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Herlin-Karnell, Ester; Kjær, Poul F.

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INTRODUCTION

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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.

KEYWORDS Justice; justification; EU politics; global governance; democracy

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).

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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 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.

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[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.

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 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.

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

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 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.

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

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.

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ORCID

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

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Why justification? The structure of public power in transnational contexts

Poul F. Kjaer

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Why justification? The structure of public power in transnational contexts

Poul F. Kjaer

Professor, Department of Management, Politics and Philosophy, Copenhagen Business School, Copenhagen, Denmark

ABSTRACT
This article asks the question why the social praxis of justification has moved to the centre-stage within the debate on transnational legal ordering. The starting point is the development of a generic concept of legally constituted public power aimed at breaking the frames that classically distinguish the national and the transnational and state and society. On that background, two structural differences between national and transnational public power are focused upon. First is the issue of constructing and delineating boundaries, which in national contexts is addressed through reference to territorial borders. Second is the issue of adapting decision-making to changing societal circumstances, which is addressed in national contexts through democracy. Both of these remedies are unavailable or only partially available at the transnational level. It is in order to respond to these deficiencies, it is argued, that a turn to justification has emerged at the transnational level of world society.

KEYWORDS Democracy; European Union; justification; transnational law; transnational politics

1. Introduction

Recent years have seen an upsurge in academic debates on justice in relation to transnational developments.[1] As also apparent from the other contributions to this special issue, the ongoing debate largely unfolds within a normative terrain informed by analytic philosophy. This article takes a different route by presenting a sociologically informed social and legal theoretical reflexion on the question of why a move to justification is unfolding. The

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CONTACT Poul F. Kjaer pfk.mpp@cbs.dk

[1] Most notably Rainer Forst, *Das Recht auf Rechtfertigung – Elemente einer konstruktivistischen Theorie der Gerechtigkeit* (Suhrkamp Verlag, 2007); Dimitry Kochenov, Gránne de Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing, 2015); Jürgen Neyer, *The Justification of Europe. A Political Theory of Supranational Integration* (Oxford University Press, 2012); and Floris de Witte: *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press, 2015). All websites accessed 10 October 2016.

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central focus is therefore on justification as a social phenomenon and the social praxis of justification, ie the actual unfolding of justificatory exercises, rather than on the logical coherency of philosophical reasoning in relation to the concept of justice. This take does not, however, imply that philosophical reasoning is irrelevant for the understanding of justice or that a fundamental contradiction is considered to exist between the two approaches. Instead, this article should be seen as complementary to the interventions which mainly draw upon analytic philosophical reasoning potentially allowing for more grounded theoretical reflections on justice and justification in transnational contexts.[2]

A focus on justification as a social phenomenon implies that praxes of justification need to be observed in the contexts within which they unfold. The understanding of the very nature of transnational legal and political arrangements from which one departs therefore tends to be decisive for understanding praxes of justification in transnational contexts. To put it simply, the academic discourse on transnational law and politics in general and the European Union (EU) specifically is characterised by two central approaches. The first seeks to describe and evaluate the EU and other transnational arrangements on the basis of the factual setups and normative yardsticks of democracy and the rule of law, both of which originally emerged in national contexts. The second insists that national and transnational political and legal processes are substantially different in both structure and purpose.[3] From the latter perspective, the already existing normative grids as well as the normative yardsticks on which transnational legal and political processes should be evaluated are considered to be fundamentally different.[4] This article seeks to go beyond this antinomy with the help of a conceptual move away from the concept of the state, replacing it with a more generic concept of public power that is capable of encompassing both national, ie state-based, and transnational law and politics. However, in a subsequent step, two profound structural differences in the institutionalisation of public power at the national and the transnational level are highlighted. First, at the national level, polities are constructed through reference to territorial boundaries. At the transnational level, boundaries between regimes tend to be systematically unclear. Second, at the national level, the adaptivity of decision-making, ie its

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[2] Through emphasis on compatibility with normative reasoning, this article seeks to further develop a more descriptive sociological perspective developed elsewhere. See Poul F Kjaer, *Constitutionalism in the Global Realm – A Sociological Approach* (Routledge, 2014).

[3] In relation to the EU, see, for example, Jürgen Neyer, 'Justice, Not Democracy: Legitimacy in the European Union' (2010) 48 *Journal of Common Market Studies* 903, and the subsequent debate; Danny Nicol, 'Can Justice Dethrone Democracy in the European Union? A Reply to Jürgen Neyer' (2012) 50 *Journal of Common Market Studies* 50; Jürgen Neyer, 'Who's Afraid of Justice? A Rejoinder to Danny Nicol' (2012) 50 *Journal of Common Market Studies* 523.

[4] For the argument that the difference between a national and a transnational take is fundamentally a methodological one, see especially Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart Publishing, 2010).

ability to change with changing societal circumstances, is primarily expressed through democracy in so far as democracy serves as such a reflexivity mechanism. In contrast, for structural reasons, transnational political and legal processes are not potential sites of democracy or only to a limited degree at best. Transnational arrangements seek, so goes the argument, to compensate for these deficiencies by invoking processes of justification. In transnational contexts, processes of justification can both be understood as vehicles of adaptation and as self-initiating frameworks aimed at portraying a given structure of public power as related to a specific segment of world society. This development further implies a stronger focus on the strategic function of law since law, relative to politics, becomes the central framework through which the praxes of justification are structured and unfold. In reality, the attempt to remedy the absence of democracy through justification however tends to be expressed through acts of self-representation with limited substantial force.

2. Public power within and beyond the state

While states are the most important institutional repository of public power, they have never been the only ones. Whereas Max Weber and Michel Foucault, in different ways, conceptualised power as intrinsic to *any* social relationship,[5] a more specific concept of public power might be seen as characterised by abstractness, generality and its legal constitution.[6] Abstractness in this context implies that public power is detached from particular individuals, the epitomy being the modern distinction between office and office holder. Under modern conditions, ie since the American and French Revolutions, the subjective interests and preferences of individuals are *in principle* irrelevant, a stance also expressed in John Adams' articulation of the objective of a 'government of laws and not of men' within the framework of the Constitution of Massachusetts of 1780.[7] This makes public power *non-substantialist* and merely *coordinating* to the extent that public power cannot grasp or define the content of the social processes it is oriented against but only provide a general framing of such social processes. With Michael Mann, one can therefore also talk about a specific modern form of de-personalised infrastructural power that is different from personalised despotic power.[8]

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[5] Michel Foucault, *Power. The Essential Works of Foucault, 1954–1984* (The New Press, Vol 3 2001); Max Weber, *Wirtschaft und Gesellschaft. Grundriss der versthehenden Soziologie* (Mohr Siebeck, [1921] 1980) 28.

[6] For such a view on public power, see especially the work of Franz L Neumann. In particular 'The Change in the Function of Law in Modern Society' in William E Scheuerman (ed), *The Rule of Law Under Siege. Selected Essays of Franz L. Neumann and Otto Kirchheimer* (University of California Press, [1933] 1996) 101–41.

[7] *Constitution of Massachusetts* Article XXX (1780), online: <www.nhinet.org/ccs/docs/ma-1780.htm>.

[8] Michael Mann, 'The Autonomous Power of the State: Its Origins, Mechanisms and Results' (1984) 25 *Archives européenne de* sociologie 185.

Abstractness is intrinsically linked to generalisability in so far as the abstractness of public power implies that public power becomes a generalised social medium which is *intended* to be deployed throughout a given polity in a fairly consistent manner. It is a form of generalisability that is conditioned by public power being manifested in a legally grounded administrative apparatus and bodies of rights—namely political, economic and social rights[9]—which are both formally and factually capable of consistently structuring and deploying norms across time and space. The legal constitution of public power therefore becomes essential in so far as law provides public power with its form, thereby making it distinguishable from other types of power. In this particular manner, one might therefore also argue that politics, as an expression of publicness, is constituted through law and not the other way around.[10]

Whereas this sort of public power was clearly ingrained in the modern concept of the state,[11] making states the most important institutional repository of public power, the boundaries of the state vis-à-vis the rest of society has never been clear-cut.[12] In reality, public power has always been bound up on a diverse set of institutional formations ranging from religious organisations, to guilds and other socio-economic bodies such as unions and business associations. Most states are in fact composite states taking the form of organisational conglomerates with some parts formally public and others formally private but all of which is engaged in the reproduction and exercise of public power. In continental Europe, for example, large segments of public welfare provisions are organised and reproduced by religious bodies and other civil society formations.[13] Such activities are formally exercised by private bodies and therefore fall outside the scope of the state while being, at the same time, part of a larger body of legally constituted realms of public power, as expressed, for example, through the incursion of administrative law into the organisation and day to day management of privately organised and owned activities.[14] On this background, the concept of the state appears as a semantic reduction that is not capable of fully encompassing public power. In contrast, the concept of public power provides a more general category, breaking the exclusive focus on the state while retaining a focus on abstractness, generality and the legal constitution of public power.

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[9] Thomas H Marshall, *Citizenship and Social Class* (Pluto Press, [1949] 1987).

[10] Hans Kelsen, *Pure Theory of Law* (University of California Press, [1934] 1960) 279ff; Neumann (n 6).

[11] Chris Thornhill, 'The Future of the State' in Poul F Kjaer, Gunther Teubner and Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart Publishing, 2011) 367–93.

[12] Duncan Kennedy, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130(6) *University of Pennsylvania Law Review* 1349; A Claire Cutler, 'Artifice, Ideology and Paradox: The Public/Private Distinction in International Law' (1997) 4(2) *Review of International Political Economy* 261, 262.

[13] Gösta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton University Press, 1990).

[14] Grahame F Thompson, 'The Constitutionalisation of Everyday Life?' in Eva Hartmann and Poul F. Kjaer (eds), *The Evolution of Intermediary Institutions in Europe: From Corporatism to Governance* (Palgrave-Macmillan, 2015) 177–97.

This is also the case in relation to transnational developments and the dual and simultaneous emergence and evolution of national and transnational frameworks of legal ordering. Large segments of transnational governance, from the Catholic Church and early modern colonial companies to contemporary globally operating entities, such as The International Accounting Standards Board, The International Organization for Standardization (ISO) and The Internet Corporation for Assigned Names and Numbers, are formally private entities which factually exercise public functions. Public functions might be defined as related to the reproduction of general and non-substitutable activities that are essential to the further existence of society at the local, national or transnational level. Activities as different as local water supply, national welfare services and universally available internet search engines might therefore all be considered as social entities that are structurally linked to the exercise of public power. A switch from a focus on the state to a focus on public power therefore avoids the tendency to merely contrast states with a 'societal' or 'privatistic' perspective.[15] In direct contrast to such a perspective the focus on public power allows for an expansion in the reach of publicness without falling back into the state category. From a normative perspective, the conceptual move away from a focus on the state and towards a broader category of public power might therefore expand the reach of normative claims in relation to the adequate forms of organisation and exercise of power within institutional sites that do not fall under the category of the state but which still involve the exercise of public functions. The trajectory of the European integration process, leading to what is now called the EU, is a good example of such a development. Contrary to prevailing views, the integration process did not start with the initiation of the European Coal and Steel Community (ECSC) in 1952. Rather, private law and contract-based international cartels, most notably in relation to steel, factually but not formally exercising public power, had been in place for several years prior to the launch of the ECSC.[16] The key accomplishment in 1952 was therefore not transnational integration but the recasting of the modus of integration from a private to a publicly organised one, thereby making the integration process subject to the specificities and normative standards of public law.

3. Structural differences between national and transnational public power

Shifting the focus to public power implies going beyond the classical nineteenth-century delineations between the state and the private and the national and the international (or, in contemporary parlance, the transnational).[17] This, in turn, implies the emergence of two central problems of which, as will become apparent later on, the 'turn to justification' is a central reflection.

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[15] For such a substitution see, for example, Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, 2012).

[16] John Gillingham, *Coal and Steal and the Rebirth of Europe 1945–55. The Germans and French from Ruhr Conflict to Economic Community* (Cambridge University Press, 1991).

First, institutional sites of public power are all confronted with a need to delineate the segment of the world they consider relevant for their decision-making. This issue compromises both the question of who the addressees of decisions are, as well as the question of who might 'have a say' in the form of influence on decisions taken. In relation to states, this issue has traditionally been handled through reference to the interlinked concepts of sovereignty, rights, national territory, the nation, constitutive power and democracy. States claim sovereignty over a specific social realm that is symbolically demarcated by reference to territory on behalf of the inhabitants of that territory within the legal construct of the nation and, in most cases, states also develop mechanisms aimed at obtaining acceptability and legitimacy from the nation in question. The construction of polities is, in other words, in large part related to the creation and maintenance of boundaries—a segment of the world is included into the realm of a state and the rest is excluded. Transnational bodies, however, have systematic difficulties in developing and maintaining clear-cut boundaries. Public international organisations can formally do so by reference to the jurisdictions of their member states. In practise however, this is more difficult than it seems at first glance. Even the EU, as pointed out by Alain Supiot, tends to describe itself as a 'space' or 'area' rather than as a territorial entity.[18] The Area of Freedom Security and Justice, analysed in Ester Herlin-Karnell's contribution to this special issue, and the European Economic Area are indications of morphological structures that are not completely detached from territorial references but which have porous boundaries. For other transnational bodies, such as the formally private bodies mentioned above, dealing with issues such as accounting, standard-setting and the regulation of the internet, the issue of porous boundaries is even more outspoken.

Most transitional bodies resort to the concept of stakeholders as a remedy. The stakeholder concept implies that a given segment of the world has the status of a systemic relevant interlocutor and partner of a given institutional body. Although often developed on a soft law-basis, stakeholder frameworks

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[17] International is here understood as denoting a strict inter-state relationship. Such relationships have however always been embedded in broader transnational setups that cannot be seen as directly or exclusively derived from inter-state arrangements. See See Poul F Kjaer, *Constitutionalism in the Global Realm – A Sociological Approach* (Routledge, 2014).

[18] Alain Supiot, 'The Territorial Inscription of Laws' in Gralf-Peter Calliess et al (eds), *Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag am 30. April 2009* (De Gruyter-Verlag, 2009) 375–93.

are developed with the intention to serve as equivalents to the legal construct of the nation.[19] Nations are entities that are constituted through political, economic or social rights, and serve as reflexion points of decision-making in the sense that members of the nation are both the addressees of decisions and have the right to articulate demands and expectations vis-à-vis decision-making processes.[20] In a similar fashion, stakeholder frameworks are instigated by institutional bodies of decision-making in order to delineate the segment of the world that is considered relevant as both addressees of the decisions and articulators of expectations vis-à-vis decision-making processes.

At least two structural differences can however be observed between the nation and stakeholder frameworks. First, the legal constitution of nations relies, as indicated, on a principle of territorial differentiation. Territorial differentiation implies the construction of a limited and coherent *social space* which is demarcated from other social spaces on the basis of boundaries which symbolically refer to geographical borders.[21] In contrast, stakeholder frameworks tend to rely on functional differentiation, which is characterised by the principle of the *equality of different societal spheres* bound up in different functions of material and normative reproduction in relation to areas such as economy, science, religion and so forth.[22] The relative primacy of functional differentiation within transnational arrangements, typically characterised by legally fragmented regimes concerning issues as different as human rights, investor protection and food safety, has profound consequences since the question who the appropriate addressees and rights bearers is in relation to transnationally developed norms tend to be unclear. Almost everyone tends, at least indirectly, to feel the effects of activities regulated through transnational arrangements, but providing a channel for democratic decision-making with global reach is, at the same time, institutionally unattainable in most cases.

Second, the functional stance that is intrinsic to stakeholder perspectives means that the constellation of appropriate addressees and rights bearers becomes interchangeable. If a given stakeholder constellation does not provide adequate problem solving capacity it can be replaced by a different stakeholder constellation. Bearing in mind the central distinction within sociology between cognitive and normative expectations, where the former are subject to change in case of non-fulfilment and therefore can be characterised by a high level of adaptability, while the latter tend to be maintained even if not factually realised,[23] one might therefore argue that the cognitive dimension plays a relatively bigger role within stakeholder frameworks than within the legally constituted nation since the nation is a profoundly normative concept characterised by a limited degree of changeability.

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[19] For more on this, see; See Kjaer (n 17) 87ff; Poul F Kjaer, 'The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law and the Political in the Transnational Space' (2010) 2 *Wisconsin Law Review* 489.

[20] For the relation between rights and nation building, see in particular the work of Chris Thornhill. For example, 'The Constitutionalisation of Labour Law and the Crisis of National Democracy' in Poul F Kjaer and Niklas Olsen (eds), *Critical Theories of Crises in Europe: From Weimar to the Euro* (Rowman and Littlefield, 2016) 89–105.

[21] Although less prevalent, a culturalist concept of segmentary differentiation can also be observed in a number of cases. In contrast to territorial differentiation, segmentary differentiation is characterised by the principle of *equality* of multiple social systems which typically are demarcated upon the basis of blood relations or cultural traits such as language and ethnicity. In its 2011 constitution, the Hungarian state, for example, relies on a segmentary rather than a territorial concept of the nation as enshrined in the principle that 'Hungary shall bear responsibility for the fate of Hungarians living beyond its borders'. See *Hungary's Constitution of 2011*, Article D, online: <www.constituteproject.org/constitution/Hungary_2011.pdf>.

[22] Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen: Zur Fragmentierung des Weltrechts* (Suhrkamp Verlag, 2006).

It follows from the above two points that the central problem of stakeholder frameworks is their fluid character and porous form. As highlighted by Martti Koskenniemi,[24] this is also a general characteristic of transnational arrangements that implies that the boundary between the law and the social practises the law orients itself towards becomes increasingly difficult to maintain. 'Lack of substantiality', as we will return to, thereby becomes a central feature of transnational arrangements to a degree which might make stakeholder frameworks into an expression of 'phony law'.

Second, the social world is always in flow. Nothing looks exactly the same today as it did yesterday, and sites of public power are therefore confronted with a permanent issue of adaptation, introducing changes in the institutional setup as well as the substantive content of decisions in order to reflect changed contextual circumstances. Following Tocqueville's introduction of the distinction between static and dynamic constitutions,[25] this issue might also be considered a particular feature of modernity in so far as modern institutions are characterised by a built-in orientation towards the future derived from a linear rather than a circular concept of time.[26] Under modern conditions, reflexivity-increasing instruments capable of observing societal developments in order to adapt decision-making frameworks and substantial decisions accordingly is essential for the long-term viability of any institution of public power. Within modern states, democracy has emerged as the most central institutional mechanism of reflexivity. From a normative perspective, democracy is typically regarded as an end in itself or at least a central institutional vehicle for enhancing a type of freedom which is an end in itself. But democracy can, without disregarding its normative salience, also be understood as an institutional mechanism of adaptation in so far as it allows the political system to 'observe' public opinion and incorporate its constantly changing preferences into itself. A central element of democracy is therefore its ‘openness to the future’.[27] Whereas feudal and totalitarian forms of ordering typically seek to transpose specific values and decisions into the future in a static manner, democracy separates the formal dimension of decision-making from the substantial issues of decision-making, allowing for a considerable degree of open-endedness in terms of substantial outcomes. In the epoch of Western industrialisation, for example, social democratic and other movements pertaining to the consequences of this development emerged, just as in the current era, where environmental issues are at the forefront, green parties and other ecologically conscious movements have emerged. Therefore, from an evolutionary perspective, democracy might also be regarded as superior to other forms of political rule because it is characterised by a higher level of adaptability while at the same time allowing for a high level of reliance on abstract and generalised normative propositions in relation to, for example, equality and universality. Democracy, in other words, seems to overcome the contradiction between cognitive and normative expectations discussed above.

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[23] Niklas Luhmann, *Soziologische Aufklärung 2. Aufsätze zur Theorie der Gesellschaft* (Westdeutsche Verlag, [1975] 2009) 51–71.

[24] Martti Koskenniemi, 'Legal Fragmentation(s). An Essay on Fluidity and Form' in Gralf-Peter Callies et al. (n 18) 795–810.

[25] Alexis de Tocqueville, *Democracy in America: Historical-Critical Edition* (Liberty Fund Inc, Vol 2 [1835] 2009) 408.

[26] Reinhart Koselleck, *Vergangene Zukunft: Zur Semantik geschichtlicher Zeiten* (Suhrkamp Verlag, 1988).

Within the transnational dimension of world society the remedy of democracy is however not, or only in a limited degree, available. A vast number of transnationally operating organisations and regimes, from the Catholic Church to the ISO, have characteristics that might be described with the terms ‘abstractness’, ‘generality’ and ‘legal constitution’, but they are not characterised by democratic mechanisms of reflexive adaptability. The same is the case, though only partially, for the EU, which at best can be described as a ‘quasi-democracy’.[28] The EU is an institutional conglomerate of public power that, though strongly dependent on, and institutionally linked with, its member states, remains a site of decision-making with a considerable degree of autonomy. In spite of its autonomy it struggles to develop adequate mechanisms of reflexivity similar to those of developed in democratic nation states. The EU is a hybrid containing both (embryonic) features similar to those which can be found within states, for example territoriality and citizenship, while carrying many of the trademarks of stakeholder-based transnational regimes. In short, the central challenge for transnational arrangements seems to be to develop democratic mechanisms or their functional equivalents not only for salient normative reasons but also for reasons of operability.[29]

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[27] Luhmann (n 23) 131–8.

[28] For more on this see Poul F Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe’s Post-national Constellation* (Hart Publishing, 2010).

[29] The Catholic Church, within the legal format of the Holy Sea, the mother of all transnational organisations, might be seen as a case in point in so far as its failure to adapt to the changed expectations of the surrounding society, for example in relation to issues such as women’s rights, homosexuality and sexual morals in general, seems to have played a central role in its continued demise.

4. The social praxes of justification and its structuring through law

A constructive, mutually supporting relationship between the cognitive and normative dimensions of social processes discussed above might however appear. To the extent that norms are abstract and generalised (as they are in democracy), they can fulfil a pivotal function in structuring societal processes with a strong cognitive component, such as economically, scientifically and technologically driven social processes.[30] Niklas Luhmann argued that the move to modernity, and with it the move to increased rationalisation, implied a reduction in the importance of normative articulations and expectations within social processes and a concomitant increase in the centrality of cognitive articulations and expectations.[31] But in most instances what can be observed is rather a reconfiguration of the relationship between normative and cognitive articulations and expectations. Under modern conditions, normative expectations become more abstract formations aimed at stabilising increasingly cognitivised social processes.[32] As already indicated, democracy is here a case in point as democratic decision-making has a very strong normative basis, ie in relation to equality and universality, while leaving the substantial outcome of democratic decision-making substantially open-ended. A central element of democracy is, in other words, the special way it combines the two forms of expectations, the normative and the cognitive, thereby allowing for norms to support rather than curtail adaptivity.

A similar view was articulated by Jürgen Habermas. As part of his theory of communicative action, he distinguished between teleological-strategic, normative-social and dramaturgical action, arguing that all social processes, albeit with different degrees of intensity, combine these three aspects. Or differently expressed, he argued that all social processes entail an element of functional goal attainment, ie the striving towards the realisation of specific objectives; normative consonance, ie the striving towards achieving a high level of normative concordance with the surrounding society; as well as engaging in processes of self-portrayal vis-à-vis a wider audience.[33] What is described in this article with Luhmann's concepts of cognitive and normative dimensions pertains to Habermas' two former dimensions, the teleological-strategic and the normative-social dimensions. Where they differ is mainly in relation to Habermas' dramaturgical dimension. Rather than dramaturgical self-portrayal, Luhmann emphasises the time aspect of social manifestations. All social processes unfold in time and the multifarious relationship between the cognitive and the normative dimensions of social processes is stabilised through externalisation in time in the sense that the tension between contra-factual normative propositions and the factual reality is smoothened through a promise of future fulfilment. In a similar way, Habermas' dramaturgical dimension serves as an attempt to bridge the gap between the teleological-strategic and the normative-social dimensions. A detailed analysis of the differences and similarities between the theory constructions of Habermas and Luhmann falls outside the scope of this article.[34] The turn to justification within transnational arrangements, however, seems to express a dual move along both Habermasian and Luhmannian lines, one towards the proceduralisation of decision-making, a transformation of law into an instrument for handling time rather than material issues,[35] and another towards a relative increase in the reliance on new dramaturgical means of self-portrayal.

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[30] Luhmann (n 23).

[31] *Ibid.*

[32] See Kjaer (n 17).

[33] Jürgen Habermas, *Theorie des kommunikativen Handelns, Band 1 Handlungsrationalität und gesellschaftliche Rationalisierung* (Suhrkamp Verlag, 1981) 126ff.

