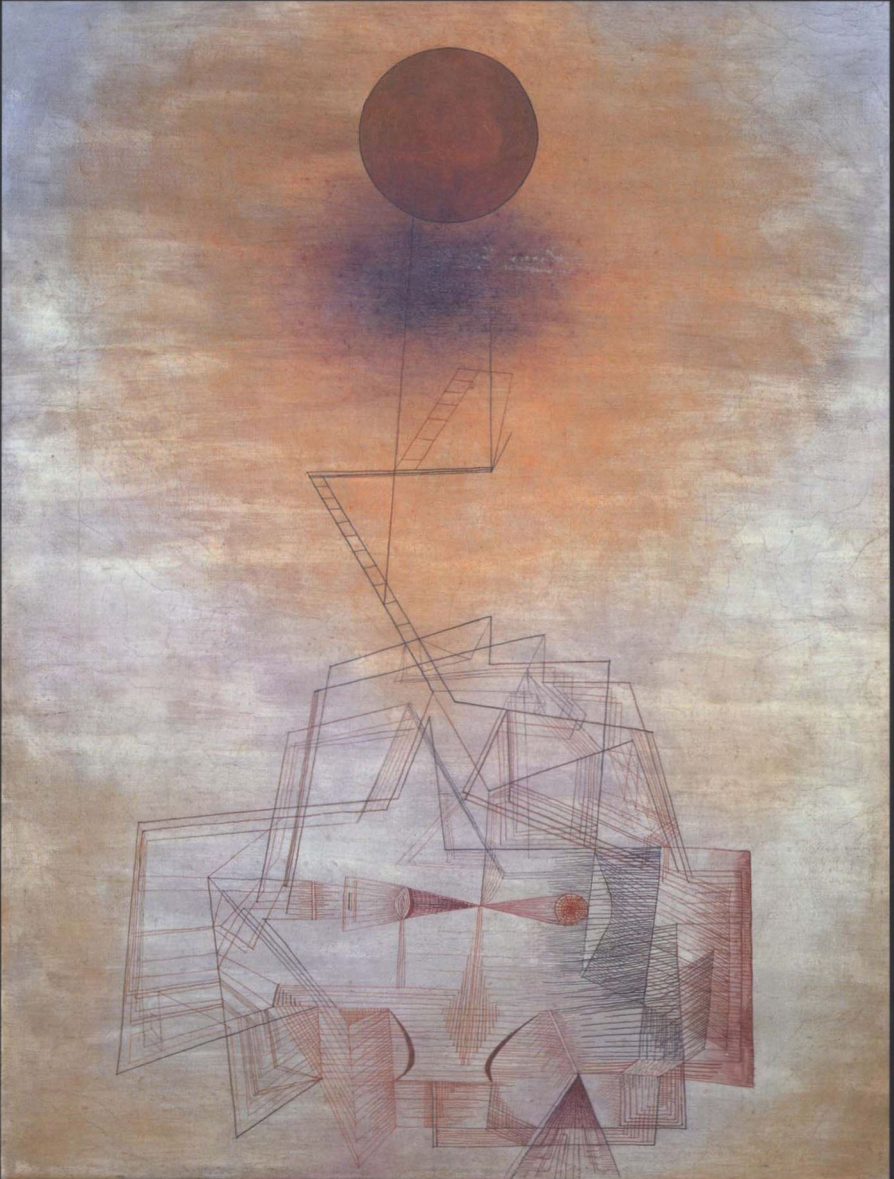


Rainer Forst

THE RIGHT TO JUSTIFICATION



ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE

Rainer Forst

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Translated by Jeffrey Flynn



ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE

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THE RIGHT TO JUSTIFICATION

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PREFACE

It is an old but still current idea that the impulse underlying the outrage against injustice, as well as the analysis and condemnation of injustice that critically reflect that impulse, may have a *ground* that philosophy might be able to reconstruct. Doubts about that undertaking are just as old, as expressed by Thrasymachus in Plato's *Republic* when he challenges Socrates by claiming that justice is merely whatever the powerful say it is. If I follow Socrates rather than Thrasymachus here, it is only because, as telling as the latter's claim is, it can only be true as a critical claim, and so the question of the "firm ground" of justice is posed anew. And even with all the distance between my constructivist answer to this question and Plato's, I still share the Platonic ideal insofar as I not only have the view that there is a reasonable justification for a conception of justice, but also that it goes back to a *single* root—that is, that the various aspects of justice in social and political contexts, and even beyond national borders, ultimately refer to a normative core: the one basic human *right to justification*. This thesis—perhaps a risky one in an age of philosophical pluralism—is what I attempt to defend in this book.

