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International institutions and legitimacy

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The theoretical debate on pluralism in law has only indirectly overlapped with the debate on global justice. It has often seemed that the former appears as a merely institutional concern of experts in law, whereas the second as a moral preoccupation for philosophers, economists and activists. In my view the two issues are closely related. They both turn on a view of the legitimacy of international institutions. It is wrong for philosophers to ignore institutions of law and it is equally wrong for lawyers to ignore global justice. In order to see this we will need to set aside the artificial distinction that is often drawn between legal and political obligation. This is the epicentre of the ‘positivist’ theory of law, which is currently popular among legal philosophers. Legal positivism is an attractive theory because it simplifies law and legal reasoning. It is nevertheless misleading because it fails to capture both our basic common sense assumptions about law and the content of technical legal doctrine. Under the legal positivist dogma legal obligations and rights become inscrutable. They come to mysteriously occupy a space occupying both the world of fact and the world of value. Legal positivism is incoherent because law is another area of practical reason, a series of arguments that run parallel to morality and ethics. In my own earlier work I offered a theory of law as practical reason, which is constructivist in method and egalitarian in inspiration, based on the work of Kant and Rawls.⁴⁶⁸ I believe that the same theory can illuminate international institutions. In this essay I argue that once we understand the law as a body of rules, practices and institutions with moral standing, the question of pluralism and the question of global justice are seen as two sides of the same coin. Lawyers and philosophers have a common task, to understand and interpret the moral nature of the division of the world into states.

Global justice

The debate on global justice has arisen out of the question of whether or to what extent the affluent peoples of the world have a duty of justice to assist poorer countries and peoples. Some philosophers argue that the duty is as strong as the duty of distributive justice that wealthy citizens have to assist their fellow citizens within the same society.⁴⁶⁹ Other philosophers disagree.⁴⁷⁰ Although they start from the same universalist premises, they argue that state borders create a morally significant distinction between fellow citizens, to whom a duty of social justice is owed, and all others, to whom such a duty is not owed. For this view outsiders have only a weaker – although real and demanding - duty of humanitarian assistance, if and when essential human needs vital to survival are at risk. These theorists give different reasons why this is the case, but all of them consider that a special and distinctive political relationship that ties citizens together is a necessary requirement if any bonds of social justice are to arise.

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⁴⁶⁸ Pavlos Eleftheriadis, *Legal Rights* (Oxford: Oxford University Press, 2008).

⁴⁶⁹ See for example Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005), Charles Beitz, *Political Theory and International Relations*, revised edition (Princeton: Princeton University Press, 1999), Peter Singer, *The Life you Can Save: How to do your Part to End World Poverty* (New York: Random House, 2010), Peter Singer, ‘Famine, Affluence and Morality’ 1 *Philosophy and Public Affairs* (1972) 229-243.

⁴⁷⁰ See for example John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999), Thomas Nagel, ‘The Problem of Global Justice’ 33 *Philosophy and Public Affairs* (2005) 113-147, Onora O’Neill, *Bounds of Justice* (Cambridge: Cambridge University Press, 2000).

This debate, important though it is, covers only part of the relevant ground. It has not dealt with the question of the legitimacy of existing institutions. In my view, an account of the legitimacy of international institutions is a prerequisite for all theories of global justice. The distinction between legitimacy and full justice is generally accepted for the domestic case.⁴⁷¹ Legitimacy is normally the result of a set of standards of justice that protect the standing of citizens as free and equal in the normal operation of institutions and procedures, but do not constitute a full social ideal. How this basic idea applies to international institutions is a relatively new area of political and legal theory.⁴⁷² But the question is highly relevant to global justice. If a certain distribution of wealth were to be delivered through unjust processes, for example through colonial conquest or some other type of violent imposition, it would be for that reason alone unjust and unacceptable. Lesser forms of violations of legitimacy, through non-violent electoral fraud, for example, would also have the effect of rendering outcomes unjust, even if they meet substantive tests of distribution.

I will address these issues by discussing three cases of action across borders. Assume that motivated by a desire to be the best moral person he can be, one of my postgraduate students, let us call him Karl, sets out to act on global inequalities.⁴⁷³ He collects money and provisions through donations from affluent well-wishers in Oxford and sets off on a cargo ship for Freetown in Sierra Leone. Karl chooses this place over others because of the stories of great suffering that have reached him about it.

Here are three scenarios of how Karl's venture may end up:

1. *Benevolent Harm*: When Karl arrives in Freetown, he sees a large group of women and children. They look desperate, so he gives them what he can and returns to his ship. On the way back a passer-by tells him that these people were part of a rebel group that has terrorised the countryside. They recruited child soldiers and forced them to commit atrocities. Their armed friends were out rampaging, so he did not see them. To his horror, Karl realises that he has assisted a group of criminals.
2. *Helpless Delegation*: Karl chooses to delegate his choice of recipients of aid to Ernest, a local politician who seems powerful and knowledgeable enough. Ernest knows about the local needs and could – potentially – enforce a fair distribution, if he wanted to. He is educated and sounds serious. But Karl has no way of controlling Ernest. He cannot guarantee that Ernest's decisions will be the right ones, or that his actions will be overseen by an independent judge. Ernest could, conceivably, use the money and provisions for his own ends, for example to favour his clan or his allies. Karl has no mechanism at his disposal for preventing this or for holding Ernest to account after the fact.
3. *Benevolent Good*. Before he ventures out on the field Karl sends representatives with the task of establishing patterns of a desired distribution according to an acceptable social model for Sierra Leone. When he arrives in Freetown, he has already identified those in need on account of demographic data. He gives the required provisions only to those charities working in the relevant

⁴⁷¹ See for example Allen Buchanan, 'Political Legitimacy and Democracy' 112 *Ethics* (2002) 689-719, Thomas Nagel, 'Moral Conflict and Political Legitimacy' 16 *Philosophy and Public Affairs*, (1987) 215-240, Fabienne Peter, *Democratic Legitimacy* (New York: Routledge, 2008), Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity*, trans. by Arthur Goldhammer (Princeton: Princeton University Press, 2011).

⁴⁷² For some relevant discussions see Allen Buchanan and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions' 20 *Ethics and International Affairs* (2006) 405-437, Matthias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 *European Journal of International Law* 907, John Tasioulas, 'The Legitimacy of International Law', in Samantha Besson and John Tasioulas, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 97-116, Allen Buchanan, 'The Legitimacy of International Law' in Besson and Tasioulas (eds.), 79-96 and Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), Ronald Dworkin, 'A New Philosophy of International Law' 41 *Philosophy and Public Affairs* (2013) 1. I shall return to these issues in section VI below.

⁴⁷³ I shall assume that Karl is motivated by something like Peter Singer's argument in 'Famine, Affluence and Morality' for direct individual action.

areas. He cannot monitor the charities but he is optimistic that they will do what he asked them to. They also have some internal processes of accountability.