In relation to time, justification is about reason-giving within an institutionalised social praxis which is oriented toward increasing reflexivity, ie the mutual awareness and accommodation between two or more parties. As such, praxes of justification are mediating the dialectical relation between power-producing entities and those subjected to the consequences of this power within an institutional form, such as the stakeholder form. Such justifications are however always process-based. Institutions of public power produce a never ending stream of decisions that build on each other and in fact grow out of each other. This is inescapable since not making a decision is its own kind of decision. In practise, the classical distinctions between an *ex post* and an *ex ante* focus on decisions, the distinction between what motivates a decision and what the effects of the decision are, is therefore dissolved through recourse to time to the extent that procedures for claiming and providing justifications are built into the legal frameworks of decision-making.[36] Proceduralised frameworks for reason-giving, such as those often found in administrative law,[37] imply that the *possibility* for demanding and delivering justification is reproduced in every act. The static *ex post*/*ex ante* perspective is thereby being substituted with a perspective that potentially implies continued adaptation through learning and correction and where the justification or the lack of justification informs the next decision. In this particular manner, justificatory measures can also be considered vehicles of continued adaptation and, as such, a reflection of increased reflexivity. In practise the 'turn to justification' therefore implies a turn from democracy to the sort of frameworks associated with global administrative law,[38] and thereby a substitution of politics with law.[39]

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[34] See, however, Poul F Kjaer, 'Systems in Context: On the Outcome of the Habermas/Luhmann-debate' (2006) *Ancilla Iuris* 66.

[35] For the debate on the proceduralisation of law see in particular; Duncan Kennedy, 'Comment on Rudolf Wiethölter's, Materialization and Proceduralization in Modern Law' and 'Proceduralization of the Category of Law' in Christian Joerges und David M Trubek (Hrsg), *Critical Legal Thought. An American-German Debate* (Nomos Verlag, 1989) 511–24; Rudolf Wiethölter, 'Proceduralization of the Category of Law' in Christian Joerges und David M Trubek (Hrsg), *Critical Legal Thought. An American-German Debate* (Nomos Verlag, 1989) 501–10.

[36] Niklas Luhmann, *Legitimation durch Verfahren. 6. Auflage* (Suhrkamp Verlag, [1969] 2001).

[37] Robert Thomas, 'Reason-Giving in English and European Community Administrative Law' (1997) 3(2) *European Public Law* 213; Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20(1) *European Journal of International Law* 23.

The turn to time therefore also implies a reconfiguration of the relationship between the cognitive and normative dimensions of decision-making in so far as adaptivity becomes central. However, this reconfiguration does not necessarily imply a diminishing centrality of normative modes but rather implies that they gain a more indirect strategic role, providing a second-order stabilisation of increasingly cognitivised processes. Abstract and general principles with a strong normative content, for example in the form of constitutional principles, tend to emerge with the objective of guiding decision-making. Such counter-factual normative principles gain the status of secondary forms of ordering in so far as they, typically in an institutionalised teleological form, provide the principles from which both the selection of decisions and the form of their justification is derived in the day to day practise of decision-making.[40] Not surprisingly, normative expectations are often ascribed a constitutional status when condensed into second-order regulatory principles. The 'ever closer Union' teleology of the EU, originally from the opening lines of the preamble of The Treaty Establishing the European Economic Community from 1957,[41] might provide one example of such a counter-factual regulatory normative principle. When normative outlooks become condensed into legal principles they become tools used to select between multiple options for decision-making. This again implies that law and not politics becomes the central grid for structuring, nurturing and safeguarding normative outlooks. As such, a switch from democracy to justification as the central framework of adaptation is mirrored in the stand-off between rights-based, liberal and democracy-inclined republican approaches and the sociologically observable gradual transformation in the function of law in the course of modernity towards an increasing reliance on rights.[42]

This is also apparent from the second dimension, namely the dramaturgical. The turn to justification implies that structures of public power have to explain and provide reasons for their decisions. As such, measures of justification are essentially legitimacy-enhancing measures. In the absence of democratic representation or, as in the case of the EU, only a partial reliance on representation through the semi-evolved European Parliament, the issue of how decision-making is presented to the wider world becomes a lacuna that transnational decision-making bodies struggle to fill. Since the publication of the famous white paper on governance,[43] the EU has, as a response to this gap, gradually developed elaborate frameworks of consultation aimed at engaging directly with 'those affected' by decision-making and to incorporate correspondent views into its decisions. Further, the European Commission has developed minimum standards[44] and established a general framework for consultation and feedback mechanisms with 'interested parties'.[45] In principle, such frameworks serve as input-oriented channels allowing decision-makers to take note of positions and preferences of the wider society. In practise, however, it is the decisional bodies, such as the European Commission, themselves that define their 'target audience'.[46] The Commission is, in other words, internally constructing a host of stakeholders with whom they subsequently engage in a dialogue, just as the Commission interprets the content of the exchanges. Factually, such frameworks thereby become an expression of self-representation serving as a stage where the Commission is able to portray itself vis-à-vis a wider audience that it itself has composed. Such frameworks can undoubtedly increase the cognitive capacities of the Commission, enhancing its capacity to observe and react upon societal developments. However, equalling such frameworks with democracy, which continues to rely on strong abstract normative principles, seems far-fetched, as such frameworks instead become aesthetic forms with little substance and with little normative guidance. Rather than being part of a drive to democracy, such frameworks highlight the structural limitations to a democratisation of transnational entities. Probably unwillingly, the scholarship that advances concepts of justification therefore ends up advancing approaches to public power that runs counter to mainstream ideals of democracy.

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[38] Richard B Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108(2) *The American Journal of International Law* 211.

[39] Martin Loughlin, 'What is Constitutionalisation?' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism* (Oxford University Press, 2010) 47–69.

[40] See also the contribution of Ester Herlin-Karnell, 'The Domination of Security and the Promise of Justice: On Justification and Proportionality in Europe's "Area of Freedom, Security and Justice"' (2017) *Transnational Legal Theory* doi:10.1080/20414005.2017.1316637, in this special issue.

[41] The Treaty Establishing the European Economic Community 1957, online: <www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_3_antlasmalar/1_3_1_kurucu_antlasmalar/1957_treaty_establishing_eec.pdf>.

[42] Loughlin (n 39); Neumann (n 6).

5. Conclusion

Within analytical philosophy, great hope has been attached to the concept of justice; this is true to such a degree that justice has been considered the 'master concept' to which all central insights can be traced back. From a descriptive perspective, it is however the social praxis of justification that is central. The turn to justification can be understood as a reflection of increased temporalisation, ie an increase in the speed of societal change. This development implies a shortening of the lifespan of political and administrative decisions in so far as the functional need to replace decisions with new decisions reflecting new circumstances is increased. As every decision implies a choice between two or more options, increased temporalisation therefore also implies an increase in the demand for justification: Why this decision and not another? Justification thereby fulfils a central role in the stabilisation of expectations and demands vis-à-vis a given chain of political decision-making. This is particularly the case in transnational settings as the broader contextual frameworks, which at the nation state level have been established through century-long processes of state-building, are largely absent. In such a volatile context, frameworks of justification are instigated as substitutes for the type of reflexivity established through democratic processes within the boundaries of nation states. However, it remains questionable whether the turn to justification, both in functional and normative terms, is capable of living up to the standards associated with democracy.

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[43] Commission of the European Communities, 'European governance – A white paper' (25 July 2001), online: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al10109>.

[44] Commission of the European Communities, 'Towards a Reinforced Culture of Consultation and Dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission' (11 December 2002), online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0704:FIN:en:PDF>.

[45] For the 'Your Voice in Europe' framework, see Commission of the European Communities, 'Contribute to Law-Making' (no date), online: <http://ec.europa.eu/yourvoice/index_en.htm>.

[46] Thorsten Hüller, *Demokratie und Sozialregulierung in Europa: Die Online-Konsultationen der EU-Kommission* (Campus Verlag, 2010) 135ff.

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ORCID

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

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Jan Pieter Beetz & Enzo Rossi

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The EU's democratic deficit in a realist key: multilateral governance, popular sovereignty and critical responsiveness

Jan Pieter Beetz[a] and Enzo Rossi[b]

[a]ACCESS Europe Postdoctoral Research Fellow, Department of Political Science and Public Administration, Vrije Universiteit Amsterdam, Amsterdam, the Netherlands; [b]Universitair Docent, Department of Political Science, University of Amsterdam, Amsterdam, the Netherlands

ABSTRACT
This paper provides a realist analysis of the European Union's (EU) legitimacy. We propose a modification of Bernard Williams' theory of legitimacy, which we term critical responsiveness. For Williams, 'Basic Legitimation Demand + Modernity = Liberalism'. Drawing on that model, we make three claims. (i) The right side of the equation is insufficiently sensitive to popular sovereignty; (ii) The left side of the equation is best thought of as a 'legitimation story': a non-moralised normative account of how to shore up belief in legitimacy while steering clear of both raw domination and ideological distortions. (iii) The EU's current legitimation story draws on a tradition of popular sovereignty that sits badly with the supranational delegation and pooling of sovereign powers. We conclude by suggesting that the EU's legitimation deficit may be best addressed demoicratically, by recovering the value of popular sovereignty at the expense of a degree of state sovereignty.

KEYWORDS Political realism; critical responsiveness; legitimacy; Bernard Williams; European Union; popular sovereignty; democratic deficit

1. Introduction

The European Union (EU) finds itself in times of crisis once more. The Eurocrisis, as well as the refugee crisis, has hit home[1] *hard*, especially if one's home is called Greece. These events have triggered reflections on the question of social justice in the EU-polity.[2] In parallel, the so-called democratic deficit

CONTACT Jan Pieter Beetz j.p.beetz@vu.nl

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[1] Tanja A Börzel and Thomas Risse, 'When Europe Hits Home: Europeanization and Domestic Change' (2000) 4(15) European Integration Online Papers (EIoP).

[2] eg Phillippe Van Parijs, 'Should the European Union Become More Democratic?' *Just Democracy: The Rawls-Machiavelli Programme* (ECPR Press, 2011) 67–78; Rainer Forst, 'Justice and Democracy. Comment on Jürgen Neyer' in Rainer Forst and Rainer Schmalz-Bruns (eds), *Political Legitimacy and Democracy in Transnational Perspective* (ARENA, 2011) 37–42.

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has re-emerged on the agenda with a vengeance.[3] A rise in anti-EU sentiments, exemplified by the Brexit referendum, relates the current stability of European integration to its perceived lack of democratic legitimacy. In academia, the democratic deficit has been a debate on the appropriate principles of democracy for Europe's novel governance regime. An influential analysis is that the regime's powers impact on national polities makes broadly consequentialist output and/or indirect intergovernmental legitimacy insufficient sources for the EU-regime. Rather than reflecting on the possible sources of legitimacy in the traditional input/output paradigm, we want to propose to understand the democratic deficit as a result of the regime's inability to reflect EU-citizens' commitment to popular sovereignty.

In this paper, we thus propose a different account of the EU's legitimacy deficit—one that breaks with both the voluntaristic and the consequentialists standard accounts, and that is specific to the EU's supranational governance structures. Our approach draws on and amends the realist theory of legitimacy recently developed by Bernard Williams and others. Our starting point is the idea that legitimacy depends not on responsiveness to citizens' *will*, but to citizens' *values*. But responsiveness is not simply a matter of reflecting actual values (i.e. beliefs and commitments). Those need to be corrected for *ideological* distortions. So we term our approach *critical responsiveness*. More specifically, rulers rely on legitimation stories to accompany the exercise of their coercive power, and those legitimation stories need to be in line with the citizenry's values, but they also need to be accepted for non-ideological reasons; i.e. for reasons that do not themselves flow from the authority of the rulers whose legitimacy is at stake. As Williams puts it, in a legitimate regime 'there is a legitimation offered which goes beyond the assertion of power'.[4] That is a bare outline of the abstract component of our account of legitimacy. Attention to the EU's context, then, provides a concrete upshot: we locate the legitimacy deficit in the misalignment between the prominent EU ruling practices of supranational delegation and shared sovereignty, and the historically formed legitimation story of popular sovereignty used to make sense of political authority within Member States. In other words, Western liberal democracies have not yet elaborated a legitimation story that fits an entity such as the EU. The conclusion also suggests that a solution to this democratic deficit should take normative priority over questions of social justice.

The paper proceeds as follows. In Section 2, we set out the basics of our general account of legitimacy. In Section 3, we show why the standard realist theory of legitimacy requires an account of popular sovereignty in modern democratic contexts. In Section 4, we apply our theory to the EU's dominant ruling practices. Section 5 summarises the argument and sketches an alternative vista.

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[3] eg Richard Bellamy and Uta Staiger, UCL European Institute, *The Eurozone Crisis and the Democratic Deficit* (2013), online: <www.ucl.ac.uk/european-institute/analysis-publications/publications/eurozone-crisis>.

[4] Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton University Press, 2005), 11.

2. Williams' realist theory of legitimacy, critical responsiveness, and 'bare liberalism'

Bernard Williams' theory of legitimacy is both a direct engagement with a traditional concern of normative political theory, and an attempt to re-orient political theory, in two ways: away from the primacy of matters of justice, and away from the primacy of ethical considerations as constraints or aims for political action. Williams' begins by identifying a '"first" political question', namely, 'the securing of order, protection, safety, trust, and the conditions of cooperation'.[5] But, unlike in Hobbes, successfully answering the first political question is a necessary but not sufficient condition for a regime's legitimacy. To achieve legitimacy a polity must meet what Williams calls the 'Basic Legitimation Demand' (BLD): 'Meeting the BLD can be equated with there being an 'acceptable' solution to the first political question'.[6] Crucially, this acceptability is not the moralised notion familiar from many mainstream theories of legitimacy. If it is a moral notion at all, it is 'a morality internal to politics'.[7] For Williams, 'making sense' is 'a category of historical understanding, […] a hermeneutical category'[8] which assesses whether the legitimation offered by the rulers can be understood as such by those to whom it is addressed. More precisely, however, the idea is about checking whether an 'intelligible order of authority makes sense to us as such a structure' which 'requires […], that there is a legitimation offered which goes beyond the assertion of power'.[9] Williams adds that 'we can recognise such a thing because in the light of the historical and cultural circumstances […] it [makes sense] to us as a legitimation'.[10] This idea relies on 'our' ability to differentiate legitimations based on assertions of power from legitimations for the endorsement of which there are reasons other than their hold of power over us.

To turn this distinction into a tool of normative evaluation Williams introduces his 'Critical Theory Principle' (CTP): 'the acceptance of a justification does not count if the acceptance itself is produced by the coercive power which is supposedly being justified'.[11] For Williams, 'the difficulty with [this principle], of making good on claims of false consciousness and the like, lies in deciding what counts as having been "produced by" coercive power in the relevant sense'.[12] So, in a Weberian vein, the source of legitimacy lies in the value-beliefs of the stakeholders; i.e. those over whom the power is exercised. A regime turns out to be illegitimate if the people accept its official justification—its legitimation story—only because they have not come to realise yet that there are no other reasons than the power of this regime for them to accept it as legitimate.[13] The test, though, is best understood as hypothetical. We look at actual beliefs, add an empirically informed causal story about their origin, and then imagine what the correct response would be once the causal story has been revealed to the belief holders. So we start with the people's current beliefs and imagine them going through a process of criticism, a process in which the test plays a significant part.[14] To clarify what 'counts as having been "produced by" coercive power in the relevant sense'.[15] Williams relies on what Raymond Geuss calls 'reflective unacceptability'.[16] To be sure, the hypothetical test is not opposed to also encouraging a process of reflection in actual people on whether they would still hold on to their beliefs (directly or indirectly about the legitimacy of the regime), once they had realised how they came to hold them. At any rate, this process will lead to context-sensitive evaluations based on one's assessment of what reasons are actually available to the citizenry.

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[5] *Ibid*, 3.
[6] *Ibid*, 4.
[7] *Ibid*, 7.
[8] *Ibid*, 11.
[9] *Ibid*, 11.
[10] *Ibid*, 11.
[11] *Ibid*, 6.

Note the crucial difference between this approach and the standard, voluntaristic account of democratic legitimacy: our focus is on responsiveness to stakeholders' values, not on the enactment of their will.[17] Our take on Williams' view combines a central feature of empirical studies of the quality of democracy, namely, the attention to value-alignment or responsiveness,[18] with a central feature of critical theory as a form of political evaluation, namely, the attention to the ideological character of some beliefs in legitimacy. So we term this approach *critical responsiveness.*

Critical responsiveness is a universal account of legitimacy in its abstract form, but it is underpinned by two forms of contextualism. First, on this broadly realist view, politics is a context with its own form of normativity, so that pre-political moral demands do not reach into politics.[19] Here a lot of work is done by the very *concept* of politics. Raw domination of the sort endured by the Helots in Sparta just is not politics, and this is a conceptual rather than a moral claim.[20] So this is a form of cross-cultural, conceptual contextualism—perhaps more of a category or scope restriction.[21] Second, each legitimation will have to culturally and historically specific elements, as per the Critical Theory Test described above. This is contextualism in the more familiar sense of the term. It is best understood as the need to provide a 'legitimation story' to each citizen.[22] Again, it is not clear to what extent we should take this literally. But the general idea seems to be that the public culture should contain the resources to allow the citizenry to make sense of the power exercised over them. If these legitimation stories are not widely accepted, rule can become perceived as domination resulting in resentment. The latter could threaten the political order, and subsequently economic, social, moral orders in the polity.[23] And if the legitimation stories are accepted for the wrong reasons, through ideological distortion, then their normative force is eroded.

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[12] *Ibid*, 6.

[13] Bernard Williams, *Truth and Truthfulness: An Essay in Genealogy* (Princeton University Press, 2002) 231.

[14] *Ibid*, 227; Here we set aside the question of the extent to which Williams' approach is in danger of introducing pre-political moral commitments from the back door. On this issue see: Edward Hall, 'Contingency, Confidence and Liberalism in the Political Thought of Bernard Williams' (2014) 40(4) *Social Theory and Practice* 545; Janosch Prinz and Enzo Rossi, 'Political Realism as Ideology Critique' (forthcoming) *Critical Review of International Social and Political Philosophy*; Paul Sagar, From Scepticism to Liberalism? Bernard Williams, The Foundations of Liberalism and Political Realism (2014), *Political Studies*, online: <www.onlinelibrary.wiley.com/doi/10.1111/1467-9248.12173/full>.

[15] Williams (n 4) 5.

[16] Raymond Geuss, *The Idea of a Critical Theory* (Cambridge University Press, 1981) 55–69.

[17] Tamsin Shaw, 'Max Weber on Democracy: Can the People Have Political Power in Modern States?' (2008) 15(1) *Constellations* 33.

[18] Andrew Sabl, 'The Two Cultures of Democratic Theory' (2015) 13(2) *Perspectives on Politics* 345; note that responsiveness can apply to other analytical levels of legitimacy-evaluation, such as input or output.

When applied to our current predicament, these two elements yield Williams' abstract formula: 'LEG + Modernity = Liberalism'.[24] 'LEG' signifies a satisfactory answer to the first political questions; i.e. the meeting of the BLD. 'Modernity' is an umbrella term for the culturally specific legitimation. The rough idea is that, given the expectations about security and protection of individual rights developed in Western societies, no set of political arrangements other than a liberal one would meet the BLD.

One may ask whether Williams is not allowing liberalism to pass the Critical Theory Test too easily here, given the actual history of liberal states and of belief in the political centrality of individual rights, and especially the property rights that are characteristic of liberalism.[25] Williams' answer to that challenge would draw on what, following Judith Shklar, he calls 'the liberalism of fear'.[26] This view, sometimes also referred to as 'bare liberalism', is a largely negative defence of some tenets of liberalism, especially individual rights. The rough idea is that, historically, liberalism has proved more effective than other systems at preventing the sorts of evils that most people would associate with overly powerful government—cruelty, torture, and, more generally, 'being in someone else's power'[27]; the same sort of political normativity behind the Critical Theory Test.

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[19] Robert Jubb and Enzo Rossi, 'Political Norms and Moral Values' (2015) 40 *Journal of Philosophical Research* 455.

[20] Williams (n 4) 5.

[21] One may well contest the coherence of such a move, for instance, noting that the concept of politics is essentially contestable.

[22] Williams (n 4) 5.

[23] Andrea Sangiovanni, 'Justice and the Priority of Politics to Morality' (2008) 16(2) *Journal of Political Philosophy* 137, 156.

[24] Williams (n 4) 9.

[25] For this line of argument see: Carlo Argenton and Enzo Rossi, 'Libertarianism, Capitalism, Ideology: A Reality Check' (2016) Working paper.

[26] Williams (n 4) 52–61.

For our present purposes, it will be important to draw attention to the fit of this sort of minimal liberalism within Williams' equation. On the left side of the equation we have a rather rich story, or at least we should. 'Modernity' is a wide umbrella term.[28] While it seems clear that the bare liberalism on the right side of the equation can provide an answer to the first political question in our context, it also seems rather thin, if we are to think of it as the product of 'LEG' and 'Modernity'. Is a government that can spare us from cruelty all that we have come to expect in Europe's modern context? We are not suggesting that (bare) liberalism is not *part* of the answer, but simply that it is not the *entirety* of the answer. To the extent that European political theory and political culture has developed and consolidated something approaching a consensus in the way to answer those questions, that consensus makes room for the ideal of popular sovereignty. In other words, the liberalism on the right side of the equation is either an inadequately narrow answer result, or it should be understood as part of de facto union between liberalism and democracy (even if it is just a marriage of convenience) that characterises successful legitimation stories in our part of the world.

3. Popular sovereignty in modern democracies

Up to this point, our argument has remained rather abstract. We will now delve into the legitimation story based on popular sovereignty in the context of the democratic nation-state and then the possibilities for the same story to legitimise in the contemporary political landscape after European integration. Williams' normative preference for 'bare liberalism' relies on a particular historical narrative. An alternative history can be told, especially for modern democracies, in which *popular sovereignty* features centrally in the legitimation story accepted by democratic citizens.

The logic of popular sovereignty[29] is that the people are the source of all political authority in the polity; therefore, the right to rule derives from the subjects as part of a collective. Many analyses of popular sovereignty have been offered in academia. For our purposes, Jonathan White offers a useful account of this logic, which captures many possible conceptions. He argues that a 'bond of collectivity' creates a people out of a diverse multitude, which subsequently sets the standards of legitimate (democratic) rule.[30] White's concept is intended to be applicable to, and facilitate interplay between, both theory and practice. In theories of popular sovereignty, a philosopher delineates a shared bond to then work out principles of legitimacy. In practice, popular sovereignty can only legitimise if citizens sincerely believe in the existence of a collective bond of some sort. This duality will also serve our analysis well, because, in this section, we will move from philosophical analysis to a historical one to assess popular sovereignty's realist credentials.

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[27] *Ibid*, 61.

[28] Enzo Rossi, 'Consensus, Compromise, Justice and Legitimacy' (2013) 16(4) *Critical Review of International Social and Political Philosophy* 557.

[29] Democratic and legal scholars also use 'constituent power' for this logic, eg: Andreas Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' (2005) 12(2) *Constellations* 223; Martin Loughlin, 'The Concept of Constituent Power' (2014) 13(2) *European Journal of Political Theory* 218; Markus Patberg, 'Constituent Power Beyond the State: An Emerging Debate in International Political Theory' (2013) 42(1) *Millennium: Journal of International Studies* 224.

Before turning to historical-contextual aspects, we will first analyse whether popular sovereignty is an attractive value for political realists of a critical bend. In the context of modern pluralistic democracies, two reasons make popular sovereignty into a particularly attractive value. First, popular sovereignty can accommodate disagreement. It can provide justifications of rule even in polities with little homogeneity, thus taking into account the diversity of its stakeholders: rulers and the citizens. A particularly 'thin' bond of collectivity justifies rule for certain Pareto optimal outcomes.[31] Williams' preferred ideal of bare liberalism fits with such a conception of popular sovereignty. The only bond between the multitude is their interest in safeguarding their basic rights. However, citizens might share more common ground than a commitment to some basic rights, which might justify the enforcement of more extensive collective projects. A 'thick'—typically cultural—bond or a consensus on democratic values are the main alternatives in the literature.[32] On a sociological level, a too thin conception of the bond of collectivity is troublesome for democracies. Therefore, some kind of thick or political bond might be necessary *in practice*. On a philosophical level, however, such a bond can mediate disagreements between rulers and citizens following the legitimation logic of popular sovereignty.

The second reason is that popular sovereignty can legitimise coercion but also provides a normative basis to defend citizens from ideological distortions.[33] A bond of collectivity can legitimise collective coercive structures. A problematic feature, however, is the possibility of disenfranchisement. As history shows, in liberal-democratic contexts, a shift towards the protection of negative rights (bare liberalism) is often accompanied by a loss of the mass-participatory aspect of democracy.[34] Popular sovereignty, on the other hand, prescribes that rulers should remain responsive to the values of the subjects, which can include but is not limited to the protection of their rights.