I have collected here the most important efforts I have undertaken toward systematically redefining the discourse of justice since my book *Contexts of Justice* (2002, originally published in German in 1994). The productive reception of that book motivated me to further develop its approach in a variety of ways. Along the way I have had countless opportunities to discuss my

ideas with numerous people and have learned a great deal from their questions and objections. I cannot do justice to all of them here (justice has a transcendent dimension here too), but would like to explicitly thank some of them. First of all, I must mention Jürgen Habermas and Axel Honneth, who have for so long productively influenced my thought. Stefan Gosepath and Charles Larmore have also been indispensable interlocutors; furthermore, I am particularly grateful to Richard J. Bernstein, Nancy Fraser, Matthias Iser, Rahel Jaeggi, Thomas Pogge, and Martin Saar. I also received important suggestions, primarily in the form of written comments, from Bruce Ackerman, Joel Anderson, Seyla Benhabib, Norbert Campagna, Jean Cohen, Simon Critchley, Felmon Davis, John Ferejohn, Alessandro Ferrara, Andreas Føllesdal, David Heyd, Otfried Höffe, Regina Kreide, Chandran Kukathas, Will Kymlicka, Matthias Lutz-Bachmann, Steve Macedo, Jean-Christophe Merle, Frank Michelman, Glyn Morgan, Sankar Muthu, Glen Newey, Linda Nicholson, Andreas Niederberger, Peter Niesen, Frank Nullmeier, David Owen, Arnd Pollmann, Sanjay Reddy, Andy Sabl, Thomas M. Schmidt, Reinold Schmücker, Bert van den Brink, Jeremy Waldron, Melissa Williams, Lutz Wingert, and Véronique Zanetti.

As these expressions of gratitude show, nobody thinks within a socially empty space of reasons; there can be no such thing. Hence, I also want to add a special word of thanks to my family for more than I can express here. The book is dedicated to my parents, in memory of my deceased father.

* * *

Addendum to the English Edition: It is a great pleasure for me to have my book appear in English. For many years now, the English-speaking community of scholars and students has been my second home, sometimes even my first. I am glad to be able to continue these conversations.

I am particularly grateful to Amy Allen for including the book in her important series “New Directions in Critical Theory” and for all her support. Thanks also to Wendy Lochner for her superb editorial work. A special word of thanks goes to Jeff Flynn, who translated the new essays of the book brilliantly, and thoroughly edited the ones that had already been published in English. Jeff is a political philosopher himself, and his philosophical and linguistic expertise greatly improved on my texts. What else could an author wish for? Thanks, finally, also to Julian Culp, who provided helpful comments on all the newly translated chapters.

TRANSLATOR'S NOTE

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Chapters 5, 6, 7, 11, and 12 were originally written in English by the author. Chapter 6 in the original German edition was replaced by the essay that appears here as chapter 6. Chapter 2 was originally translated by Ciaran Cronin and chapter 9 by Jonathan M. Caver. All of the essays previously published in English have been edited for the present volume. Permission to reprint these texts is gratefully acknowledged.

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INTRODUCTION: THE FOUNDATION OF JUSTICE

Philosophy has defined human beings in numerous ways: as beings that are endowed with reason (*animal rationale*) and equipped with the unique capacity for language (*zoon logon echon*), that are also finite and limited, “flawed beings,” and last but not least as social (*animal sociale*) and political beings (*zoon politikon*). In my view, what emerges from the combination of these definitions is the image of human beings as *justificatory beings*. They not only have the ability to justify or take responsibility for their beliefs and actions by giving reasons to others, but in certain contexts they see this as a duty and expect that others will do the same. If we want to understand human practices, we must conceive of them as practices bound up with justifications; no matter what we think or do, we place upon ourselves (and others) the demand for reasons, whether they are made explicit or remain implicit (at least initially). From this perspective, we can call a social context “political” when human beings find themselves in an “order of justification,” which consists of norms and institutions that are to govern their lives together—in cooperation as well as in conflict—in a justified or justifiable way. The most important normative concept that applies to this order is that of *justice*. Overarching every form of political community, it not only demands reasons for why someone has or does not have certain rights or goods, but first and foremost asks how it is

determined who has a claim on what and how the participants, understood democratically in their dual role as authors and addressees of justifications, stand in relation to one another.

