The EU's limited justice capacities

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The starting premise behind *Europe's Justice Deficit?* is that we have to associate justice not only with the state, but also with sub- and supra-state entities. Considering the depth and breadth of European integration, the EU cannot escape our scrutiny; the EU is, as the editors remark, 'clearly at the very least a potential agent of (in)justice'. One cannot but wholeheartedly agree with this starting assumption, but we should also acknowledge that it leaves a very important question unanswered: does the EU possess the same capacities for delivering (in)justices as other entities, in particular the state? Can we simply apply our justice vocabulary to the EU without even the slightest modicum of translation that takes into account the context within which the EU is situated? While it is not denied that the EU has the ability to deliver justice, it is suggested that there are limits to the EU's justice capacities.

Some might find these questions surprising, for the EU constitutional arrangement contains many of the elements that we commonly associate with justice: the Treaty of Lisbon has given us a binding Charter of Fundamental Rights and contains several references to democracy and the values common to the Member States. The constitutional practice might be unsatisfactory thus far, but the constitutional framework certainly isn't; it provides constitutional lawyers with the equipment to scrutinise the status quo and to turn the EU into a more just community, as Thym in his blog post seems to suggest.

Such a constitutional legal perspective is unsatisfactory for at least two reasons. What it ignores, first of all, is the constraints the EU constitutional arrangement places upon those provisions. Take the EU's duty to respect the national and constitutional identities of the Member States, enshrined in Article 4(2) TEU. Cases like *Runevič-Vardyn* demonstrate very well how such constraints may force the Court to accept practices that many of us would consider unjust (which does not mean necessarily that the Court took the wrong decision). More importantly, the constitutional legal perspective does not ask the questions that are logically prior to ones about the adjudication of legal provisions: namely, what does justice require and what are the conditions for justice? The many ways in which these questions can be answered show justice's contested nature, which is once more proven by the different contributions to *Europe's Justice Deficit?*.

Some have suggested that liberal-democratic principles of justice can only be fully implemented within the context of the nation-state; only nation-states with their common history and sense of common faith have been able to create the communal ties and mutual trust that are necessary for the sense of justice we are so desperately seeking for within the EU; it is those ties that have supported and sustained processes of deliberate democracy as well as systems of social sharing.[1]

Williams, in his contribution to the book, has tried to counter some of those arguments. The EU, he claims, offers 'a form of … community' and has unequivocally demonstrated to possess some of the capacities for redistribution of resources. If we then 'believe that our moral obligations to others should *not* be constrained by historically constructed state borders', the EU is a valid entity for pursuing justice.[2] Those arguments, with all respect, do not prove that those who link substantive justice to the state are fully mistaken. Even the most ardent liberal nationalist will not deny that we have moral obligations to those outside our state borders.[3] Neither are they likely to disagree with the definition of the EU as a form of community or the finding that wealth redistribution has taken place within the EU. What matters is whether the sense of community within the EU is strong enough to sustain the kind of social redistribu-

tion the welfare state has provided (which evidently is broader in scope than the EU's current schemes of redistribution). The question is not if we have moral obligations to non-nationals, but what they are precisely in a world in which identity, community, and solidarity are still to a large extent divided along national lines. These are the issues one must engage with in order to demonstrate the flaws in the arguments of those maintaining that justice is largely limited to the state.

To be sure, none of this suggests that justice is irrelevant in the EU's context. It is essential to discuss to what extent the EU produces outcomes that we conceive as just. In fact, I believe that we should ask the same questions with respect to communities with weaker communal ties than the EU. Nor does the above suggest that the EU cannot or should not aspire to contribute to justice. The extent to which the EU has contributed to gender equality is a perfect example of this. All that is suggested is that the fact that the EU has contributed to justice, has been able to redistribute resources, and has fostered a feeling of community among (some) EU citizens is not sufficient to dismiss the claims made by those who believe that the most substantive form of justice ultimately can be provide by the state alone.

A second counter-argument would submit that those who submit that the state is the ideal site for justice are 'shrinking the Scope of Justice to "people like us", "our state", "our nation" and the like', thereby 'interpreting injustices away'.[4] Even though I would not want to dismiss the possibility that focussing on those with whom we feel a sense of commonality may lead us to ignore injustices elsewhere, I am not sure that those who link justice to the state are blind to injustices elsewhere. Our sense of compatriotism and feelings of nationalism may very well be entirely irrational, but that is no reason to dismiss those them as irrelevant.[5] To the contrary, it is pertinent to acknowledge the irrational and subjective nature of human beings (if all of this is irrational at all), for the very simple reason that ignoring this may stretch the boundaries of solidarity beyond what many are willing to sustain. Those who claim that the most demanding forms of justice can only flourish within the state might be acutely aware of our world's social reality and incorporate that in their theories (sometimes perhaps excessively so) because they believe that this is the most likely means to achieving social justice.

