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Debating Europe's Justice Deficit:  
The EU, Swabian Housewives, Rawls, and Ryanair

Edited by Gráinne de Búrca, Dimitry Kochenov and Andrew Williams  
with the assistance of Suryapatim Roy



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## **Abstract**

This edited working paper proposes a new way of appraising the process of European integration, taking the notion of Justice as a starting point. With a number of contributions from the leading theorists of EU integration as well as younger scholars and practitioners of European law, it adopts a multi-faceted approach to what the editors branded as a possible "justice deficit" in Europe, looking at procedural as well as substantive elements of justice, also connecting justice with legitimacy, democracy, the rule of law, and other key principles of European law. Taking justice seriously is no doubt an indispensable element of any mature constitutional system. In starting the debate on justice in the EU context and immediately involving a number of leading scholars into the debate, the working paper aims at bridging an important gap in our theorising of European integration and law by starting a wide exchange on the topic of key importance, which is the essence of Justice, informing the integration project in Europe.

## **Keywords**

Justice, Democracy, Legitimacy, rule of law, internal market



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## **DEBATING EUROPE'S JUSTICE DEFICIT: THE EU, SWABIAN HOUSEWIVES, RAWLS, AND RYANAIR**

*Edited by Gráinne de Búrca, Dimitry Kochenov and Andrew Williams*

### **Foreword: What is in this paper?**

This paper contains an edited transcript of the proceedings of the Colloquium on 'Europe's Justice Deficit: Beyond Good Governance?' convened by Gráinne de Búrca (NYU School of Law), Dimitry Kochenov (University of Groningen, Faculty of Law) and Andrew Williams (Warwick Law School) on 22–23 September, 2012 at LSE in London. The colloquium has been financed by the Groningen Faculty of Law (GSL), Warwick University and NYU School of Law and benefited from the venue generously provided by the European Institute of the London School of Economics and Political Science. The convenors are grateful to these Schools for support and, in particular, to Aurelia Colombi Ciacchi of GSL and Damian Chalmers of LSE, as well as to the various Law Schools, which financed the participation of individual speakers in this event. Special thanks are due to Adam McCann, Daniël H.K. Overgaauw and Suryapratim Roy, graduate students in Groningen, who transcribed the proceedings as well as to Jenny Wilson for administrative support. Suryapratim Roy's assistance has been particularly invaluable in helping to edit this working paper.

A more conventional outcome of the colloquium will be an edited book entitled *Europe's Justice Deficit?* to be published by Hart Publishing, Oxford in 2014.

## Introduction

The gradual constitutional evolution of the European Union has not been accompanied by the articulation or embrace of any substantive ideal of justice going beyond the founders' intent or the economic objectives of the market integration project. This absence compromises the essential foundations of the EU legal system since the relationship between law and justice – a crucial question within any political system – remains largely unaddressed.

This working paper documents a colloquium convened by the editors, which united leading scholars and young researchers whose work addresses both legal and philosophical aspects of justice in the European legal context. The aim of the meeting was to appraise the existence and nature of the deficit of justice in Europe, its implications for Europe's future, and to begin a critical discussion about how it might be addressed. There have been too many accounts of the EU as a story of constitutional evolution and a system of transnational governance with little or no attention to the implications for justice.

The European Union today has certainly moved beyond the initial emphasis purely on the establishment of an internal market, as the growing importance of *inter alia* EU citizenship and social rights suggests. Yet, virtually all the legal doctrines and academic analyses of the EU Treaties and case law are premised broadly on the assumption that EU law still largely serves the purpose of perfecting what is fundamentally a system of economic integration. The place to be occupied by the underlying substantive ideal of justice remains significantly underspecified or even vacant, creating a tension between the market-oriented foundation of the Union and the contemporary essence of its constitutional system. The relationship of law to justice is a core dimension of constitutional systems around the world and the EU should be no different in that respect.

We hope that a critical exchange of opinions on justice in the Europe which took place at the London colloquium will provide valuable accompanying material to the collection of essays on *Europe's Justice Deficit?*, edited by the convenors and assembling the contributions by the majority of the participants of the colloquium, as well as additionally invited scholars, including Alexander Somek and Vlad Perju. This working paper, together with the book, aspires to contribute to the creation of a fuller picture of the justice deficit in the EU going beyond the given confines of EU law, thus opening up an important new avenue of legal research of immediate importance.

*The editors*

June 2013

## **First Session: Justification, Proportionality and Irrationality**

### *Neil Walker: Justice and Justification*

Let me turn the premise of the conference on its head. The premise, or the basic question asked, was why so little of the discourse and scholarship on the EU seems interested in justice, but actually I think an awful lot of people are interested in justice. In fact, what this conference has shown is that if you look carefully, a real momentum is developing around thinking about the EU in terms of justice. Part of that is about individual justice or corrective justice. There has always been a discourse in that area, a strong one within the EU. Here I see Sionaidh, for example, who has done a lot of work on this over the recent years, but many other people have as well. But I think one of the things that has become more prominent recently is what I would call collective justice – justice as an attribute or feature of the European Union as a whole. What I do in my short paper is, first of all, to try to show the attraction of that approach. Why is it that people have become more interested in this? And also to show some of the limitations and some of the difficulties associated with that interest. I will say something about the first and if I have any time, say something about the second.

As regards the first, if we look at the history of the legitimation of the EU, it has tended to follow a distinction between what I would call derivative theories of legitimacy and other original theories of legitimacy. But these original theories of legitimacy have tended to focus upon democracy as opposed to other originalist conceptions, and the derivative theories have been delegation-based, have been trustee-based, have been efficiency-based etcetera. In my paper I try to explain and try to link the move from delegation to original legitimation to a point in the development of the EU as a polity.

We are increasingly in need of original legitimation, which was not seen as strongly in the past as it is today. Originally, we got away with proposing derivative forms of legitimation of the EU. But gradually, of course, that has been challenged by a kind of originalist alternative – the idea that the EU, because of the range and seriousness of these policy objectives, has to be justified by the same fundamental democratic principles as a state. And so what we have in recent years is a kind of standoff between these two different types of justification. And justice presents itself to some people as an attractive bridging idea between these two different sets of options. What I do in my paper is enter a debate initiated by people like Danny Nicol and Jürgen Neyer on the right to justification as one particular conception of justice - one of the ways in which one can think about this, and whether or not it provides a reasonable or helpful way. And basically, what I am saying is that the justice debate, those who are attracted by the idea of justice tend to be those who have some sympathy with the originalist argument, but have objections or reservations about the democratic version of the originalist argument. The objections to the democratic vision tend to be twofold.

One is the motivational objection that we find in various of the papers that there is simply not the political and cultural conditions of a European *demos*, and therefore the kind of political energy you need for democracy to work at the EU level. There are well-known objections and well-known responses to these objections, often developed around the work of Habermas. The second objection has to do with the intrinsic appropriateness of a democratic discourse for the EU. There tend to be two sorts of challenges here. One is that the EU is simply a different kind of beast, that it remains something significantly other than a state in terms of the limitations of its mandate etcetera. The second objection has more to do with what we may call the negative sum objection concerning more democracy at EU level. Democracy at the EU level does not stand in an infinitely positive relationship with democracy at the national level; instead, there is some kind of trade-off, some kind of difficulty in maximising both. So, what people who talk about justice and who talk in particular about an accumulative order of justice as a right to justification in any and all contexts seem to be doing is acknowledging some of the limitations or at least some of the reservations about democracy at the European level and asking 'is there some way in which we can tweak, reconstruct, reconfigure the notion of political equality as some kind of right to justification within a community of reciprocity in a

way which allows us to legitimate the EU in a manner similar to representative and assembly forms of democracy at the national level, but recognizing that these forms of legitimation are not exactly the same? And what I try to do in the paper is to look at this and examine both the positive and the negative sides of it. The positive side of it is that it allows for a more variegated conception of what we may call accountability in the EU and one which recognizes the fact that the EU is very much a multi-institutional beast. We have all sorts of different institutional contexts including the Commission, the Council and comitology agencies, all with discrete norms and needs of justification. The downside of it is that there is a sense in which the EU as a polity has at least some of the same top-down logic as a state. There is still some kind of need and some kind of argument for a steering justification for the centre. It is not something which can be disaggregated completely into component parts.

### ***Jürgen Neyer: Who's Afraid of Justice?***

Much of the debate we have had is tied to the question of “who is afraid of justice”. I owe this title to an exchange with Danny Nicol – thanks for that<sup>1</sup> – and his critique of my original argument, which is hopefully now more clear than it was before. It is an argument about constructing a new European narrative and I think that pretty much captures it. The problem from which I start is that I think the EU has raised and still raises, democratic expectations which it is incapable of delivering. The most important reason why it is not delivering its democratic promises is basically that the EU is structurally incapable of delivering – it is structurally incapable of democracy. And I think there are three reasons for that. First, the European Union is a compromise between individual and state equality. This compromise is for good reasons built into the very structures of the European Union. Secondly, the European Union has a constitutionally limited problem solving capacity. Member States’ agents have intentionally limited the EU’s problem solving capacity which is, again, not according to democratic criteria. And thirdly, the EU must live with a fragmented public sphere which will remain with it for the foreseeable future. If all three issues are of a structural character, and if we nevertheless aim at justifying the EU, then we are faced with the challenge of finding a convincing alternative to supranational democracy. Is there any normatively sound alternative to talking about democracy in the European Union? That is how I came down to thinking about justice, and the methodology I call normative realism.

Normative realism is a methodology which flips back from positive analysis to normative reflection. It starts with trying to understand the structures of the entity we are talking about – the European Union. Then to get us a standard setting procedure to developing a standard which fits this entity. The third step reconstructs the European Union in the language of the developed standard and checks whether pertinent normative problems can be dealt with meaningfully. The fourth step criticizes the European Union in the terms of this analytical language, to see if there is a critical bite in this new language. It also formulates institutional reform proposals. Why use the language of justice for establishing such an approach to the EU? Justice, as opposed to democracy, is a universal standard. You can apply it anywhere – the setting of the nation state, the beginning of an international organization. It is much more broadly applicable than the notion of democracy, which is tied to a large number of empirical preconditions. The concept of justice that I am working with is a procedural concept. In this I take a lot of inspiration from Rainer Forst. The proposed approach defines justice as the outcome of a justificatory process, so it is not a substantive notion of justice, but a procedural notion of justice – justice as the outcome of a justificatory process. Why is justification most important here? Justification is a contestable claim to legitimize the negative effects of our own actions on others. If you do something which has an effect, an impact on somebody else, limiting his or her freedom, then

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<sup>1</sup> See D. Nicol, ‘Can Justice Dethrone Democracy in the European Union: A reply to Jürgen Neyer’ 50 *Journal of Common Market Studies* 508 (2012); J. Neyer, ‘Who’s Afraid of Justice: A rejoinder to Danny Nicol’ 50 *Journal of Common Market Studies* 523 (2012).

you will have to produce good reasons for justifying that. So, what do we do, when we justify? We try to legitimize the negative effects of our own actions – or the state tries to legitimize the negative effects of law provisions and so forth. Just, then, are those actions that have successfully withstood contestation in a consented triadic setting. There must be a third independent party which assesses the normative merits of the arguments that have been raised.

If I bring all this together and approach the European Union, then what do we see if we adopt this analytical language? Then we see a European Union which is not a superstate in the making, but is an instrument for democratizing democracies by fostering transnational justificatory discourses. Democracy cannot be located in only one state – states have external effects. So, there is a transnational need for cross-border justification. The European Union does not have a democratic deficit; member states have democratic deficits. The EU has a justice deficit; it is an incompletely justified structure of justification. A structure of justification which is imperfectly justified itself, so there is some good and some bad. And finally, the European Union should not focus on mimicking the democratic nation state, but focus on expanding avenues for contestation and establish its legitimacy on an idea of a just layer of governance that is a logical and necessary institutional corollary to economic and social interdependence in Europe.

### ***Stavros Tsakyrakis: Disproportionate Individualism***

When we are talking about human rights, many theorists in Europe and elsewhere prefer the term 'individual rights'. I consider this terminology unfortunate from the point of human rights theory and adjudication. The underlying philosophy of the proportionality test, which has become the predominant method for resolution of rights and interests, has as its starting point the individualistic idea that everyone has a *prima facie* right to everything. This method, then, proceeds to achieve the optimal realization of his rights and interests by means of a balancing exercise.

The *prima facie* right to everything is a sophisticated reformulation of the Hobbesian right to everything, even to one another's body. The *prima facie* right leaves open the possibility that it may be restricted whenever this is necessary for maintaining the social union. We can cast the same idea in terms of freedom. Individuals *prima facie* enjoy total freedom. In a society they are not enjoying total freedom, but just the amount that is necessary to secure the mutual enjoyment of the remaining portion of their freedom. Very crudely, the above scheme represents the basis for the old liberalistic tradition and seeks to maximize freedom. The less freedom we seek, the better off society and individuals are. Social value and justice takes the back seat since the front seat is held by individuals and their interests.

I find the re-emergence of individualistic liberalism problematic for both methodological and substantive reasons. Individualism is a methodologically flawed abstraction, because there is no such thing as the unencumbered self. There never has been, and it is not an appropriate starting point for establishing civil society. Aristotle's assertion that man is a social being and cannot be conceived outside society is true. This means that the practice of sharing things with others is prior to the notion of individual self-interest.

Thus, starting from the sociability of human beings, do we sacrifice individuality? We come to an attractive notion of individuality if we derive from and relate it to the notion of fair sociability. We tend to think that for a society to be just it must provide for social arrangements. A just society requires equal respect and concern for each one of its members. Citizens are properly afforded rights only so far as the rights fill their status as free and equal participants of a liberal society that they enter by birth and exit upon death. This approach does not lose sight of the distinctiveness of every human being. On the contrary, it fits well with the idea of persons being moral agents to whom organized society owes unconditional respect, but differs from individualistic liberalism since it is the notion of a fair society that supports the idea of human worth, of human dignity, of equal concern and respect. We

could call such an approach to the formation of individual rights and to the primacy of the social ‘liberal sociability’.

The concept of liberal sociability, then, is that individual rights are derived from the conception of a fair society rather than a doctrine that gives methodological priority to the individual and his freedom. Within liberal sociability, justice and solidarity find their appropriate place. We care for justice and solidarity, because we are the sorts of beings that participate in collective endeavours which constitutively constrain our liberty, and implicate our interests and the interests of others. By contrast, in the individualistic view, justice gets a bad name. Europe has never succumbed to this individualist liberalism, but the emergence of this philosophy is dangerous to justice.

### ***Gareth Davies: Negotiating Justice***

A lot of writing about legitimacy in Europe deals with certain recurrent themes: democracy, accountability, identity, and redistribution sometimes, and now justice. I have a quarrel with these. My point about it is this: that from the point of view of legitimacy they are means and not ends. The problem is primarily a lack of social legitimacy in terms of a lack of acceptance of Europe as legitimate justice by the public. It is often assumed that things such as democracy, identity, and so on will promote that acceptance and also cause people to make a choice for Europe which would transform its legitimacy. And my point here is that there is plenty of research showing that when people make choices they do not just do so for functional reasons or identity based reasons, but for more subtle reasons which one could describe as emotional, but I rather describe as aesthetic. Research on political choice making, economic choice making, all kinds of choice making, including memberships of groups, has to do with complex subtle things, things which are as complex as humanity is. The reason why it deserves more attention is precisely that the EU is actually deficient in its ability to present aesthetic qualities to its people.

If one looks at national politicians, when they make laws, they do not sell them to the public narrowly in terms of their functional outcomes. They sell their decisions as part of a bigger picture, which is – when you look at symbolic language, emotional language – they paint a big picture of the world, and then make a claim that their law is part of this picture. And that is not just a peripheral populist phenomenon. It is part of what people want from governments, law and politicians. It is part of the expressive function of law that it gives people a picture of themselves, is responsive and makes them feel bonded with law, because it expresses images and values and aesthetics to which they relate. Precisely what the EU cannot do is this: this aspect of the law is constitutionally prohibited. I think the real legitimacy problem with the EU is its attributed powers. The doctrine of attributed powers condemns the EU to present its actions in terms of narrow functions, and also to present them in a language of inevitability – that is why lawyers like Europe so much. Not in terms of political choices – you know they are there – but in terms of narrowing it to ‘this must be done to achieve this concrete goal’. In peripheral language, the language of bigger symbolism has no place. Whenever one uses the language of larger symbolism, they are vulnerable to two criticisms. When European politicians or European representatives speak in terms of grand vision or aesthetic vision one common criticism is: this is mere empty words, hot air, this person does not realize that Europe cannot do this. The other criticism is: this is wrongful, this person is trying to stretch Europe beyond what it is, is trying to claim Europe has powers to do things it should not. Both criticisms are legally correct, but what it means is that Europe is denied the language that it needs to make contact with the population and to create the bond that gives rise to social acceptance. And all the technocratic legitimacy adjustments, procedures and even identity, do not really address this.

This does not have to be a huge problem. If Europe is a small technocratic operation, fine, let it be that. The problem that has arisen is that Europe has grown so much – it is hard to see it now as a mere delegate of Member States. It has become an umbrella for the more responsive and expressive Member States, which constrains the Member States by its laws, of course in a fiscal compact, but

even before that as much in economic law. So you see this translated to national politics whereby politicians are increasingly using the language of narrow functional inevitability, and squeezing out the language of bigger vision. We must do this if we must achieve this concrete goal. Other rhetoric, other images, other languages are illegitimate, if not actually prohibited. And what this means is that Europe cannot be responsive and expressive; it takes away the capacity of Member States to be responsive and expressive, and ultimately denies Europeans expressive responsive government.

The question is: what happens next? What I realize is you cannot have expert government and responsive government at the same time. You have to make a choice. Expert government is one and responsive government another. And that creates a structural tension. Structural tensions can be creative and useful. The history of negative integration is the interaction between them. The question is whether this one is stable and constructive, or is it not, and actually I think it is increasingly unstable, although responsiveness has been on the back-foot for a long period. The technocratic approach, or the expert approach is something that is subject to an internal and external attack. External (such as the financial crisis and the lack of respect for experts) but also internal (there is, rather, reflexive modernity, postmodernism, a general lack of faith in expert rule which is reflected in things like behavioural economics and increasing acceptance amongst the kind of experts who run Europe of the limitations of their own expertise). So I think we may be entering a phase of the collapse of expertise and the resurgence of responsiveness, and the open question is – does that come by a stronger containment of Europe and more responsive resurgence at national level, like more national freedom from EU law, or does that come by making Europe a more normal political responsive organization, with more political integration and broader powers? I am open on that. I just think that from the legitimacy and justice point of view, there is a need to bring back responsive expressive government on at least some level.

### ***Discussion Following the First Session***

- *Joanne Scott to Jürgen Neyer*: What kind of effects do you mean (when you say: “We try to legitimize the negative effects of our own actions – or the state tries to legitimize the negative effects of law provisions and so forth”)?
- *Jiří Přibáň*: It is interesting to see that at a justice colloquium we immediately started to talk about legitimacy. Can only a legitimate EU be a just EU?
- *Michael Wilkinson to Jürgen Neyer*: What model of democracy do you apply to assert that it does not exist?
- *Jan Komárek to Jürgen Neyer*: Why do we not define democracy in terms of political equality?
- *Jürgen Neyer*: (1) My argument starts with the assertion that the normatively highest value is freedom. Democracy is a mechanism in which a reasonable amount of freedom can be facilitated. That is where the phenomenon of external effects becomes relevant. (2) Does *ought* imply *can*? Philosophically it is not possible, but politically it is, at least seen from the approach of normative realism. (3) My argument has been developed for the time being as long as the EU does not change its structure fundamentally; it concerns a certain empirical condition. (4) The EU is set up intentionally not to maximize political equality for individuals. Justice is the value, and democracy might be a proper instrument to facilitate justice. This is the case within the nation state, but not necessarily on the supranational level.
- *Neil Walker*: (1) Legitimacy as a moral concept can be seen as a shadow concept of justice, often with little added value. Social legitimacy is more interesting. The right to justification does not reduce legitimacy to acceptability, but it is one important dimension. (2) The idea of political equality is that it corrects for inequalities or asymmetries of people or peoples in the political system.