Narrowing in on the concept of justice, we see first of all that its core meaning is found in its fundamental opposition to arbitrariness:¹ whether it be arbitrary rule by one individual or one part of the community (a class, for instance), or particular structures that conceal and reproduce privilege, or social contingencies that are accepted as fate. Arbitrary rule is rule that lacks legitimate grounds, and when struggles against injustice arise they are directed at such forms of domination, which can take shape in a more or less personalized form.² The fundamental impulse that runs counter to injustice is not primarily that of wanting to have or have more of something, but that of wanting to no longer be oppressed, harassed, or have one's claims and *basic right to justification* ignored. This right expresses the demand that there be no political or social relations of governance that cannot be adequately justified to those affected by them. In whatever specific or "thick," situated language this indignation—this protest—is also expressed, at its core it always goes back to the right not to be subjected to laws, structures, or institutions that are "groundless," that is, that are regarded as an expression of power or rule without sufficient legitimation. The demand for justice is an emancipatory demand, which is described with terms like fairness, reciprocity, symmetry, equality, or balance; putting it reflexively, its basis is the claim to be respected as an agent of justification, that is, in one's dignity as a being who can ask for and give justifications. The victim of injustice is not primarily the person who lacks certain goods, but the one who does not "count" in the production and distribution of goods.

In the following, when I argue for the thesis that we should understand political and social justice on the basis of a single right—the right to justification—and that we should construct corresponding principles for the basic structure of society accordingly, this argument is based on the conviction that this is the best possible way to philosophically reconstruct the Kantian categorical imperative to respect other persons as "ends in themselves." I first attempted to interpret discourse theory this way in *Contexts of Justice*, showing how a recursive analysis of the claims to reciprocal and general validity made by norms of justice results in the principle for discursive, reciprocal, and general justification of those claims in different contexts.³ I continue that here, and in doing so it is particularly important to show that a formal pragmatic reconstruction must not disregard the "ultimate" normative question of how a duty to justify can itself be justified within moral philosophy.

There are, however, other possible ways of approaching the right to justification reconstructively, ways that come closer to historical or social-scientific perspectives. One could combine an analysis of the most important discourses about political and social justice with an investigation of the social conflicts that produce those discourses, such that it becomes apparent in what sense the question of justification is posed within such struggles. This would show that in all concrete legitimations of given social relations that are and have been provided, questioned, revised, or rejected, demanding the right to justification—and the corresponding normative status of persons—represents a kind of deep normative grammar of justice. One does not need a Platonic dialectical ascent from the cave to the realm of ideas in order to reconstruct this, but only a reflexive perspective on historical and contemporary politics: at the center of the specific narratives of justification that explain and support social relations, those narratives' own claims and the possibility of challenging them with reference to the criteria of reciprocity and generality form the central dimension of the quest for justice. In my book *Toleration in Conflict*, I attempt to show historically and systematically the extent to which the critique of intolerance as well as one-sided groundings of toleration display a dynamic of justification such that the reflexive foundation of toleration, which itself rests on the principle of reciprocal and general justification, ultimately proves to be the superior one—without it being tied to an overly strong thesis dependent on a philosophy of history.⁴ I shall not undertake such a comprehensive historical course once again here; nevertheless, the conviction that the right to justification is not just a rationalistic contrivance but a historically operative idea is evident throughout the text—for example, when I take up the question of the intercultural validity of this right. Starting from the central idea of a basic moral right to justification, which must be situated in political contexts of justice, I attempt in the following chapters, if not to cut through, at least to loosen some of the Gordian knots of classic and contemporary debates. I will outline them here in brief.

