indicates processes of making segments marginal, techniques of producing marginal situations, and the asymmetric power play in society. But more than all these, marginalities indicate strategies of inclusion, exclusion, differential inclusion and exclusion, and most important, techniques of turning spaces into marginal enclaves—and all these in the interest of effective government. What is at stake

in these conflict-ridden processes is the very *production* of marginality, which can be understood only as the result of specific struggles and tense constellations of power and resistance. In this dynamic field, the migrant appears as the final figure of the justice-seeking subject. In today's world, as the international jurist François Crépeau has argued, migrants remain a test for democracy.

Until now we have tried to show the crosscutting themes addressed in various chapters of this book. For easy reading we now present a chapter-by-chapter summary of the book.

In Chapter 1, Étienne Balibar stresses the equivocal and problematic nature of the concept of justice through a reading of three classical authors of the Western philosophical tradition. His aim is to point out the tensions that crisscross the relationships of justice and law (Pascal), justice and subjectivity (Plato), and justice and conflict (Marx). Inscribing himself in a long tradition of republican and democratic thought that proclaims the inseparability of justice and equality, Balibar shows how the concept of justice is characterized by what he calls an "internal void" or an "internal excess," which challenges—through the emergence of specific subjective claims and struggles against injustice—the "plenitude" of the social fabric.

In Chapter 2, Francisco Naishtat discusses some of the recent attempts to establish a theory of global justice (from Thomas Pogge to John Rawls and Jürgen Habermas) to shed light on what he calls the political issue of global justice, which means the rebuilding of a common on a global scale, rooted within the historical tradition of the cosmopolitan public sphere. This political issue is often obscured by theories referring to an a priori universality of the principles of justice in general, and can only be redeemed, says Naishtat, by a theoretical practice looking at "our common historical world, as it is affected through the process of capitalist globalization, and as it can be *disrupted by political action*." This leads to an emphasis on what Naishtat calls "disruptive justice."

The problematic nature of the universality of the principles of justice is also at stake in Juha Rudanko's essay in Chapter 3. Discussing the relationship between liberalism and multiculturalism, the author criticizes both Will Kymlicka's attempt to ground a liberal multiculturalism on autonomy and Brian Barry's attack on multiculturalism from a liberal egalitarian standpoint. Rudanko rather finds a possible base for a liberal multiculturalism in John Rawls's notion of self-respect, which he interprets in a very original way, stressing the traces of Rousseau and Hegel in Rawls's theory.

Subir Sinha presents in Chapter 4 an alternative approach to the topic of subaltern politics that have been most notably dealt with in India by the

Subaltern Studies project. Working with the notion of "subaltern power," he contends that subaltern struggles and movements played a constituent role in forging the postcolonial modernity we inhabit, not only because of their resistance to dominant elites but also "positively"—that is, with their ways of seeing and imagining the world as well as their notions of a just society. To illustrate this, he particularly draws on two movements that started in the late 1960s: for rights to coastal waters in the southern Indian state of Kerala and to forests in what is now the Indian state of Uttarakhand.

Chapter 5, by Emmanuel Renault, also deals with struggles for and of justice. Considering justice as a concept belonging to the class of "essentially contested" concepts (W. B. Gallie), he adds that its "abolitionist" nature makes the political concept of justice inseparable from a claim against social *injustice*. Starting from these basic assumptions, he proposes a discussion of several theoretical approaches to the topic of justice; his discussion incorporates as well some instances of struggles against injustice. In the concluding part of his chapter, Renault develops a "pragmatist perspective" on the productivity of experiences of social injustice, centered on the idea of the specific "framing power" that these experiences may generate.

In Chapter 6, Anirban Das starts from the thesis that the moment of decision is an aesthetic moment and that the singularity of the event called "justice" is enacted at this moment. This is the moment when the senses, in following their own particular logics, exceed the logical—but exceed without erasing. The decision he thus speaks of is a decision that does not flow from prior calculations of the one who decides. From this theoretical standpoint, Das engages himself in a critical review of recent debates on abortion in the United States and in India as a specific instance in which the limits of thinking in terms of universal solutions to a problem become apparent.

Ranabir Samaddar shows in Chapter 7 how in the Indian experience, the rich political concept of justice suffers deficit in a double absorption: justice subsumed under law and politics subsumed under constitutionalism. Combining constitutional and social history, he particularly stresses that the Indian case allows us to focus on a fundamental problematic of modern politics: its clarity about rights and its incoherence about justice. In a kind of Machiavellian move, Samaddar proposes a "return to the principles" of historical, independent India, where "politics began with a thousand cries for justice," and proposes the outlines of an alternative model of justice, which he calls "dialogic justice." Indeed, the essay shows what the other spheres could have been—always in the imaginary, and always lurching forward to enter the world of practices, the justice-seeking subject in this way becomes the true constitutive element of these possible other spheres.

Chapter 8, by Jean-Louis Halpérin, deals with crucial questions for any discussion on justice: Who are the subjects of justice? And how are the borders of justice traced from the point of view of law? In the modern European experience, the nation-state has successfully imposed itself as the main "container" of justice: its courts have become the privileged points of reference for justice-seeking subjects—that is, for its *citizens*. Nevertheless, this model has been challenged both by a set of claims pointing beyond the borders of the nation-state and by legal developments articulating new frameworks of conflict resolution. A new "legal pluralism" seems in the making, and Halpérin traces its penetration into the French legal order, which means into a legal order that used to be considered the "exalted reign of statutory and codified law." His analysis of the increasing porosity of the borders of the French national legal order stresses in particular the important role that migrants (that is, noncitizens) came to play in the legal life of the country, leading to relevant transformations in the way in which justice is viewed and administered.

In Chapter 9, Sandro Mezzadra and Brett Neilson propose a critical analysis of the relation of justice and borders, starting from the assumption that, as Étienne Balibar wrote some years ago, borders no longer exist at the edge of the territory, marking the point where it ends, but have been transported into the middle of political space. Bringing together Marx's and Foucalt's criticisms of the liberal theory of justice and their perspectives on the production of subjectivity, Mezzadra and Neilson explore some of the multifarious transformations of the border and migration "regime" that can be observed in several parts of the globe and contend that an analysis of the relationship of justice and borders, which has hitherto focused on the binary inclusion/exclusion, now needs to be enlarged to grasp the emerging mechanisms of "differential inclusion," as well as the political significance of "border struggles" in our global world in the context of the urge for justice now being evidenced in all situations and sites of existence on the borders.

The editors collectively express their thanks to the Calcutta Research Group, which organized the Third Critical Studies Conference in Kolkata in September 2007. The conference gave rise to some of the ideas later explored in the spirit of a collective workshop. The editors also thank the individual contributors, without whose willingness to discuss and formulate new ideas and ways of thinking this volume would not have been a reality. Finally, they thank Temple University Press for agreeing to publish an experimental volume and the two anonymous reviewers for their extremely useful comments.

1

Justice and Equality

A Political Dilemma? Pascal, Plato, Marx

Étienne Balibar

The title of my presentation should not be misleading: I will certainly not defend the idea that we should choose between the values designated by the names "justice" and "equality," which to me are inseparable (in this sense, I gladly inscribe myself in a long tradition of republican and democratic thinkers who proclaimed their inseparability).[1] But I want to draw attention to the fact that their articulation remains theoretically and practically problematic, and the tighter the relationship we establish between them, which culminates in a definition of each term through the mediation of the other, the more this becomes the case. Inherent in this conceptual riddle is a methodological question that is not deprived of contemporary relevance, even if it may appear rather academic in its formulation: Which point of view should have primacy—*moral philosophy* (to which the idea of justice remains traditionally and dominantly attached) or *political philosophy* (whose modern discourse has been crucially framed around the claim of equality among citizens, albeit in a typical association with the claim of liberty, as we will have to remember)? This is where a dilemma could possibly emerge. Interestingly, the roles in this dilemma are not distributed in advance, especially when we consider social structure, social hierarchies, and social welfare. It can appear that considerations of social justice and injustice are much needed, not only to provide the moral background on which political institutions and procedures acquire their political meaning, but to force the political to move from

a purely formal to a substantial and practical definition. It can also appear that around the issue of social equality—equality among groups in the broad sense and not only among individuals—the typical conflicts between opposite conceptions of justice become inescapable, which means that justice appears now as a fully political and not only moral issue. The idea of the political thus becomes at the same time intensified and complicated, even destabilized, by any deep investigation of the tensions, choices, and antinomies involved in the association of justice with equality. The political has to take into account its internal other—of which perhaps the moral issues are only a symptom and an index—which, in agreement with several contemporary philosophers, I suggest to call the "impolitical" (rather than unpolitical) side of politics.[2] This perspective is the focus of the chapter.

A preliminary remark, which I am not going to develop now because it will be illustrated in the continuation, but which I believe is crucial, is the following: each of the concepts with which we are dealing here (justice, equality, but also all the correlative notions, such as order, rights, power, freedom, society or community, etc.) is profoundly *equivocal* or constantly shifting between different definitions that are not arbitrary but reflect practical necessities and constraints, for which there is no final procedure of simplification, although there can and must be decisions of ordering and selecting.[3] Elaborating a little on the title of a remarkable essay by Ranabir Samaddar, from which I draw much of my inspiration, this equivocity brings our attention to the fact that there is not only a "game of justice," but, as he would show himself, indeed there are several heterogeneous but interfering, competing "language games of justice."[4] And behind the multiplicity and the tension of the language games, there is the fact that "justice" and "equality" are irrevocably and essentially "contested concepts," to borrow an expression from W. B. Gallie that Emmanuel Renault recalls at the beginning of his recent and important book *L'expérience de l'injustice*.[5] Not only is this conflictual character built into the very definition of the notions at stake here, which gives them a polemical character, producing a feedback effect of politics within its own understanding—not only are we therefore permanently confronted with the opposition of antagonistic "definitions" of justice and equality, none of which has the capacity to impose itself in an absolute manner from a logical, moral, or political point of view (which means that we are bound to make choices and hold a "partisan" discourse, and the more so if we seek universality and generality)—but there is a more disturbing effect: although we are not able to *reconcile* all the different points of view concerning justice and equality (because they are in fact incompatible

and express irreconcilable claims), we are also not able to *eliminate* any of them; we must constantly face the return of the repressed definitions from within our chosen point of view. This "double bind" situation could be illustrated by every classical "theory of justice" or "theory of equality." I take it to be a crucial aspect of any *critical* discourse on justice and equality, not to ignore this discursive constraint but on the contrary to consciously acknowledge it and elaborate on it.

In this essay, which has a mainly philosophical character, I recall with the help of some classical references what I consider to be three open questions that have been dominating discussions about justice over the centuries and keep dominating them today, without simple preestablished answers. They concern the relationships of *justice and law*, *justice and subjectivity*, and *justice and conflict*. I hope that this way of proceeding, by means of texts and trying to connect their reading with some contemporary debates, does not appear as an academic display of erudition or a dull chapter in the history of ideas. I leave it to the readers to decide if it is still worth reading Plato, Pascal, and some others.

Before anything else, I have to acknowledge that the references I use are entirely "Western." I suspect indeed that other references could and should be given as well. This might produce significant changes in the way in which we draw the guiding lines of our discussions on the moral and political issues, adding to our sense of alternatives and to our possibilities of making analytical distinctions. I hope this will become more and more the case in the near future, through a reciprocal learning process (or a learning process that is becoming reciprocal, therefore egalitarian in an important sense). I am not particularly proud of my own limitations in this respect, but my precaution, not to make assertions about what in fact I know only superficially, I offer as a simple proof of honesty.

My first reference, concerning the relationship of justice and law, I draw from a famous, albeit enigmatic, phrase in Pascal: "Et ainsi ne pouvant faire que ce qui est juste fût fort, on a fait que ce qui est fort fût juste" (proving impossible to give strength—or power—to justice, it was resolved to confer justice upon force—or power—or to make the strong just).[6] This is, as often in Pascal, a provocative formulation, whose full understanding depends on the reconstruction of his complete apologetic project, but it has also a specific intention of its own. It certainly encompasses a reflection on the legacies of Augustine, Machiavelli, and Hobbes. It is decidedly anti-Platonic. In fact, there are two ways of understanding it: one I call weak in the logical sense (however, it is favored by many critical theorists and particularly Marxists)

and the other I call strong (and I find it much more relevant for our debates, although it poses more difficult problems).[7]

The weak understanding is something like this: We live in a world that is both a world of injustices and a world of appearances and therefore a world of inverted values with respect to the authentic morality (probably inaccessible to human actions, if they are not inspired by God's grace). In this world, following the ancient motto, what holds true is *summum ius, summa injuria*. This means that nowhere can the claim of justice or the exigency of a just order of things become realized, because it lacks the force, or it finds before itself powerful forces as an obstacle that prevent it from winning a victory or even having the capacity to reverse it and to appropriate its language. Conversely, no force or power, however overwhelming, can remain dominant without "legitimacy," without "justifying" itself, appearing as the incarnation of justice in the eyes of the dominated and perhaps in its own eyes. Therefore, it not only has to claim that it embodies and establishes justice, but it has to define justice in such terms as to appear to be its instrument and embodiment. In modern terms, such a reversal of the just order of justice and force can be called false consciousness or an ideology covering domination.[8] Let us note in passing that, from a critical point of view, it is always useful to have a powerfully rhetorical—short and brutal—expression of this essential aspect of the logic of domination.

But this remains a weak sense compared with another one, which is also more complicated. I understand it like this: First, to have justice as such endowed with force or power, or the just being also the strong (politically, socially, ideologically), represents exactly "the impossible," which we can also understand as the element of impossibility that will never be realized as such in the realm of politics, or in relations of power, but will also keep haunting them, not become eliminated by them. Second, or conversely, to have what Pascal calls "force"—probably not so much anarchic or brutal force as a Hobbesian "sovereign monopoly of legitimate violence," an institutionalized system of political power, the law and the legal state—and to be or become "just," and therefore establish or impose justice among men within society, is possible, or is *the possible*. In other terms, this is the political, understood as a challenge, a practical project, and also a risk. So Pascal's formula suggests that the implementation of justice (which may involve its redefinition) cannot be thought of as deriving purely from its own idea but can be envisaged, and attempted, through the intermediary of its own opposite, what immediately contradicts it—namely, power in the broadest sense (or perhaps we should say *empowerment*, in a general manner). But this attempt is by its very nature risky; it is in a sense a *wager*, and a wager in which the odds are perhaps overwhelmingly against the initial project.

To this description of a "realistic" understanding of Pascal's phrase, which is also more dialectical, we can immediately associate two classical questions that form its correlatives. The first question concerns *the negative side* of every endeavor at seeking justice by means of strength, or empowerment: whatever the nature of this strength, its means, forms of organization, and so on, the "just" subject who seeks justice for himself and for others, or the "victim" of injustice who seeks redress, restoration of justice, and the establishment of a just order based on the destruction of the causes of injustice and the neutralization of its doers, must all mobilize force—that is, they must *wage force against force* (even the "force of weakness"). But which kind of force, internal and external, can become the "impossible" force of justice? Which one does not, sooner or later, reproduce the injustice it attacks, or symmetrically create another injustice? Which force of justice does remain "just"?

The second question is best understood in Hobbesian terms (which keep governing the construction of our states and legal systems, especially inasmuch as they are inseparable from a judiciary institution): How can force become "just," or better said, an institutionalization of justice? This is, as we know, the problem of the *institution of law*. Institutionalizing justice or embodying it in institutions (even with limitations, risks, and contradictions) is making it law. Following a tradition that runs at least from Hobbes to Kelsen, which is crucial for the establishment of the Republican State also called "the rule of law," *law* is best defined in terms of a (transcendental) synthesis of force and justice. Pascal's formula seems to suggest that the synthesis can become effective only if it begins on the side of power (e.g., as a *transformation* of the institution of power, or its *relations*) but also that the life and the history of power that organizes itself in the form of law (a rule of law, a legal system, or a constitution) is governed by a dialectics of relationships (perhaps conflictual; why not conflictual?) with its internal principle of legitimacy—that is, justice. This may become pushed to the idea that the internal or hidden weak point of any institution of force is its principle of legitimacy, its pretension to realize and embody justice. And the stronger the weaker.

To this Pascalian problematic, which is only evoked here but which is ineliminable from our debates on justice as a political issue, many parallel or antithetic discourses could be compared over time. I point to just two of them.

Let us first remember Machiavelli, and particularly one aspect of his thought that has been especially influential on contemporary neorepublican and democratic theories, which in the post-1968 era combined a posttotalitarian reflection on the immanent perversions of revolutionary conquests of power and, more positively, a phenomenology of "new social movements,"

which aimed not so much at "conquering power" as at democratizing existing institutions or pushing the state toward its own democratization (thus in a sense retrieving a fundamental tradition of civic mobilizations and movements for civil rights). I am particularly thinking of Hannah Arendt, Claude Lefort, and Jacques Rancière. Machiavelli's proposition, as we remember, was expressed in the first chapters of the "Discourses on Livy": it states that in class societies (rather than using the Roman juridical term "class," he speaks of the "humors" among which the wealth, prestige, and power are unequally distributed in the Republics, ancient or modern, with Rome and Florence as examples), the objective of the dominant classes is to keep their power and increase it continuously, therefore oppressing the dominated mass, but the objective of the mass is simply not to be dominated—it is not to conquer power or reverse the relationship in a symmetric manner to become dominant in turn but to *neutralize* the dominant will to power. The consequences of such *negative* representation of the political quest for justice, whose relative success in the history of republics Machiavelli would credit for their prosperity and stability, are far-reaching as we know—perhaps more than ever in today's politics.

Another discourse that I believe can be fruitfully compared with Pascal's question—I am not saying identified—is found in Ranabir Samaddar's essay "The Game of Justice," to which I have already alluded. From his reading of Benjamin and Derrida he would derive a general formulation of justice as *in excess over law* (and being as such *the excess over law*), both in the sense that it demands always something more than legal changes or settlements (particularly, it demands practices, modes of life) and that it cannot, accordingly, become expressed in legal terms and "administered" as an object or a domain of conflictual interests in need of a mediation by the legal and especially the judiciary machine. "The legal world produces the subject of justice, yet the justice-seeking subject while caught up in the justice game seeks more than a legal avenue. Inasmuch as justice is located in law yet exceeds law, the justice-seeking subject too combines in its subject-hood the reliance on law yet the dialogic capacity to look for other avenues of justice. The political complementarities and oppositions are reproduced in the world of justice."[9] However, that idea, which I share and find illuminating, can itself become interpreted and applied in two different ways, or with two unequal accents. On the one hand, it can be interpreted as saying (and perhaps this is truest to the Derridian inspiration) that the institution of justice will forever remain beyond the reach of legal structures, especially constitutional apparatuses: they need to retranslate the claims of subjects seeking justice into the preestablished language of the law, involving in particular an individualistic and

utilitarian a priori definition of the person, in order to provide what they perceive as fair settlements of conflicts—a procedure we know extends a "veil of ignorance" on much of the popular ways of life and actual practices, if it does not immediately deem them unacceptable. So the law and legal (or purely legal) procedures will appear defective if not counterproductive from the point of view of justice. But it can also be interpreted in a more dialectical way, whereby justice appears as the *internal lacuna*, or the void of law and the legal system seen as a historical institution moving itself on a contingent path toward democratization or the constitutionalization of rights; therefore it is the name—to be associated indeed with practices, vindications, protests, claims—of the very insufficiency or law, possibly its contradictory character both from the point of view of universality and from the point of view of equity (that is, the care of singular persons). This in turn produces uneasiness in the strong sense and keeps law from the possibility of appearing perfect or achieved even in its basic principles. It seems to me that, in his presentation of this internal dialectics, which focuses in a very detailed manner on the conflict between antagonistic ways of "taking care of justice" in a postcolonial context, Professor Samaddar in fact already insists on the intrinsic link between justice and equality, or justice, equality, and capability (which is a particularly concrete form of liberty), inasmuch as he indicates that the essential difference between the legal administration of justice and the demands aiming at "minimal justice" on the side of the powerless resides in the opposition between a unilateral and a reciprocal (or "dialogic") kind of game. Reciprocity of obligations—and therefore the power to obtain reciprocity in the relationship between a state apparatus and the language of ordinary citizens—is certainly a very strong political concept of equality based on social experiences.

Let me now evoke a second reference, which I have tried not to bring in immediately but which is inevitable, as everybody knows. This is the Platonic reference. In a sense, in the Western tradition at least, every theory of justice has always been a rewriting of Plato's *Republic.* Rather, I should say this: any theory of justice that is not a rewriting of *The Republic*, or that does not look for an alternate formulation of the questions it has raised, remains incomplete. This was not easily recognized at a time, still recent, when the history of political philosophy was dominated on one side by historicist and evolutionist representations that attached Plato's philosophy to the supposedly archaic universe of the Greek *polis*, even to a reactionary position within this archaic system of references, and on the other side by axiomatic reconstructions of the issue of justice that took for granted the association of

justice and equality (that is, ruled out the idea that justice could reside in the absolute negation of egalitarianism) and simultaneously subjected the issue of equality to individualistic or utilitarian premises. This is clearly no longer the case today. I say that the Platonic discourse on justice is still towering over Western or Western-oriented debates in political philosophy, but as we know, there is something disturbing and unclear in this respect that has to do with the allegedly "oriental" elements in Plato's thought, ranging from his defense of the idea of caste in general to the kind of eschatology that forms an intrinsic part of his reflection on the nature of the relationship between individual and group, and between theory and practice. But perhaps this testifies also for the completely inadequate representations of the boundaries and incompatibilities between East and West on which we live, which themselves are a very Western idea.

There are, as we know, different controversial but also exciting aspects in Plato's philosophy that have strongly influenced the discussion on justice—so that in many respects, later philosophers have had to propose *variations* or *transpositions* or *replies* to Plato, from Aristotle to Rousseau, from Hegel to Habermas. I recall three of them, which are obvious, and I suggest that the one that is most important for us here is the fourth, or *additional*, one—the "supplement," if you like—which in a sense ties them all together.

The first reason for Plato's lasting importance is indeed his *radical critique of justice as equality* (which in modern times became the obsession of some who wanted to defend an alternative idea of equality as the absolute prerequisite of justice, so that they had to refute Plato's catastrophic vision of the effects of equality, starting with his understanding of this term—the most interesting among them being those who, like Rousseau, tried to propose what we might call a Platonic reversal of Plato on this point). But this is an infinite chain, since we should not forget that Plato expressed his own critique already in terms of a refutation: not only a refutation of the "dominant" ideas or ideology of the "democratic" regime of his own city, which he held responsible for the worst catastrophes and injustices, beginning with the trial against Socrates and philosophy, but a refutation of the contemporary discourse of the Sophists, which, in many respects, was already a complete justification of *equal liberty* as a civic principle from a universalistic point of view. Plato's constant aim, as we see in the developments of Books VIII and IX of *The Republic*, was to equate the position of those Sophists who, in the name of nature (*phusis*), advocated tyranny, with that of others who, in the name of convention or law (*nomos*), advocated *isonomia*—that is, equal liberty. He translates *isonomia* as "democracy," in order to show that democracy and tyranny are in fact one and the same regime, or continuously

passing into one another, since their principle is the same: it is the absolutization of individual desire and the equivalence of all opinions or tastes. According to Plato, it is above all equality that destroys justice; therefore, justice has to establish its rule on inequality, except that—as testified by the importance and the politically subversive function of dialogue—it should be *a kind of inequality emerging through the mediation of equality itself*, or recognized from inside equality and therefore associated with *merit* and not with *custom or status*. This is a disturbing idea that he pushes to the extreme consequences against many of the "unequalitarian" convictions of his own society—as particularly clear in his treatment of the question of the community among men and women in the class of "wardens" (Book V), which has considerably puzzled readers.[10]

The second reason for Plato's importance is his radical "holism," or anti-individualism, in the sense of continuously asserting the primacy of the whole over its elements or parts. As we know, this axiom leads to defining justice, in the first instance, as a harmonious relationship among the "classes" (or castes, since they should become hereditary) that compose the society and—mirroring this structure that is said to be exhibited in "big letters" (or capital letters) by the political institutions of the (ideal) city—a corresponding harmonious relationship between the constitutive "parts" of the individual soul (which, with the help of Freud, who has largely rehabilitated this model for the understanding of the personality in modern times, we could also call psychic agencies or instances). According to Plato, there are three such agencies within the human soul: a rational agency, a desiring agency, and in the "middle," acting as an intermediary or a bilateral mediator, a "passionate" agency, or a capacity to throw one's will after a certain object and react to the other individual's behavior. All this is extremely important because, among other reasons, it amounts to thinking of justice in terms of *order* and, conversely, injustice in terms of *disorder*—also by means of cosmological and medical analogies.[11] Not only does Plato give a definition of order that is general enough to encompass many possible variations and become translated into various institutional patterns, but he provides three statements from which it will prove extremely difficult to depart:

1. The relationship between justice and injustice is one of *order versus disorder*; therefore any critique of what presents itself as order can only escape the reproach of bringing in disorder by demonstrating its capacity to bring about a superior order, or a genuine order, or an order that is not only "apparent" but real. All of Hegel and some of Marx are reflected in this concept already.

2. What makes injustice unacceptable and unbearable is not (or not only) the suffering that it causes but the disorder that it produces—or if you like, *the suffering itself is an aspect of the disorder*—and as a consequence, it is unthinkable that a claim of justice, a demand of compensation and redress for injustice, or a "revolution" against injustice takes the form of a demand for *disorder* as such. Disorder is what has to be avoided at all costs, or ultimately. But indeed we may admit that the definition of what will be deemed disorder, or "anarchy," is historically and politically a volatile matter, completely subjected to political debate and choice. This is where Plato's own antidemocratic ideology enters into play, with hysteric tones in some passages.[12] This leads to the third statement.
3. A criterion is provided repeatedly in the text: the criterion of *conflict*, or better said, *civil war.* Following a formulation concerning "dissent" (*stasis*), which is crucial for the understanding of Greek politics and beyond, Plato would describe civil war as the emergence of "two nations within the nation" or "two cities within the city," fighting each other as if they were enemies and, perhaps worse than that, destroying the possibility for the whole, or the common interest, or the common good, to prevail in the end.[13] Civil war in that sense is perhaps not injustice as such, but it derives immediately from it and reproduces it indefinitely; therefore, it imposes the counterpart: *consensus* is the other name of justice at some basic or transcendental level. No consensus without justice; no justice without consensus, or the possibility of the consensus. Arendt, who was no great friend of Plato, fully endorses this thesis.[14] And with his notion of procedural justice based on the primacy of the dialogic function, Habermas retrieves the same idea in a modern manner, adapted to the conceptualization of the liberal public sphere. In other terms, the idea of a realization of justice through conflict is perhaps not unacceptable—perhaps it is even inevitable, realistic, and moral at the same time—but the idea of *justice as conflict* (often attributed to Heraclitus)[15] is absurd, and it is nihilistic. Who escapes that? Do we escape that? In a moment I switch to a discourse of social conflict, referring in particular to Marx, which may invert that position: it will therefore have to entirely change the terms of the relationships between whole, parts, conflict, order, and disorder, at a metatheoretical level, and not simply refute the (antidemocratic) political consequences derived by Plato from his own premises.

The third reason for Plato's importance lies in his "idealism," or literally speaking, his definition of justice as an *Idea*. We know that what characterizes the idea (or "form": *eidos*) in Plato is that it forms a model of reality *more real than reality itself* (or after which only reality can be measured—i.e., understood and produced, or transformed). In other terms, justice is *transcendent*, and it is this transcendence that commands a certain relationship of theory and practice—a logical anteriority of theory, a subordination of practice, and above all, again, a relationship of inequality; practice can *approximate* the model, but it can never replace it or become indiscernible from it, or fully adequate to it. This ontological relationship of immanence versus transcendence, finitude versus infinity, conditioned or conditional versus unconditional, has been almost entirely removed from modern epistemology and technology—not to speak of the implicit ontology of the mercantile and consumption society, which is officially based on the exact reversal of this thesis. But in compensation it is almost inexpugnable from politics, and I would gladly say from revolutionary politics, in the broad sense—that is, in the sense of "changing the world," the conditions or the structures or the dispositions embodying injustice, be they personal or impersonal. Sir Karl Popper, after all, was quite right on that point.[16] Reformists may ignore the notion of the transcendence of the model that practice only approximates, but at the perilous cost of admitting at some point that they "change nothing," or nothing that matters, that is not reversible. Revolutionaries in the broad sense can hardly become absolute empiricist-materialists-pragmatists or anti-Platonists, the famous Marxian eleventh *Thesis on Feuerbach* notwithstanding ("Philosophers so long have interpreted the world in various ways, now it is a question of changing it"), because in order to change—and to change for justice—you need a model, even a minimal one. Perhaps this is one of the reasons Marx tried to avoid the term "justice" itself, but certainly he could not completely avoid the idea: communism is an idea, and it is even in a sense an idea of order.[17] If you want to escape this ontological constraint, you have to suppose that justice is not an idea for the mind to understand but a necessary tendency within history, or the empirical development itself. You fall from Plato into Hegel, at the risk of making practice itself a superfluous fiction. As we know, Marx could never content himself with such a teleological absolutism, and for good reasons: he remained an *activist*, in both meanings of the term, and therefore an idealist.

Another alternative, philosophically speaking, lies in the performative gesture that refers to the *distance* that has to be filled between the model and the practical effort to approximate its order, to fulfill the exigencies of its internal justice. The same gesture simultaneously *denies* the possibility of

identifying the representational or ontological substance of the model in any *particular* way (be it even called the universal as such); therefore it suggests that the movement toward the model is not only an effort to realize it but also a critique of its inadequate or mystifying representations. As we know, in fact, this gesture also has its roots in Plato—which shows the extent to which, as I said, he is still awaiting our critiques and objections from afar—when he redoubles the notion of justice as harmonious order with an idea of the good in itself, or the true good, which lies "beyond" justice and therefore beyond any knowledge of its essence. Perhaps there is something of that in Marx, at least negatively, whenever he refuses to define communism or the end of history, except in negative terms, as in "classless society." Above all, it is the kind of gesture that we find in Derrida (in *Force of Law* or *Specters of Marx*), who in my opinion derives it from a radical interpretation of the Kantian categorical imperative as unconditional responsibility toward a justice that is always *other* than all its finite ("constructed," "constituted") representations. If we had time, we might now return to Plato and read him from that point of view. Plato's model of social justice is an amazing combination of revolutionary utopia and conservative elitism or aristocratism, both of them converging in his critique of democracy (practically unrivalled and therefore continuously repeated until our times, it must be said). In a sense he is the first and the arch "revolutionary conservative."[18] But there is an element in Plato that reopens the question of the model and makes it an *infinite question*, so to speak. Therefore it keeps inhabiting all the successive discussions of the structure or systematicity of justice.

In spite of all that, which is certainly crucial, I believe that the reason our reflection on justice and equality—however polemically and conflictually—permanently owes a question to Plato remains to be said. It remains to be added to the preceding indications, for which it forms the binding element. As I said, this element concerns subjectivity, or the implication of the subject within the structure (or model) of justice—better said, the impossibility to isolate the understanding of justice, its definition or essence, from the understanding of a *process of subjectivation* that forms an intrinsic part and a condition for the realization of justice itself. I borrow a postmodern terminology that I think is perfectly acceptable here, precisely because Plato is premodern—that is, in his philosophy there is no idea of a *given subject*, as an originary reference or an invariant element, either a living individual or an ideal point of moral responsibility. This is not to say that there is no idea of subjectivity, either as interiority or reflection or as power of "framing" the world or center of initiative. But nothing is given, or what is given is only a complex system of forces, tendencies, capacities, and potentialities, which

have to become combined one way or another, orienting their combination in one or another direction to produce a different kind of "self."[19] It is interesting to quickly compare this with the Aristotelian transformation, and I would say *rationalization* of this, itself also expressed in terms of the importance of the "educational process," or the "education for justice," which basically takes it for granted that the various "parts" of the soul (redefined as a "vegetative," a "sensitive/moving," and an "intellectual" soul, here meaning a function or a faculty) form an always already fixed "natural" hierarchy, anchored in the finality of life. But what Aristotle (and modern Aristotelians) think is that the accomplishment of the actions that are just, individually and collectively (for instance, in the form of reciprocity of obligations), requires a certain disposition (*hexis*) of the individual, a certain quality or virtue,[20] and that, conversely, this disposition should be formed, prepared, become embodied, in individuality itself, so that the realization of justice becomes more likely: itself a "natural" consequence. But the just man, or the good citizen, remains a "virtuous" voluntary instrument of the realization of the objective order, a "just measure" (for example, a just distribution of goods) that can be defined outside his action and previous to it. On the contrary, in Plato we have a complete reciprocity and interdependency of the subjective and the objective: the constitution of justice is nothing else, from another point of view, than the constitution or recognition of the just man, and the constitution of the just man—from another point of view, psychological or anthropological, if you like—is nothing else than the emergence of the just order. None of these two aspects can exist apart from the other or can even be thought apart from the other. The subject-object relationship is a *vanishing distinction*; it is continuously expressed in order to become dialectically suppressed in the end. Which also means that *to transform the social structure* is *to change human nature* and, conversely, either pass from justice to injustice, in the sense of degeneracy, or pass from injustice to justice, in the sense of perfection. This is absolutely clear, and it even becomes the guiding thread for the whole exposition in the comparative discussion of the different political regimes and their corresponding "human type."[21]

Now I want to make two brief remarks on this. One is this: the way in which Plato established this intrinsic correspondence between justice as social order and justice as subjectivation (starting with the famous analogy between the *capital letters*, in which we can read the composition of the city, or the relationship that it establishes between needs, powers, capacities, and the *smaller letters*, in which we try to decipher the contradictory movements of the human soul and the meaning of individual attitudes toward different kinds of "goods") is closely linked with his famous doctrine of the

philosopher-king—that is, his idea that the transformation of man and society in the direction of justice depends on the highly unlikely event of a perfect fusion of power and knowledge. Power, which is the opposite of knowledge (therefore utterly undesirable for those who naturally are attracted by knowledge—the exact opposite of what we today call "experts") would nevertheless become its attribute. What is more likely (and probably in the end inevitable) is that the multitude, not to say the mob, not only deprives the philosopher from any access to power but, worse than that, succeeds in perverting his use of knowledge, in fact transforming the philosopher into a Sophist (or an "expert"). Here Plato is not only idealist, he is also elitist and intellectualist. But more than that, we discover—perhaps to our own surprise—that behind the obvious holism of his representation of the just social order (in which every class has its hierarchical function and every individual has to be located and reproduced within a single class), there lies a deeper element of individualism. This is true at least at the top, where the fusion of power and knowledge, which marks the extreme point or form of subjectivation on which all others are ultimately depending, becomes characterized in the form of a singular individual, separated as such from all others.

This leads me to the other remark: I suggest that any theory of justice, as a *political theory* in the strong sense, has to provide an alternative for this conception, or must remain "Platonic." But it cannot ignore the general problem, contenting itself either with definitions, rules, and models of objective justice as a social order, or with moral considerations on the individual virtues, the tendencies predominant in this or that individual, and most likely encouraged and heightened by education, to behave in a just or unjust manner. And let us never forget that, however structural and material a certain social order is considered, especially an order of injustice, such as capitalist exploitation, patriarchy, or colonialism, it could not exist if it were not implemented and carried on *by subjects*, who make themselves the instruments of its reproduction or nonreproduction, transgression, and critique. It has to devise an alternative concept of subjectivation. Now this seems to have been the case with a certain conception of *action against injustice*, which is part of the revolutionary tradition and simultaneously results from its critical revision, that we commonly associate with three categories: a primacy of *practice* as opposed to that of theory; a primacy of *the collective*, or the transindividual, as opposed to that of the singular within the very constitution of the subject; and a primacy of *experience*, as opposed to that of the "model," which means a reopening of the issue of transcendence. All this is to be associated in particular with a difficult conceptual move, which concerns the inversion of the relationship between the concepts of *justice and injustice*. It is my final point.

Let me now introduce my third reference. It is a complex one, in the sense that it is not attached to a single name but rather to a collection of names that I organize in the form of a critical dialogue. That is, I present a third issue around the articulation of *justice and conflict*—therefore in a sense equality, inasmuch as conflict aims at "equalizing" conditions but also constitutes a basic pattern of equalization itself: equalization as confrontation, as agonism or antagonism. I present it not as deriving from the question asked by one single philosopher but rather deriving from the rectification, or complication, of his question to which he has been progressively submitted. This philosopher's name is Marx, because I believe that he remains responsible for the forms in which contemporary social critique performs the crucial reversal from a primacy of justice into a primacy of *injustice* (at least epistemological, if not ontological), leading to a new understanding of *conflictual justice* as a form of political critique and not only a moral one. Although they are inevitable and perhaps encompass a vast majority of contemporary critical discourses, the notions of "social critique" and "social justice" are profoundly equivocal: they tend to become either moral or political, and this is a subject of debate in its own right, which will remain incomplete here.

I should take two precautions immediately. When I say that Marx (therefore Marxian discourse, Marxian theory, and Marxian activism) remains emblematic for the idea that there can be no idea or even model of justice that is not derived from a certain *experience* of definite *forms of injustice*,[22] I must avoid suggesting that the idea originates with him, and I must take into account the fact that he himself seems to have carefully avoided this vocabulary.

We have every reason to believe that the idea of injustice not only corresponds to an age-old experience, both collective and individual, but also, as a "theoretical idea," forms something like a shadow of the elaborated definitions of "justice." If I had more time, I would argue that this hidden face, times conscious and times unconscious, specifically relates to the *sovereign element* of justice, profoundly associated with the notion of *righting wrongs and compensating for sufferings*, which is inseparable from the figure of the "arbiter" or the "mediator" of the world: the sovereign as judge and the judge as sovereign. This figure has always been accompanied by the repressed anxiety—not so repressed in some cases—that the judge himself could become supremely unjust and cruel, inflict wounds and humiliations, and embody injustice in a diabolic manner. As profoundly a rationalistic legal theorist as Hans Kelsen himself alluded to this in his fascinating dialogue with Sigmund Freud.[23] This would draw our attention to the long series of mythological and theological representations of justice as *Last Judgment*,

which, in a sense, have found a secularized transposition in modern social criticism. But since we aim to identify certain elements in Marx, there are more recent ancestors to be traced back, particularly during the periods of the Renaissance and the Enlightenment. Thomas More's *Utopia* (1516) and Rousseau's *Second Discourse* "on the Origins of Inequality" (1755) are exceptionally interesting landmarks in this respect. So the move that we observe in Marx is not something deprived of any precedent at all.

It is no mystery, however, that Marx himself was not very fond of the vocabulary of social justice and injustice, though this is not to say that he depreciated it—which many Marxists after him, following what they believed to be the indications given in a famous chapter of Engels's *Anti-Dühring*, pushed to a completely one-sided attitude. There could be several reasons for that reluctant attitude of Marx. One of them may have to do with the extent to which, in his own time, the category of justice was associated to one of his intimate adversaries—namely, Proudhon—and quasi-appropriated by him.[24] There is a bifurcation in the Rousseauist legacy here, since Proudhon is an absolute egalitarian, claiming that *justice*, *equality* (or "mutuality," as he also calls it), and *association* are absolutely reciprocal and interchangeable notions. This is not the place to discuss Proudhon's philosophy—more alive today than ever.[25] We simply remember that his egalitarianism, however radical, is perfectly compatible with some amazing *exclusions from equality*, notably in the case of women, and that it aims not at suppressing the structural conditions of the exploitation of workers but rather at *equalizing* the forces of workers and capitalists in their relationship by limiting the possibilities of capitalist concentration and symmetrically reinforcing the associations and unions of the workers. Who says this is absurd? Only it is difficult, because it requires a state sufficiently autonomous from the capitalist's corporate interests to "correct" the initial inequality or "counteract" the effects of the class domination. But this leads us back to Marx: the main reason he does not speak of justice is probably that, for him, the forms of justice and injustice are clearly on the side of the *effects*, depending on a more decisive structural *cause* or set of structural causes. So, much as justice and injustice are beyond the realm of law, the modes of production and appropriation are beyond their effects in terms of justice and injustice.

But here we must pause and reverse the argument, since for Marx there was an originary experience of injustice, which logically preceded the analysis of the structure of exploitation, or whose introduction into the analytical pattern of exploitation, evolution, and transformation in fact commanded its critical character. In the intricacies of the enormous "theoretical machine" constructed by Marx under the title *Das Kapital*, which he also left unfinished

and therefore open to many diverse continuations, this point of introduction can be very precisely located: it takes place in Book I, chapter VII, when the quantitative notion of the *surplus-value* (*Mehrwert*) or "increment of capital" becomes "translated" into the qualitative notion of *surplus-labor* (*Mehrarbeit*) and therefore also when the "eternal" cyclical forms of the accumulation of capital reveal their hidden face: the historical forms of the coercive organization of labor and the alternate movements of proletarianization, deproletarianization, and reproletarianization of the working class. With this shift in his analysis, Marx, willingly or not, also performed a philosophical gesture, which "revolutionized," in the proper sense, the issue of justice. And by the same token, he would intensify the tension between its *moral* and its *political* aspect, which I have already signaled.

But this could become apparent, I believe, only inasmuch as a general form of Marxist critique had been transferred to *other forms* of oppression and domination. And this meant that, without losing or destroying a certain intentionality of Marx's critique of capitalism, other social critics associated with struggles, resistances, and social movements both criticized its one-sidedness or absolutization and extracted from his discourse a more general model (at the risk, undoubtedly, of losing some of its practical specificity). This is a movement that in a sense has become common sense and even commonplace in today's criticism, ranging from feminism to subaltern studies. I could quote from many different authors, but for the sake of brevity and to pay homage to an admired colleague and militant intellectual who recently passed away, allow me to simply quote from Iris Marion Young's classic study, *Justice and the Politics of Difference*.[26] Criticizing what she calls the "distributive paradigm" in moral theory, albeit without simply adopting a holistic point of view for which each group would have to "administrate" the issue of justice in terms of its internal order and division of labor, she focuses on experiences or "faces of oppression"[27] that cross the boundaries of institutions and solidarities (thus renewing in a sense with respect to injustice the gesture that we find in Plato with respect to traditional hierarchies), of which she broadly distinguishes five types: *exploitation, marginalization, powerlessness, cultural imperialism* (or production of stigmatized otherness through the imposition of a dominant cultural norm), and *violence* (as a social practice, both physical and moral, against weaker individuals and groups). Then she proceeds to analyze the symmetric problems related, on the one side, to the *institutional character* of these forms of injustice[28] and, on the other side, to the *modes of insurgency*—that is, resistance turned active, collective, and political, corresponding to each of them. The conclusion that she reaches is that not only "difference," or the singularity of groups, but also the freedom

of choice for each individual *within* the solidarity of her group is an essential component of that insurgency. She thus identifies *social equality* not with homogeneity but with a "representation of the heterogeneity" in the public sphere.[29]

What I find particularly interesting in Young's description is that, in her phenomenology of injustice defined as "domination and oppression," which generalizes and diversifies a Marxian concept of exploitation and alienation of labor, she is keen on stressing the fact that there are in fact always *two faces* of the processes of injustice, conceptually distinct albeit hardly separable from one another—the reason two different terms are needed.[30] They are tentatively called "oppression," which relates to the discrimination that prevents some individuals from "developing and exercising one's [that is, their own] capacity and expressing one's experience" and therefore to the "institutional constraint on self-development," and "domination"—namely, the "institutional constraint on self-determination, preventing individuals and groups from participating [effectively] in determining one's actions and *the conditions* of one's action."[31] Whereby she seems to retrieve in her own way what I describe more abstractly as *equaliberty* in the "insurrectional" sense, since I insist myself on the fact that there is no possibility to simultaneously assert in a direct and positive manner the *political identity of equality and liberty* but only a possibility to demonstrate (and in fact experience) that their *negations* are producing simultaneous effects that amount to emptying citizenship of its reality.[32] I would very much agree with the idea that, if oppression and domination, or the negation of equality (equal capacities, equal chances) and the negation of liberty (freedom of choice, freedom of expression, and above all political participation in an effective sense), contribute to a general and complex definition of *injustice*, the *critical definition of "justice"*—which will also be by necessity a *polemical* one, or a *conflictual* one, or will have a tendency to make the content of justice internally dependent on the development and modalities of conflict—can be dialectically expressed only as *negation of the negation*. These were in fact Marx's own terms toward the end of *Capital*, Book 1, in the famous passage on the "expropriation of the expropriators," in which he explicitly says, "This is the negation of the negation."[33]

I conclude by stressing the importance and the difficulty of three types of problems that I see associated, at a general level, with such a conflictual idea of justice.

A first problem is related to the articulation of negativity and subjectivity. The experience of injustice (which of necessity is a *lived experience*, which is not to say a purely *individual* experience; on the contrary, it must involve an essential dimension of "mutuality," sharing, identifying with others, and

witnessing the unbearable in the person and the figure of the other) is a necessary condition for the *recognition* of the reality and existence of institutional injustice. This is particularly important, as Young rightly insists, inasmuch as it involves the experience of the *repetition* of identical injustices, which itself testifies for their institutional or structural character, which pure moral or legal characterizations lack ("Violence is a social practice. It is a social given that everyone [that is, everyone who is subjected to it] knows happens and will happen again.").[34] Thus Marx was describing the *reproduction* of the conditions of exploitations, the permanent "attraction and repulsion" of the worker from the factory-system. But the recognition, from the "victim's" standpoint, is not itself an analysis of the structure. I do not bring the "epistemological break" of theory back in here; I just assert that there is a problem of *how the conflict develops*, through collective sharing of experiences, confronting the structures of power but also being confronted with *heterogeneous* experiences, to pass from the experience of injustice to the project of institutional justice itself. A *scheme of conflict* and the transformation of conflict—such as the "class struggle" with its various "degrees"—seems to be required. But this scheme does not simply arise from the experience itself. This is also where, once again, the "experience of injustice" finds itself at the crossroads, between a *moral* and a *political* discourse—or rather, between two *different articulations* of the "moral" and "political" elements within critical discourse—which might explain, but not validate, the fact that Marx, trying to escape the dilemma by choosing a third term, "science," precipitated himself and his followers into *scientism* (from which Althusser paradoxically tried to recover through "epistemology," or a scientific discourse in the second degree).

This first difficulty is closely related to *a second one*, which we can call in Lyotard's terms the effects of the "differend." It is not by chance that Lyotard, when formalizing his idea of a wrong that is redoubled by the fact that it cannot become expressed in the dominant language of the judge (or *spoken to the judge*), the established system of justice that becomes identified with the representation of the social interests as a whole, first referred precisely to Marx's concept of the proletariat whose perception of *surplus-labor* is in fact "incommensurable" with the capitalist's notion of profit or accumulation.[35] The word "incommensurability" is also central in Young's phenomenology.[36] And it is not by chance that Spivak and others have borrowed and reelaborated Lyotard's notion of the *differend* in order to conceptualize the "heterogeneity" or "paradox" of a subaltern condition of oppression that expresses itself while being deprived of the instruments of collective and public expression: the language in which *consensus* in the Arendtian sense or *communicative action* in the Habermasian sense can be anticipated. This is the problem of

the "alternative public sphere" and, consequently, rationality. The other side of the *differend*, namely, is the fact that what is incommensurable will be brought to the fore only indirectly in the language of metaphor or *metaphrasis*. Not only are conflicts about crucial issues of injustice dissymmetric, but they are continuously repressed or pushed back into the unconscious. Or if that is not the case, they become retranslated in the language and the categories, the modes of regulation and administration of conflicts, that form the establishment of power: for example, what today becomes universally called *governance*.

And finally, this brings us back to the issues of *totality*, *totalization*, and the relationship between the "whole" and the processes of subjectivation. I leave a detailed discussion for another occasion, not only because I have reached the limit of my readers' patience but because I am very uncertain about the terms in which the question has to be renewed from Plato. I do not want to reduce the *idea* or the *model* (or the "form") to the minor status of a "dream" or even a "utopia" (however much I value some insurgent mottoes like "I have a dream"). I can only suggest that if processes of subjectivation that represent the other dimension of justice on the side of collective and individual practices are virtually converging toward the imagination of a "just society," they are also bound to remain indefinitely embedded in *displacements and new beginnings*, rather than recognitions, reconciliations, or final revolutions, because they are inseparable from conflicts that feed them and give them meaning. But this seemingly negative or aporetic character also means something positive, which is very important to us: justice as emancipation from injustice, or negation of the negation, is not only an *effort* but also a permanent *invention*. While it is running after emancipation, it is also practically running, already in the present, after the *forms and contents*, the *institutions of justice*, that are not imposed from outside the effort (the struggle), not "remembered" like a lost ideal but rather "discovered" like an insurrection without models.

