The 'Justice' Potential of EU Constitutional Law

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I applaud the initiative to discuss the role of justice in EU law and yet I disagree with the implicit accusation, in the introductory post to this symposium, that both academics and legal practice have largely ignored the question so far. To be sure, a straightforward hypothesis supports the emergence of a lively debate – an objective that can justify a certain exaggeration on the side of the de Búrca, Kochenov and Williams. Also, the title of their edited volume is careful enough to add a semantic word of caution by means of a quotation mark, but their introductory post leaves little doubt the editors want to answer the question to the positive.

They criticise academic analyses for 'remain[ing] based broadly on the assumption that EU law still largely serves the purpose of shaping a system of economic integration' and contend that it is not even clear that 'the achievement of justice is among the EU's objectives, thus leading to a sub-optimal legal-political reality.' In this post, I will argue that these reprimands are wrong. EU law and policy may not always produce 'just' outcomes and the ECJ, in particular, should address related questions more openly, but the underlying constitutional infrastructure and academic discourses have long started addressing the topic: contrary to what the editors suggest, there is no novelty factor in highlighting the 'justice question.'

Justice Beyond the State

The starting point of the authors is accurate: in today's world of enhanced legal, political, economic and societal interdependence, normative questions about just societies can no longer be construed on the basis of state sovereignty, at least in today's Europe. The enduring crisis in the eurozone, the growing numbers of refugees and migrants trying to enter Europe and ongoing debates about climate change or free trade are tangible expressions of a world in which it is, as Kochenov, Williams and de Búrca rightly contend, no longer convincing to associate justice 'solely' with the state. If the EU exercises public authority in a similar way as a state, its actions must be judged in the light of normative ideals of justice.

It seems to me that few people would object to this assertion, at least in today's Europe (while the perspective on the other side of the Atlantic might be different). To ascertain that EU law and policy should be just, does not imply, however, that doing so necessarily vindicates the position of those who claim that a specific state action is unjust. It's rather the beginning of an inquiry into how we should recalibrate our normative compass in post- and supranational settings, an inquiry that is actively being pursued by many academics – as the test case of migrants illustrates.

It is well established in international law and political philosophy that refugees should not be forced to return to their home state if they may rely on a well-founded fear of persecution (*non-refoulement*). Until recently, however, this principle was put into practice in line with basic assumptions of state sovereignty. Refugees could only claim asylum once they had reached the territory of a state, while redemption practices on the high seas or the rejection of entry visas in third countries were considered legal, not least by the US Supreme Court and the House of Lords. Similarly, few people would maintain that the EU bears a direct moral or legal responsibility for the plight of the Rohingya off the coast of Thailand. Nor would we argue that the EU has a direct obligation to admit 200,000 Syrians among those trapped in Lebanon – or 50,000 Gambians in economic distress (Gambia is an important country of origin of migrants crossing the Mediterranean).

Nevertheless, there is a growing consensus that the EU should actively send maritime vessels beyond

the territorial waters of the Member States to help the same people entering Europe if necessary by territorial waters of Libya. In contrast to the US Supreme Court, the European Court of Human Rights concluded three years ago that European states are under the legal obligation to apply the principle of *non-refoulement* extraterritorially, at least once migrants have entered a European vessel. From a doctrinal perspective, the situation would be different if the same people applied for a visa instead of entering a smugglers' boat – and, yet, we may ask whether and if so to what extent such scenario amounted to an exercise of public authority requiring justification in normative terms.

Kochenov, Williams and de Búrca might reply that this is the kind of debate they want to stimulate, but anyone who has followed European newspapers (or the Verfassungsblog) in recent months or read academic journals following the *Hirsi* judgment mentioned earlier knows that the debate is ongoing. They might be disappointed with the course of EU policy, but it seems to me that the state of affairs in terms of public and academic discourse is much better than they suggest. This applies to migrants not much differently than to the financial crisis or discussions about TTIP.

The Role of EU Constitutional Law

Kochenov, de Búrca and Williams are legal academics with an interest in the constitutional foundations of the European Union. Reading the EU Treaties they rightly point out that 'justice' does not feature prominently among the EU's objectives (the term is mainly used in relation to the Court and judicial cooperation). That cannot be the ultimate answer, however, and I doubt that their conclusion would be more positive if the Treaty of Lisbon had mirrored the German Constitution which states in its Article 1(2): 'The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of *justice in the world*.'