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[30] Jonathan White, *Political Allegiance after European Integration* (Palgrave Macmillan UK, 2011) 5–6.

[31] *Ibid*, 6–7.

[32] *Ibid*.

[33] On ideological distortion, see: Prinz and Rossi (n 14).

[34] Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso, 2013); Colin Crouch, *Post-Democracy* (John Wiley & Sons, Ltd, 2004).

Moreover, popular sovereignty empowers citizens to judge whether a regime is actually acting in alignment with their commitments, which in turn requires critical scrutiny of ideological structures. In the end, the citizens are the sole fountain of legitimacy in the polity; not the rulers. In sum, popular sovereignty is an attractive political value from the point of view of a critical political realist. This realist analysis establishes philosophical attractiveness of popular sovereignty's BLD; this is a necessary but not sufficient condition for a political value.

A political value should *make sense* to the citizens that it pertains to govern in a *historical context*. Historically, the rise of popular sovereignty is often connected to modernity's disenchantment. Where European medieval states relied upon Christianity to ground political authority, bereft of such metaphysical principles, modern democracies require a popular sovereign.[35] The change from the divine right of kings to popular sovereignty constituted a transformation from a vertical to a horizontal principle of legitimacy; normative authority in the polity transferred from the ruler(s) to the ruled[36]—'marks a break with an old world'.[37] Rulers of the two modern regimes *par excellence* —democracies and totalitarian regimes—claim to exercise power within their polity in the name of 'the people'.[38] They appeal to the principle of popular sovereignty. Certainly, in democracies, this principle has no rival when legitimating the use of force. Moreover, in international politics, it is not just leaders; citizenries also acted as vehicles for maintaining national sovereignty.[39] On this reading, popular sovereignty became the legitimation story within modernity's disenchanted cosmology, which also makes sense to the citizens in this historical context.

Up to this point, we have argued that popular sovereignty is a realist alternative to Bernard Williams' normative theory of bare liberalism. We will now continue with an assessment of whether or not this legitimation story passes Williams' critical theory principle. If the belief in popular sovereignty is merely a product of past coercion by the state, then this legitimation story is not acceptable for a realist. We will, however, suggest that coercion played a role but its widespread acceptance cannot be entirely attributed to state coercion.

No realist denies that force plays a central role in politics, however belief in the legitimacy of the coercive structures should not be secured through those same structures. The *critical theory test* aims to assess whether ideological distortion in the past has taken place. The following genealogy is not extensive, but serves to illustrate *popular sovereignty as legitimation value* was not imposed by rulers upon the public.

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[35] Christopher J Bickerton, 'Europe's Neo-Madisonians: Rethinking the Legitimacy of Limited Power in a Multi-level Polity' (2011) 59(3) *Political Studies* 659, 666.

[36] Cécile Laborde, 'Republican Citizenship and the Crisis of Integration in France' in Richard Bellamy, Dario Castiglione and Emilio Santoro (eds), *Lineages of European Citizenship Rights, Belonging and Participation in Eleven Nation-States* (Palgrave Macmillan, 2004), 52.

[37] Pierre Rosanvallon, 'The Metamorphoses of Democratic Legitimacy: Impartiality, Reflexivity, Proximity' (2011) 18(2) *Constellations* 114, 120.

[38] Claude Lefort, 'The Logic of Totalitarianism' in John B Thompson (ed), *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* (Polity Press, 1986) 288.

[39] Raymond Aron, 'The Anarchical Order of Power' (1995) 124(3) *Daeldalus* 27.

Paradoxically, popular sovereignty finds its modern roots not in democratic but in monarchical thought. The monarchs use it against opponents in parliament. The latter, however, successfully appropriated popular sovereignty to legitimate themselves as representatives of the people.[40] Ultimately, the value would fuel democratic revolutions in Western democracies, hence rulers *and* rebels played an essential role in placing popular sovereignty at the heart of the (de)legitimation story of the modern state.

Moving from the value to its institutionalisation, state- and nation-building processes have been violent affairs, resulting in the institutional preconditions of popular sovereignty: sovereign states and peoplehood. A vast literature exists that illustrates the importance of war in the establishment of the centralised state.[41] Broadly, war required funds due to technological advances, such as fortresses and gunpowder. The recruitment of standing armies created further costs. These military developments were an important factor in the creation of centralised state institutions, such as tax collecting agencies. National economies became centrally managed by the state to ensure competitive advantages. In Europe, centralised states with the ability to enforce decisions in their territory—infrastructural power—became a fact. Moreover, since the Peace of Westphalia, these centralised states were attributed the status of sovereignty.[42]

These centralised institutions played an important role in the creation of peoplehood. These processes were both intentional and unintentional. Among the former, in Europe, homogenisation is a product of linguistic and ethnic cleansing.[43] Yet, even these processes were not necessarily always aimed at self-legitimation; other concerns such as economic competitiveness also played a role.[44] In a similar vein, the military and administrative state apparatus resulted in unintentional homogenisation. One of the most important reasons was the creation of a hard boundary between states, where rule within treated (most) citizens the same. To legitimate state rule, stories were told about the boundaries, which lay the foundation of sincerely held beliefs about subjects' ties[45]: their bonds of collectivity. As Sofia Nässtrom sums up these processes, 'peoplehood always is born out of a combination of coercive force and persuasive storytelling'.[46]

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[40] Edmund S Morgan, *Inventing the People. The Rise of Popular Sovereignty in England and America* (W W Norton & Company, 1988).

[41] See, for instance: Charles Tilly, 'Reflections on the History of European State-Making', *The Formation of National States in Western Europe* (Princeton University Press, 1975) 3–83; Philip Bobbitt, *The Shield of Achilles. War, Peace, and the Course of History* (Allen Lane, 2002); Michael Mann, 'The Autonomous Power of the State: Its Origins, Mechanism and Results' (1984) 25(2) *Archives Européennes de Sociologie Paris* 185 (Republished 109).

[42] Roland Axtmann, 'The State of the State: The Model of the Modern State and Its Contemporary Transformation' (2004) 25(3) *International Political Science Review* 259; Stefano Bartolini, *Restructuring Europe. Centre Formation, System Building, and Political Structuring between the Nation State and the European Union* (Oxford University Press, 2005), 64.

[43] Michael Mann, 'Genocidal Democracies in the New World', *The Dark Side of Democracy* (Cambridge University Press, 2005) 70–110.

[44] Ernest Gellner, *Nations and Nationalism* (Cornell University Press, 1983).

These violent processes acted as a catalyst for popular demands including democratisation of decision-making: democratic popular sovereignty. Popular pressures played an essential role in the introduction, subsequent extensions and continuously sustaining democratic procedures in domestic politics.[47] The sacrifices asked from citizens by the state, such as making war and paying taxes, were important reasons to demand more extensive welfare provisions from the state. In a more institutional vein, citizens started to demand a voice in politics, which became more important as citizens could not simply 'exit' from the state.[48] In this context, nationality became enriched with democratic citizenship,[49] which increasingly replaced purely ethnic-linguistic markers.[50] The democratisation of the state and peoplehood thus is in part a result of popular pressures to meet citizens' legitimation demands.

From a realist perspective, political power's constitutive role in creating unity is not a surprise.[51] The pertinent question is whether coercive structures are the sole or predominant reason for these legitimating beliefs. Our admittedly broad stroke account of state- and nation-building shows that the story is one of enforcement and rebellion, and *raison d'état* and popular demands. The legitimation value of popular sovereignty and its institutionalisation in modern state-democracies are, at least in part, the result of popular pressure rather than elite domination, hence popular sovereignty passes the critical theory test.

At this point, we turn to the assessment of popular sovereignty in ruling practices. To assess rulers *(critical) responsiveness*, we analyse whether the coercive structures of the modern democratic state conform to the value of popular sovereignty. This assessment is important for the subsequent analysis of Europe's democratic deficit. Because of this consideration, we focus solely on the democratic conception of popular sovereignty as empowerment in decision-making. One initial observation, which is essential for this realist analysis, is that modern states' capacity to implement its decisions is an often overlooked but essential feature of modern democracies.[52] The crucial point is not merely that these coercive structures can maintain order, but that infrastructural power is essential to meet democratic BLD. A democracy that cannot implement collective decisions does not institutionalise the *sovereignty* of the people, hence it is incongruent with the value of popular sovereignty.

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[45] Charles Tilly, 'Ties That Bind … And Bound', *Identities, Boundaries, and Social Ties* (Paradigm Publishers, 2005), 3–12.

[46] Sofia Näsström, 'The Legitimacy of the People' (2007) 35(5) *Political Theory* 624, 629.

[47] Jürgen Habermas, *The Structural Transformation of the Public Sphere An Inquiry into a Category of Bourgeois Society* (Polity Press, 1992), 131–132.

[48] Stein Rokkan, *State Formation, Nation-Building, and Mass Politics in Europe. The Theory of Stein Rokkan: Based on His Collected Works* (Oxford University Press, 1999).

[49] TH Marshall, *Citizenship and Social Class* (Cambridge University Press, 1950) 1–85.

[50] Jürgen Habermas, 'National Unification and Popular Sovereignty' (1996) no 219 *New Left Review* 3.

[51] Marc Stears, 'Liberalism and the Politics of Compulsion' (2007) 37(3) *British Journal of Political Science* 533.

Domestically, modern democracies share two central features to make rule subject to citizens' power: vote and voice. Voice refers to the deliberative dimension of mass democracies. Democracies have forums in which rulers and ruled can publically exchange ideas among each other and themselves. More instrumentally, they enable citizens to keep track of their rulers, while rulers can keep track of the citizens' preferences. These public forums are not merely passive registers of preferences; debate can also change opinions and mobilise the citizenry.

The vote further empowers citizens to actively hold their rulers to account. The people are empowered to elect representatives to make decisions reflecting their position. By the same means, citizens are given the power to eject unresponsive rulers. Modern democracies thus offer 'the people' instrumental, albeit indirect, powers to remain sovereign decision-makers in the polity. Vote and voice institutionalise democratic procedures that—however imperfect—conform to the logic of popular sovereignty. It is that sense that rulers' legitimation stories of popular sovereignty can also pass the (critical) responsiveness test.

Popular sovereignty also authorises democratic rulers in the international realm. The veto is a particularly important institution in this regard. State sovereignty, and by extension, popular sovereignty, is closely associated with freedom from external interference. Rulers often argue that they represent the citizens' collective interests abroad, such as peace or greater overall prosperity. Democratic rulers can justify their authority abroad as elected representatives by their sovereign people. However, this claim requires institutionalisation. Leaving aside the restraints on *de facto* sovereignty,[53] rulers are, in principle, autonomous in their decision-making. When entering into agreements, international organisations recognise this claim by attributing veto powers to all state representatives.[54] Veto power institutionalises the people's sovereignty in ruling practices in the international realm. So the practices of coercive rule in democratic state polities conform to the legitimation story of popular sovereignty, both domestically and internationally.

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[52] Clauss Offe and Ulrich K Preuss, 'The Problem of Legitimacy in the European Polity: Is Democratization the Answer?' in Colin Crouch and Wolfgang Streeck (eds), *The Diversity of Democracy: Corporatism, Social Order and Political Conflict* (Edward Elgar Publishing Limited, 2006) 175–204.

[53] Admittedly, modern states' autonomy is always limited in certain ways.

[54] John H Hertz, 'Rise and Demise of the Territorial State' (1957) 9(4) *World Politics* 473, 477.

As we have seen, from a realist perspective, popular sovereignty is a normatively attractive political value even upon critical scrutiny. However, can this political value also act as the core of a democratic legitimation story for the EU?

4. Does EU rule conform to the realist value of popular sovereignty?

European political integration constitutes a transformation of the EU-polity into a new kind of democracy.[55] Since the 1990s, EU-rule has become more institutionalised, and greater emphasis has been given to the Union's direct relationship with its subjects, such as EU-citizenship. The Union, therefore, has moved beyond the status of a 'normal' international organisation. Leaving aside the details of Europe's institutional complexities,[56] Wallace's famous analysis of the European Community as 'Less than a Federation, More than a Regime'[57] is even more true for the current Union. These same developments have been a catalyst for the so-called democratic deficit.[58] This deficit has an empirical dimension in widespread concerns about the EU's social legitimacy, and the 'objective' democratic credentials of its institutions. However, we will assess the EU-rule's legitimacy on a philosophical level.

In order to do so, we require an account of the institutionalisation of rule. The two prevalent institutionalised forms of EU-rule are: (1) *delegation* of state powers to administrative agents, and (2) *pooling* of state powers in decision-making procedures without retaining veto-power. We do not claim that these forms solve any interpretative issue on the character of the EU's governance-regime.[59] The more modest claim is that these practices contribute to the in-between status of the current Union. Francis Cheneval's ideal-type of multilateralism relies on these forms. A multilateral polity has 'functionally differentiated constitution of incongruent territorial hierarchies through institutionalised co-operation and integration between states. The multilateral process blends domestic and intergovernmental structures through their linkage to supranational modes of decision-making, dispute settlement, and jurisdiction'.[60] This ideal-type captures key features of the EU-regime with its mix of supranational institutions, such as the European Parliament (EP) and the European Central Bank, and intergovernmental institutions, such as the Council system. A multilateral *regime* consists of 'limited, differentiated *delegation* of competences to supranational agents and of intergovernmentalism in the areas where states cooperate but retain full or *shared* decision-making power'.[61]

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[55] Frank Schimmelfennig, 'The Normative Origins of Democracy in the European Union: Towards a Transformationalist Theory of Democratization' (2010) 2(2) *European Political Science Review* 211.

[56] Jan Zielonka, 'Plurilateral Governance in the Enlarged European Union' (2007) 45(1) *Journal of Common Market Studies* 187, 190.

[57] William Wallace, 'Less than a Federation, More than a Regime' in Helen Wallace, William Wallace and Carole Webb (eds), *Policy-Making in the European Union* (John Wiley & Sons Ltd, 1983) 403.

[58] Heidrun Friese and Peter Wagner, 'Survey Article: The Nascent Political Philosophy of the European Polity' (2002) 10(3) *The Journal of Political Philosophy* 342.

[59] Andrew Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' (2002) 40(4) *Journal of Common Market Studies,* 603; G Marks, L Hooghe and K Blank, 'European Integration from the 1980s: State-Centric v. Multi-Level Governance' (1996) 34(3) *Journal of Common Market Studies* 341; Philippe C Schmitter, *How to Democratize the European Union … And Why Bother* (Rowman & Littlefield Publishers, 2000); Vivien A Schmidt, 'The European Union: Democratic Legitimacy in a Regional State?' (2004) 42(5) *Journal of Common Market Studies* 975; Jan Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (Oxford University Press, 2006).

Before turning to the question of responsiveness, let us briefly elaborate the relevance of popular sovereignty as a political value in the EU-context. The democratic conception of popular sovereignty remains relevant because evidence exists that EU-citizens remain committed to the value of popular sovereignty in relation to democratic regime legitimacy.[62] Further, much has changed in contemporary politics–late modernity if you will–compared to early modernity. One consistent factor is that politics in the West takes place in what one may call a disenchanted cosmology.[63] Popular sovereignty remains a suitable source of authority in the EU-polity, which also makes sense to its citizens. Therefore, we will assess whether institutionalised practices of rule broadly conform to the political value of popular sovereignty.

Turning first to delegation, this practice is not necessarily incompatible with popular sovereignty. Domestically, administrative agencies are often placed at arm's length from politicians. In a similar vein, democratic politics cannot easily or at all intervene with constitutional courts. The legitimation story is that the autonomy of these institutions serves the interests of the people—popular sovereignty as output legitimacy, in other words. Still, democratic politics can often intervene with these administrative agencies through some, at times complex, procedure. German governments have at times challenged the famously independent German Central Bank, the *Bundesbank*.[64] Therefore, accountability remains possible by the democratic order. Delegation thus does not constitute a problem at first glance.

Moreover, transnational delegation is a rational route to pursue for governments on the classic intergovernmental logic of credible commitments. Intergovernmentalism assumes that governments are primarily motivated by self-interest. They enter into international agreements to pursue their self-interest and, in the case of democracies, the interests of their people. European integration is often motivated by efficiency concerns.[65] However, self-interest can also motivate non-compliance. To avoid governments not holding up their end of the deal, EU Member States have delegated quite a few powers to supranational administrative agencies. These institutions are granted autonomy to ensure *no* single government can influence them. This kind of delegation is a tool for intergovernmental actors to ensure compliance.

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[60] Francis Cheneval, 'The Hobbesian Case for Multilateralism' (2007)13(3) *Swiss Political Science Review* 309, 328.

[61] *Ibid*, 329; italics added for emphasis.

[62] Juan Díez Medrano, 'Europe's Political Identity: Public Sphere and Public Opinion' in Justine Lacroix and Kalypso Nicolaïdis (eds), *European Stories: Intellectual Debates on Europe in National Contexts* (Oxford University Press, 2010), 315.

[63] See, for instance: Christopher J Bickerton, 'Europe's Neo-Madisonians: Rethinking the Legitimacy of Limited Power in a Multi-Level Polity' (2011) 59(3) *Political Studies* 659.

[64] Richard Bellamy and Albert Weale, 'Political Legitimacy and European Monetary Union: Contracts, Constitutionalism and the Normative Logic of Two-Level Games' (2015) 22(2) *Journal of European Public Policy* 257.

That being said, this type of delegation is of a qualitatively different nature than its domestic counterpart. The core reason is the creation of a new power without a clear chain of delegation. Hans Agné persuasively makes this case[66] and we shall outline the relevant parts of his argument for our analysis. Unlike a national act of delegation, when governments choose to delegate power to a supranational agency, they create a *new* power. The agency has capabilities to enforce a policy that no one government had the authority to take before its existence. Moreover, Agné argues that 'the authority conferred on international agencies can [no longer] be retrieved by democratic states, or effectively influenced through democratic procedures'.[67] Agné provocatively implies that EU-citizens might have been alienated from their powers rather than delegating them. At this point, the incompatibility with popular sovereignty comes clearly into focus. The democratic challenge with transnational delegation is that the institution's power is no longer directly traceable to a sovereign people.[68]

So far we have used a simple analytic distinction between pooling of sovereign powers and delegation. Delegation requires the creation of a new supranational agency, while pooling sovereignty refers solely to European decision-making procedures. In practice, pooling and delegation touch upon another. One might well argue that delegation is a particular form of pooling sovereignty. However, pooling sovereignty does not necessitate a new European actor. EU-rulers can make legally binding decisions, but leave implementation solely to its Member States' bureaucracies.

Pooling sovereignty is also not necessarily incompatible with the value of popular sovereignty. Traditionally, nation-states pool powers in international organisations. These organisations have an essential institutional feature: the veto. Notwithstanding that *de facto*, sovereignty is often compromised in international relations–arguably only the hegemon is truly sovereign–*de jure* sovereignty should be recognised in this institutional feature. It should be, because the legitimation story of popular sovereignty relies on its presence. Therefore, again, we need not necessarily dismiss this ruling practice out of hand as incompatible with popular sovereignty.

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[65] Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press, 1998); Schimmelfennig (n 55).

[66] Hans Agné, 'Popular Power in the European Union: Delegated or Alienated?', in Simona Piattoni (ed), *The European Union: Democratic Principles and Institutional Architectures in Times of Crisis* (Oxford University Press, 2015) 46–62; Hans Agné, 'The Myth of International Delegation: Limits to and Suggestions for Democratic Theory in the Context of the European Union' (2007) 42(1) *Government and Opposition* 18.

[67] Agné (n 66) 36.

[68] Agné believes a democratic justification is possible in virtue of benefits. His argument implies, however, a degree of harmony in preferences. Taking conflict as part and parcel of politics, this argument cannot suffice for realists.

The above picture, however, does not fully capture the practice of pooling *sovereignty* in the EU. As Francis Cheneval puts it, governments retain full or *shared* sovereignty in decision-making procedures. The distinction between full and shared sovereignty is key to our analysis. When states retain full sovereignty, they continue to have the option to enact veto power. In the EU, Member States retain full sovereignty in many matters. One crucial area, for instance, is treaty ratification. The European Commission might be the Guardian of the Treaties; the Member States remain its Masters. In these intergovernmental negotiations, the Member States hold veto power simply by refusing to sign. One consequence has been that Member States have been able to negotiate opt-outs resulting in differentiated integration.[69] The pooling of sovereignty that results in legally binding treaties is unproblematic. The intergovernmental representatives can claim to represent their sovereign people; otherwise, they would not have signed the treaty or, in different contexts, vetoed the legislation.

Shared sovereignty in decision-making, however, is a different matter. We define shared sovereignty as intergovernmental decision-making without veto-power. This form of EU-rule poses an institutional challenge to the sovereign status of governments in international relations. In many policy areas, the Member States have given up on the institutional feature of popular sovereignty: the veto. One of the most important features is that qualified majority voting has become the *most* widely used decision-making procedure in the Councils. In practice, a consensual style of decision-making characterises these procedures. However, style is not a check on real power. By giving up on the institutional veto, Member States can no longer guarantee the sovereignty of their people. In effect, they have placed a 'gifted resource'–the status of sovereignty–beyond their control. This practice sits badly with the democratic legitimation story of popular sovereignty.

In a different vein, observers might argue the EP and national parliaments have been given the means to influence decision-making. However, in as far as this is true, it is only partially the case. Decision-making procedures often include supranational and national parliamentary bodies. The EP can play a connecting role between national parliaments within a 'field or parliaments' scrutinising EU-rule.[70] More importantly, the ordinary legislative procedure (OLP) and the yellow, orange, and, possibly in the future, green card procedures, ensure involvement of parliamentary bodies. The vote has been institutionalised in the EU-regime, hence popular sovereignty has been (partly) institutionalised within Europe's decision-making procedures.

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[69] Frank Schimmelfennig and Thomas Winzen, 'Instrumental and Constitutional Differentiation in the European Union' (2014) 52(2) *Journal of Common Market Studies* 354.

However, two reasons can be given to seriously doubt this analysis. The first is conceptual: the lack of a clear sovereign people. The second is practical: the lack of the preconditions of voice. A conceptual concern is that the OLP and card procedures effectively empower a different 'demos'. The former empowers a European demos, while the latter empowers national *demoi*. In democratic theory, *demoicratic* and *mixte constituent* positions provide conceptual solutions in which multiple demoi legitimise an overarching *kratos*.[71] A discussion between these positions is whether the EP should or does represent an overarching demos or remains an institution for national interest representation.

The second reason returns us to the practical analysis. Domestically, voice played a complementary role to the vote, however the European reality is that voice remains nationally organised. On an optimistic interpretation, Europe has a nascent transnational public sphere in which some public debate takes place. However, even European topics are mostly discussed in national public spheres.[72] Therefore, national considerations and assumptions continue to shape these debates. European decision-makers cannot keep track of popular sovereign will, or of the relevant cleavages within society. Moreover, European publics face serious coordination issues in keeping track of their decision-makers. European decision-makers, such as Commissioners or MEPs, cannot therefore rely on the value of popular sovereignty to legitimate their rule. These democratic observations relate closely to the broader observation about the lack of a European *demos*.

Finally, we should address recent developments in the EU pertaining to the institutional response (or lack thereof) to the crises. This development fits a general tendency towards the emergence of an executive-administrative order,[73] which undermines any appeal to the value of popular sovereignty. In response to the Euro-crisis, Member State governments started to make decisions outside the European framework. In essence, governments strengthened their position in European decision-making.[74] The EP and national parliaments were relegated to consultative bodies rather than proper legislators.[75] Thus, the vote has become de-institutionalised at the European level. In line with past developments, intergovernmental agents allow effective decision-making to trump democratisation of the Union.[76] A transnational legitimation story of popular sovereignty is further compromised rather than further institutionalised, hence it fails this realist test.

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[70] Ben Crum and John Erik Fossum, *Practices of Interparliamentary Coordination in International Politics. The European Union and beyond* (ECPR Press, 2013) 9–13.

[71] See, for instance: Francis Cheneval and Kalypso Nicolaïdis, The Social Construction of Demoicracy in the European Union (2016), *European Journal of Political Theory*, online: <https://doi.org/10.1177/1474885116654696>; Jürgen Habermas, *The Crisis of the European Union. A Response*, trans. Ciaran Cronin (Polity Press, 2012).

[72] eg Thomas Risse, 'No Demos? Identities and Public Spheres in the Euro Crisis' (2014) 52(6) *Journal of Common Market Studies* 1207.

[73] Deirdre Curtin and Morten Egeberg, 'Tradition and Innovation: Europe's Accumulated Executive Order' (2008) 31(4) *West European Politics* 639.

