Dimensions of Justice and Justification in EU and Transnational Contexts

Herlin-Karnell, Ester; Kjær, Poul F.

Link to publication in CBS Research Portal

Dimensions of justice and justification in EU and transnational contexts

Ester Herlin-Karnell & Poul F. Kjaer

Submit your article to this journal ⬈

View related articles ⬈

View Crossmark data ⬈

Routledge
Taylor & Francis Group

INTRODUCTION

Dimensions of justice and justification in EU and transnational contexts

Ester Herlin-Karnell[a] and Poul F. Kjaer [b]

[a]University Research Chair and Professor of EU Constitutional Law and Justice, Faculty of Law, VU University of Amsterdam, Amsterdam, Netherlands; [b]Professor, Department of Management, Politics and Philosophy, Copenhagen Business School, Copenhagen, Denmark

ABSTRACT
The introduction to this special issue presents and explains the main idea behind each contribution to this collection of papers. Specifically, this special issue explores a grammar of justice and justification through political theory, legal and sociological perspectives, and discusses their relevance in EU and transnational contexts. The introduction also links the papers together and supplies some concluding thoughts.

Introduction

The EU is currently facing a range of profound challenges, from the financial crisis and the subsequent euro-zone debt crisis, to the migration catastrophe unfolding in the Mediterranean and the heightened security situation resulting from both terrorism and its relations to neighbours such as Russia and Turkey. To this already long list one can now add the Brexit trajectory and the increased challenge to democracy and the rule of law in a number of member states, most notably Hungary and Poland.[1]

The point of departure for this special issue is that this situation is more than just a coincidental simultaneity of different societal challenges. Rather, these developments should be seen as symptoms of a more fundamental malaise in so far as Europe's dual national and transnational framework of governing has become marked by severe dysfunctionalities and a profound crisis of legitimacy.[2] This crisis is so fundamental that the *raison*

CONTACT Ester Herlin-Karnell ✉ e.herlinkarnell@vu.nl
[1] For an overview of these crises, see the contributions in Poul F Kjaer and Niklas Olsen (eds), *Critical Theories of Crises in Europe: From Weimar to the Euro* (Rowman & Littlefield, 2016).
[2] See, for example, Jurgen Habermas, *The Crisis of the European Union* (Polity Press, 2012).

d'être[3] and potentially also the survival of the integration project seems to be at stake,[4] with the consequence that the European journey to an 'unknown destination',[5] as Joseph HH Weiler famously put it over two decades ago, might, at least momentarily, have come to an end. The EU, in other words, is in need of a new navigation tool or constitutional compass, ie a new legally entrenched normative orientation point, and a new narrative capable of guiding its future development.

It is in this context that the concepts of justice and justification have emerged as focal points of academic debate and scholarship. At least three different perspectives, located on a continuum ranging from predominantly normative to predominantly descriptive approaches, can be identified. First, within political theory, the core idea and thrust of the concept justice, adopting the model of, for example, Rainer Forst, is linked to the republican idea of avoiding arbitrariness and domination to ensure freedom.[6] This perspective can furthermore be seen as being linked to questions of the distribution of justice in the classical Rawlsian sense[7] or, alternatively, to justice-centered reasoning allowing individuals equality and dignity as well as the right to justification for any decisions that concern them.[8] Second, and linked to the first, is a more hands-on debate concerning the question to what extent institutional frameworks aimed at providing substantial justice, as well as the associated question of justifications of public decision-making, can be achieved within the institutional framework of the EU at all.[9] Furthermore, this perspective is closely linked to the legal debates on how substantive justice can be achieved within the legal framework of the EU or whether it is better left to the member states.[10] Third, a sociologically oriented perspective has emerged asking why a discourse on justice and justification has appeared within transnational settings in relation to both the EU and other transnational arrangements.[11] This is a perspective that emphasises that the

---

[3] See, for example, Grainne de Burca, 'Europe's *Raison d'Être*' in Fabian Amtenbrink and Dimitry Kochenov (eds), *The European Union's Shaping of the International Legal Order* (Cambridge University Press, 2014).

[4] Damian Chalmers, Markus Jachtenfuchs and Christian Joerges (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity* (Cambridge University Press, 2016).

[5] Joseph Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration' (1993) 31 *Journal of Common Market Studies* 417, 437.

[6] Rainer Forst, *The Right to Justification. Elements of a Constructivist Theory of Justice* (Columbia University Press, 2014); Rainer Forst, *Justification and Critique: Towards a Critical Theory of Politics* (Polity Press, 2014).

[7] John Rawls, *A Theory of Justice* (Harvard University Press, [1971] 2005).