Two Pictures of Justice

The thinking about social justice, specifically distributive justice, is—in Wittgenstein's terms—held “captive” by a conventional picture that prevents it from really getting to the heart of the matter.⁵ This results from a particular interpretation of the ancient principle “to each his own” (*suum cuique*), which concentrates on what individuals are due in terms of a just

distribution of goods. This leads to either reasoning in relative terms through a comparison of each person's provision of goods, or it leads to the question of whether individuals have "enough" essential goods irrespective of comparative considerations. These distribution and goods-centered perspectives are legitimate, of course, since distributive justice certainly involves allocating goods; nevertheless, this picture not infrequently ends up cutting out essential dimensions of justice, such as, first, the issue of how the goods to be distributed come "into the world," that is, questions of production and how it should be justly organized. But even more so, second, the political question of who determines structures of production and distribution—and in what way—is thereby ignored, as if there could be a giant distribution machine that would merely have to be programmed correctly. But such a machine is not acceptable not simply because justice would then no longer be understood as an achievement of subjects themselves, which would make subjects into passive recipients; in addition, and this is the third point, this idea neglects the fact that justifiable claims to goods are not simply "given," but can only be established discursively in appropriate procedures of justification. Fourth, a perspective fixated on goods also has the potential to block out the question of injustice, for insofar as it concentrates on a shortage of goods to be rectified, those who suffer from privation as a result of a natural disaster are viewed like those who suffer the same lack of goods from economic or political exploitation. To be sure, these are both rightly viewed as cases in which help is applicable, though in one case as an act of moral solidarity and in the other as an act of justice, the latter differentiated according to one's involvement in conditions of exploitation and injustice and according to the means at one's disposal to change these. If one ignores this difference, one can end up in a dialectic of morality that views an act as generous aid when it is actually required by justice. Autonomous persons are thereby turned from subjects into objects of justice, and then become objects of aid or charity.

For these reasons, precisely when it is a question of distributive justice, it is essential to see the *political* point of justice and free oneself from the false picture, which highlights only the quantity of goods (as important as that surely is). In accord with a second, more appropriate picture, which conveys the fundamental impulse against arbitrariness, justice—which always includes an analysis of injustice—must aim at intersubjective relations and structures, not at a subjective or supposedly objective provision of goods. Only in this way, by considering the *first question of justice*—the justifiability of social relations and the distribution of the "power of justification" within a political context—is a radical conception of justice possible: one that gets to

the roots of social injustice. This insight is at the center of a *critical theory of justice*, whose first “good” is the socially effective power to demand, question, or provide justifications, and to turn them into the foundations of political action and institutional arrangements. This “good,” however, cannot be “delivered” or “received,” but must be discursively and collectively constituted. Only a critical theory of *relations of justification* can show whether and to what extent this is possible or impeded.⁶

Procedural and Substantive Justice

If one follows this second picture of justice toward a discourse theory of political and social justice, then the suspicion easily arises that it is a “purely” procedural theory, which can only lay down procedures for establishing just relations and otherwise stays out of substantive discussions of justice. At best it acts as a “neutral” mediator, at worst it is not even useful since it has no position of its own. However, this is a misconception, for a variety of reasons.

First of all, the discourse theory of justice developed here does not rest on a “neutral” foundation but on a moral principle of justification, that is, on the substantive individual moral right to justification. This is, if one prefers, the *fundamentum inconcussum* that is indispensable even in a postmetaphysical age and must be reconstructed with appropriate means. That is why a theory like this cannot shy away from using the classic concept of practical reason (in altered form); for what other capacity could enable human beings to recognize, understand, and apply the principle of justification, that is, to know that they have the duty to justify (in particular contexts)? The “ultimate” foundation of constructivism cannot itself be constructed, but must prove itself as being appropriately reconstructed in an analysis of our normative world.⁷

Second, from this “foundation” it is possible to “construct” a substantive idea of human rights as rights that no one can with good reasons withhold from other persons. This conception remains dependent on a legal-political transformation into basic rights and on concrete interpretations, using appropriate procedures. However, it is still the principle of justification, with the help of the criteria of reciprocity and generality, that allows statements to be made about such indispensable rights. This constitutes the core of what I call *moral constructivism*.⁸

It is also important to see that, third, in contrast to a pure consensus theory, the criteria of reciprocal and general justification make it possible in