

## Global Distributive Justice? State Boundaries as a Normative Problem

-- Draft Paper, not for circulation, all comments most welcome --  
for Conference on  
**Constitutionalism In a New Key?**  
**Cosmopolitan, Pluralist and Public Reason Oriented**  
**Berlin January 29, 2011**

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[A note on the interface between this paper and some broader issues of the conference:

We might observe tensions in several disciplines from various forms of statism or nationalism, toward more cosmopolitan or global perspectives. To some, this uneasy fit with 'normal science' indicate that a paradigm shift is imminent. Consider political science, where *Methodological* or *Explanatory Nationalism* (discussed by eg. Zurn 2002, Pogge 2008) gives primacy to sovereign nation states as sole or main actors to explain international or global affairs. This seems increasingly insufficient as various non-state private and public actors, and weak/wannabe states emerge as somewhat independent actors. In legal scholarship, *Constitutional Nationalism* might describe the (family of) view that the legality of the international legal system is solely or mainly based on the consent of sovereign equal states, and/or that any 'global constitution' is (therefore) thoroughly supervenient on national constitutions. This tradition is also questioned, or challenged, not least by many participants at this conference (and cf Petersmann 2006; Klabbers, Peters and Ulfstein 2009; Kumm 2009, Walker 2003).

The present paper explores and challenges 'nationalism' neither in political science nor in law, but a third discipline, normative political theory: *Normative Nationalism*, which holds that we have stronger obligations toward compatriots than among other human beings globally (reflections go back at least to Sidgwick 1919 etc). These three new 'paradigms' in different disciplines may be taken as contributions – yet to be reconciled - toward a broader, intellectually stringent reconfiguration of our perceptions about our 'partially globalized' world (Keohane 2001, etc, harking back to Grotius etc). ]

### A: Introduction

Should state borders matter for claims of distributive justice?<sup>1</sup> Many theories of justice hold that different norms of distributive justice should apply to domestic constitutions and other basic institutions, than to the international and global rules and institutions. What is it about states, their constitutions or the territorial borders of their jurisdiction that make such a normative difference? Answers to this question may also help us understand *why* whether there is a 'constitutionalisation of international law' is an important question: **What kinds of 'constitutionalisation'**

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<sup>1</sup> The current draft builds on arguments previously presented in Follesdal 2011; Follesdal 2009, Follesdal 2011 . I am grateful to participants at a PPE workshop in New Orleans February 2009, and to Tom Christiano, Geir Ulfstein and Andrew Williams for further very helpful and constructive comments.

**there are at levels above the state may affect the standards of justice, and the sorts of claims foreigners have on such shared institutions.**

The tangled web of domestic and international institutions has a massive impact on individuals, their life plans and opportunities, albeit often indirectly and surreptitiously. Many will agree to this claim, and furthermore agree that this global order is drastically unjust. It must be better governed, they demand, be it by global democratic arrangements (Archibugi, Held and Kohler 1998), or other procedural constraints familiar from (domestic) constitutional values; by the recognition of international human rights obligations (Pogge 2008, Caney 2005), or both, with careful attention to potential conflicts between these normative standards (Gould 2004, Goodhart 2008).

But what standards of distributive justice should be brought to bear on such institutions that span state borders? Consider that many thoughtful citizens, intellectuals and academics are committed to a presumption of political or economic *equality* among compatriots. Perhaps most famously, John Rawls argued at length that if we are committed to *political* equality among citizens in the form of equal political rights, our shared political, social and economic institutions – the domestic ‘Basic Structure’ (BS) should satisfy a „Difference Principle:“ they should engender equal life time shares of economic wealth, unless incentives to some would also increase the amount enjoyed by those economically worse off. Many such domestic egalitarians hesitate to make similar claims to equal shares to benefits among persons *globally*. In particular, they argue that *other* normative standards of benevolence and justice are appropriate for the “Global Basic Structure” – if there is one - than for a domestic basic structure. Citizens and foreigners may have sound normative claims on the international community that the GBS satisfies the *minimum vital needs* of all, e.g. in the form of international obligations to secure certain human rights or to otherwise reduce or remove extreme global poverty. With regard to claims beyond that threshold, views diverge.

Some authors hold that foreigners have no further claims on shared international institutions to equal or other relative distributive shares: there are no further limits on permissible global inequalities. Let us call such arguments ‘Anti-Cosmopolitan.’ The claims include some minimum international obligations, including social and economic human rights, but reject distinctly *distributive* principles of justice. Proponents of such views include John Rawls, Thomas Nagel, Samuel Freeman, and Michael Blake (Rawls 1999, 38, 105; Nagel 2005; Freeman 2006; Blake 2001, cf Barry and Valentini 2009). Typically, Nagel holds that “although absolute deprivation is an international concern, relative deprivation is not.” (Nagel 2005, fn 11 p 126). Further egalitarian norms should *not* regulate the GBS:

Egalitarian justice is a requirement on the internal political, economic, and social structure of nation-states

and cannot be extrapolated to different contexts, which require different standards. (Nagel 2005, 114-5)

What is it about states, their constitutions, other main institutions or their borders, that can justify such a disjunct in the normative claims individuals have against each other?

The present paper addresses parts of this normative puzzle, largely phrased in terms of constitutionalism. Indeed, one of the more interesting Anti-Cosmopolitan arguments may hold that it is domestic *constitutions* and their territorial borders that grant normative plausibility to citizens' further distributive claims. This is one reason why the discussion about the constitutionalisation of international law may have important normative implications: "to what extent the international legal system has constitutional features comparable to what we find in national law." (Klabbers, Peters and Ulfstein 2009). What are the implications, if the international legal order is or becomes relevantly similar to domestic rules? For instance, Anne Peters speaks of 'global (or international) constitutional law': "the most important norms which regulate political activity and relationships in the global polity (consisting of states and other subjects of international law)." (Peters 2006, 582). Its rules and practices include, *inter alia*, the treaties and practices that define sovereignty, the rules of the World Trade Organization, and *erga omnes* obligations. Might the same normative principles of *distributive* justice apply to one or more global constitutions, as to domestic constitutions?