[8] See the works of Forst in n 6. See also Philip Pettit, 'Justice, Political and Social' in David Sobel, Peter Vallentyne and Steven Wall (eds), *Oxford Studies in Political Philosophy, Volume 1* (Oxford University Press, 2015).

[9] Jurgen Neyer, *The Justification of Europe* (Oxford University Press, 2012).

[10] See, for example, Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press, 2016); Grainne de Burca, Dimitry Kochenov and Andrew Williams (eds), *Europe's Justice Deficit* (Hart Publishing, 2015).

[11] See the contribution of Poul F. Kjaer, 'Why Justification? The Structure of Public Power in Transnational Contexts' (2017) *Transnational Legal Theory* doi:10.1080/20414005.2017.1329248.

structural setup characterising transnational arrangements is fundamentally different from those characterising nation-states and that references to justice and justifications have emerged in the attempt to fill the lacuna that has emerged due to the weak level of democratisation at the transnational level. Institutionalised acts of justification have emerged, in other words, as part of a response to the functional need for norm production, which cannot be fulfilled through democratic means.

This triangular split means that justice and justification are essentially contested concepts that are ascribed different meanings and given a different status depending on the place one departs from. In spite of this, or maybe exactly because of it, they however serve as useful starting points for raising some intriguing questions about the role of legitimacy in transnational contexts in so far as legitimacy remains a shared concern for all three approaches.

On that background, we have invited several legal scholars and experts in political and social theory to reflect on the deeper meaning of justice and justification in EU and transnational contexts and, not least, to provide a comprehensive take on all three of the above positions, thereby also allowing for the exploration of agreements and differences between them. This endeavour hopes to achieve a kind of comprehensiveness that goes beyond what has been the focus so far in relation to justice in the EU, namely the economics aspects.[12] Further, this special issue not only takes stock of the continuing discussion, but also makes a tighter coupling between, on the one hand, political and legal theory and, on the other, sociological approaches to what justice and justification mean in the EU framework. The papers analyse the conditions that need to be in place in order for justice and justification practices to unfold. In addition, this special issue empirically explores the *social and legal praxis* of justice and justification within specific policy areas and regimes, namely the EU policy areas of 'freedom, security and justice' and the internal market.

The structure of this special issue

The first article explores both the EU nexus as well the broader field of transnational governance. *Poul F. Kjaer* asks the sociological question why a discourse on justice and justification has emerged within transnational settings. He argues that principles of justification serve as normative forms of stabilisation of transnational regimes. Departing from a distinction between national and transnational public power, Kjaer argues that national and transnational political and legal processes are substantially different in both structure and purpose. Nonetheless, national and transnational law historically emerged in a co-evolutionary and complementary manner just as

---

[12] Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33(2) *Oxford Journal of Legal Studies* 213.

national and transnational processes are mutually re-enforcing rather than standing in opposition. Within contemporary transnational regimes, elaborated frameworks of justification have moreover emerged that are intended to serve as functional and normative equivalents to democratic processes within nation-states. Thus, the paper provides a sociological underpinning of recent normative debates on justice and justification in transnational contexts which takes due account of the structural foundation of transnational sites of law and governance, their function and location in world society.

The next section introduces central notions of justice and justification within political theory, and links them to the project of EU and transnational law and regulation. *Enzo Rossi* and *Jan Pieter Beetz* examine the effects of adopting a realist theory when discussing the meaning of legitimacy, democracy and justice in the EU. Their starting point is the idea that legitimacy depends not on responsiveness to citizens' *will*, but to citizens' *values*. They analytically outline how engaging with legitimacy helps advance more fruitfully the debate on the future of EU integration. Specifically, they propose a modification of Bernard Williams' theory of liberal legitimacy and argue, *inter alia*, that while most EU member states ostensibly support the EU, the legitimation story offered by member states to their citizens draws upon a tradition of popular sovereignty that fits badly with the supranational pooling and delegation of sovereign powers that characterises EU rule.[13] Further, they argue that the realist framework requires a solution to the legitimation problem before any advances can be made on the front of social justice.