- *Agustín J. Menéndez*: May I say that there are two premises which the presentation takes for granted, but which in my mind should be far from being taken for granted? Firstly, can we really argue that the equality of Member States, on which the Union was premised, and which informed the peculiar (and in some senses incomplete) institutional structure and decision-making process of the Union, is still there? A fiscal union such as the one that is emerging is one which is premised on some states being more equal than others. Reversed qualified majority, generalised by the Fiscal Compact, makes surplus states structurally more equal than deficit states. Secondly, proportionality is a structural principle which helps us think about problems, but does not solve them for us. To render proportionality an operative principle, it is necessary to fill it with both data and to take specific decisions. Can we really say that the way in which the European Court of Justice operates within the principle makes the decisions of the ECJ justified? Should we not actually check case by case first? After which, it would be possible to determine if there is a similarity (or not) between the decisions of the ECJ and national constitutional courts.
- *Oliver Gerstenberg*: (1) Why give up on the standard of democratic legitimacy? There appears to be a strong relation between the EU and democratic legitimacy. (2) We must be careful to distinguish between justice and political legitimacy: of the two, legitimacy is the weaker—less demanding—notation. People who sharply, pervasively, and often reasonably disagree about socio-economic justice may still be able to share a framework of political legitimacy within which substance may be settled. Hence I believe the turn from legitimacy to justice in some of our discussions is misguided: it ignores hard facts of reasonable interpretive and ideological pluralism which drive the distinction in the first place and which are characteristic of contemporary Europe.
- *Andrew Williams*: A provocative question: do we actually need democracy, for certain forms of justice? For example, is democracy necessary for redistribution?
- *Oliver Gerstenberg*: Are we then all apostates from democracy now?
- *Justine Lacroix to Stavros Tsakyrakis*: (1) I would say that the concept of individualism includes autonomy and implies social justice, so why the diabolization of individualistic liberalism? (2) What do you mean when everyone has a right to everything?
- *Gareth Davies*: Do we need democracy? Yes, but it is a question of degree. An important question is who decides whether the EU is good: ‘us’, the experts, or ‘them’, the people?
- *Stavros Tsakyrakis*: (1) Everyone has their own distinctiveness and autonomy, and I accept the notion of individuality, but it is not the starting point. It rather derives from a notion of fair sociability. For example the notion of a fair family union requires the recognition of distinct individuals that compose it. (2) I am not inventing this kind of individualistic liberalism, it exists, and poses a challenge especially in this time of crisis because it implies that either sociability is of a secondary importance or structures it in terms of an individual’s mere utility.
- *Neil Walker*: (1) We have already failed when we say that a different vocabulary of political morality should be used for the states and the EU. (2) The relationship between democracy and justice may not always be direct; think about expert committees etc. (3) The relationship between political equality and democracy is that they are an expression of a similar belief, and the difference is a matter of abstraction.
- *Mattias Kumm*: Since there is disagreement about many policy issues, the vocabulary has shifted to ‘justice’ instead. However, now there is disagreement about justice, and the vocabulary shifts to ‘legitimacy’. The next step will be that there will be disagreement about legitimacy, and the vocabulary will shift to ‘legality’. But because lawyers also agree, we now hope for a final arbiter. The different vocabularies we have are deeply connected, however.
- *Oliver Gerstenberg*: I think legitimacy—and legitimation-worthiness—is where the spade turns.



## **Second Session: Multi-Layered Law, Legitimacy and the Markets**

### *Floris de Witte: Integrating National and Transnational Justice Claims*

I think that, at the highest level of abstraction, justice has to be about allowing people to live good lives. Everyone will have a different idea of what the good life is. Even in this room, probably, even though we have largely similar interests or life styles, everyone will have a rather different definition of what the good life is. So, in order to transform this idea of the good life into anything of actual justice, we need a system that allows us to articulate our individual views of the good life, and a system that mediates between that and a collective compromise, one solution 'this is what we think what the good life is'. That system of course is a political system. By political system, I do not really mean a system revolving every four years, but a thicker conception of politics, which contains civic spaces and public spheres, which really allows people to actually articulate their conception of the good life, as an individual and as a part of a community. This thick notion of political systems, of course, also has a very convenient function that ties people together in a communal destiny which stimulates the redistribution of resources within a community and thereby allows for the institutionalisation of the moral links that citizens have with their fellow citizens in the same community. Some people think it is based on a sort of ethno-historical account of nature and language which is intrinsically national. I think it is more probably tied to this democratic space in which people's destinies are tied together, which allows them to see each other's needs and desires, and offers them an instrument to alleviate such needs or foster desires.

Now, if that is what justice is, then the EU clearly lacks most of these preconditions, and the democratic space that can mediate between different views of 'the good' and thereby legitimise the outcome. This is essentially a contractarian theory of justice, which I think is in very general terms accepted everywhere. From that perspective, the EU cannot contribute to justice. I think if we go back a little bit, and think of justice as allowing people to live good lives, then we can see how we could actually contribute to making sure that the externalities of contractarianism are limited. There are two main ways in which I think the EU can do so. The most important one is that even though contractarianism allows everyone to freely decide what a 'good life' means to them, the political system necessarily only allows only one outcome – one outcome is the collective outcome. For four years (or however long the electoral cycle is, there is one outcome even though we have five to ten million different views on what is 'just'. So, what the European Union does – and especially free movement law – is that it allow citizens to find out where the good life lies in twenty-six other constellations. So you are no longer tied to the outcome of one polity – the outcome in your nation state. You can simply move to other ones. I am Belgian, for example, and I live in London; for some reason either personal or professional, for me the good life at the moment is in London. If the most important aspect in my life is nice weather or good night life or to be with certain persons in a certain country, then I can – in theory - move. The EU allows me to pursue my good life beyond just voting. In that way, the European Union allows us to go beyond the limits of contractarian justice. The second way, which is more familiar to EU lawyers, is non-discrimination. Not only can I move between different Member States, but I am not excluded. I am excluded from political participation, I cannot voice what I think is the good life in the UK for example, but I am entitled to the outcomes of that political process. So I as a foreigner can also access those public goods. In these two ways EU law can be seen as actually contributing to justice beyond the capabilities and institutions of the nation state. So, to put it very bluntly, the nation state is very good at generating, at allowing people to live, to articulate what they want in constructing a communal vision of the good life, especially in terms of limited resources – health care, education and whatever you want. EU law mitigates exclusionary effects of that contractarian view by allowing you to move beyond the one normative outcome, and it entitles the migrant to access redistributive resources in the host Member State.

Now I will very quickly sum up. This is a nice conception, of course, but the problem is that there is a strong tension here, because we redistribute resources within Member States, which is justified by

reference to a general sort of reciprocity and diffuse solidarity that does not necessarily extend to ‘outsiders’. So, ‘we are all tied together’ also means that we all get to put something in and get something out. If you allow people to move beyond different Member States this idea of reciprocity is slightly skewed. To use a very blunt example: if the unemployed Greeks or Italians fly to Sweden but with Ryan Air and they are allowed to say ‘hi, I am a European citizen, unemployment benefit, please’; the problem is that the Swedish electorate might say a few years down the line ‘actually we do not see that they deserve this’, while the non-discrimination obligations under EU law make the only possible policy adaptation the decrease or even abolition of unemployment benefit. Such a move may hurt migrant EU citizens, but will primarily hurt unemployed Swedish citizens. The problem here is that the European conception of justice of free movement and access to redistributed resources of the country is parasitic on the actual existence of solidarity within the nation state. So, what I think we should be thinking about in terms of how the European Union contributes to justice, is how to overcome this conundrum. I work on this in view of transnational solidarity, trying to find out which commitments of solidarity and reciprocity are implicit in the process of European integration, which are either market commitments or commitments based on Union citizenship, or commitments toward the aspiration mobility of people, and try to tie this together to reciprocal obligations of solidarity.

### **Michael Wilkinson: One Market, Many Peoples**

I approach the issue of social justice in what, for lack of better terminology, I call a ‘political functional way’ – where social justice is viewed as a struggle for equality in all spheres – economic, social, political. To the extent that social justice is achieved it will be by social movements, popular pressure, democratic methods, above all politically, not through a theory of justice, or through notions of justification. And it might be worth pointing out that since Rawls wrote a *Theory of Justice*,<sup>2</sup> levels of inequality in the US have increased and reached levels actually quite unprecedented since the 1920s.

From a political functional perspective you get a quite straightforward picture of the problem of achieving social justice, what I call a ‘moving picture’ of the dynamic of the struggle for social justice. It is captured neatly in Wolfgang Streeck’s recent work on political economy on the antagonism between capitalism and democracy.<sup>3</sup> This is interesting in itself, because it challenges the traditional liberal assumption of an affinity between capitalism and democracy. It is interesting in its own right, reflecting a deep tension that suggests democratic politics is subject both to the pressures of the financial markets, and to the demands of the people. Now, it is not only disillusioned ex-Marxists who express this view of the antagonism between democracy and capitalism. I quote Jürgen Habermas: ‘In the modern era the market and politics have had to be repeatedly balanced off against each other in order to preserve the network of the relations of solidarity among members of the political community. There always remains a tension between capitalism and democracy, because the market and politics rest on conflicting principles.’<sup>4</sup>

Now, I don’t want to go into what these principles specifically are, it suffices to say it is in itself an entire research project looking at the conflict between competition and cooperation between the common good (solidarity) and individualism. Rather than pursue that conceptual dilemma what I would like to do is query, if you like, what are the implications for European integration of this ‘dynamic equilibrium’. According to Wolfgang Streeck, we see this dynamic played out in the European Union at what he calls “breathhtaking speed”, pointing out the logic of the market’s demand of removal of elected politicians: look at the recent case of Italy. I say demand, but there is no direct

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<sup>2</sup> J. Rawls, *Theory of Justice* (Cambridge MA: Harvard University Press, 1971).

<sup>3</sup> W. Streeck, ‘The Crises of Democratic Capitalism’ 71 *New Left Review* 5 (2011) and Wolfgang Streeck, *Markets and Peoples* 73 *New Left Review* 63 (2012).

<sup>4</sup> J. Habermas, *The Crisis Of The European Union: A Response* (Cambridge: Polity Press, 2012).

cause and effect between the market and what happens in politics – because in politics we deal with contingency and human choice. I will come back to that; we should consider the competing logics of capitalism and democracy, not necessarily in terms of necessity, which would be the way historical materialism approaches it, but simply as a pressure toward certain forms of institutional change. Now, the upshot in the EU seems to be the result rather of having one market – as I call it – and many peoples. It is rather problematic, because this sort of asymmetry is making it too difficult for political channels to correct the market imbalances, the inequalities that the market produces. Political channels are weak – there are few channels for correcting or civilizing the market in the EU. There may also be sociological constraints – in other words the lack of solidarity – and of course that is a huge question now when you are looking at what is going on in Greece and Germany and elsewhere. It seems to me that a more compelling point rather than simply look at it in terms of dividing Europe into various *demos* on national lines is, to consider that transnational solidarity *might exist*, in particular along class lines. And this is a point that Streeck is elaborating. Now it does seem to me that the ‘no *demos*’ thesis is always a vicious circle, however it is understood. It is always a vicious circle. If we look at the origin of the ‘no *demos*’ thesis – the German court in its Maastricht decision quotes Herman Heller in support of the proposition.<sup>5</sup> Now, Herman Heller’s thesis was about socioeconomic equality: Heller thought that democracy without some level of socioeconomic equality would inevitably lead to authoritarianism. My sense is that this historically confirms that there is a strong interrelationship between justice and democracy, and we ignore this relationship at our peril.

Nevertheless, the asymmetry remains, the strong asymmetry in Europe between – to put it crudely – one market and many peoples, although I would say that I want a question mark added. There is this real asymmetry, which seems to lead to a proper impasse. In other words, there is a lack of channels, political channels for redressing the imbalance between capitalism and democracy. I will finish with one final claim which is how we can emerge from this impasse. It seems to me unlikely so long as the tension between capitalism and democracy is a tension between incommensurables. In other words, there is a tendency to view capitalism and markets as part of the natural world, as an evolutionary social force which we can do nothing about, and we cannot in Jürgen Neyer’s terms. But I think that is the wrong way of looking at it, because if we consider that the market is a product of political choices then its results can also be reversed. That is why I end by quoting Joseph Weiler’s early work where he specifically and emotively claimed that the choice for a market Europe was a *political* choice, and not the result of pure natural forces.<sup>6</sup>

***Oliver Gerstenberg: The Question of Standards for the EU: “Legitimacy” or “Substantive Justice?” The Question of Standards Posed.***

The controversy about Europe’s “democratic deficit” has continued unabated.<sup>7</sup> But is now a semantic shift (or even “paradigm-shift”) from “democratic deficit” to “justice deficit” advisable? Should we replace the focus on democratic legitimacy with a (search for a) more comprehensive—EU-wide—“substantive ideal of justice” (as the organizers of this conference wonder and may even be intimating)?

Are we then all apostates from democracy now? In what follows, my answer to these questions will be “no.” Writing or reading a “substantive ideal of justice” into law will of course give rise to interminable familiar debates about what lawyers call justiciability—the specter of (European) judges usurping domestic democratic prerogatives of “the people themselves.” At a deeper level, if the substantive ideal of justice is meant to express a collectively shared European aspiration, in an

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<sup>5</sup> For English translations of parts of Hellers work, see A. Jacobson and B. Schlink (eds.) *Weimar: A Jurisprudence Of Crisis* (Berkeley: University of California Press, 2000).

<sup>6</sup> J.H.H. Weiler, ‘*The Transformation of Europe*’ 100 *Yale Law Journal* 2477 (1991).

<sup>7</sup> J.H.H. Weiler, ‘*The Political and Legal Culture of European Integration: An exploratory essay*’, 9 I-CON 678 (2011).

ideologically deeply divided EU, it appears there just is no overlapping consensus on a substantive ideal—a European “social model,” as it’s sometimes called—forthcoming.

Rather than embarking on a futile—possibly even defeatist—search for a substantive umbrella-ideal of justice, Europeans should instead focus on establishing an EU-wide *framework of political legitimacy* which enables European discourse and within which ongoing debate about conceptions of socioeconomic justice and mutual learning from diverse experience is, and continues to remain, possible. Call this the deliberative turn. But to the extent that we also insist that the terms of that procedural framework must be themselves open to continued self-revision and recursive, the deliberative turn is already a democratic experimentalist one.

The institutional thrust of the democratic experimentalist model is this: the suggestion to weaken the culturally deeply entrenched attachment, in Europe, to a judicial-supremacist mode of judicial review and instead to allow judges to enforce avowedly open-textured, fundamental public commitments in ways that invite rather than exclude continuing democratic and social determination by stakeholders of what these commitments can and should come to mean in practice. Instead of trying to master and contain diversity, we should aim at producing it and embrace diversity as a resource of mutual learning from best practice and of ongoing benchmarking and of democracy.

### Justice versus Legitimacy

So we must be careful to distinguish between justice and political legitimacy. Of the two, legitimacy is the weaker—less demanding—notion. *Legitimacy* provides an answer to the problem of political justification: of how the coercive imposition of the power of the state can be justified even to reasonable dissenters who disagree with its exercise. A *legitimate* regime is one whose requirements the citizens *generally* have reason to comply with because they are its requirements. Individuals with persistently differing (but often reasonable) understandings of justice and fairness may nonetheless still agree on a background institutional framework of political legitimacy, to be used in deciding how disagreements over substance (that is to say socioeconomic justice) are to be dealt with. If individuals can agree to this framework-procedure (“legitimacy standard”), then they would have in some relevant sense agreed to the laws which the procedure produces, and hence laws will be, *pro tanto*, justified.<sup>8</sup>

But what are the requirements of political legitimacy? A debate today rages between constitutional liberals and advanced democrats, who among themselves disagree over the depth and reach of reasonable interpretive disagreement and the resulting implications for strong-form / weak-form practices of constitutional adjudication and judicial versus parliamentary supremacy. Is common ground possible?

*Rawlsian constitutional liberals*—who are comfortable with judicial review—rely on an expectation of wide agreement within constitutional-democratic societies over when there has been a violation of the “central ranges” of the basic negative liberties, including those of free trade, but exclude socioeconomic rights (guarantees of fair equality of opportunity) from the range of justiciable constitutional essentials, out of a concern with justiciability. By contrast, advanced or deep democrats are committed to the realization of just such rights, but convinced that courts will not give them a fair shake and therefore opposed to the judicialisation of rights. In particular, (say) *Waldronian strong democrats / democratic positivists* insist that reasonable interpretive disagreement spreads so wide and cuts so deep—even into the core of civil and political rights—that *any* form of rights-based judicial review will inevitably debase the respect for the dignitarian-liberal individual super- or master-right to

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<sup>8</sup> “Without tying ourselves to naïve claims about a clean separability of substance from procedure, it seems we can sometimes reasonably hope that parties caught in profound disagreement about matters of great importance to them—those being what we call the ‘substance’ of their debate—can nevertheless be brought to agree on an institutional framework (call it ‘procedure’) to be used in deciding how those matters are to be dealt with.” F. Michelman, ‘Poverty in Liberalism: A Comment on the Constitutional Essentials’ 60 *Drake Law Review* 1001 (2012).

an equal voice in deciding reasonably contestable questions of liberal constitutional interpretation in the domestic political forum of majoritarian politics. Whereas the former see the EU as epitomizing “the sovereignty of law” (F. Jacobs), the latter accordingly view the EU along more republican-intergovernmentalist lines as a *demoi-cracy* and reject strong-form judicial review.

Yet both these positions face costs. On the liberal-constitutionalist side, legitimacy beats back justice but the omission of socioeconomic rights from the constitutional essentials may have the effect of undermining the *political legitimation-worthiness* of a constitutional regime itself. But the strong democrats' rejection of judicial review, too, turns out to have hidden costs. Strong democrats insist, as they must, that the parliamentary side of the country's political life and practice must be in “good working order” (Waldron) in order to warrant inclusion into politics of an adequate respect for the liberal idea of rights. But the satisfaction of this assumption or prediction is itself likely to be ever and always subject to persistent reasonable disagreement: for example, “discrete and insular minorities” with no prospect of ever winning in politics may just disagree. And so is the question of whether the strong assumption / prediction of a self-governing demos—even if conceived along non-exclusionary lines—will ever be satisfied in a politically divided polity: EU law increases burdens of justification for the *demoi vis-à-vis* citizens for their various policies and may force them to reconsider their legal and political choices in the light of EU-wide understandings of principle in ways they would not have done if left to their own devices.

In contrast with both liberal-constitutionalist and republican-democratic-positivist traditions, the key to the democratic experimentalist approach is the claim that liberal legitimacy-by-constitution is procedurally sustainable without placement in any institutional site of a final authority to decide compliance. The grip of the stranglehold of the dichotomy of judicial supremacy versus legislative supremacy breaks. According to the no-final-decider thesis, courts act as non-dictatorial contributors to the cogency and credibility of a process of loosely institutionalised deliberative-democratic debate over the implementation of a non-formally realizable principle of fair equality of opportunity over time.

Does the EU compromise democracy?

Underlying the search for a substantive ideal of justice is a widespread and fundamental but also familiar worry about the viability and survival of the national welfare state in the EU. Two mutually adverse standard views can be contrasted.

Neo-liberals will triumphantly answer “yes, and it's a good thing, too.” The ordoliberal school of thought embraced “Europe” on the grounds of a belief in rather a neat division of labour: it would become the task of the new European economic law to implement and protect a system of open markets and undistorted competition at the supranational level beyond the state, while Member States were to retain those legislative powers in the domain of the social that proved compatible with open markets. The Contracting States should not allow the political to contaminate the economic. Hayek, for example, famously imagined a “new form of international government under which certain strictly defined powers are transferred to an international authority, while in all other respects the individual countries remain responsible for their internal affairs” (1944: 239), the role of which was to preserve “international order or lasting peace” (226) in the absence of “any common ideals of distribute justice” (228).

But in stark contrast to economic constitutionalism, the very different tradition of—political—liberalism rejected the idea of a self-sustaining “economic law.” “Libertarianism,” Rawls strikingly remarked, “lacks the concept of procedural background justice.”<sup>9</sup> As Thomas Nagel explains,

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<sup>9</sup> J. Rawls, *supra*, 262.

“[t]he moral key to Rawls’ more expansive position [as compared to economic liberalism] is in the idea that, because of the essential role of the state, the law, and the conventions of property in making possible the extraordinary productivity and accumulations of a modern economy, we bear collective responsibility for the general shape of what results from the sum of individual choices within that framework.”<sup>10</sup>

Social democrats argue that the moment of “collective responsibility” cannot be attained at the EU level and that collective responsibility at the national level is undermined as EU-integration deepens. As a result, collective fate-control by the democratically self-governing citizens themselves dissipates. The argument begins with the familiar fact that the political project of European integration was to be realized by an economic program effectuated through and by the rule of law. The pronounced emphasis on “integration through law” had, of course, to do with political stagnation at various historical stages of the integration project and could be understood as an audacious but also a prudentially wise choice, insofar as transnational legality helped, as Weiler pointed out, prevent free riding and provided stability and continuity to any *acquis* even in periods of political instability and wavering commitment.<sup>11</sup> And yet, according to an influential analysis,<sup>12</sup> the reliance on law also—by way of an unintended consequence—fatefully led, according to that view, to a double constitutional asymmetry or bias overall: first, on the substantive level, a bias in favor of economic constitutionalism at the transnational level to the detriment of social-political constitutionalism domestically—concerned with socially “embedded capitalism” (Ruggie) and with the externalities of free markets on non-market domains of life—the colonialization of the lifeworld. Second, and institutionally, an asymmetry between law and politics; a bias in favor of an unencumbered “supranational” judicial politics to the detriment of democratic law and politics “at home”—an undesirable assignment to European courts of morally decisive authority in questions concerning society as a whole, which those courts are ill-equipped to address.