Moreover, these recent developments challenge the intergovernmental legitimation story of an EU that represents sovereign peoples. The classic intergovernmental argument is that government representatives choose to remain in Europe.[77] This asserted autonomy is doubtful, however. At present, it would appear that the costs of exit have become extremely high, if not prohibitively so.[78] Member State governments 'choose' to accept direct intervention into the sovereign domain instead of unilateral withdraw. In Italy, under European pressure, the technocratic Monti government replaced Berlusconi's democratically elected one. Despite a negative referendum outcome, the Greek government has been effectively forced to accept stringent austerity measures with their bailout packages. The British membership referendum shows that seriously considering exit is not impossible. Note that a majority of the citizens took the decision to leave, while most of the British political elite campaigned to remain in the EU. In a different vein, as Ben Crum observes, '[Monetary integration can] be expected to lead to states being bound to ever more detailed policy contracts that hollow out their political autonomy in financial and economic matters'.[79] The recent developments resulted in a tendency towards intergovernmental agents losing their *de facto* veto. These forms of EU-rule do not conform to the value of popular sovereignty.

Having established that EU-rule, especially in the light of recent developments, does not sit well with the realist value of popular sovereignty, a final note on Europe's historical trajectory. We want to show that the processes were not necessarily unresponsive to citizens' value commitments, hence, for a realist, the Union's history can pass the test of critical responsiveness. The European project's origins lie in the devastation of the Second World War. The European integration project was the means of European rulers to regain legitimacy from the people.[80] A disquieting story can be told about European integration in which concerns about political and increasingly economic security drive further integration. This narrative of emergency measures results in a disenfranchisement of Europe's democratic citizenries.[81] Moreover, this disenfranchisement was, in part, by design in order to protect liberal democracy with an eye to the atrocities of populist nationalism.[82] These choices do not necessary fail the test of critical responsiveness. In the aftermath of the Second World War, citizens wanted peace, democracy and prosperity. Moreover, political disagreements were funnelled through intergovernmental channels. The EU has been the product of intergovernmental treaties.[83] Governmental agents continue to play an authoritative role within the EU's infrastructural framework.[84] The institutional outcome—transnational delegation and shared sovereignty in decision-making procedures—however, sits badly with the intergovernmental legitimation story of popular sovereignty.

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[74] eg Christopher J Bickerton, Dermot Hodson and Uwe Puetter, 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era' (2015) 53(4) *Journal of Common Market Studies* 703; Sergio Fabbrini, *Which European Union? Europe after the Euro Crisis* (Cambridge University Press, 2015).

[75] Mark Dawson and Floris De Witte, 'Self-Determination in the Constitutional Future of the EU' (2015) 21 (3) *European Law Journal* 371.

[76] Schimmelfennig (n 55).

[77] eg Moravcsik (n 59).

[78] Bartolini (n 42).

[79] Ben Crum, 'Saving the Euro at the Cost of Democracy?' (2013) 51(4) *Journal of Common Market Studies* 614, 623.

5. Conclusion: popular sovereignty, legitimacy and justice

In sum, contemporary EU-rule does not pass the test of critical responsiveness. The reason is not that popular sovereignty is the product of manipulation or that current ruling practices are purely the result of unresponsive rulers. On the contrary, citizens at crucial junctions pushed the democratic understanding of popular sovereignty, while the European integration project reflects popular demands in the aftermath of Second World War. The democratic deficit finds its origins in the conflict between contemporary ruling practices and the value of popular sovereignty. Legitimation stories of popular sovereignty—in both their intergovernmental and supranational variations—cannot meet EU citizens' (implicit) BLD. It is on this part of the analysis of critical responsiveness that EU-rule fails. The empirical phenomenon of a trust or legitimacy deficit reflects this realist analysis.

Yet legitimation stories are not set in stone, hence the EU is certainly not doomed to this illegitimate state of affairs. We want to briefly elaborate a possible direction to overcome the democratic deficit. Let us return to Bernard Williams' theory of legitimacy: 'LEG = BLD + socio-political context'. We have argued that citizens' BLD reflects a continued commitment to popular sovereignty. Moreover, this value is attractive from a realistic perspective, because, at a conceptual level, it incorporates disagreement while also offering a legitimation of coercion based on the posited bond of collectivity. The lack of crosscutting cleavages or a shared common vernacular undermines a full-blown European democracy.[85] This observation does not undermine the value of popular sovereignty, but rather illustrates the importance of the socio-political context for its institutionalisation. What kind of legitimation story for the EU might pass the realist test of critical responsiveness?

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[80] Alan S Milward, *The European Rescue of the Nation-State* (Routledge, 1992).

[81] Jonathan White, 'Emergency Europe' (2015) 63(2) *Political Studies* 300.

[82] Jan-Werner Müller, 'Beyond Militant Democracy?' (2012) 73 *New Left Review* 39.

[83] Moravcsik (n 65).

[84] Richard Bellamy, '"An Ever Closer Union Among the Peoples of Europe": Republican Intergovernmentalism and Demoicratic Representation Within the EU' (2013) 35(5) *Journal of European Integration* 499, 508.

The historical circumstances coming about through economic and technological globalisation might become a catalyst for a further change in our understanding of legitimacy.[86] Traditionally, a commitment to popular sovereignty tends towards two possible solutions for the EU's democratic deficit. The so-called communitarians argue that full sovereignty should be retained at the national level.[87] By contrast, some argue that a European superstate is the only legitimate solution.[88] In these accounts, popular sovereignty remains wedded to state sovereignty. The changes in historical circumstances might not constitute a break with our disenchanted, democratic beliefs. However, in our age, meaningful self-determination relies on interstate cooperation. From this perspective, European integration may be turned into a project to *maintain popular sovereignty at the expense of a degree of state sovereignty*.

In the current normative debates on the EU's democratic deficit, the ideal of the EU as a demoicracy is in line with this position. From a realist perspective, a demoicratic legitimation story of popular sovereignty holds some promise. Too little space is available to go into detail; please allow us to sketch the bare bones of this reconceptualisation. A shared assumption of the demoicrats is that Europe remains a polity of peoples. For realists, this assumption is acceptable as part of the socio-political circumstances in which the subjects of EU-rule find themselves. The second assumption is that this reality does not necessarily disqualify the European *kratos* as illegitimate. European peoples can govern together rather than as one, which solves the need for a European *demos*. This demoicratic literature offers multiple justifications for this *kratos*, while it diverges on how to legitimate the Union.[89] The essential point is that democratic rule is possible despite persisting *demoi*.

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[85] Richard Bellamy and Dario Castiglione, 'Three Models of Democracy, Political Community and Representation in the EU' (2013) 20(2) *Journal of European Public Policy* 206.

[86] For the following argument, we draw upon: Jan Pieter Beetz, 'Popular Sovereignty in Europe' (PhD thesis, University of Exeter, 2015). This argument draws upon demoicratic arguments by: Bellamy (note 84); Kalypso Nicolaïdis, 'European Demoicracy and Its Crisis' (2013) 51(2) *Journal of Common Market Studies* 351; Francis Cheneval and Frank Schimmelfennig, 'The Case for Demoicracy in the European Union' (2013) 51(2) *Journal of Common Market Studies* 334.

[87] Noel Malcolm, *Sense on Sovereignty* (Centre for Policy Studies, 1991).

[88] Glyn Morgan, *The Idea of a European Superstate: Public Justification and European Integration* (Princeton University Press, 2005).

[89] Jan Pieter Beetz, "Stuck on the Rubicon? The Resonance of the Idea of Demoi-cracy in Media Debates on the EU's Legitimacy" (2015) 22(1) *Journal of European Public Policy* 37, 39–40.

Taking inspiration from this literature, we propose that, in an age of globalisation, national popular sovereignty is only attainable through cooperation between Europe's peoples, but arguably at a level that may not permit the immediate implementation of the justice-driven visions of some prominent European philosophers such as Philippe Van Parijs and Rainer Forst: the supranational and transnational legal and administrative institutions envisaged by their redistributive projects seem likely to exacerbate Euroskepticism, as a post-functionalist analysis suggests.[90] Without a more convincing legitimation story, the stability of European integration remains endangered. The point is not that the aforementioned philosophers do not propose desirable political institutions and policies. If citizens widely accepted or acquiesced to EU-rule then these projects would have a chance. Solidarity might well become a spin-off of political institutions. The reality, alas, is different. The Union has for a significant number of its citizens become a source of resentment, and building solidarity upon resentment is an elusive prospect. The realist view asks us to prioritise legitimacy over justice,[91] hence the pre-eminence of popular sovereignty.

Demoicratic popular sovereignty continues to demand popular empowerment at the European level. Delegation and pooling constitute a necessary reordering of power in new historical circumstances; however this reordering should be accompanied by a reordering of democracy. Most importantly, national parliaments should remain ever present in decision-making procedures in order to effectively institutionalise vote and voice in Europe's heterogeneous polity. Ideally, these democratic bodies funnel existing disagreements at the national level, while at the European level, they can engage in cross-national funnelling of disagreements on the direction of the Union. A European demoicracy could pass the realist test of critical responsiveness: 'popular sovereignty + contemporary Europe = a European demoicracy'. In practice, this legitimate political order should provide a stable foundation on which to build solutions to Europe's challenges.

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[90] Liesbet Hooghe and Gary Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2009) 39(1) *British Journal of Political Science* 1.

[91] Enzo Rossi, 'Justice, Legitimacy and (Normative) Authority for Political Realists' (2012) 15(2) *Critical Review of International Social and Political Philosophy* 149; Matt Sleat, 'Justice and Legitimacy in Contemporary Liberal Thought. A Critique' (2015) 41(2) *Social Theory and Practice* 230.

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Ben Crum

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Public reason and multi-layered justice

Ben Crum

Professor of Political Science, Department of Political Science and Public Administration, Vrije Universiteit Amsterdam, Amsterdam, Netherlands

ABSTRACT
This paper aims to outline a multi-layered conception of justice that is appropriate to the circumstances of justice in the European Union. Adopting the Rawlsian concept of public reason, it submits that duties of justice can only be imposed to the extent that the actors involved command a shared set of reasons by which these can be justified. The paper's argument follows Rawls in using public reason to justify a qualitative distinction between the demands that derive from the domestic and the international domain of justice. It criticises Rawls, however, for misjudging the radical implications of this position in a world that has become much more internationalised than he recognised it to be.

KEYWORDS Global justice; John Rawls; multilevel governance; public reason; transnational solidarity

1. Introduction

Which claims to justice can be sustained beyond the nation-state? Typically, the philosophical debate on global justice has pitted 'statists',[1] who insist that that claims to justice only obtain within the confines of sovereign states, against cosmopolitans,[2] who maintain that the concept of justice is inherently universal and contest any distinctive normative standing of nation-states. The terrain seems however to be shifting towards more nuanced positions that allow for some claims to justice to obtain in the international sphere but also recognise the privileged status of the nation-state as a vehicle of justice.[3] One way to think of this is to consider national conceptions of justice as embedded within, and constrained by, a universal conception

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CONTACT Ben Crum ben.crum@vu.nl

[1] Typically, Thomas Nagel, 'The Problem of Global Justice' (2005) 33 *Philosophy & Public Affairs* 113.

[2] Notably, Charles Beitz, *Political Theory and International Relations* (Princeton University Press, 1979); Simon Caney, 'Cosmopolitan Justice and Equalizing Opportunities' (2001) 32 *Metaphilosophy* 113.

[3] For instance, Mathias Risse, *On Global Justice* (Princeton University Press, 2012) esp. ch 3; Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33 *Oxford Journal of Legal Studies* 213; Lea Ypi, 'Statist Cosmopolitanism' (2008) 16 *Journal of Political Philosophy* 48.

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of human rights.[4] However, in this article, I want to consider the concept of justice at large and to focus in particular on what may be the most demanding claims of justice, namely social (or distributive) justice.

For this purpose, the European Union (EU) offers itself as a particularly useful laboratory. For one, nowhere in the world have nation-states become more politically intertwined than in the EU. As a consequence, the question of justice in Europe extends far beyond the basic principles of international law and human rights and has come to affect the whole gamut of claims that citizens can make on each other.[5] The particular question of social justice has become all the more urgent in Europe given the way the international financial crisis that started in 2008 has impacted on it and, indeed, continues to impact its member states in differential ways.

If we accept that national and international claims to justice can co-exist, the critical question becomes on what grounds the scope of these different claims can be arbitrated. So far, accounts that explicitly rely on such a pluralist understanding of justice have tended to remain rather intuitive on this question.[6] Taking up this challenge, this article proposes that the scope of claims to justice coming from different (national and international) levels of political order is best arbitrated on the basis of John Rawls's conception of public reason.[7] Essentially, following Rawls's lead, this article proposes that the scope of obligations of justice is constrained by the depth of public reason: we can only oblige each other to political norms (or laws) to the extent that we command a shared set of reasons by which these can be justified. By implication, the public reason available in the context of the nation-state allows for a much wider range of justificatory claims, and thus for a thicker conception of justice, than can be invoked at the international level.

This public reason-based approach challenges functional approaches to international justice that maintain that claims from competing conceptions of justice can effectively be arbitrated by reference to quasi-objective standards like 'affectedness'[8] or 'the mutual production of collective goods'.[9] Instead, the proposed focus on public reason has much more affinity with those accounts of justice that are grounded in discursive processes of justification.[10] However, these accounts tend to suggest that the capacity of justification knows no borders, while the concept of public reason instead underlines how the substance of any conception of justice relies on the discursive resources available in actual political contexts. Ultimately, the public reason-based approach offers a context-sensitive, hermeneutic, account of multilevel justice in an internationalising world.

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[4] Sionaidh Douglas-Scott, 'Justice and Human Rights: The Basic Structure for EU Constitutionalism?', paper presented at the ACCESS EUROPE Workshop 'Towards a Grammar of Justice in EU Law', Amsterdam, 6–7 November 2014; Sionaidh Douglas-Scott, 'Human Rights as a Basis for Justice in the European Union' (2017) *Transnational Legal Theory* doi:10.1080/20414005.2017.1321907.

[5] See the range of contributions in Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing, 2015).

[6] See Risse (n 3); Helena De Bres, 'The Many, Not the Few: Pluralism About Global Distributive Justice' (2012) 20 *Journal of Political Philosophy* 314.

[7] John Rawls, *Political Liberalism* (Columbia University Press, 1993) ch VI; John Rawls, 'The Idea of Public Reason revisited' in John Rawls (ed), *The Law of Peoples* (Harvard University Press, 1999) 129–80.

[8] Carol Gould, *Globalizing Democracy and Human Rights* (Cambridge University Press, 2004); Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (Columbia University Press, 2009).

[9] Sangiovanni (n 3) 220.

This article thus radicalises the way that Rawls employs the concept of public reason to differentiate the domain of international justice from the domain of domestic justice in order to outline a multi-layered conception of justice in an internationalising world. The main grounds on which this article turns against Rawls are empirical rather than theoretical. I argue that Rawls downplayed the radical implications of his position in a world in which nation-states have become much more intertwined than he recognised. This empirical critique is particularly pertinent in the context of the EU. Hence, to illustrate the implications of a multi-layered conception of justice, the paper elaborates on the circumstances of justice as they obtain in the EU and the way these can be translated into specific duties of social justice that complement those already obtaining at the national level. The presumption of multi-layered public reason suggests that an international social order (or, specifically, a 'Social Europe') should be conceived not so much as replacing national welfare regimes but rather as complementing and reinforcing them.

The rest of the argument is organised into five sections. The next section introduces Rawls's idea of public reason. Section 3 then examines how he extends this idea to the international realm, and Section 4 picks up on these arguments to outline the multi-layered conception of public reason. The argument then turns to the case of the EU, with Section 5 sketching the circumstances of justice that apply there and Section 6 proposing a set of duties of social justice that can be justified under these circumstances. A final section concludes.

2. Rawls's idea of public reason

John Rawls introduces the idea of public reason in his *Political Liberalism* as a complement to the conception of justice that obtains in a given political community.[11] Public reason embodies the liberal principle of legitimacy for reaching political decisions and, in turn, also provides the basis on which the substantive principles of justice are elaborated.[12] It does so by delineating the form and range of arguments that are considered to have a claim to validity in public debate, that is, the norms that govern the process of justification, and the process through which the ideas that become publicly validated are differentiated from those that are not.

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[10] Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Columbia University Press, 2012); Jürgen Neyer, *The Justification of Europe: A Political Theory of Supranational Integration* (Oxford University Press, 2012).

[11] Jonathan Quong, 'Public Reason' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2013), <http://plato.stanford.edu/entries/public-reason/> accessed 5 April 2016.

[12] Rawls 1993 (n 7) ch VI, esp. pp. 224ff.

Public reason can be understood as an exclusionary device as it places certain kinds of argument off limits in the justification of fundamental political institutions. Most importantly, it disqualifies nonpublic reasons from operating as adequate grounds in public debate, that is, reasons that may be valid within private associations of like-minded people but that are inherently based on a particular conception of the good life.[13] In a pluralist society, public reason has to appeal to grounds that are in principle acceptable to citizens regardless of their particular worldviews or religious convictions. More broadly, Rawls's conception of public reason excludes reasons that are illogical, non-generalisable (ie discriminating) and that rely on claims that are widely recognised to be plainly false.

In more positive terms, public reason can be seen to correspond to a kind of *ethos* of the citizen in a pluralist society. Rawls thus suggests that public reason reflects 'a conception of democratic citizenship in a constitutional democracy'.[14] This conception of democratic citizenship presumes citizens to be reasonable in the claims they put forward in the public realm, which requires them to recognise one another as free and equal and to sincerely strive for fair terms of social cooperation. It furthermore involves a sense of reciprocity in adducing reasons that one expects also to be reasonably acceptable to others who do not share one's own conception of the good life, and a willingness to compromise and to accept reasonable terms proposed by others.

Public reason mixes universal and more contextual elements. Obvious universal elements are the requirement to comply with the essential basic principles of logic and generalisability. More substantively, as regards the political conception of justice, Rawls maintains that there are three (universal) *essentialia* to any such conception: a list of basic rights, liberties and opportunities; an assignment of special priority to these rights, liberties and opportunities that protects them against competing political considerations; and measures ensuring that all citizens have adequate all-purpose means to make effective use of these freedoms.[15] He concedes however that these basic requirements allow for a 'family' of liberal, political conceptions of justice. While both kinds of universal elements (logical and substantial *essentialia*) thus constrain the character that public reason may take, they are indeterminate as to its specific contents. Principles of argumentation or claims to rights that carry particular weight in one political society or in relation to its particular political conception of justice need not necessarily carry the same weight in others.

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[13] Rawls 1993 (n 7) 220f.

[14] Rawls 1999 (n 7) 136.

[15] Rawls 1993 (n 7) 223; 1999 (n 7) 141.

If the idea of public reason serves to identify the grounds on which valid justifications are to be discriminated from invalid ones, it essentially operates as an extension of the idea of 'the original position', as it is fundamental to Rawls's original *A Theory of Justice*.[16] The original position serves as a 'device of representation' of the ideal situation in which persons meet 'as free and equal, and as properly informed and rational'[17] to determine the essentials of the constitutional fundamentals under which they are to live together. For this purpose, these persons are to be stripped of the particular circumstances, experiences, capacities, worldviews, etc. that define them in actual life and may provide them with special interests and advantages. These distinguishing features are to be covered up by a so-called veil of ignorance.[18] Thus, rather than having the knowledge of their eventual station of life, rational persons are to consider society as a collection of positions that they have an equal chance to end up in: they may be born rich or poor, with few or many capacities, female or male, as part of any ethnic group, etc. Crucially, the 'test' of the original position requires individuals to detach from their immediate interests, to incorporate the perspectives of others in forming their political judgements, and to justify these judgements with reasons that they expect to be reasonably acceptable to all.

The design of the original position, its appeal to rationality, and its bracketing of contingent features suggest that it can, in principle, be rather unproblematically extended to a universal, world scale.[19] However, in hindsight, one can recognise that the original position does not just serve as an instrument for abstract rational choice but rather as a mechanism that calls upon a sense of mutual engagement and reciprocity with the actual co-citizens one encounters in one's society. Crucially, from its original inception, Rawls has insisted on the reflexive nature of the thought process that the original position engages one in.[20] It is in the interplay of the political structure as we encounter it and the thought-experiment of the original position that our rational judgement is formed: the original position helps us to assess whether indeed each of the members of an actual community can be expected to consent to the basic political structure.[21] In Rawls's later work the notion of the original position retreats behind the more general idea of 'public reason'—even if, arguably, the original position remains its most articulate representation and one that is particularly apt for Western societies. Public reason is better able to acknowledge the fact that the selection of reasons acceptable to citizens remains somewhat contingent on the specific historical and social conditions of their society.[22]

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[16] John Rawls, *A Theory of Justice* (Oxford University Press, 1971).

[17] John Rawls, *Justice as Fairness, A Restatement* (Harvard University Press, 2001) 16.

[18] Rawls (n 16) s 24.

[19] Cf. Thomas Pogge, *Realizing Rawls* (Cornell University Press, 1989).

[20] Rawls (n 16) 20f.; cf. Amit Ron, 'Rawls as a Critical Theorist: Reflective Equilibrium after the "Deliberative turn"' (2006) 32 *Philosophy & Social Criticism* 173.

[21] Rawls (n 17) s10.4; See also Rawls 1993 (n 7) 25–26.

Thus, Rawls's adoption of the notion of public reason underlines that he has moved away from the quasi-universalist—rational and a-historical—model of the original position. Yet, it does not necessarily follow that 'public reason can have currency only among fellow citizens in a closed society who share a common political identity', as Onora O'Neill concludes.[23] Rather, I take the essential upshot of Rawls's account of public reason to be that the scope of obligations of justice is constrained by the depth of public reason: we can only oblige each other to political norms (or laws) to the extent that we command a shared set of reasons by which these can be justified. To the extent that public reason can be recognised to operate beyond borders, there is certainly a basis for duties of justice that transcend bounded national societies.

3. Public reason beyond borders

Rawls's treatment of the issue of international justice in his *The Law of Peoples*[24] has been much contested and many have tended to consider it as an aberration from his preceding work on (domestic) justice. Notably, his treatment fundamentally diverges from those who had previously extended his original theory of justice into the international domain to defend a cosmopolitan position in which the principles of social justice obtain universally, irrespective of any particular national bonds.[25] On the other hand, *The Law of Peoples* has been taken to reserve the domain of justice to conditions in which political sovereignty is effectively in place.[26] In contrast to both these positions, I want to propose that the way that Rawls distinguishes between the domains of domestic and of international justice is best understood as informed by his understanding of public reason. In this reading, the idea of public reason essentially provides the overarching normative frame that reconciles Rawls's law of peoples with his theory of justice, and helps to appreciate the continuity between *Political Liberalism* and *The Law of Peoples*. Importantly, and against strictly sovereigntist positions,[27] the idea of public reason does provide a foundation for claims of international justice, even if these fall short of those of domestic justice.

The most fundamental difference that separates Rawls's law of peoples from his theory of justice is that its subjects are not individuals but their collectivities, the peoples or—for most practical purposes—the (government) representatives by which they are incorporated. Rawls defines a people by the sharing of a political structure, cultural orientations (or ‘common sympathies’) and a political conception of justice.[28] It is within a people that the capacity of self-government can be realised, as its members are together engaged in the development of a shared sense of public reason and of a common conception of justice.[29]

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[22] Rawls 1993 (n 7) 251.

[23] Onora O'Neill, 'Political Liberalism and Public Reason: A Critical Notice of John Rawls, Political Liberalism' (1997) 106 *The Philosophical Review* 420.

[24] John Rawls, *The Law of Peoples* (Harvard University Press, 1999).

[25] Most notably, Beitz (n 2); Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Polity Press, 2002).

[26] Nagel (n 1).

[27] Nagel (n 1).

As Rawls considers peoples to be the proper subjects of the law of peoples, he refuses to apply his initial conception of the original position to determine the fair terms of cooperation between them. Instead, he outlines a second, international, original position that is fundamentally different from the first. While the national original position requires all positions in society to be represented, the international original position involves representatives of the different peoples rather than the whole range of individual positions within them.[30] As a consequence, the norms that emerge from the international original position have as their object the proper conduct between peoples organised in their national communities rather than that they have any direct effect for all of them as individuals.[31]

Eventually, the principles included in the law of peoples involve, among others, the mutual recognition of freedom and independence of (communities of) peoples, the duty to observe treaties, the duty of non-intervention and the right to self-defence.[32] Furthermore, Rawls’s principles of the law of peoples include the obligation of peoples to honour human rights and the duty of assistance towards peoples living under extremely unfavourable conditions. Yet the obligations towards members of another people, especially those involving the redistribution of social and economic goods, fall far short of the duties that Rawls assumes to obtain between the members of one and the same people.