Ben Crum approaches the specific question of justice from the perspective of 'public reason' and contrasts the structural setup guiding the possibility that public reasoning unfolds within national and transnational contexts. Departing from the on-going debate on justice and justification, his paper seeks to lay out a theory of multi-layered political obligations that, on the one hand, allows for their projection to the EU level and, on the other, recognises what he describes as the privileged status of the nation-state as an advocate of justice. In particular, he focuses on what may be the most demanding claims of justice, namely social (or distributive) justice. Moreover, Crum discusses public reason *à la* Rawls and argues that it is largely state-bound and strongly entrenched within the confines of the nation-state, and generally allows for the imposition of far-ranging duties of justice. In a thinner form, though, manifestations of public reason can also be found beyond national borders, through transnational social relations and in functional international communities (like elite negotiations). Hence, to illustrate the implications of a multi-layered conception of justice, he elaborates on the circumstances of justice in the EU and the way these can be translated in specific duties of

---

[13] Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton University Press, 2005).

social justice that complement those already obtained at the national level. As such, the paper not only provides an operationalisation of the concepts of justice and justification in the EU context, but also clarifies the factual conditions under which political obligations can be successfully unfolded.

Next, *Sionaidh Douglas-Scott* turns to the legal theory domain and, through scrutiny of the concept of the rule of law, assesses the usefulness of justice as a critical legal concept when discussing human rights protection in the EU. She argues that since justice is a contested concept, a more graspable version of it may be obtained by understanding it in the shape of what is deemed 'injustice'. As such, the paper takes a markedly different approach than the two previous papers. A central theme of the paper is the disjunction between, on the one hand, strong reactions to injustice and a desire for some affective dimension to the EU, some normative adhesive that might bind the EU as an ethical entity; and, on the other, the very great difficulty in identifying an enforceable concept of justice in an EU that continues to be driven by a market mentality. Departing from this structural limitation, she argues that any agreed upon concept of justice will remain minimalist. However, human rights remain a powerful symbolic and actual force for justice and a better focus for its achievement, whether we understand them as a singular articulation of justice or as free-standing moral concepts in their own right. It is also crucial to retain a strong sense of *injustice* and to assess every element of EU law on that basis.

The final section focuses on two different policy areas of the EU. *Ester Herlin-Karnell* asks how the contested concept of justice could conceivably become an integrated part of the vocabulary of EU constitutional grammar by explicitly turning to the notion of justification. She takes as her starting point the claims that, (a) justice is an inherently contested notion, and (b) that justice, in terms of what justification the member states and the citizens of the EU could reasonably demand as the EU project expands, could offer a successful pathway for future European integration in the current trend towards the domination of security. Specifically, the paper sets out to explain why maintaining and institutionalising a normative idea of justice is essential for the construction of the policy area of 'freedom, security and justice' (AFSJ) (dealing with, *inter alia*, security, anti-terrorist legislation, anti-crime measures, border and migration control), which is one of the most intriguing testing fields for justice in the contemporary EU. In doing so, she investigates the link between the notion of justice and legal practises of justification, and illuminates why an understanding of them enhances the legitimacy of the AFSJ project. In testing that proposition, the paper applies the legal principle of proportionality as a particularly useful device for analysing the AFSJ by examining a number of recent cases that are set to change the dynamics of AFSJ law. The paper argues that these cases

demonstrate the potential of 'justice' reasoning in practice, and thereby addresses the greater question of 'justifications' beyond the state.

Thereafter, *Lyn K.L. Tjon Soei Len* presents a study of what she calls the moral limits of the EU's internal market, ie the EU's obligations towards others when it concerns market transactions. The paper adopts a specific emphasis on justice as a device for understanding what limits should be imposed on free trade, and what such limits tell us about justice. She argues that the EU's central task is to improve the lives of European citizens so that they are able to live and to contribute to the internal market. Yet, while the EU aims to enable market exchange through its legal structures, it does not adequately consider the moral limits of its internal market to be a European task. As such, the EU's approach to the internal market has so far been based on a decoupling of the market logic from morality. However, justice—as understood in this paper and in other recent debates —requires that European citizens are treated with equal respect and that the exchanges they wish to pursue are subject to a generalisable normative standard. The paper shows that the questions of how and where the moral limits of the internal market are drawn are questions of justice, and that the answers matter for an individual's ability to do and be what they regard as valuable.

Conclusion

The thrust of this special issue is the argument that what is really needed is a deeper reflection on both the function and the normative requirements of justification in the transnational realm. The discussion on justice and justification offers counter measures to domination and enquires how to reconcile the democracy question with more general questions pertaining to non-domination and aspirations for freedom and equality. While the papers demonstrate that the notion of justice is highly multifaceted, and while it might even be more fruitful to address injustice rather than justice, the common denominators that emerge are a focus on the conditions of justice and the need to combine analytical, institutional and descriptive approaches in order to provide a comprehensive picture.

Acknowledgements

Kumm for this opportunity. We would also like to thank Phil Kariam, Craig M. Scott and Peer Zumbansen, the editors of *Transnational Legal Theory*, for their support.

Disclosure statement

Funding

ORCID

Poul F. Kjaer http://orcid.org/0000-0002-8027-3601