#### Democratic experimentalism to the rescue

According to the democratic experimentalist model of judicial review, courts act in the first instance as instigators and non-dictatorial overseers of engagement among stakeholders (broadly defined, and public and private, with no hierarchy), in an ongoing process of interpretive clarification of constitutional meaning—a process of subsequent discursive benchmarking. The court serves as arbiter but without having the final word: judicial intervention is continuum-izing rather than based on a dichotomic contrast between strong-form and weak-form review.<sup>13</sup>

At a more practical level, and as a matter of assessing the jurisprudence of the Court of Justice, I argue that there is only scant, or at least inconclusive, evidence for the (Scharpfian) asymmetry-claim. No doubt, we all have our *bêtes noires* among the case law.<sup>14</sup> I believe that a more nuanced account than the ones offered by some of the critics of this jurisprudence can be given: indeed, the Court has played a benign role by both strengthening and transforming the rule of law<sup>15</sup> on countless occasions and is on record for making explicit fundamental legal principles often in surprisingly innovative and

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<sup>10</sup> Thomas Nagel, *supra*, 80.

<sup>11</sup> J.H.H. Weiler, ‘The Political and Legal Culture of European integration: An exploratory essay’, 9 I-CON 678 (2011).

<sup>12</sup> Scharpf; Streeck; Supiot; for a very nuanced view, cf. Bellamy.

<sup>13</sup> For a related set of arguments, O. Gerstenberg, *Negative / positive constitutionalism, ‘fair balance,’ and the problem of justiciability*, in I-CON (October 2012), with a Comment by Mark Tushnet on <http://www.comparativeconstitutions.org>.

<sup>14</sup> The notorious Viking- and Laval-cases are the usual suspects, which have attracted vitriolic comment. But for a different, more nuanced reading of these cases, see Charles F. Sabel and Oliver Gerstenberg, ‘Constitutionalising an Overlapping Consensus: The ECJ and the emergence of a coordinate constitutional order’ 16 *European Law Journal* 511 (2010) . But for an engaging rejoinder to our piece, cf A. Supiot (2012).

<sup>15</sup> F. Jacobs, *The Sovereignty of Law: The European Way* (Cambridge: Cambridge University Press, 2007).

unprecedented ways where development was blocked or arrested at the level of national law and politics.

Coda: democratic experimentalism a conception of justice nonetheless?

So experimentalism rejects the search for a comprehensive “substantive ideal of justice” (which the organizers may have had in mind) as misguided. But is perhaps democratic experimentalism itself a “substantive ideal of justice?” In one sense, the answer is “possibly yes:” democratic experimentalism assumes a world of pervasive uncertainty and vulnerability, with no final decider nor Archimedean point—be it a sense of ourselves as rational agents or part of a demos, a set of stable legal prescriptions known in advance, of judicial or legislative-majoritarian supremacist claims to finality without fallibilism. The sense of uncertainty, about ourselves, and of heightened mutual vulnerability that comes with it, we *rationaly* hope, sustains our motives to collaborate, to embrace diversity, and to learn from the other and the hitherto excluded and despised as we go along as problem-solvers. The penalty for abandoning this hope may be loss of self- and fate-control. In this sense, democratic experimentalism is not merely an institutional theory—an annex to substance always revealed and elaborated elsewhere—but, as Michel Foucault in his 1994 lecture on Kant’s “Was ist Aufklärung” once suggested, an “*ontologie de nous-mêmes*.”

### ***Damian Chalmers: Kinship, Markets, and Justice in Europe***

One of my brief arguments is that EU law pursues some styles of justice that are very effective, others are structurally incapable of pursuing, and these different styles of justice are very pervasive. This goes in my view to how you look at the authority of EU law. To start my argument I draw on Neil’s discussion and the last session on the relation between democracy and justice.

My understanding of democracy’s foundation is that it is a community of free and equals. These elements of ‘equals’ always implies some relationship between justice and democracy. But that remains more indirect; I want to say that my understanding of freedom is something we all do alone or in common with other people. Justice on the other hand – this is what is interesting about it – is something we have in relation to other people. So it is not just interesting in some notion of justice deficit, but in having a political community. How we stand in relation to others within or beyond our relations. Now, what I am going to argue is that whatever the modality – distributive or substantive – and whatever the justice, there are three styles of justice as I understand in literature. This is what I will come back to. (i) There is justice as equality of outcomes, which you see in the work of people such as Cohen and Phillips<sup>16</sup> (ii) you then have justice as a threshold concept, this is what you see in the work of Rawls, that is given and basic needs or human capabilities, (iii) Thirdly, there is justice as a psychoanalytic condition. This is the work of people like Saperstein<sup>17</sup> and others. You look at the relationship of the ‘I’ and the ‘we’, and the politics of recognition.

I will argue that when you think about these things rather in the abstract you have to look at the concept of political communities. You have to look at two things. One is the thing that Rawls is most critical of, the underlying conditions that give rise to these relationships in relation to each other, and the other is the antagonistic claim – which has not been talked about, but is actually almost the counterpart of course – is that the conditions of injustice give rise to the political. And when I say we think about these two things – the underlying conditions and this antagonism – in the modern state as I understand there are two types of relationships. First, the relationship between people as people – we understand each other in opposition and in interaction with each other as human beings. And then he draws the other one, where we interact with each other in relation with what we do, in relation with

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<sup>16</sup> A. Phillips, ‘Defending Equality of Outcome’ 12 *Journal of Political Philosophy* (2004).

<sup>17</sup> S. Saperstein, ‘Psychoanalytic Justice: An Ethical Inquiry’ 93(5) *Psychoanalytic Review* (2006).

particular common activities. Now, what I find when I look at the EU is that you do not find much. All you have is the tension between state and government that does not exist in the EU. It is a purpose-built organization to set up, to realize certain tasks – it can do these tasks better than any other organisation. It might be something beyond that, but we never find an example where the individual just exists in some wonderful state *qua* individuals. It is always for the realization of certain tasks, typically those set out in articles 2 and 3 of the TFEU. And this poses a particular challenge for justice as a traditional relationship we find in the status quo – that does not exist. To me this means that certainly for the EU it is very difficult to realize certain types of justice. Traditionally, justice is based on equality of resources or needs, based on the idea of individuals see each other *qua* individuals, not what they contribute to the realization of particular services – health care, social systems and so on. Maybe problematically around the idea of kinship, but actually recreate it at the European level is equally problematic – it is not clear to me why we should be giving health care to, say, our fellow French, not Bangladeshis. What the EU does quite well in my view is – while it cannot do equality of resources, it struggles to a certain extent is the idea of justice around minimum needs, the threshold concepts – however, it does have focus on common activities or mutual dependence – the idea that Durkheim had – mutual dependency on each other in labour rights, ecological rights, which generates mutual justice claims. This is actually quite strong in the EU. The EU typically does it better than Member States. The other thing it does very well is to problematize the idea of community, the psychoanalytic notion of justice, by problematizing the pathologies of the nation state which is written on *ad nauseam*. This touches a little bit on what Floris said in his presentation. What you find is the EU is very good articulating these two forms of justice claims: dependence and the problematization of the ‘we’. Other forms of justice it just cannot do, even though it tramples upon them again and again and again. It cannot avoid touching on them. So, what I argue is – what I said at the beginning – the conditions of the political structure of the EU and the injustice, this requires a rethinking of EU law. I think it should have authority – it can put us in relation to each other in a way better than other forms of political organization: mutual dependence and problematization of relationships very well. But where it touches upon other ideas, such as equality of outcomes, basic threshold concepts, I can’t see the reasons for its authority if you believe in justice.

### ***Discussion Following the Second Session***

- *András Sajó*: (1) Is solidarity about justice? More specifically, is solidarity justice, or is it a corrective of justice? (2) Are constitutions based not only on procedural justice, but on substantive as well?
- *Sionaidh Douglas-Scott*: There is something about the nature of the EU which produces a particular injustice, mainly that it is parasitic on national solidarity and is unable to produce a solidarity of its own. How do we deal with this governance issue? And what is the specific role of EU law to this question of justice?
- *Floris de Witte*: (1) To me solidarity is a very context-specific expression of justice. Solidarity allows for the resources to let justice actually take place. (2) A constitution can also be an expression on how we live the good life.
- *Michael Wilkinson*: The role of law cuts both ways, both to capitalism and democracy.
- *Oliver Gerstenberg*: On the one hand, I am fascinated by these mechanisms, but on the other hand I am sceptical about lawyers and their often self-serving legal ideologies (Max Weber’s “*Standesideologien*”).
- *Damian Chalmers*: (1) In my view, what is attractive to the EU is that it does not have the pretensions of a state. (2) What is interesting about justice is that it concerns how we stand in relation to each other.



- *Daniel Augenstein*: The EU might be a purposive organization, but the same can be said about nation states. What makes an inquiry into the EU's justice deficit distinctive is not that it is a purposive organization, but that its main purpose is a common market.
- *Joanne Scott*: What about the good life and ecological and other constraints? In other words, to what degree is the good life actually a choice?
- *Jürgen Neyer*: How do we assess the strength of normative argument in a methodologically sound way?
- *Neil Walker*: Can a notion of justice as rationality, which interrogates existing solidarities, itself provide a form of solidarity within the EU without an additional expressive dimension?
- *Jiří Příbáň*: We are conflating two different types of solidarity: a value-oriented one and a descriptive 'Durkheimian' one. Is solidarity a relational concept or a procedural concept, which you can turn into formal justice instead of social justice?
- *Justine Lacroix*: Does your idea of transnational solidarity also imply fiscal harmonisation or fiscal distribution, and in what sense is it then still transnational?
- *Damian Chalmers* in response to *Neil Walker*: When I look at EU law in micropractice, it works actually quite well – but the question is one I want to think about.
- *Floris de Witte*: (1) The good life also concerns ecological issues that may be articulated on European level rather than national level. (2) In my paper I reconceptualise the idea of non-discrimination on basis of solidarity, but there should not be an abuse of rights, which undermines trans-national solidarity.

### Third Session: Euro-Crisis, Solidarity and Private Autonomy

#### *Danny Nicol: The Contestability of Justice as Exemplified by the Eurozone Crisis*

I believe that discussing justice in the EU we are just milling around in the dark, unless and until, we accept the content of justice is preeminently contestable. There are multiple conflicting conceptions of justice. Or as Jeremy Waldron puts it ‘there are many of us who disagree about justice, we need democracy, so choices over what is justice and unjust can be made and remade.’ The quest for justice cannot be severed from the pursuit of democracy. Recent developments have mightily reinforced this argument, self-evidently the Eurozone catastrophe has plunged the EU into a period of unparalleled crisis, in which competing justice arguments have clashed. Yet in fact the history of the EU is littered with examples of the contestability of justice long before the disaster with the Euro. There is the example of the *Viking* and *Laval* case law.<sup>18</sup> Some argue that it is just because the Court was enforcing the four freedoms, which have been a prized part of the EU political package since the very beginning, which is based on equality between the States. Others argue that it is unjust because brutal capitalism will undermine the welfarism of the older Member States and thereby scupper the chances of the newer Member States for similar development. And then again, there is the example of the EU’s policy of compelling privatization, through judicial interpretation of Article 106 TFEU, coupled with the liberalization directive. Some say the policy is just because it prevents Member States from selfishly evading the demands of the single market and improves efficiency. Others say it is unjust since it shifts wealth from the poor to the rich. Thus even without the Euro, the very framework of the common market was highly contestable in justice terms. On the one hand, we have the justice argument advanced by some in Germany that the poorer Member States lied about their economic circumstances before joining the Euro, and afterwards embarked on an irresponsible spending spree since the Euro meant cheap money. It would be unjust to inflict on German citizens to have to pay for a vacation from reality on the part of these states. Chancellor Merkel famously contrasted the troubled Member States, with ‘Swabian housewives’, who characteristically do not spend more than is in the pot. The Swabian ethos is to save first, and then only spend what is saved, because in the long run, one cannot live beyond one’s means. On the other side of the justice argument, it could be argued that when talking about justice, we are focusing on the people – the ordinary people of Europe, not their elite. It is not the ordinary citizen who cooked the books, yet it is precisely the ordinary citizen in the poorer Member States who is expected to suffer the consequences. So, there are multiple conflicting ideas to what is just and what is unjust. To my mind, this makes the notion of the right of justification nonsensical, since there will be multiple ideas as to what precisely we should be compelled to justify. Should it be deviation from the four freedoms, should it be the suffering of the Greek, Spanish, Portuguese, and Irish? Furthermore, arguments about justice are not merely political, they are *party* political. Therefore, it would be deluded for scholars to assume by some philosophical alchemy they shall arrive at a single conception of justice that will satisfy everyone. Academics should not attempt to derive a more juristic, less polemical and more apolitical conception of justice. Instead, they should assume a more controversial and partisan role. In this regard we should not be afraid of introducing the ideas of right-wing and left-wing into our discourse. Apart from being afraid of justice, as Jürgen Neyer seems to think, this position might spark the fiercest possible controversy over what is just and unjust.

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<sup>18</sup> Case C-438/05 *The International Transport Workers’ Federation and The Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767.

***Daniela Caruso: Justice and the Regulation of Private Autonomy***

I'd like to address the idea of 'justice' in the field of private law harmonization. Talking about justice deficit in European law to anyone who has worked on private law harmonization is, today, preaching to the converted. It is by now taken for granted that EU private law should reflect social justice concerns. This, however, has not always been the case. Things started in 1985 with the Product Liability Directive. This was a glorious moment for social justice in private law harmonization: on one hand, the new directive fulfilled the needs of the single market by creating a level playing field for competing manufacturers throughout the Community; on the other, it promoted a sort of moralization of the market by inducing producers to engage in ethical manufacturing. However, this seemingly peaceful co-existence between the ideal of justice and the harmonization of private law did not last long. Innocence was lost as soon as it became clear that the directive, during the transposition process, had prompted lobbyists (pharmaceutical companies and farmers alike) to come to the fore in order to reduce their chances of liability. Then, in 2002, the ECJ in *González Sánchez v Medicina Asturiana*<sup>19</sup> declared the directive pre-emptive of higher degrees of protection for the victims of defective products. The idea that harmonization would *always* bring about additional protection for weaker parties became, at that point, untenable.

In the meantime, the Commission had been working on the harmonization of contract law (see eg the Unfair Contract Terms Directive). Because of the work of social-justice minded academics, contract law harmonization has increasingly taken into account the uneven bargaining power of the parties in most consumer transactions. This has meant aiming for substantive equality as opposed to formal equality, and correcting autonomy with mechanisms for the protection of weaker parties (consumers and small enterprises). One could say that the social justice movement in contract law has been highly successful, and that EU contract law has completely internalized the agenda of socialization. There is a sense, however, in which the movement has become a victim of its own success. When the idea of social justice in private law meets the Commission's aspiration to uniformity, a paradox occurs, and in the name of social justice the neoliberal assumption of formal equality comes back to life. In classical legal thought, contract law was built on a presumption of parity between formally equal subjects. Against this background, acknowledging the structural weakness of certain parties meant realizing social justice. And this is exactly the realization that is currently reflected in EU contract law. But, as Damjan Kukovec highlights, we are assuming that the trader in the centre is exactly the same as the trader in the periphery, and that the consumer in the centre is equally positioned as the consumer in the periphery. As a matter of fact, however, Europe is characterized by radically uneven business environments and that it is harder for businesses in structurally disadvantaged areas to internalize or pass on the costs of regulatory constraints. What is becoming clearer in this postmodern phase of private law harmonization is that the enactment of uniform regulatory requirements for market actors situated in very different socio-economic contexts is no less worrisome, from the view point of justice, than the neoliberal assumption of formal equality between asymmetrically situated contracting parties. In the name of socializing private law throughout Europe, harmonization may reproduce the mistakes of neo-liberalism.

There are two things one might do at this point to address this problem. One might give up harmonization entirely, and accept that the regulation of contracts – including such things as post-sale remedies for consumers – should remain uneven, allowing less stringent regulatory standards for structurally weaker business. This option is obviously not realistic. The countries in the socio-economic periphery of the Union would certainly not want that, because that would label them automatically as not offering the same type of guarantees, and would render their products or services less appealing. The alternative is to go forward with harmonization in light of social justice concerns. After all, it is ethical and expressive for private law throughout Europe to embrace a body of weaker party protection. This course of conduct, however, requires conducting extensive empirical

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<sup>19</sup> Case C-183/00 *María Victoria González Sánchez v Medicina Asturiana SA* [2002] ECR I- 3901.

investigation and. documenting regularly the costs that uniformity inflicts on producers in the socio-economic periphery of the Union. Without adequate assessment of, and compensation for, the asymmetric impact of uniform contract regulation, EU private law may bring about distributive consequences that are the antithesis of social justice.

***Mattias Kumm: The Case of Banks and the Financial Transaction Tax in the EU***

The question I want to address is whether (1) the euro crisis raises issues of justice, if so, (2) what exactly they are, and (3) what ‘justice’ requires for resolving them. Firstly, it is not clear whether it is a justice issue. There are some who claimed really what went wrong here was a policy choice, a constitutional design issue of establishing the European monetary Union in such a way that didn’t allow for the EU to react appropriately in the context of asymmetric shocks, and that is what we are seeing now. The initial problem was a constitutional design problem, the Euro is not an optimal currency under the current design features, and therefore we are suffering the consequences. It was bad policy leading to inefficient results. That is one type of analysis. A different type of analysis suggests there is a justice issue here but it is along the lines that Danny described, it is somewhere between profligate spending of Southern states who could not get their act together, who profited from possibilities created by the European monetary union. Cheap access to capital which leads in the end to a situation of externalities coupled with failure to pay back debts, creates a ‘justice’ issue by unduly affecting others who are not responsible for creating that type of situation. That is one perspective, and of course the other perspective is that we shouldn’t focus on the inefficiencies in the political system, but on the individuals who are suffering. And so there are duties of solidarity, from which duties of justice may follow from that. And so, there is a debate about competing justice claims.

I find that whole analysis mostly misguided on both sides. I think the core issue is a completely different one, the core issue is about regulating the private sector and precluding negative externalities from private transactions. So really, the Euro crisis is a banking crisis. From October 2008, to October 2011, the Commission has authorized 4.5 trillion Euros in State aid subsidies. That’s about 7 times the amount we have in the ESM as basic capital. And it’s about 37% of European GDP. That’s how much, effectively, was made available at least authorized to flow from the public sector to the private sector to save the banks. Now we save the banks for systemic reasons, there are externalities related to bank failures, let assume that is correct, economists mostly say that the problem is accurate, that the policy solutions selected are correct, I cannot judge that. But let us assume that it is, but if it is, it shows that there is a serious regulatory problem here.

That is that there are externalities to the organization of the financial sector that are not appropriately addressed. And that in turn, is a problem that has a lot to do with the European Union. These types of problems and the interdependency created, were made possible through a common currency and through free movement of capital, guaranteed through EU legal rules. Without them this would not have happened. Just to illustrate this, to some perhaps prima facie counter-intuitive thesis, as you know, Spain and Ireland at least, those are the clear cases and to some extent now also Slovenia and Cyprus are all countries which have actually done better than France or Germany with regard to compliance with the Maastricht criteria up until 2007/2008. So, Germany and France were doing worse, and only since then the banks in these countries had problems and needed bailing out, that all of a sudden the debt problems started. So this is a story true for Spain and Ireland, and even with the case of Greece, an exceptional case which doesn’t have much to do with banks, but we may then ask: why does Greece become a European problem? Why isn’t it just a Greek problem of not being able to pay their debts? The answer is if Greece had just thrown up its arms and said sorry ‘we made mistakes, we can no longer pay our debts’, then it would have been the French, German and Austrian governments who would have to bail out their banks who bought Greek government bonds. And so, there would have been externalities which would not have affected primarily just those who bought the bonds, the private investors, but it would have been the public purses of these respective countries. So, if we have some degree of solidarity here between Germany, France and Greece, it might be the

type of solidarity that is surrounded by interdependence from a political science explanatory point of view, rather than ideas of justice. So what should be done about that? What seems to be clear is that we have a highly interdependent market, and it is clear that it has to be regulated in a way that precludes this type of massive externalities to occur. That is the huge task that has to be addressed, and can only be addressed effectively on the European level. And there are directives out there right now, recently proposed, trying to address exactly that problem, whether they are good enough or not, is another issue. But that is a core piece of the puzzle and it has not been in the news the way it should have been.

Secondly, what should also be clear, is that to the extent that there are costs that remain to be incurred, banks to be bailed out, and to the extent that those costs cannot appropriately be fully covered by the financial sectors through some type of insurance scheme itself, it has to be Europeanized. These are genuinely European debts, the idea of leaving this to the place wherever the banks are formally registered, is in the context of a European and partially global market, completely arbitrary, and is not justifiable. So, in this context we have to accept that bank debts are European debts, and should be financed directly, not through inter-state transfers, but through directly through some type of European tax, however to be raised. So it is a question of justice to understand that these debts and the repayment of these debts are *European* issues.