Has Karl helped the people he wanted to help in each one of these cases? In the first case of ‘benevolent harm’ it is clear that he has not. His motives were good, but the outcome was obviously disastrous. In the second case of ‘helpless delegation’ it is impossible to know the outcome. There is no guarantee that the provisions will end up in the right hands. These are the risks of a personal crusade. The problems raised by this example have been well documented by development economists who raise the spectre of unintended consequences of aid. William Easterly, for example, has argued extensively that aid has been ineffective, through lack of local knowledge or through such unintended consequences as assisting corruption, creating the wrong incentives etc.⁴⁷⁴ So there are reasons to doubt the effectiveness of Karl’s giving.⁴⁷⁵ Peter Singer acknowledges these difficulties by saying that ‘in the past, a lot of official aid has been misconceived and misdirected and has done little good’. He still concludes with optimism that if more money were available, it would be spent more wisely: ‘But it scarcely seems possible that, if we truly set out to reduce poverty, and put resources into doing so that match the size of the problem – including resources to evaluate past failures and learn from our mistakes – we will be unable to find ways of making a positive impact’.⁴⁷⁶ I am not sure this is an adequate response in general. In any event does not assist Karl.

What about the third case, that of ‘benevolent good’? We may say that Karl has done some good. He has delivered provisions to people in need. But is this enough to meet the tests of social justice? The problem is that Karl has no overall account or idea of the pattern of distribution he intends to achieve. Surely distributive justice is about a pattern of distribution, not indiscriminate giving. But Karl does not seem to have an overview of the distribution of resources among the people of Sierra Leone. He does not seem to have a pattern of desired distribution among this people and all the other peoples of the world. Nor is it possible that his small contribution will do anything to remedy any overall pattern. His involvement, we have assumed, is time limited and does not being assisted by established institutions. He acts on his own out of a sense of personal duty, having perhaps read the books of Peter Singer. He cannot correct any errors with a second or third shipment of aid, in case his first shipment went wrong. There is a great deal of uncertainty about the longer terms effects of this attempt.

I believe that in this case Karl has violated the requirements of distributive justice, irrespective of the outcome. Many cosmopolitan theorists, Peter Singer being one of them, fail to distinguish between alleviating destitution and distributive justice which means narrowing the gap between rich and poor. But these are distinct moral aims that require different actions. Destitution is, for Rawls, the subject of a ‘duty of assistance’ in favour of ‘burdened societies’.⁴⁷⁷ It is a true moral duty, but it is something that is very different from ordinary social justice. Such a duty has a cut-off point, namely the point where a society becomes ‘well ordered’. This is not a principle of ‘distributive justice’ because it is not about inequality, i.e. relative wealth. The aim of the duty of assistance is not adjusting inequality, but providing relief for absolute destitution. Similarly, when Thomas Nagel discusses global justice he is concerned with differences of wealth, not absolute levels of poverty that call for a humanitarian response. Nagel says quite clearly that humanitarian duties ‘hold in virtue of the absolute rather than the relative level of need of the people we are in a position to help’.⁴⁷⁸ He contrasts these duties to the duties of social justice,

⁴⁷⁴ Wililam Easterly, *The White Man’s Burden: Why the West’s Efforts to Aid the Rest Have Done so much Ill and so Little Good* (Oxford: Oxford University Press, 2006), which argues that ambitious plans for development aid often fail for lack of local knowledge or because they create the wrong incentives.

⁴⁷⁵ Singer responds to similar objections in *The Life you Can Save* 105, where he notes Easterly’s arguments and responds that aid has been ineffective because it is normally politically motivated in order serve the interests of the giving power (p. 106-110).

⁴⁷⁶ Singer, *The Life You Can Save* 110-111.

⁴⁷⁷ Rawls, *The Law of Peoples* 106.

⁴⁷⁸ Nagel, ‘The Problem of Global Justice’ 119.

which are ‘concerned with the relations between the conditions of different classes of people, and the causes of inequality between them’.⁴⁷⁹

By mixing the two questions together, Karl has failed to provide any reason or plan or strategy as a response to the challenges of inequality. By not providing any overall such plan or desired end Karl has not even started promoting his cause. Giving money or resources to the poor is not the same thing as achieving social justice. What if Karl’s continuous giving made the people of Freetown unusually well-off compared to their countrymen? Karl does not take social justice seriously.

This, however, is not the most important failure of Karl’s venture. In the view that I wish to defend, there is a deeper moral failure and all three cases are examples of it. In all of them Karl has violated his duties of justice to the persons that share the world with him. In each case his actions were *illegitimate*. This is so even though in the last case, he may have caused no harm. Karl acted unjustly because in each case he ignored the self-governing institutions of the citizens in Sierra Leone. These institutions may not be perfect, but they are delivering a multi-party democracy with free and fair elections. For example, the current President of Sierra Leone is Ernest Bai Koroma, a former insurance executive, who won the presidential election of 2007 and was re-elected in 2012. By treating the national institutions of government as non-existent or irrelevant, and by seeking in each case to impose his own account of social ideal on Sierra Leone, Karl has treated the citizens that set them up as inferior to himself. Irrespective of whether he had good intentions – which he did – and irrespective of whether he produced any good results – which he also did in the third case – Karl’s actions did not promote the cause of justice. Justice in political matters requires respect for the equality of persons as free and equal citizens. This equality of persons is the most important principle of any political community and it is only possible through the creation of political institutions. This is true both for the domestic case and for the international case. This is not a formality or a detail. If one undermines these institutions one undermines equality. And the duties to respect them are prior to any duties of social justice. This is the point I wish to develop in the next three sections.

Illegitimacy as injustice

Thomas Nagel argued for a ‘political conception’ of social justice, according to which only those sharing a state are subject to the requirements of social justice. His interest, as we have seen, was not in humanitarian assistance alone, but on the requirement of justice that arises out of relative poverty. He wrote that whereas ‘humanitarian duties’ bind us in virtue of the absolute rather than the relative level of need of the people we are in a position to help, justice by contrast is relative. It is concerned with ‘the relations between the conditions of different classes of people, and the causes of inequality between them’. He then set out to answer the question of ‘how to respond to world inequality in general from the point of view of justice and injustice rather than humanity alone.’⁴⁸⁰ Nagel argued that when we share a state with others we are subject to the same coercive rules and involuntary terms of association. Such terms of association are imposed on all of us ‘in the name’ of each member, so that we are all considered ‘joint authors’ because our will is actively ‘engaged’ in their production.⁴⁸¹ These facts create a certain social relation with other citizens, Nagel claims, which creates on us an obligation that our relations are guided by the principles of egalitarian social justice. But when this social relation is absent, the duties are absent too. Outside these political relations we are only bound by weaker ties of humanitarian moral concern. Nagel’s conclusion is that social justice is the exclusive domain of sovereign states and cannot be extended to the domain of global society. For his political conception ‘states are not merely instruments for realizing the preinstitutional value of justice among human beings. Instead, their existence is precisely what gives the value of justice its application, by putting the fellow citizens of a sovereign

⁴⁷⁹ Nagel, ‘The Problem of Global Justice’ 119.