If this is true it must have important implications for the justice debate. We should not associate justice only with the state, but we must admit that the absence of Europe-wide feelings of community and the structural barriers that prevent such feelings from coming into being foreclose the possibility that the EU can be the site of justice in the way states have been and still are. To put it bluntly, we must admit that the EU's justice capacities are limited and that its capacity for creating injustices is at times greater than its capacity for producing justice.

The Eurozone crisis has, as Viehoff and Nicolaïdis aptly noted, exposed that 'there are limits to apprehending social justice between European peoples simply as enlightened mutual advantage'.[6] The injustices created by EU imposed austerity measures have been discussed extensively within the book and on this blog and presumably do not need further discussion. No one can seriously maintain, I hope, that we cannot talk about injustice in this context because the Greek government has signed up to the austerity measures.[7] To what extent the situation in Greece was caused by its empty purse or by the austerity measures – presumably it is a combination – does not change the feelings of injustice experienced by large parts of the Greek population. Be this as it may, my real (and somewhat pessimistic) point is that these injustices seem difficult to repair. The nationals of other Member States are not willing to make the self-sacrifices necessary to alleviate the hardship of the Greek population. That does not justify the current situation of course. That one first wants to take care of fellow nationals does not justify the disregard for the basic rights of others.

My point is a different one. If there is one lesson to be drawn from the Eurozone crisis, it is that we should not ignore the social reality within the EU. Legislative as well as judicial overreach may create profound injustices in the long run. If the conditions

for European and transnational justice are not sufficiently developed to counterbalance injustices created through economic and monetary integration,[8] there is an even greater moral duty to prevent those injustices from happening in the first place. The EU must be similarly careful, therefore, not to erode the elaborate systems of social sharing within the Member States through its competition and free movement rules. If only the Member States provide for the ties and trust that sustain elaborate welfare schemes, legislative but in particular judicial overreach may undermine rather than extend the bases of social justice within the EU.

This brings me to Kochenov's, de Búrca's, and Williams' third consideration concerning the need to 'align the considerations of justice with those of democracy and legitimacy'. To do so we should, as a start, acknowledge that the three are generally more united within the Member States than within the EU. Whenever Member States manage to ensure outcomes that are just, these are generally legitimized by their processes of democratic deliberation. The EU might very well enhance justice through its policies, but whether they are also democratically legitimated is a more complex issue. Not only is the EU lacking the preconditions for autonomous democratic legitimacy, decisions taken by the European legislator or Court are likely to constrain national processes of democratic legitimation. In addition, considering that the welfare state is one of the central tenets upon which the legitimacy of the Member States rest, the EU's impact on the Member States' capacity to promote the common welfare of society as a whole might further erode the legitimacy of the policies of the EU. The connectedness between democracy, legitimacy, and justice within the Member States only further reinforces the argument that the EU should try to avoid legislative and judicial overreach.

That the question of justice is important also for non-state actors like the EU is undisputable. We should be careful, however, not to confuse this with the question to what extent state-based conceptions of justice can be applied to the EU. The EU does not possess the justice capacities of the Member States, nor the autonomous processes of democratic legitimation. This is in no way an Eurosceptic argument; it merely suggests that we can only aspire a more just EU if we are realistic about the EU's limited justice capacities.

[1] See, for example: Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford University Press 2001) 222–225.

[2] Andrew Williams, 'The Problem(s) of Justice in the European Union' in Dimitry Kochenov, Gráinne de Búrca, and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart 2015).

[3] See, for example: David Miller, *On Nationality* (Oxford Univ Press 1999).

[4] Dimitry Kochenov, 'The Just World' in Dimitry Kochenov, Gráinne de Búrca, and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart 2015).

[5] Which is Kochenov admits as well in his chapter.

[6] Juri Viehoff and Kalypso Nicolaïdis, 'Social Justice in the European Union: The Puzzles of Solidarity, Reciprocity, and Choice' in Dimitry Kochenov, Gráinne de Búrca, and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart 2015).

[7] This is precisely what seems to be suggested by Ruffert though in his contribution to this debate.

[8] For a very similar argument, see also Joerges' blog post.

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