Importantly, Rawls justifies his alternative modelling of the international choice situation with reference to the idea of public reason.[33] While one might have expected the domain of public reason to be confined to a people,[34] Rawls actually does recognise some form of public reason to operate *between* different peoples.[35] In parallel to the way that public reason *within* a people is informed by the mutual recognition among its members as free and equal *persons*, the public reason between peoples is informed by the principle of their operating as free and equal *peoples*. However, while public reason within liberal societies appears to be relatively thick so that it allows citizens to exchange views with each other and to develop the political conception of justice under which they are united, international public reason is taken to be much thinner,[36] as it amounts to little more than a duty to justification and lacks a broader context of common standards by which the validity of these justifications can be assessed. Notably, Rawls suggests that the parties representing peoples are ultimately not held to account in the international domain but only in the context of their own domestic public reason.[37]

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[28] Rawls 1999 (n 24) 23–24.

[29] Cf. Stephen Macedo, ‘What Self-governing Peoples Owe to One Another: Universalism, Diversity, and The Law of Peoples’ 72 (2004) *Fordham Law Review* 1721.

[30] Rawls (n 24) 30, fn. 32.

[31] Cf. Charles Beitz, ‘Rawls’s Law of Peoples’ (2000) 110 *Ethics* 678.

[32] Rawls (n 24) 37.

[33] Rawls (n 24) s 6.

[34] See for instance O’Neill (n 23) 420.

[35] Cf. Alexander Brown, ‘On the Public Reason of the Society of Peoples’ (2010) 2 *Public Reason* 43; William Smith ‘Deliberation Beyond Borders: The Public Reason of a Society of Peoples’ (2010) 7 *Journal of International Political Theory* 117.

Rawls's distinction between the domestic and the international domain essentially serves as a buffer for the political autonomy that citizens realise domestically under conditions of a thick public reason. This political autonomy needs to be protected against external claims that stand on a thinner foundation of justification. The flipside of this political autonomy is that a people also carries considerable responsibility for its achievements and its prosperity.[38] Typically, Rawls submits that, when it comes to the wealth on which a people can draw, '[t]he crucial elements that make the difference are the political culture, the political virtues and civic society of a country, its members' probity and industriousness, their capacity for innovation, and much else'.[39] Hence, he refrains from requiring full international solidarity for any economic misfortune a people may suffer (beyond the extreme of a sudden crisis that calls for immediate relief). Instead, the international duties of social justice that he does recognise remain limited to a 'duty to assist other peoples living under unfavourable conditions that prevent their having a just or decent political and social regime'.[40] It is this conclusion in particular that sets Rawls apart from advocates of cosmopolitan justice who hold that the principles of social justice obtain universally, irrespective of any particular, national, bonds.[41]

Rawls's international original position captures the diversity that separates different peoples (nations); how their positions are inherently marked by different interests, cultures and histories, even if they may be able to maintain peaceful and cooperative relations with each other. This recognition is premised on the value of nation-states as established political embodiments of self-governing communities with their own conception of justice.[42] At the same time, being premised on the notion of public reason, Rawls's distinction between the domestic and the international is not absolute but relative, with a people enjoying a privileged position exactly because of the particular thickness of public reason it engenders.

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[36] Rainer Forst, 'Towards a Critical Theory of Transnational Justice' in Thomas Pogge (ed), *Global Justice* (Blackwell Publishers, 2001) 170.

[37] Rawls (n 24) 56–57. Compare the way that Cohen builds upon Rawls to propose a concept of 'global public reason' that provides minimal standards by which to assess (other) political societies in Joshua Cohen, 'Minimalism about Human Rights: The Best We Can Hope For?' (2004) 12 *Journal of Political Philosophy* 190.

[38] Cf. Macedo (n 29).

[39] Rawls (n 24) 108.

[40] Rawls (n 24) 37 and s 15.

[41] See (n 2) and (n 25).

The idea of public reason thus offers a coherent justification for the distinction between the national and the international realm of justice. However, if Rawls failed to tease out the full implications of this account, it is probably mostly for his under-appreciation of the extent to which internationalisation has advanced already and how this reflects upon public reason beyond the nation-state. In Rawls's conception, the law of peoples is primarily driven by the negative common good of averting conflict and war.[43] However, in a world in which nation-states are increasingly interdependent, additional elements may be adduced to the public reason obtaining between them that rely on more positive common goods, like international financial stability, open trade and the prevention of climate change. This is particularly apparent in the context of regional integration as it has taken place in Europe.[44] However, before moving to this particular case, it is useful to lay out the key elements of the multi-layered conception of public reason that thus emerges.

4. A multi-layered conception of public reason

The central claim from this reconstruction of Rawls's concept of public reason is that the scope of legitimate decisions and of any obligations of justice that they imply is constrained by the depth of public reason: we can only oblige each other to political norms (or laws) to the extent that we command a shared set of reasons by which these can be justified. Public reason thus emerges as the metric by which to estimate the scope and depth of the political obligations that people can impose upon each other. In spatial terms, one can distinguish different circles of involvement and of corresponding levels of public reason that are nested within each other. Thus, the public reason we share and the political obligations that it can serve to justify emerges as a multi-layered construction, with a thick body of (domestic) public reason at the foundation and a much thinner body of public reason at the global top.[45]

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[42] Macedo (n 29) 1723; Stefan Rummens, 'No Justice Without Democracy. A Deliberative Approach to the Global Distribution of Wealth' (2009) 17 *International Journal of Philosophical Studies* 657; cf. Cohen (n 37) 197–8.

[43] Rawls (n 24) ss 5 and 6; Alan Buchanan, 'Rawls's Law of Peoples: Rules for a Vanished Westphalian World' (2000) 110 *Ethics* 702.

[44] Notably, pressed by an exchange with Philippe Van Parijs, Rawls dedicated a footnote to the possibility of liberal societies desiring to form something like 'a single federal union'. Notably, in this procedure, before members of different peoples are to engage with each other directly, they first have to decide on the dissolution of their own people. Rawls excludes the possibility of direct transnational engagement between persons who are, and continue to be, part of separate peoples. See Rawls (n 24) 43, fn. 53; John Rawls and Philippe Van Parijs, 'Three Letters on the Law of Peoples and the European Union' (2003) 7 *Revue de Philosophie Économique* 7.

This multi-layered conception does not contest that the capacity to reason is universal. There may well be reasons whose validity is accepted across the globe, for example the argument of human dignity that can be used to justify essential human rights.[46] Also certain kinds of reasons are by definition excluded from qualifying as public reasons, for instance because they are logically inconsistent or offend against the principle of generalisability. However, the scope of validity of many reasons is more limited and contextual. Consider, for example, the value that different peoples may attach to the family or to work.

In line with Rawls's understanding, public reason transcends the differences between people in terms of the interests they have or the conceptions of the good life that they hold. Indeed, public reason is a precondition for them finding common norms to accommodate these differences and to live on peaceful and fair terms. Public reason thus manifests itself as an overlapping consensus to which people can come from different perspectives but still agree on a set of shared reasons that are recognised to be valid between them.

Public reason always operates in a given context; and it relies on certain common practices. Indeed, the more substantial the common practice, the thicker the public reason is likely to be.[47] Generally, one can say that public reason tracks common practices and, even more so, common political arrangements. The absolute minimum of such a common practice would be the mere mutual awareness of each other as human beings in the world. A next step can consist of interactions at the level of elites (ie diplomacy) or of economic transactions. Such interactions presuppose some shared understandings or norms, and by actually engaging in them they may serve to deepen public reason. Obviously, this is even more the case when people are brought under a common political structure, like an international organisation. The mutual engagement within the confines of such an organisation and the public deliberation about the norms (laws) that it is to adopt are to facilitate the evolution of a body of common standards of reasoning.

In principle, the nature of public reason thus allows it to be of a continuous character, sliding from thick to thin as the circle of social engagement expands. In practice, however, public reason tends to crystallise around political structures—like the nation-state, the EU or, indeed, the world at large —which have the capacity to serve as carriers of conceptions of justice.

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[45] Cf. Ronald Tinnevelt and Helder De Schutter, 'Global Justice as Justice for a World of Largely Independent Nations? From Dualism to a Multi-level Ethical Position' (2008) 11 *Critical Review of International Social and Political Philosophy* 519; Rummens (n 42). Compare Risse (n 3) on 'graded internationalism' and 'pluralist internationalism'.

[46] Cf. Rainer Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' (2010) 120 *Ethics* 711; Douglas-Scott (n 4).

[47] Cf. Sangiovanni (n 3) 220.

Historically, the level of the nation-state has come to claim a special position within the multi-layered structure of public reason.[48] Conditions like determinate and strong external borders, an extensive state apparatus, monolingualism, integrated national mass media and a national party structure have been particularly conducive to facilitating the deepening of public reason in the national domain. There is nothing special to the level of the nation-state per se. However, the nation-state can claim a privileged position in the imposition of political obligations to the extent that it has been able to foster the emergence of public reason and, hence, allows for the exercise of collective political autonomy. Importantly, however, this claim is a function of the thickness of public reason achieved and it is certainly not a claim that excludes the operation of public reason beyond the nation-state.

Indeed, to the extent that states increasingly engage in international agreements and their citizens are involved in transnational interactions, the scope of public reason beyond the nation-state steadily expands, even though (for now) it is likely to remain at considerable distance from the level secured within nation-states. Thus, while the grounding of political obligations in public reason does recognise the normative relevance of contingent historical conditions (the nation-state in particular), it does not hinge on the hypostatisation of the national community. Instead, it is inherently dynamic; as transnational relations allow public reason to evolve, so the grounds and scope of political obligations can shift.

Importantly, the different levels of public reason should not be understood to operate in hierarchical terms. Depending on the character of interactions and the degree and forms of norm institutionalisation, public reason takes on a different quality at different levels of political order. Thus, public reason at the domestic level is conditioned by the legal form of laws that most norms adopted take and the centrality of the values of order and welfare at that level. In contrast, public reason at the international level has to take account of the fact that politically binding arrangements at that level tend to take the form of international treaties in the adoption of which states, as collectivities representing their people, claim a central role.

What is more, the very notion of public reason implies each level of public reason to command a sphere of autonomy that is not subordinate to a higher actor or level. In fact, given the nature of public reason, lower levels take in principle normative primacy over higher ones. In other words, whenever the demands of justice from different levels of political order collide, the burden of argument is on the higher level. Grounding political obligations in public reason thus involves a bottom-up logic, in which priority is given to the thicker public reason in local (decentralised) settings.[49] At the same time, the inherently public character of *public* reason gives it a definite expansive orientation: we assume the capacity to reason to be universal and public reason to thicken with the increase of mutual interaction. In the end, then, the relation between the different levels of public reason is best thought of in terms of complementarities and the challenge is to find ways in which the conceptions of justice that they convey can reinforce each other.

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[48] Risse (n 3) chs 2 and 3.

[49] Cf. Rummens (n 42).

5. The circumstances of justice in the EU

The implications of this grounding of political obligations in public reason can be illustrated by the experiences of the EU. Regional cooperation in Europe has widely come to be recognised as having ushered in a system of multilevel governance in which the supranational and the national (and the regional) level of government have become systematically entwined without amounting to a fully integrated, federal structure.[50] Nevertheless, national differences have remained remarkably resilient in the EU. As much as European states may resemble each other in that they are constitutional democracies with an embedded liberal economic order, and as much as cooperation may have proceeded, there remain fundamental differences between the political structures of Estonia and those of Spain, or between the social-economic structures of Sweden and Slovakia. Importantly, much of the identities and values that Europeans have continue to be shaped by their particular nationalities and the language, social and cultural settings that come with them. These differences are very likely to be reflected in the ideas people hold as to what is to be involved in an acceptable and reasonable constitutional order.[51] Also in institutional terms, the national political orders continue to take precedence over the European one. Not only have the member states been instrumental in establishing the Union in the first place. They continue to have an indispensable, mediating role in the processes of collective political will-formation in its daily operation.[52]

Still, if anywhere public reason has thickened beyond national boundaries, then it is in the EU. After more than 60 years of European integration, relations between the member states of the EU are informed by much more than the mere threat of possible infringements in domestic sovereignty. Instead they have come to be informed by an awareness of the deep interdependence of their domestic policies. This is particularly apparent for the economy of the single market of goods, but it also applies to, for instance, the operation of large-scale companies, student mobility, labour migration and the single currency. Thus, contrary to Rawls, citizens in the EU have come to be enmeshed in a wide range of social, economic and cultural transnational relations that are no longer effectively mediated by their nation-states.

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[50] See, for example, Gary Marks and Liesbet Hooghe, *Multi-level Governance and European Integration* (Rowman & Littlefield, 2001) and Ian Bache and Matthew Flinders (eds.), *Multi-level Governance* (Oxford University Press, 2004).

[51] Cf. Juan Diez Medrano, *Framing Europe, Attitudes to European integration in Germany, Spain, and the United Kingdom* (Princeton University Press, 2003).

[52] Cf. *Brunner v The European Union Treaty* (Maastricht-Urteil), 89 BVerfGE 155–213.

This suggests that the EU is not, or no longer, appropriately regarded as merely a union of states. However, given the persistent diversity of *demoi* or people, neither is it appropriately seen as an integrated union of citizens. Indeed, as both levels play a role that cannot be reduced to the other, the Union is best regarded as a 'union of citizens and states', in which citizens are directly engaged with each other while remaining part of their nation-states as well.[53]

If, then, in the EU the scope of public reason concerning common affairs is considerably larger than has traditionally been assumed between states, this public reason is further substantiated by the fact that all its member states are democracies. Thus, the mutual interdependencies can be incorporated and elaborated in domestic debates, and the perspectives that are developed on them are likely to be more varied and sophisticated than the mere insistence on the promotion of the national interest. Rather than that the national interest can be assumed as a more or less objective given, it becomes the object of a process of deliberation.[54] What is more, with increased international interaction, the public discussion of national interests may well take account of those being elaborated in other states. At times, positions and experiences of other states may even be incorporated into the domestic public reason.[55] Indeed, this is exactly what is indicated to take place through the transnationalisation or 'Europeanisation' of domestic public spheres.[56]

To sum up, despite European integration, public reason in the EU remains strongly anchored at the national level. Still, there is no denying that, in the wake of intensifying transnational relations, there is also increasing engagement across national boundaries. Notably, however, in terms of public reason this takes a transnational form that is premised on the persistence of the nation-states, rather than that some form of EU-wide public reason emerges that eclipses the nation-states.

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[53] Ben Crum, *Learning from the EU Constitutional Treaty* (Routledge, 2012) ch 5; cf. Kalypso Nicolaïdis, 'The New Constitution as European "Demoi-cracy"?' (2004) 7 *Critical Review of International Social and Political Philosophy* 82–83.

[54] Thomas Risse, 'A European Identity? Europeanization and the Evolution of Nation-State Identities' in Maria Green Cowles, James Caporaso and Thomas Risse (eds), *Transforming Europe, Europeanization and Domestic Change* (Cornell University Press, 2001) 198–216.

[55] Deborah Savage and Albert Weale, 'Political Representation and the Normative Logic of Two-Level Games' (2009) 1 *European Political Science Review* 63.

[56] Ruud Koopmans and Jessica Erbe, 'Towards a European Public Sphere? Vertical and Horizontal Dimensions of Europeanized Political Communication' (2004) 17 *Innovation: The European Journal of Social Science Research* 97; Thomas Risse, *A Community of Europeans? Transnational Identities and Public Spheres* (Cornell University Press, 2010).

6. Multi-layered social justice in the EU

Against this background, we can turn to the kind of political duties of justice that can be justified in the context of the EU. I specifically focus on duties of social justice as these are particularly demanding, which is underlined by the fact that exactly on these duties the position of John Rawls deviates from that of most cosmopolitans.[57] A casual look at the EU goes to confirm this particular challenge as it suggests that, however far integration may have progressed in Europe, it has certainly not led to a fully integrated supranational welfare state. European citizens are not committed to the duty to pay taxes to finance extensive redistributive programmes. Even if the EU does command some redistributive instruments—like the Common Agricultural Policy, the regional and structural funds and investments in research and common European infrastructural projects[58]—it will require a budgetary revolution before the total EU budget (which currently stands at around 160 billion Euros) will leave a systematic impact on the total EU GDP of 14,710 billion Euros.[59]

Still, this state of affairs does not preclude the operation of duties of social justice across the EU member states. However, what is crucial, and implied by the multi-layered conception of public reason, is that any such duties beyond the nation-state are based on a distinctive set of reasons and need to be seen as essentially complementary to the duties that are already maintained within the different member states. Furthermore, when considering any duties of justice at the international level, it is useful to distinguish between duties that are basically inter-national in character, as they speak to the relations between the states as states, and those that are rather transnational in character, in that they speak to the relations that the citizens of these states maintain directly with each other. Thus, a multi-layered system of EU social justice emerges that is based in three complementary dimensions: the national, the international and the transnational.[60]

Starting with the *international* level, one has to recognise that there is a common value base on which the EU member states have come to converge.[61] The very substance of this order is indicative of the degree of convergence in the terms of public reason among the EU member states and of the fact that this common value base has significant social consequences. By way of the EU

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[57] See Section 3 above.

[58] Cf. Ian Bache, 'The Politics of Redistribution' in Knud Erik Jørgensen, Mark Pollack and Ben Rosamond (eds), *Handbook of European Union Politics* (Sage, 2007) 395–412.

[59] Figure for 2015 from Eurostat, <http://ec.europa.eu/eurostat/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=tec00001&language=en> accessed 1 February 2017.

[60] Cf. Sangiovanni (n 3) 217; Ben Crum, 'A Multi-Layered Social Europe? Three Emerging Transnational Social Duties in the EU', in Amandine Crespy and Georg Menz (eds), *Social Policy and the Eurocrisis. Quo Vadis Social Europe* (Palgrave Macmillan, 2015) 161–81.

[61] But contrast Justine Lacroix, 'Does Europe Need Common Values?' (2009) 8 *European Journal of Political Theory* 141.

Treaty,[62] member states are committed to support each other in the maintenance of a rather specific political order: one that relies on the consolidation of democratic political institutions, the protection of the rule of law and general basic rights and the preservation of a market economy. Throughout the history of European integration, this commitment to, what we may call, 'mutual institutional stabilisation' has been of essential importance for member states: from the post-war 'normalisation' of West-Germany, and the consolidation of democracy in Greece, Spain and Portugal, to the accession of the countries from Central and Eastern Europe. Once EU membership has been attained, the shared values are continuously reinforced by the engagement within the Union institutions as well as by the economic interdependencies that are built up. Ultimately, the maintenance of the Union's values is secured by the back-stop of Article 7 TEU that provides for a procedure to suspend member states in case of 'a serious and persistent breach' of the Union's fundamental values.

Turning to the *transnational* dimension, the key social duty that EU citizens owe each other is enshrined in the paramount status of the principle of free movement at the heart of the single European market. Certainly, the objective of a single European market is primarily driven by the neoclassical assumption that the integration of markets allows for a more efficient allocation of production capacities. However, from a social justice perspective, the very idea of market integration can be seen as involving the removal of illegitimate and arbitrary sources of inequality and the creation of equal economic opportunities. Essentially, this duty of justice operates through the disqualification across all EU member states of reasons that seek to reserve certain economic opportunities for nationals and to exclude citizens from other EU states from them.

In practice, a critical role in upholding the principle of free movement has been played by the European Court of Justice (ECJ). Notably, the ECJ has tended to elaborate the principle of economic non-discrimination on a rather functional basis, in which it is made subservient to the realisation of economic freedom and 'undistorted competition' in the European single market.[63] In contrast, from the perspective of public reason, the more appropriate and appealing underlying principles to assess and guard the single market, through which it can also be linked to the different national conceptions of public reason, would rather be the pan-European realisation of non-discrimination and of cross-border equality of opportunity. The principal focus would then be to secure for all EU inhabitants equal opportunities to share in the benefits of the single market, regardless of their nationality or place of residence.

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[62] Art. 2 TEU and Art. 222 TFEU.

[63] This has particularly come to the fore in the ECJ judgements in the *Laval* (ECJ C-341/05) and *Viking* (C-438/05) cases. For commentary, see Christian Joerges, '*Rechtsstaat* and Social Europe: How a Classical Tension Resurfaces in the European Integration Process' (2010) 9 *Comparative Sociology* 65; Fritz Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot be a "Social Market Economy"' (2010) 8 *Socio-Economic Review* 211.

Finally, we need to consider the relation between an EU system of social justice (and the transnational and international duties that it involves) and the *national* systems already in place. As argued, whatever EU duties of social justice may emerge, they certainly cannot replace the social policies of the member states. The EU institutional framework is far from equipped to take over the redistributive commitments maintained by the member states. A Rawlsian perspective helps to appreciate that the limited redistributive capacity of the EU is essentially justified by the primary claim to self-government of its member states and the relative thinness of transnational public reason. Thus, we instead have to conceive of EU social obligations as complementary to the national conceptions of social justice.[64] Such a complementarity with national conceptions of social justice would even appear a necessary characteristic of any conception of international justice. Importantly, there remains great variation between the social arrangements in the different EU member states—appropriately referred to by Fritz Scharpf as 'the legitimate diversity of existing welfare-state institutions and policy legacies at the national level'.[65] This implies that, besides the 'positive' duties of institutional stabilisation and economic non-discrimination, social justice beyond the nation-state comes with a 'negative' duty to respect each other's political autonomy in defining one's social policy objectives nationally.

Certainly, there are potential tensions between the principle of transnational free movement and the preservation of national social policy autonomy. Importantly, however, states have a collective interest to resist engaging in a regulatory race to the bottom, and international cooperation may serve to underpin such resistance. At the same time, different policy mixes allow states different kinds of comparative advantages in the international economy, and certainly for the highly advanced European economies these are unlikely to be found in deregulation alone.

Eventually, what emerges through the interplay of these three dimensions—the international, the transnational and the national—is anything but a fully integrated EU conception of social justice. Rather than considering this state of affairs as a failure of the promise of 'Social Europe', the multi-layered perspective recognises the appropriateness of the continued primacy of the EU member states in matters of social justice. Yet, it suggests that this need not preclude the identification of complementary duties of social justice at the international level. Importantly, however, these supranational duties of justice are to complement rather than to substitute for the established conceptions of justice at the domestic level.

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[64] Sangiovanni (n 3).

[65] Fritz Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' (2002) 40 *Journal of Common Market Studies* 653.

7. Conclusion

This paper has set out to defend the position that the scope of political obligations is constrained by the depth of public reason: we can only oblige each other to political norms to the extent that we command a shared set of reasons by which these can be justified. Following Rawls's cue, public reason is taken to be multi-layered in character, with thick public reason obtaining within well-integrated political societies and a much thinner form operating between them. By implication, political obligations can take different forms at different levels of political association, and any conflicting claims between them are to be arbitrated on the basis of the depth of the public reason available. Thus, while this perspective does allow for transnational obligations of justice to arise, it recognises the level of the nation-state to claim a privileged normative position.

As a public reason-based approach, the multi-layered perspective confirms the appropriateness of the continued primacy of the EU member states in matters of social justice. As public reason remains relatively thin at the international level, there is little ground for a comprehensive European conception of justice. Still, it is clear that the social fates of Europeans have become deeply interdependent and that the way these interdependencies play out depends very much on the common 'basic structure' that has emerged between them. Thus, instead of thinking of the EU as an emerging welfare state writ large, social Europe is better thought of as a multi-layered construction. In such a multi-layered perspective, supranational duties of justice may emerge to reflect international convergence on specific substantial principles and institutions, and even serve to reduce arbitrary inequalities between citizens across countries. Above all, however, the supranational level has a crucial role to play in protecting and reinforcing the capacity of the EU member states to maintain their own conception of social justice.

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Sionaidh Douglas-Scott

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Human rights as a basis for justice in the European Union

Sionaidh Douglas-Scott[a,b]

[a]Anniversary Chair in Law, Queen Mary University of London, London, UK; [b]Honorary Fellow and former Professor of European and Human Rights Law, Lady Margaret Hall, University of Oxford, Oxford, UK

ABSTRACT
Justice is a contested concept. A more graspable understanding of it requires the context of 'injustice'. As such, a main theme of this paper is the disjunction between, on the one hand, strong reactions to injustice and a desire for some effective 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. This paper also argues that it is the very *sui generis*, supranational status of the EU that creates particular obstacles to the realisation of a shared sense of justice. Due to this structural limitation, it is argued that any agreed 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.

