Taking the European Court of Justice up on its Name

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One cannot agree more with the editors of *Europe's Justice Deficit?* that the EU is capable of causing both justice and injustice. The question "how to steer Europe in the direction of justice" they raise, however, is of frightening complexity. As multiple contributors to *Europe's Justice Deficit?* recognise, Jeremy Waldron was right to note that "there are many of us, and we disagree about justice"[1] – and the rich plurality of contributions to the volume surely underlines this.

Recognising "justice" as inherently contestable, one might raise the more specific question what role the European Court of Justice has in (re)assuring justice in Europe, and whether the Court, insofar as it possesses a *distinct* role in that regard, succeeds in promoting justice. The avalanche of criticism at, amongst others, *Laval*, *McCarthy*, *Dereci* and, most recently, *Dano*, represents a deep belief that the European Court of Justice should not betray its name. In the knowledge that we fiercely disagree about what justice entails, however, it is not easy to substantiate the Court's role and scope of responsibility.

It is the late Ronald Dworkin who created the concept of "law as Integrity" to conceptualise the way in which political communities, and particularly courts, deal with justice.[2] Given the fact that we disagree about what the law means, what morality requires, and what justice demands, Dworkin rejects letting courts "work on justice" *directly* by interpreting the law in light of their personal conceptions of justice. Instead, courts ought to work on justice *indirectly*, by ensuring coherence of principle and action in law. The moral imperative of coherence of principle and action, or Integrity, can be powerfully derived from the Rawlsian notion that citizens should be treated with equal respect. The moral equality of citizens demands that, notwithstanding our persistent disagreements about justice, the law should insofar as possible "speak with one voice".

Integrity is no easy master for courts. A court committed to Integrity needs, prima facie, to ensure consistency of action. Respect for precedent necessarily flows from the imperative of warranting the moral equality of citizens in past and present. Integrity is different from mere consistency, however, in that it strives to *global coherence* in law: sometimes past practice must be overturned because higher principles of law require so. Gerald Postema brilliantly catches the essence of Integrity by emphasising the need to balance *respect* for past practice and precedent against possible *regret* about it.[3] It cannot be denied that in the presence of fierce disagreement about justice, jurisprudence is capable of being wrong, and while walking on the road towards justice, it might take wrong turns. Recalling Robert Frost's *The Road Not Taken*, regret avoids that having taken the wrong road necessarily makes "all the difference". Respect and regret – both are ultimately grounded in the *historicity* of Integrity: the higher principles of law capable of justifying regret are creations of the historical development of the political community's life, and as such equally historical as past practice itself.

Why then opt for Integrity, and not for justice? This dichotomy is, in reality, a false one. It is justice *itself* which requires, by virtue of the moral equality of citizens, that the law speaks with a single voice. Integrity allows courts to accept disagreement, and instead of imposing their own views of justice work on justice indirectly. Again following Postema, Integrity is "justice in workclothes".

Now let us turn to the ECJ. Insofar as the duty to respect past practice is concerned, it would not make a bad servant for Integrity, given its persistent dilligence to explicitly entrench its judgments in earlier jurisprudence. Nonetheless, that *respect* without *regret* can lead to widely criticised injustices, is splendidly demonstrated by, for example, the development of free

movement law. Rather obsessed by its narrow focus on the fundamental freedoms' *effet utile*, the Court had no difficulty in subjecting labour unions to the imperative of establishing an Internal Market and the hierarchy of economic and non-economic interests – notwithstanding the EU's development towards a Union of citizens instead of market participants and a Union respecting all fundamental rights, not just economic ones. If following precedent flows from the moral imperative of Integrity, there is definitely a case for acknowledging that the hierarchical bias toward economic freedom in past practice might have resulted in consistency of action to some extent, but certainly not consistency of principle. In a present-day Union where citizens who move have more rights than citizens who stay at home,[4] rich *de facto* have more rights than poor,[5] and incommensurable values are structurally framed in persistent hierarchical relationships, it is clear that the moral equality of EU citizens is not quite warranted to say the least. Hence, speaking about Europe's justice deficit, the possibility of regret *vis-à-vis* respect for a past practice centred on the Internal Market should be taken more seriously.

The ECJ's failures to strike balances between respect and regret might also demonstrate a broader attempt to hide for global coherence in law and jurisprudence. In narrowing the scope of relevant law in for example *Laval* and *McCarthy*, the Court chooses to hide behind a "positivist veil", only revealing isolated chains of case law or pieces of secondary legislation. Locally coherent interpretations for sure, but against what price for justice on the long term? A global coherence approach to legal interpretation does not provide for easily identifiable answers. Nonetheless, a European Court of Justice worthy of its name should at least try to interpret each and every case, insofar as possible, in light of the ultimate ideal of law as a single voice.

While the positivist veil is mostly exemplified by the ECJ's seemingly structural preference of respect over regret, the most remarkable example is perhaps given by *Dano*, where the Court refrained from following its carefully developed approach to determining the scope of the EU's fundamental rights protection. Notwithstanding the obvious presence of a cross-border link, the Court insisted that the matter fell outside the scope of EU law, relying solely for that matter on secondary legislation. Questions of regret do not arise here, as the Court even fails to respect its own past practice by hiding behind the provisions of secondary legislation without any legal reason whatsoever.

Whether it be isolated provisions of the Treaties or legislation, or isolated chains of case law, ignoring higher principles of law severily undermines the possibility of the law speaking with one voice. Surely, global coherence is a Herculean task. Sometimes opting for pragmatism and applying the law consistent with one's own perception of justice, or choosing the least sensitive option to maintain legitimacy, might be attractive. Demands of justice must indeed be balanced against demands of legitimacy and democracy.[6] When we speak about justice and the ECJ's role, however, Integrity cannot be ignored, while hiding behind positivism is ultimately destructive for Integrity ánd justice. According to Article 19 TEU, the ECJ must ensure that in the interpretation of the Treaties the law is observed. But what this means is that the task of the ECJ is inherently non-positivist; the law transcends the black-letter system of rules established by the Treaties. In the spirit of Article 19, Integrity requires the Court to look beyond the obvious, ensure consistency of action, while never forgetting consistency of principle. No matter how attractive it is to hide behind a positivist veil narrowing down the legal scope of cases to isolated legal provisions or chains of case law, a true Court of *Justice* ought to get into its workclothes, and commit itself to law's Integrity.

[1] J Waldron, *Law and Disagreement* (Oxford University Press 1999).

[2] R Dworkin, *Law's Empire* (Harvard University Press 1986).

[3] GJ Postema, "Integrity: Justice in Workclothes" in J Burley (ed), *Dworkin and his Critics with Replies by Dworkin* (Blackwell 2004).

[4] See generally D Kochenov, "Citizenship without Respect" (2010) *Jean Monnet Working Paper* 08/10 (NYU Law School).

[5] See eg E Spaventa, "Earned Citizenship – Understanding Union Citizenship Through its Scope" in D Kochenov (ed), *EU Citizenship and Federalism. The Role of Rights* (Cambridge University Press 2015, forthcoming).

[6] D Kochenov, G de Búrca and AT Williams, blogpost.

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