⁴⁸⁰ Nagel, ‘The Problem of Global Justice’ 119.

⁴⁸¹ Nagel, ‘The Problem of Global Justice’ 128-129.

state into a relation that they do not have with the rest of humanity, an institutional relation which must then be evaluated by the special standards of fairness and equality that fill out the content of justice'.⁴⁸²

One group of Nagel's critics have responded by challenging his major premise. They challenge the idea that social justice requires a 'political relationship' and argued that membership had no serious moral significance. Simon Caney argues, for example, that for the cosmopolitan outlook there is no fundamental difference between the domestic and global realms 'such that the values that are appropriate in the former realm are inappropriate in the latter' and that the principles to be applied in the global realm should be 'continuous' with those we think appropriate in the domestic realm.⁴⁸³ For cosmopolitan arguments of this type, borders make little difference.

Another group of critics challenge the minor premise, namely the position that modern international institutions and transactions have not created a sufficiently robust relationship among distant strangers. Cohen and Sabel, for example, argue that in contemporary global politics 'we have a mix of precisely the conditions of interdependence, cooperation and institutions that have justice-generating implications' according to Nagel's theory.⁴⁸⁴ In their view international regimes and institutions entail justice-generating conditions of collective normative engagement, similar to that which exists in the domestic case. The appropriate response to these interactions, of course, is not a world republic, but institutions of rule-making that ought to be flexible and creative under what they call a 'pluralist' view. For their position, these new forms of international interrelations should create novel institutional moral responses. These, however, are a matter of social justice, not a matter of mere humanitarian concern. I shall call this view '*institutional cosmopolitanism*' and will contrast it to the '*global cosmopolitanism*' of Caney and Singer.

How do these positions respond to the scenarios of direct aid I outlined above? The facts of Karl's expedition concern a strictly bilateral relationship. They link a citizen of one state with the citizens of another. It follows that under Nagel's 'political conception' no issue of social justice arises between them. Since givers and recipients are not part of the same political community and belong to different states, their relations are outside the framework of social justice. Karl was under no duty of social justice to assist in adjusting inequalities (although he well have had a duty of humanitarian assistance in extreme cases). Of course, this is only part of the assessment of the overall situation.

I believe that under 'institutional cosmopolitanism' the answer with regard to the applicability of social justice would have been the same. For the view defended by Cohen and Sabel there is no relevant institutional relation connecting the agents and the recipients of aid in such a way as to create obligations of social justice. This is true even though the UK and Sierra Leone may have had strong connections and interactions via the United Nations, the Commonwealth of Nations, the IMF or other international institutions. If this is the case, the resulting duties will not be bilateral, however, but international. Just like the 'political conception' the 'institutional cosmopolitan' theory will most likely interpret Karl's expedition as a private event among unconnected persons. No issues of social justice arise between them. What Karl did was, at most, an act of supererogation.

For the 'global cosmopolitan view', however, the answer will be different. It must follow from Singer and Caney's arguments that a moral relationship already exists between Karl and the citizens of Sierra Leone, irrespective of national borders and membership. A basic human relationship connects Karl to

⁴⁸² Nagel, 'The Problem of Global Justice' 120.

⁴⁸³ Simon Caney, *Justice Beyond Borders* (Oxford: Oxford University Press, 2005) 265, See also Beitz 1999a: 288; P. Jones 2000

⁴⁸⁴ Joshua Cohen and Charles Sabel, 'Extra Rempublicam Nulla Justitia?' 34 *Philosophy and Public Affairs* (2006) 147, at 166. See also Thomas Pogge, 'Severe Poverty as a Human Rights Violation' in Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford: Oxford University Press, 2007) 11-53. Pogge's view is distinct in that it sketches an argument concerning a duty not to cause social injustice through our own institutions, which is not, strictly speaking, an argument for 'distributive justice' but an argument for corrective justice which seeks to remedy a direct moral wrong.

the residents of Freetown and creates duties of social justice. For this view, whatever happened in the three cases or Karl's adventures, it happened under a framework of duties of social justice. The real contrast therefore is between this view and the other two.

These issues, however, not the most important moral questions raised by Karl's actions. The three theories of global justice just surveyed make no difference at all to the justice or injustice of the situation Karl finds himself in. Whatever view one takes of social justice, Karl's actions exhibit a violation of a more fundamental problem of political morality. All three examples are cases of a violation of political or constitutional justice as it applies to international institutions. They are all examples of illegitimate action. The cases are interestingly complex because they record what appears to be a failure of the attempted offer of aid. The degrees of failure are clearly relevant to our moral response to them, but they do not exhaust the morally relevant considerations. Far from it, they are actually secondary to a deeper moral concern. The injustice of these actions in these cases is not on account of their outcome but in the very attempt. Karl acted wrongly merely by setting out to achieve his benevolent aims. Even under 'global cosmopolitanism' his actions were unjust.

First, he ignored Sierra Leone's local institutions, because he did not seek to cooperate with them. He bypassed all domestic authority, local or national. He behaved as if those authorities did not exist, or if they were morally irrelevant. But by doing this he failed to show equal respect to the citizens of Sierra Leone. These citizens made their country's institutions possible, for example, by voting in elections and holding office. He treated them as if these institutions did not matter. He treated them as if they were his social inferiors.

Second, he acted unilaterally in seeking to impose a social ideal with the force of his money. His actions sought to bring about a benevolent ideal, but an ideal that was strictly a unilateral imposition. The recipients of his aid had no opportunity to contribute to the formulation of a social ideal as a public political project. He acted simply on his own conception of Sierra Leone and the world. By setting out to impose a social ideal unilaterally and without engaging with local institutions, Karl usurped the legitimate political functions of legislation and policy-making. These functions, however, the citizens of Sierra Leone have entrusted to their own political institutions of self-government.

His actions are wrong in a further sense. He provides no account of a process or method for ensuring that his project of social justice could succeed. Every aspect of his plan to bring social justice in Sierra Leone was based on chance. He hoped that his agents would be reliable, but has no method of assessing them or holding them to account. He hoped that they had the ability to deliver, but he did not train them. Finally, his project of bringing about a fair distribution was hopelessly incomplete, since the means he had chosen were entirely inadequate for achieving the aims. In all such respects, delivering effective social justice requires institutions that only a state possesses: it requires a democratic legislature and a process of legislation, a mechanism of administration through an effective government and the oversight of courts through a fair judicial process. These are not just matters of instrumental value. They are matters of justice.

One does not need to settle on a view regarding the political conception, institutional cosmopolitanism or global cosmopolitanism to see this point. One of our most basic moral duties, one that is a universal, general and comprehensive moral duty, is the duty to respect the legitimate political institutions that were set up by our fellow human beings. This duty, which I shall call the duty of jurisdiction, exists whenever these institutions meet the basic tests of legitimacy for political institutions.⁴⁸⁵ Karl was misled by his failure to take into account that domestic legitimacy entails a cosmopolitan duty of respect for other people's institutions.