Section B explores the various reasons offered for why institutions, and a constitution and a domestic 'basic structure' in particular, supports claims to *distributive* justice among those subject to these rules and practices. Section C considers, only to affirm, that the global set of institutions shares the salient features to such an extent that *some* principles of *distributive* justice would seem to hold also among foreigners. Various objections by anti-cosmopolitan authors are presented and criticised.

The upshot of my discussion in this paper is largely negative: I challenge the reasons anti-cosmopolitans offer against bringing distributive principles to the Global Basic Structure. While the best justified principles of domestic and of global justice may diverge: state borders, shared political, legal, social or constitutional practices and rules may matter for the substantive normative claims of justice. But the arguments considered here do not suffice.

### ***The sort of Cosmopolitanism worth exploring: Neither a global difference principle, nor a unified global government***

I assess these criticisms against a liberal cosmopolitan theory with certain salient features (cf Buchanan and Powell 2008, 349). Firstly, it remains an open question what relative shares individuals can claim: the cosmopolitanism need not insist on

equal shares or a global difference principle. The main point is that the principles of global distributive justice are “*comparative* principles concerned not merely with how individuals fare or are treated in absolute terms, but also in comparison with others.” (Abizadeh 2007).

Secondly, this cosmopolitanism is *not* committed to ‘constitutional (or institutional) cosmopolitanism’ – that is, a view that the world order should predominantly have centralized institutions with global scope in the form of a universal republic, rather than a multi-level, federal or confederal legal order. Such views would have to be defended comparatively, showing that alternative allocations of legal power and authority are less likely to secure the requisite standards of global distributive justice. An obvious objection to a global constitution with a centralised government is that it runs too high risks of turning into a dictatorship, with catastrophic consequences for many individuals.

## **B: When are institutions subject to Principles of Distributive Justice?**

In the following I explore what reasons John Rawls and others who draw on his thoughts regard the ‘basic structure of society’ and why it is ‘a special case of the problem of justice’. Rawls defines the ‘basic structure’ (BS) as the set of “major social institutions.” They include “the political *constitution* and the principal economic and social arrangements” (Rawls 1971, 6-7, my emphasis).

The basic structure is a public system of rules defining a scheme of activities that leads men to act together so as to produce a greater sum of benefits and assigns to each certain recognized claims to a share in the proceeds.

What a person does depends upon what the public rules says he will be entitled to, and what a person is entitled to depends on what he does. (Rawls 1971, 84)

Rawls held that principles of justice for institutions are different from those for individuals’ actions, and from those for private associations. Why is this so? Answers to this question are important to assess whether a domestic constitution is relevantly different from the rules and institutions of a global constitution, so as to make principles of distributive justice applicable only for the former, but not to international rules and institutions.

### ***An aside: not only when interaction already is fair cooperation***

Some authors have argued that a focus on the BS entails that principles of distributive justice only apply to institutions that facilitate not only interaction but *fair cooperation*. If a BS is defined as a constitution and other institutions that jointly engender *fair* terms of cooperation, there is obviously not a GBS – and indeed, hardly any domestic BS. Thus Amartya Sen criticized Rawls’ theory for excluding disputes

among the intolerant from “the purview of the so-called political conception of justice” (Sen 1992, 77). Thomas Nagel has recently argued similarly, that demands of distributive justice – eg. of the sort elaborated by John Rawls – only apply if the institutions subject individuals to norms on terms that treat those subjects as “putative joint authors of the coercively imposed system” (Nagel 2005, 128). This requirement has perverse counterintuitive implications, as noted by Abizadeh: “The closer a tyrant’s rule approaches pure slavery, the less it can be criticized for being unjust.” (Abizadeh 2007, cf Cohen and Sabel 2006). In response to this observation, I submit that the most plausible understanding of a BS to which principles of distributive justice should apply, is not that only *just* such structures are subject to such standards. The relevant requirement is rather that the “system of social interaction *could*, at least in principle, become ... a fair system of social cooperation for mutual advantage.” (Abizadeh 2007, my emphasis).

### ***Claims based on special features of institutions in general - including constitutions***

This response begs an obvious question: what is it about institutions – and in particular about the set of institutions included in the BS, such as a constitution – that justify principles of distributive justice? Thus Liam Murphy asks whether special criteria are appropriate to evaluate institutions generally, compared to other modes of distribution such as individuals’ isolated action (Murphy 1999, 257).

#### ***- A Constitution Assigns Independently existing Responsibility***

One reason why some normative theories find this question pertinent might be if they regard a constitution and other institutions only as instruments to implement certain duties, specifiable and justified independent of our institutional relationships (Nagel 2005). For instance, the main role of the institutions that a constitution establishes may be to render our individual obligations of mutual aid more effective, and leave us more room to carry out our other duties and pursue our own projects. One such argument may be that of “Assigned responsibility”: “special duties are devised whereby the moral community’s general duties get assigned to particular agents.” (Goodin 1988, 678). On this line of thought, the role of states in particular is to divide the general responsibility we have toward everyone else: “National boundaries simply visit upon those particular state agents special responsibility for discharging those general obligations vis-a-vis those individuals who happen to be their own citizens.” (Goodin 1988, 681-82).

Some seem to hold that it is only such considerations that led John Rawls to argue for taking the BS of society as a central subject matter. Thus Liam Murphy holds that such institutions allow a distribution of moral labour: the BS of society secures ‘background justice’, leaving individuals free to pursue their own self interest, economic and other, largely unrestrained (Murphy 1999, cf. Cohen 1997, 16; Julius 2003, 326-7). Such interpretations of Rawls have been criticized thoroughly (Pogge 2000, Scheffler 2006); *inter alia* because Rawls does not allow individuals to be

completely relieved of duties of justice in their private capacity. In the following we explore *other* reasons to hold that the constitution and other institutions of the BS have normative implications on the claims individuals may hold against each other with regard to the benefits of these institutions.