The three lines that I have been following (relating respectively to Pascal and the antinomy of justice as force and force as justice, Plato and the constitution of the subjectivity as psychic image of the whole, and Marx and Young and the articulation of justice, injustice, and conflict) seem in fact to indicate a common question, albeit very speculative, I must admit: that of an articulation of immanence and transcendence through the emergence of an "internal void." What was suggested by Pascal and retrieved by Derrida and Samaddar was not an accidental "excess of justice over law" but an *internal excess*: it does not affect the realm of law from the outside (from some

theological or social other realm that, by nature, would be *nonlegal* or *illegal*) but from the intrinsic heterogeneity of the legal realm. This could also become rephrased as follows: law is itself never anything else but the *permanent conflict* between opposite practical representations of law. For that reason, those who are *excluded from justice by the law* are led to "include" or "incorporate" themselves into the public sphere by changing the law, or imposing a change in the "rule" of the law. What was suggested by Plato and his legacy was the necessity to find a convergence between the "metaphysical" question of what still lies "beyond the realm of essences" (or pure ideas) and the political-ethical question of the element of (hyper)individualism paradoxically inhabiting the platonic "primacy of the whole" (the group, the city, over the individual), which culminates in the model of the philosopher-king incarnating the identity of contraries—i.e., knowledge and power). A modern problematic of the collective processes of subjectivation as *anonymous effects of communication* does not solve or suppress this question, but it certainly displaces it and rearticulates it. Finally, the (hardly sketched) discussion of Marx's notion of the primacy of injustice and its "generalization" by Young and other contemporary social critics as "justice in conflict" or "justice through struggle against injustices" leads to a difficult moral and political riddle concerning the condition of "victim" and the place of the victims in the discourse: we are not just brought before the "political institution of justice," as allegorically depicted once and forever by the Greek tragedies (Aeschylus's *Oresteia*), in order to identify justice with the claim of the victims, or their vengeance, but we must take into account the fact that the conflict itself (the reality of injustice and the necessity of justice) is made *visible* and *audible* only by the "void" that the victims create or perform within the "plenitude" of the social fabric. The analogies that I suggest here do not amount to delineating a new metaphysics of justice. But they share a family air, which, I believe, makes it easier to understand in which sense (to imitate a Spinozistic formula) the "just" effort or struggle toward justice or "non-injustice" is already justice itself.

NOTES

1. Jean-Jacques Rousseau, "Le premier et le plus grand intérêt public est toujours la justice: Tous veulent que les conditions soient égales pour tous et la justice n'est que cette égalité," in *Notions de philosophie*, ed. Denis Kambouchner (Paris: Gallimard, 1995), 3:9.

2. I borrow this terminology from Roberto Esposito, whose works are now increasingly translated into English. See his *Communitas: The Origin and Destiny of Community* (Stanford, CA: Stanford University Press, 2009); and, in French, *Catégories de l'impolitique* (Paris: Editions du Seuil, 2005).

3. A perfect example is the discussion between Nancy Fraser and Axel Honneth around "justice as equalitarian distribution" and "justice as equalitarian recognition," in which the equivocity of equality is involved as much as that of justice. See *Redistribution or Recognition? A Political-Philosophical Exchange* (London: Verso, 2003).

4. Ranabir Samaddar, "The Game of Justice," in *The Materiality of Politics*, vol. 2, *Subject Positions in Politics* (Delhi: Anthem Press, 2007), 63–106.

5. Emmanuel Renault, *L'expérience de l'injustice: Reconnaissance et clinique de l'injustice* (Paris: La Découverte, 2004).

6. This is *Pensée* no. 103 (Edition Lafuma) or 298 (Edition Brunschvicg). It is commented on at length by Derrida in his *Force of Law.* Complementary formulations are given in *Pensées* nos. 81/299, 85/878, and 86/297.

7. My reading is partly inspired by the excellent book by Christian Lazzeri, *Force et justice dans la politique de Pascal* (Paris: PUF, 1993).

8. Derrida also remarks on this affinity in his commentary regarding the Pascalian formula.

9. Samaddar, "The Game of Justice," 102.

10. One example is Aristotle, a firm supporter of the traditional *oikos* versus *polis* distinction, supporting the gender inequality as a "natural" basis of equality itself, among male citizens only.

11. We must remember here that the Greek term *cosmos* has two meanings: *the world* and the (beautiful) *order*, each being the other's model. The medieval concepts of order as equilibrium bring in a third term: the (living, especially human) *body.*

12. See *The Republic* VIII, 562a et seq., on the abolition of all hierarchies in the democratic city governed by "unfettered liberty" (including the command of humans over domestic animals such as dogs and donkeys).

13. See *The Republic*, 422e–423a. On the concept of *stasis* in Greek thought, see Nicole Loraux, *The Divided City: On Memory and Forgetting in Ancient Athens* (New York: Zone Books, 2006); Loraux also makes use of a comparative reading of Plato and Freud.

14. See Arendt's *Diary of Thoughts* (September 1952, §18): Denktagebuch vol. 1: 1950–1973 and vol. 2: 1973–1975 (Munich: Piper Verlag, 2002).

15. See, among others, Stuart Hampshire, "The Soul and the City," in *Justice Is Conflict* (Princeton, NJ: Princeton University Press, 2000).

16. See Popper's polemic writing, which traced the sources of totalitarianism (i.e., communism and fascism) back to Plato's philosophy: *The Open Society and Its Enemies* (first published in 1945 in London; currently in its fifth edition [Princeton, NJ: Princeton University Press, 1971]). See the refutation by Victor Goldschmidt, the greatest Plato scholar of his generation in France: *Platonisme et pensée contemporaine* (Paris: Librairie Vrin, 2002).

17. In one of his finest writings, *Mê Ti, The Book of Transformations*, a work of philosophical fiction written under the influence of Karl Korsch during WWII and presenting itself as a dialogue among Chinese wise men, Bertolt Brecht called dialectics the "Great Method" and communism the "Great Order," arising from the contradictions of the "Great Disorder" or capitalism itself. *Mê-ti: Buch der Wendungen* (Frankfurt: Bibliothek Suhrkamp, 1974).

18. Among the German philosophers who, in the pre-Nazi and Nazi periods, were more or less durably attracted within the circle of "Revolutionary Conservatism," the

one who especially worked on the idea of "justice" in Plato was Hans-Georg Gadamer. See Teresa Orozco, *Platonische Gewalt: Gadamers politische Hermeneutik der NS-Zeit* (Hamburg, Germany: Argument-Verlag, 1995).

19. Perhaps there is something "oriental" there? In any case there are affinities both with psychoanalysis and with a certain "mystical" tradition.

20. Or *capability*, as Amartya Sen and Martha Nussbaum would say. See their collective volume *The Quality of Life (Wider Studies in Development Economics)* (Oxford, UK: Oxford University Press, 1993).

21. All these ideas are prefigured in another famous dialogue, *Gorgias*, in which Plato explains (against a fictitious or "syncretic" Sophist, Callicles) that "it is better to suffer injustice than commit it." To which Brecht, in the already quoted imaginary dialogue from *Mê-ti*, has proposed an interesting alternative: it is worse to accept the injustice (committed toward others) than to commit it oneself. See *Mê-ti: Buch der Wendungen*, 61.

22. I borrow from the title and the contents of Emmanuel Renault's *L'expérience de l'injustice: Reconnaissance et clinique de l'injustice.*

23. See my "L'invention du surmoi: Freud et Kelsen 1922," in Étienne Balibar, *Citoyen-Sujet et autres essais d'anthropologie philosophique* (Paris: Presses Universitaires de France, forthcoming), commenting on Hans Kelsen's critical review of Freud's *Group Psychology and the Analysis of the Ego* (Hans Kelsen, "The Conception of the State and Social Psychology—with Special Reference to Freud's Group Theory," *International Journal of Psychoanalysis* 5 [January 1924]; Sigmund Freud, *Group Psychology and the Analysis of the Ego*, trans. and ed. James Strachey [New York: W. W. Norton, 1959]).

24. Proudhon, in 1860, published his major work *De la justice dans la Révolution et dans l'Eglise*. But the theme of justice and the "dialectical identity" of justice and equality are already dominant in his earlier works, starting with *Qu'est-ce que la propriété?* (1841). Marx defended him in *The Holy Family* (1844) and attacked him violently in *Misère de la philosophie* (1846).

25. See, for example, the recent book by Guillaume Le Blanc *Vies ordinaires, vies précaires*, with a chapter on "l'égalité comme mutualité" (Paris: Editions du Seuil, 2007).

26. Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990).

27. Ibid., chap. 2.

28. This is a point that Emmanuel Renault, after Axel Honneth, also particularly emphasizes.

29. Young, *Justice and the Politics of Difference*, chap. 6.

30. Ibid., 32 et seq.

31. Ibid., 37.

32. Étienne Balibar, "'Rights of Man' and 'Rights of the Citizen': The Modern Dialectic of Equality and Freedom," in *Masses, Classes, Ideas: Studies on Politics and Philosophy Before and After Marx*, trans. James Swenson, 39–59 (New York: Routledge, 1994).

33. Marx, *Das Kapital*, book 1, chap. 24, sect. 7.

34. Young, *Justice and the Politics of Difference*, 62.

35. J. F. Lyotard, *The Differend: Phrases in Dispute*, trans. G. van den Abbeele (Minneapolis: University of Minnesota Press, 1989).

36. Young, *Justice and the Politics of Difference*, 39.

2

Global Justice and Politics

On the Transition from the Normative to the Political Level

Francisco Naishtat

The issue of *global justice* encompasses the conflict between a normative universal scope of justice and a particular one. It draws from the well-known debate of the 1980s between normative universalism on the one hand and communitarianism or contextualism on the other; that is, it is an issue of normative universalism as an a priori regulative ideal, either as a Platonic or Kantian foundation of justice, so that any particular claim of justice would be manifest as an outcome of that universal foundation. In this chapter, I attempt to address the *political issue* of *global justice*—namely, the controversial issue of a justice whose range is worldwide, referring not to an a priori universality of the principles of justice in general but to our common historical world, as it is affected through the process of capitalist globalization and as it can be *disrupted by political action*.

The political issue of global justice depends on the formation of global agents and of a global public whose joint effort has the ability to disrupt either the economic trend of liberal globalization or the political domination of sovereign interests. As far as we can see, the sovereign domination of States is not truly opposed to liberal globalization, but is rather functionally adapting the world to liberal globalization at a very accelerated pace. The concept of justice, as related with this condition, disrupts the historical and political world. It is not merely a setting of normative criteria on behalf of universal moral principles, as disruptive and necessary as they can be; but rather, these virtual, universal criteria are often alibis through which to bypass political

questions in the absence of an empowered public with the aim of *making a common and political world*, as Hannah Arendt said.[1]

Objections to Global Justice

It may seem excessively pretentious to magnify justice into such a large political framework. On the one hand, one can object along with Carl Schmitt that justice cannot be defined beyond the frame of sovereignty and the scope of positive law,[2] so that any attempt to generalize justice in a way that transcends the nation-states is fallacious and even dangerous, insofar as it is mere hypocritical justification of a sovereign party's strategic and political interests, as when an imperialist war is legitimized by humanitarian rhetoric and by the demonization of the enemy.[3] But the notion of a justice that goes beyond sovereignty, as I intend here, is neither a humanitarian nor an ideological weapon in the hands of the sovereign; rather, it is openness or excess that disrupts sovereignty—neither like an infinite teleological end, nor as an outcome that has to be reached in the far future, in which case it could be used as an ideological justification for violence, terrorism, or any immoral or outrageous method. It is in some way purely immanent, as the empowerment of political intervention and political interference by the public that disrupts the reserved, secret, and mythical sphere of sovereignty and domination. Reported to the world, it is the political openness of the common or cosmopolitan sphere against the blind forces that stand beyond any kind of responsibility and accountability, and that deprive the public from any form of world visibility. Our present world situation is globally unjust and even intolerably unjust, not on the basis of an ideological or teleological argument, but insomuch as it deprives the public from the visibility of its own global condition.

This is neither a metaphysical nor a theological break, as by intervention of a deus ex machina, like a theological promise as opposed to secular politics, but it is a very immanent and democratic way that differs very specifically from sovereignty and from representation, being close to the mere idea of political action, understood as Hannah Arendt's idea of birth, as a human intervention that is rooted in public self-visibility, or in what she calls the *public shine*;[4] or as in the Benjamin idea of disruptive action,[5] not a teleological action as the means in order to reach an end, but an action as political appearance and intervention, similar to what Negri and Hardt call the birth of the *common* within a world scale.[6] So it is on the performative basis of empowerment of the public on a world scale that the idea of global justice emerges—and this is beyond the debate of the universal or the particular character of justice: it is not necessary to commit to the universalist

and foundationalist vision in order to feel the need to disrupt the process of globalization as the new idea of a *common care for the world* is born, expressed by the sentence "We want to see what is going on."

But to understand the link between political action and global justice is to expose oneself to another objection. We have become so used to the fragmentary and micropolitical perspective expressed by the human sciences during the last twenty years, particularly following what Lyotard referred to as the end of *metanarratives* like *world history* (*Weltgeschichte*),[7] that we manifest reluctance to play the language game of justice within a macropolitical frame, or within an historical horizon, which tends to be replaced by the conflict of memories.[8] This is also true of the very language of politicians, which has become more and more ethnocentric over the last two decades, ignoring more and more the injustices of the dominant world order, and which completely privileges a more "microrealistic" vocabulary, referring to the concrete interests, management, and governance of particular countries, communities, and regional geopolitical blocks (whether rich, like the European Union or the North America Free Trade Agreement [NAFTA], or poorer, like MERCOSUR). And when it comes to protesters, it is more and more difficult to mobilize the public about global issues because there is a feeling that concrete and direct intervention can only be limited to local issues. So the idea of justice as referring to the whole world, to the whole *humanity* (a term that is nowadays being replaced by the word "humanitarian," with a completely different meaning and scope, as charity, compassion, or assistantship), seems more and more like an anachronism from the last century.

Let me tell a story about this: just during 2007, Cristina Kirchner, then future president of Argentina, from the center-left Argentinean government party, came to a philosophy conference in San Juan, Argentina, and said in her inaugural speech that four decades ago her generation tried to change the world but that now, this generational political movement has judiciously withdrawn from that project and would be very happy if it could merely succeed in changing the country. As a responsible and pragmatic politician, to assert that you may try to change your country while abandoning thought of change on a global level seems a very wise and responsible assessment on behalf of a professional politician, worried above all about professional politics. It also seems symptomatic of a certain lack of perspective within the leftist party, especially when the current state of our world is what it is (i.e., a crazy race that threatens humanity and even the mere survival of life on Earth). But it also reveals the prejudicial view that the world is prisoner to systemic forces that stand between the status quo and any reasonable attempt to change it. Surprisingly enough, politicians of the reformist left assert again and again

that the world is integrated in a very fixed and dense way, while excluding from their political imagination any idea of changing the world in a meaningful sense. They thus refrain from speaking to justice or injustice in the world as a whole. This contradiction is a product of the belief that you can still do something in politics on a local, national, or regional scale, but that nothing valuable is possible on a global scale; and this delusion is enforced by the mere fact that national political parties are not accountable for their longevity or political future on a large world public base.

This narrow view of the reach of politics is also related to the disintegration of historical time: politicians tend to live in the present, or within the near future of their political careers, showing a lack of what Sheldon Wolin called "vision," either in space or in time.[9] It is nowadays very common to refer to this narrow viewpoint as "pragmatism." This is not, however, the genuine pragmatism of its founders, as explained by Dewey and Mead, who indeed maintained a cosmopolitan stance on democracy and on historical depth. I think that a true pragmatist would agree with the observation of Ernst Bloch, who wrote in a manner that has a familial similarity with Husserl, stating that "there is not reality but in horizon"; so that each thing has to be thought within a horizon, which thereby includes possibilities for change and being other than it is, in time and space.[10]

It is this view that I intend to address: the lack of horizon of sovereign politics and global governance is in the meantime the reinforcement of the opacity of the global world. Then the question of global justice, insofar as it is disruptive, must be set in terms of visibility: the rebuilding of the common on a global scale, rooted within the historical tradition of the cosmopolitan public sphere—and the cosmopolitan care of the world depends on the deconstruction of the view that liberal capitalist globalization is a natural process to which there is no alternative.

Indeed, globalization is commonly considered to be beyond the scope of a reflexive or conscious historic change directed by man, and far from the idea of world history. Globalization appears mainly as an intensive and blind process, whose power of disintegration is endured, rather than produced by subjects—as a sort of climate change threat. It can thus be *exscripted* as in a return to destiny.[11] But if it is so, the question of the justice or injustice of the global process would be senseless, because we talk about justice or injustice when subjects have the possibility to do otherwise: we do not talk about the justice or the injustice of a process, which appears naturally as necessity and destiny.

But isn't this kind of vision the sort of convergence from enlightenment to myth that was already denounced by Adorno and Horkheimer as the dialectic of enlightenment?[12] In this very sense, while discussing justice in his

well-known *Zur Kritik der Gewalt*,[13] Walter Benjamin distinguished between *Right* (*Recht*) and *Justice* (*Gerechtigkeit*): while the notion of *Right* is referred to as myth, and its domain is completely reified, blind, and impenetrable, as in Kafka's novel *The Process*, the notion of *Justice*, on the contrary, appears to be precisely the openness of meaning and the very possibility for the subject to *disrupt* the reified right. In this sense, we can link the birth of justice to the intrusion of tragedy temporality against myth temporality. We will return to this question of the excess of *Justice*, as opposed to the closeness of *Right*, as Derrida put it.[14] But for now I focus solely on the mythic force with which our present and contemporary world appears across the language of globalization, and how this very language prevents the world from considering the issue of political justice.

Critical Views on Globalization

There is a critical view on the global that counters that mythical trend of Globalization. Among all arguments against the present state of affairs in the globalized, liberal world, there exists the academic, normative critic, derived mainly from Thomas Pogge,[15] the disciple of John Rawls who generalized for the global world the distributive principle of his master's well-known *Theory of Justice*,[16] through a description of a distributive dimension of justice for individuals in a worldwide range. Rawls himself did not adhere to this leftist Rawlsianism, and his publication of the treatise *The Law of Peoples*[17] was in part a reaction against Pogge and his generalization of distributive justice.

The second critical source is found in the so-called critical *cosmopolitism*, whose moderate version is the Habermasian theory of world civil society through communicative processes, and whose radical version is held by the anticapitalist stand of *altermondialists*, either Marxist or radical critics, belonging to the so-called World Social Forum[18] since the mid-nineties, against capitalist globalization. I will first consider the stand of global justice set forth by Pogge, and then turn to more political issues on current globalization, culminating with the interpretations of Walter Benjamin and Hannah Arendt so as to establish an idea of justice that is neither teleological nor transcendental, but which is intrinsically political and disruptive.

Even if the academic debate surrounding Rawls's global justice and its critics has put the issue on a normative speculative level, and so suspended its very political dimension, it is worthy to mention it here, because Pogge's response to Rawls on the issue of extreme and global social inequality is without a doubt an important theoretical salvo in building a radical, critical awareness of the unfairness and injustice of the current processes of globalization.

There is, nonetheless, a paternalistic and very occidental asymmetry in Pogge's consideration of global justice, which does not seem to pay attention to the problematic issue of global resistance and cosmopolitan interaction all around the world—that is, the issue of the global political disrupting action against globalization—and this is what I intend to show below.

The debate between Pogge and Rawls reveals the issue of global inequality (e.g., Rawls's assessment of positive duties of assistance, or "charity," of the central liberal countries vis à vis the poor countries, or like Pogge as negative or "moral obligatory" duties of the citizens of liberal rich countries vis-à-vis poor countries). Of course, to put the question of global justice into well-known moral terms regarding the duties of rich people vis-à-vis poor people is to set it in a paternalistic dimension, and thus to bypass the political issue of a disruption of the world order by the affected people; it is to bypass the question of the political empowerment of global subjects and global actors both in poor and rich countries in order to disrupt the world as it is. And this issue does not come *after* the solution to the problem of the normative content of justice, but it belongs to the hermeneutic precomprehension and the preontological dimension of justice: it is because we have already understood the world as something that can be politically and democratically disrupted that we are enabled to address the question of global justice in a political mood. When we talk about the injustice of a particular social order it is because we have already understood the corresponding social order as a contingent historical product that can be disrupted by political action. If not, then the normative question would be senseless.

The Rawlsian Debate on Global Justice

The publication of John Rawls's book *The Law of Peoples* (first published in 1993 and released in final form in 1999) resulted in an international turn in the academic debate on justice. In that book Rawls moves from the idea of justice within a liberal society to the idea of justice in the international realm, discussing a tradition inaugurated by Kant in his well-known treatise *Towards Perpetual Peace* (1795).

Relying precisely on the distinction—rooted in the legal tradition since Cicero and reconsidered by Kant—between *civil right* (*ius civitatis vel civile*), reserved for the state level, and *peoples' right* (*ius gentium*), characteristic of the rights of individual human beings on an international scale, Rawls attempts to reactivate the idea of *ius gentium*.[19] However, this attempt at reactivation is characteristically idiosyncratic, since Rawls translates *gentium* with the English word *peoples*, giving this term a very specific hierarchical meaning

that was completely absent from the original expression; thus, he tries to secure a *peoples' right* by establishing foundations that pretend to normatively clarify the *ius gentium* in a pretty specific and controversial sense. Because of this, Rawls's theory has turned out to be very problematic.

On the one hand, and already in his 1993 publication, Rawls clearly blocks the possibility of projecting the principles of his *theory of justice* on a global, planetary scale. Rawls does not, at the cosmopolitan level, start out from a theory of universal equality based on the ontology of the reasonable and equal individuals in accordance with the *original position*, as stated in his 1972 *Theory of Justice*, but, instead, he takes "peoples," considered as specific entities, to be the building blocks of his 1999 theory. The notion of *people* then appears as a supraindividual entity that possesses a specific moral character, which is grounded in history, in institutions, and in jurisprudence. It is in fact a collective actor, endowed with responsibilities and open to criticism either on the basis of its own tradition of justice (in the case of liberal peoples), or on the basis of foreign traditions (in the case of the peoples placed at the bottom of the hierarchy). Thus, these subjects are endowed from the beginning with a moral nature or character.

Therefore, according to Rawls, all peoples are *not* equal; on the contrary, they would show a hierarchy delimited by three categories, which accordingly, found an asymmetric theory of the right of peoples. Those categories are (1) liberal peoples, (2) nonliberal but decent peoples, and (3) nonliberal peoples belonging to burdened societies.

At the top of the scale, *liberal peoples* are characterized as well-ordered political societies, with a strongly institutionalized democracy, which is neutral with regard to individual conceptions of good, and which recognizes the supremacy of the institutions of law based on the principles of liberty, equality, and tolerance. Because of their moral character, these peoples are accordingly qualified as *reasonable*. This is how Rawls refers to them:

> Liberal peoples have a certain moral character. Like citizens in domestic society, liberal peoples are both reasonable and rational, and their rational conduct, as organized and expressed in their election and votes, and the laws and politics of their government, is similarly constrained by their sense of what is their government, is similarly constrained by their sense of what is reasonable. As reasonable citizens in domestic society offer to cooperate on fair terms with other citizens, so (reasonable) liberal (or decent) peoples offer fair terms of cooperation to other peoples. A people will honour these terms when assured that other peoples will do so as well.[20]

Immediately below liberal peoples, Rawls places peoples who have inherited or established an internal hierarchy among their citizens but who, at the same time, possess what Rawls calls *decent political regimes*. These are societies that being fair and well ordered are, however, of a religious nature, and are not characterized by a separation of church and state. These are, in short, societies that favor one conception of good over others and over a conception of justice. According to Rawls, these societies are nonetheless "decent," since their moral and normative commitments are, in general, "convenient."

At the bottom of the scale Rawls places hierarchical societies with dangerous political regimes. These are regimes that Rawls calls "out of the law" or "criminal." There is no concept for this level other than defective and negative qualities in comparison with the two superior levels. These are peoples who, because of tyrannies and despotism—that is, because of their political leaders—have turned out to be unreasonable and unpredictable players in the international scene.

Now, while principles of justice, including the principle of distributive justice (or the *difference principle*), only apply within a liberal society (and so only to liberal peoples), the other two types of peoples specified are left out of the range of those principles. In fact, Rawls thinks that severe poverty is not a result of something other than purely internal, domestic causes, belonging to each people of the bottom level of the scale, and so he does not acknowledge or prescribe moral universal negative duties but only a mere positive duty of assistance for moral subjects—that is, for liberal peoples. Instead of considering the possibility of an *original position* that would ground a cosmopolitan justice, Rawls subscribes to the idea of a rule of moral justice with a global scope that would guide the relations of liberal peoples to other peoples; something like a guide of moral conduct for the foreign policy of liberal peoples. In this line of thought, for the relations between liberal and nonliberal societies, only positive duties of assistance and help from liberal peoples toward nonliberal peoples apply, but nothing like in distributive justice at international scale.[21]

This has been considered a serious deficit by supporters of cosmopolitical justice, and particularly by Thomas Pogge, who, contrary to Rawls (once his teacher), has emphasized the necessity of generalizing with a cosmopolitan and planetary range the very same principles that lie at the core of Rawls's *Theory of Justice* (1971)—that is, in particular, the need for a global distributive justice principle that compensates for what Pogge considers the damage that the rich countries have inflicted on poor countries.[22]

At the center of Pogge's conception of global justice lies, in the first place, *moral individualism*—that is, the idea that the subjects of justice are individuals

and not some kind of supraindividual entities like Rawlsian peoples—and in the second place, the principle of universalization, according to which every individual is equally worthy of moral attention. And the third basic element of Pogge's conception is the idea that *poverty*, or the underfulfilment of basic human rights, is explained by an empirical and causal theory about its historical and social origins on a global scale: contrary to Rawls, Pogge does not attribute the extreme poverty of the peoples at the bottom of Rawls's scale to internal causes but rather to economic processes that originated in the accumulated economic structure of rich countries, from where results what Pogge considers the moral duty of repairing the damage occasioned; thus, he considers it absolutely fundamental to acknowledge not only, like Rawls, the positive duty of assistantship but also the moral principle of negative duty (you must not hurt someone) of the rich countries toward the poor ones.

Now, from my point of view, in Rawls's theory, as in Pogge's, the problem of international justice is only considered in an *ethical normative sense*, as something that the rich countries must do or not do with regard to the poor countries, and not in a *political sense*, as the construction of a new space of global democracy where at the same time injustice can be limited and the participation of the different peoples in taking care of their own wealth and destinies can be promoted in a coherent way with the consideration of the wealth of the planet by everyone. In this sense, both Rawls's and Pogge's theories show a strong paternalism where political action of the poor countries in order to achieve a bigger portion of power and participation in the common direction of the destiny of humanity is not considered very meaningful.

Habermas's Critical Stance on Globalization

Jürgen Habermas's position in these debates allows us to introduce a perspective from which to approach the problem of cosmopolitan justice from a perspective that is primarily democratic, rather than exclusively moral, emphasizing above all the problems involved in the construction of a democratic society on a global scale, subordinating the dimension of global justice to this global political and democratic dimension. In this regard, Habermas has adeptly drawn attention since the nineties[23] to the role that civil society and its communicational dynamics can play for the democratic transformation of the public sphere, a sphere that transcends national borders and could open the way for the convergence and gradual construction of democracy of a cosmopolitan range.

In this line of thought, followers of Habermas like David Held[24] and the entire tradition of radical democracy converge on the idea of the global

construction of democracy articulated on various levels: local, national, regional, international, and global. The key to understanding the difference between Habermas's perspective and the two preceding models (Rawls's and Pogge's) lies in the switch from a moral to a political point of view, that is to say, in the priority assigned to the political-democratic process and to its transformative dynamics. This does not mean that the principles of Rawls's theory of justice or Pogge's cosmopolitan imperatives are left aside within the Habermasian discussion about a cosmopolitan political-institutional arrangement, but rather that those topics are subordinated as orientating goals within the pragmatics of the unbounded postnational discussion on the political construction of global democracy.

In questioning Habermas's perspectives, however, we can ask ourselves: Just how realistic is the idea of such a public communicative sphere of global range, when it is not even at the European scale (and Habermas acknowledges this)? Can we observe a public space that is free of coercion and asymmetries of power—asymmetries that in a systematic way distort all attempts at communicative action? With differences on the global level in political and economic power, between rich and poor countries that duplicate several times the already scandalous power differences found within the group of rich countries, how is it possible to conceive the possibility of a shared and common public sphere that would provide a basis for the generation of a postnational democracy capable of operating at various levels?

The Question of Disruptive Justice and the Question of Violence in Arendt's and Benjamin's Writings

Since the time of Plato, the idea of justice has comprised two matters, either as "commutative justice," relating to the principles of the legal code of chastisement by penalties and infractions against the laws of the State, or as "distributive justice," relating to the principles of distribution of goods in the city. In both cases, which are well established by Plato in *The Republic*,[25] and furthermore supported by Aristotle in Book V of his *Nicomachean Ethics*,[26] justice appears as an *instituted justice*, intrinsically linked to the institutional dimension of the State and of the institutional order. This institutional justice, however, in order to be such, in turn relies on the presupposition of an *institutionalizing* justice, which is the foundational justice of the civil order. It is possible to understand institutionalizing justice through the prism of the concept of *constituent* justice—that is, through the foundational power of the civil order or of the legal State. Whereas instituted justice is dominated by the idea of rights and refers back to the consideration of the legality of the

acts of those governed, institutionalizing justice is dominated by the idea of a just order and refers both to the idea of political finality and to the idea of legitimacy of civil law.

However, in either one of these two ways of considering justice, we see that it is governed by the idea of *sovereignty*: either as the outcome of an *instituted sovereign power*, or as teleologically ordained to the *constitution of a sovereign power*. From this standpoint, we discern as did Walter Benjamin later on, that in both cases equally, the order is ruled by a specific type of sovereign violence: either by a violence that is *constituent of sovereignty (constituent right)* or by one that is *preservative of sovereignty (constituted right)*. Yet neither one of these two notions of justice, given their intrinsic link to the dimension of sovereignty, has the capacity to bridge the divide created by the problem of the transition from sovereignty to postsovereignty in this ongoing process of globalization. Indeed, when we speak of *global justice*, it is neither regarding justice instituted by law and operating within the framework of the sovereign state, nor about an institutionalizing justice by means of a constituent power on a global scale, which emerges into a new sovereign power with a global reach. To the critical subjects and authors of ongoing globalization, it is out of the question to conform a new sovereign State to the worldwide scale, as the remedy—as already denounced by Kant two centuries ago regarding a Cosmopolitical State[27]—would be worse than the impairment that societies in countries around the world would incur as a result of the risk of authoritarianism and authoritarian violence.

Consequently, it is necessary to consider a third type of justice, which can now be called *disruptive justice*: a justice that is neither of the same order as the justice established by the law within the framework of a sovereign State nor of the order of a constituent power that is ordained to conform by the sovereign State. It is rather an idea of justice that would dwell on the brink of the bewitchment of political teleology, sovereignty, and representation, and that should be thought of as radically different from the professional politics of nation-states. The roots of *disruptive justice* are entrenched in Walter Benjamin's reflections on violence,[28] which we will consider next, alongside some considerations of the reflections of Hannah Arendt on the same topic.

Violence and Justice

It is not only a matter of basing our study on the empirical manifestations of violence and its justifications in social and human sciences—an effort that is fundamental but that we do not intend to elaborate herein. It is rather a matter of a discourse of the second order, which claims to encompass conceptual

frameworks—the schemas in which violence articulates itself to justice, where Violence and Justice appear in a sort of rapport, in "elective affinity"—neither in a general taxonomy nor in one that exhausts these schemas but rather in the folds or turns that seem to us fundamental to the viewpoint of our present, general sense—that is, in those categorical, singular frameworks or schemas that are perhaps at the crossroads of our historical moment, where violence and justice intertwine and conceptually report back one to the other, to the point of provoking a certain understanding of politics, of action, and of our connection with law.

Justice and Violence have always been in elective affinity, within a complex rapport: the first commandment of justice in the monotheistic tradition is in the Torah, "Thou shalt not kill"; but at the same time, the law cannot help but be coercive—it is nothing if it does not keep for itself the potential of coercive violence buttressed in its effectiveness by a force, which points to Weber's view of the State, as the exercise of the monopoly of legitimate violence. The symbol of Hobbes's State—as illustrated by the image of the Leviathan, Hobbes's *Deus Mortalis*, which shows in the baroque frontispiece of his book on the one hand a sword and on the other the prince's scepter—demonstrates quite clearly this double constituent relation of modern law, which appears already in the famous statement by Hobbes: "Pacts without swords are but words."

Evidently, this supposes in the meantime the destruction of the antique and noble ideal of politics, as in Isegoria, as a simple deliberation of equals—that is, the destruction of this politic that is so ideally entwined supposedly just as much with an ethic of nonviolence as political as with this violence that seemed to occur within the disjointed conceptual frameworks that Arendt shows so vividly in her essay *Was ist Politik*.[29] As early as the Renaissance, the realist conception of politics places at the center of its conceptual representations that which for the ancient Greeks was but at the margins of politics: violence.

The passion, the avidity, the egoism, the ruse, the evil, the crime, and the centrifugal forces—which at all times threaten the common link, once the Machiavellian moment has occurred—are henceforth not only such rare monstrosities in the eyes of men of the Renaissance as they were for the Greek community, but on the contrary, they have become the basic presupposition, the starting point of political theory. Even a moral rigorist of the stature of Kant would have to concede in his legal philosophy that civil law is nothing without coercive force, and that the true legislator must punctuate his task while imagining that he actually legislates for demons, rather than for saints.

I hereby spare the entire game of oppositions that this modern articulation of law and violence can convey around the theme of liberty of the ancients and the moderns, of possessive individualism, of centrifugal force, all the way to the Durkheimian archetypal question, "What is it that causes the social network to resist?" We retain from all of this the following fact that is impossible to ignore, that the law appears welded in its modern representation of a potential of violence, which is its proper condition of possibility as sovereign law: as Benjamin states, law is not only instituted by a constituent violence that is not supported by reason, but by a law that rests rather on a foundation of political violence, and that nonetheless is protected by a conservative violence that is its very condition as possibility for emerging as a legal force in the sovereign State.

But at the same time, does modern law thus entwined with its potential of constitutive and conservational violence enclose the totality of our idea of justice? Does there not remain, as suggests Derrida,[30] following Walter Benjamin, an excess of Justice (*Gerechtligkeit*) in contradistinction to law (*das Recht*)?

The extreme tension between justice and law calls to mind a body of work like Kafka's *Der Prozess* (1925), in which the protagonist Joseph K. is accused of a crime whose warning was well kept from him so as to ensure that he dies with the guilt of that which was never explained to him. This seems to be the most brutal expression of legal violence. Even though this source is fictional, it shows specifically that the rules of law owe only to themselves.

We can compare the figure of Kafka with the juridical positivism of Kelsen, who claims to derive his source from the formalist Kantian rigor. Of course, I am not interested in assimilating modern law to the process against Joseph K., which appears to us as abhorrent in contrast to the republican standpoint of law. But I would like to use this example so as to question the conflict between justice and law—between justice and law as two separate conceptual regimes. Justice is always in excess, and always presents a possible exit from the law. Justice is in a sense untamable by the law, and this has been true since the most ancient of conflicts in the order of our dramatizations of justice—as in *Antigone*, where the question of universal justice unfolds step by step, opening and opposing itself tragically against the figure of the civil law that is institutionalized in the city.

Can we not say, even in this sense, that Justice *interrupts law*? It is this very idea that is at the heart of Walter Benjamin's essay "Critique of Violence" (*Zur Kritik der Gewalt*, 1921), in which he sets up on the one hand the presupposed violence of the law (constitutional violence and conservational violence) and on the other hand the "divine" or critical violence that

is exercised by disruptive justice against the constituted law. Benjamin thus portrays three orders of violence: violence that *constitutes* law in a sovereign State; violence that *conserves* law in a sovereign State; and violence that *interrupts* law through an overture to justice.

Given these conceptual distinctions between the violence of law and the violence of justice—disruptive against the law—we can see the possibility of a politics of justice, which is neither the politic of ethos of the ancient Greeks (supposedly deprived of violence) nor a realpolitik of moderns (permeated by the violence of the sovereign State and by the rule of sovereignty over a territory) but rather the presupposition of an emancipatory politic that has been at the base of modern revolutions since the French Revolution. This affords me the opportunity to address a type of rapport between violence and justice that sets up the question of revolutionary violence.

Revolutionary Violence under the Spell of Sovereignty

The question of revolutionary violence is associated and intertwined with our question of justice, which in this sense is evident to all, as revolutionary violence is a violence that is carried out in the name of justice, whatever the underlying specific ideology that motivates it, be it from a republican, nationalist, Marxist or anticolonial conception.

In the 1970s, in light of the wars of anticolonialist emancipation and of the civic movements of protest around the world, like those of 1968 (of which we just celebrated the fortieth anniversary), there was serious consideration of the question of revolutionary violence—specifically illustrated in the texts of Frantz Fanon,[31] and also in the texts of his counterpoint in the 1970s, Hannah Arendt,[32] who addressed the same topic.

The issue of revolutionary violence, for example, is hereby set against the framework of the question of peaceful or violent transition into socialism. However, the tenants of revolutionary violence are tributary to a conceptual scheme at the heart of which violence is justified as means to an end, which is in turn conquest of a sovereign power. Surely this is an issue of violence that insomuch as it is revolutionary, disrupts the law that is established in the sovereign State; but at the same time, this violence is defined (merely) as a means to an end, as much as it is an available instrument through which to seize power. Violence is just because it is invoked in the name of a goal that is considered to be just. It is thus a necessary evil, undertaken with a goal in mind that is considered morally good.

This instrumental vision of revolutionary violence as just violence, however, is at the same time indebted to a philosophy of history: revolutionary

violence is displayed through the lens that conceives history as progress; so long as the end justifies the violence, at its final appeal, it is history that is the judge of human actions: "*Die Weltgeschichte ist das Weltgerichte*," as Schiller affirmed in a sentence repeated by Hegel and then also by Marx.[33]

This conception, however, sets up non sequiturs, which have two sources so to speak: on the one hand, if the presupposed philosophy of history simply loses all credibility, then the idea of associated violence falls in turn. This is what occurred following the dissolution of the progressive philosophy of history: for a long time now, we no longer dispose of the elevated perspective of history, which allows us to discern from a teleological standpoint where good and evil reside.

But in a slightly different way, violence as a means poses another problem, captured by Hannah Arendt: insofar as the consequences of human actions, intermingled by nature, are in the short term completely unpredictable, so violence that is committed with as abstract and mediate an end as a historical end always ends up producing results that are contrary to the desired outcomes. It would be necessary to have a historic theology at our disposal in order to know whether we would escape from the *counterfinalities* that violence could engender. Violence, thus, is a kind of golem, that, once launched in the world, seems to make itself autonomous in relation to the good intentions of the revolutionary pioneers, and that ends up engendering monsters. This golem is at the heart of the dialectic of sovereignty, which directs the logic of revolutionary violence. It is the entirety of the problematic of violence as instrumentality. Yet, Arendt explains, given that violence cannot be other than instrumentality, because it can never be wanted in and of itself, in favor of itself, it is always susceptible to the same unpredictable and absolutely undesirable derivatives, from a political standpoint, regardless of the ideology of its authors.

But the reflection of Arendt does not stop here: it poses the rapport between power and violence, and concludes that power is contained in a rapport that is inverse to that of violence. Not only is violence not in solidarity to political power, but it appears as the best indication of political impotence. Contrary to violence, power is defined by Arendt as *our common capacity to act*.[34] Violence thus appears for Arendt only when power as a capacity for action runs out and splinters.

Thus, as early as in her 1969 essay on violence, Arendt sets herself apart from two conceptual networks: on the one hand, from the conceptual network of domination on the one hand, which is related to the schema of sovereignty, and which posits the violence of the State as a monopoly of legitimate violence, in terms defined by Max Weber; and on the other hand, from the

conceptual network of revolutionary ideological violence, which falls under the critic both of the uncertainty of consequences of violence in the long run and of the mythical face of ideology that is like the uncritical egocentric structure of the wishful thinking. Between these two poles, there seems to be a rift: politics is as much a critical opening in contrast to the violence of the constituted domination and the one of the constituent revolutionary sovereignty. This perspective is reinforced by Arendt by experiences of modern totalitarianism where the ideology used to justify violence becomes at the same time a type of mythical representation of a world that strays from reality, in hiding the abyss between these claimed ends and actual outcomes.

Conclusion

Upon first consideration, we have identified a rift between Arendt's and Benjamin's conceptions: Arendt, as we have just noted, grasps a true antinomy between politics and violence, while remitting violence to the camp of domination, and sovereignty and power as human capacities for common action, to the political domain; from this perspective, Arendt represents violence in the order of an instrument, and thus, as an inverse indicator of political power; on its own, violence neither appears nor fortifies itself unless power is reduced, and inversely, authentic power is only fortified when it is uninvolved with violence; hereby, political power has nothing to do with the order of teleological instrumentality, but is rather a form of human existence as much as it is expression of an action, and not merely the fabrication (a like consideration opposing political power and violence was already central to Spinoza's reflections in his theological and political treatise on the subject of democracy).[35] Benjamin perceived that next to both the violence that sought to maintain the law and the violence that was founder of law, there was a violence that was disruptive of the law, which displayed itself beyond instrumentality so as to meet an end, and which is considered as "pure means" and, from this perspective, as "immediate" or "divine." This disruptive violence is none other than an excess of justice; and in contrast to the law, this violence is divine only by the miracle it brings into the world, brought in by its power or ability to breach the bonds of a temporality so bewitched by sovereignty and by mechanical domination, to the advantage of the human temporality of the action and of its meaning. Benjamin thus allows this articulation of violence and of politics, while Arendt elaborates in antithetical terms.

After closer analysis, however, we can imagine Benjamin's "divine" violence as the analog of Arendt's idea of political power: it requires a similar favoring of the interruption that gives place to the opening of meaning and

action; after all, did Arendt not herself affirm that human action, as our capacity to give a beginning to a course of things in the world, is a miracle?[36] With Judith Butler[37] and Françoise Proust,[38] we can think of Benjamin's concept of disruptive violence as a kind of *nonviolent violence*—an oxymoron that simultaneously allows for a violent rupture in the mechanical time of sovereign domination by the fact of human action, while also providing for a total lack of focus for violence of domination in the structure of sovereignty.

Indeed, in the writings of Arendt and Benjamin, it is possible to perceive the elements of a reflection on a form of justice—on a disruptive violence, that, as it is essentially linked to common human action beyond the mechanics of the violence that dominates sovereignty, could permit us the opportunity to provide a conceptual framework for a politic of global justice that could withstand collapse in a philosophy of law, which is often an issue in debates that occur within the framework of the Rawls categories of the *Theory of Justice*, that are certainly enlightening and indispensable for all that is in the order of distributive justice, but that are insufficient in all counts in the context of politics on a global and cosmopolitan scale, as given by the conditions of globalization. It is in effect the opening up of the common on the cosmopolitical scale, which is here the only guarantor for a political claim regarding the destiny of our life on Earth, and in this sense, all matter of distributive justice is fundamentally indebted to the political overture.

NOTES

1. Étienne Tassin, *Le trésor perdu: Hannah Arendt, l'intelligence de l'action politique* (Paris: Payot-Rivages, 1999).

2. Carl Schmitt, *Le Nomos de la terre dans le droit des gens du Jus Publicum Europaeum* (Paris: PUF, 2001); and *The Concept of the Political* (Chicago: University of Chicago Press, 1996).

3. See Francisco Naishtat, "Les figures de la terreur et le débat philosophique de la modernité," *NAQD: Revue d'études et de critique sociale*, no. 24 (Autumn/Winter 2007): 67–74.

4. Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958).

5. Walter Benjamin, "Critique de la violence," in *Œuvres I* (Paris: Gallimard, 2000), 210–243, and "Sur le concept d'histoire," in *Œuvres III* (Paris: Gallimard, 2000), 427–444.

6. Antonio Negri and Michael Hardt, *Multitude* 10/18 (Paris: La Découverte, 2004).

7. Jean-François Lyotard, *La condition postmoderne* (Paris: Minuit, 1979).

8. On the substitution of history by memory, see François Hartog, *Régimes d'historicité: Présentisme et experiences du temps* (Paris: Seuil, 2003). On the present

tension between history and memory, see Enzo Traverso, *Le passé, modes d'emploi: Histoire, mémoire, politique* (Paris: La Fabrique, 2005).

9. Sheldon Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought* (Princeton, NJ: Princeton University Press, 2006).

10. Ernst Bloch, *The Principle of Hope*, vol. 1 (Cambridge, MA: MIT Press, 1986).

11. Concerning *exscription* as a process of contextual and indirect exhumation of meaning, see Akira Mizuta Lippit, *Atomic Light (Shadow Optics)* (Minneapolis: University of Minnesota Press, 2005).

12. Max Horkheimer and Theodor Adorno, *Dialectic of Enlightenment: Philosophical Fragments* (New York: Herder & Herder, 1972).

13. Walter Benjamin, "Zur Kritik der Gewalt," in *Gesammelte Schriften*, vol. 2, pt. 1 (Frankfurt am Main: Suhrkamp, 1977), 179–203.

14. Jacques Derrida, *Force de loi* (Paris: Galilée, 2005). See also Marc Sagnol, "Droit et justice chez Benjamin," in *Qu'est-ce que la justice? Devant l'autel de l'histoire*, ed. Jacques Poulain (Saint-Denis, France: Presses Universitaires de Vincennes, 1996), 27–39.

15. Thomas W. Pogge, ed., *Global Justice* (London: Blackwell, 2001); Cristian Barry and Thomas W. Pogge, eds., *Global Institutions and Responsibilities: Achieving Global Justice* (London: Blackwell, 2005).

16. John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1999). Originally published in 1971.

17. John Rawls, *The Law of Peoples* (Cambridge, MA: Cambridge University Press, 1999).

18. For information on the World Social Forum (WSF), see http://www.forumsocialmundial.org.br/.

19. About the topic of *ius gentium* in Rawls and its relation (both as a debt and as new Rawlsian insight) to Kant, see Osvaldo Guariglia, "John Rawls, *The Law of Peoples* y sus críticos," *Revista Latinoamericana de Filosofia* 31, no. 1 (2005): 5–22.

20. Rawls, *The Law of Peoples*, 25.

21. Rawls's hierarchical taxonomy goes against the well-established fact that within the category of "liberal people" (in the top of his hierarchy) there can already be the worse violations against human rights, as happened after September 11th in the United States with the Patriotic Act, with torture against prisoners suspected of terrorism, and with the lack of due process for Guantanamo Bay prisoners. This is an outcome of exception procedures within liberal legislation, as Agamben showed in his book *State of Exception* (Chicago: Chicago University Press, 2003).

22. Pogge, *Global Justice*; Barry and Pogge, *Global Institutions and Responsibilities*.

23. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: Polity Press, 1996); see also Jürgen Habermas, "Kant's Idea of Perpetual Peace: a Two Hundred Years' Historical Remove," in *The Inclusion of the Other: Studies in Political Theory* (Cambridge: Polity Press, 1998).

24. David Held, *Models of Democracy* (Stanford, CA: Stanford University Press, 2006). See also David Held, "Democracy and Globalization," MPIfG Working Paper 97/5 (May 1997), Max-Planck-Institüt für Gesellschaftsforschung, available at http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp97-5/wp97-5.html.

25. Plato, *The Republic*, 2nd ed. (New York: Basic Books, 1991).

26. Aristotle, *Nicomachean Ethics*, trans. W. D. Ross, public domain English translation available at http://people.bu.edu/wwildman/WeirdWildWeb/courses/wphil/readings/wphil_rdg09_nichomacheanethics_entire.htm.