⁴⁸⁵ This is what Rawls calls a 'reasonably just constitutional democratic society' in *The Law of Peoples*, 49-51

Cosmopolitan legitimacy

What do we learn from these examples? A constitutionally legitimate state does not guarantee social justice. This is the key to the distinction between legitimacy and justice. The so called paradox of democracy is that I may consider the government just and unjust at the same time: just, because it was elected and unjust because of what it does to inequality. The position appears to be a paradox because the government's actions are both just and unjust at the same time.

An ideal of legitimacy is the only way out of the paradox and it explains our common sense judgments. Processes, elections and governments can be just in themselves. Whether their outcomes is just is a separate issue. Legitimacy is thus a matter of institutions and procedures.⁴⁸⁶ This type of justice determines the acceptability of political processes, the scope of the separation of powers, the powers of courts and the like. Whether a legitimate political process delivers a social ideal is another question entirely. This is also a common view among the social contract tradition. Rousseau outlined this view when he wrote that it 'in order... that the social compact not be an empty formula, it tacitly includes the undertaking, which alone can give force to the rest, that whoever refuses to obey the general will shall be compelled to do so by the whole body.... In this lies the key to the working of the political machine; this alone legitimizes civil undertakings, which, without it, would be absurd, tyrannical and liable to the most frightful abuses'.⁴⁸⁷ Rousseau in effect says that the institutional enforcement of the general principles that come with the social contract is key for legitimising civil offices. Without such enforcement mechanisms, a civil association would be tyrannical and open to abuse. The whole range of civil offices the 'political machine' is relevant to this issue, however: legislature, executive and judiciary. Institutions make justice possible. There are constitutional and procedural rules about how to set up these institutions fairly. Kant and Rawls have said similar things in vindicating the constitutional state.⁴⁸⁸

But this answer, even if true in the national domain, is not enough to answer the international question. Why not set domestic legitimacy aside when the international problems require it? After all, the problem of global poverty is a humanitarian disaster of extreme urgency. For this reason Simon Caney dismisses Rawls' argument regarding self-government out of hand. Rawls had argued that it would be unfair to seek to equalise conditions among two societies, where one of the had chosen to industrialise and the other had not.⁴⁸⁹ He assumed that it would be unfair to seek to reverse decisions they took freely. Caney considers Rawls' argument 'extremely unjust toward individuals'.⁴⁹⁰ He asks: 'Why should a member of a Third World country be economically disadvantaged because of a decision that the political elite in that country made and with which they disagreed?'⁴⁹¹ Caney mistakenly thinks that Rawls' argument derives its force from the consent of those disadvantaged. But Rawls' argument is entirely different. It derives its force from the need for legitimate constitutional institutions, which of course may not be consented to by many, and the fact that in the absence of a world state, legitimate states must have a 'democratic peace' between them built on the basis of international law.⁴⁹² The answer is the same both for developed and developing countries: without constitutional institutions, there can be no justice.

Caney rejects this argument because his way of thinking is entirely instrumental. Caney sees all institutions as the means to a higher end, namely the satisfaction of people's interests. He derives, for example, a 'human right' not to suffer from poverty, from the fact that 'persons have an interest in

⁴⁸⁶ I argue in detail for this point in my 'A Theory of Jurisdiction' (forthcoming).

⁴⁸⁷ Rousseau, *Social Contract*, in *The Social Contract and Discourses*, trans. By G. D. H. Cole (London: Dent, 1973), bk. I, ch. 7, p. 195.

⁴⁸⁸ I discuss some of these issues in Eleftheriadis, *Legal Rights* 51-60.

⁴⁸⁹ Rawls, *The Law of Peoples* 117-118.

⁴⁹⁰ Caney, *Justice Beyond Borders*, 130.

⁴⁹¹ Caney, *Justice Beyond Borders*, 130.

⁴⁹² Rawls, *The Law of Peoples*, 44-54. For the basic principles of international law see Rawls, *The Law of Peoples* 37.

having the opportunity not to suffer from poverty'.⁴⁹³ He dismisses arguments from the legitimacy of institutions or the self-government of states by claiming that such arguments 'penalize' those born into an impoverished system and 'depriving them of the very means to live, simply because of their 'place of birth'.⁴⁹⁴ On this basis Caney concludes that there is an overwhelming duty of justice to 'eradicate poverty'.⁴⁹⁵ But this argument fails to see that nobody is 'penalizing' the poor by respecting their legitimate institutions. Poverty is not caused by our inaction to relieve it. As Karl's examples show, no individual person has the power to alleviate poverty around the world or to bring about justice single-handedly. We should alleviate suffering whenever we can. But the questions raised by the demand for social justice are entirely different and far more comprehensive. No individual can answer them.

A similar but more sustained argument for the relative insignificance of institutions is made by John Tasioulas, who argues that as a matter of principle an institution, national or international makes little difference to our moral position. Tasioulas postulates that an authority is legitimate when its outcomes are correct, or 'when its putative subjects would likely better conform with the reasons that apply to them by treating the putative authority's directives as content-independent and exclusionary reasons for action than if they adopted some other guide'.⁴⁹⁶ Tasioulas adopts here Joseph Raz's view of authority and concludes that what matters for legitimacy is 'enhanced conformity with reason', even if it is not 'perfect conformity'.⁴⁹⁷ Nevertheless, as I have argued elsewhere,⁴⁹⁸ this is no theory of legitimacy at all. Under such a theory the structures of law have no priority. It is a theory of outcomes, not processes. But this comes at a cost. The instrumental view would perhaps see nothing wrong in Karl's usurpation of state authority, it would produce the desired outcomes. For if global poverty could be addressed through a new colonialism, then colonialism becomes a duty of justice. Caney and Tasioulas provide little argument to deflect this unattractive conclusion.⁴⁹⁹

Most philosophers would wish to retain legitimacy as a standard feature of all international law and politics. They would wish to maintain just processes. One such attempt to show that legitimacy is prior to outcomes is offered by Allen Buchanan, who specifies, contrary to Tasioulas, that 'the rules of a legitimate institution have a privileged status vis a vis our reasons for acting' and that 'their having this privileged status is not dependent on their content'.⁵⁰⁰ In his view legitimacy is less demanding than justice and it is for that reason much easier to reach.⁵⁰¹ Buchanan argues that for what he considers the 'dominant' philosophical view legitimacy justifies a 'right to rule' and requires six elements, namely that a) the institution's agents are morally justified in engaging in governance functions, b) use morally justified coercion, c) are exclusively justified in exercising coercion, d) are justified in excluding others from exercising governance activities, e) those whom the institution attempts to govern have a content-

⁴⁹³ Caney, 'Global Poverty and Human Rights: The Case for Positive Duties' in Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford: Oxford University Press, 2007) 275, at 277. I have argued that the interest theory is a very poor fit for a theory of human rights in Pavlos Eleftheriadis, 'Human Rights as Legal Rights' 1 *Transnational Legal Theory* (2010) 371. I argue there that human rights are not 'summaries of value' but institutional protections of liberty.