KEYWORDS Justice; injustice; human rights; EU law; transnational law

I. Why justice is particularly perplexing for the EU

Justice seems essential as a normative basis for the EU. What might be said of a society or legal entity that would not embrace justice as a founding value? However, for a long time, the notion of justice was overlooked as a conceptual tool for analysing EU problems. Yet the events of the first decade of the twenty-first century—the threat from terrorism, the financial crisis and the problems of migration—have forced justice onto the agenda for the EU in a way that might have seemed inconceivable in the 1990s,[1] when some commentators were forecasting, somewhat smugly, in the wake of the fall of the communist bloc, an 'end of history',[2] as if the West had emerged into a Kantian age of perpetual peace.

CONTACT Sionaidh Douglas-Scott ✉ s.douglas-scott@qmul.ac.uk

[1] See Grainne de Burca, Dmitry Kochenov and Andrew Williams (eds), *Europe's Justice Deficit* (Hart Publishing, 2015).

[2] See, eg, Francis Fukuyama, *The End of History and the Last Man* (Free Press, 1992).

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But perhaps justice was best left out of the limelight. For any attempt to bring it into focus reveals its essential perplexities in the EU context, which may be summarised in the following five failures of justice in the EU: (1) justice is not specifically stated as an EU value; (2) justice is inadequately conceived in the context of the Area of Freedom, Security and Justice (AFSJ); (3) social justice is almost impossible to fulfil in EU law; (4) the Eurozone crisis illustrates a lack of solidarity and disregard for justice and (5) it is impossible to find an overarching concept of justice for the EU, given its complex and indefinable nature (except in the very limited sense of 'critical legal justice'). What should we conclude? Except for the crucial task of ensuring respect for critical legal justice (which is essentially based on ensuring observation of the rule of law) and human rights, it is probably wise for the EU to remain unambitious regarding justice as a value and goal, because the EU will always fail to live up to expectations. This does not mean we should not rigorously point out injustice where it occurs, and focus on injustice as a motivation or call to action. However, human rights (whether or not we understand them as a manifestation of justice) provide the most comprehensible and compelling moral basis for the EU. The rest of this paper will set out these arguments in greater detail.

Omission of justice as a specific value for the EU

Justice is notably not presented as one of the EU's founding values in Article 2 of the Treaty on European Union (TEU). We are told that justice 'should prevail' in this society but not that justice is one of its values. Why not? One might believe it is possible to infer justice as a value for the EU from the sum total of all the other values, aims, objectives and principles that it embraces. Yet this seems unsatisfactory—one should not have to extract or distil justice as a value from a range of clauses and provisions—its salience surely renders its importance freestanding. For, as John Rawls stipulated, '[j]ustice is the first virtue of social institutions'—a suggestion to take seriously, even if one does not concur with Rawls' own substantive theory of justice. So this is the first problem, or obstacle, for justice in the EU—*the omission of justice as a stated value.*[3]

An inadequate concept of justice in the context of the AFSJ

Where we do find explicit references, the picture does not improve greatly. It might be thought that an entity proclaiming the term 'Justice' in its title would be a good place to examine the salience of justice for the EU. The EU created the AFSJ in 1997 in the Treaty of Amsterdam. This was supposed to make the

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[3] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 3.

EU citizen feel more included by the EU, as well as solving some particular functional issues. Within the scope of the AFSJ, the EU adopts many measures not traditionally associated with EU action, including measures on terrorism, migration, visas and asylum, privacy and security, the fight against organised crime and criminal justice.

Unfortunately, it has become almost a commonplace to state that, within the AFSJ, freedom and justice have been sacrificed to security. This means, among other things, that important human rights are sacrificed. Although the EU Charter of Fundamental Rights (EU Charter) is now binding, the EU has been slow to adopt measures on rights, and too quick to adopt more coercive measures such as the European Arrest Warrant (EAW) or a very broad definition of terrorism.[4]

It is hugely significant that within the scope of the AFSJ are matters which have been core state powers—the provision of security, the provision of justice and the relation between the individual and public authorities—indeed almost at the heart of constitutional law. If the AFSJ is to be further developed, it should preferably be as a space of hope, rather than what Pocock has called a 'Machiavellian moment' (ie an attempt to remain stable by any means in the face of a stream of irrational events).[5] However, also highly significant is the fact that the interpretation given to justice in the AFSJ is very narrow, namely it is focused on the 'administration of justice'.[6] Such an interpretation is no doubt supported by the wording in some language versions of the EU treaties—the Dutch and German versions use the word *Recht*, which does not have the same associations as 'justice' in English or in French, but connotes a narrower concern for law and order. The EU's 1998 Vienna Action Plan asserted the need to 'bring[] to justice those who threaten the freedom and security of individuals and society' and therefore a need for crime control, for justice to be administered, and for judicial cooperation.[7] Justice is perceived as a means of dealing with those who threaten society. This understanding leaves little room for any richer sense of justice, and therefore justice, in the context of the AFSJ, is elided and impoverished in meaning.[8]

Part of the problem is a failure of supranationalism. Are freedom, security and justice actually goods that the EU can deliver? What is it about them that requires their realisation at EU level? And is there sufficient consensus at EU level about what they might mean? There has been very little reflection on this. It is with the concept of security that there exists some agreement that the EU can add value, at least if Eurobarometer polls are reliable. Unfortunately, the overwhelming focus has been on security as a means of crime control, which is a limited notion, rather than as a social and political good, which is a deeper understanding that might also require the nurturing of freedom and realisation of justice.[9] Effective supranationalism also requires states to have trust in each other's' criminal justice provisions, so that the mutual recognition that underpins much of the AFSJ can function adequately. Yet it is a formidable task to create such trust, because EU states do not deliver uniform standards of justice. All member states are not equal, and cracks appear in the system. A dominant emphasis on security (ie automatic surrender for the EAW) is at the expense of justice (protection of rights). Integration is unbalanced, and although an internal market in security may be in the process of being created, it is at the expense of progress in human rights, freedom and/or justice. Justice in the AFSJ is curtailed by the problems of supranationalism.

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[4] See, eg, European Arrest Warrant (EAW), (Framework Decision 2002/584/JHA 1 (EU) on the EAW and the surrender procedures between Member States OJ [2002] L 190/1; Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.

[5] JGA Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press, 2nd edn 2003).

[6] See Ester Herlin-Karnell, 'The Domination of Security and the Promise of Justice: On Justification and Proportionality in Europe's "Area of Freedom, Security and Justice"' (2017) *Transnational Legal Theory* doi:10.1080/20414005.2017.1316637 in this issue.

[7] Council and Commission Action Plan (EC) on how best to implement the Treaty of Amsterdam on an area of freedom, security and justice [1999] OJ C19/1.

[8] See further on these points, Ester Herlin-Karnell, 'Two Conceptions of Justice in EU Constitutionalism—The Shaping of Security in Europe' Inaugural lecture, VU University Amsterdam.

The lack of a shared conception of social justice

Article 3 of the TEU states that the EU 'shall promote social justice'.[10] Yet is it possible to secure 'social justice' in an EU which has for so long focused on market ideology? Admittedly, EU Law has been beneficial for achieving equal treatment for men and women. However, for the most part these benefits have been market driven, animated by the need to secure a level playing field in an area of free movement, rather than being a result of a freestanding concern for equality. And for much of the EU's existence, equal treatment law failed to extend beyond the employment field and beyond the equal treatment of men and women to discrimination of other sorts, such as discrimination based on sexual orientation or race.

However, it would be unfair to accuse the EU of actively opposing social justice. The situation is rather that a shared, redistributive social policy is unrealisable in the EU when its member states are divided on whether social welfare should be market driven or redistributionist and welfarist (although the Eurozone crisis now seems to have imposed austerity throughout the EU). Indeed, if anything, there exists a mutual mistrust, which was illustrated by the polarised reactions to the Lisbon Treaty (with some states seeing earlier drafts as too free market and Anglo-Saxon in approach), and by the squabbles over how to deal with the financial crisis of the euro. In such an environment, EU joint action is restricted to the lowest standards acceptable to all states, or to the very limited redistributive functions in the fields of regional development policy and the varying budgetary contributions of its member states.

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[9] See Lucia Zedner 'The Concept of Security: An Agenda for Comparative Analysis' (2003) *Legal Studies* 23; Andrew Williams, *The Ethos of Europe* (Cambridge University Press, 2010).

[10] Article 3(2) TEU reads: 'It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child'.

Given these circumstances, as Fritz Scharpf has asserted,

> European integration has created a constitutional asymmetry between policies promoting market efficiencies and policies promoting social protection and equality. National welfare states are legally and economically constrained by European rules of economic integration, liberalization, and competition law, whereas efforts to adopt European social policies are politically impeded by the diversity of national welfare states, differing not only in levels of economic development and hence in their ability to pay for social transfers and services but, even more significantly, in their normative aspirations and institutional structures.[11]

The failure to reconcile market liberalisation with social standards also serves to exacerbate the unease voiced by some over immigration in EU states. In any quasi-federal system, free movement of labour should be accompanied by financial provision to ameliorate social costs that arise (eg for housing, education, healthcare, etc.). This could be funded by a levy on the economic interests that benefit from immigration, for example, large food processors and supermarkets. No such systems exist within the EU.

In any case, it is difficult to see how the EU can promote itself as the sort of social market community urged, for example, by Habermas,[12] when so many of its members would veto such a role for it (no doubt in many cases due to an absence of solidarity), and when the austerity measures taken in the wake of the Eurozone crisis undermine social justice. The real worry is that, while the EU lacks its own redistributive social justice policy, for the reasons already outlined, it nonetheless interferes with member states' social policies, depriving them of an ability to regulate. This results in asymmetrical and unbalanced integration.

Abnegation of justice in the crisis of the Eurozone

A further example of injustice in the EU is provided by the handling of the Eurozone crisis. Since its onset, EU states and institutions have stumbled from summit to summit, instigating a seemingly incessant series of measures in an ad hoc and reactive way.[13] Once we examine the details of what the EU has actually done in its attempts to solve the Eurozone crisis, we can see that the scope and impact of measures taken have been formidable, as for example the imposition of 'conditionality' clauses in bailout agreements. The conditions imposed by the Greek bailout in 2010 (described by one author as 'the most drastic intervention in a member state's economic and social policy ever decided by the EU'[14]) required Greece to end its deficit situation by adopting measures including the reduction of pensions, the reduction of public investment and a reform of wage legislation in the public sector. Beyond specific bailout packages, more general legislative measures were introduced, such as the 2011 measures colloquially known as the 'Six-Pack',[15] or the 2012 'Fiscal Compact Treaty',[16] under which EU institutions may scrutinise national budgets prior even to scrutiny by their state's parliament (a huge challenge to democracy in itself), and, if a state fails to reduce its debts, they can be subject to very large fines. All of these measures were adopted with little debate and a minimum of public awareness. Most Europeans have little idea that such changes, involving such inroads into their government's economic sovereignty, have taken place.

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[11] Fritz Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' (2008) Max Planck Institut für Gesellschaftsforschung Working Paper 02/08. See also Christian Joerges, 'The *Rechtsstaat* and Social Europe: How a Classical Tension Resurfaces in the European Integration Process' (2010) 9 *Comparative Sociology* 65–85.

[12] See, eg, Jürgen Habermas, 'Why Europe Needs a Constitution' (2001) 11 *New Left Review* 5–27.

Further, it would seem that many of these measures have brought the EU into conflict with both human rights and its own treaties and proclaimed values. For example, the measures which impose unilateral cuts on wages, pensions and public spending, and restrict collective bargaining certainly do not enhance the objective of social justice set out in Article 3 of the TEU. Further, conditionality clauses in the bailout agreements, which impose restrictions on the availability of collective bargaining, show little concern for the freedom of association recognised in the European Court of Human Rights (ECtHR) and the EU Charter.[17]

A final criticism is that Article 7 of the Fiscal Compact Treaty, which deals with the excessive deficit procedure, requires the member states in the European Council to support the European Commission in its decision to take disciplinary proceedings against another member state, and to base their voting decisions exclusively on matters of fiscal probity, that is, to have no regard to other matters such as key constitutional principles and human rights. Such a requirement does not comply with other provisions in the EU treaties, particularly those that set out the importance of a plurality of values for the EU, such as human rights, solidarity and equality referred to in Article 2 of the TEU. As Articles 2 and 3 of the TEU make clear, the EU is not a one-dimensional organisation established for, or limited to, the aim of implementing austerity.

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[13] For more on these matters, see the special issue in the *European Law Journal*: Hermann Heller, 'Authoritarian Liberalism?' (2015) 21(3) *European Law Journal* 295.

[14] Roland Bieber, 'Observer—Policeman—Pilot: On Lacunae of Legitimacy and the Contradictions of Financial Crisis Management in the EU' (2011) European University Institute Law Working Paper 2011/16.

[15] The EU 'Six-Pack' sets out provisions for fiscal surveillance, strengthening the earlier Stability and Growth Pact (under which general government deficits must not exceed 3% of GDP and public debt must not exceed 60% of GDP).

[16] This treaty is an intergovernmental treaty, signed by all members of the EU, except the Czech Republic and the UK.

[17] Further, all EU member states have ratified ILO Convention no 154 on collective bargaining and ILO Convention no 87 on freedom of association.

To be more specific about the *injustices* of the Eurozone crisis, some of the measures taken in response appear to be in direct contradiction to the EU's avowal of social justice in Article 3 of the TEU, as well as an infringement of certain human rights, for example those of collective bargaining and freedom of association in the EU Charter. Further, notably, the crisis of the Euro is also a crisis of supranationalism, of a failure to perceive the dangers of integration at one level (monetary union) without integrating in other areas (namely economic or fiscal union), as well as being a crisis of governance. The solution to this crisis is not obvious. Few member states desire the deeper union and central control of a fiscal union. So action continues to be ad hoc and fragmented, and it seems that much of the resultant injustice is attributable to the very fact of unsatisfactory, unbalanced integration.[18]

The impossibility of an overarching concept of justice for the EU

Yet one must also engage with the nature of the EU itself. Is it even possible to find a workable, overarching concept of justice for the EU? It will be noted that I have not yet suggested any specific meaning or interpretation for the concept of justice. Indeed, justice may seem so elusive as to be a utopian ideal. There is no one determinate way of interpreting it. It may be understood in a rich, substantive sense, or as a complex of fair procedures. It may be deemed to be closely tied to particular circumstances, or proclaimed as a universal good for all times. Justice is clearly related to law, but nonetheless justice also operates as an external standard by which we evaluate law. Derrida captures these perplexities by interpreting justice as a complex of *aporia*, one that demands immediate action, yet infinite time, knowledge and wisdom in order to do 'justice'.[19] Indeed, Douzinas and Geary find justice to be somewhat of a philosophical failure, given that no society or ideology has yet developed a determinate and accepted theory of justice, and it is therefore probably fair to assume that no such theory can be developed.[20]

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[18] ie Economic and Monetary Union assumes a level playing field. But states are not equal in this union. Conditions that work for Germany do not work for Greece or Ireland.

[19] Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority' in Drucilla Cornell,Michel Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge, 1992).

[20] Costas Douzinas and Adam Geary, *Critical Jurisprudence* (ch 4, Hart Publishing 2005).

It is clear that attaining justice in the supranational and pluralist EU raises very complicated issues. It raises justice in all of its manifold forms—substantive and procedural, distributive and corrective. For example, the question of securing social justice in the EU raises very thorny issues of distributive justice, whereas the problems of the AFSJ will often turn on issues of corrective justice, which raise different concerns, but may be equally problematic for a transnational community. Different parties within the EU—states, EU institutions and private parties—may clearly also have different obligations of justice.

The very nature of the EU itself causes problems. Namely, it is unfinished, inchoate and there exists no consensus as to its nature. Should we conceive of it as an international organisation, as evolving into some sort of 'superstate', or as a *sui generis* organisation? Clearly, the ways in which we conceive of the EU will colour our impressions of its capacity for justice. If we believe it is becoming something more state-like in nature, then we may require it to generate effective bonds and the type of solidarity necessary for a more substantial concept of justice.

Further, some of the examples of injustice in the EU have been generated by the EU's very nature as a supranational project. Unless the EU becomes a superstate, a role almost no one would wish for it, it will always have competences in some areas and very limited powers in others. Its institutions will lack the full institutional capacities of national governments and parliaments. They will not be democratic or accountable in the way that state institutions or parliaments may be, and indeed may not seem democratic at all. Yet those areas in which the EU's powers are strong will inevitably cause spillover problems that are beyond the capacity of functionalist theories to solve. But the urgency of moments of crisis—9/11 and the Eurozone crisis—will require swift solutions, which, however, the EU will be perceived as lacking the full legitimacy to dispense with.

Consequently, there is a sense in which *injustice* (and not just the inefficiency bemoaned by some EU commentators) is built into the very nature of the EU itself. Yet an end to, or reversal of, integration provides no obvious solution. A vicious circle exists. The imperatives of globalisation—global financial markets and security threats—render cooperation necessary, and with it the injustices rendered by the failures and imbalances of integration.[21]

Therefore, the problem of justice for the EU is considerable and may be summarised in the following ways:

(i) Justice is undervalued, in that it is not specifically named as a value for the EU in Article 2 of the TEU (although it is more indirectly referenced). It is also undervalued in that its interpretation in the context of the AFSJ has been reduced to that of the 'administration of justice' and therefore instrumentalised.

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[21] For a very different, Rawlsian approach, see Ben Crum, 'Public Reason and Multi-layered Justice' (2017) *Transnational Legal Theory* doi:10.1080/20414005.2017.1299537 in this issue.

(ii) There are specific problems in generating a sense of justice for the EU—namely, how to agree to such a concept in a transnational context where there is no shared culture or sense of solidarity, or indeed how to find agreement as to what the EU itself is or should become. Achieving social justice is particularly problematic. Transnational law, pluralism and integration wreak particular injustices, yet a reverse of integration does not seem feasible.

(iii) The concept of justice is itself contested and subject to a plurality of interpretations.

Taken together, these points might seem almost to amount to a counsel of despair, causing a resigned pessimism on the issue of justice in the EU. Should we therefore agree with Ulrich Haltern, who suggests that those who aim to create a normative foundation for the EU 'will be prone to making a laughing stock of themselves rather than suiting the Union's purpose', who proposes instead that the EU be celebrated for what it is—'a shallow' and 'superficial' entity engineered for the 'privileging of the commercial above all else'?[22] Well, not quite.

This paper continues with three suggestions for taking the debate further. First, it argues for a non-ideal understanding of justice, based on the intuition that our sense of injustice precedes any notion of justice. A sense of injustice provides a strong motivation that is lost if justice is translated into an abstract ideal, unrealisable in practice. Any attempt to articulate a notion of justice for the EU should work with the following intuition: our concept of justice should be motivating and practicable. Second, it argues that a consensus may be reached on a limited, but nonetheless important notion of justice *within* (EU) law, which I name 'critical legal justice'. Finally, it suggests human rights as the most motivating and progressive ethical component for the EU.

II. The primacy of injustice?

The world that we inhabit, let alone the EU, is immeasurably unjust. Douzinas and Gearey refer to the 'great paradox' in which, '[w]e know injustice when we come across it … but when we discuss qualities of justice both certainty and emotion recede … Justice and its opposite are not symmetrical'.[23] As they also note, justice is far more likely to move people in its breach than as an academic exercise or 'piece of rhetoric that fails to convince or enthuse'.[24] Perhaps, then, we should look more closely at the notion of *injustice*.

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[22] Ulrich Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination' (2003) 9(1) *European Law Journal* 14.

[23] Douzinas and Geary (n 20) 28.

An awareness of injustice avoids an over-focus on ideals and takes account of the contextual inspiration for our sense of justice, the fact that we derive it from our experiences and responses to varieties of situations. A sense of injury comes first, which is then followed by a demand for justice. In the past decade, there has been a turn toward non-ideal theorising about justice. A notable exponent of this is the Nobel laureate Amartya Sen, who has been critical of such accounts as those of Rawls for being overly focused on an ideal, 'transcendental' theory of justice and, as a consequence, unable to offer practical guidance for remedying injustice in the actual world.[25] Sen argues that '[a] theory of justice that can serve as the basis of practical reason must include ways of judging how to reduce injustice and advance justice, rather than aiming only at the characterisation of perfectly just societies … '[26]

Given the inescapable diversity of human practices and capabilities, and the pluralism of values, there exists no common standard, no single unit of measurement for justice. What is needed is a theory of justice for an imperfect world, which will enable us to move from a situation of 'more unjust' to 'less unjust'. Sen's 'realisation-focused comparison' focuses on a shared sense of injustice which people possess, enabling them to agree that a given situation is unjust, even if they cannot agree on one single reason why they believe it to be so. For example, individuals may not agree on the reasons why they believe the war in Iraq is unjust but may nonetheless agree that it is unjust. Our starting point should be the reflection that what justice is seen to require in a particular situation is initially motivated by feelings of injustice.[27]

However, this emotive reaction must, for Sen, be coupled with the exercise of reason. Although our emotions should not be ignored, it is necessary to assess them critically in order to avoid a visceral, biased and subjective notion of justice. Furthermore, our decisions must be able to withstand public scrutiny, and so public reason is necessary to combat injustice.

Nonetheless, while fairness might seem to demand impartiality, this need not lead to a singular, unique conception of a just society, for there exist diverse ways in which people may be impartial. Rawls' mode of impartiality described in his *Theory of Justice* assumes a closed, self-contained society.[28] Instead of Rawls' 'original position', Sen prefers the approach adopted by

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[24] *Ibid.*

[25] See, in contrast, Crum's Rawlsian approach in this issue.

[26] Amartya Sen, *The Idea of Justice* (Allen Lane, 2009) ix.

[27] See also Hauke Brunkhorst, *Critical Theories of Legal Revolutions* (Bloomsbury, 2014), who at 7 writes, 'The central driving force of the social is a struggle between material and ideal interest over normative claims and violations that are articulated by the societal sense of injustice'.

[28] This assumption is highly problematic for the EU, as the positing of a single, self-contained society seems to remove the possibility of transnational justice.

Adam Smith, whose *Theory of Moral Sentiments* employs an 'impartial spectator'. For Smith, the impartial spectator is a creature produced by the moral power of the imagination, who shapes the moral sensibility of an ethically sensitive person. Smith's spectator does not represent an ideal, for he requires one to look at issues 'with the eyes of other people', and from the viewpoint of 'real spectators'. Thus the plurality of impartial reasoning is ensured, and is more appropriate in the transnational, multi-cultural EU, where no one monolithic perspective exists.

The key point here is that we place unrealistic demands on citizens if we start with justice as an ideal, pre-existing, neutral concept that is self-produced by a rational mind, as it is understood in the work of Kant, who requires us to act, 'not from inclination, but duty … the necessity to act out of reverence for the law'.[29] But this is uninspiring for most people—it represents a distant icon, or even a delusion. It is injustice, and its emotional sources, which inspire most people. Social psychology therefore is as much a crucial component of our moral reasoning as philosophy.

In summary, we should not ignore the importance of our sense of injustice as a motivator, a call to resistance, instilling us with a sense of responsibility to take action, in Sen's words, 'a matter of actualities, of preventing manifest injustice in the world, of changes, large or small, to people's lives—the abolition of slavery, improvement of conditions in the workplace—realisation of an improvement in the lives of actual peoples'.[30] This is an important realisation. It underlines the fact that, even in the absence of any coherent, substantive concept of justice for the EU overall, a sense of injustice may animate EU citizens, making some recognition of some correlative principles of justice necessary. In the final sections, I consider how this intuition can be put to work, namely, how is it possible to realise a non-ideal, practical, yet motivational understanding of justice for the EU.

III. The rule of law and critical legal justice

Law is not merely a theoretical pursuit or an academic discipline. Law is also practical—lawyers, judges and others daily face the necessity of actually doing justice in their application and enforcement of the law. They cannot put into practice unworkably idealistic theories, but nor can they give up and renounce law's aspirations to justice. How then, given the perplexities of justice in the EU outlined in the last sections, may EU law make good on its task to do justice?

The rule of law is what is very often understood by the concept of 'legal justice', importantly acknowledging the rule of law as form of justice. There exists a strong intuition that power, position and status should not corrupt justice, and the rule of law functions to constrain the abuse of power. The rule of law has traditionally been seen to require laws to rest on legal norms that are general in character, relatively clear, certain, public, prospective and stable, as well as to recognise the equality of subjects before the law.[31] Some would add to this the protection of fundamental rights,[32] although, if it includes too many rights, the simplicity of the rule of law is lost, and it begins to look more like a complete social philosophy.[33] The rule of law's benefits can be stated simply. Its observance enhances certainty, predictability and security, both among individuals and between citizens and government, as well as restricting governmental discretion. It restricts the abuse of power. Unlike many substantive theories of justice, the rule of law—at least in its more limited procedural sense—does not require adhesion to a particular moral philosophy. Indeed, for that very reason it may be thought to be a somewhat thin notion of justice. However, it has the very palpable advantage that, due to its lack of reliance on any comprehensive moral theory, it may be embraced by those with widely disparate moral beliefs, and by differing cultures and societies. This feature is also fundamental for any notion that is to find purchase in the EU.