### ***- A Constitution Resolves Coordination Problems***

Some institutions may help provide beneficial conditions for interaction – such as property rights and contractual obligations (Nagel 2005, 137). Such institutions increase our opportunity space, and hence possibly our duties. Why is this? Certain institutions help participants resolve several collective action problems (Murphy 1999, 253; Buchanan and Keohane 2006, 408; Pettit 2000, 110-13). In particular, several institutions may address assurance problems among individuals who are uncertain about the actions of others, and this may affect the content of their moral duties.

Consider individuals who are motivated by what John Rawls called a *Duty of Justice*:

This duty has two parts: first, we are to comply with and to do our share in just institutions when they exist and apply to us; and second, we are to assist in the establishment of just arrangements when they do not exist, at least when this can be done with little cost to ourselves. (Rawls 1971, 334)

For citizens' duty of justice to apply, and for them to have a political obligation to obey existing rules, they must have good reason to believe that the rules are normatively fair, and that they are generally complied with by others – thus Rawls notes that even with a sense of justice,

compliance with a cooperative venture is predicated on the belief that others will do their part, [so] citizens may be tempted to avoid making a contribution when they believe, or with reason suspect, that others are not making theirs. (Rawls 1971, 336)

Indeed, general compliance is required for institutions – including a constitution - to exist: an institution only “exists at a certain time and place when the actions specified by it are regularly carried out in accordance with a public understanding that the system of rules defining the institution is to be followed.” (Rawls 1971, 56).

Institutions established by a constitution can provide such assurance in several ways, including (democratic) decision making, independent courts, monitoring of compliance, and public enforcement eg by means of sanctions. If such institutions are in place, they reduce the risks of free riding and other forms of partial compliance. This removal of risks affects the content of individuals' duties compared to situations of partial compliance or other circumstances of unjust institutions. This may be one

reason for agreeing with Nagel that the sanction mechanisms that states employ may make the BS normatively significant (Nagel 2005). However, such sanctions may not always be required.

Such arguments may help understand why institutions – and domestic constitutions – should be regulated by special normative standards. But these coordination benefits still do not suffice to support claims that substantive principles of *distributive* justice apply to such institutions.

### **- Domestic Constitutions have Special Effects**

Authors following Rawls often argue that the BS affects the normative claims its subjects have on it and among themselves. One central premise is that the BS is a *social construction* in important senses. It could be otherwise, that is: alternative BSs will allocate legal powers, benefits and burdens differently among its subjects, and thus engender different distributions of such goods and bads. The power to create and shape it is of great value to those who are able to so affect the design of the BS.

### **Impact on individuals' starting points, opportunities and capability sets**

The BS has a large impact, in several ways. The benefits of the BS have drastic influence on individuals' life chances. Even taking due account of the fact of pluralism among citizens as to their conception of the good life, the effects of the BS – especially those of the constitution – such as legal powers, career opportunities, income and wealth – all have profound effects on individuals' objective and subjective level of well being.

### **Impact re aspirations, life plans**

A second more profound and challenging form of impact of the BS is on individuals' conception of the good life, expectations and aspiration levels. This creates a further normative challenge under pluralism: how should such structures affect preference formation, when subjects partly for this reason will disagree about conceptions of the good life?

### **The Basic Structure Constitutes Social Primary Goods**

A third aspect of the BS worth noting is that it creates *new goods* through institutionalised cooperation. Thus Rawls specifies certain 'Social Primary Goods,' (SPG) as various legal powers and immunities:

mainly features of institutions, that is, basic rights and liberties, institutional opportunities, and prerogatives of office and position, along with income and wealth. (Rawls 1988).

Many of these goods are created by the constitution. Their importance thus illustrate that the BS does not only serve instrumental functions in allocating independently

existing duties among individuals: The question of how such goods should be distributed only arises for those who live under the constitution that creates them. It is only for this subject – constitutive institutions - that distributive justice arises, according to Samuel Freeman:

Basic social institutions and legal norms that make economic production, exchange, and use and consumption possible are *political products*, one of the primary subjects of political governance. It is not just fiscal policies, taxation, public goods and welfare policies that are involved here; more basically it is political decisions about the myriad property rules and economic institutions that make these policies, and economic and social cooperation as well, possible. A primary role for a principle of distributive justice is to provide standards (ideally to democratic citizens and their representatives) for designing, assessing, and publicly justifying the many legal and economic institutions that structure daily life. (Freeman 2006)

Even with this constitutive role of the BS, it is pertinent to ask whence the force of *egalitarian* claims - of principles of *distributive* justice, at least for a domestic BS. Some further arguments are required.

### **Constitutional and Institutional *Division of Labour*:**

One further reason to regard the BS as a special topic of justice is that it allows a certain division of labour: Rawls defends

an institutional division of labor between the basic structure and the rules applying directly to individuals and associations and to be followed by them in particular transactions (Rawls 1993, 268-9)

Samuel Scheffler calls this the *institutional* division of labour (Scheffler 2006). For our purposes it has two features. The BS includes constitutional institutions that specify and allocate legal powers among private parties and thus ‘govern the transactions and agreements between individuals and associations’ (Rawls 1993, 268).

Secondly, the BS helps citizens secure the justice of the distributive pattern that results from many uncoordinated individual actions. The indirect, small and opaque effects of any individual action make it unlikely that even individuals with a sense of justice can comprehend how they should act in order to maintain a fair distribution of benefits and burdens.. Note that the claim is not that such a division allows individuals to completely ignore considerations of justice in their day-to-day life (*pace* Murphy 1999) but that they can pursue their individual self-oriented ends fairly

and more effectively by placing the main responsibility to ensure background justice over time with the BS. Such arguments hold best under conditions of 'ideal theory', when the individuals and associations can be sure that the BS including the constitution does indeed satisfy the principles of distributive justice over time. Again note that such considerations are not sufficient to justify *distributive* principles of justice that constrain permissible inequalities.