### ***Juri Viehoff: The Choice for Sustainable Solidarity in Europe***<sup>20</sup>

Firstly, what kind of justice do we talk about in the paper? It is socio-economic distributive justice, in the Rawlsian spirit. First of all, it is distributive i.e. we can establish the justice of a state of affairs by evaluating how well certain goods are being distributed, it is not primarily political justice. And second, it is the Rawlsian idea that justice is comprehensive and institutional. This means that the justice under consideration within the state is about how collective institutions should be designed and how political systems as a whole distribute advantages and benefits from co-operation. It does so without addressing how individuals within that system ought to behave in order to behave justly, so it takes an institutional and comprehensive view on distributive justice. The second issue relates to the content of the paper. What are the three puzzles that we raise? The first one starts off when people say there ought to be less distributive policy in the EU. One of the most common arguments here is the lack of solidarity in the EU, and that therefore it would be impossible to have such policies. But that argument is philosophically puzzling. Why should the absence of some sort of belief amongst people exclude questions of whether and when justice applies? The second puzzle deals with agency. We say the EU is unique in the sense that directives apply as much to individuals as they apply to collective agents, States. If we think about the theories of distributive justice, which of these two perspectives ought we to think about? Is justice how the surplus of co-operation should be distributed between States? Or must we take a different perspective, in the sense that there is a basic structure that applies to individuals, so we substitute the state level with the perspective of the individual. The third puzzle is about the role or the relevance of choice in determining the type of socio-economic justice we talk about. There is a very influential view regarding global justice (see T. Nagel and M. Blake) which holds a fundamental difference between institutions which are voluntary, where people have the ability to consent to the institution's authority, and those where they don't. It's only the second type of institution that raises concerns of egalitarian social economic justice in terms of how people fare relatively, rather than absolutely. If this is a sound argument then we could establish that there is a requirement of distributive justice within States but not between States in the EU. If we consider the EU from the collective agent view, it might still be considered something that is voluntarily engaged by each state, and therefore, distributive justice just doesn't apply.

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<sup>20</sup> This contribution was co-authored with Kalypso Nicolaidis who could not be present in London.

How is this conception of justice and the puzzles mentioned relevant for what has been said so far? Two points: the first one is on the relationship between democracy and justice, and the debate between Danny and Jürgen. I think one corollary of the view that we present is that justice is different from legitimacy. Justice how we understand it, refers to how people fare. Legitimacy, on the other hand dispenses of the question when the actions of authority are justified, i.e. when does the law have authority. These are very different questions, and we can't collapse one into the other. And of course democracy is a means to make it the case that institutions have authority and are normatively legitimate. It is not so obvious then that democracy is a requirement of justice.

The second point is on the sociological motivation and consequences of disagreement. I think the correct Rawlsian understanding of disagreement is that disagreement only matters provided it is reasonable. So when we think about considerations of justice, we must first evaluate whether or not the people who disagree, disagree reasonably, and then we must construct institutions that are legitimate in this light.

### ***Discussion Following the Third Session***

- Agustín J. Menéndez: I have two different kinds of problems with Kumm's paper: empirical and normative. On the empirical side, there are at least three problems. First, you associate the banking mess and the Euro. The peculiar way in which banking was affected by asymmetric EMU has made of European banks the most leveraged in the world, and has created banks that are too big to be bailed out, given the relation of assets to GDP. But unfortunately, facts are very stubborn, and a similar banking mess has happened in many other countries, including the United States and the United Kingdom (and even Canada, despite the myth of soundness of Canadian banks). The banking mess is but part of the financial crisis, a crisis which is in its turn one of the perhaps five key building blocks of the present crisis. Which is first and foremost a crisis of capitalism as we know it, the neoliberal capitalism that developed as a solution to the structural crisis of postwar capitalism in the 1970s. Asymmetric EMU may have determined the peculiar virulence of the crisis in Europe, but the causes of the crisis cannot be circumscribed to EMU. If there had not been monetary union in Europe, but capital would have been unleashed as it has been in the 80s and 90s, European banks (and very especially banks of surplus countries within the Eurozone) would have recycled their profits in different toxic products, increased their leverage, while national regulators would have not realised the contingent liabilities the state of incorporation was incurring until it was too late.

Second, you follow the mainstream "anti-austerity" arguments when you claim that in the cases of Spain and Ireland, the culprit of the fiscal crisis of the two countries are the banks. The gargantuan deficits result from socialising the losses of the financial sector. Indeed, the public sector was extremely virtuous before the crisis, with very low public debt (in both countries under 40% GDP and decreasing before the crisis) and with balanced or close to balanced budgets for many years. This claim is on the surface of it impeccable. But it misses the obvious fact that the Spanish and Irish socio-economic model was one made dependent on unsustainable economic activities: real estate and banking. Blaming the banks after 2007 does not take into account a vital part of the picture: That the state fostered a socio-economic model which was an accident happening. And more to our present point, this model was fostered because it provided easy access to tax revenue (the revenue generated by construction and real estate speculation), tax revenue which was used to reduce taxes over sustainable economic activities, thus creating a hidden revenue deficit; camouflaged until the unsustainable binge would collapse, that is. More damagingly, the structural effects of this socio-economic model was not only the spoilage of natural resources, but the undermining of many sustainable economic activities. Not only real estate crowded out other types of economic activities (with more stable perspectives, but with much lower returns in the short run), but a prolonged speculative binge sent fully distorted

signals to students and to those already in the labour market. Access to tons of cheap money recycled from the surplus economies of the Eurozone core pushed financial institutions out of financial intermediation with a view to ensure the reproduction of the economy. The gargantuan deficits of Spain and Ireland since 2008 are not the result *only* of rescuing the banks, but the delayed payments associated to the speculative transformation of their economies. So Spain and Ireland were actually only doing good on paper. The debt that has emerged since was already being made *during the boom years*. This speculative financierisation of the economy is not the result of banksters capturing the political process, but it is a strategy of adaptation to the international division of labour within capitalism, a division of labour rendered even more acute by EMU, but of which EMU is only a later part. Again, this is not only a problem of the banks, it is a structural problem of the economic model, the division of labor between the northern chord, (which is hyper-competitive and exports capital) and the southern chord (who spend the money), and Benelux (that is the tax heaven).

Thirdly, you say we have a very integrated financial market in Europe. Well, we had. Transnational financial activities have shrunk dramatically, and indeed if we can keep of talking of a European financial system is because the ECB, at different times, has either underpinned such market, or become a substitute for it (clearly between October 2008 to mid 2009, and then again from mid 2010, when the sovereign debt crisis closed the door of many European banks to the money markets, especially the American money markets which serve as global intermediaries). This empirical observation should lead us to rethink indeed what is the European Union actually become. While the rhetorics of the “market economy” and the “free market” are alive and kicking (especially in the ECJ), the fact of the matter is that the allocation of capital, which is fundamental in any modern market economy, is not subject to market forces, but is fully intervened in by the ECB. The virtually unlimited refinancing at low rates which are applied to all banks, together with the virtual elimination of any requirement concerning the quality of the collateral, has led not only to massive rents accruing to European banks, but to six years in which access to credit has not much to do with markets. Either what the ECB has done is regarded positively (in which case we should really doubt about market allocation of capital) or negatively (in which case we should contest the whole steering of the crisis). To portray six years of intervention as a temporary measure is simply disingenuous.

On the normative side, it seems to me that there are considerable gaps between your rather abstract if not rarified premises and the very specific conclusions. Consider your claim that ‘justice requires we mutualise European bank debt.’ How can you be sure? Even if we were to agree to a properly fleshed out case for the existence of solidaristic obligations extending to all Europeans as European citizens (a case you do not flesh out, but merely postulate, although I think it can be done, and perhaps it should be done), why should mutualisation of debt the way out? Mutualising debt may dilute the problem, but clearly favours rentiers over workers. It could be argued that both of them will be better off than with the present policy of muddling through, but that would require taking seriously the amounts of debt being socialised. I have serious doubts Hamilton would have been so keen to go federal if the piles of debt would have been equal to the present European ones. But even then, the question remains of whether there are other alternatives to actually socialising the debt. We could follow strategies which combine the actual policies of ordoliberal Erhard or liberist Einaudi after the war, meaning, shrinking the pile of debt through the exchange rates of monetary reform, or through benign neglect towards inflation. Or we could take seriously the cancellation of debt, a policy that could certainly be articulated in much better ways than the so-called private sector involvement in Greece or in Cyprus. Measures which could be combined, and in my view should be combined, with the nationalisation of banks, much as the far from radical Hyman Minsky argued for (a tendency that would revert to policies that were largely consensual at some points of the postwar period in some countries). My point is not to prejudge one option or the other, but to reiterate with a twist Danny’s (and Waldron’s) question, why should your option be the just option and not the others?

We disagree about this, and there is no obvious way how we can decide over a scholarly workshop what is to be done. It is not for the cosmopluralists to decide on the basis of their wisdom, but for we the people to decide.

- *Michael Wilkinson*: Mattias raises a very important point on the banking crisis. I share some of the reservations that this is the dominant issue. But putting this to one side, even if you are right and the core issue is about regulating the private sector, I am incredulous if you do not find this is a political issue, because of course politics is always about the question of regulating the private sector. (*Mattias interjects*: ‘but who said it is not a political issue?’). Well, you began by saying ‘it could be a problem of constitutional design, which you rejected, you said it could be a political issue in the way Danny has expressed it, which you... (*Mattias again interjects*: ‘it’s a justice issue.’) ok, but it is also a political issue (*Mattias*: ‘yes’). In which case, you are not giving an alternative to Danny’s problem, if the problem is about what degree to regulate the private sector. But, there is another point, which is looking at what has happened. Take the fiscal compact, where now you have surveillance over national parliaments, and their budgetary autonomy, so it has become quite deeply a constitutional issue, however much your solution might be an attractive one, we have to face the reality, that it will be now an issue of constitutionalism as well.
- *Gareth Davies*: I see three kinds of questions about justice. One is – does this term add anything to the discussion about legitimacy and so on? And if so, then what exactly do we mean by justice? And even if we could answer that question, and even if we could reach some kind of consensus on certain elements of justice, the third question makes me very nervous, and it touches on what Danny and Mattias were talking about. The question is, what policy considerations follow from our conception of justice? And this kind of question seems to me, basically impossible. On the one hand, because it’s very complex, hopelessly complex. On the question of redistribution – it is never just individual redistribution, it’s the philosophy of the system. So justice is more than the situation one is looking at. More importantly than this, if one applies justice to policy, one is inherently thinking of a substantive concept of justice, in which consequences or effects become part of it, a policy which might be just and works as intended might not be just if it does not work and leads to more human cost and injustice. So making a claim that a policy is necessitated by a view of justice is really making a claim about effects, about social and economic effects, about what would happen if we do this with the banks, or if we had this private law...and as lawyers, we make our arguments about social and economic issues, but what exactly are we doing? We make empirical claims about social sciences, political sciences, economic sciences...and I just ask myself, how can we make claims like that?
- *Danny Nicol*: I want to make a remark to Juri Viehoff regarding your comment that disagreements have to be reasonable, I wonder how on Earth does one decide what is a reasonable disagreement and what is an unreasonable disagreement. Hopefully, the various issues, which I flagged up where people disagree about the justice implications were reasonable. But how do you judge what is an unreasonable disagreement, and if you do have that prerequisite doesn’t it invite an inbuilt conservatism? But if one deviates too much from the *status quo*, is one having an ‘unreasonable disagreement’?
- *Mattias Kumm* in response to *Agustín J. Menéndez*: So, Agustín, on one point is right and on another point is completely wrong. I think, to put it carefully, it’s not very helpful to talk about a crisis of capitalism without looking closely at which rules are at play and create a type of situation that we have now. It is true, it is not just a European phenomenon, it goes to global governance. It goes to a certain deregulatory ideology, which played a role in the Lehman crisis with the evolution of the Glass-Steagall Act,<sup>21</sup> the way that supervisor institutions are structured and the role of banks within them etc. So you can really list a number of specific things, and in turn enact

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<sup>21</sup> Ch. 89, 48 Stat. 162 (1933). The Glass-Steagall Act is the popular name for four amended sections (16, 20, 21, 32) of the Banking Act of 1933.



rules, which address these issues. In such case you still have a capitalist system in many ways, a market-based system, but it would not be characterized by externalities and injustice problems. Now that is the claim, there are those who claim that there is something wrong with capitalism that it is endemic to crises, and what you really have to do is abolish the system and replace it with something else, but that seems to me to be the wrong way of approaching it. A closer analysis of what went wrong, and what the rules are is likely to be more productive.

Secondly, I think you are right when you say that all types of other solutions than the one which I suggested, might equally be just or more just. So I do not want to be nailed down to the particular solution I suggested. What I do want to be nailed down to and express as clearly as I could, was that it is wrong to think that justice issues play out along the lines that Danny described (but did not necessarily subscribe to), and my claim is that this is simply the wrong debate to have. This is a deeply reactionary debate; it posits one country, the rich against the poor, on a country based level, instead of looking at this as a systemic problem of the financial sector. And I think, on that level, we are likely to agree. So, yes, there is a justice issue here, but it is a different justice issue than the one I identified to Danny, so this policy issue is a justice issue, but a different one than described by Danny. It is not between Germany and Greece, it is more about understanding who pays for the debts of banks to a significant extent. Not the only question, but the significant question.

- *Juri Viehoff*: To respond to Danny, I think it is important to distinguish different ways in which disagreement matters for how we think about institutions and about justice and legitimacy. I think the way in which you invoke Waldron in your papers shows that we need to talk about reasonable disagreements as opposed to any type of disagreement. The point is that the response that you give, i.e. that democracy can serve as a kind of solution to the problem of disagreement (make it acceptable to persons being *ruled*) only works if certain types of views are excluded. Democracy can only render political decisions acceptable to a person where that person already accepts certain fundamental assumptions, most importantly that we see each other as equal citizens, even when we disagree. It is not clear how democracy could make disagreement acceptable for people who hold crazy or vicious views, e.g. "I should be king" etc. To serve the normative purpose of making political decisions acceptable to individuals, some shared basis must already exist between them.
- *Suryapratim Roy*: I was wondering whether picking up from Danny, as well as from Gareth, it is possible to argue that justice not only does violence to the notion of expressive democracy, but that violence is necessary for legitimizing the stability of institutions in Europe. John Gardner in his review of Sen's 'Idea of Justice'<sup>22</sup> says it's a great book with an unfortunate title. So justice could be viewed as a floating category populated by institutional preferences; we have seen today that substantive justice could mean the freedom to take a Ryanair flight, or the requirement to include sustainability in well-being. Even procedural justice does not have a claim to correctness free from institutional subjectivity – you might have a right to be heard, but not a right to a suspension of institutionally defined standards of reasonableness while exercising such rights. Justice seems to be a mechanism used by institutions to prevent empirical anarchy and maintaining their status quo. So to go back to Jürgen's presentation, perhaps the challenge is not really appreciating normative issues in a methodologically sound way, but to have the ability to contest the hermeneutics and implicit institutional preferences in any methodology used to make decisions in the pursuit of justice. So that is why justice could be viewed as a rhetorical category that is politically charged and is potentially a violent one.
- *Joanne Scott to Mattias Kumm and Juri Viehoff*: Do you think it makes any difference to the capacity of justice, that some of the recent Eurozone measures have taken the form of international treaties rather than EU instruments, because then you are dealing with an intergovernmental mechanism, and a particular lack of democracy in that case, parliaments (national and European)

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<sup>22</sup> J. Gardner, 'Amartya Sen's The Idea of Justice' (2012) 6 *Journal of Law, Philosophy, and Culture*.

play less of a role, and indeed if one is looking for solidarity or redistribution, there is less of a capacity for that if you're dealing with a treaty rather than an EU instrument?

- *Neil Walker*: Danny, I think the fact that questions of justice are all politically contested, which I agree with, doesn't make the language of justice redundant. Looking at it from the other direction, one might also say that all sorts of political questions relate to questions of justice. And maybe the EU isn't always the best example. I come from a part of the United Kingdom, which is having a debate about independence, and will do so over the next two years. This raises all sorts of questions that are political questions, but are also questions of justice, about whether this is a correct community which should have control over its own destiny given the associative ties, given the practical ties of existing political arrangements etc. But also even in terms of substantive political debate, don't we all – unless we subscribe to a really high agonistic conception of political – don't we all think that politics is somehow framed through some type of register of public reason, where people are trying to make up arguments which are general arguments about the whole community and appealable to the whole community? They may be very different arguments, but they all often also explicitly make claims of justice as a whole. So the point is not necessarily that when you talk of reasonable disagreement, all one sees is the fact of disagreement. It should, by the way, be reasoned disagreement – not necessarily reasonable disagreement. And we all at least have an implicit sense that within that reasoning there is an appeal to different conceptions of justice, rather than simply different conceptions of self-interest.
- *Carole Lyons*: Two quick pragmatic interventions, the first to Mattias. Based on your (assumed) rhetorical question – why is the Greek problem a European problem? One answer might be that one can perceive the Treaties' role as expressing a kind of vow - “in sickness and in health”, hence the whole point of the EU: a ‘closer union’. The Greek problem is European because it is written into the Treaties. The second question is, if we are feeling our way towards a conception of how much of a justice deficit there is in the EU, when did that deficit, if there is one, begin? Not with the banking crisis, not with Viking and Laval but arguably much earlier. A word which comes to mind in this context is “fish”. Particularly, the fisherman of Peterhead – (North East Scotland) – how long have they been breaking up their boats? Well in Peterhead since 1973, but in other parts of the EU since a lot earlier. Where is the justice in that? How far back do we go?
- *Fernanda Nicola*: I just want to make a methodological point about the conceptual shift of this panel, dealing with substantive rather than procedural justice. It seems to me that in order to grasp this substantive notion, we are thinking about injustice, and so we are trying to figure out where is the injustice and between whom in the context of Eurozone crisis. Injustice emerges between bankers and consumers, capital and workers, right and left, or even between centre and periphery in Europe. Substantive justice appears as a moving notion changing in place and time. For instance in European private law those jurists who were creating the social market agenda were at the periphery – now they are coming closer to the centre. Likewise, the freedom of movement of workers and the citizenship of the European Union are legal doctrines that have dramatically changed their meaning in the last ten years. In these changing contexts it is hard to pinpoint substantive injustice – this is a moving target, which we have to follow in different places and times.
- *Daniel Augenstein*: Just a quick point to Danny, picking up on what Neil said. You move very quickly from the realization that normative concepts are contested to the claim that they are normatively meaningless. I wonder how your distinction between ‘the left’ and ‘the right’ – could withstand your own critique. The concern I want to raise is that you might end up in the position where all you have left to say is something like ‘let's find some friends and try to get it our way’. This is a deeply conservative position, ironically, because at the end of the day, it legitimizes the *status quo* and disables critique.
- *Jürgen Neyer*: I like Neil's intervention on politics being intrinsically contestable, and I think that is even more important to take into account regarding democracy. Democracy is about permanent

conversation, it can't be anything else. And therefore talking about justice and connecting that to democracy must always be an invitation of conversation. That must be at the heart of a good concept of justice. Therefore, I think there are multiple meanings of justice, that is true, but there are some meanings of justice that are more or less compatible with the notion of democracy. And the right to justification, I think, has as its strength that it lies at the heart of a republican understanding of democracy, as a discourse among the people. Also, this picks up on a previous question, what is the function of law? And how does law relate to justice? In this sense, European laws is helpful to look at. It is basically not about allowing or preventing issues, it is about structuring political discourse among the Member States and non-State actors, it provides criteria of rationality. It is telling what kind of reasons to use, what are good reasons, what are bad reasons. Therefore, EU law is basically an invitation to a structured discourse of justification. I think it is a helpful construct to understand what legitimacy is in the EU. It is a real democratic understanding of what justice is.

- *Danny Nicol*: I think there has been a misunderstanding. I don't think that justice is a normatively redundant idea nor is the language of justice redundant. My view is simply that justice is something we argue about, and that there is no one single formula which can somehow represent justice, whether it is the Treaty of Rome, or some philosophy of Rawls or whatever. I agree that justice is endemically controversial. We can go back to 1973, but I am sure we could go back to 1957, and well before then. As for the value of the right of justification in structuring political discourse, my concern would be that the structure itself would be controversial and go one way rather than another. That needs to be considered.
- *Mattias Kumm to Carole Lyons*: It wasn't just being rhetorical to say 'is the Greek problem a European issue?', because we can look at this as a set of private interactions, we can look at this as the Greek state looking on the capital markets for somebody willing to lend money for interest, and then those who bet on Greece being able to repay are the ones, who, in this case, unfortunately place a bad bet – and in the end they lose their money. Or they at least strike a deal and still lose a significant amount money. That is how it goes. That is normally how contracts are meant to function, with minimum externalities between the parties. It is between the parties that make choices. That would have been possible in the case of state defaults. Now the reason why that didn't work in the case of Greece is that there are so many other stakeholders – banks in particular – which would have required refinancing, i.e. bailing out, so there was strong government pressure on Greece not to default: a very important part of the equation, not the whole part, but an important part. This also allows to go back to the point Gareth made, that without being sophisticated about theoretical constructions, to use the language of justice, there are certain types of harms that are relevantly easy, at least to identify *prima facie*, when raising justice concerns, when there are significant sums being transferred to people who, under normal contractual accounts, would lose them. So shareholders of banks, bondholders of banks, managers of banks do not lose as much because it is taken from the tax payers and directly transferred to the banks. That is what has happened. That doesn't mean it is necessarily unjust, but it does suggest that it is something you want to have a damn good justification for, and to make sure this doesn't happen again. In that sense at least, this is a relatively easy case to use justice in a way that, in the end, it requires us to conceive of complicated regulatory answers. But we need to mobilize first, and to that we need political actors who employ public reasons, who identify what the problem is and make arguments as to why it is important to push back on the organized interests in this case, and establish the type of rules to avoid letting this happen again.
- *Juri Viehoff*: Two very quick points. The first one on the question of treaties v intergovernmental agreements, it might make a difference for legitimacy, but I don't know how it would make a difference for justice – it might make a difference as to contestability. The second point, in a very general way, there is some value in talking about how the benefits of social co-operation should be distributed, and what states of affairs we ought to bring about. I think these are substantive questions of distributive justice. A different question is how we should come to decide what we

do: what the procedures are to which we come to distribute. I think to define justice in terms of justification makes it very difficult to not go back and forth, asking – is this about democracy or is this about substantive conceptions of justice?