27. Immanuel Kant, *Perpetual Peace* (New York: Cosimo Books, 2005).

28. Benjamin, "Critique de la violence," 210–243.

29. Hannah Arendt, *Was ist Politik: Fragmente aus dem Nachlass* (Munich: Pipper, 1993).

30. Derrida, *Force de loi*.

31. Franz Fanon, *Les damnés de la terre* (Paris: Maspero, 1981).

32. Hannah Arendt, *On Violence* (New York: Harcourt Brace Jovanovich, 1970).

33. "World history is world court," from Friedrich Schiller, "Resignation," in *Werke und Briefe*, vol. 1 (Frankfurt am Main: Deutscher Klassiker Verlag, 1992), 420. See also Enzo Traverso, *Le passé modes d'emploi: Histoire, mémoire, politique* (Paris: La Fabrique, 2005), 76.

34. Arendt, *On Violence*.

35. Baruch Spinoza, *The Chief Works of Benedict Spinoza*, vol. 1, *Tractatus Theologico-Politicus* (*Theological-Political Treatise*) (New York: Dover, 1951).

36. Arendt, *The Human Condition*.

37. Judith Butler, "Critique, Coercion, and Sacred Life in Benjamin's 'Critique of Violence,'" in *Political Theologies: Public Religions in a Post-Secular World*, ed. Hent de Vries and Lawrence E. Sullivan (New York: Fordham University Press, 2006), 201–219.

38. Françoise Proust, *L'histoire à contretemps: Le temps historique chez Walter Benjamin* (Paris: Cerf, 1994).

3

Traversing the Borders of Liberalism

Can There Be a Liberal Multiculturalism?

Juha Rudanko

The borders of liberalism have been subjected to two sustained assaults in the past few decades: those of communitarianism and those of multiculturalism. I call these critiques assaults on the borders because the essence of both is that liberalism fails to include fundamental phenomena within its purview. Both communitarians and multiculturalists aim to show that the borders of liberalism are too tight: too many morally relevant claims are left outside, or alternatively, too many people are left outside. The communitarian claim is that the fundamental human need for community is ignored by liberalism, which is obsessed with individuals; the multicultural claim is that by focusing on redistribution and equality before the law, liberalism ignores the fundamental importance of culture and thus bypasses important questions of justice. At the extreme, liberalism seems to admit only white Christian males within its borders, while everyone deemed different from this "standard" is left out.

The aim of this essay is to examine the borders of liberalism through the contemporary debate on multiculturalism. The question that I pose is whether those borders can be expanded to account for claims to cultural recognition and minority rights, or whether the borders must fall altogether in the face of these claims. In other words, my aim is to consider whether liberalism has the resources to formulate a specifically liberal approach to minority rights, or whether liberalism is as poor as the critics claim: that if we want to take multiculturalism and minority rights seriously, we must forfeit liberalism.

One seemingly liberal response to the claims for minority rights would be to deny them outright by invoking the principle of equality before the law. Modern liberal democracies seek to guarantee formal equality before the law and certainly attempt to curb the most blatant examples of outright discrimination. Why should this not suffice for minorities? This is the question that Brian Barry poses, and he emphatically concludes that minorities should be content with formal legal equality.[1] Barry's conclusion is that liberal equality is just fine as it is, thank you very much. While Barry's argument has a certain argumentative clarity, it fails to take the question seriously enough. I aim to show that the question of the borders of liberalism is trickier than Barry thinks. This is because Barry tends to resort to common-sense arguments instead of the fundamentals of liberal philosophy. In arguing against multiculturalism, Barry utilizes arguments that are more libertarian than liberal—arguments that he rejects when it comes to economic distribution.

Barry, then, tries to contain the assault at the border but does so by appealing to the most obvious liberal principle—legal equality. By doing so he risks collapsing the borders even further. If legal equality is the only criterion to take into account when discussing recognition, then why not do the same when the question is redistribution? Surely we should not forget the substantive equality of contemporary liberalism when considering recognition. To be sure, there may be good reasons to discard its relevance in the discussion, but if we are to remain committed liberals, it should at least be taken into consideration.

Taking a completely different line, Will Kymlicka argues that liberal justice demands special minority rights.[2] Kymlicka argues that culture is important to individual autonomy, or in other words, individual liberty. Culture provides the context for exercising liberty, and hence minority cultures that provide the resources for their members' autonomy should be protected. Kymlicka attempts to embrace the problematic claims of multiculturalists while at the same time holding onto the fundamental liberal principle of liberty. The purpose is to widen the borders of liberal theory without collapsing them altogether. I argue, however, that Kymlicka ends up doing just that—collapsing the borders, in the sense that despite its aims, in the end it is difficult to recognize Kymlicka's argument as liberal. Kymlicka veers to a communitarian position in which the fundamental value of a culture is asserted.

Even though they are diametrically opposed, Barry's and Kymlicka's arguments are similar in that they attempt to navigate the tricky borders of liberalism in trying to make sense of multicultural claims. They illustrate how difficult this task is for contemporary liberals, because even though their

approaches and conclusions are very different, both end up compromising some of the liberal ideals they ascribe to. My aim in the first two sections of this chapter is to illustrate these difficulties by criss-crossing between the center and the periphery, or the borders and the core of liberalism. The borders are where the debate happens, where liberalism meets both the claims of the theorists of multiculturalism and also the real-world calls for special rights for specific minorities. The core is the philosophical basis of liberalism, a theory where the value of individuals is in some sense taken as primary and where those individuals are, in some sense, guaranteed both equality and liberty.

The final sections of the chapter attempt an answer to the second part of my title: can there be a liberal multiculturalism? Is this an "either/or" situation—multiculturalism and postmodernism or some variety of critical theory or liberalism without multiculturalism? I aim to formulate an answer to this question by retreating from the borders to the core, as it were. To continue the metaphor, by returning to the core we can perhaps expand the borders so that multicultural claims can be acknowledged within the purview of liberalism. I attempt this by examining key elements of John Rawls's liberalism.

Rawls is conventionally considered a typical proponent of liberal neutrality, but I argue that although Rawls never addresses the issue of minority rights, his work contains potential resources for liberals wishing to do so. I examine Rawls's substantive conception of equality and suggest an analogy between the critique of state neutrality in the economic sphere and the conventional liberal conception of neutrality in the cultural one. I discuss Rawls's notion of self-respect, and suggest it as a possible liberal reason to take culture seriously. I also consider the relationship between the individual and the social in Rawls's thought, and argue that Rawls follows Rousseau in emphasizing the social rootedness of individuals. Unlike the Hobbesian Barry, Rawls is not an asocial individualist—he sees our very selves determined to a large degree by our social environment. These elements suggest that Rawlsian liberalism might provide an antidote to Barry's vehement attack on multiculturalism, and perhaps even a potential liberal basis for a theory of minority rights.

Finally, I argue that the issue of multiculturalism raises the question of borders in yet another sense—the borders of theory. Although Rawls, for instance, thinks we should base our theory of justice in some sense on our real-world moral convictions, he does proceed to formulate his theory at a very abstract level. His theory is more of a Platonic exercise in ideal-state building than a response to real-world claims for justice. But multiculturalism stems from real-world claims to recognition. These claims demand entry at the borders of liberal theory as well. In the final section I move the discussion to

this more general level—what should be the relationship between the ideal theory of political philosophy and the claims to justice made by real-world individuals and social movements? In this section I draw on Nancy Fraser's and Axel Honneth's debate on "redistribution" versus "recognition," where an important distinction is Honneth's critique of Fraser's emphasis on the importance of so-called "new" social movements.

This chapter operates on an abstract level, but it should be remembered that these debates do have implications for real-world justice. Claims for recognition of minority cultures are made in terms of justice—and obviously ignoring them will be experienced as injustice by those making the claims. On the other hand, adopting a strong set of minority rights might be experienced as an injustice by the majority, if they follow Barry in thinking that formally equal treatment is all that justice requires. The debate on multiculturalism is fundamentally about what justice is and is not, what is included within the borders of liberal justice and what is left out.

Defending the Borders: Barry's Liberal Attack on Multiculturalism

The most obvious liberal response to the claims of multiculturalism is to ignore them. Conventional liberal theories provide considerable leverage for different cultures to flourish because they guarantee such basic rights as free speech and freedom of religion. They rule out overt discrimination of individuals based on their race, gender, or sexual orientation, for instance. Liberal justice seeks to protect the autonomy of each individual, while refraining from taking a stance on which ways of life or conceptions of the good are valuable.

Why, then, would particular groups need special rights? Why should minority cultures be given special recognition, given that the liberal state is meant to stay neutral in questions of the good? Brian Barry's *Culture and Equality* is the most powerful sustained attack on the politics of multiculturalism from this kind of liberal egalitarian standpoint. Its power derives, I believe, from the simplicity of Barry's argument, his insistence on commonsensical principles. Liberalism is largely about two fundamental values, variously defined: liberty and equality. Barry forcefully argues that the politics of multiculturalism fails because it violates equality.

Barry's point is simple. The liberal state is supposed to be neutral between different religions, world views, and conceptions of the good. Liberalism privatizes religion and takes it out of the public political sphere.[3] The same goes for cultural practices. This "strategy of privatization,"[4] as Barry calls it, "entails a rather robust attitude towards cultural diversity."[5] Basically,

it entails ignoring cultural differences. Barry invokes a classical liberal idea, straightforward and commonsensical: the law should be the same for everyone. Individuals' cultural affiliation should have nothing to do with how the law is applied to them, or the kinds of rights they have under the law. In Barry's words, the strategy of privatization says that "here are the rules which tell people what they are allowed to do. What they do within those rules is up to them. But it has nothing to do with public policy."[6]

Barry relies on the classical liberal idea of equality. In classical liberalism, equality is a formal concept. What ensures equality is that the formal rules of society do not discriminate against any of its members or give special privileges to some over others. Thus, no one can be barred from political office or employment because of being from a particular ethnic group or professing a certain religion; conversely, no one is to be given special access to, say, high office, because of his or her aristocratic lineage. This understanding of equality is what John Rawls calls natural liberty: it is simply the absence of discrimination with each individual left to his or her own devices in making use of this liberty.[7]

Here is the essence of Barry's objection to multiculturalism. By giving special rights to the members of particular cultural groups, multiculturalism violates the principle of formal equality: "The strong claim made by many theorists of multiculturalism is that special arrangements to accommodate religious beliefs and cultural practices are demanded by justice. The argument is that failure to offer special treatment is in some circumstances itself a kind of unequal treatment."[8] Barry offers a very commonsensical critique of this line of argument, pointing out that any law inevitably treats some people differently than others. By definition, the law treats criminals differently than the victims of crime.[9] Barry notes that the law always protects some interests, and actively works against others, which are considered illegitimate. The interest of women in not being raped is protected by the law with no regard given to the interests of those wishing to commit rape.[10]

Barry's colorful examples press the point: "If we consider virtually any law, we shall find that it is much more burdensome to some people than to others."[11] He concludes that it is simply a mistake to think that a law's having differentiated impacts on different people is an indication of its unfairness.[12] What Barry ignores is that in his discussion of culture he operates with a formal, classical liberal notion of equality, while in discussing economic distribution, he is a strong advocate of a much more substantive conception of equality, related to the very egalitarian strand in most contemporary liberal theory.[13] Indeed, one of Barry's conclusions is that the politics of multiculturalism threatens the politics of egalitarian, redistributive liberalism.[14]

There is no doubt that the more substantive view of equality prevalent in mainstream liberal political theory violates the formal conception of equality advocated by Barry vis-à-vis culture. In Rawls's justice as fairness, for instance, the difference principle requires that economic inequalities are arranged so as to ensure the worst-off group in society the best position they could possibly have.[15] It seems obvious that this entails treating the economically best-off and the worst-off groups in society in substantively different ways. Indeed, the libertarian critic Robert Nozick has asserted that Rawls's principle implies using the economically better-off groups in society as a means for advancing the position of the worst-off.[16] Whatever the merits of Nozick's argument, it seems beyond doubt that Rawls's conception of equality treats different groups differently in a way that Barry rejects on principle when it comes to multicultural policies. Barry, of course, endorses Rawls's *A Theory of Justice* as the "major statement" of the kind of liberalism that he espouses himself and seeks to defend against multiculturalism.[17]

It seems that Barry has two conceptions of equality, one that applies to culture and one that applies to economic distribution. I think it is helpful to characterize Barry's understanding of equality as applied to culture as broadly "Hobbesian." A Hobbesian individualism lurks behind Barry's attack on multiculturalism. Consider his description of the liberal ideal he espouses: "There should be only one status of citizen . . . so that everyone enjoys the same legal and political rights. These rights should be assigned to individual citizens, with no special rights (or disabilities) accorded to some and not others on the basis of group membership."[18] This is close to Hobbesian asocial individualism—the idea that we are individuals first and foremost, an idea that ignores the importance of our social environment and our starting place in society. In Hobbes's theory, the state is set up because of the impossibility of living in a state of nature characterized by a war of all individuals against all others.[19] Society is composed of atomistic individuals, all relatively equal,[20] who possess liberty in an extremely formal sense.[21]

Barry describes Hobbesian individuals in his critique of multiculturalism—individuals whose attachment to their social environment or their culture does not seem to go beyond preference: "The position regarding preferences and [religious] beliefs is similar."[22] Barry gives an example of preferring vanilla to strawberry ice cream to demonstrate that while both beliefs and preferences may be difficult to change, this is not a reason for thinking that it is unfair that either of them gives rise to unequal impacts of general rules.[23] According to him, "It is false that the changeability of preferences is what makes it not unfair for them to give rise to unequal impact. It is therefore not true that the unchangeability of beliefs makes it unfair for them to give rise to unequal impact."[24]

Barry's individuals can always choose to act according to the law or against it; what he emphasizes repeatedly is the individual's choice.[25] It makes no difference which religion, ethnicity, or cultural group one is born into, because one is fundamentally an individual. But what if one is born into the group defined by Rawls as the economically "worst-off" in society? Surely, to take Barry's logic to its extreme, being born into that particular group should not justify any special claims. If one takes the Hobbesian conception of equality that Barry is working with and applies it to the economic sphere, one ends up with libertarianism. To be consistent, surely Barry should apply the same ideas in the sphere of economic distribution, perhaps allowing redistribution as a pragmatic policy as he does some group-based cultural policies.[26] Instead, Barry insists on substantive economic equality as a requirement of justice.

The strength of Barry's argument is its consistency and its ability to fend off all multicultural incursions. The borders appear to stay intact. However, it seems that in order to do so, Barry has to invoke a principle of equality that he rejects in the economic sphere. In this sense, then, Barry betrays a fundamental feature of contemporary liberalism in favor of an older, Hobbesian idea. This is understandable, given how tricky it is for liberalism to deal with the kinds of claims that the proponents of multiculturalism make. It is a balancing act, but Barry falls down into libertarianism.

This is not to say that Barry is right or wrong in making his argument. It is simply to show how tricky multiculturalism is for liberalism: one of today's leading liberal egalitarian theorists has to resort to libertarianism in order to hold liberalism's borders secure. Thus, even completely denying the claims of multiculturalism does not resolve the problem. Surely, if multiculturalism were such a direct violation of liberal principles, this could be shown without invoking libertarian ideas?

In the next section I consider an attempt to formulate a liberal theory of minority rights from a liberal-egalitarian point of view. Although the aim is completely different from Barry's—Will Kymlicka tries to affirm multiculturalism from a liberal perspective—it runs into curiously similar trouble. Kymlicka does not become a libertarian like Barry, but he does become a communitarian.

Welcoming Minority Rights In: Kymlicka's Attempt

If Barry wants to close the borders of liberal theory to multicultural incursions, Will Kymlicka welcomes them right in. For Kymlicka, minority rights are not merely something that liberal theorizing on justice should account

for; they are actually demanded by basic liberal commitments. Minority rights are a question of justice rather than of pragmatic policy.

As I noted before, liberalism embraces two basic ideas—liberty and equality—and a great deal of liberal theorizing is about making sense of these concepts. Liberals support high levels of negative and positive liberty because they believe in the individual's right to choose and revise a conception of the good life for himself.[27] It is in this idea of autonomy that Will Kymlicka bases his liberal account of minority rights.[28]

Kymlicka's starting point is the concept of a "societal culture." This is "a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres."[29] The argument is simple. Liberty is about making choices. Possibilities for choice do not come out of thin air; they are provided by our societal culture. Culture is crucial for freedom since culture provides the context within which freedom can be exercised.[30]

Furthermore, culture not only provides options for us; it also fundamentally shapes how we conceive of those options. Understanding "the value of a practice is, in the first instance, a matter of understanding the meanings attached to it by our culture."[31] Hence, Kymlicka maintains, "Understanding . . . cultural narratives is a precondition of making intelligent judgments about how to lead our lives."[32] Thus, the importance of culture from an individualistic perspective is that "it is only through having access to a societal culture that people have access to a range of meaningful options."[33] And only by having such options can individuals exercise the central liberal virtue of autonomy.

Now it seems self-evident that *some* sort of culture is necessary for individuals to be able to make choices and thus utilize their autonomy. You cannot make choices in a vacuum. But there is a huge leap from this point to the one Kymlicka wants to make—that secure access to *one's own* culture is necessary for autonomy. As Kymlicka admits, the first point in no way provides a grounding for minority rights. There is a big difference between saying that you have the right to *a* culture and saying that you have a right to a *specific* culture. If access to *some* culture is necessary, then "Why not let minority cultures disintegrate, so long as we ensure their members have access to the majority culture . . . ?"[34] The essential question remains open.

Kymlicka argues that membership in one's own culture is very important for individuals.[35] He notes that the idea of letting minority cultures disintegrate "treats the loss of one's culture as similar to the loss of one's job."[36] Integration into another culture can be extremely difficult.[37] Most people are

firmly based in their own culture, and the choice to leave it is a grave one.[38] He concludes that "in developing a theory of justice, we should treat access to one's culture as something that people can be expected to want, whatever their more particular conception of the good."[39]

Here the argument has shifted. The justification for sustaining cultures is no longer autonomy but rather the importance of culture for individuals. Kymlicka's general argument about the importance of culture for liberty is based on autonomy, but here where the issue is the specific one of the protection of particular minority cultures, the argument is based on the observation that people value their own culture. Of course, I do not wish to deny this latter claim. I merely wish to point out that it does not provide a grounding for minority rights based on the liberal value of autonomy. It might provide a grounding for such rights on a different basis—namely, the supreme value of cultural membership. But such a view seems communitarian rather than liberal. It seems to embrace a particular conception of the good—that provided by one's own culture. The whole point of contemporary liberalism is to avoid questions of the good, because a fundamental premise of such thinking is that the plurality of conceptions of the good is a fundamental, immutable feature of modernity.

Kymlicka makes an unwarranted leap from the general claim about culture and autonomy to the particular one about minority rights. I do not think this is just a fault in his particular argument. Autonomy cannot be used to get minority rights off the ground. The reason is this: From the individual's perspective, there are a variety of cultural influences from which to formulate one's particular conception of the good. This is particularly so in a multicultural society. While one's own culture undoubtedly has a privileged position in this, there is no reason to assume that one only draws on it to conceive of the good. Indeed, in a multicultural society it is probably impossible to accurately pinpoint what exactly has influenced our understanding of the good and of ourselves. It seems that only in an extremely homogeneous society does our own culture play such an overriding role in our formulation of our conception of the good or our plan of life. And of course, in such a society, multiculturalism has no relevance.

Kymlicka wants to invite minority rights into the liberal sphere, because he believes they are demanded by liberal justice. However, in making his argument Kymlicka ends up collapsing the borders of liberalism altogether. By sneaking in a communitarian argument about the value of cultural membership, an argument that at least suggests a definitive stance on conceptions of the good, Kymlicka undermines the liberal commitment to giving individuals the maximum possible liberty in choosing their own conception of

the good. The liberal difficulties in dealing with multiculturalism reappear—even though Kymlicka's project is the polar opposite of Barry's. Again, my aim is not so much to prove Kymlicka's argument wrong but rather merely to show how Kymlicka's argument brings up the same kinds of problems as Barry's. Barry invokes libertarian arguments to make his case; Kymlicka seems to be using communitarian ones. Can liberalism not deal with multiculturalism without betraying its fundamental commitments?

Retreating to the Core: Rawls on Equality and Self-Respect

We have seen how both Barry and Kymlicka run into trouble when trying to address the claims of multiculturalism. It seems that multiculturalism is a problem that renders the borders of liberalism unstable: whether they are accepted or rejected, it seems that something fundamental in liberalism has to be compromised. In this section I attempt to retreat from the borders to the core, as it were, to examine some of the central elements in John Rawls's liberal philosophy and see whether they might be used to address the claims of multiculturalism. I will first briefly discuss Rawls's substantive understanding of equality, and then focus on his emphasis on self-respect as a primary good.

Rawls's understanding of equality is best illustrated by examining his discussion of the different interpretations of the second principle of justice in sections 12 and 13 of *A Theory of Justice*.[40] For our purposes, it is only necessary to contrast the two extremes, "natural liberty" and "democratic equality." Natural liberty, which I have already referred to in my discussion of Barry, means a system of formal equality. Economic opportunities are not to be formally assigned based on social class as in an aristocratic society. Rather, access to opportunity and wealth is to be based only on individual ability. No compensation is to be made for those who are less successful since, at least in a formal sense, they are given the same opportunities as everyone else. As I have already noted, this notion of equality is deeply flawed. In Rawls's words,

> since there is no effort to preserve an equality . . . of social conditions . . . , the initial distribution of assets . . . is strongly influenced by natural and social contingencies. . . . [T]he most obvious injustice of the system of natural liberty is that it permits distributive shares to be improperly influenced by these factors so arbitrary from a moral point of view.[41]

It seems that Rawls's conception of equality and his development of the difference principle is an answer to Marxist critiques of liberalism. Perhaps this

critique, discussed here in only the crudest terms, can be presented in the language of neutrality. Classical liberalism, as I have pointed out, promotes equality of a very formal kind—that of careers open to talents. In other words, this kind of equality demands neutrality toward people from different social classes, for instance. A strict formal equality is preserved between citizens; no distinction is made between them based on their economic status. Marxist theory clearly brings out that this kind of neutrality, practiced by a libertarian state, is by no means neutral, but is in fact in the interests of the better-off groups in society.

This point is accepted by virtually all liberals. In his *Lectures on the History of Political Philosophy* Rawls explicitly argues that his own justice as fairness is able to address this exact Marxist critique:

> To the objection that the political rights and liberties of a constitutional regime are merely formal, we reply that by the fair value of the political liberties [ensured by the difference principle] . . . all citizens, whatever their social position, may be assured a fair opportunity to exert political influence. This is one of the essential egalitarian features of justice as fairness.[42]

Rawls goes on to note that the egalitarian features of justice as fairness also address Marx's concern that liberal democracy only ensures negative liberty and ignores positive liberty, which is another way of phrasing the critique of liberal neutrality.[43] Thus, in the case of economic distribution Rawls acknowledges the importance of the critique of liberal neutrality, or, in other words, of the classical liberal conception of formal equality, and shows how elements in his own theory address the critique. In the sphere of distribution Rawls abandons neutrality for substantive equality.

In cultural terms, neutrality means that the state refrains from policies that promote the interests of particular groups. Thus, it would not give special land rights to indigenous populations, for example. Furthermore, no special exemptions to, for instance, motorcycle crash-helmet laws would be given to Sikhs in Britain, and the Amish in the United States would have to send their children to school just like everyone else. The liberal point is that the liberties of religion and assembly protect cultural practices within the existing framework; anything that goes beyond this is unfair since it places some groups in a better position than others.[44]

As Kymlicka points out, this argument in favor of "benign neglect" is deeply flawed: "It ignores the fact that the members of a national minority face a disadvantage which the members of the majority do not face."[45]

There is no such thing as full neutrality in cultural issues in modern states. For instance, the use of the majority language in public schools is in itself an endorsement of the majority culture. As Kymlicka points out, it makes a huge difference for the survival of a language whether it is accorded official status in a state.[46] And so surely it makes a big difference for the individual—the member of a minority who has to learn the majority language in order to be able to go to school is surely unequal to the member of the majority who is schooled in his native language. Likewise, the designation of public holidays, for instance, is not neutral.[47]

There are two points that arise from the above discussion. First, it is certainly not a priori illiberal to treat people differently based on group membership. The Rawlsian emphasis on substantive equality, which is the paradigm of contemporary liberal thought, clearly treats people in substantively different ways according to which group they happen to belong to in the economic system. The well-off are only able to become better-off to the extent that this also benefits the least well-off; and the worst-off group in society has a claim to the best position it can possibly achieve when assessing different schemes of justice. This at least invites the question whether this kind of thinking might be applicable to culture as well.

The second point is the Rawlsian emphasis on seeking to avoid giving moral status to facts that are arbitrary from a moral point of view. These are facts of life that individuals cannot in any sense have chosen, such as their starting point in life. While there are, of course, numerous cultural choices that one can make, some are beyond choice. One cannot choose one's mother tongue, even though, of course, one can choose to learn the majority language if that is a different one. Surely Kymlicka's point about language, referred to above, stands up from a Rawlsian perspective. It should be noted that making this point does not lead to the same kinds of communitarian trouble that Kymlicka's general argument for minority rights does. It is a simple fact of life that one is raised to speak a particular language; one does not need to make any assumptions about the normative value of one's native language to consider this question relevant to justice.

The second element in Rawls's thought that I wish to draw attention to is the emphasis on self-respect: "Perhaps the most important primary good is that of self-respect. . . . [I]t includes a person's sense of his own value, his secure conviction that his conception of his good, his plan of life, is worth carrying out."[48] Self-respect is relevant as regards economic distribution since an excessive concentration of wealth in the hands of one class is likely to undermine the self-respect of others.

The link between self-respect and culture is based on the fact that our self-respect is dependent on the respect we get from others. In Rawls's words, "Our self-respect normally depends upon the respect of others. Unless we feel that our endeavors are honored by them, it is difficult if not impossible for us to maintain the conviction that our ends are worth advancing."[49] This point is well made by Iris Marion Young:

> People have or lack self-respect because of how they define themselves and how others regard them. . . . Self-respect is at least as much a function of culture as it is of goods. . . . [C]ultural imperialism . . . undermine[s] the self-respect of many persons in our society.[50]

Now it seems that self-respect might be useful in formulating a liberal response to multiculturalism, for two reasons. The obvious one is the one made above, that self-respect is linked to culture. There is no doubt that systematic disrespect shown by the general public toward the members of some minority by denigrating their culture or way of life will undermine the self-respect of members of that minority. The second reason, which makes self-respect particularly attractive, is that it seems to lack the need to take a definitive stance on conceptions of the good. I do not think that we have to make normative claims about the value of cultural membership to make the sociological point that if people *are* members of a minority culture that is generally vilified, this *will* undermine their self-respect. Kymlicka needs to make the claim that one's own culture is fundamentally important for individuals, coming dangerously close to a normative communitarian claim, but if we emphasize self-respect, it seems that it does not matter whether culture is important to the individuals affected or not. Surely one can be identified with a vilified minority culture even if one's own attitude toward that culture is neutral or even hostile. If there are such vilified or deeply disrespected minority cultures in a society, individuals who do not even identify with those cultures may be disrespected because of it—this can happen, for instance, if members of the public identify them as corresponding to their stereotypes because of skin color. This is very tricky ground, but appealing to self-respect might serve as a way of addressing some of the claims of justice that the theorists of multiculturalism make without surrendering fundamental liberal commitments.

In this section I have pointed to two possible liberal resources for addressing minority rights—the substantive conception of equality and the emphasis on self-respect. These are elements at the heart of Rawls's theory—at liberalism's core. They are not meant as definitive conclusions in any sense,

but rather as starting points and ways forward for thinking about how we could utilize core ideas in liberalism to accommodate the multicultural claims reaching its borders. Next, I present a further suggestion for a starting point—namely, the idea that the sociological importance of culture for individuals can perhaps be taken into account in a liberal theory of justice without invoking normatively communitarian arguments or taking stances on conceptions of the good.

Rawls on the Individual and the Social

Previously, I noted that behind Barry's specific arguments against multiculturalism lurks a Hobbesian asocial individualism. It is a standard criticism of liberalism to assert that all liberals misconstrue the relationship between the individual and the social by espousing such a notion of individualism.[51] I have argued elsewhere that by examining John Rawls's thought historically, investigating how his own theory is shaped in response to the tradition of the social contract in the history of political thought, it is possible to see how he is immune to this criticism because he follows Rousseau and Hegel in stressing the deep social rootedness of individuals.[52] If Barry's asocial individualism leads to a vehement attack on multiculturalism, then perhaps Rawls's notion of social rootedness proves more hospitable.

Rawls addresses the asocial individualism criticism directly in his *Lectures on the History of Moral Philosophy,* in a lecture on Hegel:

> A . . . criticism of liberalism is that it fails to see, what Hegel certainly saw, *the deep social rootedness of people within an established framework of their political and social institutions* [emphasis added]. . . . But I don't think that a liberalism of freedom is at fault here. *A Theory of Justice* follows Hegel in this respect when it takes the basic structure of society as the *first* [emphasis in the original] subject of justice. *People start as rooted in society and the first principles of justice they select are to apply to the basic structure* [emphasis added]. The concepts of person and society fit together; each requires the other and neither stands alone.[53]

Although, of course, individuals choose principles of justice under the veil of ignorance in Rawls's theory, and hence individuals are *normatively* primary for him, the above passage shows that individuals are not *sociologically* primary as in Hobbesian asocial individualism. In terms of culture, then, Rawls would not construe cultural allegiances in terms of individual

preferences or choices. Kymlicka illustrates this point by pointing to a passage in *Political Liberalism* where Rawls emphasizes individuals' attachment to their own culture.[54] This passage, where Rawls examines the importance of culture in a discussion on emigration, is worth quoting at length:

> Normally leaving one's country is a grave step: it involves leaving the society and culture in which we have been raised, the society and culture whose language we use in speech and thought to express and understand ourselves, our aims, goals, and values; the society and culture whose history, customs, and conventions we depend on to find our place in the social world. . . . [T]he bonds of society and culture, of history and social place of origin, begin so early to shape our life and are normally strong.[55]

For Rawls, then, individuals are profoundly shaped by their social environment and their culture. They have a deep attachment to their own culture; the contrast with Barry's individuals to whom religious belief, for instance, is just another preference is clear enough. Kymlicka rightly argues that for Rawls, "the ties to one's culture are normally too strong to give up."[56]

The argument is deepened by examining other passages in Rawls's major works. In *A Theory of Justice*, Rawls writes: "The social system shapes the wants and aspirations that its citizens come to have. *It determines in part the sort of persons they want to be as well as the sort of persons they are* [emphasis added]."[57] Not only does the social system shape individual lives, it *determines* them in large part. The same idea is repeated in the later *Political Liberalism*, with an added reference to culture: "The basic structure [of society] shapes the way the social system produces and reproduces over time a certain form of culture shared by persons with certain conceptions of their good."[58] Thus, the most fundamental institutions of society—which is what Rawls means by the basic structure—not only determine individual lives to a large part, they help produce a certain type of culture as well.

Two points arise from this. First, Rawls's approach is the very opposite of Barry's Hobbesian one. In discussing culture, Barry operates with a formal conception of equality, which ignores the overriding influence of the social in individuals' lives. In contrast, Rawls draws on anti-Hobbesian elements in Rousseau. In his *Lectures on the History of Political Philosophy*, Rawls argues that for Rousseau, "Social institutions and conditions of social life exercise a predominant influence over which human propensities will develop and express themselves over time."[59] On Rawls's interpretation of Rousseau, the institutions of society thus shape and mold individuals in profound ways.[60]

He gives a quote from Rousseau: "At the birth of societies . . . the leaders of republics create the institutions; thereafter, it is the institutions that form the leaders of republics."[61] Rawls follows Rousseau in this line of thinking, stressing the overriding importance of social institutions. While this does not directly lead to an embrace of multiculturalism, it is an antidote to Barry's Hobbesian critique of it.

What Rawls is doing in following Rousseau is accepting the sociological criticism of classical liberalism, and taking the basic structure of society rather than relations between individuals as the starting point of his theory.[62] But at the same time, he is retaining the fundamental normative individualism of liberalism, as shown by the decision procedure under the veil of ignorance.[63] This is essentially what we would want from a specifically liberal theory of multiculturalism—to take culture seriously as more than mere individual preference but retain the *normative* focus on individuals.

The second point to arise from the passage above is this. For Rawls the most fundamental question is the justice of the basic structure, the most important institutions in society.[64] Now Rawls's insistence on the overriding importance of those institutions for individuals' lives and his argument that those institutions help produce a culture perhaps open up the possibility of considering the justice of the basic structure not only in terms of economic distribution, but also in terms of culture. What kind of culture do the institutions of a just, well-ordered society produce? Certainly a culture that fosters a sense of justice in the citizenry.[65] Rawls does not really probe the matter further than this. But perhaps there is scope for further investigation, because we can see that Rawls's emphasis on the importance of the basic structure for individuals' lives goes beyond matters of economic distribution and the differential opportunities that entails for different groups.

If the basic structure of society indeed produces a culture, then we may ask whether that is a culture that fosters equality between different groups. Might the parties in the original position choose principles for ensuring cultural fairness as well? The veil of ignorance would certainly make the parties in the original position ignorant of which religion, ethnicity, or other group they actually belong to, and even of which groups exist in society.[66] But perhaps they could assume the existence of different groups, and keeping in mind that the basic structure they are choosing fundamental principles for helps shape a culture, they might seek to secure substantive equality for different cultural groups by choosing principles of justice that foster the development of a culture of equality. Whether this would include some provision for cultural rights, public affirmation of particular cultures, or culture-based exemptions to general laws is another matter. But the question is worth raising.

In the previous section I suggested that Rawls's emphasis on self-respect might lead us to attempt to apply his substantive conception of equality to culture as well. This section has provided further Rawlsian suggestions—that his Rousseauian emphasis on the social rootedness of individuals serves as an antidote to Barry's Hobbesian asocial individualism. Finally, the idea that the basic structure of society helps produce a culture opens up the possibility of considering the justness of that culture.

What I have attempted is simply to offer some suggestions to the effect that at least Rawlsian liberalism is not necessarily as inhospitable to multiculturalism as Barry thinks. Perhaps, instead of the fundamental commitments of liberalism being compromised in the face of multiculturalism arriving at its borders, they can be used to address those very claims of justice. I have tried to suggest not only that liberals may possess resources for dealing with multiculturalism but also that they need not necessarily resort to pragmatic arguments or compromises when doing so. When confronted with new claims of justice at the borders, liberals need not reach out to communitarianism or libertarianism to address them—they can, perhaps, reach toward the very core of liberalism.

The Borders of Theory

The student of political philosophy is from time to time confronted with the question of justifying his enterprise. One deals with lofty ideals—social justice, equality, autonomy. One tries to learn from the greats in the history of political thought. The motivation for this is perhaps pure intellectual curiosity, but especially in the case of the study of political philosophy it is probably also a belief and commitment to some vision of a just society. But what is the relevance for achieving that just society of academic debates on, say, how to best interpret a particular passage in Hobbes or Rawls? If one is committed to a vision of justice, then is the study of political philosophy a way to further this cause?

The student of liberalism, perhaps, feels the sting of this question even more acutely. Liberal theory is abstract. It tends to begin from generalized notions of human needs and interests, and it employs very abstract devices such as the original position to formulate principles of justice. Although, of course, the aim is ultimately to produce a conception of justice that can be utilized in actual societies grappling with injustices, liberal political philosophy tends to operate on a very high level of abstraction. It is perhaps possible to see some sources of inspiration for Rawls's justice as fairness in the actual political history of the United States, the struggle for civil rights being the

most obvious example. But Rawls seems almost Platonic in his insistence on ideal theory, echoed even in *The Law of Peoples* where he emphasizes the realism of his utopian project.[67] What is important is not so much that a just society will be achieved; it is rather that such a society is not a theoretical impossibility.

To use the metaphor of borders, the case of multiculturalism is one where real-world claims for justice confront the borders of ideal-theoretical liberalism. The discussion of multiculturalism in this chapter has been very abstract, and I have attempted to investigate what happens when the theoretical claims of multicultural theorists reach the borders of liberalism. In this final section I use the debate on multiculturalism to explore the larger question of liberalism's ability to deal with real-world questions of justice. I draw on the debate between Nancy Fraser and Axel Honneth to illustrate the issue.

Fraser and Honneth engage in a detailed debate on the merits of "redistribution" versus "recognition" in the book *Redistribution or Recognition?*[68] The issues raised are at the heart of the debate on multiculturalism, since multicultural theorists call for the recognition of different cultures, and the argument that merely focusing on distributive justice ignores important sources of injustice is central to their case. It is not possible to consider this debate in any detail here. Rather, I would like to raise one issue from the debate, because it provides an additional perspective on the borders of liberalism I have been discussing.

This issue is the relationship between political philosophy and actual political movements. Nancy Fraser argues that redistribution and recognition are both necessary perspectives on social justice, neither of which can be reduced to the other, and that together constitute a perspectival dualism necessary to address issues of justice in contemporary democracies.[69] Axel Honneth, on the other hand, argues that recognition is the fundamental category. According to Honneth, claims to redistribution can be interpreted as claims to recognition.[70] Honneth argues that individuals require recognition in order to develop their identities.[71] From this premise, he concludes: "Societies only represent legitimate ordering structures to the extent they are in a position to guarantee reliable relations of mutual recognition on different levels."[72]

In both accounts, there is a "dialectic of immanence and transcendence."[73] What this means is that neither wishes to ground a theory of justice in merely immanent, real-world claims for justice or purely in a transcendent "God's-eye-view wholly independent of the society in question."[74] While both operate within critical theory rather than conventional liberalism, this debate highlights an interesting problem for contemporary liberalism as well.

Where should the borders between theory and real-world claims for justice be drawn? This is another issue where the tricky question of multiculturalism—where claims to recognition and redistribution clash—highlights the problematic borders of liberal theory.

Although Fraser refers to the claims to justice made by so-called new social movements, she wants to distance herself from their immanence by invoking "folk paradigms of justice," which "constitute a society's hegemonic grammars of contestation and deliberation."[75] In other words, they are the discourses of justice that have gained prominence in contemporary democracies, and would presumably include ideas of justice propounded by social movements such as feminism, gay rights, or groups advocating special rights for cultural minorities. Honneth criticizes Fraser for her emphasis on social movements, since he believes she surrenders too much to the immanent. According to him, basing a theory of justice on the claims of the social movements that happen to be dominant today risks reproducing current "political exclusions."[76] Honneth argues that the daily experiences of injustice suffered by individuals, whether they are publicly acknowledged by social movements or not, should be the focus of a theory of justice.[77] Fraser retorts, "If Critical Theory's reference points should be normatively reliable—if, in other words, they should help us to conceptualize what really merits the title of injustice, as opposed to what is merely experienced as injustice—then social-movement claims are at least as plausible candidates as untested prepolitical discontent."[78]

At first glance, the dominant strand of contemporary liberalism seems to be lodged firmly in the transcendental camp. Rawls justifies his two principles of justice by utilizing a decision procedure that aims to transcend all the immanent features and interests of those making the decision. In a sense, the original position models fundamental human interests, and it is not surprising that many critics have thought that it is premised on a theory of human nature. The parties in the original position seek to further their interests in the most general sense, since they do not know who they are in the real world. How could such a theory deal with claims to justice made in the real world, when it operates on such an abstract level?

Yet the other element highlighted in the Fraser-Honneth debate is present in Rawls as well. Rawls uses "considered moral convictions" as his theoretical starting point.[79] These are moral convictions that are widely and deeply held in contemporary democracies, such as the belief that slavery is an absolute wrong, or that discrimination should not be allowed. Thus the theory does not start from some wholly abstract, God's-eye-view, but rather attempts to uncover some of the most fundamental moral convictions immanent

in contemporary liberal societies and utilize them as the starting point of theory. The Rawlsian ideal is "reflective equilibrium," where our considered convictions and our theory of justice have been brought into harmony.

Just like Honneth and Fraser, Rawls's theory is pulling in two directions. When it comes to the question of multiculturalism, the problem is that those claims are not included, at least not directly, within what Rawls labels our considered convictions. Even though Honneth may be correct in pointing out that claims to recognition are nothing new, the specific claims of multiculturalism *are* new. Rawls's considered convictions are classical—antislavery and pro–religious freedom, for instance. Could multicultural claims be included in our considered convictions? Perhaps this is not the route to take, given how contested multicultural claims are; they certainly do not have the kind of wide acceptance that the abhorrence of slavery has. But the question is at least worth asking.

The problems with both Fraser's and Honneth's accounts are illustrative of the problems of liberal borders. Fraser is quite correct in criticizing Honneth for seemingly basing justice claims in merely subjective experience; Honneth is equally right in criticizing Fraser for potentially neglecting injustices not brought to public forums by social movements. Although Fraser states that her folk paradigms of justice are simply starting points and fully open to criticism, it seems that she does risk basing justice on such paradigms. The problem with this would be that those discourses that happen to be current are thought to be definitive of justice. We might well ask—either from a Marxist or a Rawlsian perspective, whichever we prefer—if those paradigms have not been perverted to some degree.

There is no space to consider this question here, but suffice it to use the classic example of a slave-owning society, which Rawls uses. In such societies, it may be possible that the majority of people believe the current arrangements in society are just—it may even be possible that the slaves themselves, conditioned to believe they deserve their position, may view the prevailing order as legitimate. However, the fact that slave-owners and perhaps even slaves think their society is just is no reason for us to refrain from considering such a society grossly unjust. A theory of justice needs to be able to point out injustice even in a society that is completely blind to it.

The above example is extreme, but I think the point is valid even when the case is not so blatant. According to Fraser, her ideal of participatory parity needs to be applied in open, democratic processes of discussion.[80] But even if the discussants do not suffer from some kind of false consciousness, and even if their conceptions of justice are not perverted by the prevailing injustices of their societies, there is still a problem: namely, those who are in the most dis-

advantaged positions in society will find it extremely difficult to make their voices heard. For instance, it must be utopian to think that even if the claims of minority groups are heard at all in the public sphere, they will be evaluated equally vis-à-vis the views of the majority. Surely it is only in societies that are already very egalitarian, where what Fraser calls "participatory parity"[81] is at least close to being a reality, that we could arrive at an adequate conception of justice through such democratic discourses. Hence, it is the duty of political philosophy to develop a theory of justice that is not limited to validating only those claims of justice that are actually heard.

But on the other hand, such a theory of justice may, of course, run into trouble when it faces new claims of justice. Even if such a theory of justice is able to completely incorporate the considered convictions on justice in a particular society at a particular time, and thus may reach full reflective equilibrium, it will eventually face new claims of justice that were earlier perhaps wholly inconceivable. How can it respond? I do not pretend to have an answer to this problem. The aim of this chapter has been to show how difficult it may be for a theory to adjust when new claims arrive at its borders. I have tried to show that in the case of liberalism and multiculturalism, some of the fundamental features of one liberal theory—that of John Rawls—do seem to yield some resources for dealing with the claims of multiculturalism. But we have also seen how tricky it is to traverse these borders, as the problematic arguments of Barry and Kymlicka have illustrated.

Conclusion

I have utilized the metaphor of borders to illustrate how difficult it is for liberals to deal with multicultural claims to justice. It seems that whether the aim is to include minority rights within liberalism, or to shut them out altogether, fundamental liberal commitments are at least in danger of being betrayed. The stability of the borders comes into question. I have also attempted to point to some potential resources in liberalism for avoiding these difficulties. Whatever the merits of my arguments, the ground remains unstable. I have purposively refrained from making any clear-cut conclusions; the aim has been more to open up questions and to show how problematic some of the arguments employed in the debate on multiculturalism actually are.

There is yet one question that these discussions bring to the fore, and to this I give a very limited and tentative answer. The question is this: Why, if liberalism seems to run into such deep trouble when attempting to deal with a real-world dispute about justice such as the multiculturalism debate, should we want to be liberals in the first place? Why not abandon the borders

altogether and seek different ground? I think this question is raised whether or not we are partisans of minority rights. If we are not, then the difficulties that liberalism runs into might suggest that we should find different grounds for opposing multicultural claims. And if we are, the obvious difficulties liberals have in incorporating multicultural claims may lead us to seek completely different premises for our conception of justice.

A central figure in the debate on multiculturalism, Iris Marion Young, seems to advocate exactly this kind of abandonment of liberalism:

> If we give up the [liberal] ideal of impartiality, there remains no moral justification for undemocratic processes of decisionmaking concerning collective action. Instead of a fictional contract, we require real participatory structures in which actual people, with their geographical, ethnic, gender, and occupational differences, assert their perspectives on social issues within institutions that encourage the representation of their distinctive voices.[82]

The sentiment, of course, is admirable, and it is mirrored by Nancy Fraser. But what, if we follow Young in such a wholesale rejection of liberalism, is the justification for democratic processes of decision making? What gives all these individuals the right to participate? Why should the representation of people's distinctive voices be encouraged? Surely it is because of fundamental liberal commitments. It is because each individual has a claim to equality and liberty that the failure of neutrality or impartiality has to be criticized in the first place. Young confuses the issue: the problem is that the fundamental commitments of liberalism have not been interpreted and implemented adequately, and have thus led to inequality rather than equality. The solution is not to abandon liberalism, but to renew and refine it.

Young seems to think that replacing liberalism with recognition will lead to genuine democracy. Yet recognition of difference in itself does nothing positive. In the debate with Fraser, Axel Honneth makes the point that Fraser conveniently ignores all those new social movements that reject equality, such as extremist religious movements or neo-Nazis.[83] Surely, if we have no prior commitment to liberalism, what we end up with in Young's "real participatory structures" are situations where the neo-Nazi has as equal a claim to pressing his views as anyone else. Note that this goes beyond granting the neo-Nazi free speech. He is given the opportunity to "assert his perspective" in institutions that "encourage his distinctive voice."

Philosophically, we can consider Friedrich Nietzsche's politics. Here, recognition of difference is the premise. The very basis of Nietzsche's politics

is the division of people into those who matter—the small elite—and those who matter only as a means and a tool for the elite. Recognition of difference can be used to ground the most abhorrent politics.

We can see that in itself, recognition of difference does nothing positive. There are reasons for attempting to remain within the borders of liberalism, even if one wants to try to expand them to accommodate the claims of multiculturalism. The ground is perilous, but it is worth traversing.

NOTES

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2. Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).
3. Barry, *Culture and Equality*, 24–32.
4. Ibid., 19.
5. Ibid., 32.
6. Ibid.
7. John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 72.
8. Barry, *Culture and Equality*, 34.
9. Ibid.
10. Ibid.
11. Ibid.
12. Ibid.
13. Ibid., 7. He supports Rawls's justice as fairness, which is very egalitarian in terms of distributive justice.
14. Ibid., 325–328.
15. Rawls, *A Theory of Justice*, 83.
16. See the discussion in Samuel Freeman, *Rawls* (London: Routledge, 2007), 189–190.
17. Barry, *Culture and Equality*, 7.
18. Ibid.
19. Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge, UK: Cambridge University Press, 1996), 86–90, 117–121.
20. Ibid., 86–87.
21. Ibid., 145–146.
22. Barry, *Culture and Equality*, 36.

23. Ibid.
24. Ibid.
25. See especially Barry, *Culture and Equality*, 40–50.
26. Ibid., 12–13.
27. Kymlicka, *Multicultural Citizenship*, 80–82.
28. Ibid., 82–84.
29. Ibid., 76.
30. Ibid., 83.
31. Ibid.
32. Ibid.
33. Ibid.
34. Ibid., 84.
35. Ibid., 84–93.
36. Ibid., 84.
37. Ibid., 85.
38. Ibid., 86–87.
39. Ibid., 86.
40. Rawls, *A Theory of Justice*, 65–83.
41. Ibid., 72.
42. John Rawls, *Lectures on the History of Political Philosophy*, ed. Samuel Freeman (Cambridge, MA: Harvard University Press, 2007), 321.
43. Ibid.
44. Kymlicka, *Multicultural Citizenship*, 107.
45. Ibid., 110.
46. Ibid., 111.
47. Ibid., 114–115.
48. Rawls, *A Theory of Justice*, 440.
49. Ibid., 178.
50. Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990), 27.
51. Paul Kelly, "Introduction: Between Culture and Equality," in *Multiculturalism Reconsidered: "Culture and Equality" and Its Critics*, ed. Paul Kelly (Cambridge, UK: Polity Press, 2002), 5–6.
52. Juha Rudanko, "'What I Have Attempted to Do': John Rawls and the Social Contract Tradition" (master's diss., University of York, 2007).
53. John Rawls, *Lectures on the History of Moral Philosophy*, ed. Barbara Herman (Cambridge, MA: Harvard University Press, 2000), 366.
54. Kymlicka, *Multicultural Citizenship*, 87; John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 222.
55. Rawls, *Political Liberalism*, 222.
56. Kymlicka, *Multicultural Citizenship*, 87.
57. Rawls, *A Theory of Justice*, 259.
58. Rawls, *Political Liberalism*, 269.
59. Rawls, *Lectures on Political Philosophy*, 206.
60. Rudanko, "'What I Have Attempted to Do,'" 31–34.
61. Jean-Jacques Rousseau, quoted in Rawls, *Lectures on Political Philosophy*, 239.