The term justice is far too abstract to provide meaningful guidance on how to resolve specific legal questions. Normative ideals of justice are usually conceptualised, in contemporary constitutional law, in terms of human rights and countervailing public policy objectives. Human rights law can build upon a well-established doctrinal foundations and judicial institutions translating questions of justice into everyday legal discourses. To focus on the abstract notion of 'justice' arguably misses the point, since corresponding legal debates evolve around more specific norms. I do not argue, crucially, that everything is fine in the EU legal order. All I would say is that the constitutional infrastructure is intact and that we have adequate tools to feed normative arguments into legal debates in a process that one may aptly described as jurisgenesis in constitutional theory and designate as a doctrinal argument about constitutional principles.

Against this background, the EU Treaties are far from deficient. The accusation, in the introductory post, that they reflect the pedigree of market integration ignores the considerable expansion of constitutional norms and values after the Treaty of Lisbon, which realised core contents of the never ratified Constitutional Treaty. The legally binding Charter of Fundamental Rights and the proliferation of invocations of democracy and multiple values, including 'justice', throughout the Treaty text arguably presents us with the most important reformation of EU constitutional law in recent history (Nicolas Sarkozy even insisted upon the symbolic relegation of the open and free market economy to the benefit of social cohesion).

Andrew Williams, in particular, may contend that these promises remain empty normative shells. For constitutional lawyers, however, dormant provisions are not dead. The academic project of establishing a discipline called European Constitutional Law is more than an affirmative exercise vindicating existing practices with a constitutional label. To take seriously the invocations of human rights, democracy and justice in the EU Treaties, can be a heuristic device to scrutinise the status quo. Such undertaking is not directed against the European Union, but tries to understand it from within. Arguably, that is what dozens of colleagues have been doing over past years in numerous publications (including to the Verfassungsblog) on the financial crisis, migration, democracy or free trade. EU constitutional law and related discourses are better than their reputation.

That leaves us with the question about the role of academics. I would contend that they should usually refrain from endorsing easy constitutional solutions, since we are living in a world in which different positions on normative justice can be defended (like in the case of migration) and in which we are usually faced with a plurality of constitutional rights and principles that are resolved by means of balancing, at least in European constitutional practice. Academics are, unlike judges, not institutionally authorised to resolve constitutional value conflicts. They can prepare the ground, however, by taking care of the constitutional infrastructure and by exposing models and choices inherent in the, often opaque, judicial and practical solutions.

The Salient Justice Deficit of the ECJ

While I am, by and large, happy with the constitutional infrastructure, my outlook on the judicial practices of ECJ is less optimistic. Why? Throughout a number of prominent recent decisions, we may observe a growing tendency, on the part of judges, to evade constitutional arguments. On the basis of questionable doctrinal arguments, it flatly denied the applicability of the EU Charter to austerity measures in Portugal within the broader framework of ESM support. Similarly, it rejected free movement and equal treatment rights of a Romanian citizen who was not looking for work and did not have sufficient resources without investigating whether this interpretation of Article 7 of Directive 2004/38/EC was compatible with the social guarantees in the EU Charter. I have explained on this blog before that this presents us with a noticeable shift, on the side of judges, away from constitutional imagination towards technical legal construction.

It is important to understand that I do not necessarily take issue with the outcome of the cases. There may be good legal reasons that the conclusion of judges in Luxembourg was correct (or at least defensible). My unease concerns the absence of constitutional arguments in these seminal rulings, which relate to the essence of both the EU Charter and Union citizenship which the Court had previously identified as being destined to be a 'fundamental status'. The project of European constitutional law will be difficult to sustain in the long run if the highest court in the Union continues ignoring the constitutional dimension of landmark decisions. Both judgment mentioned above may have been decided correctly, but I would have preferred if judges had tried to explain the constitutional conception beneath their decisions, thereby indicating underlying value judgments which are inherent in any constitutional adjudication.

Gráinne de Búrca pointed out on an earlier occasion that institutional and procedural deficits may prevent the Court from assuming the constitutional role the framers of the Treaties had in mind when they agreed upon the legally binding Charter and the revision of the EU's objectives. Along similar lines, there are indications that, notwithstanding the *Spitzenkandidaten*, the Commission fails to develop political visions about the future of Europe, not least in the euro crisis. In this respect, the assertion of a 'justice deficit' may be justified even if I would prefer labelling it a 'constitutional deficit' in order to underline that I do not necessarily criticise the policy outcome but are unhappy with the (increasing) absence of constitutional imagination. It is for that reason that I highly commend the book edited by de Búrca, Kochenov and Williams, since it contains many contributions that anyone interested in EU constitutional law should not miss.

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