### **Coercion of a Kind that must be Normatively Legitimate**

One further aspect of the BS is that it is maintained with a particular form of state coercion.

Agents or institutions with coercive power are often central subjects of arguments about justice. One reason is surely that considerations of justice and legitimate rule primarily arise for questions of how to regulate power and influence that is in practice inescapable, or that otherwise subject some individuals to the arbitrary will of others (Abizadeh 2007, Cavallero 2010). Such powers – for instance those expressed in a constitution - affect an individual in potentially objectionable ways when the individual's opportunity set is limited to a problematic extent, or when she is subject to domination. Lack of coercion or the opportunities of exit might in principle nullify any such claims, assuming that a baseline of no coercion, or of exit, is normatively acceptable.

The BS involves an additional aspect of the use of coercion, insofar as this coercion is claimed to be carried out 'in the subjects' name.' Thus Nagel speaks of the state that

... given that it exercises sovereign power over its citizens and in their name, those citizens have a duty of justice toward one another through the legal, social, and economic institutions that sovereign power makes possible. (Nagel 2005, 121)

What is involved in exercising power 'in their name'? I submit that one plausible explication is that a condition for the institutions and a constitution to create political obligations among their subjects – that they have a duty of justice to obey – is that this BS must satisfy certain principles of justice. The political authorities and other citizens can expect each to obey, but only if the constitution and other institutions are fair. This seems to be the sense of 'political community' Nagel has in mind when he holds that

We are required to accord equal status to anyone with whom we are joined in a strong and coercively imposed political community. (Nagel 2005, 134)

Nagel furthermore argues that such equal status renders certain inequalities objectionable:

What is objectionable is that we should be fellow participants in a collective enterprise of coercively imposed legal and political institutions that generates such arbitrary inequalities (Nagel 2005, 128).

But why, may we ask, does 'equal status' also require equal shares of certain benefits? One salient argument can draw on the constitutive role of the BS. For the question of how SPGs should be distributed, a presumption of equal shares is reasonable among persons regarded as free and equal. These goods are the products of joint cooperation, namely products of a constitution that enjoys willing, general compliance by citizens motivated by a duty of justice. We ask, then: what are the conditions for when a constitution and a BS is legitimate, in the sense that subjects have a duty of justice to comply with its rules and practices? This discussion suggests two aspects: the source of SPGs as the joint product of institutionalised cooperation within a constitution, combined with the social fact that the BS that created and engenders their distribution could have engendered different distributions, helps justify a *prima facie* claim to equal shares of these goods.

The upshot of these arguments is that there are reasons to agree that institutions in general, and the BS of society in particular – including the constitution - should be held to different standards of justice than other subjects. They have pervasive impact on individuals life chances and preference formation. The *prima facie* claim to *equal shares* or other principles of *distributive* justice among those subject to a common constitution is plausible because the goods subject to such principles are constituted by the participants' shared practices. Their willing participation in the creation of these benefits support claims to equal shares thereof; only when ensured an equal share does a duty of justice apply to the BS so as to create a political obligation to comply.

We now turn to ask: do similar considerations support motions to bring principles of distributive justice to the GBS – and a 'global constitution' – if there is one?

## **C: A *Global Basic Structure*: is There such a Thing - in the Relevant Sense?**

### ***Clarification: what if anything is the Global Basic Structure?***

For clarification let us talk of a possible GBS as rules and institutions which structure individuals' actions and shared practices, and otherwise serves the functions of the domestic BS as discussed above - wherever on the globe the individuals are. In our present world order where states play prominent roles the alleged GBS includes at least several *domestic* BSs, and possibly an *international* basic structure. Central components of the *international* part of the present GBS are international treaties, and the courts, tribunals and other bodies they establish – cf. Anne Peters' notion of 'global (or international) constitutional law'.

Is the impact, source, means, or objectives of such international law, international institutions and other international public practices so different in kind – or degree – from domestic institutions as to make principles of distributive justice inapplicable? That would seem to be a premise of the ‘anti-cosmopolitans’ – leaving only requirements that the GBS as a whole secure basic needs, somehow specified. Thus, we must consider some of the questions of concern in debates about the ‘constitutionalisation of international law’: “to what extent the international legal system has constitutional features comparable to what we find in national law. “ (Klabbers, Peters and Ulfstein 2009)

I shall challenge the anti-cosmopolitan premise that the domestic and international BS are so fundamentally different as to reject all claims to global distributive justice. Note that the philosophically contested views accept that states are economically or politically interdependent; few deny that international rules of trade etc clearly have a causal impact (cf Freeman 2006). Rather, the argument is that the combination of domestic and international institutions fails to exhibit the normatively relevant aspects of a GBS. That is: actual impact on individuals is not enough to create claims of distributive justice. Rather, the kinds of practices that international institutions are, and the goods they help create, are argued to be normatively different from those of domestic BSs. In the following I consider several arguments that states serve roles that remove grounds for claims to global distributive justice.

### ***Objection: Domestic, not ,International or Global’ Constitutions impact on Individuals***

One reason to dismiss or discount the effect of international institutions is that it is largely the distributive impact of intra-state institutions that matter for individuals’ starting points, aspirations etc. International institutions only regulate few issue areas – traditionally primarily of an inter-state nature. What impact does occur is indirect: the effects are mediated by, and largely the responsibility of, domestic authorities.

Consider two examples, concerning domestic components of global economic inequalities, and inter-state variations of the effects of international economic institutions.