## **Fourth Session: Territoriality, Periphery and the Political**

### *Sionaidh Douglas-Scott: Two Visions of Justice in the EU*

Where I depart from many of the conference papers is that the focus of my work has been on *injustice*, as much as on justice. This derives from reasons which have been already explored during the last session in the discussion of Danny's paper: namely, that there exist a myriad of concepts of justice available and that, in one way or another, the EU gives voice to them all – substantive or procedural justice, distributive or corrective justice, uniform concept or plurality of justices. The many differences between member state legal systems, and their varied attitudes towards, for example, redistribution of wealth, render an overarching concept of justice for the EU seemingly unattainable. Indeed, the complex, pluralist landscape of EU law and governance, with its fragmented lines of authority and near invisible accountabilities, seems to render injustice all the more likely. So, it is difficult to find a single, overarching theory of justice appropriate for the very complex organism that is the EU. In some earlier work I highlighted the rule of law, or critical legal justice as I have preferred to recast it, as one possible common denominator for justice in the EU.<sup>23</sup> This is a specifically *legal* notion of justice, which takes account of the fact that law has a particular relationship with justice. As lawyers, we have this imperative to do justice. You cannot have the luxury of the philosopher who will sit back and think about it. You have to actually act. So, I looked to a legal concept of justice, and I argued that the rule of law should operate as a lowest common denominator as a form of justice in the EU.

I am not going to go into many examples of where I believe the EU to be lacking in the rule of law. I believe there are many. However, we have just been talking about the Eurozone, and that provides a good example of the absence or deficit of the rule of law. Steve Peers, for example, recently commented of Eurozone measures that they 'failed the test of transparency, because of their near total complexity. Unreadable, they are scattered across dozens of primary or secondary sources.'<sup>24</sup>

Now, the problem with looking only to a legal concept of justice such as the rule of law as a lowest common denominator is that it sets only a basic or minimal standard for justice in the EU. On the other hand, justice in a broader sense may be so elusive as to be an ideal or utopian. This is where and why I shift my focus to injustice, arguing that it is the diagnosis of injustice that is itself crucial, as justice is more likely to move people in its absence, rather than as an academic or rhetorical exercise that fails to convince. In order to reinforce this argument I have used images, some of which I distribute here. The first illustration is of a very familiar type of statue of justice – with the sword and scales, not particularly emotive or captivating, nor anything unfamiliar. In contrast, I use another image which you may have seen before, it is the work of a Danish sculptor, Jens Galschiøt and it is entitled *The Survival of the Fattest*.<sup>25</sup> It was displayed in Copenhagen harbour next to the internationally famous Little Mermaid statue at the time of the Copenhagen Climate Change Conference. It depicts a grossly obese European 'Justitia' or more properly injustice, actually bearing the scales of justice in her right hand, being carried on the shoulders of a starving African man. Galschiøt himself said this represents the self-righteousness of the rich world which sits on the backs of the poor. In the picture here you can also see the backdrop of chimneys billowing out pollution and smoke, ironically making their point on the Climate Change Conference. I believe this work conveys its message far more effectively and memorably than so many speeches of politicians, or musings of philosophers. A turn to Art is not, I believe, misplaced in our investigation of justice and its relation to law, given the important role that

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<sup>23</sup> See e.g. S. Douglas-Scott, 'The Problem of Justice in the EU' in Julie Dickson and Pavlos Eleftheriadis (eds.) *Philosophical Foundations of EU Law* (Oxford: Oxford University Press 2012); Sionaidh Douglas-Scott, 'Pluralism and Justice in the EU' (2012) 65 *UCL Current Legal Problems* series 83.

<sup>24</sup> S. Peers, 'Draft Agreement on Reinforced Economic Union (REU Treaty)', *Statewatch*, 21 Dec. 2011, available at <http://www.statewatch.org/analyses/no-164-reu-treaty.pdf>.

<sup>25</sup> For a photograph of the sculpture, please see [http://reason.com/assets/mc/khooks/2010\\_01/artifact.jpg](http://reason.com/assets/mc/khooks/2010_01/artifact.jpg).

visual images can play in the communication and investigation and exploration of legal ideas in their cultural context. So, the point I am making is that it is very difficult to agree on a theory of justice, particularly one that can apply in the highly complex concrete circumstances of the EU. This contrasts with the readiness with which we experience injustice, with the immediacy of emotion that injustice provokes. It is injustice that motivates and propels action. Hence illustration 2 seems far more compelling than Illustration 1.

Sen's work has already been mentioned in the conference. Sen in his recent book *Idea of Justice* suggests that we focus on injustice. For Sen, our starting point should be the reflection that our determination of what justice requires in a particular situation is initially motivated by feelings of injustice. We are left with a sense of injustice as a motivator, a call to resistance, instilling us with a sense of responsibility to some sort of action. I think there is value in taking this approach, because we can agree a certain situation is unjust even although we may not agree on the reasons why. There has been quite a lot of talk about Rawls today, but where I have been trying to turn to with my work has been examples of non-ideal philosophy, such as Sen's work, which does not take as its premise some sort of fully worked or even utopian philosophical theory. I am interested by the work of those philosophers of the Scottish Enlightenment - David Hume and Adam Smith – who start with the theory of emotions as a premise for justice, because the emotions rather than reason are able to provide motivation for action. Our sense of justice is derived from our sense of injustice, which in turn develops from a complex constellation of emotions, which provide a psychological basis from which moral theories may emerge. Reason and emotion are therefore compounded and inseparable, and work together in the formation of moral judgements, providing a motivation for moral action in a way that reason alone (in the cool and disengaged form it finds in rational philosophy) is unable to do. The key point here is that an account of justice which acknowledges the role played by the emotions in identifying injustice, and the contribution of our emotions to our reasoned ethical judgements, not only more accurately represents the nature of our ethical thought, but is better placed to *motivate* citizens.

There is a lot of value in taking this approach, because within the EU one of the problems is motivation. There exists a motivational deficit which can turn people to almost a nihilist disengagement, and so it is very important, I think, to search for what causes it, and start with injustice and the emotions – even if we subsequently temper our theory with reason.

### ***Antonia Layard: Creating a Europe of Places***

I concentrate on Spatial Justice, or thinking about justice in geographical terms. What I intend to do is talk about justice in geographical terms and using geographical techniques: there is no single normative claim in my paper; it is rather a series of reflections and questions. My first claim is that spatial justice is highly situated, and uses three broad techniques of legal geography: (i) Law constitutes society and space, and society and space constitutes law. This is the starting point in legal geography and draws from the law and society tradition, combining both doctrinal abstraction and 'law on the streets'. Legal geography often works from the site up. (ii) Legal geography incorporates geographical assumptions of plurality and multiplicity integrating them into legal analysis. This is both a conceptual device and a guiding assumption. Legal geographers join with other critical scholars in their starting point of critiquing unitary, fixed and (above all) neutral understandings of 'the law'. (iii) The techniques of scaling, place and space. Place-making activities (at whatever scale) are primarily socio-spatial rather than legal acts, even though they take legal form so that they are (as socio-legal analysts suggest) mutually constitutive. For example, when the EU was formed, this was a social, political, cultural, racial, religious decision that took legal form. The context influenced the law and the legal form affected the form of the Union itself (with fixed borders, accession by Member States (rather than regions), assumptions of legal consistency and so on (Walker, 2010)). These are multiple acts, at multiple scales, achieved in multiple ways.

I have three questions: (i) what is European legal space? The technique of scaling may be used here, we know scaling is a conscious political and legal act, and so is the EU, as it is not ontologically given, but socially constructed. In EU law we often think of jurisdiction at the EU level, the Member State level, and at the individual level, but geographers argue that it is far more dynamic; it is much more intertwined. For example, when Damian talks about justice, is EU justice different from any other forms of justice? Mattias mentions the arguments about tax that can also be seen in spatial terms people feel a greater sense of obligation in some quarters, (ii) In relation to multiplicities, we have EU Spaces rather than EU space. So we have EU justices, rather than EU justice, depending largely on justice consciousness similar to legal consciousness which may be uneven, and (iii) there are objects and subjects of justice. For example non-discrimination may require some amount of reciprocity.

***Damjan Kukovec: Justice and the European Periphery: Taking Change Seriously - The Discourse of Justice and the Reproduction of the Status Quo***

The discourse of justice is to be welcomed as an opportunity for a change in legal thinking. However, there are also dangers in the discourse of justice and it is these dangers that I would like to address. The universal discourse of justice can, rather than delivering change, entrench existing hierarchies. It is because there is no human situation in which injustice of some kind or another does not exist, that "justice" as a term makes any sense at all. The empty notion of justice as a rhetorical move assists particular demands to be able to claim universality. The focus of my work has been the hierarchical relationship between the EU's center and the EU's periphery. As I have argued on the basis of the discussion surrounding the Laval and Viking cases, in matters of social and goods dumping, brand power, antitrust, state aid, private law and other internal market regulation, the actors of the periphery – workers, consumers, companies etc. are in a different structural situation than actors of the center. However, the universal argument of the Union, the argument of uniformity, is the particular argument of the center. In other words, it is assumed in the legal discourse that throughout the European Union, a company, worker or consumer of the center is in the same structural situation as a company, worker or consumer of the periphery. The demands of the center, the universalized claims, are therefore strong and the claims of the periphery, their social or free movement claims, are either invisible or weak and foreclosed from operating powerfully.

No theory has one necessary realization and no theory of justice has one necessary realization. My fear is that the realization of theories of justice discussed in universal terms will be carried out according to the existing conceptualization of harm, from the perspective of the center, and reinforce the already stronger, visible claims in the legal discourse. In the case of the EU legal discourse, this would reinforce the social and free movement claims of the center.

In the context of social justice, "justice" is often synonymous with the strengthening of social, labor and human rights components of our legal thinking. Justice, poverty alleviation, solidarity and advancement of the concerns of the marginalized are then understood to follow from a stronger enforcement of social and socioeconomic rights or from other social or value-laden components of our thinking. However, as actors of the periphery are differently situated than actors of the center, the question that we should be asking is not whether to give a preference to social or to economic considerations. The question that we should be asking is whose social and whose economic considerations are we giving preference to.

The current legal consciousness, which follows thinking in terms of giving preference either to the (universalized existing) social or to the (universalized existing) economic/autonomy/free movement considerations reflects a conceptual understanding of the world, the mode of thinking I have called "the conceptualism of Contemporary legal thought". The dichotomy of neoliberal laissez faire policy and protectionism, and the assumption of their inherent link with either free movement or social considerations, clouds a conscious construction of the Union and prevents us from thinking about alternative constructions of the European legal structure. Many analytical mistakes flow from this

conceptualism, some reproducing the mistakes of laissez-faire reasoning, what I have called “social lochnerism”. Moreover, claims of autonomy are falsely solely associated with economic growth while social claims are falsely only associated with protection against externalities of growth. Such thinking also leads to the conclusion of progressive lawyers that what needs to be fought is “the market” or “the goal of free competition”. According to such thinking, more “justice” thus means less free movement; the argument of justice should fight free movement considerations. However, as the interplay of the universal social and free movement considerations is played out in the understanding of harm understood from the perspective of the center, the externalities of the legal discourse are often borne by the periphery.

The constitutional and pluralist debates too often perceive the EU legal system as an order implicitly containing “the principle of constitutional tolerance”, “the logic of inclusion” and ideals of the good society, ignoring the dynamics of power in the Union and its externalities. Many calls for more justice coincide with constitutional calls for more accountability, more democracy, more participation and representation. These calls, made in universal terms and oblivious of structural differences within the Union, are calls for a better implementation of existing thinking, rather than for a transformation of the existing legal discourse. As a result, such calls for justice promise to entrench the existing state of affairs, rather than offer a transformative potential.

Claims of actors of the periphery are often lost in the existing interplay of social and economic/autonomy/free movement considerations. The static relationship between center and periphery can only be properly understood as a set of freedoms and prohibitions or legal entitlements. In the reproduction of these entitlements, understanding of harm, as well as the doctrines and the concepts we use play a vital role. The existing entitlements should be rearranged if change and social transformation is to be taken seriously.

### ***Fernanda Nicola: Substantive Equality and Territorial Justice in the EU***

My presentation introduces the concept of territorial justice to do three things: (i) This is not to romanticise the local, but to use the concept of territory and geographic space as a legal realist tool. From a legal realist standpoint, a territorial focus allows us to view federalism not as a discussion between two institutions in power, but rather a trade-off between various actors. (ii) Territory has been used as a proxy to address poverty and redistribution in EU cohesion policy which attempts to balance inequalities brought about by the common market. However, as I have written elsewhere, these policies have been unsuccessful in tailoring their interventions to a particular territory or the regions involved in cohesion policies. (iii) Finally a territorial justice perspective allows us to contextualise concepts of distributive justice in EU law. In my presentation I will focus on the first and third issue. First, in introducing the concept of space, the existing EU federal tensions are no longer limited to two actors, namely the Member States and the Union, but rather, they are reconceptualised as a trade-off of power and resources among various local, national and supranational actors.

Second, the notion of territorial justice helps us to understand where an inequality lies and justify a redistributive policy. This approach is in line with Amartya Sen’s contribution to John Rawls’ notions of liberty and autonomy in the distribution of primary goods. In fact Sen’s capabilities approach reveals the gap between the opportunity for primary goods and what people really enjoy because of their preferences. In a similar way, by territorializing some of the Court of Justice’s decisions on the free movement of people, spatial location determines how primary goods are enjoyed and by which groups. A territorial justice approach to EU law accounts for the social realization of each, differently situated, group of individuals rather than tying them to decisions based on abstract legal principles and institutional demands.

Sen’s *Idea of Justice* raises a new perspective on the notion of fairness in the creation of institutions. This should take into account the difference principle of both economic and social capabilities. In



departing from Rawls, Sen says there is a gap between what is the primary good and how people can take advantage of the such good. Depending on where you are, and how you are differently located to enjoy primary goods. In my example the way you are spatially situated (periphery, centre, north, south etc.) will determine how you can enjoy certain goods or not.

***Agustín J. Menéndez: Political and Territorial Justice in the Light of the Constitutional Foundations of Redistribution in the EU***

Five minutes for five theses. First thesis, political justice finds its institutional embodiment in the Social and Democratic *Rechtsstaat*, which is the peculiar combination and reconciliation of three regulatory ideals: the rule of law, not men; the democratic state structured and shaped by democratic politics; and the social, welfare state. As I have just said, that form of state results from a certain constitutional tradition and history.

Second thesis, the European Communities played a key supporting role in the transformation of the regulatory ideal of the Social and Democratic *Rechtsstaat* into real institutions and policies. European integration rendered possible the shift from diplomacy to transnational and supranational law, creating the conditions under which public institutions recovered power from cartels and other forms of private power. European integration helped overcome the democratic deficit intrinsic to a system of nation-states. European integration created the structural stability which rendered possible the sustained economic recovery of the *trente glorieuses*.

Third thesis, The European Communities have elided and mutated since the early eighties and are now acting *also* in ways that undermine the stability of the Social and Democratic *Rechtsstaat*. For one, the conception of economic freedoms as metafundamental rights (economic freedoms breached by obstacles, not only by discriminatory treatment) is the structural nemesis of the Social and Democratic state. For two, the unfinished constitutional season started in the 1980s has led to executive constitutionalism, a constitutionalism where far from impeccable changes to the Treaties from a democratic perspective are justified in the name of urgency, as was the case during the Lisbon process. For three, asymmetric economic and monetary union has become a constitutional Frankenstein that has forced to set aside constitutional law—both national constitutions and Treaties—and moved us further into executive constitutionalism and executive federalism (the Fiscal Compact being the ultimate example in that regard), and has pushed the unravelling of the fabric of the social state, a process well advanced in the periphery of the Eurozone.

Fourth thesis, the present socio-economic constitution of the European Union is plagued by a peculiar mix of individualistic subjective rights and communitarian redistribution. On the one hand, economic freedoms are presented as the institutionalisation of commutative justice; but they are much more than that; they are trump cards that prevent any democratically decided form of distributive justice. When the activities that constitute tax dodging are protected as part of the breadth and scope of freedom of establishment or free movement of capital (*Centros, Cadbury, Marks and Spencer*, among others) economic freedoms actually become structural blocks to redistribution through progressive taxation. Consequently, the socio-economic constitution of the Union is radically individualistic, and consequently, downplays the key role played by collective goods as part of fundamental rights in the postwar Social and Democratic *Rechtsstaat*. For two, the limited redistribution of resources that takes place within the European Union is mediated by the States. The decision to equip the Communities with genuine own resources, while never fully implemented, was partially reversed in 1984, and is in the process of being fully reversed, with the funding of the expenses of the Union increasingly coming from state contributions. To that it should be added that the actual redistributive expenses of the Union are calculated by reference to the relative position of states and regions, not of individuals. Consequently, the fiscal constitution of the Union has a collective, not individual, unit of distributive justice, contrary to what is the case in the postwar Social and Democratic *Rechtsstaat*.

Fifth thesis, political justice calls for the reconstitution of the European Union in a democratic fashion. We should write a democratic European constitution, we may write a democratic European constitution, but quite tragically we simply cannot write a democratic European constitution.

What I would like to stress is that the Social Democratic *Rechtsstaat* concerning subjective rights and fundamental collective rights underpin such rights. EU pushes national diplomacy to supranational law: cartels that existed before are now subject to intervention. Second, it helped overcome democratic deficit. Third, it created a stability background post-war. In the 1980s, there were several turning points. Judicially, *Cassis du Dijon*<sup>26</sup> was a turning point as it instilled a neo-liberal ideology, Callahan in 1976 changing course, which is confirmed by Thatcher. *Cassis* and subsequently Thatcher changed the course of EU law because it undermines the *Rechtsstaat* – it acted in contradictory ways. First, Economic freedoms are the nemesis of the social democratic *Rechtsstaat* since *Cassis*. Second, the asymmetric monetary and economic union has become a constitutional Frankenstein as we are selectively applying Treaties. The European Central Bank should not be doing what it is doing. We have mutated into a form of executive constitutionalism galore, with some executives becoming more influential than the others. We have also started to get rid of the achievements of the welfare state. We don't have the right to strike or trade unions as we did earlier in the periphery. Third problem, Economic freedom has resulted in dominating interests. Underlying these problems is how we view Justice. We have assumed substantive justice is something that can be apolitical. It is theoretically and empirically false that economic freedoms are supposed to belong to notions of community justice. We have a funny combination where we embrace Individualistic notions of freedoms, but the benefits of justice accrue collectively. The unit of redistributive justice should be the individual. Conclusion: new constitution making process should not, cannot and will happen.

#### ***Discussion Following the Fourth Session***

- *Andrew Williams*: The problem of focussing on injustice is the problem of attribution – the relationship between power and responsibility. There was a prior question on whether the EU is a primary or a secondary agent. If this question of power is not addressed, could focussing on injustice become a deflection of responsibility?
- *Daniela Caruso to Sionaidh Douglas-Scott*: Could injustice in the EU destroy the living organism and thereby eventually justice itself?
- *András Sajó*: It is no longer a dialogue about progress. The question I have is why the EU is moving away from a common understanding of [in]justice?
- *Sionaidh Douglas-Scott*: (1) I do not think we need to go on the road of complicated questions about agents in order to talk about injustice. (2) Modernity has been called an autoimmune disease which is actually destroying itself, and a similar point could be made about the EU – there is an element of self destruction in it.
- *Stavros Tsakyrakis to Sionaidh Douglas-Scott*: Did I understand correctly, that one either comes up with arguments or we rely on emotions and expect wider agreement on that base?
- *Sionaidh Douglas-Scott*: I think we might say that something is unjust, but disagree about the reasons why we believe it is unjust. There is in fact research to the role of emotions in moral reasoning.
- *Neil Walker*: I would always be wary of a system which allows political masters to point at injustices beyond their influence or control instead of taking responsibility. This should not become a feature of the EU.

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<sup>26</sup> C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon) [1979] ECR 649.