⁴⁹⁴ Caney, 'Global Poverty and Human Rights: The Case for Positive Duties' 283. See also Caney, *Justice Beyond Borders* 111-112.

⁴⁹⁵ Caney, 'Global Poverty and Human Rights: The Case for Positive Duties' 288.

⁴⁹⁶ Tasioulas, 'The Legitimacy of International Law' 100.

⁴⁹⁷ Tasioulas, 'The Legitimacy of International Law' 102.

⁴⁹⁸ See Eleftheriadis, 'A Theory of Jurisdiction'.

⁴⁹⁹ This problem also makes less persuasive Samantha Besson's argument that 'individual autonomy' is the legitimating ground of international law because she too fails to explain the distinct moral standing of state institutions. See Samantha Besson, 'The Authority of International Law—Lifting the State Veil' (2009) 31 *Sydney Law Review* 343, 374.

⁵⁰⁰ Buchanan, 'The Legitimacy of International Law' 83. Buchanan contrasts legitimacy to 'authority', which entails the 'right to be obeyed' as well; see for example Buchanan, 'Political Legitimacy and Democracy' 691 and Buchanan, *Justice, Legitimacy and Self-Determination* 237.

⁵⁰¹ Buchanan, 'The Legitimacy of International Law' 81.

independent moral obligation to comply with all the rules the institution impose and f) citizens have a duty not to interfere with the institution's effort to secure compliance. Buchanan considers these requirements to be too strong to apply to anything except states. A different set of requirements should apply, he thinks, to international institutions which would not include, for example, the exercise of coercion.

His argument is that in the international context political power is legitimate if it does a credible job of protecting at least the most basic human rights of those over whom it wields power, as long as it provides this protection through processes, policies and actions that themselves respect the most basic human rights and is not a usurper.⁵⁰² On the basis of these premises Buchanan postulates a 'robust natural duty of justice, which is related to a 'moral equality' principle.⁵⁰³ Buchanan's overall argument is very rich in detail and suggestive. However, it lacks clarity on one question. Why should anyone be concerned only with the *most basic* human rights and not the full range of human rights and justice? Why not consider that an situation is only legitimate if it protects all available human rights, basic or not? The problem is that if legitimacy is *less* than full justice then the paradox emerges in another form. For why should we prefer less justice than more? I don't think Buchanan's effort to elevate legitimacy on the basis of 'basic rights' can therefore succeed. His argument, however, points to the correct answer, which is in my view is an argument for the moral distinctness and priority of constitutional justice. This is the argument we find, I believe, in Kant and Rawls.

Legitimacy, for this view, concerns the way in which citizens are related to one another as free and equal. Legitimacy depends on a foundational constitutional principle of equal citizenship which protects everyone's rights to participate in a democratic process and to have equal standing before the law. The argument has been outlined in great detail by Kant, who explains that the creation of a legal order (or a 'civil condition') according to the principles of constitutional justice (or 'public right') is a natural duty of justice that binds everyone.⁵⁰⁴ Kant writes that the 'civil condition' is not simply a union for some common end, but a union which is 'in itself an end' and which is the 'unconditional and first duty in any external relation of people in general, who cannot help mutually affecting one another'.⁵⁰⁵ Setting up a constitutional order that complies with the principles of equality and reciprocity is thus the 'supreme formal condition' (*conditio sine qua non*) of all other external duties, without which no external duty is possible. The principle is necessary and formal because no empirical end can be the focus of a similar agreement: 'for, since people differ in their thinking about happiness and how each would have it constituted, their wills with respect to it cannot be brought under any common principle and so under any external law harmonizing with everyone's freedom'.⁵⁰⁶ As I read him Kant make a simple point about the priority of legitimate institutions. An effective and egalitarian legal order is a pre-condition for any other form of social justice.⁵⁰⁷

⁵⁰² Buchanan, *Justice, Legitimacy and Self-Determination*, 247 and Buchanan, 'Political Legitimacy and Democracy' at 703.

⁵⁰³ Buchanan, *Justice, Legitimacy and Self-Determination*, 85-97 and Buchanan, 'Political Legitimacy and Democracy' at 704.

⁵⁰⁴ Strictly speaking this is a 'postulate' for which no further proof is possible, see Kant, *Metaphysics of Morals*, translated by Mary Gregor, in Kant, *Practical Philosophy*, edited by Allen Wood (Cambridge: Cambridge University Press, 1996) 6:231, p. 388. For this 'postulate' see Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Mass.: Harvard University Press, 2009) 355-388. The principle is however backed by a duty of virtue of 'respect' for other human beings: 'Every human being has a legitimate claim to respect from his fellow human beings and is *in turn* bound to respect every other. Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being (either by others or even by himself) but must always be used at the same time as an end'; Kant, *Metaphysics of Morals*, translated by Mary Gregor, in Kant, *Practical Philosophy*, 6:462, p. 579.

⁵⁰⁵ Kant, 'On the Common Saying: That May be Correct in Theory, but is of no Use in Practice' in Kant, *Practical Philosophy*, trans. and edited by Mary J. Gregor (Cambridge: Cambridge University Press, 1996) 8:289, p. 290.

⁵⁰⁶ Kant, 'On the Common Saying', 8:290, p. 291.

⁵⁰⁷ I discuss these issues in greater detail in Eleftheriadis, *Legal Rights* 44-67

Rawls makes a very similar point. He tells us that the natural duty of justice to support legitimate institutions is separate but on a par with other natural duties, such as the duty of mutual aid, i.e. ‘the duty of helping another when he is in need or jeopardy, provided that one can do so without excessive risk or loss to oneself’, the duty ‘not to harm or injure another’; and ‘the duty not to cause unnecessary suffering’.⁵⁰⁸ These are horizontal relations to other persons with whom we come into contact, without having any special relationship with them. These natural duties are moral duties that apply irrespective of one’s relationship to a given state. In that sense they are ‘natural’: ‘A further feature of natural duties is that they hold between persons irrespective of their institutional relationships; they obtain between all as equal moral persons. In this sense the natural duties are owed not only to definite individuals, say to those cooperating together in a particular social arrangement, but to persons generally’.⁵⁰⁹ These duties, Rawls tells us, are owed to every person.

The cosmopolitan dimension is inherent in the argument for legitimacy. All social institutions, ours and the institutions of others, are human creations. This is why different nations and peoples are responsible for the basic structure of their own societies (and should feel a measure of shame for their failures). Success in setting up a legitimate constitutional structure is, conversely, something of value because it recognises and respects our creative and moral potential as agents. A legitimate state is, thus, not a set of ephemeral encounters, nor is it a series of agreements. Its value lies not in the goodness of the results it secures, but in that it is an attempt at securing equal respect for everyone through institutions of justice. As Rawls and Kant explain, this kind of excellence derives from justice, not goodness and it is a kind of performance, not a pursuit of any particular end.⁵¹⁰ I can show respect to people as free and equal agents, even if they are living very far away from me.