The central basic capabilities measured by the Human Development Index (HDI) are life expectancy, schooling and gross national income per capita. In all countries the HDI of the population suffers as a result of unequal *domestic* distribution of health, education and income. Research also shows that in several states and regions *domestic* economic inequality has risen since the 1980s, with severe impacts on citizens. such effects of domestic inequalities are much larger in Sub-Saharan Africa, and tend to be lower in high HDI countries (UNDP 2010, eg ch 5). This is often due to an increased gap between urban and rural populations, eg in China, India and several other Asian nations ( Milanovic 2007, 40). Two central

causal factors that help explain *domestic* inequality seem to be *state capacity* and *domestic political will*, eg to ensure a well regulated market economy and redistributive taxation policies. These are domestic factors, not a result of international rules.

Secondly, consider the differences in income, and in economic inequality, among states. Exact measures of the relative impact of inter-state inequality and intra-state inequality are difficult and contested; Milanovic argues that "Some 70 per cent of global inequality is due to differences in countries' mean incomes." (Milanovic 2007, 62-63). States are also affected by the international institutions in drastically different ways. In many states the *visible* impact of international institutions is great, for instance how the conditionalities of the IMF affect the political opportunity space. But this is more true of some domestic governments than of others. Likewise, countries with higher export-to-GDP ratios are more heavily dependent on regional or global markets, - and hence more vulnerable to WTO rules that regulate protectionist measures etc.

Factors that help explain inter-state inequality and dependence are contested, and include neo-liberal trade regimes, modernization processes, dependency theories etc. Some of these are at least partly a matter of domestic political choices about economic policies, export strategies etc.

Such economic and political facts about international and domestic polices and inequalities seem to support the position that individuals have little in the way of distributive claims on *international* institutions. Instead, it appears that such claims should mainly be addressed to the domestic BS and those domestic elites who shape it and who decide on the state's external relations.

In response, it is clear that states differ both in their political and economic opportunity spaces domestically and internationally, and in how the domestic authorities decide to use these opportunities. The domestic BS has great impact on individuals' well being directly, as do the international rules - if more indirectly. However, these empirical claims do not suffice to extinguish claims that the GBS should be regulated by principles of distributive justice. There are at least three reasons to challenge this premise of the anti-cosmopolitan argument.

Firstly, the variations among states do not entail that the domestic *opportunity spaces* and the choices made are not *also* profoundly affected by the GBS. Indeed, in our interconnected world, it is difficult to disentangle and distinguish sharply between the impact of domestic and that of international institutions, e.g. concerning the economy, exchange rates, or how trade rules affect the bargaining power of multinationals vis-à-vis host governments. Consider the effects of agricultural subsidies in rich countries, combined with the rules of the international trading system voting rights in the IMF and the World Bank, and the regulations that allow global mobility of capital. All of these, in complex interaction, help explain the options open to many states on issues ranging from export policies to taxation of mobile capital. The fact that important decisions are made at the domestic level does not extinguish the impact of international rules.

Secondly, it does not follow from the *de facto* effects of domestic decisions that the international rules therefore matter less, but only that if they matter, they do so in different, more indirect ways. We may agree, for instance, with Risse that much harm is wrought by the quality of domestic institutions (Risse 2005, 356-79). But his claim that this is something which outsiders can do little about is open to challenge. In particular, consider how international rules *also affect the political will of many domestic governments*. The ability of unelected elites to remain in power often depends on access to international markets to buy weapons and make loans, and to sell the territory's natural resources. These legal privileges are defined by international rules, and thus depend on compliance by other governments and their peoples (Pogge 2008). Other rules could have been in place, eg that would not recognise dictators as entitled to their country's resources or to borrow money from international sources. If so, these domestic authorities would no doubt have made quite different decisions.

Thirdly, claims that state governments must bear all responsibility for the distributive claim that individuals have, and thereby insulate the international institutions from claims to distributive justice, amounts to an inappropriate reification of statehood and domestic constitutions.

Many of the powers and immunities of states are themselves defined by international law and institutions – that some may regard as part of the Global Constitution. States understood as complex sets of legal rules and practices are important parts of our current GBS. And in particular, their bundles of legal powers referred to as 'sovereignty' are part of, and constituted by, our current GBS. Even if states as we know them do play a predominant role for the distribution of benefits and burdens among individuals, this does not reduce the importance of the GBS. To the contrary: States are *part of* the present GBS, and this fact underscores the need to consider whether the current system of states is just, by principles of distributive justice. I elaborate on this interpretation of statehood below, and use this point to respond to further anti-cosmopolitan objections.

### ***Sovereign States are partly Constituted by the Global Basic Structure***

Crucial aspects of statehood as we know it are „social constructs“ constituted by the GBS. A sovereign state consists of a complex bundle of rules and practices, crucially including various legal powers and immunities that define the state as an international legal actor; and the legal powers and immunities vis-à-vis other states with regard to respect for its borders and citizens. Consider that statehood is a matter of satisfying conditions of international law concerning population, territory and autonomy. These criteria have been set by states jointly. Recognition by other states may also be relevant state practice in cases of doubt (Crawford 2005, 26-28).

I submit that sovereignty can therefore be regarded as a particular Social Primary Good. ***To be a state in the global legal order and on the international arena is to be an entity constituted by rules, practices and actions by actors outside state borders, and outside the control of the state itself*** – namely other states. Several of the important benefits and burdens to such sovereign states are partly effects of

international institutions: International rules allow governments of such sovereign states to enter into treaties, or acquire international debts which later governments of that state must honor. The Bank for International Settlements and the World Trade Organization regulates central aspects of international monetary and financial cooperation, and trade – but only among those parties who are recognized as states.

One objection to this view might arise from Freeman's claim that control over territory is not a matter of institutional rules:

peoples can and have controlled territories without a need for any sort of norms of cooperation or even recognition by other peoples at all. Indeed this has been true of many countries for most of history; they have existed in a Hobbesian state of war. ... unlike property and other basic social institutions, a people's control of a territory is not necessarily cooperative or in any way institutional, (Freeman 2006, 248)

In response, I suggest that we must distinguish Freeman's historical claims about control over territory from the legal notion of sovereignty. The *present* institution of sovereignty includes recognition by international law in ways indicated above. This is clearly true with regard to respect for the integrity of state borders.