- *Agustín J. Menéndez*: Perhaps we are unavoidably talking past each other, because we come from different constitutional traditions wherein the relation between the (constitutional) law and the idea of justice differs. It is in that regard that we have underestimated the structural differences between (1) the Social and Democratic *Rechtsstaat*, which being a late child of Weimar underpinned the constitutional self-understanding of the French and the Italian republics (and later of Spain and Portugal), but which crystallised in a similar form, resulting from a different historical and intellectual trajectory, in postwar austerity Britain (the real austerity, I am tempted to say, not the present bogus one) and (2) the ordoliberal Social Market Economy, which is the late child of the collapse of Weimar, and has come to dominate the self-understanding of the German Republic, especially after the failure of Schiller's brief Keynesian moment, and the ascendancy of the myth of the Bundesbank in the 1970s and 1980s.
- *András Sajó*: Whether the constitutional welfare state is sustainable is the real issue. France encourages Chinese or Korean investment. These companies will ask for restrictions on trade unions. This has nothing to do with the law. At the legal level, perhaps nothing will change but things in practice will change. How is this structural problem to be addressed and at the same time how to maintain the constitutional welfare state?
- *Daniel Augenstein*: I want to pick up on Antonia's remarks about trans-national justice. The EU creates an attractive trans-national legal space for a particular kind of people. But there are also those who don't move, and/or who are not economically active, at least not in the way required for them to enjoy the kind of trans-national justice the EU has on offer.
- *Oliver Gerstenberg*: how does *Cassis de Dijon* create so many problems? It was just spurious alcohol! Sometimes things are national politics and policy – so how can we accuse the EU of such things? Many of the problems of the national welfare state are caused from within. Just consider contemporary British debates about the welfare state—and the attempts by some—reminiscent of Mitt Romney's failed strategy—of dividing society (and the vulnerable) into strivers and benefit-scrungers.
- *Damian Chalmers*: I disagree with Agustín as a recent judgement of German Constitutional Court on parliamentarisation of bond issues shows a kind of 'no-questions asked' nationalisation by the executive. There is no question about parliamentarisation, liability, operations – this has never happened before.
- *Dimitry Kochenov*: I disagree with Damjan to a certain extent – is emptiness really a problem? Emptiness is not a reason we should not consider usefulness – you need to point to uselessness. Emptiness is a bad way to dispose of justice.
- In relation to Agustín: In *Bidar*,<sup>27</sup> the ECJ cracked the Member State, as there is a social reality which the Member State does not want to acknowledge. This is a good thing as this is – as Gareth calls it – the constitutional humiliation of the Member States by the European Union. This is why we have the right to strike in the Netherlands – it was initially not there on the books. Thus, the periphery may suffer from it and the centre may benefit from it – it's not a one-way street. As András Sajó mentioned, we really need to preserve what we have. If we watch what's happening in Hungary, Romania – there are important problems and steps taken by EU institutions are branded as unjust, but on procedural, not substantive grounds. On substantive grounds, I agree with Damjan, who made a magnificent point that preserving the *status-quo* is painful for the periphery, and we have the ability not to do so.
- *Antonia Layard*: I'm yet to understand whether EU justice is different from justice in general – does it stop at the boundary?

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<sup>27</sup> Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* ECR [2005] I-2119.

- *Damjan Kukovec*: I did not say that theories of justice are devoid of meaning. The word “justice” is devoid of content, as Laclau stated, not theories of justice. What I said was that no theory has one necessary realization. What I wanted to point out is that if we say “we need more justice”, such statement has no content, but for the fact that we are not satisfied with the existing situation. But this in itself is also not the core problem of the discourse of justice. The problem is that both justice as a rhetorical move, i.e. “we need more justice” and the theories of justice, argued in universal terms, are bound to reproduce the status quo. The argument “we need more justice” and the theories of justice will be realized in the existing consciousness, in the consciousness of the interplay of existing, present, strong particular claims, which are rendered to be universal. In the European Union law context, as I have repeatedly argued, these are the claims of those in the structural situation of the center of the EU, while the claims of the periphery do not reach the status of universality. As such, they are foreclosed from operating powerfully in the discourse of universal justice. The realization of justice in the current consciousness promises to be carried out and entrench the existing conceptualization of harm, from the perspective of the center.
- *Agustín J. Menéndez*: I remain deeply sceptical of the paradigm of competitiveness, both on empirical and on normative grounds. Consider these three different but related arguments. First, for trade to be sustainable it has to be mutually beneficial. This was understood even by David Ricardo, but seems not to be understood by the third generation of ordoliberalists now shaping the economic policy of the European Union. Either the “ordo” of the international system is one which structurally rebalances trade, or there is the risk that imbalances will pile up and the system will collapse, as indeed it did during the interwar period. If some states run permanent trade deficits and others run permanent trade surpluses, the system can only be balanced by credit being extended by the countries in surplus to those in deficit. But if the trade imbalances persist, credit only buys time. At some point the debt reveals itself as impossible to pay back. This is why Keynes argued in the last years of the second world war in favour of balanced international trade, away from a system based on unbalanced competition (which is the real nature of the competitiveness paradigm). This vision failed to shape the Bretton Woods arrangement (something which played a part in their collapse barely thirteen years after being fully applied), but underpinned the European Payments Union. Second, the whole concept of competitiveness is vague and underdefined. Can we really have anything approaching free competition when China enters the fray? The socio-economic constitution of China is largely capitalist, but the state remains heavily in control of the way in which capital acts. Chinese combination of a strong Communist state and capitalism may be on the verge of proving much more effective in purely productive terms than the postwar alliance between the democratic state and capitalism, but that peculiar state configuration is one where the forces of free competition à la Hayek are simply non-existent. Third, when free competition is regarded as being the force that should shape the very “ordo” of the economy, there is the risk that capitalism devours itself. Tax dodging in the European Union is directly related to the utopian understanding of economic freedoms defended by the European Court of Justice. But if it proceeds unabated, it will end up undermining the very institutional structures that render the market economy possible to start with. And in the process, undoing democracy itself. Indeed, Damian is right in calling our attention to the shifts of power and competences between European institutions. But perhaps this is just a secondary show, the main show being the shift of power between public institutions *tout court* and key actors in the financial markets. A shift which is at the very least symbolically reinforced by the rather revealing decision to make use of the very instruments through which financial actors evade state regulation and tax power to rough the boat of the European Union. The European Financial Stability Facility was, after all, a special purpose vehicle, legally speaking a *societe anonyme luxembourgeois*, established in Luxembourg (where the owners of hedge funds have a proclivity to establish them), and governed by English law.
- *Damjan Kukovec*: I do not see the key component of center-periphery relationship as spatial and geographical, but above all, as hierarchical. The consciousness of the actors involved in the EU’s

internal market is very cemented. The legal discourse is an interplay of the claims of the center and the claims of the periphery sound unreasonable in this discourse.

## **Fifth Session: Participation, Citizenship, and Human Rights**

### *Daniel Augenstein: EU Justice as Politics*

Concerning prosperity, I am not concerned with the appropriateness or effectiveness of the austerity measures we are currently facing, but I want to ask whether this quid pro quo of money for reform is in the nature of the polity, and I want to suggest that what we witness is an internalization of economic risk and an externalization of political accountability. Very briefly: if you look at it from the perspective of the Member States, it is unlikely that any Member State could impose these measures upon its own people on its own account. So you need Brussels' helping hand. At the same time, the political protest we see in these states does not register at a European level, but is channelled toward the national government. Now when you look to it from a European perspective somewhat shielded from these national political anxieties, the EU treats the economic crisis very much as something that is internal to the euro polity. So, something that is more akin to domestic politics than the foreign interventions we normally associate with the IMF and the World Bank in some other contexts. At the same time again there is a sense in which political accountabilities matter. To give some examples, think about a proposal to curtail the powers of national parliaments in favour of technocratic government, or the concentration of political power in a bank, which is meant to be independent from politics.

Now, the broader point here is that I think what the crisis shows us is that it is less and less plausible to insulate the economy and economic integration, its common market and questions about its common good. This brings us to my second point about unity, because as I see it, it makes little sense to pose the question of the common good without presupposing political unity. It is a question of who holds this good in common. Now to conceptualize European political unity, it is necessary to detach ourselves from certain propositions associated with this paradigmatic case of statism represented by democracy. I want to do this through the lens of political representation which is something kind of popular where I work. The proposal is that political unity does not presuppose or is grounded in a substantive unity of the people, a common set of property values and nor does it require a particular set of democratic institutions. Rather, at a more detached level – political unity is a product of positing the polity to law and deriving law from the polity. Whereas the latter aspect is the one that provides its legitimation. Now, this doesn't say anything about content of the common good, which brings me to my third point, the topic of this conference, which is justice.

Like others I approach justice from the political justice – from the perspective of justification, but I do so in a slightly different way. I want to suggest that political justice engages the common good by asking what precisely is it that justifies the political unity of the polity. This is in a way putting it in the context of political ownership. What is it that is presented to us as the common good that we are asked to endorse as our own. This is how I engage with justification. The first obvious candidate would be fundamental rights, partly because whatever are your conflicting views on the relationship between rights and democracy, I think that most people would agree that fundamental rights do carry part of the burden of transforming power into legitimate forms of political authority. It is also the obvious candidate is the sense that fundamental rights are said to reveal something fundamental about the nature of the polity. I am here drawing on Joseph Weiler's distinction between fundamental rights and fundamental boundaries.<sup>28</sup> Fundamental rights are about the autonomy and self-determination of the individual, and fundamental boundaries are about the autonomy and self-determination of the polity. Together they epitomize the core identity of the whole. To convey their communitarian undertones I propose a political reading of this. Fundamental rights motivate the individual toward collective self-restraint. You again have fundamental rights and fundamental boundaries. My important point for this

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<sup>28</sup> J.H.H. Weiler, 'Fundamental Rights and Fundamental Boundaries' in J.H.H. Weiler (ed.), *The Constitution Of Europe* (Cambridge: Cambridge University Press, 1999).

purpose here is that the relationship between fundamental rights and fundamental boundaries has always been considered as entrenched in the Member States. So the European Union does not lay claim to a European equivalent of a national constitutional tradition, yet could function as a fundamental boundary of the European polity. Rather, what we find –and I do not want to go in the jurisprudence now– is that instead appeal to a commonality between Member States' national traditions and disappeared commonality is meant to aid diversity. Now, appeal to diversity cannot establish a claim to autonomy as distinctiveness, so it fails to spell out the fundamental boundary of the European polity. It fails to give flesh to the bones of the claim of autonomy if you wish. Instead, what renders EU fundamental rights autonomous is an appeal to the common market.

I would like to address the political question: how meaningful is a political argument about having a market in common. Economic integration was always a means to political integration. Thus, presenting economic integration as apolitical, or something that is exclusively about the market, is problematic. So this all appeals to the unity of the market and the cohesion of the community. How can we have a meaningful political argument about what it entails to having a market in common? And there is a tension here. On the one hand, European economic integration was always a political project, at least in the minimal sense that economic integration was a means to the end of political integration. On the other hand, European political integration seems to work best if and to the extent that economic integration is presented as apolitical: it is only about the market. There are many accounts of this sort of problems, but to mention three words: technocracy, juridification, depoliticization.

Many people have written about this. I just want to add one aspect I think that is particular to this crisis. If it was the case that economic integration was presented as a means to a however impoverished notion of political integration, thanks to the crisis you would have a new momentum here. There are no alternatives, this is how it is being presented. If this is true, and this is truly the end of politics, there is no more meaningful way of engaging in politics when it comes to the inevitable. There are no more choices to be made. Last point – fundamental rights: to bring it back to fundamental rights and end with a less dystopian outlook, the question that arises from the perspective of fundamental rights is whether fundamental rights can still muster the political strength to motivate eventual empowerments towards collective self-restraint of a polity whose fundamental boundary is the market.

### ***Richard Bellamy: Political Justice for an Ever Closer Union of European Peoples***

The argument I want to put forward is broadly Rawlsian in inspiration, taking off from his *The Law of Peoples* Harvard University Press, 1999, though I depart from his arguments in certain crucial respects which are influenced by Philip Pettit's republican development of this approach<sup>29</sup> (though I have my differences with Pettit too). Below I want to sketch an answer to three questions: why political justice?, why peoples?, what are the implications for the EU?

#### *Why political justice?*

I'm aware this is predominantly a gathering of lawyers, who may be inclined to assume that political justice consists of a just legal constitution to regulate the political relations of citizens, these political relations being broadly conceived so as to include much of their publically regulated social/private relations as well. To a certain degree, this appears – *prima facie* at least - to have been Rawls's view, as expressed most fully in *Political Liberalism*. Yet, a distinctively political concern and context motivated his argument: namely, that if those political agents and agencies charged with promulgating, administering and enforcing the collective policies of any political society (which include the judges

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<sup>29</sup> P. Pettit, 'A Republican Law of Peoples', 9 *European Journal Of Political Theory* 70 (2010).

and other officers of the legal system) are to do so legitimately, as the credible agents of all citizens rather than of themselves or certain influential groups, then their actions need to be publically justifiable to all citizens as giving equal consideration to their interests. Indeed, the definition of what he called a 'well-ordered society' is that it is 'effectively regulated by some public conception of justice, whatever that conception of justice may be.' (*JF*: 7).

One can express this Rawlsean argument in the more political language of Pettit's republicanism as follows: only those policies that track the commonly avowed interests of citizens will be non-dominating. In other words, a conception of justice needs to be public in two senses – it must be openly avowable and serve shared concerns, with these two criteria seeking to rule out the capture of political (and legal) power by private, sectional interests.

The need for such a public conception arises from what, again adapting Rawls (here following Hume), we can call the 'circumstances of political justice'. These are occasioned by two issues: first, the fact that people have different interests and conceptions of the good; and second, the resulting need to resolve conflicts in a manner all can acknowledge as fair, and the difficulty of doing so given the tendency all human beings have to be partial to their own values and interests – be it for self-interested reasons or on account of our limited experience. However, Rawls himself offered a curiously depoliticised response to this dilemma in suggesting that citizens could abstract from their differences and achieve an 'overlapping consensus' on certain political principles to regulate their public affairs, with these being capable of codification within an entrenched constitution expressive of the will of 'we the people' and adjudicated upon by a constitutional court. Yet this solution largely circumvents the very issues that occasion the need for political justice in the first place – namely, the problem of conflict and disagreement, on the one hand, and the difficulty of partiality and, one might add, fallibility, on the other. Is it really possible – except perhaps at the most abstract level, to agree on substantive principles of justice; and how can one expect any set of persons to reliably interpret them without either partiality to their own limited ways of thinking or committing mistakes?

An alternative, genuinely *political*, account of justice addresses these problems in a different way. It sees a democratic political process as offering just such a public mechanism for the equal consideration of interests – offering equality of respect by giving all citizens a vote in fair and regular elections, and equality of concern through forcing rulers to be publically authorised by and accountable to the ruled. In this account, it is an impartial process that leads citizens to engage with each others views and concerns and that offers a mechanism for checking that those who govern do so on their terms, in ways that can correct for their partial and fallible actions. This argument is Rawlsean in spirit if not in the letter. Justice is political because we encounter the need for just rules to regulate our social behaviour in circumstances where we need a political process to fairly and publically adjudicate between our different, partial and fallible, understandings of justice.

Why peoples?

In *TJ* Rawls conceives of justice in terms of those principles that would be agreed upon by individuals as suitable for the regulation of the basic structure of society. However it becomes clear in *PL* that these individuals are citizens of a liberal democracy who collectively form a people. Moreover, when Rawls speaks of international justice, he talks of those principles that would be agreed between the authorised and accountable agents of well-ordered peoples rather than all individuals across the entire globe.

Rawls's reasoning is that only a people are likely to agree on principles of justice of the public kind that are needed to regulate a political society. A people is composed of natural persons who have claims against each other by virtue of being engaged in a 'cooperative venture for mutual advantage ... marked by conflicts as well as by an identity of interests' (*TJ*: 4). The character of social cooperation – the fact that all citizens have a roughly equal stake in collective decisions, possess 'common sympathies' and share a public discourse and sphere - provide the conditions that make it



possible for them to avow 'common interests' and indeed that oblige them to do so. These are normative conditions that structure how a 'well ordered society' might arise. Without them, it will be nigh impossible to share a public conception of justice. *Either* one will have a much more minimal view of justice, suitable for regulating separate groups with limited social relations with each other and only bound by their explicit contractual agreements with each other, *or* there will be the danger that the government, including the administration of justice, will be captured by certain sectional groups that will extract rent and oppress the other groups. Both these problems are characteristic of complex political systems characterised by multiple layers of governance and the proliferation of checks and balances and veto points. In seeking to stem the second problem, they create the first and *vice versa*. Ironically, the United States Constitution that inspires much of Rawls's own attempt to deduce institutional recommendations from his theory is probably the best known exemplar of these dual failings.

Within the international sphere, justice has to be between peoples rather than persons because the relationships of cooperation that generate a public conception of justice are absent in this context. Moreover, for those citizens who do share such a conception as part of a people, it is hard to see why they should seek to establish norms of justice at the international level except in that guise – that is, via the representatives of their peoples rather than directly themselves. Note, though, that Rawls deliberately does not talk of states. His reasoning is that states only have legitimacy as agents of peoples, and to be so they must be liberal democracies – regimes that have institutionalised the requisite public mechanisms for authorising political agents and holding them to account so that they can speak in their citizens name.

The terms of justice between peoples are different to those that pertain among a people. Yet they can be fairly demanding nonetheless. They extend on the one hand to providing support for all citizens to form a people and offering aid to those who have not been able to, and on the other to ensuring that the relations between peoples are conducted on the basis of equal concern and respect: that they are non-dominating and do not undermine the capacity of that people to conduct its affairs according to a public conception of justice. It also requires that those who seek to act as agents of their peoples must be publically authorised and accountable for what they do. They cannot claim executive authority as agents of a sovereign state with distinct interests to the commonly avowed interests of the citizenry.

What are the implications for the EU?

Arguments from justice are sometimes advanced as alternatives to arguments from democracy as a source for legitimising the EU, and in particular as a way of countering and even overcoming the 'no-demos' argument. However, on the neo-Rawlsian account of justice offered above, that will not be possible. For the conditions needed for a public conception of justice are precisely those required for a workable democracy that can operate as a mechanism through which citizens can give equal consideration to their values and interests in a public way – namely, that they form a people. By contrast to the Habermasian notion of a constitutional patriotism, one cannot deduce the pre-conditions of democratic justice from adherence to the very idea of democracy. That different peoples are committed to democracy as a way of organising their affairs does not imply that they are committed to, or capable of, forming one democratic people – merely that they are committed to allowing those other peoples to act as democracies.

The Rawlsian argument provides normative reasons for taking the EU's declared goal of promoting 'an ever closer union among the peoples of Europe' seriously. The Member States can all be said to be 'nearly just' societies in Rawls's sense – they operate as functioning liberal democracies for their respective peoples. Indeed, the main challenge to their legitimacy comes from popular pressure for the devolution of power downwards to their constituent peoples in the case of multinational states such as the UK, Spain and Belgium. Pressure for the relocation of power at a supranational level is almost entirely elite led – it is driven by the logic of statehood, whereby rulers claim to speak in the name of

their subjects by virtue of having sovereignty over them and seek to maximise state power through competition, conquest, merger or mutually beneficial bargains. From this Hobbesian perspective, rulers relate to their subjects like company executives to their shareholders, providing them a return on their holding through acquisition, cartels, aggressive bargaining and so on.

To promote political justice within the EU will be to modify this state-like logic, on the one hand, without seeking to create a European people, on the other. Instead, it will involve obliging state officials to represent their peoples on the basis of each state's public – that is democratically constructed – conception of justice. That will constrain and enable. To the extent that similar relationships of cooperation and common terms to those found at the domestic level do not operate at the European level, then it will constrain by making the norms of justice operating between the Member States justifiably different to those operating within them. The EU currently is characterised more by segmental than by cross-cutting cleavages, with these segmental divisions strongly correlated with Member States' borders. Within multinational states such divisions persist even after hundreds of years of enforced Union. There is little reason for assuming they will wither away in the EU. The reality of a Europe of peoples has to be grasped. However, the Rawlsian perspective on this union of peoples will also enable. For while the authorised rulers of a people should act rationally to further their interests, they ought also to be reasonable in seeking fair terms of cooperation with other peoples that recognise their equal right to live according to their public conception of justice. Such attitudes will lead to norms of mutual recognition and non-discrimination in their mutual undertakings, and cooperation to secure shared public goods in areas such as the environment, through measures that seek to overcome negative externalities and provide the full benefit of positive externalities. The EU has been most successful in areas that conform to these norms, and least successful where it overstretches them and promotes measures that are more akin to domestic than international justice.

The rather sober conclusion stemming from these reflections is that the Euro crisis and its likely resolution through political union among at least some Member States is the product of such overstretching and will result in a polity that will prove far less capable of sustaining political justice than any of the Member States.

### ***Jiří Příbáň: Contingency of Political Justice and Participation***

I am afraid I have even worse news than Richard, because what I want to propose is simply describing political justice as a contingency for law and move from this language of substantive justice – of democracy or representation, human rights foundations as foundational moments of commonality – to a different language of systems theory and systemic operations at a European level. In another word, it is almost like moving from Ode to Joy to Kraftwerk and Autobahn and Trans-Europa Express, networks and communications rather than Great Values. Because, after all, when we talk about universal validity of values such as democracy and representation, and human rights, we can endlessly debate 'what are these rights?' These values have always a diabolical nature; you can always look at them as contestations, and different sets of arguments and different kinds of value. One example: should we support Catalans and Scots in their attempt to secede from those 'backward monarchies' and constitute finally 'progressive republican' regimes, or should we just support the current setting and its politics of constitutional patriotism. Another example: what is human rights at European level or at national level? Its recent examples on the ban of halal and kosher food in Netherlands, or circumcision in Germany. Are we in the final stage of human progress when we protect individual autonomy to such an extent that we ban 'backward' religious practices? Or is it just a continuation of Nazi mentality and policy by other means, this time disguised by the rhetoric of human rights? I am leaving it as a question, not as an answer.