62. Rawls, *A Theory of Justice*, 7.
63. Ibid., 11–15.
64. Ibid., 7.
65. Ibid., 454.
66. Ibid., 137.
67. John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 5–7.
68. Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (London: Verso, 2003).
69. Ibid., 60–64.
70. Ibid., 154.
71. Ibid., 173.
72. Ibid.
73. Ibid., 202.
74. Ibid.
75. Ibid., 207.
76. Ibid., 125.
77. Ibid., 125–134.
78. Ibid., 205.
79. Rawls, *A Theory of Justice*, 19–20.
80. Fraser and Honneth, *Redistribution or Recognition?*, 230.
81. For example, see Fraser and Honneth, *Redistribution or Recognition?*, 36.
82. Young, *Justice and the Politics of Difference*, 116.
83. Fraser and Honneth, *Redistribution or Recognition?*, 121–122.

4

The Long March from the Margins

Subaltern Politics, Justice, and Nature in Postcolonial India

Subir Sinha

Subaltern power: to canonical subaltern studies this would be an oxymoron, as this field of study has written subalterns out of the history of the sources of modern power, such as the state, law, science, planning, and so on. Elsewhere, I have sketched out an alternative approach to subaltern politics, one that sees through the social movements of subalterns their role in constituting key aspects of modernity (Sinha 2009). Here, I make a limited claim: the modernity that we inhabit today is one that bears the traces of subaltern power, not only as a source of opposition to the projects of dominant social groups but also as a positive force in creating a modernity that is inflected with their ways of seeing and their notions of a just society.

I trace the career of the subaltern subject as a seeker of justice in India, exploring the engagement of subalterns with key constitutive elements of the domains from which they are excluded. Canonical subaltern studies tell us that science, the law, planning, the language of universal citizenship, and transnational circuits of solidarity exert an inexorable violence on the subaltern. Yet I show that movements of subalterns are organized, and claims to rights and justice are made, precisely using the scaffolding that props up the domains from which they are excluded. I do so by raising a series of questions. First, what are the pathways pursued by the collective subaltern subject to enter this other domain? Second, what remains of the *differentia specifica* of subalterneity once subaltern politics transgresses its externally assigned

domain and enters another, and how is it transformed? Third, how does this subaltern transgression upset the stability of these elements? These questions relate to the dynamic tensions between some forms of constituted and constituent power in contemporary India.

Chakrabarty (2002) has denied the possibility of any positive experience of modernity for subalterns, and of any role for subalterns in the constitution of current modernity. In his account, to be subaltern is to be marginal to modernity, and an "ethical" position of partisanship with subalterns is actually to facilitate their exit from the margins and to occupy a position of pure exteriority. However, a central theme of subaltern politics today, I argue, is the refusal to occupy, or rather to accept, the margins. This is not merely a quest to become "mainstreamed," but, much more subversively, to transform that in relation to which they are marginal. To illustrate this I draw on two movements that started in the late 1960s: one for rights to coastal waters in the southern Indian state of Kerala, and the other for rights to forests in what is now the Indian state of Uttarakhand.

In the next section, I expand on some of the writings on which I draw to make this argument with relation to law, science, planning, and transnational circuits of solidarity. Subsequently, I take up these themes serially to explore how subalterns have contributed to their fraught histories. Finally, I return to the question of the conditions for the (re)production of subalterns in our current, globalized modernity.

In his meditations on subaltern cosmopolitanism and counterhegemonic globalization, de Sousa Santos (2002) asks the provocative question, "Can law be emancipatory?" He suggests that it can, if law reflects subaltern modernity, such as the conceptions and sites of law that are being proposed by organizations of subalterns. Further, he identifies "anti-hegemonic uses of hegemonic legal tools" by subalterns. How does law reach this horizon? De Sousa Santos argues that "a strong politics of law and rights is one that does not rely solely on law or on rights. Paradoxically, one way of showing defiance for law and rights is to struggle for increasingly inclusive laws and rights" (de Sousa Santos 2002, 465).

In these formulations, de Sousa Santos steps well beyond the conceptualizations of canonical subaltern studies. First, he firmly puts modernity within the history of subalterns. Second, he identifies the possibility of subalterns using elements of hegemonic formations to further their agendas. Third, he shows how pushing the limits of hegemonic formations subverts such formations. And finally, insofar as such subalterns are engaged in a project of counterhegemonic *globalization*, the insistence in canonical subaltern studies

on the fragmented nature of subaltern consciousness and the lack of ability to think in terms of a totality are severely attenuated.[1]

If de Sousa Santos arrives at his account for emancipatory law by working "downward" from his observations of the global/international/transnational justice movements, Samaddar builds his observations regarding political subjectivity, justice, and law by looking at concrete instances of contention, confrontation, and deliberation from the Indian field of politics. Because legal and constitutional recognition is the "award" sought by diverse political organizations for their stand on justice (Samaddar 2007b, 65), contemporary social movements pursue the constitutional path as one of the key routes to advancing their agendas, contrary to the position of canonical subaltern studies, in which subalterns are outlaws committed to illegality, or one in which their common practices are rendered illegal by law.

Canonical subaltern studies write off the law as belonging to the elite domain, and one to which, even if they aspire, subalterns will perennially be outsiders.[2] What, then, to make of legal rulings on land acquisition, or constitutional protections for tribal lands, or forest laws that now oblige the state to transfer lands to forest inhabitants, or the proliferation of "public interest litigation" done in the interests of the poor, whereby new laws are created that give more power to subalterns? These seem to confirm Samaddar's insistence on "the possibilities of other forms of justice from popular deliberations" (2007b, 72). The challenge is to show how dialogic spaces are created where such deliberations can take place, and how, from deliberation, *actual* legal change *actually* can follow.

The chief problem with modernity/subalterneity or political/civil society binaries on which canonical subaltern studies rest is that the politics of subalterns has long been transgressive of such divides. As Samaddar notes, "Even political activists resorting to violent means accept the machinery of justice, transforming themselves from political subjects to justice-seeking subjects" (2007b, 75). Samaddar's suggestion that in the "production of alternate ideas and practices of justice we can find traces of the new visions of a desirable political society" (2007b, 66) shakes another element of canonical subaltern studies—namely, that subaltern political action is "spontaneous," ephemeral, and short-term. Conscious and organized action of the sort de Sousa Santos labels "subaltern cosmopolitanism" today refers to "the emancipatory projects whose claims and criteria of social inclusion reach beyond the horizons of global capitalism" (de Sousa Santos 2002, 460).

To bring political economy into an account of contemporary subalterneity, let me ask: what did two contrasting projects of modernity—primitive accumulation and paternalistic community development—produce? In the

classical writings of Marx, primitive accumulation produced, among other things, classes such as the bourgeoisie and labor, as well as the capitalist state, and formed the basis on which class solidarity and a proletarian political project could be based. I agree that such a classical history of transition will not be repeated in the postcolony, a point conceded by agrarian Marxists themselves (see Bernstein 2007). While the lens of primitive accumulation is used in relation to Garhwal, I enter the fisheries in Kerala through early paternalistic community development programs. I suggest that it is difficult to maintain that after primitive accumulation, paternalistic development, and the law and the state that accompanied them, subalterns in India remained unchanged, and that they remain subalterns today in much the same ways they did in the eighteenth and nineteenth centuries.[3]

As I show later, primitive accumulation—its timing, its modes, and its legitimation—all opened up specific possibilities for subjectivity. I differ with the recent "rethinking" of capitalist development by Sanyal (2007) and its adoption by Chatterjee (2008); they argue that primitive accumulation is not possible today because of electoral democracy and the fact that the developmental state has taken on pastoral-welfare functions. In contrast, I argue that even before the onset of electoral democracy, primitive accumulation was accompanied by elements of bourgeois geoculture that made moral, scientific, and universalist arguments for it, opening up a space for contestation and negotiation. Primitive accumulation served as a ground-clearing episode in the history of political subjectivity, rendering obsolete certain modes of making claims to resources, while making possible certain encounters with the developmental state in the 1960s and later.

Let me now turn to the politics of two sets of contemporary subalterns: fishworkers and forest dwellers.

What, if any, is the role of subalterns in *constituting* the law? And, if it can be shown that subalterneity is part of the vector of forces that authors the law, then why do subalterns, on whom law has been a force of inexorable oppression, take it upon themselves to seek redress of the law, as well as changes in the law?

While conquest was a key condition for the emergence of law as a form of regulation, law did not follow conquest immediately, nor was it created de novo. The East India Company conquered the Garhwal Hills (where a century and a half later the Chipko movement emerged) in 1815, at the request of the local raja to rid them of the tyrannical rule of the Gurkhas. A grateful raja then gave half his kingdom to the British, and the ruling house maintained a stance of willing subservience to them until national independence

in 1947. The first settlement of land and forest rights of 1823 (referred to as "san assi ka paimana," or "the measurements of 1880") in the region recorded the preexisting rights of communities.[4]

Early chronicles of conquest refer to hill peasants as guardians of forests, and marvel at their "eternal abundance." No law was required at this point. In 1850, the British adventurer Frederick Wilson experimented successfully with floating logs down the Ganga and its tributaries. After the rebellions of 1857 threatened the stability of colonial rule and the construction of railways became urgent, the demand for timber increased exponentially. Abundant forests now suddenly seemed scarce, and the hill-man no longer appeared as a benign guardian but as a villain whose profligate habits needed to be checked by the weight of law.

Primitive accumulation made the issues of access and rights to forests political. Within years of conquest the company's interests in Garhwal forests expanded rapidly, as did its revenues from them, requiring the creation of an extensive forest bureaucracy (Walton 1911, 11–12). Forest laws, starting from the first Forest Act of 1865, progressively curbed the rights of communities and circumscribed the activities of hill populations in their relation to terrain: grazing of livestock, clearing of forests, what could be collected, who could sell the products, levies, and so on. New laws brought forests under state control, including all "unoccupied land," and all "land covered with trees, brushwood, and jungle."

Conquest led to demands by colonialists to expand the sovereign domain of the state. As one colonial officer argued, "The right of conquest is the strongest of all rights—it is a right against which there is no appeal." Customary rights were transformed into privileges, concessions made from a position of "kindness," not to be mistaken for weakness of the colonial state (D'Abreo 1985, 2). Law gave foresters expansive powers to catch and punish rule breakers. The Forest Act of 1927 provided an exhaustive list of forest products on which taxes were levied: "timber charcoal, catechu, wood-oil, resin, natural varnish, bark, lac, mahua flowers, mahua seeds," and also "trees and leaves, flowers and fruits and all other parts or produce . . . of trees; plants not being trees (including grass, creepers, reeds and moss), and all parts or produce of such plants; wild animals and skins, tusks, horns, bones, silk, cocoons, honey and wax, and all other parts or produce of animals, and peat, surface soil, rock and minerals and all products of all mines and quarries" (Malik 1981, 9).

In the face of such legal separation between the inhabitants of the hills and their immediate surroundings, and of the abrogation of community rights to create the sovereign domain of the state, how can one talk of subalterns becoming the author of law? One can identify three openings for that

possibility. First, as Sivaramakrishnan (1999) has shown, the law itself bent to local specificity: in each area of its application, it made room for some "exception"—whether to terrain, or to trade, or to security and administrative realpolitik, such as recruitment of soldiers for the army. Second, there were the crises of governability emerging from the crisis of livelihoods. Fodder and fuel had become so scarce that "parties of women are often seen travelling miles . . . and returning to their homesteads after an absence of four or five days" (Sivaramakrishnan 1999, 85–88). This crisis had sparked incendiary rebellions that scorched hundreds of square miles of the forest in so-called *dhandhaks*, and hill villagers had taken a stand of complete noncooperation with forest officers. Haripriya Rangan (2000) argues that there are easily identifiable "dominant policy phases" with relation to the hills, responding partly to popular movements. And third, colonialists legitimated rule on the claims that it worked in the interest of—because it aimed to increase the welfare of—the ruled. Departing from Sanyal's take on primitive accumulation, I propose that the welfare of the colonized was a prime legitimation for early organized primitive accumulation. Indeed, it was a part of bourgeois geoculture. Both Wallerstein (1996) in his original formulation, and Dussell (2002) in his amended version, have talked about such geoculture as part of bourgeois subjectivity. In contrast, I argue that both primitive accumulation and the bourgeois geoculture that accompanied it—and indeed was the prime mode of its legitimation—created possibilities for the subjectivity of the colonized.

Facing a crisis of governability, the *Report of the Kumaon Forests Grievances Committee* (1922, 7) recognized that forest policies were doomed without local support. Village forest councils were formed, and local populations were granted a wide variety of rights. The Wyndham Commission of 1922 recommended returning some forests from state control to community management through *panchayats*. These boundaries were determined by subaltern demands for return to "san assi ka paimana," or the village measurements recorded in the first colonial records of 1823. The new laws of 1930–1931 gave in to these demands and recommendations, and within ten years several hundred *van panchayats* were operating in the hills.

A key condition for this third route for hill peasants to make legal changes was the increasing link between hill politics and the broader nationalist movement, with regional actors such as G. B. Pant and Virendra Saklani acting as important "translational agents" (see Ribeiro 2004 for this formulation). The hills had entered the literary imaginary of nationalism through the writing of the Almora poets, chiefly Sumitra Nandan Pant. This insertion of hill peasants into wider circuits of solidarity gave a new direction to subaltern politics.

Until the 1820s Garhwal had been at the edges of the imperial politics of the plains but an integral part of another region encompassing Tibet and Nepal. Now it became marginalized within the polity created by primitive accumulation. Forest law was justified on the grounds of the emerging concept of "public benefit." But who was the public? Was it "the whole body of taxpayers," or "the people on the track within which the forest is situated"? However one defined a public, serving its interests involved "the regulation of rights and restriction on privileges of users in the forest areas . . . previously . . . enjoyed by the inhabitants of its immediate neighbourhoods" (Joshi 1989, 17). Citing "public interest," forest law gave officers the power to make rules regulating the management of village forests; prescribe the conditions on which the community may be provided with timber, other forest produce, or pasture; and define their duties for the protection and improvement of such forest (Malik 1981, 44–46). This posing of the interests of "the inhabitants of the forests" as counter to that of "the general public" was at the base of the emergent regional political identity that was mapping on to the forest question. Indeed, Chipko and the movement for statehood for Uttarakhand led by radical students were intimately fused for a decade from the late 1970s.

Along with law and the public interest, the last element of bourgeois geoculture I consider in relation to subaltern political subjectivity in the hills is that of "science," both natural and social. Aguirre-Rojas (2000) has argued that the modern social sciences were a constitutive element of bourgeois geoculture, which claimed power based on universal and eternal truths—power, as it were, that was above or beyond politics. But geoculture was a hegemonic force, and thus, of necessity, had to be responsive to the resistance of the ruled. "Scientific forestry" had emerged to balance growing demands on forests with measures to regenerate them, but because it acted against the interests of forest populations, and because, under its rule, forests themselves were fast disappearing, its status as "truth" and as "being above politics" was increasingly under question.

Between 1930 and 1968, the hills were relatively quiet, though translational agents were laying the grid for new circuits of solidarity. The first, connected with the Gandhian movement, was the creation of a network of schools and labor cooperatives that popularized the ideas of "village self-rule" and nonviolent resistance. This was loosely linked with the entrenchment of the Congress party in the area. The second was that of the Communist Party of India through agents like P. C. Joshi. Later, in the 1970s, Garhwal students forged linkages with the students' movements against the National Emergency ongoing in provincial North Indian universities. Forms of local activism were also linked with the transnational alternative development

movement, including feminism, while in the 1990s, the forces of the Hindu far right, such as the Vishwa Hindu Parishad, emphasizing the sacred geography of the Himalayas as "*devabhoomi*," found considerable traction. The hills, once remote, were now multiply articulated.

By the 1960s through the 1980s, hill populations had become "modern subalterns," by which I mean that, against the grain, they argued on the basis of their material existence that there was a "crisis," they provided a causality leading to the crisis, and they offered a program of positive action. In the novel *Pratikar ke Ankur* (Seeds of Rebellion) Chandi Prasad Bhatt (1979), one of the leading intellectuals and activists of the Chipko movement, presented the experience that was widely felt by those residing in Garhwal: the floods of 1971, and the landslides that followed. Mountain areas see annual floods and landslides, but from the late 1960s these had increased in their intensity and their destructive capacity. Because land by the rivers was used to grow basmati rice, the main source of cash incomes for most hill peasants, the destruction of these lands had a severe effect on livelihoods. Movement activists gathered evidence that showed that where deforestation was more advanced, such destruction was also more widespread. Another leading intellectual-activist, Sunderlal Bahuguna, organized marches through such areas, such as the forests of Auli, in order to make the links between deforestation and destruction of life, livestock, arable land, and livelihoods *pratyaksha*, or apparent.

Subaltern politics aimed to make scientific forestry and planning appear ridiculous. In Chipko's myth of origin, the Forest Department auctioned willow and ash trees to a sporting goods factory. When confronted by irate villagers, the forest officer suggested that they use pine trees to meet their needs such as making plows. Villagers pointed out that pine trees, being resinous, cut into the skins of draft animals. The critique that scientific forestry was oblivious to the basic uses of tree species had deep resonance in the hills, summed up in the slogan that it was tantamount to "burning lamps in the noonday sun," as forest officers could not recognize the obvious truth. At the same time, Chipko activists also sought connections with sympathetic scientists, such as Vandana Shiva and Jayanto Bandopadhyaya, culminating in the 1980s with close links with M. S. Swaminathan, the so-called father of the green revolution.

By the early 1970s, the intellectual critique of centralized planning in India had become widespread in the alternative development movement, and sympathetic social scientists began to research these movements. Movement organizations such as Navjivan Ashram (the New Life Community) and Dasholi Gram Swaraj Mandal (Dasholi Village Self-Rule Society) also

began to produce copious documentation of their activities. I have considered Chipko's critique of planning at length elsewhere (Sinha 2003). Activists constructed dialogic spaces, in which they could come into conversation with agents of the state, of the so-called third sector, and of radical scholars. The Delhi University group Kalpavriksha became a gateway for linking university activism with Chipko. The journals *Economic and Political Weekly* and *Lokayan Bulletin* became vehicles for taking sympathetic readings of Chipko to a wider audience. Bhatt traveled frequently to Delhi to use the platforms provided by the Society for the Promotion of Wasteland Development (a quango formed by officers of the Ministry of Agriculture and Allied Activities) to meet official scientists, planners, and representatives of the World Bank and bilateral aid organizations. It was in this forum that Bhatt provided a critique of the World Bank–funded reforestation programs, arguing that they lacked an employment component and pushing for all programs for ecological regeneration to have such a component paid for by funds earmarked for rural employment programs. This is now common sense in policy circles.

Feminism was another sphere of expert knowledge engaged by movement activists. Connected with the women's movement, a whole field of feminist development policy has emerged, seeking authenticity based on claims to organic links with movements. Spivak (2000) has argued that internationally dominant feminism on the one hand needs the figure of the subaltern woman to legitimate itself, but on the other hand it can neither fully encompass nor represent her. But this formulation, while perceptive in its own right, misses the complex interplay between movement feminism and its internationally dominant counterpart of "policy feminism." Chipko sparked off some of the more animated debates of Indian feminism, and indeed Indian ecofeminism has emerged from the experiences of certain intellectuals connected with Chipko.

The Forest Acts of 1980 and 1988 may look inadequate from the vantage point of today, but it needs to be kept in mind that they were major breaks from the prior history of forest laws. The rights of communities, abrogated in 1865, were recognized again. Villages were given the right to decide what use common forests could be put to. Most importantly, the pressure of movements such as Chipko sparked off a new debate about rights to forests that was conducted on ecological terms. What was sustainable forestry, how was it to be measured, and what were the links between the rights of poor forest dwellers and sustainability: these issues became central. Indigenous knowledge, long derided by foresters, now achieved a new status as situated and closer to the ground, and thus gained in importance in development policies. The international attention given to Chipko played a key role in elevating

the status of Indian movements around nature internationally, and key Chipko activists became engaged in creating transnational movements for forest rights.

Until the early twentieth century, Indian states were not too interested in the lives of fishers, or in their relation with fish, except in the extraction of rent from its sale. The historical record, such as it is, talks excitedly of an abundance of fish. In 1320, the friar Odoronie noted that "there are fishes in those seas that come swimming in such abundance that for a great distance into the sea nothing can be seen but the back of fishes, which casting themselves on the shore, do suffer men for the space of three days to come to take as many of them as they please" (Pillai 1940, 433). Francis Day observed in 1865 that the plenitude of fish in the Malabar seas was "double the quantity produced by an acre of water considered to be rich by the fishery experts of the world" (Day 1865, quoted in Pillai 1940, 433). Fishers were exploited by an ensemble of actors, including Portuguese and Dutch colonialists. In Portuguese enclaves no fish could go to the market unless "the clergy had taken all they wanted." The Dutch required each fisherman in the town of Cochin to bring eight pounds of fish every day to the senior official (433). The interest of the state in fisheries was purely extractive in nature, and it was not involved in enhancing production or providing benefits to fishers. It would be difficult to credit primitive accumulation with politicizing the question of fish, its numbers, and the distribution of incomes from its catch.

The concept of "the margins" sits uneasy on the Kerala coast. True, fishers were considered socially inferior by members of their religious communities; caste Hindus considered their work impure, while orthodox Catholics and Muslims found their syncretic beliefs objectionable. At the same time, their practices and technologies bore the imprint of linkages and connections: Christianity came in the second century, Islam in the eighth, and boats and nets from China, Egypt, Polynesia, Spain, Portugal, and Arabia over the years. Fishers supplied cheap protein to a large population, but they were marginalized by their economic and social "superiors." They shared, across the coast, conditions of grinding poverty, compounded by the fact that how often they could go out to sea and what they could catch were not in their control but determined by the season, the weather, and the winds.

There is a different starting point in this story of collective political subjectivity, with the elite programs of "uplift" of poor fishers, and forms of community development aimed at them. The "enlightened" Travancore kings and the British colonial administration in Malabar (the region under their

control together makes up the present-day state of Kerala) lifted the harsh taxes of previous centuries and expanded their access to roads and markets. Fishers remained very poor, and their incomes remained limited because the inputs for curing fish remained costly, technology remained low-intensity, and transport faced a set of levies. When the British and the Travancore states became actively interested in the fisheries and began to promote exports of fish and fish products, they attracted external entrepreneurs and middlemen. By the early twentieth century, the role of merchant capital had become crucial to fisheries, both for exports and for industrial fish processing.

State agents identified the lack of appropriate technology and institutions as the main reasons for the fishers' persistent poverty. The British started several curing units, canneries, and an experimental fisheries station. Government scientists introduced new production processes for making guano and fish meal. But as often happens, programs to improve the lives of the poor made the already rich even more so. These government efforts encouraged the rapid entry of external capital into the fisheries, and by the early 1920s 542 private fish oil and guano factories had been established. The Fisheries Directorate also introduced four mechanized fishing craft for experiments and demonstration purposes.

If it was primitive accumulation that lay the ground for the emergence of governmentality and new forms of subjectivity in the forests of Garhwal, it was paternalistic community development interested in the welfare of poor fishers that played that role in coastal Kerala. The colonial state identified prevailing lack of capital and state of knowledge, and relations of production and exchange, as major reasons for the persistence of poverty. By 1922, it organized fifty-seven fishermen's cooperatives that disbursed loans for "industrial use" connected to fishing. The modernizing bureaucrat James Hornell initiated a number of "welfare" activities. A training institute was started in 1919 to teach students the basics of fishing using a canoe; elementary marine zoology; and current technology in harvesting sardine and mackerel, and to teach them how to manage a cooperative society. Other welfare measures provided village schools and also undertook a "temperance" program (Hornell 1923). Likewise, by 1933 the Travancore state had organized ninety-five cooperatives with over 8,000 members, structured along the lines of caste and religious affiliations (Kurien 1990). The social reformer Velakutty Arayan started the Arayan People's Welfare Society and the All-Kerala Araya Association in the 1930s in response to the increasing concentration of wealth among fish merchants and the intensifying indebtedness and general penury of the fisherfolks, as fishers invariably were referred to by the patrons of paternalistic development.

Late-colonial paternalistic development projects laid down a template for the formation of subjectivity. The state was involved in organizing cooperatives, in boat and net design, and in increasing production. For state agents, export-oriented production was the preferred means of development of the sector and also of poverty alleviation. However, no independent collective political subject of fishers emerged during this period. Among radical activists of the fishers' movement in the 1980s, it was common to hear that fishers had played a significant role in the communist uprising known as the Poonapra Vayalar in central Kerala in the mid-1940s, but the lack of any comprehensive accounts of their involvement indicates that it still did not make it to the archives of rebellion. Their lack of autonomous political action is signaled, instead, by the stories of 1957, when conservative bishops ordered them on the streets to bring the world's first elected communist government in Kerala to its knees and out of office.

When they next become the object of interest in the early 1960s, in light of the Indo-Norwegian Fisheries Development Project, fishers are represented much as one finds them in the annals of paternalist community development. Not only poverty persists, and the conditions that reproduce it intergenerationally, but also the belief in Kadalamma, the benevolent but potentially malevolent sea goddess, a belief that was common to Kerala fishers, whether followers of Islam, Hinduism, or Christianity. As documented by Murickan (1991) and Andrews (1990), this belief entailed a number of practices. Andrews's collections of stories about the sea contains one in which a vessel that brings in a bumper catch of fish is subsequently destroyed in a storm in the sea. Andrews notes that fishers attributed this widely to the use of "black magic" by the crew to have harvested such a large catch in the first place, and they saw the destruction of the boat as both justified and inevitable. Kadalamma's retribution for greed also generated another practice, the sharing of the catch, in which boats from the village fleet that came in with the heaviest catch shared it with those that came in which the lightest. T. S. Pillai's 1956 novel *Chemmeen* (Shrimps) documents the related restrictions on women, such as their being disallowed to the beach when the fleet returned to shore, or going to the beach with open hair, or stepping into the sea except during the festival of Kadalamma. The novel, and the popular 1972 film based on it, show the destruction visited by Kadalamma on the family of a fisher who displeased her. This sort of subaltern belief, labeled superstition, is what the development projects of the 1960s aimed to transform.

So the politicization of fish, fishing, and fishers remained dormant through a half-century of paternalistic interventions, incipient as a possibility, but not yet bursting on the political stage. What changed this was the

Indo-Norwegian Project for modernizing the fisheries that was launched in the 1950s. Conceptualized as a (bizarrely) Gandhian intervention—the Norwegian bilateral development agency then was headed by a Gandhian—it created a new rationality of exploiting the coast: revenue maximization through export-oriented fishing. Upgraded technology in the form of trawlers and cold storage facilities, and upgraded institutions such as new market linkages and cooperatives, the project officials hoped, would lift poor fishers out of poverty. An assemblage of institutions and relations were conjured up, but small-scale fishers were marginal to them. They were not the beneficiaries of these programs, and once these programs took off, they were primarily the ones who felt the negative effects, such as the decline in catch and the depletion in the fisheries, as well as the further entrenchment of the power of the fish merchants, auctioneers, and refrigeration plant owners. These fishery capitalists formed fraudulent cooperatives, and got new boats and loans. Small-scale fishers found it hard to form cooperatives, and when they did they waited fruitlessly for new boats.

The export market was particularly strong for shrimp, which are bottom feeders and inhabit the coastal waters. Trawler technology involves nets that scour the seabed. These nets have small mesh size. Because shrimp is the prize variety, and fuel is expensive, trawler owners make multiple trips, catch juvenile fish of other species, and expel a lot of "by-catch" to make room for shrimp on deck. The upshot of this structure of incentives was that trawlers began to fish more intensively for shrimp, they destroyed a large number of other fish that formed the basis of the livelihoods of small fishers, and trawlers and nonmechanized boats began to compete in the coastal waters. This shrinking of the fishing ground is what politicized fish, fishing, and fishers.

Against this backdrop, a paternalistic experiment of community development took a radical turn. The Bishop of Thiruvananthpuram had established a model village in Marianad in 1960, where a core of social workers helped small-scale fishers set up cooperatives that would provide collective solutions to collective problems, starting from fishing but encompassing all aspects of everyday life. Over the 1960s, this program achieved success and fame, and the original social workers trained a large core of workers from other coastal villages. This network of activists launched a magazine called *Theer Shabdam* (*Word from the Coast*). Over this same period, liberation theology had become influential among the Catholic social workers. Nationally, radical priests set up the Indian Social Institute, whose occasional bulletin carried news of popular movements such as those of the fishworkers and was disseminated widely through the network of Catholic schools, especially Jesuit schools. The collective subject of fishworkers, constructed to take advantage

of the state's paternalistic community development programs, now took a radical turn. They formed trade unions, initially on religious lines, and then, in defiance of the church, a statewide secular independent socialist union, the KSMTF, was formed.

While the KSMTF undertook a wide range of actions, we will only consider those that concern the law, science, planning, and circuits of solidarity (see Baviskar, Sinha, and Philip 2006 for a detailed account). The union made an important change in the appellation of those it represented in the public arena: the "fisherfolk" of paternalistic development was no more, and the category of "fishworkers" was formed. This was strategic, as Kerala in the 1970s was going through a high point of workerist politics, in which unions organized by professions gained legal and political recognition from government and could then claim a number of industrial rights and welfare measures (Kurien and Paul 2007). These included unemployment benefits during the off-season, compensation for death and injury at sea, and so on. The KSMTF claimed that fishworkers deserved these rights because they supplied cheap protein to the population.

A central goal of union activism was the passage of a new law that would create a regional and seasonal fisheries commons: the area five kilometers from the coast would be reserved for the exclusive use of so-called artisanal craft, and trawling within fifteen kilometers of shore would be banned during the monsoon so as not to disrupt the breeding season for fish. To argue for such a law, the union abandoned the strategy of basing its appeals on the needs and rights of fishworkers alone. It raised the specter of a "generalized crisis of overfishing." Scientists associated with the movement collected evidence such as the species and size breakdown of the catch, showing that some species were disappearing, and that fish was caught at an earlier point in its life cycle. Movement-affiliated social scientists argued that the fish varieties disappearing were largely consumed by the poor, that wages for all workers, including those on trawlers, were precarious, and that export orientation had created scarcity of fish, thus affecting every Keralite's daily diet.[5]

While the powerful lobby of trawler owners rejected the very idea of overfishing or crisis, the KSMTF lobbied the state scientists to fix a "maximum sustainable yield" for Kerala's waters, a common unit of measure against which the current fishing practices, per category of technology, could be judged. Moreover, union activists produced pamphlets highlighting the concordance between the practices of artisanal fishers and emerging notions of "appropriate technology" and ecological appropriateness. For example, they showed that the fishers had intimate knowledge of sea conditions, that seasonal practices provided relief for fish during its breeding seasons, and that

fishers had historically regenerated fish stocks by constructing artificial reefs. This embracing of science went a considerable way in gaining recognition for fishworkers as responsible political actors. While militant action was never given up, seeking justice based on science and the general discourse of workers' rights were key strategies in the passage of a new law, the Kerala Marine Fisheries Regulation Act of 1984, that capitulated to many of the union's demands.

While forging close links with Kerala's vibrant "people's science movement," the KSMTF also put state scientists under constant pressure. For example, following the outbreak of "Australian fish disease" in the early 1990s, scientists of the Central Marine Fisheries Research Institute (CMFRI) in Kochi issued a public advisory declaring that eating diseased fish would likely cause serious illness—even death—and the price of fish plummeted. The KSMTF set up a large kitchen at the gates of the CMFRI, with volunteers cooking and eating fish in full public view and inviting passers-by to join. Activists challenged marine fisheries scientists by saying that if the individuals who ate the fish did not come to harm, then the scientists should resign and compensate fishers for their loss of income. The CMFRI was forced to withdraw its advisory and issue a public apology.

A key movement activist found employment in the prestigious Centre for Development Studies and used that platform to produce social scientific research as well as form a corps of researchers who studied issues connected to the fisheries. Making use of fringe meetings associated with the annual conventions of the Food and Agricultural Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD), Kerala activists connected with activists from other parts of the world. They formed the International Collective for the Support of Fishworkers, and launched the magazine *Samudra*, which helped them establish liaison with fishers' organizations worldwide, culminating in the formation in the 1990s of a global federation of such organizations that lobbied for changes in the Law of the Seas at the United Nations. Likewise, those associated with the movement also found employment with the FAO's Bay of Bengal Project, and others founded the South Indian Federation of Fishworkers Societies. Research undertaken at these institutional complexes of expertise engaged emerging approaches in the field of "natural resources economics," such as new institutionalism. As with Chipko, the Kerala context was a key ground for the emergence of a feminist critique of social movements (Nayak 1990), and for building feminist solidarity across otherwise disparate political positions. Indeed, "Indian environmentalism," which became highly influential in the social science and policy positions over the 1980s, cannot be conceptualized without the constituent power of these movements.

In writing about the contemporary politics of subalterneity, canonical subaltern studies insist that any ethico-political project that is partisan to subalterns must reflect their experiences and aspirations for the future. They argue that this would necessarily be a consciousness of fragments, and its anti- or exomodernity could be taken for granted. It is also suggested that the categories of organization and the particularistic demands that characterize the sphere of "political society"—of which today's subalterns are denizens—pose a threat to democracy and that any effort to "impose" universalism on them, whether in the form of "discipline" from above or "solidarity" from below, would be tantamount to violence against subalterns.[6] What, then, to make of the story of forest dwellers and fishers I recounted earlier, specifically the logic and the pathways pursued by the collective subaltern subject to enter the domains of science, law, planning, and solidarity; the changes in subalterneity once it transgresses its externally assigned domain and enters another; and the reconstitution of these domains as a result of subaltern political action?

"Forest dwellers" and "artisanal fishworkers" are new political categories that did not exist prior to the politics of constituting them, and they draw on a range of idioms of self-presentation and claim making. The process of the constitution of these new categories begins within projects of domination and hegemony, such as primitive accumulation and paternalistic development, but along the way they borrow from, and contribute to, law, science, and transnational circuits of solidarity. And they mutate: the forest dweller of the 1980s now appears on the Indian political scene in debates on the new forest bill, as a "forest worker," while the "fishworker" now identifies as "*dalit*," reflecting the changing salience of caste in relation to class even in the communist bastion of Kerala. These changes have involved subalterns understanding domination, oppression, and exploitation *on their own terms*, rather than only through a lens exterior to subaltern consciousness.

Key to this process was the identification and creation of new dialogic spaces between the subalterns and moderns, such as new institutional complexes of expertise, and the entry into existing complexes of the same. Central to this process were translational agents. This category includes certain movement activists themselves. For example, Chandi Prasad Bhatt was active in labor cooperatives and worked as a bus conductor, a profession that allowed him to travel across the Garhwal hills to see deforestation for himself, and to spread the word about the movement in this terrain. Likewise, many of the key activists of the KSMTF were themselves fishers. In addition, in both movements there were prominent activists who were not themselves peasants or fishers but then adopted the lives of peasants or fishers and identified

completely with them. In addition, the identification and courting—even manipulation—of agents outside of the movement, such as comradely social scientists, also helped in the translational process.

The objective of these translational agents and their practices was, on the one hand, to render the preferences and problems of subalterns themselves—hill peasants and fishworkers in this case—intelligible to a wide network of hegemonic actors, and, on the other, to make the architecture and language of hegemony understandable to subalterns themselves. In that, they resemble Rancière's (2000) "spokespersons," seeking changes in law by positioning themselves as representing the "public" interest, and by arguing that the law as constituted is partisan in that it serves narrow class interests. Rancière is talking about those agents who "cross the barrier between languages and worlds, to vindicate access to the common language," and who "uproot words from their assigned modes of speaking." Prakash (2000) and Chatterjee (1993), among others, within canonical subaltern studies have allowed for such a role to the nationalist elite with relation to colonial modernity. What I have shown through my comments on law, science, policy, and solidarity is that these processes driven by spokespersons and transnational agents are now deeply entrenched in popular politics.

But then the domains of universalism themselves do not remain as they once were. De Sousa Santos's category of "emancipatory law" itself lays out the fractures within that domain and the openings it offers for modern subaltern politics. In relation to science he argues that "disciplinary power is increasingly a nondisciplinary power, to the extent that the sciences lose their epistemological confidence and are forced to share the field of knowledge with rival knowledges—such as indigenous knowledges in the case of contemporary struggles around biodiversity—which are in turn capable of generating different kinds of power and resistance" (de Sousa Santos 2002, 447). As Agrawal (1995) has pointed out in relation to the Uttarakhand forests, the differences between indigenous knowledge and science are overdrawn. Hoeppe (2006) has shown that fishers themselves were key agents in the production of modern fishery sciences in India. And as Prasad (2003) has shown, indigenous knowledge has been the basis for key components in the emergence of ecological science. Partisans of subalterns, instead of accepting the claims of separate domains or the inflated claims of universalism, are better off looking for the traces of the subaltern in the constitution of the domain of the modern.

The politics of subalterns making claims to nature is transgressive in the sense that claim-making borrows from the key codes of modernity, and it is therefore of necessity one that creates hybrids. In hitching their demands

for rights to nature to "universalist" notions of law, science, and solidarity, subalterns both uphold *and* subvert universalism. As subalterns become intelligible to powerful others, and as they make power intelligible to themselves, the domains from which they are excluded themselves get transformed, as does subalterneity itself. Changes in law, science, policy, and transnational circuits of solidarity all show their imprints. This does not, however, resolve or close the question of subalterneity, but it alters the terrain on which subalterneity is played out: it moves from a situation in which exclusion and oppression were based on unbridgeable unintelligibility to one in which subalterneity is reproduced through a constantly changing set of power relations.

NOTES

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1. am not suggesting here a singular analysis, or a unified program, or a complete unity within the networks of solidarity. Indeed, de Sousa Santos is careful to point out on the basis of his reading of the Zapatistas, that "as the faces of oppression are multiple, so are the struggles and proposals for resistance varied," and "no unified theory can possibly render the immense mosaic of movements, struggles and initiatives in a coherent way" (de Sousa Santos 2002, 462, 463). However, I am suggesting that constituents of networks in which the movements considered in the paper were located did have elements in common, both in their analysis of the "crisis" and in their proposals for the way forward.

2. For a critique of the idea that subalterns are defined by exteriority to the modern, see Sinha 2009.

3. Elsewhere (Sinha 2009) I have argued that, for example, Partha Chatterjee's sketch of "political society" attempts to place three elements of the condition of nineteenth century subalterneity—community, contiguity, and consanguinity—as described by Ranajit Guha in his foundational writings on subalterns, especially Guha 1983.

4. The year 1823 fell within the year 1880 in the *shaka samwat* Hindu calendar.

5. As the movement-affiliated academic John Kurien asked, "While Kerala consumers eat less fish the students of Japanese universities enjoy large quantities of cheap instant soup made from prawns caught by our trawlers. Is their enjoyment and nutrition at our expense?" (1979).

6. This argument is made most forcefully in Chatterjee 2008, Chakrabarty 2002, and Spivak 2000.

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5

Struggles of Justice

Political Discourses, Experiences, and Claims

Emmanuel Renault

The Philosophical Conundrum

From Plato to Rawls, the notion of justice has been identified by many philosophers in the history of Western philosophy as the main topic of political philosophy, and it undoubtedly provides a good means to specify the relationships between political philosophy and philosophy. Since many, if not all, political conflicts tackle the issues of justice and injustice, it might be concluded, following Plato or Rawls among others, that philosophy as a theory of justice is one of continuation of politics. Conversely, since politics is specified by the conflicts of justice that philosophy strives to overcome, it might be considered that this continuation or realization of politics is a "realization-suppression."[1] This Rancierian expression could be conceived of in a strong (genuinely Rancierian but also Marxian) or weak sense.

In a strong sense, it could be argued that the very idea of justice as principle is in contradiction with the essence of the political: first, because justice has to do with social ordering, whereas politics, at least in its democratic essence, means the right to contest all social orders; second, because while social justice seems synonymous with rationalization of inequalities, democratic politics relies on equality as an inalienable right. It could be added that this contradiction between justice and politics has reproduced itself in a contradiction of political philosophies and politics, at least when political philosophies assume the primacy of justice. This line of argumentation would

then retrieve the core of the young-Marx critique of political philosophy, for it would provide a contemporary illustration of the reproduction of political alienation in philosophical alienation (alienation meaning in both cases confusion of abstract principles with reality). The critique of justice as a political claim in late Marx could also be related to this line of argumentation. But the shortcomings of these types of strong criticisms of the philosophical approaches of justice are obvious. It is hardly questionable that justice is at issue in many political conflicts and that in these conflicts, the notion of justice is conceived of in very different ways. The statement according to which all of these conceptions would contradict the essence of the political is highly questionable, and it seems subjected to the speculative premises of the political philosophy that Marxian criticism (but indeed not Rancierian) wishes to get rid of. Should one think of justice and politics in terms of essence if one really wants to think politically? Indeed, references to justice are sometimes means of depoliticizing political conflicts: depoliticizing by moral or legal definitions of justice, for instance. But this is not always the case, so the issue at stake should rather be to specify the political meaning of justice and the nature of political conflicts about justice. Now, if justice as a political stake is not to be ruled out of genuine political issues, then we can hardly dispute the point—namely, that philosophy becomes genuinely political when it intervenes by its own means in political conflicts about the nature of justice itself.

Therefore, it seems more fruitful to elaborate the critique of philosophical theories of justice in a weaker sense. The challenge of the Marxian connection between the critique of the political and the critique of political philosophy would then lead to a transformation of the philosophical approaches of justice. The inability of contemporary philosophy to account for the roles and forms of experiences and conflicts of justice in contentious politics is one of the clearest illustrations of its "abstraction" in the Marxian sense of the term. But instead of contrasting the true politics with the essence of justice, political philosophy has to account for the relevance of conflicts of justice in contemporary politics and strive to specify the variety of conflicts of justice—not only the conflicts over justice but also the various types of conflicts linked with contentious claims against injustice; not only the conflicts between definitions of justice but also the conflicts of claims against injustice with other political norms. In such a perspective, the task of political philosophy would be threefold. First, it has to conceive of justice in such a way that its internal link with conflicts of justice would become explicit and be considered crucial. Second, philosophy has to articulate the specific political dimensions of justice again in a way that can explain why in the name of justice certain moral or juridical processes end in depoliticizing. Finally, it should also account for

the fact that the centrality of justice (in Rawlsian terms, the fact that justice is "the first virtue of social institutions"[2]) is also a matter of political conflicts.

In what follows, I try to take up these challenges in three steps. First, I discuss the epistemological characteristics of political discourse in order to differentiate political, legal, and moral meanings of justice and to analyze their political interplay. I contend that conflicts of justice should be conceived of in dynamic terms and from the point of view of the claims emerging from experiences of injustice. In a second step, I strive to clarify the very notion of experience of injustice and attempt to contrast the normative dynamics of claims against injustice with the dynamics of public justification. In the third step, I distinguish three types of linkage between experiences, claims, and political languages.

Justice as an Essentially Contested and Abolitionist Concept

The notion of justice illustrates the specificity of political discourse. It belongs to the class of concepts that W. B. Gallie termed "essentially contested" concepts,[3] and it is also an "abolitionist concept" (to quote M. Walzer).[4] According to Gallie, all political concepts are "essentially contested." Conflicts between political discourses translate into conflicts about their very meaning. While, according to Wittgenstein, for instance, all concepts should be defined by a social agreement about their use—that is, meanings—political concepts are political insofar as such agreement is impossible. Yet the fact that they have a meaning is usually not put into question. On the contrary, this very fact is generally one of the presuppositions of the conflicts between political discourses,[5] at least of those conflicts in which a political discourse strives to make us recognize a given definition of a master political concept as the legitimate one. There is no doubt that "justice," as well as "equality" or "freedom," is a master political concept of this kind. In fact, the main political conflicts of our political modernity are conflicts in which justice, or equality, or freedom (or all of them) are at stake. And in most of the cases, the stake is then the very definition of these notions—a stake that belongs to what can be termed "symbolic struggles" or "politics of meaning."[6] With regard to justice, two noteworthy consequences derive, then, from Gallie's approach. The first is that the political concept of justice should not be conceived of without reference to conflict, and the second is that conflicts about the meaning of justice play a crucial role in politics.

These first interrelations between conflicts and justice raise many issues. One question is that of the origin of the conflicting meanings of a concept such as justice. Following Gallie, it is a consequence of a conflict between

political discourses: conflicting discourses give conflicting meanings to given concepts. In other words, a concept is never political by itself. It is only the conflicts between political discourses that lend the concepts they mobilize their specific political nature. If one now asks what the origin of such conflicts between discourses might be, it seems that one would thereby run the risk of falling into a vicious circle. For an obvious answer would be that the conflicts are produced by various social and cultural factors, among which collective meanings and social beliefs about justice could also be included. Indeed, political discourses do not produce political meanings out of nowhere; they are always embedded in social experience. But they give to these meanings and beliefs their specific political conflictualities. What is then the specifically conflictive nature of political discourses? The relationship between discourses and powers provides at least part of the answer. As such, political discourses are discourses of powers in the various meanings of the phrase—that is, discourses occupying different locations in the social distribution of powers, discourses conflicting with each other about the effects of this distribution of powers, and finally, discourses conflicting about social attempts to transform this distribution of powers.[7] The definition of justice as abolitionist concept makes it possible to capture one among many relationships between conflicts of justice and conflicts of powers.

As Walzer points out, concepts such as equality and justice (one could indeed add freedom) are political as far as they are abolitionist. For instance, the mathematical concept of equality has to be distinguished from the political concept of equality insofar as the latter entails a claim made against inequality. This indication is fruitful concerning justice since it helps to distinguish between moral, legal, and political concepts of justice. Instead of being defined as a proportionality to merits (of the deeds of an individual or a group), or as a conformity to law and juridical procedures, the political concept of justice is inseparable from a claim against social injustice (in other words, against inequalities produced by social settings). As an abolitionist concept, the political concept of justice is hence specified by the reference to a social context, in contrast with moral or legal definitions of justice that rely on some forms of social decontextualization. The political concept of justice is also specified by a polemical reference to inequality, in contrast with moral or legal definitions that rely on a positive reference either to equality (for instance, arithmetic equality with respect to law, and geometrical equality with respect to distribution of rewards in proportion of the merits of the deeds) or to inequality (since geometrical equality can also be conceived of as just ordering of inequalities).

I have already pointed out that a political concept acquires its specifically contentious logical form through its uses in conflicting political discourses.

When a claim against injustice is at issue in a conflict, from a strictly epistemological point of view it implies that the logical structure of the associated political concept is here being ultimately defined negatively, or dialectically, instead of being defined in a positive way corresponding to the classical theory of definition. This consequence is indeed paradoxical, since political discourses strive to impose what they present as the true definition of essentially contested concepts—definitions formulated in a positive way. While the approach of justice in terms of abolitionist concepts tends to identify justice as the reduction of social inequalities, it is simply a fact that the dynamics of political conflicts tends to give a positive content to this formal and dialectical definition of justice; this dynamics requires more than this formal and dialectical definition: for instance, a liberal or a socialist or a feminist definition of justice. But what follows from the idea of "abolitionist concepts" is not so much that all political concepts should be articulated though negation. It is rather that the very meaning of these concepts, even if articulated positively, depends on a negative claim. It depends on it either directly, when political discourses strive to give a positive formulation of this negative claim, or indirectly, when other discourses of power struggle against this claim. In other words, the idea of "abolitionist concepts" is not so much intending to set up a theory of the definition of the political concepts as it is to identify the specific claims that specify the stakes of political discourses.