Everyone can understand the difficulties and challenges of creating and sustaining legitimate institutions. Michael Walzer, for example, has explained that the moral standing of states depends on the political communities that underpin them and on an idea of a ‘communal integrity’ which ‘derives its moral and political force from the rights of contemporary men and women to live as members of a historic community and to express their inherited culture through political forms worked out among themselves’.⁵¹¹ We do not need to accept this picture in its entirety. The moral standing of political communities has been explained by Kant somewhat more austere with the metaphor of a tree with its own trunk and roots:

‘for a state is not (like the land on which it resides) a belonging (*patrimonium*). It is a society of human beings that no one other than itself can command or dispose of. Like a trunk, it has its own roots; and to annex it to another state as a graft is to do away with its existence as a moral person and to make a moral person into a thing, and so to contradict the idea for the original contract, apart from which no right over a people can be thought’.⁵¹²

Whenever constitutional justice has been achieved I shall call the resulting set of institutions a ‘jurisdiction’. The personal duty of respect to any legitimate state that exists, however far away from us, I shall call the duty of jurisdiction. The duty of jurisdiction requires us to respect appointed officers in the host state and recognise in them the moral standing of all the co-legislating citizens and their success in setting up just or nearly just institutions. It is a natural duty that binds everyone, irrespective of their actions or the particular way in which they relate to a state. The moral basis of jurisdiction, however, has a reciprocal effect.

⁵⁰⁸ Rawls, *A Theory of Justice* 98.

⁵⁰⁹ Rawls, *A Theory of Justice* 99.

⁵¹⁰ We could perhaps say that they have ‘adverbial’ value, as explained by Dworkin in *Justice for Hedgehogs* (Cambridge, Mass.: Harvard University Press, 2011).

⁵¹¹ Michael Walzer, ‘The Moral Standing of States: A Response to Four Critics’ 9 *Philosophy & Public Affairs* (1980) 209–229, at 211.

⁵¹² Kant, Towards Perpetual Peace, 8:344, in Kant, *Practical Philosophy*, p. 318.

Jurisdiction entails the recognition of reciprocal duties owed by all states to all persons, citizens or non-citizens. Kant refers to this as the cosmopolitan right to ‘conditions of universal hospitality’. Any foreigner can claim before any state official that they be treated with respect and without violence or mistreatment:

‘What he can claim is not the right to be a guest (for this a special beneficent pact would be required, making him a member of the household for a certain time), but the right to visit; this right, to present oneself for society, belongs to all human beings by virtue of the right of possession in common of the earth’s surface on which, as a sphere, they cannot disperse infinitely, but must finally put up with being near one another; but originally no one had more right than another to be on a place on the earth.’⁵¹³

It is obvious that such a cosmopolitan duty cannot derive from a relation of citizenship. The duties are moral duties to all human beings. Our duties are to each other.

Legitimacy and international law

What does this mean for our examples? I conclude that in all cases, Karl violated his duty of jurisdiction. By usurping the functions of the political institutions of Sierra Leone he failed to show equal respect to the citizens he was trying to help. His failure was not one of outcome, but one of attitude. His very intentions failed to respect the citizens of Freetown as equals, as persons whose joint efforts create legitimate institutions with cosmopolitan moral standing. By using one’s money to impose a social ideal on them, whether they want it or not, one treats them as inferiors or as persons whose political rights can be bought or sold. What can be done about this? Does it follow that in the absence of a world state the only avenue for the legitimate pursuit of social justice is that of bilateral state relations? Is foreign policy the only option? I do not think so. International law and institutions may also enjoy legitimacy, even though it will be based on different grounds to the legitimacy of states. But to see how this is possible we need to have a new account of the legitimacy of multilateral international action and international organisations. This includes Security Council resolutions, European Union regulations and directives, International Court of Justice judgments, law-making mechanisms such as treaties, customary international law and even *jus cogens* create law. When are they legitimate?

It is obvious that there cannot be a duty of jurisdiction to international entities, since by definition jurisdiction is exclusive to a state. So the account of the legitimacy of international institutions cannot be the same one as that offered by Kant and Rousseau for the emergence of states since there is no attempt here to set up a legitimate ‘civil condition’. International bodies do not exercise the same comprehensive political powers that states do, nor do they embody the creative moral work of equal citizens. So there is no duty of jurisdiction to them. This means that the legal institutions of international law and those of a constitutional law do not compete. They have different moral purposes. The key here is again to see this again as a problem of the required respect for persons. We saw that a legitimate state has special moral standing because and to the extent to which it sets up institutions guided by just and equal moral concern. But if a state is to recognise the equal moral standing of all persons, it must also at the same time recognise the moral standing of all those outside it. They too must at least receive recognition for their efforts to set up legitimate political institutions. This is not an external duty, imposed from outside, after such foreign political entities have been formed, so to speak. It follows that our state ought to endorse a principle of the *mutual recognition of states* and the recognition of international organisations that states bring about. This is what Rawls calls the requirement of ‘democratic peace’, which applies to the mutual relations of peoples and which leads to the basic principles of international law.⁵¹⁴ These establish, among others, the principles that peoples are to be free and independent, that treaties are to be respected and that human rights are to be protected. Rawls

⁵¹³ Kant, *Towards Perpetual Peace*, 8:358, in Kant, *PP*, p. 329.

⁵¹⁴ Rawls, *The Law of Peoples*, 44-54.

says that ‘peoples are free and independent, and their freedom and independence are to be respected by other peoples’.⁵¹⁵

Kant, like Rawls, concludes that democratic peace among nations (or as he calls it ‘perpetual peace’) does not need a world state, but the ‘federalism of free states’ that come together voluntarily in creating a league of nations under international law.⁵¹⁶ Having such principles of international law is, thus, required by the natural duty of justice because domestic institutions are incomplete without them.⁵¹⁷ Respecting institutions of public international law, international organisations and treaties is a domestic duty of justice, a duty we owe to each other.⁵¹⁸ These are very general principles, whose details of course will have to be filled out, just like the details of a constitution need to be filled out by constitution-making, legislation and adjudication.⁵¹⁹ But they show how the justice of the domestic constitution and the framework of international law are elements of the same project of justice. We cannot achieve one without the other.⁵²⁰

The continuity of international law with the natural duty of justice shows that the legal obligations of international law are not dissimilar to legal obligations in domestic law. They both derive from the same argument for legitimacy. But the argument also shows that international law is not a new legal system for the world as, for example, Kelsen assumed. It is the basis for the mutual respect of all the various different legal systems, properly understood as jurisdictions, and of ever closer and deeper coordination among states, from international trade to intellectual property and environmental protection. Understood as a legitimate basis for the self-government of all peoples at the same time, international law creates a duty of justice.