We have two possibilities. Either to look for substantive justice and – this is what we like as academics, because it tells us about moral community, moral values and then we believe that if we have a euro crisis or any kind of crisis we can steer it by providing the right formulae, by providing the

right moral solutions. Or maybe we could retreat and believe – like lawyers and positivists hundred years ago and say with Hans Kelsen that justice is not an external or ultimate criterion of legal validity, the ultimate source of law, but an intrinsic value of the legal system manifested in its procedures, operations, internal coherence and most importantly efficiency as its internal criterion of legitimacy. I think this is what I understood when Neil was speaking about the difference between justice and justification. For me, it was like a mark moving from a substantive to a procedural concept or proceduralized notion of justice even as a moral formula. However, because we know, there will always be different concepts of justice, as we heard yesterday, and we know that this concept of justice as a contingency formula within the law transforms a tautology into a sequence of arguments and makes something that is seen as highly artificial and contingent hence natural and necessary from the inside. I am talking already about the inside of the EU legal or political system.

In the beginning of our seminar there was one important question raised: what is the relationship between legitimacy and justice? I would argue that only legitimate politics can facilitate justice. Only legitimate politics – and I am not engaging in the debate whether democracy, human rights based or what else; yes, legitimacy facilitates justice. But only functional politics can be legitimate politics, and therefore justice is part of this functionality, and therefore it has to be part of formal procedural justice. When we look – and I will go very quickly through the texts – we can see that the whole post-Maastricht process of European integration is basically illustrated by growing pressures regarding the Union's legitimacy and administration. The Lisbon Treaty has it in its Preamble, in its Article 10. Simply, what is legitimacy? Enhancing democracy and efficiency. The current problem of the EU in crisis is not just the democratic deficit, but all of its legitimacy deficits, including its deficit of common benefit and legitimacy by output. Europeanization always was presented as a solution to political and legal problems and now it is not – Europe became a source of problems, not solutions.

If we stand back from European domain you can see politics as a permanent process of politicization and depoliticization. Maybe more democracy does not mean automatically more legitimacy, because politics is always framed by three questions: *By whom* am I governed? That is democracy and representation. But also, *how much* am I governed, and *how well* am I governed? Even European politics has to answer these three questions. This includes a typical functional split between government and governance and the EU needs to address these questions in its own terms. In other words, how far can you go in democratization of EU governance, and how far do we have to go in responding to the crisis by expertise and expert knowledge? Especially at a time when we know that the formula 'Only an expert can deal with the problem' was one of the biggest lies of the last twenty or thirty years in the economy, but also in politics. We remember Bill Clinton's winning formula 'It's the economy, stupid' from the 1990s. Today we could respond: 'It's politics, stupid'.

We have to move back to political questions, including the question of commonality. So, what is our commonality? Can we facilitate it through a symbolic expressive rationality? When I studied these constitution-making moments at national level and European level in the past I was intrigued by the fact that legality can facilitate not just its functional, intrinsic rationality but also its symbolic rationality. However, I came to the conclusion that this moral rationality does not constitute an *autopoietic* self-referential system. It is systemic, but nevertheless it is much less important for functionality than law and politics defined by legality and power as its medium. To conclude, the problem of Europe's political justice deficit is a political and not a legal one. Yes, we need more politics, but whether it is democratic or expert driven is an open question, and always will remain an open question. Dealing with this deficit, the EU and its politicians, nevertheless, need to engage in democratized political processes rather than yet another process of juridification of EU politics, because juridification is depoliticization and we need more politicization of the EU today. I think that continuation of the expert knowledge and administrative reason driven EU policy of the 'there is no alternative' formula would be disastrous for future of the EU in particular and Europe in general.

***Justine Lacroix: Is a Transnational Citizenship Still Enough?***

At this stage I'm afraid I only have doubts, which I wish to discuss. These doubts concern the very concept of transnational citizenship, which many scholars have defended for a long time – the concept of an “ever-closer union” of the peoples as evoked by Richard. My key question is this: is transnational citizenship still enough? To be sure, the concept of Transnational Citizenship was conceived as a normative one, but as Jürgen Neyer pointed out, we must keep such normative concepts in touch with reality. More precisely, I am afraid that the current crisis undermines the three pillars of transnational citizenship.

Let us consider the first pillar – the primacy of individual rights and the extension of choice beyond national boundaries. Current developments seem to give comfort to those who argued as long as 20 years ago that individual rights would in the long run undermine social justice. This danger was pointed out from a philosophical point of view by Stavros and Floris' argument of free movement and non-discrimination, and also by Agustín when he raised the question about fundamental rights.

Let us consider the second and third pillars – mutual recognition and Europeanisation of national spheres. As you know, many scholars have suggested reading European citizenship as a process of mutual recognition. The antidote to the dispossession which citizens may feel towards European issues should be articulated by a Europeanisation of national spheres. Is the economic crisis a prelude to this Europeanisation of national spheres? Some hope so, as the recent crises in Italy, Spain and Greece have been treated in other countries as national issues. Europe was a key issue in the French and Dutch elections. In Belgium, there will be elections in the near future, and it has become almost impossible to speak of anything other than Europe. But is this enough – as Habermas hopes – to lead to the feeling of a shared destiny? At this stage, it is hard to deny that the Europeanisation of national spheres increases mutual prejudices more than mutual recognition. In addition, we have not so far seen any “spill-over effect” of attitudes from the ‘European’ to the ‘non-European Other’. In this regard, I regret that none of the presentations have discussed what we owe to those who try to get into the European Union.

I have no solution to offer but I am no longer sure that a transnational citizenship is enough to attain both political and social justice in the EU. To focus the question further, we can ask (as raised by Philippe Van Parijs) whether the present Europe is balancing between two impossibilities. The first is the economic impossibility of doing anything serious about inequality at the national level, and the second the political impossibility of doing something serious about inequality at a supra-national level. This is the reason why Philippe Van Parijs argues in favor of a quasi-American distribution at a European level and a common language that would enable effective communication, co-ordination and mobilisation among Europeans. Such solutions might seem less attractive from a purely conceptual point of view than insisting on the radical novelty of the EU. However, they may be the only way to rescue political and social justice in Europe. At the end of his paper, Richard underlines that the resolution of the current crisis may well result in a situation in which political and social justice are more difficult to sustain than in our Member States. I share his worry, but it would be more precise to say that it may result in a situation in which justice is more difficult than it *used* to be in our Member States.

***Robert Schütze: A European ‘Incorporation Doctrine’: Human Rights and the Member States***

We have already looked at two kinds of citizenships and two kinds of corresponding rights in a federal polity. What I have done in this paper is to explore their relationship in the context of the United States and the European Union. Quickly, on the American side: American constitutionalism did not initially think that the federal “Bill of Rights” was incorporated into the State legal orders. There existed a dual structure or spheres of rights and thus two – separate – spheres of justice. Federal rights could only be invoked against the federal government; and – despite being an “American” citizen – they could not be pleaded against one's own State government. This partly changed with the 14<sup>th</sup> Amendment after the

Civil War; yet, as is well known, the Supreme Court originally chose a conservative reading of the Amendment: only *certain* types of federal rights would bind the states and thus provide a common sphere of justice to all American citizens. Incorporation was here “selective”: not all fundamental rights protected at the federal level would be recognised at the state level. In the last century, the Supreme Court has however increasingly moved away from selective incorporation, and today almost all federal rights may also be enforced as against the States.

The European story is – sadly – much more complicated, since it centres around the three bills of rights identified by Article 6 TEU. For each of these three sources of fundamental rights a distinct European incorporation doctrine has developed in the past. For European fundamental rights as general principles of Union law, two situations have thereby been identified as leading to incorporation: the implementation situation and the derogation situation. The more problematic one here is doubtlessly the latter. For what is a derogation from Union law; and what is the constitutional rationale for insisting on a common sphere of justice here? The second source of European fundamental rights is the Charter, and it seems that Article 51 of the Charter restricts the incorporation of these European fundamental rights to the implementation situation. We also have a third – future – direct source of fundamental rights: the ECHR. The question here is: once the Union accedes to the ECHR, would this not lead to a total incorporation of these fundamental rights per Article 216 (2) TFEU?

In sum: there may be different conceptions of justice at the federal and state level. Yet in both the United States and the European Union, there has been a gradual blurring of the federal/state distinction which contrasts with the original idea to create separate spheres of justice. One – interesting – major distinction between the United States and the European Union today is that while incorporation in the US depends on the *type of fundamental right* at issue, in the EU it is the *type of situation* in which a Member State acts that determines incorporation. The latter solution may lead to much more legal *uncertainty*. This constitutional problem has, some time ago, been addressed by Advocate General Sharpston. In *Ruiz Zambrano*,<sup>30</sup> she appears to propose a form of total incorporation for all European fundamental rights.<sup>31</sup>

### ***Discussion following the Fifth Session***

- *Neil Walker*: I wish to focus on Richard as he takes a particular position, which can clarify other debates by allowing us to appreciate the Rawlsian line on peoplehood. It's a strong and resilient Rawlsian terminology about peoplehood, which a lot of people find very difficult. When Rawls talks about people who come together as a co-operative venture for mutual advantage, this co-operation has different dimensions. This co-operative advantage which is vital to the DNA of peoplehood seems to have three different dimensions. One is equality of units in collective decisions, the second is the common effect and the third is the shared public sphere. Two points: these are the features, which go together for an ideal type of justice, the other meta-claim is that these things can only be cultivated and can only survive together. They cannot be disaggregated. But is that true? But can you not actually disaggregate some forms of co-operation? Some people say no – each of these together constitute the objective and phenomenological conditions of co-operation as a people, as against other forms of co-operation. But the papers presented show they don't have to come together in a holistic manner; you can treat 'people coming together' in different ways at different levels. This is different from a rigid grammar on geopolitics which says none of the conditions of justice within a state can be replicated.

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<sup>30</sup> Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi*, [2011] ECR I-1177.

<sup>31</sup> *Ibid*, para.170.

- *Agustín J. Menéndez*: Can we really say that the steering of the crisis has reinforced the idea of a European common good? Hardly so. In fact, what we can observe, if we pay close attention to the form and substance of the legal measures that have been taken, is rather the opposite. After intentionally omitting the creation of the institutional structures allowing the putting in common of the risks resulting from the Europeanisation of financial institutions in 1992 and in 1997, Europeans were faced with the imminent collapse of banks all across Europe. Doped by EMU and cheap money in the American repo markets, European banks were leveraged in excess of 40 to 1. What was done? After a miserable attempt at improvised coordination (Dexia, Fortis), each state did what it could (even what it could not, as was the case with Ireland), and only afterwards the European Commission pretended there was a common European response. It was a matter of relabeling the aggregate of national decisions as a common European position.

Can we really say that European law has become reinforced? Hardly so. Consider three developments. Firstly, we have a flight into the Union method, which is a peculiar attempt at circumventing European and national constitutional law by means of international law. The pious limits set by the German Constitutional Court and the ECJ (*Pringle*), claiming that this is justified as long as national and European constitutional law are respected, will become in the future fundamental examples of void formalistic decisions. Part of this flight is the extremely odd transformation of the IMF in part of the institutional framework of the European Union, even if partially an external institution to the Union. Secondly, not learning from the disastrous experience of codifying into the Treaties principles that were impossible to comply with (the no bailout clause), the European legislator has written into European law a set of fancy “rules” which are supposed to define the way in which European economies perform. Living aside the very interesting question of whether these “rules” are actually legal rules or travesties of legal rules (positive morality with hard coercion, as indeed the legally indeterminate concept of “structural deficit” may suggest), a fetishistic understanding of rules, based on a belief on their magic powers, is no indicator of the triumph of law in the steering of the crisis. Thirdly, we have been subjected to an overdose of pious intentions regarding the need of completing monetary union, most of the time by reference to political union. But what kind of completion is this? The actual plans being put forward are plans for having a political union without democratic politics. An authoritarian political union where self-interested charity is mistaken with democratic solidarity.

Eurozone? We have normative intuitions, but I have problems with the empirics of it as Justine suggested. It is nice- there are good things about the EU, but is it stable to have a European Union? I agree there was a Frankenstein which was born out of global political changes, but what is the alternative- a Federal political union? Can we have a political union without politics? It would be nice if a stable European Union could repair things, but is this a form of retroactive charity?

- *Daniel Augenstein*: Political justice only makes sense in relation to a political collective and for Habermas, Rawls and others this requires some notion of a constitutional legal order. This is the difference between the ‘constitutional’ Rawls in *Political Liberalism* the ‘international’ Rawls in *The Law of Peoples*. What Richard did is to apply the ‘international’ Rawls to the EU context, but you get a very different picture if you think that there is more to the EU than an international organisation of states. It all depends on how you draw the boundaries of the political collective at stake. For the EU, this entails asking what it means politically to have a market in common. Damian suggested some kind of a functional delimitation of policy areas in which the EU can raise legitimate justice claims. What I was trying to get at in my presentation is that this becomes increasingly difficult. It becomes ever harder to avoid questions relating to the *common* good of the European *polity*.

If the foundation of this polity is a market, this would require a politicisation of the market.

- *Jiří Příbáň*: 'Federalisation without politics' – we still look for normative bases to the crisis. But what is this crisis? It is simply a momentary heightened contingency – perhaps some countries will drop, or there will be two eurozones. But political evolution will continue despite normative prescriptions surrounding the crisis. The tragedy of the euro was that it was legitimised by this notion of the common good: if you want to avoid war, let us have a common currency. The market does operate in a combative manner which leads to fragmentation. The European project will go on regardless of its normative foundation – we do not suffer from a deficit of formal justice. The question is how citizens and institutions will view justice from a federal context – it is still undecided. Foundations cannot be decided once and for all. Different fears are faced by different member states: political justice cannot be anything other than clarification of human rights etc. We cannot go on by any means other than federal democratisation- there is no other way to politicise.
- *Justine Lacroix to Agustín J. Menéndez*: What is important is the issue of stability of the Union, which goes back to the viability of a *demoi*-cracy. It's ok from a conceptual point of view, but it may not survive.
- *Gareth Davies*: what kind of *demos*, shared identity, communication, values – what social context do you need for transnational justice? The question is not whether such context is there, as such a vision is very static, it creates circumstances which justify their own actions. If you do justice, then this may convince people that justice is possible! The ECJ has done that successfully to a certain extent such as *Cassis* by creating a conception of a shared legal order – but such contexts have not really been created. Psychological research shows even highly educated people, if they are allocated arbitrarily to a group, convince themselves that they share a bond with others in that group (and that others are shallow and worthless) even when they did not do so prior to such experiments, but that has not worked in Europe.
- *Joanne Scott*: I find this comparison of EU and US interesting. But fundamental rights come in the EU in a collateral way because of the preliminary reference system as against the US. *Schmidberger*<sup>32</sup> – freedom of speech comes up in a secondary/collateral way because of the preliminary reference system, where the national court has to do the preliminary work. There is something absent and unsatisfactory in the absence of direct action. What these cases show is that there is no direct action, because of the nature of the EU as a polity: EU jurisdiction is limited. Is the ECJ ever going to develop its human rights jurisdiction as the US Supreme Court? If it can't, then will there always be a form of dissatisfaction in the way justice is done through fundamental rights in the EU?
- *Gráinne de Búrca*: I have been reflecting on the evolution of our discussion since yesterday. Today what I am hearing is the impossibility of *status quo* justice in the EU –that there may, for example, be a need for a more federal political system if the EU is to embody any kind of system of justice. Or, alternatively, if the EU as it currently is cannot deliver justice as we currently understand it, that we need to consider whether there is a *sui generis* novel alternative, a conception of justice in the context of this system that is neither mere international co-operation nor analogous to a state level. And if so, how?
- *Carole Lyons*: When did the European Union move from being a forum for market regulation to being an arena with justice potential? The *Butter* case<sup>33</sup> – and the EU incorporation of German principles of human dignity. Free butter availability was generated by ostensibly neutral, trade related EEC/European Union internal market provisions but you had to use your id card to get the butter, thus engaging, and bringing directly to the market focused EU, issues of dignity, rights and justice based questions.

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<sup>32</sup> Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, [2003] ECR I-5659.

<sup>33</sup> Case 29/69, *Erich Stauder v City of Ulm* [1969] ECR 419.

- *Danny Nicol*: With regard to the question as to whether deep rights without incorporation (Richard) can be reconciled with Strasbourg, I would caution that it isn't that one court is federal as against the other one. It's more nuanced and a difference of degree. One can discern from the case law of Strasbourg, for example, the emphasis on the right of effective remedy as national judges can be held responsible for not doing so. Second, the opening up of remedies shows this. Obviously ECJ is more federal which is why there is no prisoner voting in the UK.
- *Daniel Augenstein*: If you are Dworkinian, the European Court of Justice and the European Court of Human Rights should spell out the single right answer to conflicts of rights across the Union/Convention legal space, no deference, margin of appreciation and the like. From this perspective of rights jurisprudence, the EU would very much operate like a constitutional state.
- *Damjan Kukovec*: What is it exactly that we are pursuing when we argue for "more justice"? You said we need more politics? I could possibly agree with that but it seems to me that the assumption is that as soon as we have more politics, more "justice" will follow. The key question to me is what kind of politics and what kind of justice we want, this is the eternal question. Also, when we say that we need less law and more politics, we need to be aware of the fact that politicians are bound by the constraints of the legal language just as well. Indeed, you said later that more politics should mean more human rights and more democracy. But a call for politics in this sense reproduces the same unresolved questions – what kind of democracy and what kind of human rights do we desire? Yes, we need a human rights regime, but you can construct alternative human rights regimes, so where does such an abstract debate lead us? Furthermore, if more justice equals more human rights, why do we need to speak about justice at all? We could only say that we need more human rights. Moreover, we speak about "more justice" and "less justice". But how is this really different from our own personal preferences or values? And how do you deal with "justice" in a particular case? Let's imagine we get a merger case on the table, or the *Schmidberger* case that was just mentioned. How would the talk of justice, as we hear it deployed, help us? What do we do with justice, how do we operationalize it? We critique the European Court of Justice, but what exactly would the European Court of Justice have to do, what do we actually want when we argue for "more justice"?
- *Dimitry Kochenov*: Introducing dynamics following Gareth's *demos-taken-as-a-given*: one factor is shaking the boat through contesting the settled agreements at the national level. However united the *demos*, there are outcasts and there are now outcasts before the ECJ. The ECJ can help them to forward their own version of justice, which allows us to rethink basic values which are taken as a given at the national level. The EU helps us to reinvent the Member States and creates a different vantage point, as it were, and it is important to ensure access to people who want to contest notions of justice at different levels. So we need an outline what rights apply where. So what Robert said is fundamental and parallels with the US are vital: when Eleanor Sharpston went in *Ruiz Zambrano* for the *programma maksimum* using Leninist language – a totally new Union has been proposed. I don't entirely agree that the Court is moving from an assessment of rights towards a right assessment. If we look at the latest cases on citizenship rights, the court applies rights, which it invents – which are not grounded in the Charter, Treaty, anywhere – probably unwritten rights which are not connected to the specific cross-border situation, which was the doctrinal approach before. So it is shaking the boat and being optimistic about it.
- *Justine Lacroix*: there might be a misunderstanding, as I agree that there is no such thing as transnational citizenship since one needs to be a Member State national to be a European Citizen. However, many scholars consider that the principles of free movement and the absence of any discrimination grounded on nationality are the actualisation of the cosmopolitan law envisioned by Kant.
- *Oliver Gerstenberg*: The activism of the Courts – not Leninist (not even in Maurice Duverger's sense) but Marxian – the consciousness limps behind reality. The constructive function of the Courts may, in a way, be ahead of social reality. If a legal construction is new, and the alternative



is worse, then, without it, an idea of Europe would be lost. Take the ECtHR's decision in *Goodwin* concerning the plight of transsexuals. The Court said there's an "international trend" towards legal recognition. But how do we know there's a trend unless we were already looking for it? So moral judgment is necessary—and irreducible. And it makes good democratic sense. Of course, the judges didn't just make it up—they were responsive to changing social values in society. The decision epitomizes the complex entanglement of fact and value which is inescapable whenever judges set out to develop the law.