Furthermore, consider the authority of state governments to enter into binding agreements. The historical source of such entities may often be groups of individuals who imagine themselves to be a people or a nation and for this reason want a state (Anderson 1983). However, this is neither necessary nor sufficient to be a state: multi-ethnic states exist *as a matter of international law* even though they consist of individuals who regard themselves as members of different nations. And many governments have recently discussed whether to recognize Kosovo or the Palestinian people as a state – where the population's preference thereto is relevant but insufficient. Thus, the ability of a state to enter treaties is not only a matter of it declaring itself to be a state, or of whether it has certain necessary features, but also depends on the fact that these features are thus identified in international law; and statehood sometimes depends on whether other sovereign states recognize it as such a state (Crawford 2005, 15-24). With such recognition, control over territory will certainly be much more difficult for most states, and far more costly even for powerful state.

**I submit that the GBS includes such international rules about sovereignty, and a wide range of background rules – arguably with 'constitutional features' - for reaching specific agreements on issues such as trade, investment, currency exchange, and travel. These background rules have great effects on individuals.** This set of rules share several of the normatively salient features of domestic BSs and with domestic constitutions in particular. They impact fundamentally on individuals' starting points, life chances and preference formation, though often with the rules that constitute states as intervening causes. And these rules are not natural but

partly under willful control. **Thus it is also of practical relevance to ask whether the rules of state sovereignty should carve out rights and immunities the way they currently do, and whether international institutions should distribute benefits and burdens the way they do.** Indeed, in the European Union we witness how these rules are changing and thus profoundly reconfigure the state system in Europe – and the sense in which the member states are ‘sovereign’.

In the following I consider objections to the claim that these benefits of the GBS, such as the good of sovereignty and benefits of the rules that allow and regulate international trade, should appropriately be assessed by standards of distributive justice that apply to the GBS as a whole.

***Objection: Global Institutions – and a ,Global Constitution’ - are Supervenient, Mere Agreements among States***

While there are global or international institutions, some hold that these are not ,basic’ and should as such not be subject to principles of distributive justice. Thus Freeman argues:

There is no global basic structure because there are not *basic* global institutions—no world state, no independent global legal order, no global property system, no independent global contract law, negotiable instruments law, securities law, and so on. The rules and institutions that make global economic cooperation possible are national, and they apply internationally only due to agreements among peoples. (Freeman 2006, 247)

This objection merits two sorts of rebuttals: Empirically, and normatively: why such ‘supervenience’ of global institutions on state consent insulates them from claims of distributive justice.

Empirically, Freeman holds that states remain the central authors of international regulations:

... even in the few cases where international norms do exist independent of any nation’s particular law, these norms do not issue from any global political body with non-derivative original political and legal jurisdiction, for there is none. Whatever jurisdiction global regulators and courts have is not original, but they have been granted and continue to enjoy it only by virtue of the political acts of different peoples. (Freeman 2006, 247)

However, the actual design of international institutions – both as to their creation and their substantive contents – is to a certain extent *not* controlled by state governments, neither *de facto* or *de jure*. One area concerns customary international

law. State consent has also become less necessary for a wide range of international law. Thus Mattias Kumm argues that the obligations of international law

are no longer firmly grounded in the specific consent of states and its interpretation and enforcement is no longer primarily left to states. Contemporary international law has expanded its scope, loosened its link to state consent and strengthened compulsory adjudication and enforcement mechanisms. (Kumm 2004)

We witness a broad rise in international organizations and treaty bodies that enjoy a broad range of powers. And “as the decision-making powers of international organizations increase, both formally and in practice, the need for control of such powers increases accordingly.” (Ulfstein 2009, 60).

Moreover, with regard to a wide range of regulations, the chains of command and accountability from governments to their delegates - who often cooperate with private actors - are so long and opaque as to make control and informed consent impossible. Consider, for instance, the binding effect of WTO’s Dispute Settlement Body (DSB) decisions, that reach far beyond the WTO Members directly involved in the dispute with considerable implications for business operators. A wide variety of international rules are the result of private parties engaged in ‘private governance’ that leave governments with no de facto choice, exit nor voice. Examples range from the International Organisation for Standardisation over the regulation of the internet, to transnational civil society organisations that influence both states and transnational corporations (e.g. Hall and Biersteker 2002; Ruggie 2004; Follesdal, Wessel and Wouters 2008, Keck and Sikkink 1998).

Finally, many treaties evolve drastically over time, often far beyond what the states could have expected: witness the ‘dynamic interpretation’ of the European Court of Human Rights, or that of the European Court of Justice. Thus Philippe Sands notes that

...the rules, once adopted, take on a logic and a life of their own. They do not stay within the neat boundaries that states thought they were creating when they were negotiated. You can see that most clearly in the rules on free trade and foreign investment. (Sands 2005, 8)

- Free trade and foreign investment are only two of very many issue areas that witness similar ‘dynamic interpretation.’

**The upshot is that while states remain the primary political organizations, it is drastically incomplete to describe the current web of international institutions as exclusively consisting of norms agreed among states.**

In addition, of course, it is a highly inaccurate description of the current world order to hold that governments’ consent can plausibly always be taken to

express or indicate the acts of 'peoples.' Too many governments are not even 'decent' in Rawls' terminology (Rawls 1999), and lack meaningful accountability mechanisms to be able to assume that government decisions are sufficiently responsive to the interests of their subjects.

A more plausible position may be that states are still in control in that each can legally chose to withdraw from any particular treaty, and that absent such exit, the state tacitly consents. But even this view is difficult to square with international law. Consider that art. 54 of the *Vienna Convention on the Law of Treaties* also specifies the procedures for when and how a party may terminate or withdraw from a treaty<sup>2</sup>:

Article 54 Termination of or withdrawal from a treaty under its provisions or by consent of the parties

The termination of a treaty or the withdrawal of a party may take place:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties after consultation with the other contracting States.