The fact that political concepts are not only means of expression of a given claim but in themselves already particular articulations of this claim has various interesting consequences. One of them is that a definition of a political concept can be contested in the name of the negative claim it is supposed to express (or to exclude). This general structure can be instantiated with the idea of justice as with freedom. The idea that justice is in excess over itself has been formulated in many ways from Plato to Derrida (perhaps bypassing Marx).[8] Although philosophers have not so often attributed this negative structure to the political concept of liberty, it is undoubtedly in this negative sense that Hegel (after Fichte and before Marx) defines freedom by liberation. Hegel also associates liberation and strives for a better definition than the institutionalized definition of liberty. Hence, he provides a historicized model to conceive of liberty as in excess over itself.[9] This model can be applied to the issue of justice. For it could be shown that the various definitions of justice competing in the contemporary philosophical debate express various historical experiences of injustice: the liberal definition traces back to the historical experiences of injustice as privileges in the ancien regime, its socialist definition to the emergence of the social question in the mid-nineteenth century, and its communitarian definitions to particular

experiences of injustice in some postcolonial situations.[10] It could also be shown that in each of these cases, what was at stake was precisely to overcome the shortcomings of the institutionalized definition of justice. In political conflicts about justice, there are many historical illustrations of the argument that "justice" means more than its current definition. In some of them, some political discourses raise new claims (against new inequalities) against old definitions (for instance in the conflicts between socialism and liberalism about social questions, or between liberalism and communitarianism about cultural survival). Some others target the very idea of an institutional definition of justice: for instance, Indian nationalists argued that justice was something too important to be reduced to the legal definition that the colonizers strove to enforce. The fact that the political excess of justice over law was then identified to the excess of a moral definition of justice over its legal definition is indeed paradoxical. But what lies behind this appeal to a moral definition is the fact that the legal definition of justice was perceived as unable to express some claims against social injustice in the context of colonization.[11] In this sense, this appeal to a moral definition of justice is a political use of it, or an attribution of a political meaning to a moral definition of justice. Here again, the political dimension of the notion of justice depends not only on the conflict between powers discourses, but also on the fact that a claim against injustice is at issue.

With these examples, it appears that approaching the political definitions of justice in terms of abolitionist concepts means to approach justice as a negative and as an expressive concept. Political concepts of justice are essentially negative because they are linked with claims made against social inequalities—that is, with claims for a transformation of given social situations that are experienced as unjust or as claims for social transformation. And indeed, such claims are contested, for instance by those whose power positions are at issue in such social transformations. On the other hand, political concepts of justice are essentially expressive insofar as they are means of articulation about what is at stake in an experience of injustice. These examples also make it possible to distinguish various types of conflicts of justice.

When claims against injustice are articulated, the "politics of meaning" does not develop only through conflicts about good political definition of justice—for instance, through conflicts between liberal definitions of justice by equal respect of freedom-rights, and socialist definitions by social rights, or communitarian definitions by cultural rights. As we have seen, other types of definitions of justice compete with each other—for instance, a moral one against a legal one. And moral or legal definition can also compete with political definitions of justice—for instance, in procedures of depoliticizing

political claims of justice through emphasizing the virtue of legal justice (by talking of the "criminal" nature of the revolts against injustice or protest movements, for example), or in the space of moral justice (such as in the many ways of reducing structural injustice to individual wrongs). Conversely, the relation between legal, moral, and political definitions of justice can go the other way around. For instance, the dissatisfaction with demands for legal redress can start engaging with processes of politicizing, as has recently been the case with French *banlieues* or Australian Aboriginal communities, after a series of unpunished deaths in custody or in police operations.[12]

The politics of meaning can also develop through conflicts in which other normative principles are supposed to have restricted the relevance of justice claims—for instance, from the point of view of care as in the feminist critique of justice, or from the point of view of "social pathologies" (such as forms of alienation) understood as the "other of justice";[13] or from the point of view of political participation (as nondomination) as in contemporary republicanism, or from the point of view of economic efficiency in neoliberal argumentations such as in Hayek's charge made against social justice. As a matter of fact, there is no consensus about the Rawlsian thesis that justice is the main virtue of societies. Nevertheless, a political claim has to justify itself in the dynamics of the political conflict, and it seems difficult to use another language of justification other than that of justice. Interesting enough in this respect is the fact that the care theoreticians have oscillated between a feminist critique of justice and a feminist redefinition of justice, just as contemporary republicanism oscillates between alternative to liberalism and reformulation of it. The issue of "social pathologies" might help clarifying what is at stake in these oscillations. It is clear that all the social and political problems that are linked, for instance, with the suffering at work and suicides in workplaces in France and China could not have been articulated in a relevant way inside the problematic of justice.

In this respect, a complementary approach in terms of alienation seems plainly legitimate. But it is also clear that claims against suffering at work will have to be articulated as claims against injustice in order to find their public justifications: the suffering at work and the particular forms of alienated experience of work that result will then be presented as a particular form of social injustice. And in a second step, it would probably also be necessary to argue that the social transformations that are required in this struggle against injustice will not produce new injustices.[14] Even when the content of the claim cannot be articulated significantly in terms of justice, the claim remains formally associated with justice through the logic of public justification.

Besides these issues belonging to the conflicting politics of meaning, there is also the other side of the "symbolic struggle" that depends on relations between powers and discourses—that is, on the social locations and legitimate forms of political discourses. It is simply a fact that those who are experiencing injustice are not always in a position to articulate their claim in the political public sphere. The conflicts between the abovementioned definitions of justice are tightly related to the structures of the modern public space and to successful struggles against some of their limitations (notably because of socialist and feminist struggles). For people living in the streets of Paris or suffering social exclusion in the banlieues; for populations facing social and cultural marginalization, such as Romani people; for the victims of the Bhopal disaster or for women of a country where men became simultaneously rapists and citizens;[15] or for workers subjected to overexploitation in *maquiladoras*,[16] these conflicts of meaning might lose some of their significance.[17] It is not surprising that the experiences and claims of the politically excluded find almost no echo in philosophical discussions about justice; here, political abstraction reproduces undoubtedly as philosophical abstraction. But it is more noteworthy that the politically excluded are sometimes driven to use another language than that of the political public sphere.

As an illustration of such a "subaltern"[18] claim against injustice, one could mention the politicizing of the moral claim for "respect" by the youth of the French banlieues. It is quite clear that the general and political use of respect as a claim, explicitly involved in the critique of institutions such as the education system, the police, and public transportation, was a means to criticize forms of social injustice in which lack of recognition was the crux of the matter. As a matter of fact, struggles of justice are not necessarily struggles over justice. But it is also a fact that when claims are articulated in a different political language than that of the political public sphere, they are less easily successful. And they become vulnerable to various operations of translation in the institutionalized political language. Hence, during the last French presidential campaign, one of the main candidates (Ségolène Royal) defined her political project as that of the "France of respect." There is no doubt that nothing more was captured from the politicizing of "respect" in banlieues than "banlieues" as a mere political symbol.[19] In the context of internal colonialism, such problems, typical of subaltern politics, are directly and overtly tackled. In fact, the symbolic struggles take a different shape when the meanings consciously associated with justice in a social or mobilized political group are heterogeneous with those of the public political sphere and when such a group is aware that it does not have the power to transform the meanings that structure the major political discourses of the public sphere. It then

has to engage itself in a process of political translation and try to control by itself, through "word warriors."[20] These conflicts between powers discourses provide a good illustration of the fact that the political concept of justice is a negative and an expressive one: what is at issue for those who experience injustice in the context of subalternity is to find an articulation of the specific stakes of their experiences despite the gap between their experience of injustice and the legitimate forms of political discourses.

This expressive dimension regards its relationship with injustice as an experience. Until now, I have mainly drawn attention to the epistemological specificity of the political language taken by itself. But political discourses are attempts made in order to understand and solve problems of our social experience, as well as strategies developed in the framework of such attempts or against them. In this respect, political discourses offer an illustration among many of the following Deweyian principles: "A universe of experience is the precondition of a universe of discourse"; "The universe of experience surrounds and regulates the universe of discourse but never appears as such within the latter."[21] From J. Dewey to A. Honneth, several authors have conceived of our normative concepts as means aiming at analyzing the various normative stakes of our social experience. In such a perspective, the negative social experiences are structured by the dissatisfaction of implicit normative expectations. This dissatisfaction initiates an inquiry about what is at stake and how a more satisfactory experience could be achieved. This process of inquiry includes a shift from a preconscious to a cognitive attitude toward the environment responsible for the dissatisfaction of these expectations. And this shift could lead to a reflective relation with the normative expectations, as well as with an analysis and articulation of these expectations through normative concepts such as justice. In Honneth's model, for instance, the very notion of justice relies on negative social experiences that result from a dissatisfaction with implicit expectations of recognition, and our feelings of injustice, as well as our claims for justice, are attempts to make explicit what is at stake in such experiences, as well as attempts to find a solution to the problematic situation.[22] Understood in this way, the claim for social transformation and the expressive dimensions that we identified as crucial in the political notion of justice are inseparable from a dynamics that transforms implicit normative expectations into feelings of injustice and demands for justice. In these pragmatist approaches, justice as a claim appears as one possible result of a practical and cognitive dynamics emerging from experiences of injustice, and as one way of making explicit the normative expectations innervating one's social experience. Justice as a claim is the provisional result of a dynamics of articulation of normative stakes that develop all along an

inquiry process. In other words, the excess of justice over its social definition is conceived of as the excess of the normative stakes of experience over their conceptual articulations.

Such a perspective offers an alternative point of view to the constructivist approaches of justice according to which the content of justice should be abstractly derived from the condition of its universal acceptability (Rawls). It also provides an alternative to the hermeneutic option that contends that philosophy's role should be restricted to providing better interpretations of social and cultural meanings of justice (Walzer). This pragmatist perspective is reconstructive since the issue of justice is tackled through a reconstruction of the normative stakes of social experiences. It is also dynamic since it approaches claims against injustice in a process-centric mode, instead of focusing exclusively on criteria of justice enabling choice between preexisting claims (Rawls), on principles of public justification of them (Habermas), or on shared beliefs about justice (Walzer). Rather than focusing solely on the conditions of consensus (Rawls) or of reduction of conflicts (Habermas or Walzer), this reconstructive and dynamic approach seems to be able to account for the centrality and variety of conflicts in the political issues of justice.

The Productivity of the Experience of Injustice

According to this pragmatist model, experiences of injustice are experiences of a dissatisfaction of normative expectations. The feeling of injustice is a first form of awareness of this dissatisfaction, a first form of reaction to the dissatisfying situation, and a first form of identification of its specific features. Because of space limitations, I mention here only the issue of the nature of these normative expectations: Are they reducible to recognitive expectations as Honneth contends, or do they have several sources as Dewey suggests (namely, satisfaction of needs, recognition by others, and necessity to preserve the presuppositions of the collective life)?[23] Honneth's position is grounded in the fact that the various feelings of injustice seem to correspond to some kinds of denial of recognition. The normative core of our feelings of justice is then reduced to the normative stakes of the intersubjective constitution of identity. But it is not easy to rule out the hypothesis—namely, that in feelings of injustice these normative stakes may be associated with needs and interests rooted elsewhere than in identity.

Whatever the nature of these expectations might be, what matters now is that the feeling of injustice is the first knowledgeable and cognitive reaction to the dissatisfaction of these expectations. But indeed, such dissatisfaction is

not sufficient to give rise to a feeling of injustice. For example, if recognitive expectations are not met, the result could be a feeling of injustice as well as a feeling of disrespect (not necessarily associated with the idea of injustice), or a feeling of shame (usually incompatible with an identification of the situation as unjust). It is not my intention to analyze here the psychic and psychosocial mechanisms that could explain how the same kind of expectation can lead to different feelings. Instead, I would like to draw attention to the fact that feelings of injustice mean not so much interpretation of subjective dissatisfaction as understanding the unsatisfactory situation as "unjust" (by contrast to the feeling of shame, for instance).

"Unjust" here means a specific "quality" that unifies a situation[24] and that is identified by the meaning "injustice." The unification and the identification of the situation (through this quality and this meaning) result mostly from an immediate "understanding" of the dissatisfying situation. Most of the time, this attribution of quality and meaning is spontaneous and anchored in the tacit knowledge that structures social experience. It depends on biographical, social, and cultural meanings of justice, and of course on an individual and collective degree of sensibility to injustice (and, for example, to our capacity to resist contemporary processes of "trivialization of social injustice)."[25] But attribution of quality and meaning can also result from an "interpretation" in the proper sense of the term—that is, from a reflexive analysis of our experience. When individuals engage themselves not only intellectually but also affectively in the reflexive analysis of their experience, the result can be a change of the feelings previously associated with it. Psychoanalysis produces such effects for idiosyncratic experience; collective mobilizations for social experiences. One interesting consequence is that feelings of injustice themselves can be a matter of political conflicts.

There is no doubt that feelings of injustice play the role of incentives in struggles against injustice, but conversely, some struggles against injustice are struggles over feelings of injustice. The emergence of the struggles of unemployed workers in France in the 1990s provides a good illustration. Because of the long-lasting subjection to various forms of social disrespect and because of various effects of individualization of their specific social experience, unemployed people tend generally to develop a kind of self-attribution of responsibility. Social mechanisms and psychic processes converge that tend structurally to substitute feelings of shame for feelings of injustice. Such self-attribution of responsibility is of course a powerful obstacle to collective mobilization. Nevertheless, large groups of French unemployed engaged themselves in protest actions against the injustice of their social situation. The reason, among other explanations, is probably that unions, social workers,

and associations have managed to offer them another interpretative framework of their own social situation, which poses the issue of injustice as an issue of collective experience produced by a social context that could be changed.[26] It may be said that at the end of a long process in which affective as well as cognitive work was at play, social feelings of injustice tended to replace feelings of shame; consequently, collective mobilization became possible. I will soon describe more precisely the role of such interpretative frameworks of problematic situations in the dynamics of collective struggles of justice, but for the time being, I would like to analyze a bit further the nature of feelings of injustice.

It seems hardly disputable that there is no feeling of justice, but only of injustice.[27] Also, no more disputable is the fact that feelings of injustice are unspecified. There is nothing like a feeling of social injustice that could be differentiated from a feeling of moral or legal injustice. Except when it has been transformed reflexively by a given interpretative framework and associated (implicitly or not) with given statements about justice, a feeling of injustice has no link with the main specifications of justice. Hence, it is only in a second step that a spontaneous understanding in terms of injustice is specified through interpretations. This latter remark should not give credence to the classic conclusion that the experience of injustice is inchoate in itself, and that only a sideways view, for instance that of rational reflection, produces its normative content. Rather, the cognitive dynamics that leads from understanding to interpretation of an unjust situation is internal to the experience of injustice; in other words, it belongs to the dynamics engaged by the feeling of injustice. Dewey's theory of inquiry enables us to clarify this point, for it explains that a problematic situation should only be conceived of as the precondition of the inquiry process. The fact that this situation is problematic underlies all processes of inquiry, which is nothing but a means to transform the problematic situation into a more satisfactory one. Nevertheless, the first step of this inquiry is not this situation as such, but "the institution of a problem"—that is, the reflexive analysis of what is problematic in the problematic situation.[28] Indeed, this first step is crucial, since the development of the inquiry will be the attempt to solve the problem as it as been articulated.

The feeling of injustice is precisely what posits a situation as problematic, giving to it the specific qualitative unity of an "injustice" in general. An unjust situation is problematic not only because it has produced dissatisfaction, but also because this dissatisfaction is associated with uncertainties of reactions appropriate to it and with the ways in which a more satisfying situation could be obtained. These very dissatisfactions and uncertainties are the origins of the process of specification of the nature of the injustice through

reflective analysis. As a result, what is problematic in the situation will be interpreted in terms of moral, legal, or social justice. And of course, the fact that the problem is articulated in moral, legal, or social terms will engage very different styles of inquiry on the best way to solve it. In the development of inquiry about the nature and causes of the problem and about the best means to reach a satisfying solution, it also may be the case that it appears that the initial problem has been wrongly articulated. In this case, it is the same dynamics that has emerged from the experience of injustice that will now engage in inquiry in another direction. I have given several illustrations of such transitions: transition from a struggle for legal justice to a struggle for social justice when it appears that legal justice is unable to provide a satisfying solution; transition from moral denunciation or from legal accusation of an individual's deeds to struggle for social justice when a repetition of the problematic deeds makes individual responsibilities less convincing.

These dynamics lead to the general idea of a productivity of experiences of injustice. Philosophy and sociology of justice usually contend that this kind of experience is unproductive in itself.[29] Feelings of injustice would be an inchoate material that rational reflection should structure from above; otherwise they would be a mere sense-centric rendering of rational principles or of social meanings and would be unable to transform these principles and meanings in any way; and/or they would depend mainly on our individual competence in expressing our emotions in conformity with whatever is required by our social environments.

Various objections could be raised against these opinions. I have already argued that feelings of injustice engage practical dynamics of reaction to a problematic situation—such as adaptation, exit, or attempt to transform the situation—and that these dynamics are inseparable from cognitive dynamics. A first cognitive effect is that of a transformation of the evaluation of the problematic situation: while our routines are accompanied by implicit positive valuations of our social environments, the emergence of a feeling of injustice entails a shift to critical appreciation. A second possible cognitive effect is that of a transformation of our appreciation of the normative principles that rule the problematic social environment. If the inquiry on the nature of the injustice concludes that it is produced by, or compatible with, these principles, their positive appreciation turns into a critical one. Here, an objection could surely be that these facts are not proving any normative productivity of the experience of injustice. Following this objection, the changes in the perception of the environment would only presuppose others' principles of justice. And the changes in the appreciation of the institutionalized normative principles would only undermine them, without being able to transform

them. With J. Shklar, we should conclude that the feeling of injustice is able to identify unjust situations but not to go beyond moral skepticism. Yet when experiences of injustice lead to attempts to transform this situation through collective mobilization, it is clear enough that the symbolic struggle is sometimes associated with attempts at transforming ways of identifying and explaining the specific injustice they are confronted with, as well as the forms of the claims of justice.

Developing this idea of the productivity of experiences of injustice from the point of view of political theory could lead to mentioning once again the debates over justice in the context of the emergence of the social question. For in the mid-nineteenth century, the "social question" meant the discovery of the compatibility of the liberal principles of justice with misery and overexploitation. In this context, only the liberal party tried to draw a merely skeptical conclusion, considering that the liberal principles may have less value than expected, but that they remain nevertheless the only possible definition of injustice. On the contrary, the Socialist Party tried to transform the liberal definition of justice, considering that rights should not only be conceived of as rights of freedom, but also as social rights, as rights to the conditions of freedom. The emergence of feminist or communitarian definitions of social justice is an instance of a similar cognitive productivity.

I have already contended that the experiences of injustice cannot be considered as inchoate since they rest on specific normative expectations. From a sociological perspective, the point is that these expectations are irreducible to social construction, although they are always articulated into social meanings. What might be added now is that these social meanings are not always able to articulate the normative stakes of these experiences in a satisfying way. This normative deficiency becomes a part of the problematic situation, and the dynamics of experience is then that of an attempt to find a better articulation through a transformation of social meanings or normative principles. Developing this idea in sociological terms would lead to arguing against E. Goffman that "negative experiences" not only result from one's wrong cognitive framing of a situation, or from one's inability to maintain our actions and feelings inside of a given frame;[30] rather, they are also structured by processes in which given social frames are experienced as unable to articulate our normative expectations so that better framing has to be found. While social experience is always framed, some negative experiences have a specific framing power, a critical and transforming power.

It is in the dynamics of social mobilization that this framing power finds its most interesting illustrations. The contemporary sociology of collective mobilization has become aware of the shortcomings of its main former

research programs. The methodological individualism of the rational choice option is not able to account for the fact that collective mobilization usually develops inside of constituted social groups. And the rationalist bias of this research program is also incompatible with any convincing explanation of the constructive role played by feelings and emotions in the development of the collective mobilizations and actions. The alternative approach in terms of the structures of political opportunities tried to highlight the social dimensions of the mobilizations. But, because of an objectivist bias, it is unable to account for the role played by motivations. And its relational approach remains too structuralist to provide a full explanation of the dynamics of collective actions.[31] Consequently, various contemporary sociologists have tried to enhance the role of motivations, in their affective dimensions (feelings and emotions) as well as in their social and cultural dimensions. Sociologists have also emphasized normative dynamics such as identity transformation or transformations of frame of injustice.[32] These approaches provide a model in which the role of feelings of injustice as well as their contribution to the specific dynamics and rationality of collective action can be accounted for in all their significance.[33]

The role of "framing processes" in contentious politics[34] deserves special consideration. Here, the notion of "frame" denotes a normative model for the critique of the problematic situation, for the interpretation of its causes and means of transformation, as well as a model of justification of the claim. Instead of conceiving social frames as spontaneous modes of social understandings associated with given rules of interaction, as in Goffman, the framing process relates here to an interpretative activity, reflexive and collective, in which what is at stake is the nature of the situation as well as the best way to articulate claims and to rule the collective action. The notion of "framing processes" highlights the dynamic aspect of a reflexive work that belongs already to the conditions of a collective mobilization and that develops during the collective action. Such an approach enables one to articulate a concept of "frame of injustice" and to distinguish the various normative dynamics that are at play in conflicts of injustice. I propose to conceive of frames of injustice as interpretative models intended to characterize a social situation as unjust, to identify the causes of injustice, to project a social transformation, and to articulate and justify a claim. I have already given an example of the role of such a frame of injustice as a condition of mobilization. The French protest actions of unemployed workers in the 1990s would not have been possible without the construction of a relevant frame of injustice making it possible to identify the experience of unemployment as an unjust situation, project possible ameliorations, and articulate claims in the public political sphere.

Another possible role of the framing process as a condition of mobilization involves the homogenization of various experiences of injustices and types of claims. It is often the case that a given mobilization against injustice is rooted in various forms of injustice so that an issue at stake is to unify, if not to hierarchize, various claims. Feminist theories of justice (N. Fraser, for instance)[35] and of domination (in *Black Feminism,* for instance)[36] have elaborated the implications of such situations in the case where the various injustices are experienced by a given social group. But in some mobilizations, the challenge is to make compatible various frames of injustice already articulated by various groups such as unions, associations, and political movements. A contemporary illustration of such a "frame alignment process"[37] is provided by the French Antilles general strike from 2008. It has been preceded by a long work of construction of common claims that entailed a collective reflection about the common features of the various problematic situations and about the general structures of the various injustices.[38] In all these examples, the dynamics of the claim is always intertwined with a dynamics of public justification inside of the internal public space of the mobilizing group, but it is hardly disputable that this latter dynamics is subordinated to the collective reflection on the nature of experienced injustices and on the way to struggle against them; in other words, it is subordinated to the dynamics of the claim.

Here is one other general sociological consequence of the idea of a productivity of experience of injustice: the normative dynamics of struggles of justice cannot be reduced to that of public justification inside of given institutional settings (as in models inspired by M. Walzer or Boltanski)[39] or inside of the political public sphere (as in models inspired by Habermas).[40] Indeed, as I have noted, claims for justice always have to use forms of social justification as soon as they are involved in political conflicts. But the normative dynamics of the claim and that of its justification are not the same.

Here again, the framing analysis provides a good way to discuss the empirical evidence. The framing processes do not intervene only as conditions of mobilization. Rather, they develop all along the mobilization, as part of its internal dynamics and also as modified by relations with other social groups and with powers put in question by the claim against injustice. In such complex processes, it might be considered that it becomes impossible to distinguish between what belongs to the dynamics of the claims and what belongs to the dynamics of the public justification. And it could also be considered that the more the conflict with other groups increases, the more the issue of public justification becomes decisive. Yet, in situations of increasing conflictuality, collective contentious actions are often engaged in a process of radicalization. Often, such radicalization entails transformations in the

framework of injustice: changes in the characterization of the injustice, in the definition of justice, and in the nature of the required social transformation. Now, it seems difficult to explain such radicalization by the constraints of public justification. For more radical claims are usually less justifiable outside of the mobilized group, less amenable to finding allies, and more easy to defeat. The unemployed protest actions could again illustrate such a radicalization in the process of framing injustice—some of the mobilized groups shifted from claims for better pensions to claims for a "universal income of existence." These later claims aimed to suppress the very distinction between workers and unemployed in the context of a general critique of the role of wage labor in our societies. In this case, it seems hardly disputable that the transformation of the frame of injustice was not so much produced by the dynamics of confrontations with powers and other groups and by the justification constraints associated with these conflicts as by the development of a collective reflection on what it means to be unemployed and to struggle against the experience of unemployment. In other words, the inquiry on the normative stakes of this negative social experience and of the claims raised against it was crucial.

The Dynamics of Struggles against Injustice

I have tried to show that a reconstructive and dynamic approach to conflicts of injustice is able to account for the variety of claims against injustice. As a conclusion, I would like to show that such an approach is also able to capture the continuum of contentious action and differentiate the various relationships between struggles over justice and institutional languages.

Considered from the point of view of experiences of injustice, struggles of justice can no longer be reduced to collective struggles over justice carried within the confines of the public political sphere. Rather, they include the entire range of practical resistances to injustices. Such resistances could be merely individual, and without any overt claim or public justification, such as when the experience of injustice leads individuals to no more than episodic attempts at disturbing social routines. But the experiences of injustice can also drive individuals to put social routines more explicitly into question, and to confront more directly the powers that control and regulate these routines; they can drive individuals to violence against institutions or to overt criticism or denunciation, in private or in public spaces. And when they are repeated inside a given institution or are frequently suffered by a given social group, experiences of injustice can also lead to collective mobilizations. Such mobilizations can engage in a struggle against injustice through various means, from

violent action against its symbols or putative individual responsibilities (in riots, for instance) to institutionalized collective action led by associations, unions, or political parties, passing through the various degrees of institutionalization of collective action (from "boss highjacking" to various forms of strikes, from "marches for justice" to classical forms of demonstrations). All these forms of struggles against injustices are indeed not to be identified as uniform, and their political value is surely not the same. But they do all belong to the continuum of contentious action, and since politics begins when a power is put into question, they do all belong to political struggles against injustice. There are indeed many reasons to refuse the very idea of such a continuum. A classical argument is that it should be of the highest importance to distinguish genuine political claims from prepolitical resistances and struggles. But where exactly can the political threshold be located? Is it in rational public justification, or in acceptance of the legitimate forms of the political debate? Considered from the point of view of the critical dynamics emerging from experiences of injustice, the very notion of political threshold is nothing but an essentially contested concept: its definition depends on political options and not on a qualitative difference between struggles of injustice.

The collective claims against injustice should also be conceived of in their various modes of articulation: from mere refusal to overt claim, from overt claim in "prepolitical" languages (for instance, "discourse of respect") to overt claim over justice. Claims over justice can also take different shapes. This variety depends on the degree of specification of the reference to justice—from justice understood as general normative reference to justice articulated in one of the conflicting definitions of social justice. But this variety also depends on the relationship between the claim and the institutional definitions of injustice. In this respect, three situations must be distinguished, to which three philosophical models correspond: that of the public deliberation (Habermas), that of the "disagreement" (Rancière), and that of the "differend" (Lyotard). Each of them corresponds to a particular relation between experience and political language, between claim and political discourse.

By justice, Habermas understands that which relies on the application of the rule of universality in public deliberations. According to him, it is the dynamics of dialogue that is capable of overcoming boundaries of private interest toward consensus. This very dynamics allows one to present a given claim as a claim of justice. But in order to reach a real universality, it is required that all individuals take part in the public deliberation: "All members of the political community have to be able to take part in discourses, though not necessarily in the same way."[41] This requirement provides a theoretical

argument for the struggle against all restrictions of public space, and against all the social structures that produce such restrictions. But this theoretical argument remains external to the claims of the existing struggles against these restrictions. Habermas takes for granted that a theory of justice has to define justice from a theoretical point of view external to the experience of injustice. Therefore, he adopts a sideways view (that of the public justification and of the legal theory) on the political claims emerging from experiences of injustice, and in particular on those emerging from these specific experiences of injustice that are structured by political exclusion. There is much evidence that the institutionalized political language expresses forms of dominations and social hierarchies that hinder a satisfying description of the normative stakes of some social experiences. In such conditions, it is the structure of the public deliberation itself, and not only a social or institutional restriction of its dialogic dynamic, that excludes particular claims from the political space. This exclusion becomes part of the experience of (in)justice itself.

With regard to their relationships with types of articulation of claims emerging from them, there are basically three types of experience of injustice. In the first, the injustice of a situation can be expressed with the help of the institutionalized political languages of justice. The claim can be articulated through the principle of justice that governs a public space relevant to an institution (as in the Walzerian or Boltanskian models) or through the general requisites of public justification (as in the Habermasian model). In that case, the conflict between political discourses is about the correct use of a principle whose meaning is not disputed; the politics of meaning only concerns the compatibility of the claim with a normative principle—that is, the justification of the claim. But as I have repeatedly contended, the institutionalized political language of justice cannot be reduced to such principles. It also contains conflicts about this essentially contested concept. To continue, in this way the conflict between political discourses becomes one about competing meanings of justice, but still, these discourses are able to articulate the normative stakes of the experiences of injustice.

In a second type of experience of injustice, a socially valid principle of justice can help express the normative stakes of one situation only if its meaning is modified. This is the case when a principle of justice is socially institutionalized in a sense considered restrictive by those who suffer from one form of injustice—for instance, in the case of the various historical restrictions of the right to vote (exclusion of workers, women, foreigners) and in all situations where groups are legally excluded from rights that are supposed to be universal (right to juridical protection, to work, and so on). Here, the experience of injustice engages with a normative dynamics that leads to a critique

of this restriction and to the claim for a broadening of the meaning of the principle at issue. In such cases, struggles over justice are not only struggles between political discourses but also struggles against the public language of justice itself. In such situations, the politics of meaning concerns not only the justification of the claim or the choice between competing meanings but also the transformations of the existing meanings of justice. This political situation as well has been termed "disagreement" by Rancière and has been fully elaborated by him.[42]

But the normative stakes of some experiences of injustice sometimes cannot be articulated with the help of the institutionalized political languages of justice. This is the case when the principles of public justification become obstacles to the expression of a claim in the public sphere (for instance, in the case of the victims of massive rapes associated with the birth of citizenship in India and Pakistan) or when sufferers of injustice cannot find a way to bridge the gap between the debates going on in the public political sphere and their own invisible social experiences (the situation of many marginalized populations, such as in slums, and socially destructured communities, such as some aboriginal communities). In these subaltern situations, the very possibility of a political claim for justice is at issue. When such claims emerge from the experience of injustice, it is not only a shift in these meanings, in the process inventing new ways of defining and expressing injustice—for instance, through a politicized "language of respect," or through various modes of expression of "social suffering."[43] Lyotard has defined a "wrong" as a specific form of injustice that cannot be publicly recognized as such.[44] One of the main examples on which he has set up his theory is that of the worker who abolishes himself as a free responsible subject (represented as such in a legal employment contract) when criticizing the situation of his own exploitation. But, inspired by another example—survivors of the Holocaust—he concluded that silence and exit, rather than voice, formed the political response to the "wrong." Hence, Lyotard assumed that this third type of experience of injustice has no more normative consequences than a skeptical one. Yet, his first example, and notably the historical fact that the critical dynamics emerging from the experience of exploitation has had many legal and political consequences, could have supported another conclusion. In the case of this third type also, experiences of injustice can produce more than a skeptical stance on norms—they can have a normative productivity; they can give rise to the claims and struggles of justice typical of the subaltern politics.

The first type of experience of injustice might have given the impression that justice as a claim is nothing but a product of political discourses. But the two others illustrate the principle according to which experience rules

our discourses and could engage in a critical relation to them, giving rise to struggles against the social political language itself. The meaning of political justice thus has to be specified from the point of view of an epistemology of political discourses. Yet—and this is important—the various types of political conflicts about justice cannot be explained without a theory of experiences of injustice.

NOTES

1. See J. Rancière, *Disagreement: Politics and Philosophy* (Minneapolis: University of Minnesota Press, 1998), intro. and chap. 3.

2. J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 3.

3. W. B. Gallie, "Essentially Contested Concepts," *Proceedings of the Aristotelian Society* 56 (1956): 167–198.

4. M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1980), foreword.

5. This is indeed not always the case. For instance, in his crusade against socialism, the point of F. Hayek is that the notion of "social justice" has no meaning at all; see *Law, Legislation and Liberty*, vol. 2, *The Mirage of Social Justice* (Chicago: University of Chicago Press, 1978).

6. P. Bourdieu has highlighted that the political struggle is a "symbolic struggle"; see *Pascalian Meditations* (Stanford, CA: Stanford University Press, 2000), chap. 5. The notion of "politics of meaning" has a wider range of use, from the sociology of social mobilization—see, for example, D. A. Snow and R. D. Benford, "Master Frame and Cycles of Protest," in *Frontiers in Social Movement Theory*, ed. A. D. Morris and C. McClurg Mueller (New Haven, CT: Yale University Press, 1992), 133–155—to cultural studies—see, for example, D. Hebdige, *Subculture: The Meaning of Style* (New York: Routledge, 1981).

7. While the general relationship between discourses and powers has been emphasized by Foucault, these specific linkages between political discourses and powers have been elaborated notably by J. Rancière in his post-Althusserian but still Marxian period; see *La leçon d'Althusser* (Paris: Gallimard, 1974) and the first issues of the journal *Révoltes logiques* (1975).

8. E. Balibar suggests this idea in Chapter 1 of this book, "Justice and Equality: A Political Dilemma?"

9. See especially his introductions to *The Lessons on Philosophy of History*.

10. And indeed, historical transformations of experiences of injustice have sometimes reshaped some of these definitions (as is the case with Rawls's attempts to recast the liberals' principles).

11. See R. Samaddar, "The Game of Justice and the Seeking-Justice Subject," in *The Materiality of Politics*, vol. 2, *Subject Positions in Politics* (London: Anthem Press, 2007), 63–106.

12. One of the main political organizations in the French banlieues during the 1990s, the MIB, has precisely tried to organize a move from a denunciation of police violence and legal implicit complicity to a criticism of the capitalist and postcolonial structures of social injustices. The French revolt of November 2005 has to be conceived

of in this context (see E. Renault, "Violence and Disrespect in the French Revolt of November 2005," in *Violence and the Post-Colonial Welfare State in France and Australia*, ed. C. Browne and J. McGill (Sydney: Sydney University Press, 2010), 169–179. On the dynamics of politicizing of police violence and institutional implicit complicity, and their relation with the Redfern (Sydney) and Palm Island riots, see B. Glowczewski and L. Wotton, *Guerriers pour la paix: La condition politique des aborigines vue de Palm Island* (Montpellier, France: Indigène Editions, 2008). On the normative dynamics of Aboriginal rioting in Australia, see also G. Cowlishaw, "Framing Violence: An Ethnographic Perspective on Rioting," in *Violence and the Post-Colonial Welfare State in France and Australia,* 27–52.

13. A. Honneth has defined "social pathologies" as the "other of justice" in "Pathologies of the Social: Past and Present of Social Philosophy," in *Disrespect: The Normative Foundations of Critical Theory* (Cambridge, UK: Polity Press, 2007), 3–48. This perspective has contributed to substantial renewals of the philosophical discussion on alienation; see R. Jaeggi, *Entfremdung: Zur Aktualität eines sozialphilosophischen Problems* (Frankfurt am Main: Campus Verlag, 2005) and S. Haber, *Aliénation: Vie sociale et expérience de la dépossession* (Paris: PUF, 2007).

14. I have discussed the relations between suffering at work as justice and as alienation in *Souffrances socials: Sociologie, psychologie et politique* (Paris: La Découverte, 2008).

15. See V. Das, *Critical Events: An Anthropological Perspective on Contemporary India* (New Delhi: Oxford University Press, 1995).

16. About experiences of injustices and claims for justice in maquiladoras of Managua, see N. Borgeaud-Garcianda, *Dans les failles de la domination* (Paris: PUF, 2009).

17. From their point of view, the deliberative turn in political philosophy is confronted by severe objections; see E. Renault, "Radical Democracy and an Abolitionist Concept of Justice: A Critique of Habermas' Theory of Justice," *Critical Horizons* 6, no. 1 (2005).

18. In the G. C. Spivak sense, see her classical "Can the Subaltern Speak?" in *Marxism and the Interpretation of Culture*, ed. C. Nelson and L. Grossberg (Urbana: University of Illinois Press, 1988), 271–313.

19. For a sociological and political analysis of this "discourse of respect," see E. Renault, "Le discours du respect," in *La quête de reconnaissance*, ed. A. Caillé (Paris: La Découverte, 2008), 161–181.

20. On the specific issue of the symbolic struggles in such contexts, see, for instance, M. Grossman, ed., *Black Lines: Contemporary Critical Writings by Indigenous Australians* (Melbourne: Melbourne University Press, 2003).

21. J. Dewey, *Logic: The Theory of Inquiry* (New York: Henry Holt and Company, 1838), 68.

22. A. Honneth, *The Struggle for Recognition: Moral Grammar of Social Conflicts* (Cambridge, UK: Polity Press, 1996).

23. J. Dewey, "Three Independent Factors in Morals," in *The Later Works*, vol. 5 (Carbondale: Southern Illinois University Press, 1988), 279–288.

24. On quality as immediate unification of a situation, see J. Dewey, *Logic*, 69–71.

25. See C. Dejours, *Souffrance en France: La banalisation de l'injustice sociale* (Paris: Seuil, 1998).

26. See D. Demazière and M.-T. Pignoni, *Chômeurs: Du silence à la révolte* (Paris: Hachette Littérature, 1998).

27. This point is highlighted by J. Shklar in her *Faces of Injustices* (New Haven, CT: Yale University Press, 1990).

28. J. Dewey, *Logic*, 107–108.

29. For a survey about sociology of the feelings of injustice, see V. Guienne, "Du sentiment d'injustice à la justice sociale," in *Cahiers internationaux de sociologie* CX (January–June 2001). On the philosophical discussion, see E. Renault, *L'expérience de l'injustice: Reconnaissance et clinique de l'injustice* (Paris: La Découverte, 2004), 33–51.

30. E. Goffman, *Frame Analysis: An Essay on the Organization of Experience* (New York: Harper and Row, 1974).

31. For a synthesis of this criticism, see R. R. Aminzade et al., *Silence and Voice in the Study of Contentious Politics* (Cambridge, UK: Cambridge University Press, 2001) and L. Mathieu, "Des mouvements sociaux à la politique contestataire: Les voies tâtonnantes d'un renouvellement de perspective," *Revue française de Sociologie* 45, no. 3 (2004).

32. See D. McAdam, S. Tarrow, and C. Tilly, "To Map Contentious Politics," *Mobilization* 1 (1996) and *Dynamics of Contention* (Cambridge, UK: Cambridge University Press, 2001).

33. See W. A. Gamson, "The Social Psychology of Collective Action," in *Frontiers in Social Movement Theory*, ed. A. D. Morris and C. McClurg Mueller, 53–76.

34. See D. A. Snow and R. D. Benford, "Master Frame and Cycles of Protest," in *Frontiers in Social Movement Theory*, ed. A. D. Morris and C. McClurg Mueller, 133–155; and D. McAdam and J. D. McCarthy, " M. N. Zald, "Opportunity, Mobilizing and Framing Processes—Toward a Synthetic, Comparative Perspective on Social Movements," in *Comparative Perspective on Social Movements* (Cambridge, UK: Cambridge University Press, 1996), 1–22.

35. N. Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Postsocialist' Age," *New Left Review*, 212 (July–August 1995), 68–93.

36. See, for instance, the collection edited by E. Dorlin, *Black feminism: Anthologie du féminisme africain-américain, 1975–2000* (Paris: L'Harmattan, 2008).

37. D. A. Snow, E. B. Rochford, S. K. Worden, and R. D. Benford, "Frame Alignment Processes, Micromobilization, and Movement Participation," *American Sociological Review* 51 (1986).

38. See P. Charles, "La dynamique de la lutte sociale aux Antilles," *Actuel Marx* 47 (2010).

39. See L. Boltanski and L. Thévenot, *On Justification: The Economies of Worth* (Princeton, NJ: Princeton University Press, 2006).

40. See *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, UK: Polity Press, 1989); and *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996).

41. J. Habermas, *Between Facts and Norms*, 182.

42. J. Rancière tried to develop the theory of these situations in *Disagreement: Politics and Philosophy*.

43. See A. Kleinman, V. Das, and M. Lock, *Social Suffering* (Berkeley: University of California Press, 1997).

44. J. Lyotard tried to study this kind of experience of injustice in *The Differend: Phrases in Dispute* (Minneapolis: University of Minnesota Press, 1988), without taking its cognitive productivity into account.

6

Aestheticizing Law into Justice

The Fetus in a Divided Planet

Anirban Das

Law and Justice

Aesthetics and justice are two categories that, in certain senses, work beyond—while not altogether abandoning—the calculations of reason. This is not to say that reason can be reduced to calculability.[1] To be cognizant of the incalculable is the call of reason; it is to be true to reason, to be reasonable in an extended sense, not circumscribing reason to what is amenable to calculations. Both these categories—aesthetics and justice—involve *deciding* the moment of *responsibility* to *singularities* of *events*. They work differently yet in proximity.

I am using a very specific sense of "law" and a specific sense of "justice."[2] Laws are abstract principles that guide action. Laws provide the grid of calculus to circumscribe action: "what is to be done" is to be guided by laws, laws that might be revolutionary if not conservative. The legal apparatus provides guidance to imperatives of action in concrete situations. Two points are to be noted at this juncture. The first one is regarding the nature of justice. If justice was a Rawlsian formal notion where the principles of formal justice are only to be applied to the legal system to make the system legitimate, justice would then be, on principle, a law at a meta level: a principle to be applied to concrete situations. To do justice would, in such a thought, be an application of the calculations of the abstract law-like principle called justice. On the contrary, the Derridean notion of justice I employ involves a moment of decision by the judge. This decision is worth its name only when—and it is

always and already so in the performative iteration of the law—the imperative of action does not flow automatically from the rules of law. Justice here involves interpretation of the law. And law is that which always, ontologically, begs interpretation. Justice, irreducible to the law, makes law possible.

The second point, intimately associated with the first, is regarding the force associated with the law. The force of law, if not derivable from a formal justice, has to have a "mystic" authority at its origin—mystic in the sense of not explicable in terms of the logic of the law itself. Following Benjamin, Derrida (2002a) speaks of two kinds of violence in law—the law-preserving violence and the law-instituting (or founding) violence. The former is the "legitimate" day-to-day acts of violence that law perpetrates: to be a law means to be en-force-able. The latter form of violence is the violence presupposed by the coming into being of the law. It is that act, that performative moment that brings law to existence. For, the moment when a law becomes a law is not derivable from the law itself. This is something like the moment of formation of the new state when some body ("we, the people") self-legitimates to give birth to a new state: "a signature gives itself a name" (Derrida 2002b, 50). For Derrida, this initializing moment of force (beyond the rationale of the law it institutes itself) is also carried into the everyday of the law it initiates. Rather, the law-preserving violence shows the founding violence in a displaced form. These two forms of violence are separate and same, discrete and continuous at the same time.

The point is that the forces that accompany law do not invalidate the necessity of law. Justice, to act in the moment of decision, presupposes the calculations of the law. Without going through the calculus, one cannot reach the moment of justice. Yet to be just involves, always, the risk of being unjust—not being the unmediated application of prefixed legal principles. I move on to the specific problem I want to discuss after alluding to the question of how justice involves an opening out to the *other*. In *Specters of Marx*, Derrida speaks of Heidegger's attempt to think of justice (as *Dike*) as something that one gives to the other unconditionally, a giving of the *accord* of the other with his self. This accord is something that the one who gives does not have for himself as it is the accord of the receiver with his self:

> This offering is supplementary, . . . it is necessarily excessive. . . . The offering consists in leaving: in leaving to the other what properly belongs to him or her. . . . What the one does not have, . . . but what the one gives to the other, . . . is to leave to the other this accord with himself that is *proper* to him (*ihm eignet*) and gives him presence. (Derrida 1994, 26–27)

Derrida points at the absences that constitute such a presence of the other. Thus this justice that one gives to the other cannot be a fully present "thing," cannot but be an event always "to-come," not fully present to itself:

> Beyond right, and still more beyond juridicism, beyond morality, and still more beyond moralism, does not justice as relation to the other suppose . . . the irreducible excess of a disjointure or an anachrony, some *Un-Fuge*, some "out of joint" dislocation in Being . . . , a disjointure that, in always risking the evil, expropriation, and injustice (*adikia*) against which there is no calculable insurance . . . ? (27)

The moment of decision is an aesthetic moment. The singularity of the event called justice is enacted at this moment. This is the moment when the senses, in following their own particular logics, exceed the logical—exceed without erasing. The decision I am thus speaking of is decision that does not flow from prior calculations of the one who decides. The structure of calculability is stalled at, while leading to, this moment, like as Derrida suggests, the calculations of the law lead up to and stop at the threshold of the dispensation of justice. The work of *interpreting* the law is, while adhering to the letters of the law, to go beyond its calculations. Interestingly, this points at the openings of law itself: law that is deconstructible yet in an embrace with the undeconstructible justice.

When I name the moment of decision in justice "aesthetic," I have in mind the derivation from the Greek word *aisthanomai* (to perceive) that worked in Baumgarten's coinage of the term "aesthetics" in his *Reflections of Poetry* (1735). The connections with "sensory experience and the kinds of feelings it arouses" (Audi 1999, 12) point at the term's intimate relations to the body. In Terry Eagleton's treatise *The Ideology of the Aesthetic*, the body is treated as a resource for a "long articulate rebellion against the tyranny of the theoretical" (Eagleton 1990, 13). Even if one remains undecided over such a possibility for the "body" as material, the body as metaphor is easily recognized as a resource for figuring a domain beyond the calculations of reason. Eagleton has indeed painstakingly traced the itineraries of such a figuration. To take the decision to interpret law in dispensing justice is thus, in exceeding the reasoned calculations of law, implicated in the sensate domain of *aisthesis*. Not that this exhausts the relationships between justice and the aesthetic. As I hope to show in my instance of a specific debate around the question of rights and responsibilities, visual and conceptual representations of certain figures through technoscientific and discursive maneuvers play

crucial roles in the making of a notion of the just. The central image I deal with is the figure of the fetus in the abortion debate.

In the following section, I talk about two episodes in the history of public responses to the killing of the fetus in the womb. These two are separated hugely in space (one in the United States of America and the other in India) and slightly in time, and are not alike in nature (one involving the debates around a specific lawsuit and the other involving the response of a state and a society over a few decades). Yet, as I discuss in detail in the third section, the differences between the events are symptomatic of a larger issue: that of the mutual constitution of the universality of laws and the *aisthesis* of justice. In the fourth and final section, I deal with a text on a certain distant event of death accompanying abortion in a little village in India. I look at how law works in at least two registers, one as the enforcement of the legal apparatus of the state and the other as the general principle guiding action, to produce uniformities. Finally I try to produce an ethic, in a very specific sense, from the interactions of the aesthetic moment of justice with the regulative moments of law.

Two Events

One

In 1971, a pregnant single woman (Jane Roe) in America challenged the constitutionality of the Texas criminal abortion laws. The Texas laws proscribed procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. Argued December 13, 1971, reargued October 11, 1972, and decided January 22, 1973, this was the famous *Roe v. Wade* (District Attorney of Dallas County) case.[3]

The judgment recognizes and endorses the right of "personal privacy" that lets the woman have the right to decide whether to have an abortion. But this right is not to be understood in an absolute and unqualified sense. It claims that at some point of time in pregnancy, the interests of the state in safeguarding health, in maintaining medical standards, and in protecting potential life "become sufficiently compelling" to retain its regulatory power over the abortion decision:

> For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. (410 U.S. 113, at 165 [1973])

It is compelled to keep open the question regarding the time when life begins in the mother's womb:

> When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer. (410 U.S. 113, at 160 [1973])

The verdict recognizes

> that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, . . . and that it has still another *important and legitimate interest in protecting the potentiality of human life*. (410 U.S. 113, at 163 [1973]; emphasis added)

Susan Bordo (1993, 312) points at the "many frequent misapplications" of this clause. It has been used to support forced cesarean section operations on unwilling and/or unable-to-give-consent (for example, comatose) "mothers." "The slippage from state interest in fetal life (which Roe grants) to the elevation of that interest above the preservation of maternal health . . . converts the protection of fetal life into a doctrine of maternal self-sacrifice," she rightfully asserts.

I start my discussion with a much-publicized case, already well known in the theoretical literature, to bring out an initial moment (in the 1970s) of the U.S. woman's struggle for her rights to choose abortion. The rights thus gained were not absolute and came with modifications that often render themselves liable to be misused. There is, moreover, little likelihood in finding in these rights the absolute and aggressive swallowing of the fetal well-being that later pro-lifers would try to impute on them. Instead, in the verdict, the judiciary has meticulously worked out the stakes of the state and the physician ("a medical responsibility") that tightly delineate the rights of the woman.