- *Agustín J. Menéndez*: Social rights have taken the very back seat in the European Union since the beginning of the crisis. With an eye to the empirical reality of the "PIIGS" countries, it is hard to affirm that fundamental labour rights, as the right to form a trade union and the right to strike, are actually enjoyed by most workers. Similarly, the thinning of the welfare states resulting from "austerity" as endorsed by European institutions following the intellectual lead of Alberto Alessina and others, casts a long shadow on the effectiveness of the right to health and the right to education. Austerity kills rights, and has already killed many persons who were turned into despair and committed suicide. Or who have been deprived of medical treatment that has made their condition a lethal one. And the worse – in terms of the structural damage to the populations of the PIIGS, and to the very integrity of their social and political structures – is still to come.
- *Jürgen Neyer*: I'm not very qualified to talk about social rights. I'm not saying that the ECJ does not have the mandate to protect fundamental rights, but it appears to be more minimalist. With regard to Richard, federalism is unity in diversity – we are not treating everyone as equal – but perhaps you didn't talk about inequality in a spatial sense, but in a sense of rich versus poor. Perhaps once you have political safeguards, then minority rights can be protected. With regard to Dimitry, other than Lenin, sometimes you have to shake the boat to be established. I guess that one of the expressions of that is constitutional pluralism which I'm not too happy with, as it does not lead to any solution – just says that there is something wrong with the existing system. To the observation regarding a shift in the court's jurisprudence, I have to go back to see if there is indeed a shift in the way rights have been incorporated.
- *András Sajó*: There are people who believe that the European Court of Human Rights should have a Dworkinian approach, but one must accept that there are reasonable disagreements in a pluralistic society. The Court does have a pro-European mandate, though this is contested and it is under growing pressure. It is important to reflect on the real role of transnational courts as they are not working in isolation. If you look at the interaction of Strasbourg with domestic judicial systems, there are enormous differences in that interaction. These differences may be limited to the judicial sphere). The Swedish Supreme Court tries to figure out what would have been a judgement of Strasbourg in a parallel case, and when the case comes to us, they learn that they are wrong. In Belgium and Holland, they order a stay of proceedings if a comparable case is going on. The UK judiciary is ready to transpose it immediately. With Germany it is a bit different, and some countries couldn't care less. They pay the awards and do nothing. Lithuania, notwithstanding its respectable compliance, never changes its law on transgendered people but the domestic courts offer damages to people who go to Thailand, get operations done there and come back to claim damages. Obviously, human rights cannot alone generate social justice. We may even be overestimating the role of human rights in Europe. A grim part of reality is that there is no responsiveness to systemic human rights problems. Europe is a little bit less critical than it should be; for this absence of soul-searching we certainly need to look within the nation-states.
- *Jiří Příbáň*: I am almost ashamed that my presentation was taken as provocation. I wanted to come with the most humble presentation on systems theory without mentioning reflexivity and autopoiesis. The idea of reflexivity is simply democratisation of democracy. Something which is a non-foundationalist, yet founding principle of the EU, but it nonetheless has to be nationalised by Member States, too. The German Federal Constitutional Court in a recent judgement was devolving democracy by requiring the German parliament to deal with democratic deficits of EU decision-making. We can no longer disguise the political project by further economisation or

juridification of European integration. I have a problem with Derrida post-1990 as this is turning deconstruction into moral kitsch. The distinction between procedural and formal justice is undoubtedly a construct of legal theory, but it helps us to operationalise justice within formal law and legal system. From the perspective of formal justice, European justice particularly gets reformulated and framed by the debate about constitutional courts making national parliaments responsible for the democratic legitimacy of further formal processes of European integration.

## **Sixth Session: Inter-Generational Considerations: Historical and Ecological**

### ***András Sajó: Vulnerability and Victimhood as Grounds for Reparative Justice Distributive in Nature***

'Europe' is understood for the purpose of this paper beyond merely the EU 27 and its institutions. I understand that EU institutions do pose a very specific problem in the process of generating justice in terms of legitimacy but the perspective here is broader. I am interested in how concepts of justice are generated or sustained. The discussion so far related to a modern or post-modern understanding of justice. But I think Europe is not necessarily fully modern, and concepts of 'justice' which pre-date modernity still exist. It is a fact of contemporary life, that there are alternative ways of generating justice, not all connected to modernity.

When talking about generating justice, I refer to a theory of moral sentiments which I think is empirically valid and relevant to concepts of justice. Then there is a normative question, to what extent different groups have to accept a given concept of justice, and what are the grounds for accepting it. An additional issue is the special task for legislation and a different task for courts in coping with emerging concepts of justice.

Today I concentrate on a specific form of generating justice, or better said claims of justice. What we are really talking about: claims of justice, not justice as such. This is based on victimhood and vulnerability. Now, victimhood is very specific in this context because it is assumed that the human rights system, especially in Europe is based on the experiences of World War II, where in fact, fundamental victimization occurred. There is a general shared belief that this should not be repeated. This seems to offer a very accommodating human rights environment. Here specific forms of victimhood are based on genocidal victimization. But if you look at the history of this recognition, genocidal victimization was not something taken for granted or foundational right after World War 2. The recognition of specific victimhood was selective, and its acceptance took a long conflict of over 20 years. On the basis of this recognition of victimhood, there was a certain trend to apply the same approach for other claims; vulnerable groups have gradually accepted to represent their claims in terms of being victims. And sometimes, this was a clear and easy to understand association. If you look at the anti-Roma prejudice, and genocidal persecution, there are long-lasting consequences, making them socially vulnerable. So, here victimhood and vulnerability are historically interlinked. But there are many other groups which partly accepted victimhood as a strategy and centered on their vulnerability as a source of rights. Vulnerability as a result of socio-economic disadvantage is construed; Nancy Fraser called it 'misrecognition'.<sup>34</sup> Institutionalized patterns of culture or value constitute some actors as inferior and excluded, so the need for protection of the dignity of the vulnerable group and the members of the vulnerable group builds as a justification for social services that are otherwise not necessarily due.

I will end by saying that justice politics based on vulnerability has normative advantages but it is very difficult to use it as a foundation for policy. When it comes to judicial policy, as a form of adjudication, taking vulnerability into consideration becomes much more important, or at least easier to deal with, because in this case it serves as a tool for making judges sensitive to issues which are otherwise hidden by traditional legal dogmatics. At this point, a traditional role for courts may emerge. Just as the King was the protector of the weak, the Courts will become the protector of the weak. This offers them a traditional legitimacy which easily resonates in the general public. This protective role has a perfect legitimacy in democratic theory. The role of the court is to intervene in the name of rights when there are insular minorities. The courts have a very adequate function here, and I feel comfortable with that. To what extent is this idea accepted in trans-national, super-national courts?

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<sup>34</sup> N. Fraser, 'Rethinking Recognition' 3 *New Left Review* 116 (2000).

This remains to be debated. But there is a strong claim of legitimacy, even within democratic theory for that kind of role.

***Carole Lyons: Just Fatherlands? From Kristallnacht to Katyn***

Though drafted in the shadow of the Shoah, there is really no formal recognition of institutionalized killing embedded in the European Convention of Human Rights. I classify this as the ‘original sin’ of the Convention, a sin which permeates through the decades. My concern today is with the European Court in Strasbourg, but indeed similar questions may be asked of the EU Court in Luxembourg. My question is: how do these courts work through their specific, extreme past? How does a day to day EU lawyer move from dealing with prosaic free movement of goods to confronting the legacy of the Shoah? I think we must remember that EU justice issues considered today did not all begin with the market, with coal and steel, with Schuman - they did not begin there but prior. Three themes will be focused on: (1) historical justice and the role of the courts, (2) memory mediated through the judicial route, and (3) the specific legacy of Auschwitz in Europe and the human rights response. Firstly, courts and historical justice; there are fascinating layers of adjudication observable in Europe in the 1960’s, when, for example direct effect was being conceived in the *Van Gend* case<sup>35</sup>, while at the very same time German judges were dealing with the mass killings in Treblinka. How did the emergent Europe embrace those very distinct strata of justice and was there any integration or link between them? The second theme is courts as sites of memory. The ECtHR is an enthralling arena for European legal historians, although a relatively unexplored one. When you ask the question about a court as site of memory, the work of Pierre Nora has influenced me here, and effectively if you adopt his approach, courts can’t deal with memory, they can deal with history but not actually with genuine memory because of its intimate organic nature.<sup>36</sup> And finally, the issue of the legacy of the Holocaust in Europe. In the 1961 *X v Germany* case,<sup>37</sup> the nameless X was in Auschwitz and several other camps and epitomizes the whole gamut of the Jewish experience of World War II and the Holocaust, from *Kristallnacht* onwards. His case was guillotined and rendered inadmissible; the paper examines how that compares to how cases involving National Socialists were dealt with in the same era in Strasbourg. To add by way of quick conclusion and connections with other contributions, I liked Neil’s comment about how one conception of justice is the capacity to deal with arbitrary domination and see links with themes of this paper and also Damian’s view of justice as mutual dependency, in relation to which I argue from context of my paper that if you haven’t got mutual confrontation of the past, then that ability to have mutual dependency is depleted.

***Joanne Scott: The Justice Dimension of the EU’s Climate Change Unilateralism***

The background to the paper that I want to give is very well known – the lack of progress in global climate change talks and this lack of progress is in significant measure because countries can’t agree as to how the burden of mitigation is to be distributed between states, and how the principle of Common But Differentiated Responsibility established in international law should be interpreted and applied. Absent any agreement as to that distribution question, really barely any progress is being made. Against that background the EU is persevering, it has established a unilateral emissions reduction target for 2020; there are serious questions about whether the tools are appropriate, but it is pushing forward. But it is inevitable given the competitiveness issue being raised elsewhere that the EU is struggling to do this alone. There’s a limit to what it can achieve alone – it contributes 10% to global emissions, can cut a whole lot but won’t make a whole lot of difference. Within the EU distributive questions are also being raised. Poland, in particular, is blocking any efforts at

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<sup>35</sup> Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR I.

<sup>36</sup> P. Nora, ‘Beyond Memory and History : *Les lieux de mémoire*’ 26 *Representations* 6 (1989).

<sup>37</sup> *X v The Federal Republic of West Germany*, App. No 627/59, Decision of 14.12.1961.

constructive reform. Competitiveness concerns are being raised by countries such as the UK. Against that background, the EU is attempting something that is quite interesting, ambitious and controversial as it extends the global reach of its climate law by trying to bring in within the European climate change regime foreign actors based abroad. We see this most closely in the extremely flawed emissions trading scheme. The clearest example is the EU decision to bring in foreign airlines within the European emissions trading regime. Thus any flight departing or arriving in the EU will have to purchase allowances from the EU to cover the entire flight – all the way from San Diego to London and just not the stretch within the EU territorial space. So the EU is seeking to extend the global reach of its climate change law to assuage competitiveness concerns and also in a bid to serve as a catalyst for climate action elsewhere, on the part of other states and on the part of the global community. The EU framework for externalising its climate change law is very firmly premised upon the concept of equal treatment – so it's based upon the equal treatment of airlines regardless of the nationality of the airline and the route that the airline flies. The EU regime based upon equal treatment in the sense that third countries can be exempted if they adopt measures which are equivalent to the measures which have been adopted by the EU. So it's equal treatment all the way through. The principle of CBDR – the idea that different countries should bear different burdens depending on how much they contributed to the problem and how much capacity they have to respond to the problem – is in no way reflected in the regime. There are different ways to respond to that. One response is to say that this is completely right. The idea behind the EU regime is to serve as a catalyst for global climate response – since such a regime is so unbelievably unfair and the regulatory penalty default so unattractive – other countries will have a genuine incentive to negotiate a better deal. Another possible response which has been a familiar response from American readers is to say that the principle of CBDR is wholly misconceived in this context. It only concerned with distribution between states and not between individuals – we should be concerned with achieving climate justice, which means protecting the vulnerable and the poor from the impact of climate change policies. So actually the aviation point is a wonderful illustration of how the current thinking on climate change justice as CBDR is misconceived because it is only the rich who fly. Finally, one could argue that actually the principle of CBDR should be considered to be relevant in the context of EU unilateral action – the EU acting alone captures 60% of global aviation emissions (Robert's scale point). In that context, to argue against the relevance of CBDR seems to be misconceived. In keeping with this, my co-author (Lavanya Rajamani) and I give practical examples as to the how the principle of CBDR may be appropriately reflected in the context of climate change unilateralism.

### ***Jane Holder: Negotiating Nature and Ecological Justice in the EU***

For the last few years I've worked on environmental justice, spatial justice, climate justice and ecological justice. It struck me that such categories or dimensions of justice have no home as yet within the EU: there is limited visibility or reception of such categories of justice within the EU. There have been useful attempts to apply quite creatively EU law on racial discrimination to deal with cases of environmental injustices in which the location of developments disproportionately affects particular racial or socio-economic groups within society, but this remains limited in practice. I wanted to use this forum to work through the potential place and destabilising role of ideas of *ecological* justice using in particular the Habitats Directive, and Natura 2000, an ecological network of protected sites, the establishment of which forms the core of the Habitats Directive.<sup>38</sup> The Habitats Directive is an interesting example of ecological thinking: it includes regulation relating to both species and habitats, recognising the connections between the two. It ambitiously attempts to link together protected areas in recognition of the need for transboundary action. Ecological justice is an emerging form of ecological justice – as between people and the rest of the natural world, and provides a stark

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<sup>38</sup> Directive 92/43/EEC of the European Council of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, (1992) OJ L 206 (Habitats Directive).

comparison with more usual forms of justice which focus instead on relations between people. Although emerging, ecological justice is not a new category of justice; it's been emerging for a very long time: in the 1960s and 70s deep ecologists developed the foundations of ecological justice, with the Sierra Club then taking up the concept in practical ways. More recently, work by Barry, the GAIA Foundation and Wild Law UK has reformed these ideas as Earth Jurisprudence. There has been interesting glimmers of recognition of this idea in the form of constitutional guarantees and draft UN declarations. A particularly important conception of ecological justice is found in Aldo Leopold's work in which he sketched out a sense of an expanded community of life, in which the continued existence and inter-relationships between animals, plants and soils had value regardless of their use to man. He saw this value as being far broader than economic value. For Leopold an action is right if it protects the integrity, stability and beauty of the biotic community, and wrong when it does otherwise. Such thinking is potentially destabilising and makes us think about Rawlsian justice in terms of differentiation between species and temporal differentiation.

The Habitats Directive reflects aspects of distributive justice, procedural justice and compensation/corrective justice. Distributive justice is interesting because the Natura 2000 regime includes the need for an ecological assessment of a site which is threatened by development, which may lead to alternative locations or patterns of development. To give a quick example, if you're setting up a Scottish wind farm, the assessment calls for an evaluation of the ecological impacts of that development throughout the rest of the EU. So what I set out to do is not examine the existing categories which are being developed but to argue for the development of a set of ecological criteria (e.g. integrity, coherence, resilience). This is not an expansion of justice, but thinking about justice in an entirely new way. We can look at this as a collective project of including all species in the biotic community within the realms of justice.

### ***Discussion Following the Sixth Session***

- *Neil Walker*: One way of connecting these papers is intergenerational justice. I think it's interesting because we go back to the debate about the nature of peoplehood and potential for peoplehood within the EU – one of the fault-lines in the debate is between those more sceptical voices who assume a social ontology of peoplehood is already there, as against something which is dynamic and immanently constructible (as Robert discussed). One of the tests of peoplehood is extendability over time, so the duty pertains to past and future generations. If one takes a dynamic view, then you take into account the past or future versions of yourself, which helps construct a notion of peoplehood. If you take an always-already social ontology viewpoint, then these areas become very, very difficult to think about in terms of collective action.
- *Andrew Williams*: The last two presentations brought to the table the rest of the world. If EU must be a just project, we need to work not only towards domestic action, but that domestic action has an effect on the rest of the world, so it is not only an internal project. The world of John Rawls is a world of the past, concerning disconnected nation-states. Trade policies, environmental policies etc. show that the EU borders are both spatial and temporal. Hence, we cannot be so parochial to assume that Europe concerns only the people of Europe. This also brings us back to the issue of responsibility. So how could Europe be responsible for member states and corporations of its member states located outside for acts beyond its borders? There's nothing to be said about the British engagement in Iraq – there's no questioning of policy as such. Construction by corporations which results in environmental disaster – the ECHR is restricted by jurisdiction to look into private action. The sense of how far responsibilities go, forward and back, is not something we have fully addressed.
- *András Sajó*: I would like to address a question that was not addressed to me regarding the role of Courts. It is an empirical observation, and you find this in the literature – it is a criticism by historians that courts do not look at history. Second, the courts are not well equipped for

establishing historical evidence and when it comes to historical memory, memory is handled as a matter of evidence. This is the worst thing that can happen for memory as a living instrument. If you look at *Kononov* at the chamber level,<sup>39</sup> it held that evidence of Russian partisans in Latvia in 1944 cannot be relied on. My Dutch colleague, Judge Myjer,<sup>40</sup> provided a detailed summary of the events from different perspectives, but he relied in his position on prevailing historical information and on the findings of the Nuremberg Tribunal. The Grand Chamber was more interested in the normative aspects (applicable law) than in the historical factual context in the theatre of war and later. How do you do a historical reconstruction on questionable evidence? The Grand Chamber took a legalistic position whether the Hague Convention and the developing law of nations in 1944 was such that these Soviet partisans in the woods should have known it or not. This is not a historical issue – it is the wrong question for a historian. It is not a proper account of historical memory. But I do not think it is the proper function of courts to reconstruct memory because of the lack of professional knowledge. In any event, memory is something that is more than professional knowledge. It would amount to overloading the court. I am reluctant to appraise the role of judges as historians.

- *Joanne Scott*: I think what you say is normatively appealing but not necessarily theoretically inevitable. In relation to external relations, is there any reason why the EU cannot be a hard-nosed realist supra-nationalist? I don't think that the nature of interactions preclude that possibility, but what does happen in the type of situation that I'm describing is that there is an overlapping consensus of different countries leading to a political dynamic that put in train the justificatory processes you have in mind. This is true for global administrative law- the processes bubble up and muddle along. As for Rawls, things are profoundly different now. In relation to Andrew, I am interested in the kind of processes of exporting of European norms and values, and whether these process stops when we export our capital. Such relations are always discussed from certain perspectives in relation to private international law such as Alien Torts Act etc, but I'm interested in looking at it more from a regulatory perspective- the nitty-gritty when does the EU regulation seek to restrain what EU companies can invest in?
- *Jiří Přibáň*: Recurring theme of justice not as equal treatment of all, but justice as protection of the weak – I like the idea of courts replacing monarchs as protector of the weak. I wonder how this plays into the idea of Richard Rorty who depicts justice as loyalty.<sup>41</sup> If you want to have a community, then you have to have the loyalty of the people. I wonder whether you can imagine a community commanding loyalty without protecting the weak?
- *Damjan Kukovec*: I agree that the European Union should say more about how it affects the outside world, but who should say these things – the European Commission, the European Court of Justice? The problem is that we are rarely satisfied with what they say and I can also imagine we would soon start complaining that they are meddling in our national constitutional systems.

Second, the discussion of justice between individual and nature reminds me of the old property concept as a relationship between a man and land. I think it was already the Roman lawyers who said that a property relationship is not a relationship between a man and, for example, a plot of land, but *between men in relation to* a plot of land. I believe we are split between ourselves and within ourselves as to how to act and what actions to follow, but I cannot be split between myself and, for example, a plot of land.
- *Joanne Scott*: Going back to Richard, I completely accept that CBDR is about responsibility and capability, and responsibility and vulnerability, and would therefore easily fit into a Rawlsian framework. So what is it that I'm telling you that wouldn't fit into a Rawlsian framework? It's that when states get together, they sometimes cannot agree on anything. Thus, the EU acts alone and

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<sup>39</sup> *Kononov v Latvia*, Application no. 36376/04, Judgment of 24 July 2008 (Chamber).

<sup>40</sup> Judge Myjer, concurring opinion, *ibid.*

<sup>41</sup> R. Rorty, *Justice as a larger loyalty*, 4 ETHICAL PERSPECTIVES 2 (1997).

has an external effect. This is a puzzle which Rawls did not pay much attention to- the kinds of political organisation you need for that kind of externality.



**Participants of the Debate:**

**Daniel Augenstein**, Tilburg University School of Humanities

**Richard Bellamy**, UCL, European Institute

**Gráinne de Búrca**, NYU Law School

**Daniela Caruso**, Boston University School of Law

**Damian Chalmers**, LSE, Law Department

**Gareth Davies**, VU University of Amsterdam, Faculty of Law

**Sionaidh Douglas-Scott**, University of Oxford

**Oliver Gerstenberg**, University of Leeds, Law School

**Jane Holder**, UCL, Faculty of Law

**Dimitry Kochenov**, University of Groningen, Faculty of Law

**Damjan Kukovec**, Harvard Law School

**Mattias Kumm**, NYU Law School

**Justine Lacroix**, Université Libre de Bruxelles

**Antonia Layard**, Birmingham Law School

**Carole Lyons**, School of Law, RGU

**Agustín J. Menéndez**, ARENA Oslo / University of León

**Jürgen Neyer**, University of Viadrina

**Danny Nicol**, University of Westminster

**Fernanda Nicola**, American University College of Law

**Kalypso Nicolaïdes**, University of Oxford (co-author not present in London)

**Jiří Přibáň**, Cardiff Law School

**András Sajó**, European Court of Human Rights / Central European University, Budapest

**Robert Schütze**, Durham University, Law School

**Joanne Scott**, UCL, Faculty of Law

**Suryapratim Roy**, University of Groningen, Faculty of Law

**Stavros Tsakyrakis**, University of Athens, Faculty of Law

**Juri Viehoff**, University of Oxford

**Neil Walker**, Edinburgh Law School

**Michael Wilkinson**, LSE, Law Department

**Andrew Williams**, Warwick University School of Law

**Floris de Witte**, LSE, Law Department