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[29] Immanuel Kant, 'Groundwork of the Metaphysic of Morals', in *Practical Philosophy*, A. Wood (ed) (Cambridge University Press, 1996) 4.

[30] Sen (n 26) see ch 1.

Elsewhere I have argued that the rule of law be recast as 'critical legal justice', in order to distinguish it from discredited understandings of the rule of law.[34] I also wish to identify it more clearly with *justice* rather than with, for example, the bland identification of the rule of law as a value in Article 2 of the TEU, whose content is empty and undefined.[35] The application of critical legal justice involves, at its best, a remorseless and pervasive holding to account, and attention to the detail of law-making and transparency.

I do not argue that the rule of law exhausts justice, but rather that it is an essential element of it. It is also particularly needed in the EU. The *lack* of the rule of law has been glaring and damaging in areas of EU affairs, such as in the lack of access to courts in the criminal law pillar of the EU (at least until the Lisbon Treaty), or the lack of institutional balance which has granted too much power to unelected, unaccountable agencies such as Eurojust, Europol or member state executives in the Council, or in less than transparent, almost secretive, law-making.[36] This lack of the rule of law is also evident in the Eurozone, of whose measures Steve Peers has commented 'fail the test of transparency, because of their near-total complexity and unreadability, scattered across a dozen primary, secondary and soft-law sources, with more to come'.[37] Further, the experience of actions taken in the course of the 'war on terror', such as the willingness of some EU states to accept landing US flights in the course of 'extraordinary rendition',[38] and the unwillingness of the EU to take any action against those states under Article 7 of the TEU, also suggests that the rule of law, along with human rights, has been lost in a search for 'expedient' measures.

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[31] See, eg, Joseph Raz 'The Rule of Law and Its Virtue' (1977) 93 *Law Quarterly Review* 195, 196.

[32] See, eg, Lord Bingham, *The Rule of Law* (Allen Lane, 2010).

[33] Raz (n 31).

[34] Namely, those understandings of the Rule of Law that have been perceived as overly formalist and blind to difference.

[35] Notably, the rule of law is nowhere defined in the EU treaties and different member states have different understandings of it. For example, it is understood as *Etat de Droit* in France, *Rechtstaat* in Germany and so on. See also Laurent Pech, 'A Union Founded on the Rule of Law' (2010) 6 *European Constitutional Law Review* 359.

[36] See, eg, Case C-345/06, *Gottfried Heinrich* [2009] ECR 000. The Treaty of Prüm, dealing with justice and security matters, also provided a fine example of untransparent law-making.

Therefore, I identify the rule of law, recast as critical legal justice, as a form of 'legal justice'. However, I do not argue for it as an example of a transcendental, idealist theory, but rather, to use a prosaic term, as an element in the legal toolbox. Critical legal justice and (I shall go on to argue) human rights provide a background theory of justice (itself the product of a practical consensus around a variety of different accounts) within which EU law can operate. Understood in a non-perfectionist, non-ideal sense, they offer a meaningful mechanism by which legal institutions may avoid causing injustice and thereby a contribution to a better world. There exists a sufficient consensus for us to embrace their use.

IV. And finally … human rights

It is hard to be a critical lawyer or philosopher and yet provide some positive element, some platform for hope or concrete legal development; much easier to criticise and deride. Nonetheless, the imperative of the first section of this paper remains. How to instil a normative element into EU law, an element providing hope, and a belief that it stands for more than a market mentality and soulless bureaucrats. Yet such efforts seem almost doomed to fail, given the huge challenge set by the nature of the EU itself: the supranational project, the impossibility of attaining agreement from 28 different systems and cultures, most of them also internally pluralistic, not to forget the state as jealous guardian of values. Vital as it may be, critical legal justice is too minimalist to provide such inspiration.

If it is hard to articulate a substantive concept of justice for the EU, might not human rights instead serve as its normative foundation? Or do they also prove problematic, especially given the disdain that some states such as the UK seem to reserve for human rights, and more particularly supranational human rights systems? I believe it is possible for human rights to function as a basic value system and vehicle of normative legitimacy for the EU, and I briefly set out why below.

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[37] See Steve Peers, 'Analysis: Draft Agreement on Reinforced Economic Union' (December 2011) *Statewatch* 21 .

[38] For which, see *Al Nashiri v Poland* [2015] 60 EHRR 16. In that case the ECHR found that Poland hosted a secret CIA prison at a military intelligence training base in Stare Kiejkuty where the applicant was held *incommunicado* and tortured.

Human rights as the solution to the violation of justice

In *The Ethos of Europe: Values, Law and Justice in the EU*, Andrew Williams castigated the EU for lacking any coherence in its values, or ethos, and for the absence of a clear moral purpose, suggesting that the EU's ethos has been technical rather than ethical, with the requirements of the market providing a 'value surrogacy'.[39] The EU has not taken justice seriously. Williams' suggested solution to this failure is a human rights-centred concept of justice, because human rights 'provide cultural, philosophical and legal strength and application across the Member States', and are 'equipped to provide a framework for practical initiatives aimed to achieve substantive notions of justice'.[40] I agree with much of Williams' argument. Human rights are crucial and should play a vital role in European integration.

However, human rights are not identical to justice,[41] although they may be an essential part of an understanding of justice. For many years, concepts of justice flourished without any reference to human rights, which only really came into their own as a doctrine in the eighteenth century.[42] Yet for many, human rights now occupy the full terrain of moral discourse. While recognising that human rights and justice are not complete co-equivalents, for the remainder of this paper, I seek to focus on why human rights provide a more fruitful focus for our moral concerns in the EU, given the perplexities of justice already outlined.

Human rights as the first moral element in (EU) law

For many people, it is both essential and inevitable to turn first to human rights in the search for a moral element in law. It has become commonplace to describe them as a 'secular religion' for our times,[43] or, as depicted by Sousa Santos, a 'political esperanto',[44] a creed which has displaced other once-favoured concepts such as distributive justice or equality. Generally, they are seen as praiseworthy—it is hard to deride the ‘idea’ of human rights (as opposed to less than optimal applications of them).

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[39] Williams (n 9) 223.

[40] Andrew Williams, 'Promoting Justice after Lisbon: Groundwork for a New Philosophy of EU Law' (2010) 30 *Oxford Journal of Legal Studies* 663.

[41] For some time I struggled with this, believing that it should be possible to articulate a doctrine of justice for the EU that was not very heavily dependent on human rights. As will be clear, I have now given up this struggle, and believe that any workable doctrine of justice in the EU must be human rights-centred.

[42] See eg, Lynne Hunt, *Inventing Human Rights* (Norton, 2007).

[43] Elie Wiesel, 'A Tribute to Human Rights', in Yael Danieli et al. (eds), *The Universal Declaration of Human Rights: Fifty Years and Beyond* (Baywood, 1999).

[44] Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (Butterworths, 1995) 348.

Human rights also possess a crucial advantage over justice in the EU dimension. There has been political agreement over their content and articulation, and this agreement takes concrete form in the EU Charter (and also in the European Convention on Human Rights (ECHR)) which, since the Treaty of Lisbon, has been legally binding and has the same legal status as EU treaties. The EU Courts have been working with fundamental rights for many years, and although we may be critical of some of the attendant case law, at least there exists a receptiveness to fundamental rights as both a philosophical and legal concept (even if this receptiveness might seem at present to be undermined by the European Court of Justice’s (ECJ) focus on autonomy in its *Opinion 2/13* finding[45]). Although there has been criticism of the EU Charter and the ECHR (particularly from the UK), and though these documents may present their own problems, they nonetheless provide a material and powerful focus for the application of human rights. On the other hand, as we have seen, there exists no such consensus or focus on the notion of justice in the EU, which is omitted as an EU value and elsewhere (such as within the AFSJ) is degraded to a minor notion. Therefore, the basic point is this: there exists political consensus on human rights protection in the EU, translated into material form in the canonical text of the EU Charter. This presents an actuality and stability notably absent from other, more inchoate notions of justice in the EU.

Inadequacies?

However, this may seem overconfident. Politically, human rights may be at the fore, a marching banner of any politician, cause or global movement that wishes to claim a moral highground, but conceptually, there exists a great deal of scepticism as to what human rights actually are, a scepticism that is partly the product of so many (different and competing) causes and movements claiming human rights for themselves. Bentham’s critique that human rights are ‘nonsense on stilts’ highlights their wobbly conceptual foundation, still shaky 200 years later. Does this take us back to our quandary and dissatisfaction with justice? Can human rights be truly valuable, then, as weapons to counter injustice?

Moreover, converting human rights into law involves what Conor Gearty describes as a ‘Faustian bargain’.[46] Law is not notable for its radical, progressive nature, and the translation of rights into law risks jettisoning any emancipatory force rights may have, even setting them in opposition to politics. A legal claim for rights takes on an antagonistic form, constructed around a paradigm of two parties, diminishing any public interest. Marx's critique highlights how rights have been misused, appropriated and have become tools of ideology, a possession of the dominant class.[47] There is a risk of the corruption of human rights by law, and if the moral imperatives of human rights are contorted and made misshapen, then human rights become not a means of ensuring law's justice, but the reverse.

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[45] *Opinion 2/13 Accession to the ECHR* [2014] ECR 000. Here it was held that the EU draft agreement for accession to the ECHR was not compatible with EU law. See further, Sionaidh Douglas-Scott, ‘Opinion 2/13 and the “elephant in the room”: A response to Daniel Halberstam’ (2015) *VerfBlog*, online: <http://verfassungsblog.de/opinion-213-and-the-elephant-in-the-room-a-response-to-daniel-halberstam-2/>. accessed 2 March 2017.

[46] Conor Gearty, *Can Human Rights Survive? (Hamlyn Lectures)* (Cambridge University Press, 2006) 67.

Further, EU law presents its own problems in the human rights field. The history of human rights protection in the EU has not been a complete success story, and there still remains much to do.[48] First, the *scope* of EU law has become the main determining factor for the existence of a human rights violation, as the EU Charter cannot be applied if the action does not first fall within the scope of EU law. Yet, this jurisdictional limitation is complex in the extreme,[49] transforming legal argument and the legal literature into a debate about the arcane limits of the EU's competences rather than a focus on human rights. Moreover, the history of human rights protection in the EU, particularly through the legal decisions of the ECJ, readily translates into the form of a familiar narrative: that human rights were not concerns of the EU's founders, but instead grudgingly recognised by the ECJ in the face of a threat to the sovereignty of EU law, and European integration more generally, from national constitutional courts which threatened to disapply EU acts that failed to comply with their human rights standards. As a result, the fear is that human rights have become instrumentalised to further European integration.

Why do human rights still preoccupy us?

There is some truth in the suspicions of human rights manipulation outlined above. However it is not the whole story. Why then, in spite of these reservations, might human rights be the best hope for a normative element in EU law?

We should be clear that evidence of abuse of human rights for certain ends does not disqualify them as emancipatory devices. There are two explanations for this—one relating to psychological features and the other to the fact that human rights provide a hugely powerful vision of, and means toward, a democratic and socially just society. These explanations come together to explain the continued centrality of human rights as the prime ethical motivation for contemporary western society. They have a powerful practical force *and* relate to our innermost hopes and needs. These two points will be briefly explored.

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[47] Karl Marx, 'On the Jewish Question' in Waldron (ed), *Nonsense upon Stilts* (Methuen, 1987). In the past, rights in EU law have too often been invoked not by individuals, but by corporate applicants and other powerful entities. See, eg, Grainne de Burca, 'The Language of Rights and European Integration' in Gillian More and Jo Shaw (eds), *New Legal Dynamics of European Union*, (Oxford University Press, 1996).

[48] For more on this see, eg, Jason Coppell and Aidan O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 *Common Market Law Review* 669, 689; S Douglas-Scott, 'Human Rights in the European Legal Space?' in Jo Shaw, Stephen Tierney and Neil Walker (eds), *Europe's Constitutional Mosaic* (Hart Publishing, 2011).

[49] Examples may be found in cases such as Case 5/88 *Wachauf* [1989] ECR 2609; Case 60/00 *Carpenter* [2002] ECR I-627 and more recently Case C-34/09 *Ruiz Zambrano* [2011] ECR I-0000.

First, if the discourse of human rights had never been more than rhetoric, a handy tool for those in power, it would not have become hegemonic, and it would not have delivered actual results. Human rights have succeeded as the contemporary expression of aspirations for justice because they can produce concrete benefits and improvements for those who assert them. The power of human rights derives partly from their practical success. Rights are not merely individual protections against the state but also advance the case for societal transformation. Not only do human rights acknowledge the moral worth of the individual but they also recognise the individual's place in society as a member of different associations and groups. They can protect the weak and vulnerable and also those who have strong opinions to voice. The EU Charter does both by containing, in one document, both civil and political rights, and economic and social rights, thus stressing the indivisibility of human rights. Human rights place obligations on those in power that impact how they shape policy and make decisions (this is evident in the requirement that EU officials take account of the EU Charter in all their decision-making). They also restrain the abuse of power by imposing all sorts of side-constraints.

In sum, human rights articulate a vision of, and the practical means to work toward, a more just society and a flourishing democratic culture. As Williams argues, '[i]t is not self-evident that any other value has the capacity, normative stability or political support to produce an ethical framework that does justice to the EU's *sui generis* nature and position *and* will evoke sufficient public allegiance'.[50] I believe Williams' arguments to be persuasive. Human rights do evoke public allegiance in a way that abstract conceptions of justice do not, and a human rights-centred pathway toward justice in the EU carries a distinct advantage over an attempt to articulate and enforce a stronger more substantive conception of justice.

However, there is also a second explanation for the strong pull of human rights as the primary ethical basis for any modern polity, and it derives from our deep psychological needs. It can be explained in the following way. In contemporary western culture, governance is often experienced as devoid of any ethically compelling nature, and law is too often felt only as externally coercive and not internally binding or compelling. In the terminology of HLA Hart, few citizens experience an ‘internal point of view’.[51] In these circumstances, governments exert some control by exercising a politics of fear and security, and justice is diminished to an emaciated ‘administration of justice’. This provokes a condition of *anomie*, a crisis in which society provides little moral guidance to its citizens, engendering a sense of futility, emotional despair and emptiness,[52] what Nietzsche described as ‘the dead stop, a retrospective weariness, the will turning against life’.[53] One response to this crisis is nihilism, which takes a variety of forms—whether of destructive acts of terrorism, or instead, to use again the words of Nietzsche, ‘a European Buddhism’, namely a resigned recognition that life has no meaning or goal,[54] that in the absence of any universal moral standards, we can set our own, should we so wish. For the philosopher Simon Critchley, what is needed to combat this nihilist drift is a philosophical activism—an empowering concept of ethics.[55]

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[50] Andrew Williams, 'Promoting Justice after Lisbon: Prospects for a New Philosophy of EU Law' Warwick School of Law Research Paper No. 2009/07, 50.

In these circumstances, critical legal justice—however essential to prevent injustice—is unlikely to provide the motivation to overcome this sense of *anomie*, which is especially palpable in the EU context. The same may be said for notions of procedural justice or accountability more generally. For such concepts are responsive; they place checks and constraints on institutions and thereby reduce scope for injustice, but fail to establish any more active duties. They fail to inspire visions of a better society.

This is where human rights come into the picture. Faced with despair and the prospect of nihilism, we search for something to give meaning to our lives. In human rights, we locate the nearest thing to religion, or magic, for the attainment of our fantasy. Human rights play the role of Lacan’s *petit objet a*, or objects of our desire.[56] Conor Gearty writes of human rights being able to ‘work its magic’. This use of the word ‘magic’ is revealing—for the embrace of human rights can even take us beyond rational attachment, to the attribution of an almost supernatural force, identified in terms of religion, magic or ‘alchemy’.[57] It is very important to understand this facet of human rights—an almost irrational belief in their power. Indeed, the enduring nature of human rights is inexplicable if we ignore this dimension. So this second function of human rights is a psychological, almost spiritual one: to fulfil an essential gap, a desire for ethical resolution and moral meaning.

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[51] HLA Hart, *The Concept of Law* (Clarendon Press, 1961) 89.

[52] Emile Durkheim, *Suicide* (Free Press, 1951).

[53] Friedrich Nietzsche, *On the Genealogy of Morals* (1887) (Walter Arnold Kaufmann, tr, Vintage Books, 1969) 5.

[54] *Ibid.*

[55] Simon Critchley, *Infinitely Demanding* (Verso, 2007).

[56] For an expression of these views, see Costas Douzinas, *The End of Human Rights: Critical Thought at the Turn of the Century* (Hart, 2000); Renata Salecl, ‘Rights in Feminist and Psychoanalytic Perspective’ (1995) *Cardozo Law Review* 1121.

[57] See, eg, Patricia Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991); Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford University Press, 2010). The latter being a work by South African constitutional court judge discussing human rights cases.

It might be asked: is this not also the case with justice itself? Is not justice also a placeholder for meaning in our lives, an object of desire? This may be so. But, within the EU, justice has not to-date developed the kind of normative stability nor popular public allegiance to which Williams refers to as applying in the case of human rights. Therefore, I believe these two different explanations come together to elucidate the continued centrality of human rights as the most salient moral force in the EU.

V. Conclusion

Therefore, human rights bring with them much promise and ambition—self-evidence, universality, inalienability, 'values for a godless age'.[58] Even if on closer inspection many of these promises seem incapable of being fulfilled—if no adequate foundation can be found for them, if they are just as often used cynically as earnestly—they are still available as a resource, more powerful perhaps than any other moral resource for law today. Even those most sceptical of what law has become see human rights as a means of returning ethics to law, acknowledging their utopian, emancipatory possibilities.[59] Whatever the source of conflict, there is still the essence of a common language here, a currency that all can understand, even if it is interpreted differently. There is, further, a means of importing morality and ethics into law, the basis for substantive justice, and a reminder that we should not tolerate the intolerable or suffer the insufferable.

I have tried to highlight the injustices of aspects of EU law, and suggested that there exists no overarching theory of justice, per se, that is workable for the EU. The rule of law, reimagined as critical legal justice, is a vital tool for deterring injustice, but inadequate of itself as a motivating force and articulation of principles for a more just society. It is in human rights, even if sometimes unsatisfactory in their concrete realisation in the EU, that we find essential moral ingredients for EU law, not only as ingredients of critical legal justice, but also going beyond it, as positive ideals or aspirations for the law.

Marie Benedicte Dembour wrote a highly regarded book with the title *Who Believes in Human Rights?*[60] She acknowledged that her book grew out of both an attraction to, and a discomfort with, human rights; a certain ambivalence.

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[58] Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights,* (Penguin, 2000).

[59] See, eg, Douzinas (n 56).

[60] Marie-Benedicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge, 2006).

Now is the time for the EU to move beyond ambivalence and to state clearly that it believes in human rights as the best route to justice.[61]

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[61] Accession to the ECHR, in spite of *Opinion 2/13* of the ECJ, would be one important step in this process.

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The domination of security and the promise of justice: on justification and proportionality in Europe's 'Area of Freedom, Security and Justice'

Ester Herlin-Karnell

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The domination of security and the promise of justice: on justification and proportionality in Europe's 'Area of Freedom, Security and Justice'*

Ester Herlin-Karnell

University Research Chair and Professor of EU Constitutional Law and Justice, VU University of Amsterdam, Amsterdam, Netherlands

ABSTRACT
In this paper, I explore the connection between the notions of justice and justification in an European Union (EU) security-related context. I argue that a full comprehension of these notions enhances the legitimacy of the EU's 'Area of Freedom, Security and Justice' (AFSJ) project. However, we still need to go further when investigating justice's potential as a theoretical device for navigating the future of AFSJ law. This paper contends that we need to analyse justice in the AFSJ by starting from the position of security as domination. Only by doing so can we understand the capabilities of the EU for realising justice and freedom in a largely security-driven site. Marrying these abstract claims with the empirical reality of security regulation in contemporary European law helps to establish democratic credentials within the AFSJ and links the question of justice to that of justification and ultimately proportionality in AFSJ law.

KEYWORDS EU; justice; justification; security; non-domination; proportionality

1. Introduction

The quest for justice is one of the foremost aims of any democratic society. So it should be for the European Union (EU) with the rule of law, democracy and human rights as its foundational and core values.[1] Yet, while Rawls anchored justice in the basic structure of society as a response to the question of how

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CONTACT Ester Herlin-Karnell ✉ e.herlinkarnell@vu.nl

*All websites accessed were updated in January 2017.

[1] On 'justice' in the EU context, see, eg, Sionaidh Douglas-Scott 'Human Rights as a Basis for Justice in the European Union' in this special issue of *Transnational Legal Theory*, doi:10.1080/20414005.2017.1321907. See also Sionaidh Douglas-Scott, 'The Problem of Justice in the European Union: Values, Pluralism, and Critical Legal Justice' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of EU Law* (Oxford University Press, 2012), ch 16; Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing, 2015), especially the contribution of Neil Walker, 'Justice in and of the European Union', ch 17; Andrea Sangiovanni, 'Solidarity in the European Union' (2013) 33(2) *Oxford Journal of Legal Studies* 213; Jürgen Neyer, *The Justification of Europe: A Political Theory of*

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government action could be justified and designed,[2] a broader discourse on what public reasoning means in the context of the relationship between the individual and the state has emerged at the transnational level.[3] While justice is often proclaimed as an essentially contested concept,[4] this contribution argues that it can still be a vital and useful notion for gauging fairness when applied contextually.[5] This becomes especially evident in legal settings where the level of sophistication of the legal reasoning that grounds each concrete court case reflects the question of how to achieve a just order.[6]

Although justice is a highly controversial notion, with Dworkin, its conceptualisation depends on the underlying interpretation and competing rationales behind it.[7] Therefore, it is not the abstract notion of justice but the particular conception—'justificatory', as I claim below—that needs bearing out in the EU context. The particular conception of justice is especially important in the framework of the progressing area of EU security regulation. Moreover, conceptions of justice offer a compelling perspective for understanding the wider governance structure of the EU.[8] Rather than merely anchoring the individual's array of legal rights and the access to justice that expresses it—that is, a basically administrative concept—justice would then constitute a broader normative as well as institutional principle for arranging the values underlying the EU's 'Area of Freedom, Security and Justice' (AFSJ). Such a conception of the AFSJ would not only value security, but equally strive to ensure freedom and justice—and thereby the overall fairness of the system.

Supranational Integration (Oxford University Press, 2012). See also most recently Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press, 2016).

[2] John Rawls, *A Theory of Justice* (Harvard University Press, 1999). See also Andrea Sangiovanni, 'Justice and the Priority of Politics to Morality' (2008) 16(2) *The Journal of Political Philosophy* 137.

[3] For example, see Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012); Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002); Vicki C Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124(8) *Yale Law Journal* 2680, 3094; Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4(2) *Law & Ethics of Human Rights* 142; Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford University Press, 2012); Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012). See also the contributions in Grant Huscroft, Bradley W Miller and Grégoire CN Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014); and Grégoire CN Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, 2009), Malcolm Thorburn, 'Proportionality', in D Dyzenhaus and M Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford University Press, 2016), ch 15 and Arthur Ripstein, 'Reclaiming Proportionality' (2017) 34(1) *Journal of Applied Philosophy* 1.

[4] See, eg, contributions in Jürgen Neyer and Antje Wiener (eds), *Political Theory of the European Union* (Oxford University Press, 2010) 111–38.

[5] See Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Columbia University Press, 2012).

[6] Mattias Kumm, 'The Turn to Justification: On the Structure and Domain of Human Rights Practice' in Adam Etinson (ed), *Human Rights: Moral or Political?* (forthcoming, Oxford University Press) (on file with the author).

[7] Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) 98–99.

[8] On the role of transnational law in this process more generally, see Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism' (2012) 21(2) *Transnational Law and Contemporary Problems* 305.

The EU is an interesting case in that it is tailor-made for testing the discursive potency of justice and justification not only at the supranational (vertical) level (ie with respect to the member state-EU bond), but also with regard to the (horizontal) member state-member state level as well as the competences between the EU's institutions. In particular, the relationship between the nation state, the individual and the EU is complex, which makes explaining EU action and entrenched forms of public reasoning a challenge. This complex relationship is also intimately connected to what kind of justification citizens are entitled to as the EU project expands.[9] Because of the rapid development of the AFSJ in recent years and its crisis-driven agenda (eg the fight against terrorism and the management of the migration crisis), a serious awareness and critical reflection as to how the EU could construct a just order of security regulation is warranted.