These empirical worries raise the normative puzzle even more clearly: why should *state consent* of this kind render inappropriate the application of principles of distributive justice to these international norms and institutions? In the following I present and criticize three proposed arguments in favor of this claim.

Before turning to those, note in passing that Freeman's argument may be criticized for slipping too quickly from is to ought: even if it is correct that states have agreed to many of the prevalent international norms, it is by no means obvious that this is the most defensible arrangement. Firstly, treaties are typically negotiated by the executive branch, in ways that leave the typical democratically accountable legislature few opportunities to review and assess the process and alternatives. Secondly, it might arguably be better that other bodies than the present crop of states made and agreed international norms. One alternative could be that only human rights respecting democracies were recognized as authors of such norms. This is arguably the procedure for the regional norms of the European Union. It only allows as members states who have ratified the *European Convention on Human Rights*.

### ***Objection: State Consent secures the requisite division of labour without a global basic structure?***

An anti-cosmopolitan argument might hold that the present issues of injustice that arise for the GBS are largely due to non-ideal circumstances. A more just world would implement a division of labour among states so that each state bears the responsibility for the economic well-being of its own citizens. Under more ideal conditions than the present, all states could insulate their domestic affairs sufficiently

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<sup>2</sup> I am grateful to Geir Ulfstein for this point.

from the disadvantages of such international institutions as there were. This would ensure that inter-state distribution was hardly significant from the point of view of justice. Whatever cooperation was desired could proceed fairly on the basis of state consent.

Against this claim, I submit two points. Firstly, presumably, such a world order of economically more insulated states might or might not be normatively ideal, but be that as it may, the question of concern to us is rather the normative standards for global orders similar to the present one. A charitable interpretation of Rawls – and Freeman – is that they were too optimistic with regard to the ability of states to insulate their citizens from the impact of international institutions. Currently not even affluent, domestically just states can insulate their citizens from the differential impact of international trade and competition. In the mid-20<sup>th</sup> century the US and European social democracies might indeed benefit from economic globalisation, while buffering the vulnerable segments of society in a

grand social bargain whereby all sectors of society agreed to open markets,... to contain and share the social adjustment costs that open markets inevitably produce. ... Governments played a key role in enacting and sustaining this compromise: moderating the volatility of transaction flows across borders and providing social investments, safety nets and adjustment assistance yet all the while pushing international liberalization. In the industrialized countries, this grand bargain formed the basis of the longest and most equitable economic expansion in human history. (Ruggie 2003: 232)

But Ruggie and others note that such protection and safety nets, previously unavailable for the ‘developing’ world, is increasingly also beyond the reach of the ‘developed world’ and its citizens as well:

It presupposed the existence of national economies, engaged in external transactions, conducted at arms’ length, which governments could mediate at the border by tariffs and exchange rates, among other tools. The globalization of financial markets and production chains, however, challenges each of these premises and threatens to leave behind merely national social bargains. (Ruggie 2003, 232)

This limit on states’ abilities may point to another conclusion to be drawn from the present non-ideal forms of globalization: A more just GBS should include

international arrangements that compensate the costs of globalization to those disadvantaged by it, in effect applying standards of distributive justice.

The second objection to this argument is that states engaged in global trade and other forms of long term institutionalised interaction must have arrangements in place to maintain background justice. The same arguments for an institutional division of labour support the case for a GBS as for a domestic BS. There is no reason to believe that voluntary state agreements over time can avoid unfair bargaining power etc. Rawls makes precisely these points in the *Law of Peoples*:

I assume, as in the domestic case, that, unless fair background conditions exist and are maintained over time from one generation to the next, market transactions will not remain fair, and *unjustified inequalities among peoples will gradually develop*. These background conditions and all that they involve have a role analogous to that of the basic structure in domestic society. (Rawls 1999, 42, footnote 52, my emphasis)

A further assumption here is that the larger nations with the wealthier economies will not attempt to monopolize the market, or to conspire to form a cartel, or to act as an oligopoly. (Rawls 1999, 43)

These assumptions seem empirically unfounded. The upshot is that just as a domestic BS must secure domestic conditions to maintain the long term justice of individual transactions and agreements, a GBS must secure international conditions. Critics should be quick to point out that this argument alone does not suffice to show that such a GBS should be regulated by principles of *distributive* justice. However, I submit that the GBS is sufficiently similar to the domestic BS in further ways.

### ***Consent rather than coercion, hence no basic structure?***

One reason to hold that state consent invalidates comparisons between a domestic BS and a set of international institutions is that the domestic BS is a special case of coercion, which raises particular challenges of normative legitimacy. Since by hypothesis states *consent* to international rules and institutions – and whatever ‘global constitution’ there is, there is no inter-national coercion in need of justification.

**In response, many authors will insist that several though not all states are de facto coerced to acquiesce in existing international rules, in part because exit from certain regimes is economically or politically impossible** (Cavallero 2010). For instance, states can hardly contemplate not being part of the WTO. Thus several international institutions and rules must be said to coerce states, albeit by other means than military threats. The International Monetary Fund can threaten to

withhold international aid to pressure states to liberalize their capital markets, and exercises indirect power by signalling to private investors.

***Objection: There is no Coercion of the Requisite Kind: to ensure Stable Expectations, or Legitimacy?***

A second anti-cosmopolitan argument may grant that there is coercion, but hold that *the kind of coercion* that international institutions and rules exercise is relevantly different from that of domestic BS.

Some authors hold that the coercion international institutions enjoy is a different *form* of coercion (Blake 2001, 280; Nagel 2005). Wherein lies the normatively significant difference?

At least two possibilities seem worth considering.

Firstly, Nagel may plausibly insist that one of the main contributions of the domestic BS is to provide assurance of general compliance with public rules, so as to enable stable expectations about the future conduct of others. Threats of sanctions by domestic courts, police etc may help provide such assurance. In the absence of global enforcement agencies, it might be thought that a GBS cannot exist: it cannot stabilize expectations and provide assurance of states' future actions.