Two

The Medical Termination of Pregnancy Act was passed by both houses of the parliament, the Government of India in 1971. It came to force on the first of April 1972. Abortion was legally sanctioned with little controversy around it. Remember that the *Roe v. Wade* case, which was not even a parliamentary act,

came to be decided in 1973. Still today, many states in the United States are reluctant to provide rights that women in India have been enjoying for about four decades. Not that social taboos, personal emotional responses, or scriptural injunctions were conducive to abortion on any account in India. The key to the anomaly, where the seemingly developing and the underdeveloped have overtaken the "developed" in the race for progress, is the readiness of the Indian state to step up its measures of development that, for India at least, seemed to involve a scrupulous control of the increasing trend in population growth. The twin targets that prompted the government to legislate for abortion were family planning and population control rather than concern with the rights of the woman over her body. The concerns of women that were taken account of were those of health, in the sense of goods to be provided rather than rights to be recognized, "in relative isolation from the women's movement" (Phadke 1998).

In India, the language of development overrides the pro-life arguments. The emphasis of the programs remains on female contraception (during Emergency the strong resentment against forced "male" sterilization was perfectly legitimate in its democratic content, yet was also symptomatic of a lack of awareness regarding the male component of contraceptive practices). The language of *choice*—of rational, free individuals—in contraception is thus hollowed out of its content. Abortion becomes an imperative of development (through international agencies, the science establishment, plans, modernizing impulse, etc.). Choice becomes the only choice. This does not make the dichotomy of "choice" and "life" irrelevant. The phenomenon points to the situatedness of the working of ethics. Probably nothing could more poignantly express the marks of location in ethics than the strange and macabre twist the pro-choice legislation takes, by which thousands of girl children are selectively aborted through connections of technoscience, family, and the state.[4] The differences in the sexual identities of the future person are retrojected back on the identity of the fetus to determine its fate: continuation (for the male) or abortion (for the female). The economic, political, and cultural imperatives that mark the woman as far less desirable than the man in the family seal the future of the fetus. Sex-selective abortion is the "neutral" term that tries to express this paradox of a phenomenon in the discourse of international civility.

I take up the question of abortion as a specific instance where the limits of thinking in terms of universal solutions to a problem become apparent. That would point at the necessity of thinking about justice in terms of embodiment. The abstract framing of the problem in terms of a pro-choice/pro-life binary acquires "flesh and blood" once one goes into the thickness

of specific and contextual enunciations of the event. Who is a mother? Who (What?) is a fetus? How do technoscientific practices and instruments shape the definition of both and their interrelationships? How do relations of coloniality, gender, race, or economy take part in, and "distort" the contours of, the process? How does the abortion debate reappear in a displaced form in the debates on female feticide in the postcolonial nation-state of India? As one looks critically into the terms and metaphors at work in the formulation of the matter in legal, medical, and philosophical texts, and into the multiple intricacies of the situation, the seeming simplicity of the arguments dissolves. It becomes difficult, if not impossible, to comment on the desirability of a "stance" with regard to the problem.

The Abortion Debate

The existing debates around the question of abortion revolve around two contending positions. The *pro-choice* argument asserts the rights of the woman over her body and life. As an individual, she has to have the freedom to choose whether to go on with her pregnancy, and whether she wants the changes in her ways of living that being a mother entails. The *pro-life* position argues for the rights of the fetus to life—as the fetus is regarded as a human being and a prospective or (in some arguments) even a real person, an abortion is an act of murder. A *pro-life* argument renders the woman invisible. Sometimes she is demonized, sometimes effaced, at other spaces reduced to a synecdoche, or even forgotten doubly (in the sense that the act of forgetting the woman is itself forgotten). A ready answer *for* the *pro-choice* argument obviously remains within a discourse of the rights of the individual. The feminist position speaks in the language of individual "autonomy," and the conservative argument invokes "empathy," a familiar trope in feminist ethical thinking.

What should be a feminist position in the abortion debate?

The literature on the issue, mostly set in terms of an opposition between the pro-choice and the pro-life positions, is huge and would need at least a monograph to sum up the contending positions. I take up a few of the issues for discussion.

The debates about the status of the fetus have traditionally been argued through the question of *personhood*. As if an "answer to these questions guarantees a resolution of the entire abortion issue. . . . [I]f the fetus is human, it must not be aborted except when the mother's life is endangered (and, for some, not even then); but if it is not human it may be aborted under any circumstances" (Weiss 1978, 66). There have been efforts to demarcate

the exact point in time from when the fetus acquires personhood—from the time of conception, to the formation of the vital organs, the time when "it" becomes *viable* (that is, able to live on its own with supports other than the mother's womb)—and so on. "At what stage of fetal development, if any, and for what reasons, if any, is abortion justifiable?"—Weirtheimer (1982, 43) puts the question in a succinct manner.

Weirtheimer's essay goes on to show the futility of such a query as the various shades of the liberal and the conservative positions restate each other's positions turned inside out. As the liberal ("pro-choicer") tries to define a distinctive trait that differentiates some one stage in the life of the fetus from the previous ones, so that abortion may be justified before that stage, the conservative ("pro-lifer") points at the continuity of consecutive stages and the impossibility of such a definition and extends this notion of continuity to that between the fetus and the child so that feticide and infanticide become the same. Now the liberal might extend this argument to the indefinability of the boundary between the human and the nonhuman. She may stress the aggressive anthropocentrism in the conservative's reverence for the "potential" human at the cost of all other pains and violence involved. For her, the "other half" of the (hu)man is the closest and most obvious object of this violence of forgetting. The conservative points out the inability of the liberal to specify the properties that mark out the "person" from the "nonperson" so that he can morally assert the right to abort before the attainment of those qualities. He himself is "equally unable to say what properties something must have if it is to have a right to life" (Tooley 1972).[5] The arguments for continuity and/or discontinuity per se do not lead to a pro-life or pro-choice position—"if you are led in one direction rather than the other, that is not because of logic, but because you respond in a certain way to certain facts" (Weirtheimer 1982, 52–53).

To bring in the question of the *subjectivity* of the observer/questioner is not to evade the urgency of the ethical dilemma in the problem of abortion. It is to move on to a newer terrain in search of answers that seem unattainable in the familiar field of reasoning based on universal principles of rights and individual persons as discrete entities. We now have to deal with the contexts in which the question is raised, pay attention to the changes and continuities in the perceptions of the fetus (especially with the coming of the new visual technical aids to "reach into" the womb of the woman, like the ultrasonogram), and consider the multiple levels of ideologies, powers, and interests acting in the viewing of abortion in a specific setting. We had a focus on the other "person" whom the debates on "personhood" forget to mention—as if personhood involves the fetus alone. We are speaking of the "mother," the *woman* who bears the child.

A *pro-life* argument, notwithstanding its feminist rhetoric (if indeed that argument uses such language), renders the woman invisible. A ready answer *for* the *pro-choice* argument obviously remains within a discourse of the rights of the individual. Tooley's (1972) rigorous exercise of the logistics of this narrative leads to the scary proposition of a defense of infanticide on certain occasions (the infant, like the fetus, does not possess "the concept of a continuing self" and thus lacks "a serious right to life"). In spite of Tooley, we want to respect this "feeling" of a subjective scare to killing in the face of an abstract and value-neutral objectivity of reason.

To speak of the woman to point out the discriminations being heaped on her is a feminist task. That does not exhaust the work. There are problems, which still need to be addressed—beyond the *rights talk* of the "choice," and beyond but not without regard. In the fraught field of sexual difference and discrimination, one ought to take the side of the "other" woman, the side of choice. But, at the same time, one should remember that this is in the space of rights based on the individual subject. Within the space of rights, one takes the momentary *decision*. The contingency of the *moment* has to be emphasized. Once one has frozen the moment to a universal "taking of sides," once one has erased the undecidability that haunts *every* decision, one enters the uniform field of "universal rights" again. And one thus brings in the attendant violence of the forced straightening of the curve of the socius—to homogenize the diverse through the authority of the dominant. Remember the case of female feticide where the choice to abort functions in the cause of patriarchy to end the lives of prospective girl-children. My imperative is not to forget that the choice has been taken over a rugged terrain of incomprehension. A responsibility to the "other" of this divide, to "life," is to inform the decision to choose abortion.

Nivedita Menon's attempt to question the universality and the "impossibility" of justice has a rare analytic clarity. Paradoxically, this clarity also produces the limits of her argument. In a comprehensive and discerning discussion on the question of abortion (Menon 1995), she points out that the concerns confronting the feminist in India are quite different from those of the feminist in the West/America. The latter, working in the background of efforts to criminalize abortion, has to put stress on "retaining women's access to safe and legal abortions, and ensuring that the state intervenes positively through laws and administrative measures." The former works in a space where amniocentesis is being used to determine the sex of fetuses and to selectively abort the female fetus. So the Indian feminist has to tackle the dilemma of working for safer access to abortions (on conditions of more autonomy for the woman) while making a cautious attempt to curb the abortions done

(also by women) to get rid of prospective female children. Menon offers no simple solution. Instead, she points to the impossibility of a universal justice and to the limits of an assumption implicit in the "discourse of law"—an assumption "that justice can be attained once and for all by the fixing of identity and meaning." "[R]ights are constituted by particular discourses," she claims, a mode of constitution to which the "discourse of rights" remains blind (389).

This position, although nuanced, works within a too-neat binary of justice/law. The Derridean thematic she works with would avoid such neatness. It would rather point at the *simultaneous* working of a possibility *and* an impossibility in the process. Impossibility does not preclude possibility. Speaking of justice, Derrida—in the piece Menon refers to (Derrida [1990] 2002a)—remains obsessively engaged in the intertwining of the meanings of justice, law (as *droit* and as *loi*), and right (also in both the senses of "being right" and "having a certain right"). He relentlessly points at a coimplication as well as a disjuncture between justice and law acting simultaneously. He speaks unambiguously of a "deconstructibility of law" and an "undeconstructibility of justice." These descriptions might imply a "non-passage" between the two. But, as Spivak (1999, 427) points out, for Derrida "justice is disclosed in law, even as its own effacement."

For a deconstructionist, the reference to the "experience" of disclosure and effacement in simultaneity is important. Otherwise, as it has been with Menon, the responsibility to the other (that inalienably informs the experience of justice) would look like an eclectic move to be added on pragmatically to a well-defined (though contingent) category called justice. Here, as is evident with Menon, justice remains historically contingent—"constituted by specific moral visions." This position avoids the question of the necessity to engage with the *general* undeconstructibility of justice. Instead, it celebrates an epistemic relativism (albeit with a pragmatic nod to an ethics of "responsibility"). To remember, not all generalities "suppress singularity in order to establish a 'fact'" (Spivak 2003b, 44). One has to negotiate certain "unverifiable" generalities (not tied to a single "fact") in order to be responsible. Cautiously we try to explicate the nature of this responsibility. For, a blanket ethic of responsibility for all constitutive others may amount to a nonresponse to each. Such a homogenizing of responsibility becomes just a naming of a relationship that blurs the specificity of each in the purported obligation for all. The relationship to each "other" is a singularity. The alterity of each is unique, as is the singularity of the ethical subject.

How does the notion of otherness act in the question of abortion? One could remember the intimate link of otherness with the question of sexual

reproduction by men and women. Donna Haraway (1990) reminds us that (hetero)sexual economy need necessarily not flow into the familial circulation of the reproduction of the same through generations. Contrarily she asserts that sexual difference is a potential scandal for the liberal conception of the individual and the internally sufficient Western "self." For sexual reproduction always takes two. And neither parent is *continued* in the child. The child is rather a "randomly reassembled genetic package." For Haraway, "where there is sex, literal reproduction is a contradiction in terms. The issue from the self is always an(other)" (143). Sexual difference and reproduction, even when they serve the continued production of the Western Man, perennially belie the project of generational continuity. They always produce difference, as they are out to (re)produce the same. In a way, the fetus is the ultimate metaphor for this difference in sameness. The woman has thus to split when she asserts her rights and emancipations for "choice" as she, at the same time, perceives the call of the other within, with responsibility.[6]

There is a paradox in conceptualizing the fetus. Its specificity as distinct from the teleological person gets effaced at the moment when one speaks of its right to life—as if nonpersons do not need to live.[7] Against such a way of thinking, one might posit the fetus "in the species of alterity, belonging to another system; and yet [inhabiting us]." I have put these last two words in the place of "we inhabit it." For Gayatri Chakravorty Spivak (2003b, 72) was thus speaking of the *planet*, and we, the *fetus*. This is how—by the way of an inversion in the relationality acting in the act of inhabiting—one might connect the twin figures of the wo/man in the planet and the fetus in the woman. Donna Haraway (1997, 173–212) has eloquently spoken of both the fetus and the "planet earth" acting as an "image" "about the origin of life in a postmodern world." In the world of technoscientific artifacts and artificial life, both of these—the earth and the fetus—point at myths of origin and rootedness. Being thus linked to the origin changes little in the way an ethic can be conceptualized through attempts toward (im)possible figurations of the other in thinking the earth or the fetus.

Referring to Freud's use of the word *unheimlich*—the turning of the *homely* to the *un-homely*—Spivak goes on to weave the implications of planet-thought. Freud, as she reads, had spoken of the neurotic's feeling of "something uncanny about the female genital organs"—"[t]his *unheimlich* place . . . is the entrance to the former *Heim* [home] of all human beings, to the place where each one of us lived once upon a time and in the beginning" (Freud, quoted by Spivak 2003b, 74). This origin as home is referred to by Irigaray (again I follow Spivak's paratactic reading) as she reads Plato to show that the allegory of the cave constructs the disavowed womb as a place one

inhabits yet wants to escape from. This acts as a metaphor for reason wanting to come out of the inescapable spell of the uncanny. In a way, Irigaray seems to use and occupy the same system as Freud in signifying the *uncanny* by the female genital tract. Yet she brings in the whole system of signification into crisis by her strategy of dogged mimesis whereby the value-system of homeliness gets inverted. As Irigaray mimes Freud, she pushes the latter's logic to its limit to transform the role of the *uncanny*.

Gayatri Spivak shifts from the vagina to the planet as "the signifier of the uncanny." It is the indefinable, inevitable place one inhabits at the origin, rendered un-homely. We propose the fetus as another figure that carries the weight of the uncanny. If the space that enfolds the body is liable to be rendered uncanny, the individuated space *inside* the body marked by economies of gender, class, race, and nation one calls the fetus is equally prone to such a transformation. The outside and the inside of the body remain equally unknown and underivable from the self. Which twenty-first century parent has not suffered the anxiety of the "retarded" baby, rendered a threat through the familiarizing moves of the medical sciences? The fetus acts as a potential monstrosity. My sense of the fetus is inflected by the figure of the uncanny within.

To speak thus of the fetus as the intimate other is not to forget the tendencies of this intimacy being designed in terms of a postcolonial patriarchy or a globalized capital or in terms of both. Maybe, the chances of such an implosion are quite high in the trope of the fetus. That does not absolve one to forget the imperative of the human "to be intended toward the other" (Spivak 2003b, 73). To go into the complicacies of this argument, one has to engage with an attempt by Emmanuel Levinas to conceptualize ethical responsibility in terms of the mother's body. In *Otherwise than Being* (1998), Levinas had proposed the figure of the mother—who bears an other within her body without integrating the other into the self—as a metaphor for responsibility. Here one nurtures the other within, yet not transforming it to the self, and is attached to the other in her own being. One shares the other's travails intimately, yet at an internal distance. This move has rightly been criticized by some feminist scholars as a valorization of the mother's sacrifice, and as a giving away of a politics of equality and justice for the woman. But, as Lisa Guenther (2006) argues with rare analytic clarity, one does not have to renounce the ethics of infinite responsibility for gaining a politics of equality:[8]

> The calculations of politics find their limit in the ethical proximity that puts calculation into question; and the potential violence and persecution of ethical life finds its limit or rectification in a politics of justice that demands liberty, equality and "fraternity" for all. (128)

I do not go into Guenther's maze of argument involving the implicit paradox in the use of Moses in the example of motherhood in Levinas. Also, I do not fully agree with her in the neat division between the mother as an ontological and biological entity and mothering as an ethical and political practice. For me, to cling to the two ends of rights and responsibilities, to the twin notions of the calculations of politics and incalculable ethics, one does not need a clear ontological separation between the two. Ethics and politics may yet be conceived in an intimate embrace.

Is it really so difficult to think simultaneously of a sexuate difference in rights and a call of the wholly other that presents itself as *this* intimately embodied figure—"a catachresis for inscribing collective responsibility as right" (102)? The call for responsibility to the uncanny other might inform the located sense of choice for the woman in the first, second, or the third worlds. There may even, I propose, be a beyond to the economy of "natural rights" and the naturalized "life."

Laws of Reading, Justice of Reading

> *This essay begins with a transgression.*
> (Guha 1987, 135)

In 1987, the historiographer of the subaltern, Ranajit Guha, was thus writing on his study of a dusty document later published in a vernacular Bangla collection of "letters." The collection was deemed to present a representation of the "society" and was accordingly named *Chithipatre Samajchitra*—a picture of the society through letters. The document in question was a rendering of the depositions (*ekrars*) to a lower court of law in mid-nineteenth-century Bengal from the relatives (mother and sister) of a dead woman, named Chandra, who died after taking some medicines for inducing abortion, along with the *ekrar* of the person who had prescribed the medicine. Chandra conceived through an illicit affair with Magaram Chasha, "her husband's sister's husband." Magaram had (magnanimously?) offered to pay in kind for the medicines. Otherwise he would drive Chandra to a life in *bhek*, a predicament that Guha (1987) characterizes as a "living death in a ghetto of social rejects" (161). Everything had gone on smoothly with Kalicharan Bagdi agreeing to supply the said remedy on payment in money by Chandra herself. Except this little turn by which "the pain in Chandra's belly continued to increase" even after "the bloody fetus" was picked up with some straw and thrown away. Chandra died. Guha's purpose, as he declared, was "to reclaim the document for history" (135).

Two separate authorities—the law and the editor of the collection—had already *claimed* the document for their respective purposes. His writing was a reclamation on Guha's part. For him, this gesture of looking again involved a transgression—a violation of the intentions of earlier authorities. As is well known by now, law and the apparatus of legality have the entrenched propensity to forget the "event" and remember it in terms of the codes of law—"by reducing its range of signification to a set of narrowly defined legalities" (Guha 1987, 140).

In "Chandra's Death," Guha has dealt extensively with the problem that the mediation of the law poses for the historian wanting to reclaim the event. It is a struggle between the two claimants, *law* and *history*. The struggle was made no easier for the latter by the other mediator (who had earlier entered the scene)—the editor of the eclectic collection of documents, *Chithipatre Samajchitra*. This collection has been so "broad in scope" and been with "such scant regard for the contiguities of time and place" (Guha 1987, 139), that it could not help the process of "contextualization" that, for Guha, is the prime condition of historiography.

He sets on his task with an eye to astonishing details of social and cultural milieu of the people inhabiting the specific geographical theater of the event. With unusual sensitivity and acuteness of thought, Guha reads into the event of Chandra's death something that eludes the eyes of an observer who—even if not complicit with the criminalizing gaze of the structures of order—might look at it casually, without the concerns of a feminist vision seasoned with the politics of the subalternist historian. In the attempt to induce an abortion in Chandra by herself and her womenfolk that would seem to be an act of surrender to the male norms of sexuality, kinship, and family, he sees a "women's solidarity" against such institution of male norms. For him, these women had made a choice to reject *bhek* as an alternative—"this was a choice made by women entirely on their own in order to stop the engine of male authority from uprooting a woman from her place in the local society" (164). "That she lost her life as a result of this effort" (165) was, for Guha, a measure of the "strength of women's solidarity [in the given social and historical setup, I may hasten to add in his defense] and its limitations." He quotes, to bring out the tragic import of the situation, a particularly telling comment by Brinda, Chandra's sister, in her *ekrar*—"I administered the medicine in the belief that it would terminate her pregnancy and did not realize that it would kill her."

If someone seems to hear in this act of quoting an echo of the Derridean reading (1981) of Plato's *pharmacon*—the ambivalent medicine, "beneficent or maleficent" simultaneously—I submit, that perception would be faulty. Notwithstanding the patent evocations suggested by Brinda's deposition,

Guha does not explore such a possibility. For him, the meaning of the text becomes clear as one situates it in the context. The "cryptic depths" of the medicine that *is* poison at the same instance "refusing to submit their ambivalence to analysis" get illuminated by the searching vision of history to bring out a resounding signification. As Guha's text declares in no uncertain terms, "the triumph of fate helped to enhance rather than diminish *human dignity*—the dignity of the *women's choice* to terminate the pregnancy and their determination to act according to it" (161, emphasis added).

Undoubtedly this is one of the best among the pieces that deal with the problem of gender (in the work of the "subaltern studies" group). It has a discerning eye to the nitty-gritty details of the multiple and uneven dynamics at both "micro" and "macro" levels, and is firmly rooted in the fragmented histories of early colonial Bengal that enmesh the workings of patriarchy in the given context. Yet it is surprising to note the ease with which it works with the notions of a *human dignity* and of *women's choice*. This is not a "liberal" reading of the women's choice as articulated by themselves, the agents who are women. This articulation of *choice* involves an active *reading* on the part of the author. But that act of reading becomes an act of discovery: a transigent, *transgressing* removal of the "cover" that hides the true import of agency and solidarity. The *empathy* that Guha speaks of, between the women, is at the unambiguous service of this solidarity. Is it imperative that one must straighten the curves of ambivalence at the level of theory to spell out a definitive politics of action, in order to act? Should that moment of mad *decision* be thus brought in to the realm of thinking as a well-defined rationale of action?

A presupposed category through which the rationalizing of choice works in the context of the social is the notion of "rights." After Foucault, with the too well *known* intertwining of knowledge and power, and after Said with his indictments of the colonizing impulse of knowledge, it might be easy to point at the exclusions and the latent coerciveness of "universal rights." At the level of its working, one has to show the dominance of international financing organizations based on the northern countries and the diverse overt and covert ways in which these dictate the terms of understanding, control, and day-to-day activities in the nation-states of the south. In this transfer/translation of knowledge, power, and economy, the roles of the various nongovernmental organizations (the NGOs), of well-meaning individuals and globalized functionaries of the state and technoscientific institutions, along with certain "local" level initiatives, are gradually becoming clearer. Detailed analyses and critical descriptions of the dynamics of these efforts are crucial. Yet these do not exhaust the scope of the problem.

The question of the right to abort is a site where the problem of rights gets different and seemingly incommensurable hues from the contexts where it is placed. To begin with, one has to look at the notion of universal rights as bearing within it, along with the idea of "having or claiming a right or set of rights," something different, a certain "kind of social Darwinism" about "righting wrongs" (Spivak 2003a)—a presupposition of one's *self* always being in the right and of dispensing of rights to *others*. This is not a gesture to discard the concept of rights in its entirety but to point to the limitations that mark its existence and working—"the enablement must be used even as the violation is re-negotiated" (Spivak 2003a). Looking at the rights question in this mode enables one to reconfigure the arguments surrounding abortion. As Shefali Moitra, in a short yet incisive piece (1999, 12) asserts, we become aware that "an overarching principle for conflict resolution" is not always available whenever there is a "moral conflict." An acknowledgment of "experiences which are not conducive to formalization and other traditional modes of explanation" becomes necessary in this context. The notion of *rights* becomes problematic with the understanding of the implications of the *might* and the *wrongs*. The formal and universalizable principles of *personhood* and *morality* that are involved in the "abortion issue" are thus marked with the lineaments of the *body*, the *contexts* and the *otherness* of the woman, the colonized and noncapital.

To go back to Guha's (legitimate) concerns, I look closely into the concepts he deploys. He has been digging out elements of women's choice in an event that seemed to signify just the opposite. For him, the tragic (in the true sense of fate ruling over free will) consequence of the women's action does not take away the "dignity" of their move. This dignity lies in the building up of a solidarity among women. This solidarity was born of "empathy" in the face of a patriarchal solidarity congealed through the action of fear (of being ostracized because of the defilement of a woman). Women's action, for Guha, here transgresses men's laws. These laws, those of the patriarchal society in that colonial village, were not the laws of the state. Guha's perceptive analysis searches out the "mechanics of discipline and punishment which are presupposed, though never explicitly mentioned," (150) in the legal documents. These mechanisms do not work at the register of the official law. "It belongs to that subcontinent of right and wrong which was never painted red" (150). Guha is acutely aware that this "subcontinent," though active below and beyond the level of the official rule of law, itself constitutes a realm of legality, constitutes a realm of "law" in the sense of a fixing of "right and wrong." This law institutes fear to produce the solidarity of patriarchy against

the "devious" woman. Guha, here, is aware that the law is not only the legal apparatus of the state. His brilliance is in bringing out the oppressive nature of the hardening of a system of rights and wrongs through the workings of fluid social institutions—"an amalgam of local custom, caste convention, and a rough and ready reading—more often just recollection—of the shashtras" (151). The laws of society oppress the woman. The laws of the land cannot reach into the workings of these laws, not to speak of the spectrum of real acts of women who work in opposition to these and are thus—at least—twice removed from the laws of the state.

Does Guha's own reading follow any law? Do his notions of empathy (acting among women relations of Chandra) and solidarity (thus formed within these women) inhabit a law-like field? Is this the domain of law in the sense of natural law, laws of thought, or moral law? Guha opens up the question of the law-ness of "right and wrong," and spreads his analysis over the minute workings of that patriarchal moral (and social) domain. He puts his assertions on the "activity of women" (162) in a detailed historical context. Yet he remains silent over the possibility of such a law-ness acting in the works of women and in the work of the theorist. Do women act only in response to the patriarchal project? Is the (male) "solidarity of fear" enough to produce the (female) "solidarity of empathy"? If women act instituting justice through their actions, does that justice not call for the "just": the subject who institutes justice? I would like to insist that the sheer act of responding to the patriarchal act does not involve the "just" in the sense of the one who enunciates justice. In this sense, to react or to oppose injustice is not enough to enunciate justice. The aesthetic moment of decision to be just is not derivable from the calculations against injustice, though again, that moment cannot come into being without the latter.

In "Justices," Derrida (2005b) speaks of the responsibility of the "someone who says, 'je,' 'I'" (689). Referring to J. Hillis Miller writing on the poetry of Gerard Manley Hopkins, he refers to the one who is the "just" as someone who "justices": "This just man [*sic*] is a man who justices. But because he is just, inasmuch he is just, in an immanent way and through emanation, he does or renders justice in a performative fashion" (693). Here, justice is used as an intransitive verb, a verb without an object, an act brought out performatively to produce justice. The one who *justices* does not refer "to the calculable rules and norms of law" (692). Derrida invokes the naming of the God as the Just, to refer to the solitude of the just. Who but the God for the Christians is more solitary, more isolated, than all else? The just, in bringing in the event of justice, shares the solitude of the

Christian God. But is not this solitude the solitude also of the self? Derrida, as he speaks of the inability of any man [*sic*] to attain the solitude of God, also speaks of a certain *selftaste* in its radical isolation and insularity. He speaks of "the experience of a 'selfbeing,' a 'selfhood,' a 'self-awareness' that, long before thinking itself, long before the *cogito*, senses the taste of the self" (698). This sense of the body, this *aisthesis*, is related to the moment of justice. This moment is also related to the moment of uniqueness and singularity.

For J. Hillis Miller, as Derrida asserts, justice is again related to the "ethical necessity" of the "example" to knowledge. For no knowledge is possible without the example. Yet each example, in its uniqueness, escapes necessarily—even if a tiny bit—from the generality of knowledge. "Miller's exemplary justice consists of paying essential attention to the irreplaceability of the example" (695). And then again, the notion of the example brings us back to the theme of law. For law, like the universal knowledge, cannot work except with examples, cannot work without instances that are each unique, each calling for an interpretation. Derrida describes this as the "terrible paradox of the law" in that, "despite its universal structure, it is formulated always in the performative of an event" (707). Thus the inalienable link between law and justice. The irreducibility of justice to law or the absolute heterogeneity of the two concepts is not enough to sever their connection. For justice, as the interruption of law, is constitutive of the latter. And law, as the ground that justice interrupts, constitutes justice.

Is it possible to de-link the "man" and the Christian God from this notion of justice? Can the soiled, brown, dead woman in the little village of colonial Bengal be just? She cannot be just by the sheer reaction to the terror of patriarchy in her every day. Does she reach out to the transcendent? Is the reader/writer of the event of her acts ready to wrench her out of a foreordained immanence? Even as he or she writes through the immanent *and* transcendent space-time of postcolonial states, societies, and academic institutions, is the reader/writer ready to acknowledge his or her own un-homely queerness of being? These are probably some of the questions one would have to face if one approached the question of justice from the standpoint of the *aisthesis* of the corporeal. The death of Chandra's body was the death of the body that bore the fetus that it expelled. If it was the place where women's solidarity was acted out, it—at least—was also the place where the body of the woman turned metaphoric. The body—on death—only performed what it already was: *absent*. But that performance was an act of the just, of the justice enacted not by the apparatus of the law but through the body of the woman. This, we perhaps realize, also interrupts law for the moment.

NOTES

I thank all the participants in my presentations of this theme in its various forms at various places. A part of this essay repeats the argument I put forward in another essay, "Choice, Life and the (M)other: Towards Ethics in/of Abortion" (2010).

1. On the contrary, one may speak (with Derrida 2005a) of the "at once continuous and differentiated becoming of reason" (141), of a rationality "that takes account of the incalculable so as to give an account of it, there where this appears impossible, so as to account for or reckon with it" (159).

2. This specific sense of law and justice is found in the works of Jacques Derrida (especially 1994 and 2002a and in numerous other works that follow him in this regard). See Buonamano 1998; Cornell 1992, 1995; Keenan 1997; Ieven n.d.; Sokoloff 2005; and Spivak 2003a.

3. The whole text of the judgment, with concurring and dissenting opinions of the judges, is available online at the website of "Priests for Life," hosted by *Catholic Online* and has been used extensively in the following discussion on the topic.

4. See Balakrishnan 1994, Weiss 1995, and especially Menon 1996 for detailed discussions on the parallels between the arguments against female feticide and the pro-life positions, a phenomenon that, for me, indicates the contextuality of all purported generalities, even the feminist ones.

5. I discuss the problem with Tooley's extreme rationalism shortly. The abortion and related debates on the human embryo continue in a number of directions (Campbell and McKay 1978, Hursthouse 1991, Kirejczyk 1999, McMahan 1993, and Sofia 1984 are a few examples of this variegated space). We choose a specific line, which to us seems to reflect some of the principal concerns.

6. See Moitra 1999 for a detailed analysis of this "split."

7. Derrida (2002a, 246–247) speaks of "a demand more insatiable than justice" flowing from an act of "deconstructing the partitions that institute the *human* subject" (emphasis added), and of a *carnophallogocentrism* that has a *carnivorous sacrifice* as essential to the structure of subjectivity and the founding of law. I temporarily suspend a detailed discussion on the matter.

8. Guenther has invoked a "politics of justice." Her use of "justice" here is a little loose, and I prefer the realm of politics in her sense to be with that of law. She herself relates it with "the field of moral philosophy" (2006, 128), which is clearly different from justice in my sense.

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7

The Justice-Seeking Subject

Ranabir Samaddar

The Constitution and the Governmentalization of Justice

Ever since the idea of constitutional justice has achieved the status of public domain, political parties, governmental departments, communities, groups, chambers of commerce, consumer sections, and sectional movements all look to constitutional recognition of their respective stands on justice as the mark of final approval. All other ideas of justice—moral, ethical, psychic, political, and economic—have given way to the most abstract form, the idea of constitutional justice. The justice-bearing provisions in the Indian constitution are not understood as isolated dots; together with liberty-bearing provisions, they are considered an independent, coherent domain with strictly determined connections to the entire domain of politics—leading, setting standards, and evaluating the larger domain. As a consequence of the preceding implication, in this distinct and describable domain of constitutional justice, we find the whole meaning of the constitution, absorbing all history and, at times, all politics. In addition, we find a relatively robust tradition of judicial decision making, with the constitution as its warrant, subsuming popular decision making and politics to which the constitutional language hitherto had been less important. Our political practice has conceded authority over questions addressing the basic issues of a political life to a transtemporal practice of juridical language, called in the complete absence of humor *basic law*. The rich

political concept of justice suffers a deficit in a double absorption: justice subsumed under law, and politics subsumed under constitutionalism. The result is the emergence of what I call the notion and practices of governmentality in the area of justice. Since the justice-bearing provisions in the constitution do not form a coherent whole, they depend too much on the governmental procedure of justice.

Initially the government found the liberty-bearing provisions of the constitution at odds with the imperatives of a developmental state, and the Court took the opposite stand mostly in the belief that these governmental attempts (acts and other measures) to restrain the right to property were at odds with the right to freedom, while the government saw that the imperatives of development and the state's obligation to develop the country were being blocked by the Court. Justice was the watchword of the government, and constitutional amendments (the Fourth Amendment, 1954, and the Seventeenth Amendment, 1963) were carried out in the name of justice, which was being blocked by the Court. The roles reversed in the eighties, when the Court started acting in the name of justice and the government was shown as clinging to archaic and insensitive acts and practices. The notion of justice, upheld as the key to constitutional existence, developed in this game. On the one hand, the government wanted the constitution to strengthen its hand (for development, refugee rehabilitation, building dams, etc.) in removing old, feudal, property acquiring and possessing practices, and thus enacted the Fourth Amendment in view of the courts' decisions in Sholapur Mills and Bela Banerjee cases, so that governing becomes possible. On the other hand, the Court wanted the basic structure of the constitution to remain unaltered.

Today we can say that through these legislations of the first thirty years, requisitioning and acquiring property for refugee relief, developmental work, takeover of sick industrial units, and so on, made governance modern. These legislations elaborated the concept of public welfare and public duty of the State, but without in any deep way affecting the structure of private property on which the State stood. Land reforms and land legislations proved to be the slowest ground, and even though later on, Article 31 was removed altogether from the constitution, the structure of property did not change; what changed were some archaic practices and laws regarding land takeover, requisition, compensation, and so on.[1] We can even doubt now the purpose of some of these amendments and requisition acts as we find more and more of the land thus requisitioned has been wrested out of the hands of the indigenous communities, or marginal farmers without due compensation, and thousands have been displaced—all in the name of development such as

construction of dams, widening of roads, or construction of newer and bigger airports.[2] However, there is little doubt that the Court in the initial decades, by appearing as defendant of private property, strengthened the idea of constitutional justice, which in turn helped it when it had to turn the stick of justice from the eighties onward against similarly archaic governmental practices. Nominal steps such as separation of the executive from the judiciary by the 1973 revision of the Criminal Procedure Code (CrPC), whereby the collector of revenue, a civil executive, could no longer act as the prosecutor, the judge, and also the jury, helped to some extent the development of an articulate judicial machinery giving out justice.

Since the inauguration of the Constitution of India, the most litigated section of it has been the provisions on rights and directive principles. As a consequence, the liberty-bearing provisions have become more pronounced. Constitutional jurisprudence regarding private property by and large stopped after 1978 with the abolition of the fundamental right to property, with two consequences. One was that it came to be accepted that state's reasons for acquisition of land (property) were enough as public reason, and thus thousands and thousands of people were dispossessed of land, evicted, displaced, and forcibly moved through all these decades from one place to another, in the public interest. Another consequence was that a situation of virtual liberty arose—as if there remained no further problem posed by private property to the liberty-bearing and the justice-bearing provisions of the constitution. After 1978, attention moved to increasing personal liberty by means of expanding the right to life and personal liberty. The National Emergency (1975–1977) left an impact on the judiciary which until then by and large used to be quiescent, and the Supreme Court decided to take an activist stance since then. That phase has resulted in a strange mixture of virtues and myths—liberty has supplanted justice, individual freedom has supplanted group rights, state's reasons have become the public reason, protection (of weaker sections) has become the essence of welfare state, and today we are made by the judiciary to think that justice is a matter that has to be primarily *administered*, and it can be administered mainly by expanding the liberty-bearing provisions and by merging with these provisions the Directive Principles. Justice Krishna Iyer, one of the judges giving the most acute expression to this line of thinking, actually thought that "social justice—the conscience of the constitution" could be ensured by the uplifting of "every little individual," by expanding the liberty of every individual.[3] This line of thinking was boosted by the Court's anxiety regarding justice, as a consequence of which the victims of administrative abuses or wrongs were entitled to compensation. It started with the Rudul Shah case (AIR 1985 SC 1086)

and culminated in 1997 in the D. K. Basu case, making the right to compensation enforceable and a part of the public law regime of the country.

Justice as award is a product of a constitutional culture that thinks that justice can be defined and accepted by the society only in the form of a constitutionally sanctified award and must be appropriate for juridical translation. Otherwise, it is inappropriate as political virtue. This has been most evident in the development of the law of torts. A tort is considered as a breach of a duty owed to the public in general, as distinct from a duty or an obligation owed to an individual. In a few cases only, as in the Fatal Accidents Act, the law is codified; otherwise it has been left to the court. Specifically constituted judicial bodies such as commissions or the courts have to decide on issues like the nature of liability, liability of the state, liability for death caused by tort, law of arrest, compensation for arrest, tort of negligence, or liability for extremely hazardous activities—matters familiar to common law jurisdiction only now becoming relevant to what can be referred to as "constitutional tort"—that is, an act or commission violating a constitutional right. Justice has become contingent on this, often with the State invoking its duty to discharge "sovereign functions." The judiciary has at times acknowledged the damage to a collective done by a company (*Union Carbide Corporation v. Union of India*, AIR 1990), but has often been slow in recognizing the damage done by agencies of the State, particularly security agencies, or agencies responsible for providing essential supplies for citizens (food, medicine, etc.), resulting in death of a number of people (at times through suicides or hunger deaths). The legal concept of tort on which justice has come to depend so much in India today has revolved around two main issues: (a) is the person suing in tort entitled to sue? and (b) is the person being sued in tort liable to be sued? We can easily see how substantive issues of justice can be as a consequence subsumed under procedural questions. The enemy alien cannot sue, a foreign state cannot be sued without government's permission, and even though State immunity is not recognized where a fundamental right is violated by the State, the State is not liable for torts committed by its employees within the scope of their employment, if the torts have been committed in connection with the exercise of "sovereign functions of the State." Furthermore, even though the judiciary restricted the meaning of the "act of State"—that is, an act of the executive as sovereign power of the country that cannot be challenged, controlled, or interfered with by the courts—the judiciary has by and large accepted all executive and legislative explanations on "public order and safety," even to the extent of sanctifying the Armed Forces Special Powers Act that has resulted in unjudged deaths of many. Thus, even though the judiciary on the one hand has expanded the scope of

Article 21 of the constitution, it has not treated death as giving rise to a cause of action, not even for its own wrong awards causing death (for instance, the death penalty) or deep damage. Similarly, compensation to dependents on death has remained contingent on various definitions relating to social norms, capacity of the wrongdoer, calculation of multipliers, the nature of liability (for instance, of the master for the damage done by the servant), and the general juridical appreciation of the nature of remedies available in the country (nominal damage, exemplary damage, special damage, etc., awarded by the court). Giving injunctions has remained a matter of common law; similarly, "negligence" has remained a complex concept, and only recently has the court recognized the special nature of damage done to women, such as domestic women or the woman farmhand. It is not that development of tort law will extricate the idea of justice from the situation in which it finds itself. The extremely individuated form of justice that one finds in the form of tort law in the United States cannot be the answer, nor can public intervention in the form of public interest litigation be a durable remedy.[4]

The development of public interest litigation (PIL) in the early eighties, as an aftereffect of Emergency, was a landmark in the recent history of justice in India. The Supreme Court embarked on explaining the whole idea of constitutional justice by arguing that a right without remedy was no right, and if people had no resources to enforce the right to have a right, then Articles 32 and 226 needed to expand in scope. First, the Court's power was not in issuing the writs only—it would not refuse to entertain any petition based on Article 32 merely on the ground that it involved the determination of the disputed issues of fact. And once it was satisfied that the fundamental rights of the petitioner had been infringed upon, it was not only within the power of the Court, but its duty to enforce the right by affording relief to the petitioner. Article 226 was found to be broader than Article 32 because it contained the phrase "any other purpose," meaning thereby other rights, too, besides the fundamental ones. Following this spirit came the Court's argument that if the injury was of a public nature, or the wrong was a public wrong, caused by an act of the State, or its omission, thereby becoming an infringement on the constitution, any *bona fide* member of the public having sufficient interest could maintain an action for judicial redress.[5] Thus, rights infringement was a public concern, because it was a breach of public duty by a public authority. Yet, by the sheer nature of judicial remedy, the court did not say so. Justice Bhagwati in his verdict spoke of the necessity of "public duties to be enforced and social collective diffused rights and interests to be protected" by utilizing "the initiative and zeal of public minded persons and organizations by allowing them to move the court and act for a general or

group interest, even though they may not have been directly injured."[6] What could be upheld in this way was public right, public duty, public intervention, and public verdict, but all this was without public accountability, public punishment, and public reorganization of the instrument of (in)justice. In this sleepwalk there was no talk of the need for thorough restructuring of the system of justice to make it accessible to the poor, although legal aid services for the poor were gradually initiated, and it was thought that many of the daily disputes with which we live, such as family disputes, workplace disputes, and so on, should be taken care of henceforth by special mechanisms such as arbitration or specially designated courts. This was the dreamworld of public spirit, in which public interest litigation was a "strategic arm of the legal aid movement."

To be fair to Justice Bhagwati, he accepted complaints from a civil rights organization, the People's Union for Democratic Rights (PUDR), against violation of labor laws, accepted its *locus standi*, and led the Court in going far in the direction of defining and expanding the "public" and the idea of the public interest. Yet when we see the type of cases that have come to symbolize PIL, the restricted nature of the public interest must attract our notice. One can also notice the emerging nature of justice/injustice as a consequence of this process, the euphoria and the disenchantment for those who need the justice mechanism most. Thus, the Court can order political parties to observe internal democracy, and can take actions against those businesses that pollute/harm public life, but may fail to take serious action against projects that bring bigger harm to a larger number of people; can proclaim constitutional values as secular, yet cannot save the members of minority communities from mass murder; can expand Article 21 yet time and again declare the death penalty as constitutional and proper; or can pronounce norms of natural justice, yet can exclude the victims of injustice, such as the victims of the Bhopal gas disaster, from the process of ensuring justice by excluding them as petitioners from settlement orders.[7] Judicial activism riding on the shoulders of PIL practice became a part of the modern governmental regime, which needs a mature legal system, a viable party system, an intricate system of arbitration over conflicting claims, a system to watch over state lawlessness, control over practices of immunity, and an overall culture of civility.

The governmental idea of justice depending on the juridical idea of tests is most expressed in the countless cases relating to group membership and group preferences. Justice in all these cases has been linked to the factor of identity. Thus, justice issues have involved questions like these: Is membership in a caste or tribe solely to be determined by birth, or by allegiance, or by the opinion of the members of the group, or by the neighborhood? Does

one lose caste by conversion, or by assimilation, or by excommunication? Are the tests used for the application of personal laws appropriate in the area of preferences? In what way can the judiciary engage in the delicate task of mediating between social realities and goals of the polity? Marc Galanter has shown while discussing various possible tests that justice remains very elusive in all these cases involving identity issues. In some cases the Court has allowed a flexible approach allowing for some dilution in social group structure (Jasani, Kartik Oraon, and William Reade cases); in other cases the Court has taken a very formal view (in Galanter's word, "fictional") that sees society, particular Hindu society, as one of mutually exclusive and hierarchically ranked compartments.[8]

When we take into account the breakthroughs made by the judicial practices and the limits of these practices, we can see clearly how the constitution appears to the machinery of justice and the enunciating mechanism of justice as an integral whole combining its particular type of liberty-bearing provisions and justice-bearing provisions, and how at times the justice-bearing provisions appear as derivative of the liberty-bearing provisions. The constitution, to be frank, was reasonably clear about its idea of liberty, but had no coherent notion about what it took to be the principles of justice. We arrive here at a fundamental problematic of modern politics—its clarity about rights and its incoherence about justice. In a way, this paradox is present in all kinds of political systems that derive from the political theory of liberalism. The universe of rights at the end of the day is a legal one, with which liberal political practices are happy to coexist although with some amount of jitters, but the universe of justice is by nature indeterminate; more than legal recognition its configuration depends on just practices that spill over the frontiers of governmental politics.

Also, we have to remember that India is a society where formal recognition by the system of justice is considered as essential for millions of issues relating to order, implementation of changes, or execution of social control. From village disputes to great public issues—all clamor for governmental attention and resolution. It is not that there is no alternative idea (or ideas) of justice. Yet loyalty to the legal notion of justice is overwhelming, although regularly marked by precariousness. The legal profession is numerous. Everywhere lawyers abound—Galanter estimates that they are more numerous in India than in any third-world country[9]—and with the legal system providing familiar techniques for forwarding private interests, justice is taken by the millions of people as both private interest forwarding and public business serving. The pervasive attachment to law and the respect accorded to the judiciary—both trends further propped up by the State—is strangely or

uniquely combined with equal skepticism about legal effectiveness. Yet the institutional strength (for instance, the judiciary) is such that except in times of mass madness (as in the partition or in government-aided mass killings) people look to institutions of justice as the most certain form of "keeping the society running." The organization of legal services and the style of delivery of those services make justice a calculable and calculated individualized affair. The governmental way of justice has produced a legal system, marked by the above characteristics, that is internally disparate, as various Court judgments show, but also embodies uneven norms of conflict resolution practices diverging from many of the dialogic practices at different levels. The result is justice as a system of operative controls—justice as a system of certain ethical symbols.

To understand how this happened, we have to see how the idea of constitutional culture developed in the last sixty years in this country. I have already hinted at some of the crucial contentions that arose in our recent political history and have indicated how the constitutional machinery of justice arbitrated and resolved those contentions. Arbitration over the quarrels of rights, and justice as award—these two became the two dominant forms of justice. In the process, they clarified the role of adjudication, and to some extent the nature of rights in a polity, and they perfected the award-giving mechanisms and institutional practices. But what is equally significant is that they limited in the process the very idea of a *justice-creating and justice-setting practice as an autonomous political activity*. What was loss to politics became gain to constitution and constitutionalism.

Indeed, the practice of PIL and other court practices and judgments created the subject that would from now on be seeking justice primarily in the legal-constitutional sphere. The justice-giving machinery requires the justice-seeking subject, and the process of justice in this case gave birth in time to the justice-seeking subject—a subject who appears in the court and chooses the forum of the court to plead grievance, innocence, mercy, difficulties, alleviation, and redress. Indeed, the history of justice has shown the link between criminality and the appearance of the justice-seeking subject in the sense that the world and the system of justice become complete and universal only when the criminal has submitted to it as a willing subject of justice. In post-independent India, not only the bandits of the ravines of Uttar Pradesh and Madhya Pradesh submitted to justice, repeatedly confessing their sins—even political activists taking to violent means accepted the machinery of justice, thus transforming themselves from political subjects into justice-seeking subjects. Subjection and subjectivization thus have gone together.

In this process of subject-creation the juridical and historical stakes have been enormous.[10] The question to be settled at the time of transition was this: would the legal-constitutional machinery based on the constitution be the main form of justice, or was there another form of justice? I see that alternative form as a dialogic form, as I explain later, a form that included the constitutional one but went much beyond. The Court, as history shows, tried to initiate a process of guaranteeing justice, where the representations by various mechanisms in the process of justice—such as middlemen, political manipulations, propertied interests, masculinities, legal obstacles, and so on—would be reduced to a minimum, and the stark process of justice would be dispensed as directly as possible with the minimum of fuss and ceremony. The modern court, the rules of law, and the justice-seeking subject—together the troika would render the political presence of constitutionalism viable. In a way, the judicial interventions were significant events in the history of the idea of justice as a constitutional property. The Court's interventions were momentous. They made the idea of justice a mechanism to be secured by singular events of judicial pronouncements. Historically different forms of experience of injustice (gender, agrarian, political, service conditions, tort, threat to life, inequality, loss of freedom, restorative, retaliatory, etc.) were to be resolved with the "reality" of constitutional justice—that is to say, its mechanism, process, protocols, and standards, which would reveal themselves to us only through the events of judicial decisions. It is this process wherein we witness the appearance of the modern law-abiding, justice-seeking political subject, to whom the presence of the constitution is the guarantee of justice. Equally significant is the fact that it is this process that makes justice a historically singular experience—namely, a judicial experience.