⁵¹⁵ Rawls, *The Law of Peoples* 37.

⁵¹⁶ Kant, *Towards Perpetual Peace*, 8:354, in Kant, *Practical Philosophy*, p. 326. For an excellent account of the Kantian argument for international law see Amanda Perreau –Saussine, ‘Immanuel Kant on International Law’ in Besson and Tasioulas (eds.), *The Philosophy of International Law* 53. See also B. Sharon Byrd and Joachim Hruschka, ‘From the State of Nature to the Juridical State of States’ 27 *Law and Philosophy* (2008) 599-641.

⁵¹⁷ A very similar argument is made by Dworkin, when he says: ‘A state is also defective in its legitimacy when it cannot protect those over whom it claims a monopoly of force from the invasions and pillage of other peoples. Any state therefore has a reason to work toward an international order which guarantees that the community of nations would help it to resist invasion or other pressure’; Ronald Dworkin, ‘A New Philosophy of International Law’ 41 *Philosophy and Public Affairs* (2013) 1, at 17.

⁵¹⁸ A similar argument is made by Leif Wenar who notices that any more directly ‘cosmopolitan’ argument for the global scope of distributive justice fail to acknowledge the need for principles outlining the rights and duties of states in their mutual relations. In effect, if the scope of justice is the globe, then international law must be replaced by (global) constitutional law – which would rule out treaties, custom and the other standard sources of international law. See Leif Wenar, ‘Why Rawls is not a Cosmopolitan Egalitarian’ in Rex Martin and David A Reidy (eds.), *Rawls’ Law of Peoples: A Realistic Utopia?* (Oxford: Blackwell, 2006) 95-114.

⁵¹⁹ And the most taxing duty of this specification is the determination of relations with states that are not legitimate. How are just states to treat unjust states or even barbaric regimes? This is a highly contested subject of international justice. Public international law has adopted so far a most cautious or conservative stance. It does not use internal political justice as a test for international recognition or legitimacy. If what we have said above is correct, this position is unjustifiable (and to some extent contradicts other parts of international law, such as human rights law or the statute of the international criminal court). See the pertinent comments by Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law*. On the other hand, international law is not an independent constitutional order and its tools are limited. States are supposed to be self-governing. Peace and stability is unusually important. As in all public political decisions (where we make decisions that affects the lives of thousands or millions others) the consequences on others matter much more than the consequences on us. The difficulties are here genuine and deep, because policy and principle are inextricably tied together.

⁵²⁰ A theory of international law along these lines is also defended by Ronald Dworkin who argues that the aim of international law is: ‘the creation of an international order that protects political communities from external aggression, protects citizens from of those communities from domestic barbarism, facilitates coordination when this is essential, and provides some measure of participation by people in their own governance across the world. These goals must be interpreted together: they must be understood in such a way as to make them compatible’; Ronald Dworkin, ‘A New Philosophy of International Law’ 41 *Philosophy and Public Affairs* (2013) 1, at 22.

Pluralism and legitimacy

I will now turn, very briefly, to theories of pluralism. Recent arguments have made the case for seeing the relations between national law, international law and transnational law in terms of a new theoretical framework of pluralism.⁵²¹ These theories respond to the emergence of a significant body of transnational or international legal rules and scholarship. They tend to say very different things, however. One type of theory sees the problem that pluralism addresses as that of overlapping and therefore conflicting ‘legal systems’. The problem they address is effectively one of a turf war fought by the various legal systems that claim exclusive effect or authority over a territory. Such theories are implicitly or explicitly inspired by the legal positivist view of law according to which law is a hierarchy of norms or rules, the ground of which is some significant event or fact, for example a ‘rule of recognition’, as Hart argued in the *Concept of Law*.⁵²² For law to exist, Hart argued, a special structure is necessary, which he called the ‘union’ of primary and secondary norms under a rule of recognition. The emergence of law depended, he thought, on the convergence in attitude and belief of officials and other relevant persons. The unity of the law depended on the clarity of the rule of recognition. If two rules of recognition existed at the same time they would create a constitutional crisis. A crisis occasionally happens but it is a ‘substandard, abnormal case containing with it the threat that the legal system will dissolve’.⁵²³ Hart’s view on international law was that it does not meet these factual tests because ‘there is no basic rule providing general criteria of validity for the rules of international law, and that the rules which are in fact operative constitute not a system but a set of rules, among which are the rules providing for the binding force of treaties’.⁵²⁴ A similar position is offered by Joseph Raz.⁵²⁵ Raz takes the same view as Hart that states have legal systems, because a legal system requires a rule of recognition and consistent practices of officials, features that are evidently absent from international relations.⁵²⁶ In a discussion of the institutional nature of law Raz leaves it open that international law may not be a proper legal system.⁵²⁷

Starting from these or similar premises, some pluralist theories identify a conflict between the overlapping systems or their ‘rules of recognition’.⁵²⁸ They conclude that transnational law has upset the unity or order or rules assumed by legal positivism and has created radical uncertainty about what law is and where its borders lie. Some theorists welcome such uncertainty as something positive. Nico

⁵²¹ See for example Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), Roger Cotterrell, ‘Transnational Communities and the Concept of Law’ 21 *Ratio Juris* (2008) 1, Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010) and Nicole Roughan, *Authorities: Conflicts, Cooperation and Transnational Legal Theory* (Oxford: Oxford University Press, 2013). For my own criticism of pluralist theories as they apply to European Union law see Pavlos Eleftheriadis, ‘Pluralism and Integrity’ 23 *Ratio Juris* (2010) 365.

⁵²² H. L. A. Hart, *The Concept of Law*, second edition (Oxford: Oxford University Press, 1994).

⁵²³ Hart, *The Concept of Law*, 123.

⁵²⁴ Hart, *The Concept of Law* 236.

⁵²⁵ Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) 98-99.

⁵²⁶ Raz writes for example: ‘Nothing is part of a legal system unless either it is a rule of recognition of the system, or the courts ought to recognize and apply it’; *The Authority of Law* 97. Raz’s views are explored by Keith Culver and Michael Giudice, *Legality’s Borders: An Essay in General Jurisprudence* (Oxford: Oxford University Press, 2010) 41-78. See also Joseph Raz, ‘Human Rights Without Foundations’ in John Tasioulas and Samantha Besson (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 321, where Raz recognises that human rights are valid reasons for the limitation of state sovereignty but leaves it open whether the limitation is legally valid, as well as morally so.

⁵²⁷ Raz, *The Authority of Law* 105. See also Joseph Raz, ‘Human Rights Without Foundations’ in John Tasioulas and Samantha Besson (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) 321, where Raz recognises that human rights are valid reasons for the limitation of state sovereignty but leaves it open whether the limitation is also legally valid, as well as morally so.