In response, I submit that there are other means to stabilize expectations about other states and other actors than international enforcement bodies. Several scholars have addressed the perplexing question of why states tend to comply with treaty obligations to a significant degree – even in the absence of international enforcement.

Among the answers is that many obligations of international law have been internalized to a large extent. They are regarded as normatively binding by several domestic significant actors – ranging from civil society organizations to courts. Non-compliance can be costly signals of lack of trustworthiness in general – toward other states, corporations – and the domestic population (e.g. Chayes and Chayes 1995, Franck 2006; Sands 2005; Simmons 2009). Furthermore, various 'non-binding' international rules have legal consequences: there are differences in degree, rather than differences in kind of mechanisms for ensuring compliance (Guzman 2010; Guzman and Meyer 2010). Consider that General Assembly Resolutions and a host of other 'non-legal' pronouncements shape interpretations of legally binding rules, and thus "shape states' expectations as to what constitutes compliant behaviour" (Guzman and Meyer 2010). This is one way that binding international law develops, "from acts which are not, in the formal sense, 'binding' (Higgins 1995, in Guzman 2009). The upshot is that the lack of strong international sanctions does not prevent the existence of a sufficiently robust GBS.

Another more complex argument concerns the normative warrant for coercion that the domestic BS must enjoy. Recall my interpretation of Nagel's central claim involved in exercising power "in the name of" those subject to it: the need for the government to create political obligations among their subjects, that they have a duty of justice to obey. It is for this reason that the BS must satisfy principles of justice, and it is because the subjects are to be recognized as equals that certain inequalities are

objectionable. The political authorities and other subjects can expect each to obey, but only if the institutions are fair (Nagel 2005, 134). Blake may have similar arguments in mind when writing that

[n]o matter how substantive the links of trade, diplomacy, or international agreement, the institutions present at the international level do not engage in the same sort of coercive practices against individual moral agents (Blake 2001, 265).

Arguing against the comparison to a GBS, Nagel might seek to argue that a GBS does not need to elicit political obligations of compliance among those subject to it. That is, there is no need for actors such as states to expect other significant actors to comply out of a sense of justice, i.e. from a sense that the rules are normatively legitimate, even when such rules are counter to their self oriented preferences.

I disagree with such claims. For the complex global interdependence of states and individuals to function effectively, actors must have stable expectations. This is may be difficult, especially with few sanctions at disposal at the international level, and if there are wide spread suspicions that a state will withdraw from a treaty as soon as it finds it in its self interest to do so. Expectations of future compliance are bolstered if several significant actors chose to sign up to and comply with international rules from a sense of justice. In practice, many see the need for such expectations, based on a sense that the international institutions are normatively legitimate. Thus Bodansky holds that as international institutions

have become more influential, and as the need has grown for international institutions with greater authority to address collective problems such as climate change, this has prompted more questions about what will make such institutions legitimate (Bodansky 2008, 309)

Likewise, Matthias Kumm notes that partly as a result of the independence of international law from state consent, for domestic legislatures and courts

International law's legitimacy has become a central concern. Contemporary critiques of international law take many forms. Particularly influential in recent years are critiques made in the name of commitments of constitutional self-government and democracy. (Kumm 2004, 907-8; and see Buchanan and Keohane 2006)

**The upshot of these discussions is that that similar sorts of normative challenge of justifiability and legitimacy seem appropriate toward international rules and institutions, and toward a global constitution, as toward the domestic BS. The**

question is whether such coercion can be defended as legitimate, carried out 'in the name' of those subject to it. This would seem to provide the same normative setting for which Nagel defends principles of distributive justice that limit inequality. It seems that the normatively salient features and functions of a domestic BS that give rise to standards of distributive justice among subjects, also hold for the GBS. In particular, the role of states, and consent of states, cannot support claims that the GBS is sufficiently different that some such distributive standards should also apply to it.

## **D: Conclusion**

Several authors have argued about whether it is appropriate to bring principles of *distributive* justice as a principle of legitimacy to bear on the global order as a whole, including international rules and institutions – including those that some have labelled a 'global constitution.' Some have maintained what I have referred to as 'anti-cosmopolitan' positions: that once the basic needs of all are secured, individuals have no further claims on shared international institutions to equal or other relative distributive shares. There are no limits on permissible global inequalities. I have addressed and sought to rebut some of these arguments.

Central to these arguments is the assumption that the institutions above states, such as there are, are not of a kind that give rise to distributive claims. I have considered the premises about the nature of and contributions of international law and treaties, central components of the alleged GBS. I have suggested that the impact, source, means and functions of the GBS are not so different from the domestic BS as to render claims of distributive justice a category mistake.

Our world is 'partly globalised', characterized by 'complex interdependence' among states; the international legal order is partly constitutionalized in several relevant ways. Yet this global political and legal order suffers from a major governance gap (Keohane 2001). Market competition, oligarchic trans-national corporations, structural adjustment policies and international human rights norms drastically affect, enhance and restrict, states' ability and legal authority to determine their international and domestic policies. Some government can buffer the impact of international economic inequalities, but only in part, and not all governments can do so (Ruggie 2004). One central reason why the impact of current state borders is normatively highly problematic is that the bundles of legal powers and immunities that are sovereign states are themselves part of the GBS which constitutes a web of practices, regulated by rules, which all of us participate to maintain.

Arguments to this effect as discussed in this contribution may themselves be seen as an expression of the 'constitutionalisation of international law', in the sense that principles of legitimacy are increasingly brought to bear on the web of international rules and practices. Some of us derive great benefits from these constitution-like rules, and exercise much control over the rules. Others mainly suffer

large disadvantages from this common project. Some argue that such inequities engendered by international laws are incompatible with a commitment to treat all as political and social equals. I have suggested that these worries cannot be easily dismissed.

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