The Emergence of the Justice-Seeking Subject

Yet one must also remember that the Court's actions in resuscitating justice by invoking the legitimacy of the constitution and founding the process on it would not have been possible without the necessary political actions. Conferring the status of an interested public on an organization such as the PUDR by Justice Bhagwati was a momentous action in the history of justice. However, more momentous were some of the decisions in the initial years, by which the nature of Indian politics was elucidated as a republican one with its specific high ethos and institutional norms.

First, those who framed the constitution also governed the country as interim government ministers and other associated functionaries, and therefore they knew the value of compromise, the necessity of enforcing the notion

of rule of law, and the value of combining the task of rule with the value of democracy—that is, mass politics and rights. Second, the constitution was deliberately made a long one through the borrowing from various sources besides the 1935 Act to make the task of ruling elastic. The Indian Republic was to be a conservative republic, in which the demands of popular legislation and popular sovereignty were to be combined with stability and continuity, and therefore mere general provisions would not suffice as a constitution. It would require incorporation within it of details of working relating to the management of a bargaining federal system, and many such issues. Granville Austin speaks of two constitutions in the Indian constitution[11]—one for the union government, the other for the states and the entire country. Indeed, the constitution includes several and not two—besides the two mentioned by Austin it has within it a constitution of rights, duties, obligations, principles, culture, and justice; another of rules of law and administration; a third for the marginal areas and the marginal people; and finally, one can say that there is within the constitution another constitution for rules of property, commerce, industry, trade, exchange, and arbitration. Finally, this republicanism meant, as the Objectives Resolution of the Constituent Assembly put it, social, economic, and political justice secured to all "before the law," and equality of status, opportunity, association, and action, again subject to law and public morality.[12] To ensure continuity, thus the Constituent Assembly did not touch any law and left it to the parliament after the introduction of the constitution to change any if it deemed fit. To ensure republican rule, it introduced universal franchise; one-man, one-vote; separation of powers; supremacy of the cabinet, the prime minister, and the parliament; the isolated singular glory of the judiciary; and a standardized polity. To ensure justice as constitutional property, it ensured justice before law, justice subject to law, and justice sanctified by law. In short, by the first two decades of political functioning, the constitution had succeeded in establishing rule of law as the most cardinal principle of Indian political life—by which everyone had to function—and when the Court would point out its violation in the form of the violation of constitutionally sanctified justice, everyone had to submit, including the mighty and the rich, and the bureaucrats and politicians. Justice would be thereby restored. More important, the *rule of law* would be restored. By various ways the notion of "public order" was to be strengthened in the first two decades after independence. Article 19 was amended, particularly Article 19 (1a). The prime minister found in 1949 that "some two page news-sheet" that had occupied the place of responsible newspapers was expressing "vulgarity, indecency, and falsehood," and now needed to be tackled sternly, and therefore government needed to have powers to

place "reasonable restrictions" over all the provisions of Article 19, and in this backdrop came the First Amendment. Peasant insurgency and social unrest including communal disturbances were still continuing in Bihar, Punjab, and Madras Presidency. The panic of those who ruled was physical, an experience to be repeated in 1963 when in the context of the Indo-China border war of 1962, the DMK movement, and the movement over the Punjabi Suba, the parliament passed the Sixteenth Amendment, which reminded the nation that the highest interests of "sovereignty and integrity of India" might require a curb on Article 19 and new restrictions on the right to assemble and form associations and unions. Two things further reinforced the *rule of law*: (a) the constitutional sanctity of preventive detention and in severe cases murders by the State, upheld by the Court, and (b) the idea that the constitution had a basic structure, and that the powers of the parliament were huge, yet not unlimited as to change and destroy that basic structure. Subsequently the Court in India hanged an unknown number of people in the name of keeping the rule of law intact, saving public order, and punishing those who committed injustice to others—almost all of those put to death coming from the poorer sections of society. Here, we need to inquire more: how did this situation arrive where governmental and judicial actions could make justice singularly an administrative and a judicial concept?

With a constitutionally sanctified "rule of law" firmly in place, the phenomenology of justice has only one form of experience to lean on—the judicial experience, which means that at the bottom of judicial experience stands the reality of procedural justice—that is, justice sanctified and defined by procedure (of law, procedure as law). With this formulation of justice, if you like (it is only a summary explanation), we can see with clarity that this formulation gives us in the densest form the history of the working of legal-constitutional justice. The emergence, the appearance, and the requirement of "taking care of justice" as a procedural necessity of a regime based on rule of law have owed themselves mostly to the legal experience of justice, which has made the constitution and the Court the spiritual agency, and the material agency respectively.

We can call the constitution the spiritual agency of justice, because it based itself on moral explanations and ethical practices relating to justice (we can recall here as an example the way in which ideas of natural justice developed in the colonial era were usurped by the constitution, or the way the idea of "social justice" meant for dalits and the indigenous people was absorbed by the constitution in the form of provisions for "scheduled castes" and "scheduled tribes"), and placed itself above all material interrogations. We can call the courts the material agency of justice, because it was the courts

as an institution that laid down the procedure by which justice could be demanded, adjudicated, and awarded. It is in this dual way that "taking care of justice" became one of the principles of politics of the land, by which I mean those principles by which politics has been moderated, softened, sanitized, and at times quarantined. A genealogy of the justice-seeking modern political subject is to be found in the way these two agencies, the moral and the material, have related to each other and have worked. On the one hand there are actual articles, clauses, provisions, and phrases in the constitution alluding to its idea of justice; on the other hand there have been actual procedures laid down and furthered, whereby justice can be accessed. And, out of this game between the fantasy, the mode, and the real procedures, which become the fantastic appearances of those distant ethical values indicated in the holy book, the figure of the political subject seeking justice develops. Four elements become crucial in the emergence of this figure:

- Laid-down procedures for access to justice
- Activation of the material agency of justice in realizing the principle of "taking care of justice"
- Knowledge of procedures, and a democratization of that knowledge
- Subjugation of politics to the rules of the justice game

In order to understand this emergence, we need to go back to the years of the radical constitutional amendments in the seventies of the last century, when the idea of justice took firm roots as the most shining flag of the legitimacy of rule. We know that bank and insurance nationalization and privy purses abolition were the focal points of a developmental regime whose twenty-point program enunciated governmental priorities. Even if some of these points were pure slogans, others—like expanding rural credit to small farmers—needed governmental control over commercial banking, only one-third of which at best was under governmental control after the nationalization of the Imperial Bank, now known as the State Bank of India, in 1953. In both cases (the bank nationalization case, known as the Cooper case, and the privy purses case, known as the Madhav Rao Scindia case) the government had lost out in Court verdicts, and the government now retaliated by arguing that the parliament needed more powers, including sweeping powers to amend the constitution for developmental legislation, justice for the poor, and social revolution. Thus came the Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth Amendments in quick succession. And, not satisfied with these and other amendments, the rulers now spoke of change in the constitutional structure itself, and once again, they spoke in the name of reaching justice to

the poor in the farthest area—and that change, it was suggested, should include introduction of a presidential system, lengthening the life of the parliament, abolishing Article 32, and so on. Thus came the Forty-Second Amendment. It trimmed federalism by denying high courts the power to rule on the constitutionality of central laws, changed the mandatory status of the advice of the Election Commission to a consultative status, strengthened emergency provisions, and made amendments of the fundamental rights beyond review. Until the Forty-Second Amendment, the constitution had seemed in spite of changes what Austin has termed "a seamless web"[13]—that is, its character depended on the integrity of the web. But now with the Forty-Second Amendment that character changed, and after the changes the constitution did not look any more what it was, and the issue of justice seemed grotesque in face of the violence done on the constitution. Liberty-bearing provisions had proved crucial to the survival of the justice-bearing provisions, and the electoral verdict of 1977 proved that the legitimacy of popular rule in India depended on maintaining the tricky, fine, and difficult balance between the two.

As we know, with the electoral defeat of the Congress, the Forty-Second Amendment was undone, except for the keeping of a very few changes. Indeed, as many amendments in the following years show, such as the Eighty-Third and Eighty-Fourth Amendments, *freedom, decentralization, and justice for the poor* now form the real "seamless web" on which the validity of the constitution depends—a lesson that both the executive and the judiciary as organs of the State seem to have learned. This is not to say that the justice game is over. We have now deeper interrogations in the mirror of justice of provisions relating to freedom, devolution of power, and social equality—particularly as the impact of globalization on the socioeconomic scene of the country makes the sustainability of rights difficult. The Court and administration—until now the two main players in the justice game—seem to be going through some rethinking on how to alter the rules of the game. We have now new keywords—such as responsibility, governance, development on the fast track, requirements of new age, and environmental cleanliness—that indicate the coming of new rules, in the mirror of which both players now want to perch the justice-bearing and at times even the liberty-bearing provisions of the constitution.

The executive has come out in the last one and a half decades with a spate of policies, some already enacted into legislations, aimed at protecting the people who may be adversely affected by globalization and at making globalization for the people. We are hearing already critical voices on these policies, accusing both the Court and the government of being insensitive to the cries for justice from the victim populations. Are we witnessing a new alignment

in the game? While it is difficult to give a clear answer at this point, we can at least say that neoliberalism will certainly be a vital element in shaping governmental and Court response to the incipient demands for justice.

Politics in independent India began with a thousand cries for justice. The borderlands demanded freedom, peasants demanded land, workers demanded a living wage, students demanded educational facilities, the middle class demanded jobs, dalits demanded dignity, indigenous people demanded their rights to the land and forest taken away from them in the course of last one and a half centuries, and the entire country expected a decentralization of power, and sympathy from their "own" government for these demands. In governmental language, "taking care of justice" was the only way in such a context to make rule agreeable to the people who were being ruled by old colonial laws, an army and police built on colonial lines, and an archaic legal and criminal punishment procedure system. Taking care of justice was like a clinical action in those founding years, and as years went on, the judicial practices of justice conceived and established the theme of justice as fundamentally a legal operation. The relation between justice and judiciary became a natural relation beyond all suspicion and interrogation. In this increasingly insistent and pronounced correlation between justice and judiciary reinforced by the welfare functions of the State, the theme of "taking care of justice" was vindicated.

If we contrast the founding years of the constitution with the situation a few decades later, the decades of the eighties and nineties of the last century, we become aware of a stark difference. The time when the constitution was being made was a great dialogic moment, which we of course lost in substantial measure although the constitution still carries some traces of that dialogic time, whereas in the eighties and nineties of the last century the government learned how to rule under the constitution—by rejecting the dialogic path of justice and by combining its policy of taking care of justice with what I have referred to elsewhere as "permanent exceptions"—that is, by enacting special legislations, building up a massive security establishment, and conducting massive security operations in the Punjab, Kashmir, the Northeast, and Andhra Pradesh with at least 200,000 lives lost in this period as a consequence, plus uncounted hunger deaths in Orissa, the Jharkhand region of erstwhile Bihar, and the Chattisgarh region of erstwhile Madhya Pradesh. Between 1946 and 1950 the government had offers and opportunities of dialogue with adversaries over their grievances—Muslims and other minorities, dalits, indigenous people, Kashmiris, Nagas, other nationalities such as the Assamese, and political opponents, such as the communists. The government entered into some understandings (the Akbar Hyderi Pact with the Nagas,

or Article 370 in the constitution, for example), and some provisions in the basic text carry the traces of the dialogic time. But by and large the government did not follow the dialogic path. Thirty years later when again opposition became strident, the government forgot the founding years and turned justice into an administrative affair, by and large the Court remained a silent witness, and then the government combined one administrative strategy with another. Taking care of justice was combined with security operations to maintain what the government called the integrity of the nation.

Max Weber had noted long back that with the advent of mass bureaucracy, there is a separation of law and justice. Legal bureaucracy ensures the rationality of a faceless modern order implementing the norms of justice.[14] Whereas in earlier societies justice had depended on personal attachments, loyalties, access, interclan conflict management systems, priesthood, the nature and extent of the leadership nexus, and so on, the formal rationalization of law created a faceless order of justice, which Weber noted was distant from "substantive justice." Professional judges, lawyers, jurists, codified law, rational tests of justice, legal education, and so on have taken the place of the earlier system. What Weber did not add was that it was not pure modernity that was solely responsible for creating the formal, procedural justice at the cost of substantive justice; it was the age-old compulsion of the State to maintain its punitive and suppressive function that in the first place required the legal army. Added to that is the fact that, while in the far-flung villages men in disputes are rushing to the next person they know so that they can reach the court and get vindicated, and the premodern networks that Weber spoke of as things past play a vital function in the justice game (who will be the judge; the quantum of fee; caste affiliation; proximity to the police and to the men of substance; the nature of property disputes involving gender, widows, and so on—that is to say, status and village identity), litigation is going up in number as a consequence—a sort of witch's brew involving Weber's legal bureaucracy and the vile nature of a quarrelsome world where men are ready to take out justice on one another. In this deadly physical, conflict-torn, violent world, the government has the only recourse to its model of justice.

The government carefully weighed the choices and decided for a centralized method participated in by a few chosen organs or institutions in this justice game. Figures of justice in the imagined dialogic universe are strewn everywhere, indeed as they are in real political societies; as political subjects they reflect on procedures of justice at every level, in the countless variety of situations that call for dialogue for their negotiation and solutions. Even now we can see in some political practices justice being negotiated and arrived at in "nonjusticiable" ways—that is, nonlegal and nonbinding ways—whose

traces then remain buried under layers of practices and norms of the colonial-legal system of justice. *This experience of justice as legal-administrative operation* in place of *justice as the dialogic option* raises some lessons for us.

Dialogic Justice

Focusing attention on the dialogic possibility means first to retrieve actual ways in which popular politics negotiates the issue of justice, and to do so, the first step is to rescue justice from the legal-administrative confines within which justice is turned into a game of power of various institutions. I think the crucial point is to gaze at the political society as a whole, where justice in actual historical forms and possibilities occupies an important position. The challenge for political society will be this: can it master the most difficult, laborious, technical task of reconstructing justice—that is to say, can it ensure dialogic justice as the main form of justice?

Dialogic justice has two forms or components—minimal justice and legal pluralism.

What I term as *minimal justice* is arrived at dialogically. It is minimal, because it is historically arrived at out of contests and conversations, and its rules are historically established. It may be propelled by higher aims, but as a social phenomenon or norm it rests on what has been historically possible and realized through practices of justice. What is important to mention at this stage is that the judiciary is one of the institutions playing its role, which may not be the most important one, in the establishment of these rules; similarly, the constitution as a basic text plays a role but not an overwhelming one. Primarily, it is necessary to go back to the founding years to search out the minimum possibilities of dialogue that existed at that time and raised their heads, off and on, in the course of four years of dialogue and contests over the making of the constitution.

In the specific Indian context, which was not much different from other colonial contexts, five different principles of minimal justice that I have described elsewhere presented themselves around which dialogues could have been crystallized, the dialogic base could have widened, the participants could have multiplied, and interactions could have gone down to the unknown depths of accommodation and understanding.

The first imperative is to acknowledge past injustices of two hundred years, and their layers, their *recognition*, out of which would have emerged broad strands of recognition of injustices; around those strands the agenda of justice would have taken primary shape.

The second imperative is to conduct wide-ranging dialogue toward fashioning *guarantee* clauses that these injustices, at least the fundamental ones, would not happen in the country's life again.

The third imperative is that of evolving *forms of shared sovereignty*.

The fourth imperative is of *innovating* new forms of political society on the planks of accommodation and legal pluralism.

Finally, there always appears at some juncture the possibility of marking the polity with some of the radical forms of justice, such as justice for women, lower castes, dalits, and indigenous communities' accommodation with some of the frontier communities; and most important, the idea that justice is a notion that carries above all a sense of fairness, compassion, and readiness to consider the other point of view and consequently accommodate.

These possibilities and imperatives of justice are dialogic, and the compromises that these imperatives involve in translating into reality make justice minimal, but historically possible.[15]

Now we must turn our attention to the second component of dialogic justice. We are speaking here of legal pluralism. Dialogue does not only indicate conversation between law and justice or law and politics, it also means dialogue between different legal imperatives, situations, requirements, traditions, and procedures. In natural resource management, management of the common property resources, indigenous people's economy, and several other related matters, the better way may be to give custom the place of law, while it is true that customary authority has not always been sensitive to rights and justice, particularly where issues of gender and caste are concerned. Custom always strengthens personalized authority, which may go against other values of the customary procedures of conflict settlement and management of common resources. In giving out justice, modern law sources its wisdom to statute, precedent, and doctrine, whereas custom in giving out justice sources its wisdom to social relations and the interrelations between duty, good custom, and ancient knowledge.

In this connection we have to further note that our notion of group justice is very unclear, while law is oriented, as by its sources mentioned above, toward ensuring individual justice, thus ignoring not only the requirements of group justice against the backdrop of which the individual may be suffering injustice, but also ignoring the aspect of capability that I mentioned earlier. As one observer has pointed out, as one of the features of the emerging scene of justice—seen, for example, in November 1946 in Bengal when the masses of peasantry joined hands to demand a fair share of the crops produced (this was known as the *Tebhaga* movement) and in 1973 when

villagers hugged trees in order to save these trees by interposing their bodies between the trees and the contractors' axes in the hills of Uttar Pradesh—increasingly groups are demanding justice, to which our justice machinery has no response (indeed, the Court, apart from framing a penal response, has no way to even respond to the emerging justice scene).[16] Not only do we need a perspective of group justice, we need to have reviews of laws such as the Land Acquisition Act of 1894 that enables the government to acquire group property and group territory for "public good"; similarly, we need to have review of the Indian Forest Act (1927), the revised National Forest Policy (1988), and the Wildlife Protection Act (1972),[17] and a thorough review of what the constitution meant by property rights.[18] Thus we have had unequal legal-constitutional protection with regard to different property rights—private-individual, public-individual, public-group, and private-group.[19] The lack of clarity has resulted in one more failure. The constitution remains inadequate for ensuring justice for minorities who are increasingly victims of a majoritarian polity. The establishment of the National Human Rights Commission and the National Minorities Commission and similar commissions at the state level has proved inadequate, although these commissions were established in conformity with Paris Principles precisely on the ground that normal procedure of individuated justice is inadequate to protect group rights and in general human rights.

In brief then, the need to pay attention to the ways in which the justice-seeking subjects seek justice is the other name of the requirement to take a close look at legal pluralism as one more possible way of ensuring dialogic justice, because unlike formal law, other forms of law may be more open-ended, at times bordering more on being norms than on being laws. Then again, other forms of law may be more locality-specific, resource-specific, and time-specific (such as laws meant for an emergency situation, for common grazing land, for one particular area such as the Northeast, or for a minority group), and therefore the need of the time is for conversation between different legal systems, legal situations, and legal norms. Indeed, it is a big challenge if the State wants to ensure agrarian justice in the vast countryside where the governmental wisdom of distinguishing the "occupied" and "unoccupied" areas and governmental actions against "encroachment" mark the revenue and property scene, and the government is determined to stop the peasant rebels and agitators from directly ensuring agrarian justice by land redistribution.

We can ask, why did the framing of the constitution not show any awareness regarding these dialogic possibilities? The problem was that the constitution-making power and process were different in nature from the dialogic possibilities of that constitutional moment I am referring to here.

To understand the problem I want to introduce here the question of the *constitutional power* and the *constituent power*. Clearly, the constituent power at that transitional time was not fully a constitutional power. As a form and product of the British Congress–Muslim League confabulations, elections had been held in the country, covering roughly one-third of the country's population. The elections were never intended to be an election to the country's constituent assembly. As a result of the limited polls, the country got an interim government, and a provisional central legislature, which now started doubling up as the constituent assembly. Reins of rule were in the hands of the government, and the government was busy in disciplining the country, while its assembly kept on deliberating over the so-called fundamental rules of governing the country. In short, this was the *constituent power*—power in the form of the leadership of a nationalist party, leadership of interim government, power derived from partnership with the British in effecting the transition, power in the form of the leading group of the legislature, which was also the leading group in the constituent assembly, power of managing the deliberations in the constituent assembly—in short, power that constituted the country's constitution. The constituted power, which in time became the constitutional power, as a result could not have taken on the dialogic route. As a consequence, whenever and whatever possibilities of dialogue presented themselves to the constituent assembly, they were quickly snuffed out. It happened again and again during discussions on minority rights, indigenous people's rights, socioeconomic rights, emergency provisions, and provisions of federalism and decentralization of power. On the contrary, the interim legislature showed an astonishing will to legislate;[20] it did not wait for the constitution. Lacking full legitimacy but enjoying stability, it paved the way for the future governmental games of justice. In this game the basic rule was this: while the constitution will be new, everything else crucial will remain old—thus the old laws and old organs were in place when the basic text appeared. In the absence of any dialogic exercise, the constitution could envision justice only in the governmental frame—as a game between a few defined actors—and thus possibly not surprisingly in the bank nationalization case (one of the most famous cases involving the notion of constitutional justice), the main issue occupying the Court's mind was the principle and ratio of compensation (which never occurred in government's or judiciary's mind in terms of restoring at least some of what had been taken away from the peasantry, particularly the indigenous communities, in the past hundred years). In a similar case—the Keshvananda Bharati case—the game of justice revolved around the poser as to whether Article 368 of the constitution gave the central legislature the power to amend the text from which it derived its power, whether

it could be held as the depositor of sovereignty, and therefore whether it could have self-destroying capacity. Not only this, it further turned out that the game involved who would be the next chief justice of the apex court (who directs one section of the justice game). In this case, Justice A. N. Ray became the chief justice of the apex court, resulting in the resignation of three senior judges.[21] Indeed, the discussion on the issue of compensation in the bank nationalization case showed how justice was mirrored in the frame of judiciary and law, where justice had to be determined in terms of paid-up value, book value, market value, amount of compensation, and claims by the government that the nationalization was needed for public good, prompting one of the judges to comment, "I have indicated sufficiently the bristling difficulties which this question poses because, it appears to me, that the urge of the State to appropriate the private property of the individual without payment of compensation and the resistance of the owners of the private property against such attempts is an ever-continuing one, notwithstanding the effacement of the right to property as a fundamental right by the 44th Amendment when Articles 31 and 19 (1) (f) were deleted and in their place Article 300 A was inserted making the right to property only a constitutional right."[22]

After all, the reason behind the overwhelming domination of the governmental form of justice has been the legitimacy given to the governmental form by the constitution, and the legitimacy that the constituted power attained to set aside the dialogic possibilities of justice and introduce in its place a procedure that would rely endlessly on time-tested and time-driven laws, institutions, and methods. To go to the roots of this process, we must of course go back to the old question of forms of power and see the distinctions between constituent power and constituted power, which we often—like the lawyers, jurists, and constitutional experts—think have nothing to do with law.[23]

NOTES

Details of the arguments in this chapter can be found in my book, *The Materiality of Politics* (London: Anthem Press, 2007), 2:chap. 2.

1. On this period and the issue of constitutional sanctity of land legislation, see H.C.L. Merillat, *Land and the Constitution in India* (Bombay: N. M. Tripathi, 1970), 139–188; and P. S. Appu, *Land Reforms in India: A Survey of Policy, Legislation and Implementation* (New Delhi: Vikas, 1996). For a broad review of land rights and land legislation in terms of human rights, see Roger Plant, "Land Rights in Human Rights and Development: Introducing a New ICJ Initiative," *International Criminal Justice Review* 51 (1993): 10–31.

2. On government's rehabilitation policy and other policies aimed at ensuring justice, for a comprehensive critique, see Paula Banerjee, Samir K. Das, and Madhuresh

Kumar, *People on the Move—How Governments Manage Moving Populations*, CRG Research Paper Series, *Policies and Practices 1* (Calcutta: Mahanirban Calcutta Research Group, 2004); and Madhuresh Kumar, *Globalisation, State Policies, and Sustainability of Rights*, CRG Paper Series, *Policies and Practices 6* (Calcutta: Mahanirban Calcutta Research Group, 2005).

3. *Som Prakash v. Union of India*, AIR 1981 SC 212 at 234, cited in S. K. Verma and Kusum, eds., *Fifty Years of the Supreme Court of India* (Delhi: Oxford University Press, 2003), 100.

4. For a short history of tort laws in India, see P. M. Bakshi, "The Law of Torts," in *Fifty Years of the Supreme Court of India*, 590–620.

5. P. N. Bhagwati, "Judicial Activism and Public Interest Litigation," *Columbia Journal of Transnational Law* 23 (1985): 561.

6. *S. P. Gupta v. Union of India*, AIR 1982 SC 192.

7. Upendra Baxi notes some of these achievements and limits of the process in *The Indian Supreme Court and Politics* (Lucknow, India: Eastern Book, 1980) and "Judicial Activism, Legal Education, and Research in a Globalising India," *Mainstream*, February 24, March 2, and March 9, 1996.

8. Marc Galanter, *Law and Society in Modern India* (Delhi: Oxford Paperbacks, 1992), 134–135.

9. Ibid., 279.

10. Étienne Balibar notes in this process the appearance of civility. See his book *We, the People of Europe? Reflections on Transnational Citizenship* (Princeton, NJ: Princeton University Press, 2004). On the other hand, Slavoj Žižek sees in this post-Marxist celebration of civility not only the final submission to law but also a persistence of an old religious tradition that has all along explained virtue by means of arguing that law becomes law by conquering sin—even the virtue that had appeared as sin in its first emergence. See his book *The Ticklish Subject: The Absent Centre of Political Ontology* (London: Verso, 1999), 127–170.

11. Granville Austin, *Working a Democratic Constitution: The Indian Experience* (Delhi: Oxford University Press, 1999), prologue.

12. Parliament of India, *Constituent Assembly Debates* 1, no. 5 (1946): 59.

13. Austin, *Working a Democratic Constitution*, 390.

14. Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich (New York: Bedminster Press, 1968), 809–815; reproduced in Sam Whimster, ed., *The Essential Weber: A Reader* (London: Routledge, 2004), 250–256.

15. For a discussion of the place of law in promoting dialogue, see Martha Minow, ed., *Breaking the Cycles of Hatred: Memory, Law and Repair* (Princeton, NJ: Princeton University Press, 2002).

16. Shivani Chaudhury, "Indigenous Community-Based Property Rights in India: Public or Private?" in *Legal Pluralism and Unofficial Law in Social, Economic, and Political Development*, papers of the 13th International Congress, Chiang Mai, Thailand, April 7–10, 2002, ed. Rajenfra Pradhan (Kathmandu, Nepal: International Centre for the Study of Nature, Environment and Culture, 2003), 1:35.

17. "Indigenous Community-Based Property Rights in India: Public or Private?" in *Legal Pluralism and Unofficial Law in Social and Political Development* 1: 35–61;

see also Robert L. Clinton, "The Rights of the Indigenous People as Collective Group Rights," *Arizona Law Review* 32, no. 4 (1991): 739–747; Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge, UK: Cambridge University Press, 1991); and James Crawford, "Legal Pluralism and the Indigenous Peoples of Australia," in *The Rights of Subordinated Peoples*, ed. Olivier Mendelsohn and Upendra Baxi (Delhi: Oxford University Press, 1994), 178–220.

18. On the ways in which the concept of property has been variously used, see C. B. Mcpherson, ed., *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978).

19. Owen J. Lynch discusses the typology by cross-referencing various property-rights systems in "Whose Nations? Whose Natural Resources? Towards Legal Recognition of Community-Based Property Rights," in *Legal Pluralism and Unofficial Law in Social and Political Development* 1:199–209.

20. This is one area that certainly remains under-studied. In response to "terror" and demands of "social reform," the legislature showed exemplary willingness to make newer and newer laws. Here it is noteworthy that an unbridled enthusiasm for making laws on women's welfare was matched by an equal absence of any basic accomplishment. Flavia Agnes, through a detailed examination of laws addressing rape, dowry, domestic violence, prostitution, indecent representation of women, sati, and sex determination tests, has explored the broader question of why law has had so little impact in women's lives and whether law can bring about any worthy social change. She in fact comments, "Each law vests more power with the state enforcement machinery. Each enactment stipulates more stringent punishment, which is contrary to progressive legal reform theory of leniency to the accused. Can progressive legal changes for women's rights exist in a vacuum in direct contrast to other progressive theories of civil rights?" See Flavia Agnes, "Protecting Women against Violence? Review of a Decade of Legislation, 1980–89," *Economic and Political Weekly*, April 25, 1992, WS-19, reproduced in *State and Politics in India*, ed. Partha Chatterjee (Delhi: Oxford University Press, 1997), 521–565. Also in this connection, see Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India* (Delhi: Sage, 1996).

21. On the entire period, for an intimate account by one of the serving judges of the time, see P. Jagmohan Reddy, *The Judiciary I Served* (Hyderabad: Orient Longman, 1999), 171–182, 225–254.

22. Ibid., 182.

23. To understand this context, one may refer to J. Starr and J. Collier, eds., *History and Power in the Study of Law* (Ithaca, NY: Cornell University Press, 1989).

8

Law's Internationalization and Justice for the Citizens and Noncitizens in France

Jean-Louis Halpérin

Who are the subjects of justice? And how are the borders of justice traced from the point of view of law? These are crucial questions for any theory of justice. The devices and institutions that allow the justice-seeking subjects to articulate and translate their claims in the language of law play, of course, a key role in any given historical regime of justice. In the modern European experience, the nation-state has successfully imposed itself as the "container" of justice: its courts have become the privileged points of reference for justice-seeking subjects—that is, for its *citizens*. Nevertheless, while other instances and practices of justice have always existed along the lines of the national judicial system and national courts, in the last few decades, this model has been challenged both by a set of claims pointing beyond the borders of nation-states and by legal developments articulating new frameworks of conflict resolution. *Legal pluralism* seems to be the keyword capable of grasping these new developments. What are the potentialities and the consequences of these developments for a theory of justice? This is the main question that leads the analysis of the French case presented in this chapter.

As an old European country, unified and centralized for many centuries, France does not have the reputation of a pluralist legal order: on the contrary, the exalted reign of statutory and codified law, the total submission of judges to an exegetic interpretation of written texts, and the rejection of any community interests or affirmative action on the account of the equality principle

are often considered as traditional features of French law from 1789 until today. For this reason, French legal academics, among whom we do not deny occupying a place, are suspected to be out-of-date positivists, always thinking that state law has the monopoly of legal sources. These assessments are, of course, more caricature than they are nuanced analysis of the situation nowadays. In this chapter, we first correct this evaluation by bringing up three developments of the past few decades in French law: (1) the growing role of European and international law in the French legal order, (2) the new powers acquired by judges to take away French statute laws considered to be inconsistent with European or international law, and (3) the important place that immigrants have taken in the legal life of the country. Then, we analyze the links between these three phenomena (apparently three kinds of openness toward "foreign" legal conceptions, if not toward a pluralistic legal world) and ask if noncitizens are real players, or only passive subjects, of these transformations.

Three Phenomena of Possible Openness Toward "Foreign" Conceptions

France is clearly, since the end of World War II and the constitutional text of 1946 (preceding the 1958 constitution that has continued the same rule under its article 55), a so-called monist country, whose constitution explicitly requires that international treaties, once ratified, are incorporated into the French legal order, with a high level in the hierarchy of norms—which means above the parliamentary statute laws.[1] Now, the French state has signed many treaties and ratified most of them. In 2000, the Council of State estimated at about 6,000 the number of treaties and agreements linking France with other entities.[2] About 80 percent of these treaties are bilateral conventions, addressing specific matters (tax, nationality, trade questions, cultural cooperation, and others), but France has also ratified many of the great multilateral treaties, including the 1949 and 1951 Geneva conventions concerning war rules and refugees, the United Nations covenants (1966) and conventions (on torture, the rights of children, the struggle against discrimination, and other principles), nineteen treaties among the Den Haag conventions concerning private international law, the 1980 Vienna convention concerning international rules, and of course the World Trade Organization rules.

With the development of European law since the 1957 Rome Treaty, this constitutional requirement has become more and more important, as all the European regulations are incorporated directly in French law (and become self-executing) without being ratified by the French Parliament. This

"derived" or secondary (authorized by the primary law of treaties) European law is today one important part of French law and one "common part" of all state members of the European Union: for many matters, the same rules are applicable in Great Britain and in France, which is a revolution in the history of common and civil law. Furthermore, guidelines made for harmonizing European legislations normally have to be transposed into the French national order by a statute law. But if the pertinent deadline has passed, a guideline can become self-executing, despite the absence of action by the French legislator. The Council of State evaluated the number of European texts incorporated in French law at around 14,000 as of the year 2000, and since that time European institutions have adopted about 600 regulations and 100 guidelines each year. These data can be compared with a stock of about 9,000 statute laws and 120,000 decrees in force today in France. Although it has been said that 80 percent of domestic legislation is now determined directly or indirectly by European law, it is difficult to obtain precise statistics, especially because many statutory laws contain a few articles for transplanting European guidelines and other articles without a European link.

One has to add the impact of the 1950 European Convention on Human Rights (ECHR) and the case law of the Strasburg Court. France took until 1974 to recognize the competence of this court and until 1981 to authorize its citizens and residents to use individual recourse to this court. But, from the 1990s onward, France has been condemned in many cases. From 1998 to 2006, the Strasburg Court decided about fifty-five times per year for plaintiffs against France and sanctioned forty-nine violations of the ECHR. Beyond the payment of compensation by the French state to the victim of the violation of the ECHR, these decisions have no binding effects for France. But, in fact, the political and media pressures, let alone the risks of additional recourse and condemnations in similar cases, are strong provocations for a more or less long-delayed change in the French law. The impact of the two European legal orders, which one must not amalgamate, is thus of tremendous importance in terms of the quick pace of change (about 10 percent of the rules contained in the different codes are likely to be changed every year) that characterizes the recent evolution of French law.

In recent decades, the reign of statutory law has also been considerably affected in France by the recognition of new powers of judges. For the first time in its history, since 1958 France has experimented with judicial review through the Constitutional Council, which is empowered to exercise control over seeing that parliamentary statutes—if denounced just after the vote of the text from 1958 until 2010—are consistent with the constitution. A legal revolution succeeded in 1971, when the Constitutional Council decided,

very surprisingly, to strike down a statute judged contrary to the 1789 Declaration of Rights of Man and Citizen, or the "fundamental" principles of the republic. After a 1975 decision of the Constitutional Council, refusing to judge whether French statute law was consistent with international norms, the Court of Cassation (Chambre Mixte, *Administration des douanes, Société des Cafés Jacques Vabre et SARL Jean Weigel*, May 24, 1975) made another revolutionary step by taking away a French statute law deemed inconsistent with European norms. Followed fourteen years later by the Council of State (*Nicolo*, October 20, 1989), this judge-made law created a new kind of judicial review—rather scarce in comparative law—called in France "conventional" review because of the use of conventional norms to take away French statutes. In these cases, as in the American-style judicial review where the statute in question is not explicitly nullified by the judges, the legislator is obliged—here again with more or less delay—to yield and to abrogate the controversial disposition. We do not have statistical indications about this practice and the number of French statutes thus "ejected" from our national order in this way. We know only that the argument is now commonly used by lawyers and that, for matters judged by administrative courts, about 40 percent of the decisions of the Council of State in 2000 quoted the European Convention on Human Rights.[3] Of course, in the great majority of cases, courts judge that the French statute is consistent with European norms (including the case law of the European Court of Human Rights) or international norms, but at the same time they develop an interpretation of French law taking account of this supranational law. A 2008 constitutional amendment, applied since 2010, has authorized judges to raise questions of "constitutionality," directed first to the Court of Cassation and the Council of State, and then if these courts agree, to the Constitutional Council. This new kind of ex-post judicial review is likely to reinforce judicial power. If one adds that since the 2000s some French courts, especially the Court of Cassation, have begun (in some cases) to look to foreign law for inspiration—in the preparatory works made from the report of a judge and the conclusions of the advocate general—we have here another clue of a larger openness of the French legal system toward "foreign" conceptions and a kind of convergence with developments of judge-made law that are traditionally linked with common-law systems.[4]

As a third phenomenon proving the growing importance of legal questions linked with conceptions from abroad, one has to take account of the importance of foreign immigration in contemporary France. In truth, France is a country that has received many immigrants since the end of the nineteenth century, first from Europe, then from France's past colonial empire,

and now from the whole world. In recent years, France has been ranked the first or second country in the world in terms of asylum requests filed by refugees. In a population of more than 65 million inhabitants today, there are about 3.5 million foreigners (noncitizens). Whereas the number of new immigrants is nowadays about 100,000 each year, there are more than 100,000 naturalizations in the same annual period and the overall number of foreigners is rather stable. This means that there are more and more French people with foreign origins; French demographics count as immigrants—meaning persons living in France but born abroad with a foreign nationality—more than 5 million individuals. Within a generation, France is succeeding at integrating more than one-third of these immigrants into the nation. Of course, as in other legal systems, the main distinction—reflected in legal forms of discrimination concerning political rights—is between citizens (nationals) and noncitizens (foreigners). But, in sociological terms, immigrants also share common problems and risks of illegal discrimination. Furthermore, the immigrant communities—which include French citizens of foreign origin but are also becoming more and more "porous" as a result of marriages between persons of different origins (another French specialty evaluated at about one union in seven)—have transplanted and developed specific cultures (notably religious ones)[5] that have changed the sociological landscape in France and cannot be without impact on the legal scene, despite the facade of uniform equality (which has until this time prohibited the inclusion of ethnicity statistics in the French census).

Concerning noncitizens, as in other European countries the most important legal question now involves the treatment (which means, in many cases, the deportation) of illegal immigrants coming from extra-European countries. The French Parliament has developed, since the 1980s, very extensive legislation (which has changed almost every year) regarding the "policing of foreigners," which has been codified since 2004 in the Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA). The Sarkozy policy, developed since 2002 when Nicolas Sarkozy was home minister before becoming president of the republic in 2007, has restrained the (already limited) rights of illegal immigrants and imposed target objectives designed to increase the number of deportations (from 9,000 in 2003 to more than 26,000 in 2008). One of the consequences of this policy is the growing importance of litigation concerning foreigners and deportation orders before the administrative courts. The number of registered administrative requests in the administrative tribunals (before a possible appeal to the Council of State) consisted of 12.7 percent of the total number of filed requests in 2000 and 26.2 percent in 2006.[6] Many of these requests are quickly rejected—and in some

administrative tribunals the increasingly severe policy has provoked a backward movement in the litigation figures—but the weight of these foreigners' *contestations* (as they are called) on the administrative courts is considerable, as it is more generally in (penal or civil) disputes concerning fundamental rights. For this reason, it can be asked whether the three phenomena we have been describing are not linked together and to think about their mutual interaction.

Are International Law and Foreigners' Contestations Becoming the Driving Force of Legal Change in France?

Historically, there is an obvious link between the development of judicial review in France and the implementation of international law, especially European law. If the 1958 constitution has confirmed the monist principle and created the Constitutional Council, there is no doubt that the rise of European law since the 1957 Rome Treaty, with the character of primacy enhanced by the Luxemburg Court (notably in the 1962 decision *Costa v. Enel*), has been the decisive factor in case law about "conventional review" initiated by the 1975 decision *Cafés Jacques Vabre* from the Court of Cassation. One can note that tax law and litigation originated by French companies were the first fields—rather than human rights—to experiment with the impact of the growing internationalization (or Europeanization) of French law. It is also important to consider that every French judge is becoming, since this period, an "objective ally" or a "good soldier" of this legal internationalization: one can presume that courts are prone to use "conventional review" in order to conquer powers that have be denied to them for a long time.

More than ten years later, a second stage occurred with the first decisions (from 1986 onward) of the Strasburg Court condemning the French state and then the multiplication of these decisions in the 1990s and 2000s and the dramatic increase of the use of the ECHR before the administrative and judiciary courts in France. Here we would like to note a particular feature that has not been studied, according to our information: the contribution of foreign plaintiffs in the cases decided by the Strasburg Court against France.[7] The first of these condemnations, the 1986 decision *Bozano*, concerned an Italian national who was the victim of an illegal extradition from France. Beginning in the 1990s, with the growing impact of numerous decisions condemning the French state, we can notice the important part this litigation has played, until some years later when one-third of the cases have been introduced by foreign litigants. This is a matter, of course, of cases concerning the deportation of foreigners and the violation of article 8 of the convention

concerning protection of privacy and family life: in 1992, the *Beldjoudi* case (about an Algerian national who had lived almost all his life in France) and the *Vijayanathan/Pusparajah* cases concerning Sri Lankan nationals; in 1995, the *Nasri* case about an Algerian national; in 1996, the *Boughanemi* (Tunisian) and *Amuur* (Somalian) cases; in 1997, the *Bouchelkin* (Algerian), *H.L.R.* (Colombian), *Mehemi* (Algerian), *El Boujaïdi* (Moroccan), and *Boujlifa* (Moroccan) cases; in 1998, the *Dalia* (Algerian) case; in 2006, the *Aoulmi* (Algerian) cases, and more recently (2007) the important *Gebremedhin* case involving an Eritrean migrant. On December 3, 2009, France was condemned for a decision involving the expulsion of a supposed Algerian terrorist—who was denaturalized after having acquired French nationality—to Algeria, where the Court feared that he could be submitted to torture (*Kamil Daoudi v. France*).

We also have many penal cases judged by the European Court of Human Rights and introduced by foreigners prosecuted in France (often, for drug trafficking): *Jamil* (Brazilian) in 1995, *Selmouni* (Dutch and Moroccan; it was the second condemnation of France for acts of torture committed by the police after the 1992 *Tomasi* decision that concerned a French national from Corsica) in 1999, *Göktan* (Turkish) in 2002, *Slimani* in 2004 (a Tunisian dead in prison), and *Siliadin* in 2005. In some cases, foreign plaintiffs were involved in "ordinary" civil procedures: for example, in 2000 the *Ganohori* decision (addressing a question about child support for a father coming from the Ivory Coast). One part of the litigation involves persons accused of, or condemned for, terrorism—the 2006 *Ramirez Sanchez* case (the so-called *Carlos* case) and the *Cesare Battisti* case (in these two cases no violation of the ECHR was recognized)—and a recent decision about the powers of the French public prosecution service has concerned Ukrainian nationals arrested at sea by the French navy and suspected of drug trafficking (*Medvedyev*, March 29, 2010). We also find some foreigners in cases concerning the freedom of speech, for example in the 2001 *Association Ekin* decision (concerning books or periodicals of foreign origin—in that case, about the Basque country) or the 2006 *Giniewski* case involving an Austrian national (about a paper considered to be defamatory against Christian communities). Without trying to violate the right to privacy of some litigants, we can presume that some of the plaintiffs are French nationals of foreign origin (coming especially from the countries colonized by the French state) and that others belong to specific minorities (from Corsica in the *Tomasi* and *Acquavi* cases in 1992 and 1995, or from New Caledonia in the *Rivas* case in 2004; in all three cases the action of French authorities could be seen as discriminatory).

As they are likely to be victims of illegalities committed by the French authorities, foreign litigants are probably prone to use the European Court of

Human Rights as a recourse in order to make the French state be condemned for violation of the European Convention on Human Rights. But the litigants in Strasburg are logically a very small group—considering that because of legal conditions they have used all internal recourse and been subjected to the socioeconomic constraints of a very long process—in comparison with the great bulk of foreign litigants, especially those concerned by deportation, who invoke the European Convention before the French courts. One can, however, suppose that this "foreign factor" has been decisive in (1) increasing the number of Strasburg Court decisions applicable to France, and (2) raising the standards, used by case law and statutory law in France, concerning the treatment of foreigners (those of the European Union being additionally protected by the principle of nondiscrimination inside the Union). For example, the case law of the Strasburg Court has provoked some evolutions in the Council of State case law (concerning deportation and concerning respect of family privacy) and in the statutory law (the *Gebremedhin* decision was followed in 2007 by a change in the "*loi Hortefeux*" in November 2007 concerning requirements involving migrants being received as political refugees).

As a hypothesis, we can also think that French nationals have been encouraged by the example of foreign plaintiffs suing the French state before the Strasburg Court and prompting evolution of free speech, due process ("*procès équitable*"), or penal procedure according to new standards that are applicable to citizens and noncitizens alike. Is not the French state, after it has accepted the signing of treaties without knowing the use made of them by judges, now bound to allow the autonomous development of a pluralistic law that recognizes more rights for minorities?

We can thus imagine that the links between the internationalization of French law, the increase in different kinds of judicial review, and the growing presence of foreigners in litigation have engaged a "virtuous circle" of French law, opening it to new conceptions. As we have said, the condemnations of the French state by the Strasburg Court have often provoked changes in legislation or case-law: for example, in 1991 about wire traps, in 2000 about penal procedure and hunting, in 2001 about illegitimate children (with a reform of articles of the civil code), in 2002 about electoral poll results revealed publicly in newspapers one week before the elections, in 2003 about publications of foreign origin, in 2004 about outrages against foreign heads of state, and in 2007 about the right of recourse for refugees. In many of these cases, the statutory changes have been preceded by decisions of the courts taking away French statutes as inconsistent with the European Convention on Human Rights. Not only did the Constitutional Council, through its 1975 decision, clear the way for a "conventional review" by ordinary courts, but it

devoted one of its most important (and longest) decisions, in 1993, to a statute law concerning the control of immigration (August 13, 1993, *Maîtrise de l'immigration*). In this decision, the Constitutional Council maintained the distinction between citizens and noncitizens, notably in connection with the restricted freedom of circulation of foreigners outside the European Union, but declared that fundamental rights were granted to all persons residing in French territory and that social rights were the same for nationals and foreigners living in a stable and legal manner in France. More generally, the equality principle, erected as a constitutional rule on the basis of the 1789 Declaration of Rights of Man and Citizen, has in recent years been increasingly interpreted as a refusal of any discrimination between nationals (including persons recently naturalized) and foreigners. Legislation against racial discrimination, beginning with an important law in 1972, has received clear impetus from the international and European norms: thus, the High Authority for the Struggle against Discrimination and for Equality (HALDE) was created in 2004 after a 2000 European guideline recommending this type of action. French nationals of foreign origin, people of color from the French departments overseas, and French citizens seeking to claim recognition of regional languages (ostensibly obtained through a constitutional amendment in 2008, declaring that regional languages are part of the national heritage) appear to have shared interests with foreigners for obtaining this larger openness of French law toward "diversity." If we follow this line of argument, it could be argued finally that the subjection of the French state to international conventions and courts, combined with the activism of constitutional, administrative, and ordinary judges, has created a process of continual progress of human rights that cannot be stopped by any French government.

We would like to show the limits of so "optimistic" an analysis and the presence of opposite trends in the recent evolution of the French legal system. First, concerning the litigation before the Strasburg Court, there are also salient differences between the cases involving foreigners (most of them about deportation) and the ones that are launched by nationals—in general about the functioning of justice or about "new" human rights for other minorities (for example, cases about sexual orientation). We can say that noncitizens and citizens are often fighting against the French state in different areas and that, in the cases where noncitizens are seeking general human rights, they could appear as proxies acting in favor of citizens, but without profiting in terms of improving the status of foreigners. If the case law of the Strasburg Court has, without doubt, changed the attitudes of administrative and ordinary courts in deportation cases—through the introduction of the right to a (family) privacy standard in the consideration of the proportionality of the

administrative decision—it has weaker consequences when it comes to the destiny of illegal immigrants who are bachelors and, above all, it has no real impact on the general trend of statutory law, which is clearly characterized by the hardening of repression against illegal immigration. Many nongovernmental organizations have considered that the new dispositions concerning political refugees, introduced after the *Gebremedhin* decision in 2007, have a deceptive character.

Furthermore, this repressive trend toward illegal immigration, expressed through an accumulation of statutory laws pertaining to this subject and through a dramatic increase in new laws initiated by Nicolas Sarkozy (in 2003 and 2006 as home minister, then in 2007, and probably also in 2011 as head of state), has not been stopped, or even made to clearly slow down, by the recent decisions of the Constitutional Council. In 2003 (decision of November 20), 2006 (decision of July 20), and 2007 (decision of November 15), the Constitutional Council has struck down only a few articles of the immigration laws and considered that it was not inconsistent with the constitution to restrict the rights of noncitizens (from outside the European Union) with regard to their access to French territory. There is no room for vested rights or past assets in this field: the idea of a continual progress toward openness is completely denied. The same Constitutional Council, which in 1991 refused to allow the mention of a "Corsican people" in statute law and in 1996 refused to recognize Tahitian as an official language in French Polynesia, considered in 1999 that the ratification of the 1992 European Charter for Regional and Minority Languages was inconsistent with the French constitution. This decision has blocked the process of ratification—even with reservation clauses—of this European convention by the French state. More recently, the government has abandoned the idea of a statute law about regional languages and invoked the necessity of reinforcing national "identity" and unity.[8] The treatment of minorities in France has not been transformed through the process of internationalization.