⁵²⁸ This is well explained by Neil MacCormick who speaks of a risk of ‘constitutional conflict’ in MacCormick *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999) 102-121. See also Nick Barber, *The Constitutional State* (Oxford: Oxford University Press, 2010) 145-171.

Krisch for example, relying explicitly on Hart's theory, interprets recent developments towards the strengthening of international and transnational legal structures as a challenge to law's unity or 'anchor'.⁵²⁹ He advocates an alternative 'pluralist' theory which explicitly 'eschews the hope of building one common, overarching legal framework that would integrate postnational governance, distribute powers, and provide for means of solving disputes between the various layers of law and politics'.⁵³⁰ He believes that the division of labour between the different domains should be set by each domain by itself, without a 'common legal point of reference to appeal to for resolving disagreement'.⁵³¹ It is very hard to place these arguments against any political theory of global justice. These arguments entail, for example, that a stronger state could lawfully force a constitutional position on another state or a stronger court on a weaker court, without any legal redress. All such things contradict established ideas about international law. More generally, I cannot see how 'fragmentation' or, more appropriately, incoherence is to be welcomed and reconciled with legitimate institution. Without a coherent institutional structure to speak of, every argument about the merits of any institutions will be futile. Even the debate on global justice would become impossible, because no institutional structure would be available to guide us.

But perhaps the most obvious flaw in Krisch's arguments is his narrowness of scope. He sees only two options for accounting for postnational or transnational law, one being the appropriation of constitutional architecture for the globe and the other the abandonment of any attempt at coherence. These are the two sets of theories that Krisch discusses in his book as respectively the 'constitutional' view and the 'pluralist' view.⁵³² The mistake is forced, in my view, by the theoretical framework he adopts from Hart and Raz. If you believe in a rule of recognition, it either exists or it does not. But as I have argued in this chapter a more sophisticated account of law can account for international legal structures with a moral dimension. This is how we sought to explain the legitimacy of international and therefore global law.

Some theories of pluralism have indeed departed from the Hartian paradigm and have been much more successful. Although not explicitly about pluralism, Ronald Dworkin's view of international law, searched for the grounds of international law not in any kind of 'rule of recognition', but in arguments of political morality.⁵³³ It therefore offered a glimpse of a much righter idea of 'democratic peace'. Other theories addressed pluralism directly. Nicole Roughan, for example, begins by rejecting the legal positivist analysis of Raz (and Tasioulas).⁵³⁴ She proposes the idea of 'relative authority' or relative claims to legitimacy, according to which 'when there are multiple *prima facie* legitimate authorities in interacting or overlapping domains, and there is no outweighing reason to have just one singular authority, then those *prima facie* legitimate authorities can have only relative authority and must coordinate or cooperate or tolerate one another in order to be legitimate for their subjects'.⁵³⁵ The distinctness of this argument is that it seeks the unity of law and the legal order not in a 'rule of recognition' or the creation of a positive 'authority' by some kind of fact, but in considerations of substantive practical reasoning, including the questions of legitimacy and authority. On the basis of this

⁵²⁹ Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010) 11.

⁵³⁰ Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010) 69.

⁵³¹ Krisch, *Beyond Constitutionalism*, 69. Nick Barber similarly welcomes this kind of incoherence suggesting that it is sustainable if the resulting conflicts remain unresolved indefinitely: '[I]nconsistent laws need not demand inconsistent action; the constitutional dilemma can remain unresolved, provided that each side exercises restraint'; Barber, *The Constitutional State* 170.

⁵³² See Krisch, *Beyond Constitutionalism*, 23-24.

⁵³³ See Dworkin, 'A New Philosophy of International Law'.

⁵³⁴ She states that her book sets out to: 'to treat plurality and relationships between legal orders/institutions/officials/norms as matters concerning legitimate authority, and thus as being part of any question about the existence and/or legitimacy of authority over subjects'; Roughan, *Authorities*, 3.

⁵³⁵ Roughan, *Authorities* 158.

practical view of law she can explain how relative authority 'is simply a claim to have legitimate authority through appropriate relationships with other authorities'.⁵³⁶ Her argument is not about legal systems, but about the substantive content of law as an attempt to meet the tests of justice and legitimacy while regulating social life.

It must be evident now that a theory of legitimacy of international law depends partly on having a clear view of the practical nature of law and of the way in which states and international institutions create parallel structures of legitimacy. For the positivist point of view, by contrast, an overlap or a pluralism of 'legal systems' is always an anomaly because it undermines the hierarchy and exclusivity that all law requires. The problem arises because in their zeal to present law as a content-independent order of rules, legal positivists close their eyes to the specific moral aims of the international legal order. As I argued above, the tasks of the international legal order are entirely different to those of the domestic legal order. International institutions never seek to approximate those of a state. Because international law and state law have different aims they can come together as a mutually supportive system of reasons.

We can therefore say that pluralism is correct in this sense. International law is a legal order, meaning it provides standards of conduct for international actors and individuals within a systematic intellectual framework. State law, however, is more than a legal order. It is also a *jurisdiction*, which creates a system of offices and institutions securing the comprehensive determination and enforcement of standards of conduct. Only jurisdictions claim sovereignty or 'dominion' in this way. International law does not. This also means that the relationship between international laws and domestic law can be understood as one of 'dualism', not monism. How they are to fit in a singular case is just another interpretive problem for legal reasoning.⁵³⁷ It is to be resolved according to the internal principles of constitutional law, international law and transnational law. The answer is not to be found in an extra-legal search for foundational but not legal events or patterns of power. The task of reconciling domestic and international law is just another doctrinal puzzle, whose answer is to be found through the ordinary toil of legal reasoning.

Conclusion

The debate on legal pluralism and the legitimacy of domestic and international law is the same debate. And it is also a debate that, as I argued above, is crucial for global justice. A theory of legitimate political institutions is prior to any theory of global distributive justice. This is because a fair distribution needs a legitimate agent of distribution in the form of a complete set of executive, legislative and adjudicative institutions. I defended such a theory of legitimacy on the basis of a Kantian natural duty of justice to set up an egalitarian civil condition, where the equal status of all persons is recognised and protected. In the argument that I defended, the priority of the equal moral standing of all persons as citizens, leads to a basic theory of constitutional justice for the domestic state, but also to the first principles of international law as the law bringing together different jurisdictions under terms of reciprocity and mutual respect. A just distribution of resources for the peoples of the world is not therefore a constitutional principle of international law. It ought to become, I believe, a chosen *end* of international law, through the adoption of appropriate agreements and measures within international law, starting perhaps from the 'millennium goals' for global development and the climate change agreements as appropriate starting points and continuing with even more ambitious multilateral treaties. We must not, even if we could, take an illegitimate shortcut to arrive at a desired result, even if this is about social justice. The legitimacy of law and institutions takes priority over any social ideal.

⁵³⁶ Roughan, *Authorities*, 158.

⁵³⁷ I show how the English courts have been doing just this in Eleftheriadis, 'Pluralism and Integrity' 380-385.