It is also very important to note that the European Union has globally joined this trend of a harder policy toward illegal immigrants, with the so-called return directive, adopted in 2008 and devoted to the development of standard procedures for expulsions in Europe. Whereas this directive has authorized a maximum period of custody of foreigners waiting for expulsion that (at six months, or in some cases up to eighteen months) is far longer than the one in French law (this is not the case in the United Kingdom), the transposition of the European guideline is now used by the government (in a project submitted to Parliament in March 2010) to lengthen this period of custody from thirty-two to forty-five days. We have here an example of

the "negative" impact of the Europeanization of French law on the status of foreigners.

Finally, we can have doubts about the effect in the *longue durée* of the new powers acquired by French judges for changing the situation of noncitizens. Whereas administrative courts are deciding to review a few decisions of removal or, as happened in January 2010, judiciary judges release refugees from Kurdistan detained through illegal procedures,[9] thousands of illegal immigrants are expelled from French territory according the statutory process organized by the new laws. There is no clear example of a French statute law recently taken away by judges for lack of conformity with the international commitments of the French state concerning noncitizens. The constitutional reform of July 2008 introduced a new process of constitutional review *ex post*, with a priority question of constitutionality (*Question Prioritaire de Constitutionnalité*, or QPC) asked before judges, then filtered by the Court of Cassation or the Council of State, and finally examined by the Constitutional Council. Some analysts have feared that this QPC could stop the process of "conventional review" by ordinary judges, but the Constitutional Council has just decided (DC 2010-605, May 12, 2010) that nothing is changed in the powers of ordinary judges to take away a French statute law judged inconsistent with international or European norms. It is too soon to evaluate the impact of this new kind of constitutional review, but one can doubt that an alliance between ordinary judges and members of the Constitutional Council (now all chosen by the same political majority) could strike down important statutory laws about the status of noncitizens. In some cases, French lawyers are beginning to envisage phenomena of "renationalization" of international norms: once the international norms are incorporated in the French legal order, they are used by judges for national purposes and with a national interpretation, which limits the innovative effect of texts coming from an external universe. In developing this logic, it could be said that the internationalization of French law is now under control and that it cannot provoke movements toward critics of the government policy by the judges. Against the idea of "virtuous circle," is there a diabolical spiral of hostile attitudes from democracies toward noncitizens, considered as suspected terrorists?

We do not agree with the idea of implacable process explaining logically all the changes in law. We would prefer to say that nowadays, globalization has provoked, without surprise, phenomena of resistance and especially revivals of legal nationalism. In France, the progress of European harmonization did not prevent the failure of the 2005 referendum about the European constitution. The Constitutional Council combines the decline of national sovereignty with the keeping of this principle in the French constitution, as

with the defense of the unity and indivisibility of the French Republic. In the same way, the increase of legal immigrants, mixed marriages, and naturalizations has provoked (sometimes, among the immigrant themselves) growing fears toward illegal immigration, fictive marriages,[10] and disappearance of French values concerning national unity and the "laic" state. The Sarkozy government has thus initiated a (disastrous according to us) debate about "national identity" and now about the legal prohibition of the burka on French streets. It appears hazardous to decide which movement—in this tension of internationalization versus nationalist reflexes—will prevail in French law in the near future. It is probably not the role of the lawyer to point out a "winner" in a supposed fight. We prefer to continue a critical analysis of these changes in a comparative perspective, showing the ambivalent effects of legal internationalization and development of judicial activism on the crucial question of the rights of noncitizens.

Can we conclude that legal pluralism has found a new field at the borderline of French law? It is not a case of territorial spaces, with inhabitants of foreign origin settled at the frontiers of the French Republic. The only situation that could be compared—very cautiously—with Indian scheduled tribes is the one of New Caledonia: here the Kanak population has obtained the recognition of "country laws," which defined a kind of personal status different from—but consistent with—French civil law. Elsewhere, in the metropolitan territory, migrants and foreigners are submitted equally to the imperative laws—called laws of "public order"—of the French state. Romani people who are not completely stationary people (the so-called "gens du voyage," who are mostly French citizens) settled in specific areas—some of them legally and others illegally. The latter phenomenon was advanced as pretext for the collective deportation of foreign Romani people in the summer of 2010. But these people are not endowed with a special legal status. More generally, ghettoization of migrants is a sociological, not a legal, reality. And the denunciations by governmental authorities of "outlaw areas" in some suburbs is a political argument rather than the recognition of an autonomous legal order for the marginalized population. Affirmative action policies in France remain underdeveloped and are never linked with the legal identification of personal criteria. For the same reason, respect for the principle of equality, the establishment of shariah courts, or community awards is unbelievable in France.

The phenomena that we have tried to link together—the growing importance of international rules, the increasing participation of noncitizens in litigation, and the new developments of a creative, judge-made law—are observed inside the French legal order and need the action of state authorities.

Procedures concerning foreigners are part of the docket of administrative and civil courts. If we can speak of a borderline law, it is with the meaning of legal rules and decisions concerning noncitizens or coming from outside (through international law), something that is becoming more and more integrated in French law. In this sense, it is possible to say that these phenomena happen in the imagined frontiers of the French legal order, because of some contacts with foreign elements (as specialists in private international law say about situations involving contacts with different legal systems). But the links with French law prevail on these foreign components and clearly attract the situations in the orbit of French law: it is not the matter of any no-man's-land. Even retention areas in the airports are subjected to French law!

We have to relativize, however, the purported opposition between core rules of a legal system—those concerning situations without any contact with other countries—and the supposed less-interesting border zones. Whereas the place of core rules is often exaggerated on the behalf of an alleged tradition—as if these core rules were unable to change—the range of border rules is underestimated. We think that contemporary legal orders are notably characterized through the ways they act or react with international law and migrants. As many legal theorists have said, the sovereignty of the state appears, in all its truth and in all its violence, through limit situations such as emergency powers. Limit situations—those of the penal law sanctioning the violation of legal rules at the legal frontier between citizens and noncitizens—can say more about a legal order than routine cases where the traditional rules of civil or public law are applied. In the case of France, the Europeanization of law has as a consequence neither the end of the monist state nor the disappearance of frontier problems. On the contrary, it has reinforced the centrality of these border questions.

NOTES

1. Article 55 of the 1958 French Constitution.

2. Conseil d'Etat, *La norme internationale en droit français* (Paris: La Documentation Française, 2000), 18.

3. Olivier Dutheillet de Lamothe, "Contrôle de constitutionnalité et contrôle de conventionnalité," in *Juger l'administration, administrer la justice*, ed. Daniel Labetoulle (Paris: Dalloz, 2007), 315–327, and Elisabeth Lambert Abdelgawad and Anne Weber, "The Reception Process in France and Germany," in *A Europe of Rights*, ed. Helen Keller and Alec Stone Sweet (Oxford: Oxford University Press, 2008), 129, are using other statistics, from the Juripro database, that indicate 50 percent of the 1981–2007 decisions of the Council of State (but less than 5 percent of the ones from the Court of Cassation).

4. Basil Markesinis, Jörg Fedtke, eds., *Judicial Recourse to Foreign Law* (London: University College London Press, 2006), 309–328, with the text of the former president

of the Court of Cassation, Guy Canivet, who was the greatest advocate of this practice in France.

5. The number of Muslims in France, difficult to know without official statistics, is estimated at between 3.7 and 5 million. Without great change in the legal organization of cults (dominated since 1905 in France by the separation of church and state), there is necessarily some legal impact of the development of the now second religion in France.

6. Emmanuelle Saada and Alexis Spire, "La généralisation de l'usage du droit comme mode de résolution des conflits," in *Le recours à la justice administrative: Pratiques des usagers et usages des institutions*, ed. Jean-Gabriel Contamin, Emmanuelle Saada, Alexis Spire, and Katia Weidenfeld (Paris: La Documentation Française, 2008), 49.

7. We have used in particular the *Cahiers du Centre de recherches et d'études sur les droits de l'homme et le droit humanitaire (CREDHO, Université Paris-Sud, Sceaux)*, ed. Paul Tavernier, *La France et la cour européenne des droits de l'homme*, one annual issue since 1994, published (since no. 9) by Bruylant (Brussels).

8. Declaration of the Minister of Immigration and National Identity, Eric Besson, on December 10, 2009.

9. "Les arrêtés de reconduite à la frontière des Kurdes bientôt abrogés," *Le Monde*, January 24, 2010.

10. The 2003 and 2006 laws concerning the control of immigration have tried to fight against these fictive marriages; some of the articles of the 2003 law have been struck down by the Constitutional Council.

9

Borderscapes of Differential Inclusion

Subjectivity and Struggles on the Threshold of Justice's Excess

Sandro Mezzadra and Brett Neilson

The Music of the Spheres and the Noise of the World

"Spheres of Justice" was the title of the Second Critical Studies Conference, held by the Calcutta Research Group in Kolkata in September 2007. What sense does it make to collocate the concepts of spheres and justice? For us, this is not an innocent move. Both the concept of justice and that of the sphere conjure up notions of perfectibility. The sphere is that most faultless of voluminous forms. In ancient cosmology, it provided the basis for semimystical notions of harmony: the music of the spheres. It is the billiard balls of modern mechanics, the very symbols of cause and effect. And let us not forget the elegant surface of the Riemann sphere, that geometrically and analytically well-behaved manifold. No wonder Jürgen Habermas's (1989) discussion of the domain of *Öffentlichkeit* is regularly figured in the English language as the "public sphere," indicating a rational horizon of publicity in which all claims and contestations are dialogically mediated. Nor is it an accident that Peter Sloterdijk (2007) chooses the figure of the sphere to encapsulate the philosophical history of globalization, which from the start has been marked by an interest in spherical perfection and its geometrical construability. Our aim in this chapter is to explore tensions and limits in contemporary approaches to justice by placing them not in this realm of spherical perfection but in the mundane, imperfect, and noisy domain of shifting global mobilities and their negation and control in processes of bordering.

Not only the notion of the sphere but also the notion of justice carries the implication of perfectibility. To speak of justice is not necessarily to speak of its dispensation, the actually existing carriage of justice, whether summary, retributive, commutative, normative, or otherwise. Justice, if not ideal, is always something better than the imperfect decisions made by institutions or individuals. It is important, of course, to distinguish justice from the law. But when justice reaches beyond the deformed forms of the material world, it becomes something that we strive for but never reach. It inhabits a realm that is neither social nor immanent.

To reverse this situation is by no means as simple as claiming that justice lies hidden in society as we know it. For how do we know the social? There are multiple approaches to social relations and dynamics, and when these meet theories of justice, there is an equally diverse range of theoretical frameworks: utilitarian, liberal, communitarian, welfare-based, multicultural, and so on. The notion of spheres of justice reminds us immediately of an influential contribution to liberal theories of justice made by Michael Walzer in 1984. We have in mind his book *Spheres of Justice*, which was an attempt to elaborate liberal theories of justice to accommodate many of the critical points made by communitarian philosophers of justice in the late 1970s and early 1980s (see, for instance, Sandel 1982). What allowed this intercourse of liberal and communitarian approaches was their shared commitment to understanding justice as a problem of the distribution of social goods. This is to say that they were both distributive theories of justice that, in the final analysis, sought to encode the social as a field in which unevenly distributed goods could potentially be brought into an even balance. Behind this picture of the social was an attempt to go beyond merely formal models of procedural justice in order to conceive justice in more substantial terms, linking questions of distribution to problems in political theory including debates on democracy, legitimacy, membership, and identity (Hardt and Negri 1994).

What interests us is the reliance of both liberal and communitarian theories of justice on the notion of social goods. What are social goods? How do they come into being? We cannot assume a world in which such goods are merely given. To reduce all qualities (including political power and even, in some versions, the community itself) to the status of goods is not to ask the question of how such goods are produced in a world marked by multiple divisions, mobilities, and processes of marketization. It is important to keep in mind the analytical distinction between the notion of goods and that of the commodity. Nonetheless, the notion of social goods necessarily implies a matrix of social relations that surround and compose the goods in question.

Such social relations are always embedded in the dense materiality of regimes of domination, exchange, and production.

As we know from Marx, the commodity is nothing other than a cipher of social relations that unfold in historically and geographically determinate contexts—those of the capitalist mode of production and its attendant processes of spatial expansion, hierarchization, and linking. While the notion of goods should be analytically separated from such a conception of the commodity, there is a need to ask how the distribution of social goods overlaps and becomes implicated in the circulation of commodities. For instance, the social good of membership in a political community or citizenship has since the dawn of the modern era been considered inalienable and nonfungible. Nonetheless, as Ayelet Shachar (2009) has eloquently argued, it tends to function as a form of inherited property that is transferred from generation to generation through the legal device of the birthright. More recently, there has been strong advocacy for the commodification of citizenship rights through the introduction of a fixed entry price or the auctioning of entry permits for admission into wealthy jurisdictions (Chiswick 1982; Becker 1992). Countries such as the United States, Canada, the United Kingdom, Australia, and Germany have introduced so-called "investor category" admission routes, allowing a limited stream or quota of entrants per year to buy their way into the polity. There are thus compelling empirical as well as methodological reasons for interrogating theories of distributive justice in the context of a critical analysis of capitalist transitions and transformations. This is especially the case in the contemporary globalizing world, where commodity relations increasingly colonize the world of goods and expand the frontiers of capital. Twenty-five years after the publication of Walzer's *Spheres of Justice*, his attempt to keep at bay the influence of money and of market relations, policing the *border* between the "spheres" of money and political community seems quite optimistic, to say the least. Looking for instance at Walzer's discussion of "what money can't buy," of what he calls "blocked exchanges" (Walzer 1984, 100–103), one gets a good map of some of the strategic field of capitalist development in the last decades—from police protection to primary and secondary schooling, from marriage and reproduction rights to military service.

To be methodologically aware of these processes is not only to call upon the analytical framework of capital-labor relations but also to ask how these relations are spatially organized across different geographical scales. Our argument is that in the contemporary world theories of justice must reckon with the multifarious roles played by borders in the production of social and material goods as well as in the production of subjects between whom such

goods are circulated and consumed. Approaching the question of justice in this way is to recognize that the globe is not a perfect sphere but is rather crisscrossed, divided and subdivided by material processes that play themselves out through tensions and conflicts, partitions and connections, traversing and barricading, life and death. Not only the production of goods but also the production of space is at stake in any attempt to come to terms with justice in contexts marked by competing interests, struggles, and imaginaries. What has been recently discussed by Nancy Fraser (2008) as the problematic and politics of *framing* plays therefore also for us a key role in any discussion of justice. While we further agree with her on the necessity of mapping the multiple "scales" of justice and struggles for justice in the contemporary "Postwestphalian world," our emphasis on borders and boundaries is meant to shed light on the turbulent processes of *production* of these scales, challenging the very idea of their stability.

Justice as Excess

In a thought-provoking chapter of his recent work, *The Materiality of Politics*, Ranabir Samaddar investigates what he terms "the notion and practices of governmental justice, or governmentality in the area of justice" (2007, 2:65). He very effectively points to the tensions arising in the Indian case between "justice-giving machinery" and the "justice-seeking subject," and he more generally stresses the structural *excess* characterizing justice with respect to every historically given regime of justice. This is an often-made point in recent debates on the issue of justice, for instance along the lines proposed by Jacques Derrida in his *Force de loi* (1994). But what we find striking in Samaddar's approach is how he links the excess of justice with the emergence and the constitution of what he calls the *political subject* (see also Samaddar 2010). It is this link (and any tension between "justice-giving machinery" and the "justice-seeking subject") that tends to be erased by governmental or distributional approaches to justice: "The political subject wants justice and calls for justice and were it not for that fact, today the political subject would not be the most nonconformist form of our self. But what these judicial practices [that is, the practices of governmental justice] have meant is that one form of experience of justice has been made universal; one historical form made the transcendental form; and now this universalized form seeks to constitute the political subject" (Samaddar 2007, 2:76).

It seems to us that it is worth investigating the issue of the border in its relation to justice precisely from this point of view. Borders have been crucial also to the modern definition of citizenship—that is, of the authorized ways

of "being political" (see Isin 2002) and therefore of political subjectivity. We are confronted here with a peculiar oscillation within the semantic field of the border. It is necessary, for instance, to investigate the relation between "borders" and "boundaries" (Banerjee 2010). To put this simply, for the purposes of this essay a boundary is a social, legal, or cultural demarcation, while the border is a line that separates as well as connects diversely composed geographical spaces, including but certainly not limited to the classical modern political spaces of the nation-state. In any case, while the boundaries of citizenship have always been contested (and it would be possible to make sense of most social and political struggles in the modern age considering them in terms of a continuous contestation of these boundaries), the very institution of the border is undergoing radical transformations in the present. There is a need to recognize that, as Étienne Balibar puts it, borders no longer exist only "*at the edge of the territory*, marking the point where it ends" but "have been transported *into the middle of political space*" (2004, 109). Every attempt to politically develop the "excess" of justice must take these transformations into account. It is very difficult to imagine a "political subject" that would be able to "reactivate" nowadays the excess of justice as a subject whose emergence and constitution would take place within what still pretends to be the well-established borders of the political.

Despite or perhaps precisely because of this difficulty, we find it necessary to approach the question of justice, its excesses, and its governmentalized or distributed forms with respect to the richly implicated but not entirely philosophically reconcilable theories of the production of subjectivity offered by Marx and Foucault. Borders and boundaries not only play an obvious role in the geopolitical production of space and the related dynamics of the distribution of social goods but are also crucial to the processes of limitation and enablement that give rise to forms, conducts, and practices of life as well as to the related system of subject positions (see also De Genova 2010). What we stress in both Marx and Foucault is the criticism of a normative theory of justice and its accompanying liberal model of subjectivity. Marx's criticism of the liberal theory of justice is centered upon the opposition between the "surface" of exchange relations and the practices of exploitation that underlie them. While the former involves a contractual relation that constructs the participating subjects as formally free and equal individuals operating within a market context, the "hidden abode of production" (Marx 1977, 279) reveals a radical scission within the field of subjectivity revolving around the opposition between capital and labor-power. This is for us a seminal reference, although such a division of the field of subjectivity cannot be explained by economic factors alone but always assumes a political dimension that must

be understood in the context of struggles, affects, passions, and the combined labor of reason and imagination.

Foucault's criticism of the liberal theory of justice also turns around a theory of the production of subjectivity that emphasizes not only political practices of struggle but also technologies of power. His emphasis on the multiplicity of power devices and technologies leads him in a rather different direction from Marx. But there is a sense in which Foucault's discussions of the forging of bodies and souls dovetail with Marx's arguments about the production of political subjectivity. Both deal with questions of labor, life, and language—to remember the title of a chapter of *The Order of Things* (Foucault 1973). There is a need to reach beyond the merely economistic reading of Marx that Foucault himself seems sometimes to perpetuate. By highlighting the dimension of struggle that provides the keystone for Foucault's thinking of justice, it is possible to revisit his account of the production of the liberal subject of justice alongside those aspects of Marx's work that emphasize the production of political subjectivity in and through struggle.

Part of what is at stake in this methodological approach is an attempt to move beyond some of the more politically cautious interpretations and extrapolations that have emerged from the recent explosion of interest in Foucault's later works on liberalism, governmentality, and biopolitics (see, for instance, Rabinow and Rose 2006). By recalling the interventions of an earlier Foucault, whose approach to justice was shaped by a series of direct involvements with movements and political struggles, we aim to approach these concepts from another angle (Revel 2006). The border is the conceptual and material field in which we stage an encounter between Marx and Foucault: power devices and technologies that are central to the control of borders in the contemporary world are also reshaping the reality and the spatial reorganization of what Marx termed the "hidden abode of production." An investigation of these processes of reshaping is crucial to any attempt to think about the production of political subjectivity beyond the terms of a normative, liberal, or governmentalized approach to justice.

In his 1971 dialogue with Noam Chomsky, Foucault provocatively states, "Rather than thinking of the social struggle in terms of justice, one has to emphasize justice in terms of the social struggle" (Chomsky and Foucault 1971). What does it mean to follow through the implications of this provocation, which recognizes that as soon as justice is implied in struggle it also becomes an instrument of power? We want to argue that this recognition profoundly changes the way in which we must look at social goods. To say that social goods are not merely given is to draw attention to the struggles, power relations, and even discursive strategies implied by their production.

For instance, when membership of a community is itself presented as a social good, it is necessary to inquire how such a community is formed and limited. It is worth remembering that, for Walzer, membership in a political community is the most important social good, the one that must be distributed in order that all other social goods might be accessed or enjoyed. The decision about membership, which is necessarily one made on the borders and boundaries of political subjectivity, must thus be constantly reiterated for the distributive rationality of justice to become viable and evident. According to Walzer, the very notion of distributive justice presupposes a "limited world" within which distributions can take place. Such a limited world presupposes the division of "members" and "foreigners" and thus makes the question of borders central to any theory of justice (Walzer 1984, chap. 2). An emphasis on the membership, on the duties, on the social ties, and on the sense of loyalty that arise from a shared life and history seems moreover to many liberal thinkers the only way to find a "moral ground" for restrictive migratory policies (see Sandel 2009, 230–232). And one could say that in this way the political presupposition of the very existence of the border (that is, political membership) becomes the element that legitimizes the border itself, in a kind of circular argument that ends up neutralizing it.

Without the border and the clear-cut distinction between the inside and outside, there could be no bounded modern political space. It is necessary not only to come to terms with the actual social and historical conditions that cross the field in which social goods are distributed but also to account for the ways in which this field is subject to continual developments, transitions, and ruptures. Especially in the era of so-called globalization, there is a need to ask where society begins and ends. The modern association of the social with the political through the mediation of the nation and the state cannot be assumed at a time when processes and agents of transnational connection prompt the emergence of new assemblages of territory, authority, and rights. This is not to claim that the state and nation are being erased, but rather that they are radically redefined in their functions and nature within these emerging constellations. Even claims for the reassertion of the monopoly of state and nation over the political and the social in front of such events as war, terror attacks, financial crisis, or indeed migration can themselves be read as symptoms of this redefinition. The liberal democratic tradition and its attendant institutions are themselves constantly shaken by and readapted to this evolving and turbulent global environment (Sassen 2006).

To think of justice nowadays means to confront the crisis and transformations of this tradition and of these institutions. It means to take seriously the hypothesis that we are confronted with irreversible mutations of

the conceptual and institutional set of arrangements that "contained" justice in the modern age, producing a lot of "injustice" but also representing in a certain measure the framework within which particular configurations of justice were established: that is, the modern state. Our focus on borders and border struggles is thus not merely a means of exemplifying a paradigmatic situation that forces a rethinking of justice but a conceptually and practically necessary investigation for any theory of justice that is to remain adequate to the spaces, times, and transitions of the contemporary world. To come to grips with justice's excess over its governmental and distributive forms is to interrogate the workings of justice in a situation where sovereign power itself maintains a systemic property but is increasingly operating within a multiplicity of centrifugal legal and institutional arrangements (Joerges, Sand, and Teubner 2004; Ferrarese 2006). A multilevel system for the administration of justice is emerging, but its constitutional and institutional frameworks need to be analyzed both with respect to claims of justice that exceed them and the political logic that emerges from the system's attempts to absorb and accommodate this excess.

The border is a site and an institutional setting in which such claim-making and the processual efforts of dealing with its excess meet and clash. This gives rise to new regimes of governmental justice and produces some crucial subjective forms and positions that correspond to them. At the same time, the border is a site of contestation of these regimes at the very moment of their emergence. Contrary to the commonsense approach that sees the border only as a site of exclusion, it is necessary to analyze the complex tensions that make the border a field in which processes of traversing and crossing meet those of reinforcement and blocking (Vila 2000; Rajaram and Grundy-Warr 2007; Mezzadra and Neilson 2008; Papadopoulos, Stephenson, and Tsianos 2008; De Genova and Peutz 2010; Squire 2011). Border struggles intervene in this field of tension, often contesting processes of exclusion and deportation but also, in their more politically challenging forms, relating these processes to the permeability of the border itself. These struggles assume many different forms. It is necessary to account for groups of migrants who put pressure on particular borders and organize transnational networks that cross these divides (Rodríguez 1996; Migreurop 2006). It is also important to remember the struggles of borderline peoples, such as those who populate the Thai-Burmese borderscape, that are usually not "perceptible because their subjectivities [fall] outside the authoritative territorial mapping of what constitutes political subjectivity" (Tangseefa 2007, 240–41).

Justice is always at stake in border struggles. These are often struggles over the processes and material conditions that contribute to the elusive and never

entirely predictable operation of the threshold between procedural justice and its excess. Many political and social struggles approach this threshold as a stable barrier whose existence allows the development of specific calculations and of a kind of technical approach to issues of justice. In border struggles the production of the threshold itself is frequently an object of contention, whether in explicit or hidden ways. This does not mean that border struggles are always radical or even "progressive" struggles or that they are the only struggles in which the division between governmental justice and its excess is challenged. When this division itself becomes an object of struggle, however, a new continent of contentious politics comes into view. Far from being a noise that can be reduced to the logic of the system, contingencies emerge as political resources, while actions and claims tend to attract consequences that cannot be probabilistically calculated. Border struggles do not necessarily exhaust themselves in attempts to incrementally expand the sphere of justice through a movement of inclusion that progressively integrates excessive claims into executable rights and procedures. Rather, they tend to confront the fact that this threshold can jump unpredictably and even retrogressively and that the surety of procedures is often a limited tool for winning battles for justice.

Differential Inclusion

If we take justice to be characterized by the tension between the processes of its governmentalization and its excess, then it is clear that the border is at once internal and external to justice: it is *internal*, insofar as it is one of the conditions of its realization; it is *external*, insofar as it limits, as we can say playing with Hans Kelsen's language, the sphere of validity of justice. We can move a step further to claim that the border plays a crucial role in the *production* of justice, or to be more precise in the production of the threshold between procedures of justice and claims that lie beyond them. While the movement of the border does not necessarily determine the variations of this threshold or vice versa, they are clearly interrelated, and we will return to this point. For the moment, we can simply say that to raise the question of justice in relation to the border means to take a critical standpoint that highlights the gap between justice itself and any (partial) realization of justice under given spatial and temporal circumstances.

To pose the question of justice *on the border* is therefore not merely to speak of the ways justice is dispensed *at the border*, which is to say the distribution of justice at the intersection of regimes of rights, property, law, sovereignty, myriad cultural phobias, and so on. Rather, it is to interrogate the

very processes and conflicts by which justice is operationalized at or within the threshold of its excess. This means highlighting the dimension of political struggle, not simply because borders are sites of conflicts and contestation but also because this results in their constant displacement, reiteration, and proliferation. Struggles that approach the border as a fixed line of exclusion often take a different form from those that attempt to come to grips with the porosity of borders and the ways in which they can selectively filter, differentiate, and include subjects in transit. The latter must deal with a production of subjectivity that neither fully includes nor completely excludes migrants from the modern political space that was once conceived as the primary, if not the sole, container of justice.

Such a production of subjectivity must necessarily be analyzed with regard to processes of domination, exploitation, and subjection, but it can also open new and highly contested fields of struggle in which political invention is possible (see also Soguk 2007). One important feature of the subjectivity at stake here is the way it ruptures the classical dyad of the citizen-worker and the link between Fordist models of production, developmental paths of nation building, and the political form of the state implicit in them. The contemporary proliferation and shifting meanings of borders are directly related with the necessity to address the problem of the production of *labor-power* as a commodity within current transitions of global capitalism. Borders and their changing configurations play a crucial role in the management of labor mobilities, shaping them not only in accord with class hierarchies but also with regard to gender and race relations that create new kinds of ethnicized and gendered workforces. New subjects are produced every day at the border as "bearers" of labor-power, to borrow a term from Marx, while border devices crisscross and increasingly transnationalize the system of subject positions upon which formally "national" labor markets were based.

When we stress the importance of labor-power in the analysis of border and migration regimes, we want to highlight the "hidden abode of production" that remains obscure in analyses and theories of justice that assume the liberal subject as their starting point or normative reference. Those subjects whose mobilities break the modern intertwining of the figures of citizen and worker cannot simply be identified as liberal subjects, while at the same time it is difficult to integrate them into traditionally socialist images of a homogeneous "working class." Many labor relations are still marked by the legal device of the contract, which can be negotiated and concluded in an international frame and often functions as an immunizing device against the susceptibility to deportation of migrant workers. But the image of the contract as the iconic political device that institutes the social as such is increasingly

placed under duress. This is not only to make the classical Marxist point about how freely concluded contracts enable exploitative relations of production but also to note the multilevel and multiscalar refraction of legal frameworks within which the very status of citizenship is variable and becomes the site of plural tensions and conflicts. The threshold between inside and outside, inclusion and exclusion, becomes increasingly elusive under these conditions (Bigo 2005). What we need is a new theoretical framework capable of coming to terms with the shifting modalities of this elusiveness and the myriad systems of *differential inclusion* that we see taking shape in various borderscapes across the globe.

The concept of differential inclusion has a complex and multiform genealogy that crosses the borders of migration studies and feminist thought. Although it has assumed many names, this concept has long provided a means for describing and analyzing how inclusion in a sphere or realm can be subject to varying degrees of subordination, rule, discrimination, and segmentation. More recently, the concept of differential inclusion has been deployed in an attempt to move beyond the blind spots in the widespread notion of Fortress Europe, which fails to account for the prodigious presence of migrants in the European space. The concept was introduced to account for the actual operation of the migration regime in the making in Europe (Mezzadra 2006, 2011; Rigo 2007; Transit Migration 2007). Quite interestingly, an important point of reference in the forging of this concept was ethnographic analyses of the ways in which the U.S.-Mexico border is managed (De Genova 2004, 2006; Vila 2000). In both the European and U.S.-Mexican instances, there is a legal production of illegality and a corresponding process of migrant inclusion through illegalization that creates the conditions under which a racial divide is inscribed within the composition of labor and citizenship. From this perspective, the devices and practices of border reinforcing shape the conditions under which border crossing is possible and actually practiced and experienced.

This is a point of view that emerges from the angle of subjects in motion and an attempt to point out the multifarious tensions that crisscross contemporary practices of mobility far beyond the so-called global North. In contemporary China, for instance, the *houkou* system of household registration has been an important device in the filtering, restriction, and return of labor mobilities around a whole set of internal borders that circumscribe the country's coastal cities and special economic zones (Pun 2005; Chan 2008). Similarly, in India, there have evolved complex systems of bordering that internally divide the labor market, not only to restrict mobility to special economic zones but also to filter migration into the cities for occupations in

industries such as construction and sex work and to control short-term and seasonal migration in agriculture through means such as debt bondage and labor brokerage (Samaddar 2008). To this we must add the vast panoply of South–South migration that operates across international borders, including the movement of female domestic workers across East and Southeast Asia (Oishi 2005), the transnational circuits and networks of migration that are reshaping the Latin American space (Caggiano 2006), and the labor mobility from South Asia and Africa toward the Gulf states (Malecki and Ewers 2007; Gardner 2010). These migratory movements, which often operate across internal borders, are redefining global geographical scales and economic divides to the point that the conceptual split between North and South is increasingly muddied. In all of these cases, the border provides a nodal point of crystallization where tensions of labor and capital as well as transformations of citizenship and the potentialities inherent in them become visible.

To fully understand the processes of differential inclusion, it is useful to mention a couple of technical devices of changing border and migration regimes that make the selective filtering of mobility possible. The first of these is externalization, which involves the displacement of border control and its technologies beyond the territorial edges of formally unified political spaces. This is evident in the management of the "external frontiers of the European Union" as well as in Australia's "Pacific Solution." In both cases, third countries are involved in the border regime, whether this implies the offshore outsourcing of detention facilities, cooperation in deportation procedures, visa policing, or the surveillance of routes and so-called carriers of migration. There emerge different degrees of internality and externality, which substitute and blur the clear-cut distinction between inside and outside that was produced by the traditional border of the nation-state. These techniques and measures of externalization facilitate the processes of filtering and differential inclusion by creating waiting zones through which the timing and tempo of migration can be more precisely regulated. They also serve to channel migratory and refugee movements through holding zones and funnels, in which the procedures of selection can be exercised, whether in entirely technocratic ways or through violent interventions (Bigo and Gould 2005; Cuttitta 2007; Rigo 2007; Neilson and Mitropoulos 2007; Perera 2007).

These complex transformations of border regimes correspond to the dream of a "just-in-time" and "to-the-point" migration that is increasingly shaping migratory policies across diverse geographic scales, for instance in East Asia (see Xiang 2008). Confronted with the unpredictability and "turbulence" of contemporary migratory movements, this dream is compelled to come to terms with the impossibility of its full realization: a fact attested by

the continuous but often unreported deaths that occur across borderscapes worldwide. Nevertheless, the fantasy of eliminating this gap between dream and reality continues to spur innovations in migration policies that attempt to react to the crisis of traditional quota systems, which are increasingly recognized as inadequate to the new flexibility and interpenetration of labor markets and economic systems. Although points-based systems of migration control have been present since the 1970s in former settler colonies such as Canada and Australia, their current diffusion to European countries such as Britain and Germany exhibits the growing desire to attune ever more finely flows of migrants to the real or imaginary economic and social needs of "countries of destination." Particularly in the context of international competition for skilled labor, there is a tendency for countries to borrow and imitate the taxonomies and calibrations that compose such migration systems (Shachar 2006). These are highly technocratic but also quite arbitrary means of instituting differential inclusion, and multiplying and increasingly stratifying the legal statuses of subjects inhabiting the same political space, while at the same time allowing an effective policing of the borders and boundaries between these different subject positions.

Despite this multiplication of control devices, there appear tensions and contradictions within points-based migration systems, not least due to the increasingly complicated landscape of transnational migration. These fault lines within such migration regimes are opened up not only by the inventiveness of migrants themselves, who continuously find tactics to negotiate and move through the hierarchized terms of these systems, but also by a myriad of other actors including labor brokers, migration agencies, and middlemen working along the boundaries between legality and illegality. The question of what counts as skill is one particularly pressed by these actors, who engage in practices of reverse engineering migration policies, often anticipating and prompting actual developments within these regimes themselves. In particular, they draw upon the elusiveness of the very concept of skill within contemporary forms of flexible production, particularly in the service and cognitive sectors. This is increasingly recognized as a problem within policy-making debates. As Anderson and Ruhs (2008) note in a recent report prepared for the Migration Advisory Committee of the United Kingdom, "the term 'skills' is a very vague term both conceptually and empirically," since it can refer to "technical competencies" but also "to generic 'soft skills' (such as 'team-working skills') that are difficult to measure." "Demeanor, accent, style, and even physical appearance" as well as "personal characteristics and attitudes" possessed by workers "who will be compliant and easy to discipline and control" become qualities that can be figured as "skills" (4). This clearly

establishes a gray area in which the very barrier between skilled and unskilled labor becomes porous and mobile, opening up new spaces of negotiation and paths for migrants and those who facilitate (and often contribute to exploit) their movement.

This introduces a two-way mobility between the categories of skilled and unskilled migrant labor. Not only are those who are traditionally viewed as unskilled able to find gaps through which to negotiate systems of differential inclusion, but also new techniques and forms of exploitation and labor market manipulation force those traditionally viewed as skilled workers into unskilled labor positions. For skilled and qualified workers, cross-border mobility often spells a radical devaluation of their competences. Even in cases where skilled workers move to access higher wages or citizenship entitlements, however, the boundary between skilled and unskilled labor is easily blurred. For instance, in the system of international mobility management for Indian IT laborers known as "body shopping," workers are frequently "benched" or artificially removed from the labor supply to create a "virtual shortage" that forces up the cost of their labor services. During these periods of "benching," IT workers fritter away but also constantly update their expensively acquired cognitive skills while performing unskilled tasks such as taxi driving or shop assistance (Xiang 2007).

But the logics of differential inclusion embodied in technologies such as point systems not only come to bear on forms of mobility that work the boundary between skilled and unskilled labor but also have their effect upon migratory regimes that address labor sectors traditionally viewed as unskilled. In programs for the preparation of Indonesian domestic workers as well as Sri Lankan caregivers for work in regional and intercontinental markets (Anggraeni 2006; Pandya 2005) or the recruitment of temporary migrants for agricultural, construction, and catering jobs in EU countries (Castles 2006), we can see diverse instantiations of "just-in-time" and "to-the-point" migration. Needless to say, the illegalization of unskilled migrant workers is frequently an element that comes to play in the operation of these regimes (Düvell and Jordan 2002; Squire 2011).

The Threshold of Justice and the Borders of Citizenship

The blurring of patterns of internality and externality implicit in the increasingly prevalent migration regimes of differential inclusion also has important ramifications for the issues surrounding political subjectivity we mentioned and briefly discussed above, not least the changing nature and forms of citizenship. A key feature of the fast-growing worldwide competition for skilled

migrants is the construction of policy schemes that allow a preferential path to permanent residency and eventually to citizenship for subjects who perform appropriately in the intricate obstacle race of skill-based migration systems. Shachar (2006, 199ff.) discusses the spread of such "talent-for-citizenship exchange" as well as its "mirror image" in emigrant-sending countries, which increasingly encourage dual citizenship, investments in the national economy, and return migration. This involves manifold processes of flexibilization of citizenship as well as the overlapping and alteration of the traditional nation-state logic of political membership and identity with a "more market-oriented and calculated rationale."

Here we see another manifestation of the multiplication of citizenship statuses, but it is important to note that its effects are not merely restricted to an elite of globally mobile talented workers. Citizenship, under these circumstances, is not only a site of multiplicity but also one of conflict. Unskilled workers, too, have a multiplicity of citizenship and residency statuses, among them the condition of being undocumented or clandestine. Taken together, these transformations exhibit a disarticulation of the space of citizenship. Who is the citizen? becomes an increasingly problematic question for contemporary theories of citizenship (Isin and Turner 2008, 8). Under these conditions, Sassen (2006) argues, a full understanding of the tensions and conflicts that mark contemporary citizenship can emerge only from an analysis that works from the edges of the space of citizenship and not from one that operates from the legal plenitude of its center. That political subject who is "unauthorized yet recognized" (294) or, in other words, the illegal migrant, not only is subject to exclusion but also becomes a key actor in reshaping, contesting, and redefining the borders of citizenship. The multitudinous claims articulated by movements of undocumented migrants, including the *sans papiers* in Europe and an important element of the U.S. Latino movement of 2006, attest the potentialities of these kind of citizenship conflicts and practices (Suárez-Navaz, Couple, and García 2008). Contrary to the usual tendency in migration studies to place a firm border between analyses of skilled and undocumented migration, it is necessary to take account of both of these, as well as of the overlappings and gray zones between them, to arrive at an adequate analysis of the contemporary contours of citizenship.

The mutations of sovereignty and citizenship, analyzed by Aihwa Ong (1999, 2006) among others, have very important implications for theories of justice. If, for Walzer and other theorists of distributive justice, membership in the political community is the primary social good to be distributed before all others, then how are we to situate the boundaries of such membership when it becomes inflected with market values and calculations? When

political belonging becomes entangled with market calculations, the boundaries between state and market are blurred. The interpenetration between the social good and the commodity appears here with a definitive empirical force. This indefiniteness of the boundaries and borders of citizenship appears not only with respect to the actual material transformations to geopolitical border regimes but also with respect to the mutually implicated entwinement of political, legal, economic, and even cultural forms of membership.

This set of material transformations radically modifies the context in which issues of borders and migration have been dealt with in recent debates on the liberal theory of justice. In an important book, *Philosophies of Exclusion*, Philip Cole has proposed a detailed criticism of the series of "asymmetrical arguments" (that is, arguments based on a radical asymmetry between the position of members and of foreigners, of insiders and outsiders) developed by the liberal theory of justice in order to overcome its uneasiness before the exclusionary function of the border (Cole 2000, 53–55). This kind of reflection on the border has ceased to be a marginal issue in political philosophy, and it has rather tended to install itself at the very center. One could even make the point that the whole development of liberal political philosophy in the last two decades has been driven by the need to find a solution to what liberal political philosophers growingly experience to be the "riddle" of the border. It would be possible to mention a series of keywords, such as "culture," "nation," "community," and "welfare," upon which these attempts have centered (Schwartz 1995; Hashmi and Miller 2001; Düvell and Jordan 2003). And it is pretty easy to recognize in these keywords basic references to the main currents of liberal political philosophy prevailing nowadays at least in the Anglo-Saxon world.

In their concentration on the conceptual problems raised by the exclusionary capacity of the border, these approaches neither recognize nor come to terms with what we have called differential inclusion and the related processes of disarticulation of citizenship. This is not to underestimate the often violent processes of exclusion that take place at the border or to propose a notion of justice that remains blind to the action and effects of what Étienne Balibar (2004) calls the "non-democratic element of democracy." We could also call differential exclusion what we have termed differential inclusion. The nub of the matter, however, is how these differential processes of bordering affect the threshold that lies between governmental processes of delivering justice and the politics of claims that exceed them. Earlier we mentioned that border struggles tend not to approach this threshold as a stable and given entity, which can be slowly and incrementally pushed to expand the sphere in which proceduralism is an effective political tool. There is a need to further

investigate the processes and discontinuities that characterize the relation between the variations of this threshold and the contemporary transformations of borders.

Importantly, in her book *The Rights of Others*, Seyla Benhabib (2004, 113) points to a multiplicity of what she calls "democratic iterations"—among them legal procedures and moral and political dialogues as well as social conflicts and practices—which can radically shift the threshold that separates political claims from governmentalized forms of justice. Although we do not share the normative orientation of Benhabib's theory of justice, we find the concept of "democratic iterations" useful and challenging since it allows us to think of the ruptures and interruptions that a politics of claim making and rights within border struggles necessarily implies. To further understand the temporality and scope of such iterations and breaks, it is necessary to map out the relation between the movement of the threshold that separates procedural justice from its excess and the mobility and permeability of borders and boundaries that we have analyzed under the sign of differential inclusion.

Clearly this relation can take different forms. For instance, many kinds of migration politics and border activism assume both the border and the limits of governmental justice as stable, if not entirely coincident, lines. This is particularly the case in activist campaigns that appeal to an authentic and just idea of national community as the sole or primary basis for contesting decisions about exclusion and other forms of border control. In instances where one of these limits is conceived as mobile and the other as stable, there is a great variability of political horizons. These cases include campaigns that operate primarily around the discourses and legal instances of human rights to denounce the effects of new kinds of mobile border regimes. They also encompass political stances that understand current migratory movements as the reciprocal effects of the colonial adventure, denouncing the implication of actually existing justice-giving systems, but reproducing the stable divide between metropolis and colonies (for instance, under the sign of the slogan "We are here because you were there").

Far more interesting and challenging are those border struggles that view both borders themselves and the threshold immanent to justice as mobile, permeable, and discontinuous. Although it is difficult to identify such struggles in a pure form, it is in the interplay of these complex mobilities and arrangements that we see the most hopeful possibility for rethinking the relation of justice to borders. If we think, for instance, of the slogan "We did not cross the border but the border crossed us," popular within the mobilizations of Latinos in the United States, there is an implicit connection between the claim for the mobility of the border and the question of which jurisdiction

or legal process might be adequate to any claim for justice. That this slogan has a possible nationalist reading (referring to the Mexican-U.S. war and the Guadalupe-Hidalgo Treaty of 1848) does not detract from the more radical force of the interpretation we have suggested.

As we argued above, struggles that pose the question of justice *on the border* interrogate the very processes and conflicts by which justice is mobilized at the threshold of its excess. Coming to terms with the processes of differential inclusion leads to struggles that entail a production of subjectivity shaped by the current deformations and transformations to the field of citizenship. It also necessitates a search for constellations of justice that reach beyond both the modern attempt to contain universal rights within the particular space of the nation-state and more recent efforts to extend and perpetuate modern liberal principles on the global scale. Crucial to the rethinking of justice we wish to foreshadow here is the question of political subjectivity, which, as we suggested earlier, can be reframed with reference to the works of Marx and Foucault.

The concept of labor-power can provide a theoretical conduit that facilitates a deeper understanding of the emphasis upon struggle in Marx and Foucault as well as of their criticism of the liberal model of subjectivity. While the theoretical focus on labor-power is clear in Marx's discussions of class struggle, Foucault tends to deploy and even displace this concept within a wider analytical field that encompasses the genealogical investigation of many different technologies of power. Nonetheless, the manifold processes of production of subjectivity that correspond to these technologies of power need to be analyzed and understood against the background of current transformations to global capitalism. Foucault (2008) himself works toward this realization in his lectures of 1978–1979. Discussing the neoliberal concept of human capital, he states that "the wage is nothing other than the remuneration, the income allocated to a certain capital, a capital that we will call human capital inasmuch as the ability-machine of which it is the income cannot be separated from the human individual who is its bearer" (226).

Although Foucault here addresses the concept of human capital rather than that of labor-power, the very indication of the impossibility of separating it from the embodied individual attests the proximity of his analysis to the conceptual field occupied by labor-power. This is especially apparent given his use of the term "bearer," which is precisely that used by Marx (1977, 276) to designate the subject exploited in the "hidden abode of production." Even more relevant for our purposes is Foucault's turn to include mobility, "an individual's ability to move around, and migration in particular," in the elements that make up human capital (2008, 230). Although Foucault develops

this point in the context of an explication of neoliberal approaches to labor and innovation, this move to discuss migration and mobility is hardly accidental considering their importance in the shifting labor regimes of historical capitalism (Moulier-Boutang 1998). As historical developments in the control of the mobility of skilled labor since the time of Foucault's late lectures have shown, the migration of "human capital" is itself subject to complex systems of harnessing and restriction. Our analysis above has suggested that these regimes of control must be understood in relation to those that apply to the mobility of undocumented and unskilled labor, which remains the hidden underside of the neoliberal concept of human capital. Indeed, we have gone one step further to argue that it is precisely in the gray area between skilled and unskilled labor, or human capital and its underside, that the most crucial distinguishing features of contemporary border transformations are revealed.

In the context of these historical transformations and conditions, the very concept of human capital appears oxymoronic. While it can account for the kind of rationality that leads to investments in education and training and even for the logic that shapes points-based migration systems, the notion of human capital assumes a far too smooth construction of global space and a far too homogeneous construction of subjectivity. Not only does the concept of labor-power allow us to map the processes of striation, hierarchization, and bordering that characterize the contemporary production of global space, but also, and even more crucially, it points to the deep scissions and discontinuities that mark the contemporary production of subjectivity. This is because on the one hand it is rooted in the ground of human potentialities—as Marx defines it as "the aggregate of those mental and physical capabilities existing in the physical form, the living personality, of a human being, capabilities that he sets in motion whenever he produces a use-value of any kind" (1977, 270). On the other hand, the processes of commodification of these general human capacities and attitudes produce spatial divisions and hierarchies as well as constantly dividing and fracturing the "human" itself.

The concept of labor-power thus proves pivotal in struggles that negotiate the unstable relation of justice to borders. At one level, this is because it is often precisely labor rights that are at issue in contemporary struggles that are actively changing the shape and composition of the field of citizenship. In a more conceptual vein, we can say that labor-power, insofar as it is at once an unused potential and a commodity exchanged in the marketplace, provides a bridge and overlapping point between the production of subjectivity and the constitutive role of borders in shaping and ordering market relations, property regimes, and assemblages of authority and rights. These

are the parameters in which an approach to justice that acknowledges the difficulties of identifying any subject as a member of a "limited world" in the current global conjuncture must be developed.

Contemporary forms of subjectivity as well as the production processes that give rise to them are not simply delimited but also internally crossed by boundaries and borders. It is crucial not to forget that these processes of the production of subjectivity are bound to but equally capable of challenging global capitalist dynamics. The difficulties in defining labor skills and their ramifications for mutations of citizenship are doubtless only one symptom of the intangibilities confronted by systems of measurement that attempt to reduce human aptitudes, forms of life, systems of conduct, and so on to quantifiable elements. It is perhaps here that we find the reason for the expansion of points-based systems and other techniques to ever more finely calibrate and hue the unlimited reserve of potentiality held in the materiality of labor-power. The inescapable return of the immeasurable in these very schemes is at once a register of the ungovernable element that pertains to labor-power and the excess of justice. It is in this crossing, this unavoidable encounter with the immeasurable in a world obsessed with statistics, rankings, calculations, and probabilities, that we locate the most fertile ground not only for the rethinking of justice but for new practices of struggle that might emerge from it. The border is a site where this kind of crossing and encounter is occurring every day.

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Index