But what conception of justice should become an integral part of the EU's constitutional vocabulary? This paper seeks to elucidate why it is helpful to analyse EU security regulation through the lens of justice as 'non-domination'[10] and how constitutionalism offers a useful framework for this process. This paper then focuses on the broader theoretical and normative understanding of the EU security project. In doing so, it explores the link between justice and justification and explains how it may enhance the legitimacy of the EU's AFSJ project.[11]

Before developing this question further, however, I will briefly set out the general EU framework in which we need to understand EU security law. The EU is a supranational organisation consisting at present of 28 member states (alas with one core member state, the U.K., about to leave through its 'Brexit' process, which started in 2016), with constitutional values and aspirations set out in the Lisbon Treaty (ie the Treaty of the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU)). The EU has its own legal system, which has largely been developed by the Court of Justice of the European Union (CJEU) and which focuses on the direct effect and supremacy of EU law. EU law has supremacy over national law unless otherwise endorsed by EU case law or if there are good reasons listed in the Lisbon Treaty for it not to. The EU is not a state, even though it increasingly comprises state-like features and functions by legislating on, *inter alia*, criminal law, tax law and migration governance. Yet the EU's lack of coercive power—for example, the absence of an EU police force and the lack of a full set of enforcement powers comparable to those possessed by member states—is often highlighted as one of the criteria distinguishing it from a fully formed nation state.[12] The CJEU has an overarching goal of creating an autonomous European legal order that provides adequate safeguards for fundamental rights and grants individuals rights in national courts.[13] Additionally, the CJEU has expounded the classic EU loyalty principle into a holistic mechanism for establishing and maintaining European integration in the member states and thereby guaranteeing the effectiveness of EU law.[14]

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[9] On public reason in legal context see Wojciech Sadurski, 'Reason of State and Public Reason' (2014) 27(1) *Ratio Juris* 21. See also the paper by Ben Crum 'Public Reason and Multi-Layered Justice' in this special issue of *Transnational Legal Theory*, doi:10.1080/20414005.2017.1299537.

[10] On freedom as non-domination, see Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, 2013).

[11] On the compatibility of the combination of justice and justification, see Enzo Rossi and Matthew Sleat, 'Realism in Normative Political Theory' (2014) 9(10) *Philosophy Compass* 689.

The EU also regulates security-related issues: the fight against terrorism, the suppression of crime, the governance of asylum seekers and migration, etc. These issues are dealt with under the policy domain of the AFSJ. This policy domain is one of the fastest expanding in contemporary EU integration and deals with, *inter alia*, security, border control, anti-terrorism law and crime. Thus, it embodies a new and sensitive field in the EU, one that is being transformed from a largely isolated 'justice and home affairs' domain to that of a European hub for security co-operation. Specifically, the AFSJ's policy domain provides a fascinating example of a clash between the due process concerns of the individual and security-driven preventive measures, for which the EU is carving out its security agenda.[15] The tasks of identifying the underlying values in this divergent area, how these values drive the development of an AFSJ, and identifying where the concept of justice ought to guide the EU as a constitutional compass, are of paramount importance. The legal framework for the construction of the AFSJ is set out in Article 67 of the TFEU, which links different AFSJ parameters to the overall ambition of ensuring a high level of security in the EU.[16] In addition, Article 68 of the TFEU, which stipulates that the European Council 'shall define the strategic guidelines for legislative and operational planning',[17] mandates that the political programme establish future security co-operation within the EU. Part of this projection involves drawing up the agenda points to be achieved in the AFSJ, where the focus, to date, has been almost exclusively on security.[18]

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[12] Neyer (n 1).

[13] Case C-6/64, *Flaminio Costa v ENEL* [1964] ECR 585.

[14] For example, see Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press, 2014); Stephen Wetherill, *Law and Values in the European Union* (Oxford University Press, 2016).

[15] On the emerging AFSJ, see, eg, Neil Walker (ed), *Europe's Area of Freedom, Security, and Justice* (Oxford University Press, 2004); Diego Acosta Arcarazo and Cian C Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing, 2014); Christian Kaunert, Sarah Léonard and Patryk Pawlak (eds), *European Homeland Security: A European Strategy in the Making?* (Routledge, 2012); and the contributions in Maria Fletcher, Ester Herlin-Karnell and Claudio Matera (eds), *The European Union as an Area of Freedom, Security and Justice* (Routledge, 2016).

[16] *Treaty on the Functioning of the European Union*, 13 December 2007, C115/47, online: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:12012E/TXT>.

[17] *Ibid.*

[18] See European Commission, *The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union* (2014), COM (2014) 144 final, online: <http://ec.europa.eu/justice/effective-justice/files/com_2014_144_en.pdf>; Council of the European Union, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens* (2009), 17024/09, online: <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/the_stockholm_programme_-_an_open_and_secure_europe_en_1.pdf>.

Recently, the EU security and border enterprise has been severely strained by the EU migration and refugee crisis that has escalated since 2015 and the concomitant need to fight terrorism and monitor movement across Europe. This new reality begs the question: what does it actually mean to refer to a Europe of solidarity and justice? While the idea of open borders may be one of the hallmarks of EU integration, as established by the Schengen Agreement of 1985, its future is uncertain and hotly debated. The EU's strong internal security agenda over the last decade is by now well-documented, especially in political science literature.[19] What seems much less explored—both in law and other related disciplines—is the EU security mission and its trajectory viewed through the prism of political theory and understood as a question of constitutionalism.[20] In addition, the question of justice appears to have become closely associated with that of legitimacy in the EU legal context.[21]

1.1. The structure and argument of the paper

This paper charts how conceptions of justification become the golden rules for deciding which principles of justice, fairness and procedural due process provide the best constructive interpretation of a specific claim. The aim is then to explain how justice has a dual function here: it is both a classic legal device for deciding on 'rightness' in concrete court cases and, more broadly, a tool for integrating 'fairness' into the structure of the AFSJ. It may sound obvious that the EU should strive for justice within the AFSJ. But, given the current security focus of AFSJ discourse, there is an urgent need for a radical change of navigation—even a radical view of justice—in order to save the AFSJ's stipulated normative commitments from deteriorating into an empty formalistic shell. An integrated notion of justice, therefore, as part of the EU constitutional 'grammar', its structure if you will, asks how the application of proportionality could help to foster fairness throughout the overall system. Consequently, in legal terms, the classic proportionality test comes close to that of the right both to justification *and* to non-arbitrariness in decision-making, which in turn is the most compelling expression of justice conceived of in terms of the right to justification. For justice in such terms to be realised in an EU context, a turn to justification, rather than engaging in traditional debates over what justice exactly entails, may be more fruitful.

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[19] For example, see Massimo Fichera and Jens Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia, 2013); and Cian C Murphy 'Transnational Counter-Terrorism Law: Law, Power and Legitimacy in the "Wars on Terror"' (2015) 6(1) *Transnational Legal Theory* 31.

[20] For a recent contribution on the constitutional dimension of EU migration governance, see German Law Journal, *Special Issue: Constitutional Dimensions of the Refugee Crisis* (2016), volume 18, issue 6, online: <www.germanlawjournal.com/s/Full-Issue-PDF_Vol_18_No_01.pdf>.

[21] Neyer (n 1).

The next section sets out to explain the relevance of justice theory (as well as explaining its salient contexts) for understanding the AFSJ project and its evolution. It outlines the main debate over the conception of justice and discusses why the classic debate in political theory and jurisprudence is particularly relevant in the context of EU security regulation and the AFSJ. It elucidates why the security paradigm has always constituted the AFSJ's driving principle, largely dominating its agenda. The third section argues that justice properly understood in the AFSJ should be interpreted as a non-domination principle. In other words, there is merit to using justice as a compass for finding a successful pathway for future European integration in AFSJ matters. The fourth section examines how the security focus could successfully be shifted by exploring the impact of justice-based reasoning as a balancing mechanism towards successful EU integration. In so doing, the paper investigates the link between proportionality and justice, their mutual dependence on justification, and the discursive and institutional conditions for justification. The cases examined are set to change the dynamics of AFSJ law since they demonstrate the potential of justice reasoning in practice, and thereby address the greater question of justification beyond the state. The analysis attempts to demonstrate why practice matters in AFSJ law and how justification is helpful here as a manifestation of justice in context.[22]

In sum, this paper will attempt to demonstrate that: (1) the concept of justice must play an essential role in the process of establishing a culture of fairness in AFSJ matters, which could help to balance the current security focus; and (2) justice offers a helpful lens for understanding and debating the question of what justification the Member States and the citizens of the EU could reasonably require as the EU project expands.

2. Justice as a contested concept—what we are debating and why

Justice is often considered a self-evident political objective. Surely, no civic-minded person would argue against justice as a normative benchmark for a decent society. However, the concept of justice is at risk of losing any concrete meaning, of becoming no more than a metaphor for the political process.[23] Given the EU's strong emphasis on security such that it is now dominant, the idea of justice is of crucial importance as EU security law is shaped for the future. Justice within the AFJS ought to be seen as an expression of non-domination.

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[22] See, eg, Andrea Sangiovanni, 'How Practices Matter' (2016) 24(1) *The Journal of Political Philosophy* 3.

[23] See, eg, Philip Pettit, 'Justice' in David Sobel, Peter Vallentyne and Steven Wall (eds), *Oxford Studies in Political Philosophy* (Oxford University Press, 2015) vol 1, chapter 1.

One of the most helpful debates over justice in contemporary political thought is between Rawls' justice model and Cohen's attempt to rescue equality from what he claimed represented a distorted picture of justice. As is well known, Cohen criticised Rawls' model of justice on the basis that his difference principle[24] would permit inequality.[25] He also rejected Rawls' idea that justice is the basic structure of society by arguing that it is not enough for justice to be built into the institutional design of societies, but it must also be an imperative for individuals.[26] According to Cohen, there must be 'pure' justice, not mixed with any other components (such as empirical facts). Cohen's theory is idealistic, as his version of justice cannot reflect any other virtue than 'justice'.[27] Others, like Amartya Sen, attempted to shift attention away from notions of 'ideal justice' to the more practical questions of advancing justice by eliminating at least the worst forms of injustice.[28] Justice discourse today, and its implications for law, spans from what some would characterise—simplistically summarised here—as 'moralism to realist' views[29] and 'ideal versus non-ideal' theories,[30] to the capability approach advocated by Martha Nussbaum,[31] who argues that what is needed is a minimum level of justice in accordance with a list of basic capabilities that must be protected.

On this background, Rainer Forst has developed a political and critical understanding of justice.[32] In his view, instead of imagining justice as a distribution machine which allocates various goods in a just way, justice allows individuals equality and the right to justification for any decisions that concern them and form part of the very idea of human dignity.[33] This appears similar to the debate in legal discourse on proportionality: both suggest that there can be no simple formula, but that what is required is a multifaceted understanding of justification. The picture is more complex and requires a political understanding of the specific context in which it operates. Arguably in line with this contextualised approach, Michael Walzer noted that the concept of justice is a human construction and it is therefore doubtful that it can be used in one single way.[34] For Walzer, there are different 'spheres' of justice linked to a faithful understanding of the wishes of the members of a society.[35]

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[24] In short, the principle that each person has an equal claim to an adequate scheme of basic rights and liberties and that any inequality must still enjoy the greatest benefits of the advantaged members of society.

[25] Gerald A Cohen, *Rescuing Justice and Equality* (Harvard University Press, 2008). J Rawls, *A Theory of Justice* (Harvard University Press, 1971).

[26] J Donald Moon, 'Cohen vs. Rawls on Justice and Equality' (2015) 18(1) *Critical Review of International Social and Political Philosophy* 40.

[27] Eliane Sadee, *The Concept of Justice and Equality: On the dispute between John Rawls and Gerald Cohen* (De Gruyter, 2015).

[28] See also the contribution by Douglas-Scott (n 1) of this special issue of *Transnational Legal Theory*; and Amartya Sen, *The Idea of Justice* (Harvard University Press, 2009)

[29] See Enzo Rossi, 'Justice, Legitimacy and (Normative) Authority for Political Realists' (2012) 15(2) *Critical Review of International Social and Political Philosophy* 149.

[30] *Ibid*.

[31] Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2007).

[32] Forst (n 5).

[33] Rainer Forst, *Justification and Critique: Towards a Critical Theory of Politics* (Polity Press, 2014).

While different spheres of justice would seem to challenge the idea of a single culture of justice in the EU domain, this paper acknowledges these difficulties and nonetheless argues that 'justice' *matters* as a concept in AFSJ law. This is because much of the EU's involvement in the AFSJ has been built on the concept that European security is a device for achieving further integration across the member states. Consequently, a large majority of the measures adopted by the EU in order to suppress terrorism have been characterised by a strong precautionary focus closely related to that of risk regulation and the need to boost consumer confidence in the EU market. This trend has been visible not only in the EU counter-terrorism movement, but also in other areas such as immigration and asylum law, where securitisation has provided much of the main justification for the EU's involvement in the AFSJ domain.[36] In the migration context, for example, justice may be very relevant in cases where the EU invokes criminal sanctions but through administrative procedures as a strategy for preventing migration as part of the securitisation of the AFSJ.[37]

Perhaps it needs to be asked whether the concept of justice and its links to the question of justification, in the AFSJ context, pre-supposes a contractualist ideal. For Rawls, a contractualist conception of justice is based upon a notion of public justification.[38] According to this view, the use of political power is fully proper only when 'it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in light of the principles and ideals acceptable to their common human reason'. Consequently, a well-ordered society is a fair system of social and political co-operation which is effectively regulated by a public conception of justice. But, as argued by Wilfried Hinsch, the requirement of public justification means that the basic norms of a well-ordered society must secure the consent of citizens whose moral, philosophical and religious views are, at least partially, incompatible. It is, therefore, conceivable that no publicly justified political principles can be found.[39] There will always be reasonable disagreement in some areas. The AFSJ seems likely to belong to such an area, given the sensitive nature of its subject matter. However, there is a plausible way out of this dilemma, or at least a shortcut. As Selya Benhabib points out, the question of normative justification is also about democratic legitimacy, since the transnational law project cannot sacrifice discursive deliberation.[40] As noted by Poul Kjaer, though, the question of justification has largely become one of a substitute debate for democracy beyond the state proper.[41] The more problematic the lack of a credible public justification becomes in the EU, the more visible the democratic deficit appears.[42] In order to address this question of justification in greater depth, it seems as though we need to explain the significance of justice in the specific framework of security regulation.

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[34] Michael Walzer famously addressed the question of membership in a political community for theories of distributive justice (what people owe to one another) as well as for theories of democracy. See Michael Walzer, *Spheres of Justice: A Defence of Pluralism & Equality* (Wiley-Blackwell, 1983). See also the discussion in Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press, 2004) 117.

[35] Walzer (n 34).

[36] Ester Herlin-Karnell, 'The EU as a Promoter of Preventive Criminal Justice and the Internal Security Context' (2016) 17 *European Politics and Society* 215.

[37] For example, see Jennifer M Chacón, '*Immigration Detention: No Turning Back?*' (2014) 113(3) *South Atlantic Quarterly* 621; Andrew Ashworth and Lucia Zedner (eds), *Preventive Justice* (Oxford University Press, 2014).

[38] John Rawls, *Political Liberalism* (Columbia University Press, 1993) as discussed in Wilfried Hinsch, 'Justice, Legitimacy, and Constitutional Rights' (2010) 13(1) *Critical Review of International Social and Political Philosophy* 39. Also see Sadurski (n 9) and Crum (n 9).

3. The relevance of justice and the domination of security

It is through seeing security as domination that we will understand the EU's strategy in AFSJ matters. Specifically, looking at the meaning of 'non-domination' as a realisation of justice will help us to link the rather abstract right to justification to the more 'graspable' proportionality test, and will confirm the need for both *ex ante* and *ex post* checks of EU law measures in the security-related area. This section will elaborate on the implications of domination and non-domination in AFSJ law, while the specific question of justification and a proportionality test will be explored in further detail below. While the EU's heavy reliance on security as a justificatory tool for its presence both internally and beyond its borders has been criticised by academics in the last decade, it still plays a fundamental role in furthering its security agenda.[43] As noted above, from the perspective of 'justice', such an approach is problematic since the fundamental elements of due process have not been given sufficient weight.[44]

However, as the EU is taking on more state-like features, it inevitably has to address some of the core questions that traditional nation states have had to answer, namely the need to justify any use of coercive power and to tackle the issue of what it means to refer to justice across the EU. Thus, as the EU pushes forward with deterrent measures to ensure a high level of security and to fight terrorism and the financing of it, the status quo in AFSJ law has become 'too preventive' a regime, in which the safeguards of the individual are lost, despite the grand treaty values set out in Article 2 of the TEU. It could even be argued that the rights in the EU Charter of Fundamental Rights (EU Charter) and the European Convention on Human Rights (ECHR) are, at present, almost empty assertions, in the sense that not enough is being done at a political level to ensure a European culture of due process across all member states.

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[39] Hinsch (n 38).

[40] Seyla Benhabib, 'Democratic Sovereignty and Transnational Law. On Legal Utopianism and Democratic Skepticism' (2014), APSA 2014 Annual Meeting Paper, online: <https://ssrn.com/abstract=2455436>.

[41] Poul F Kjaer, 'Why Justification? The Structure of Public Power in Transnational Contexts' in this special issue of *Transnational Legal Theory*, doi:10.1080/20414005.2017.1329248.

[42] For a parallel argument on human rights and the international forum, see Allen Buchanan, 'Human Rights and the Legitimacy of the International Order' (2008) 14(1) *Legal Theory* 39.

[43] See Douglas-Scott, 'The Problem of Justice in the European Union' (n 1).

[44] For example, see Fichera and Kremer (n 19).

For justice to work as a concept in AFSJ law, however, we need to establish the extent to which justice can appropriately be debated in the supranational sphere, or whether it is predominantly a local (national) phenomenon. As Rainer Forst argues, there is good reason to believe that, for example, Rawls' theory of justice could be extended beyond the nation state, provided we have the right toolkit for doing so.[45] Essential tools in this toolkit are a conception of context and critical interpretation as the main yardsticks for understanding justice. When discussing justice in the AFSJ setting, we therefore need to recognise 'justice' as a concept closely related to the governance structure of the AFSJ as such. Central to this argument is the importance of viewing justice as a process and not as a static phenomenon.

Yet, here we have what amounts to the first challenge to the argument. After all, as seen in security theory, the 'process'-based lens is generally considered to be highly problematic.[46] The claim is that security is often deployed and manipulated through strategies of power, which are easily corrupted through a 'process'. The problem with the interlinked relationship of security and the political realm is that there is no guarantee that the discursive framework of security will be used for 'just' purposes.[47] My argument, however, is that the merit of viewing something as a process, rather than as a static enterprise, is different when it comes to justice than with the concept of security.[48] This is because there is a link between justice and legitimacy in an EU context; it is an evolving—normatively and functionally—but necessary 'process'.

Justice as an umbrella principle for structuring the AFSJ is also linked to the question of non-domination. The idea of non-domination seems especially relevant in an AFSJ context which is 'dominated' by security. The notion of non-domination could then be formulated as a constitutional 'right' to freedom and justice, in that nobody is to be subject to arbitrary power.[49] Yet in legal language the notion of domination is often addressed through the concept of coercion. Specifically, the notion of coercion is often regarded as a form of domination. Indeed, any textbook on criminal law starts with the question of coercion, and explains how it is an obstacle to freedom as well as a means to achieving it. A state is said to coerce its citizens because it issues commands (laws) backed by the threat of sanctions.[50] The coercive power of the state may well be needed to deter malefactors and to assure citizens of one another's compliance with the law. For Dworkin, any conception of law must explain why law is the legitimate authority for coercion.[51] For Rawls, political power is always coercive power and always backed by the government's use of sanctions.[52] Coercive power is also about the legitimacy of the general structure of authority. Perhaps this is in line with Dworkin's reasoning that fundamental values of equal concern and respect are interpreted in light of their role in a coercive order.[53] After all, it was Dworkin who argued that 'the various standards governing the state's use of coercion against its citizens be consistent in the sense that they express a single and comprehensive vision of justice'.[54] Dworkin argued further that coercive political organisations undermine the dignity of their members unless each accepts a reciprocal responsibility to the others to respect collective decisions, provided that these decisions meet the appropriate conditions. Dworkin famously linked the general justification for the exercise of the coercive power of the state with that of the moral obligation of citizens to obey the law. So every conception, in Dworkin's terms, therefore faces the same dilemma of whether anything can justify coercion in ordinary politics. For Rawls' the question of justification is about the boundaries of coercion coupled to the question of the extent to which coercion is a necessary price to pay for people living in a state together.[55]

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[45] Forst (n 5).

[46] Andrew W Neal, 'Foucault in Guantánamo: Towards an Archaeology of the Exception' (2006) 37(1) *Security Dialogue* 31.

[47] *Ibid*.

[48] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press, 2006).

[49] Eoin Daly, 'Freedom as Non-Domination in the Jurisprudence of Constitutional Rights' (2015) 28(2) *Canadian Journal of Law and Jurisprudence* 289.

While certainly not doing 'justice' to the rich political theory debate on non-domination, this paper has schematically tried to illustrate the strong link between justification, non-domination and the question of coercion. The point is that the EU's emphasis on security in the construction of the AFSJ calls for reflection upon the level of justice (call this a culture of fairness) that could be achieved. The question of power, as Forst points out, is the first question of justice and the right to justification,[56] and is at the very heart of a non-domination-oriented conception of law and justice.[57] Therefore, we need to place the question of justice in the AFSJ in the context of non-domination (as it is properly meant). Furthermore, the EU's security mission and how it could be safeguarded against domination poses the question of how the security mission is related to the identity of the AFSJ. One of the EU's core objectives is to establish a secure Union. But the term 'security' runs the risk of being used in an overly broad way. Added to this is the tendency for ill-defined legislation and concealment[58] in the legislative process when the EU deals with security threats, as much of the resulting legislation is emergency-based and could result in domination at the expense of adequate human rights protection and the rule of law. A critical notion of justice within the AFSJ is therefore linked to the basic right of justification as a counter-measure to domination. But the right of justification does not tell us much about the concrete meaning of non-domination. At a macro level, 'domination' may be identified in the way the EU uses security to extend its objectives to new areas. At a micro level, domination may be identified in the way in which the security dogma deprives individuals of some of their basic due process rights, which were traditionally guaranteed by the nation state.

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[50] Laura Valentini, *Justice in a Globalized World: A Normative Framework* (Oxford University Press, 2012).

[51] Dworkin (n 7) 190.

[52] Rawls (n 37).

[53] Dworkin (n 7) 190–1. See also A John Simmons, 'Justification and Legitimacy' (1999) 109(4) *Ethics* 739.

[54] Dworkin (n 7). See also Simmons (n 52).

[55] Andrea Sangiovanni, 'Taking Institutions as They Are, or as They Ideally Ought To Be?' available at <https://www.wzb.eu/sites/default/files/u32/a_sangiovanni_ccfls_2013_practice-dependence.pdf>.

[56] Forst (n 5).

[57] Philip Pettit, 'A Republican Law of Peoples' (2010) 9(1) *European Journal of Political Theory* 70; Ian Shapiro, 'On Non-Domination' (2012) 62 *University of Toronto Law Journal* 293, 311.

4. Justice as non-domination: specifically in the AFSJ

I will now try to marry the abstract contours of the notion of freedom as non-domination with a reading of it as an expression of justice and clarify its meaning further. As explained above, the idea of non-domination as the yardstick for testing the level of freedom in a society is well-documented, and remains the starting point for any discussion of the use of criminal law.[59] In order to identify the notion of domination, Philip Pettit uses the well-known master–slave relationship as the prime example of 'unfreedom'.[60] As Adam Tomkins points out, however, while the master–slave example is the most obvious instance of domination, it is far from the only one.[61] There are more recent examples, and the difficulty with identifying them is that it requires translating the 'domination' criterion, as a device for measuring freedom, to the meta level. In the EU context, the question of non-domination is usually framed as a question of equality among member states. Moreover, as noted above coercive power is often held to be the key characteristic that distinguishes an institution such as the EU from that of a nation state.[62] Indeed, Max Weber famously defined the nation state as possessing a legitimate monopoly on force and power.[63] In addition, non-domination is the republican theory benchmark or key for understanding justice in a free and democratic state, and is considered by some to be incentive-compatible, that is to say that people would rather pursue their own advantages than ideal aspirations for any genuinely non-dominating order.[64]

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[58] Deirdre Curtin, 'Overseeing Secrets in the EU: A Democratic Perspective' (2014) 52(3) *Journal of Common Market Studies* 684.

[59] For example, see Andrew P Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2011) 3–7.

[60] Pettit (n 57).

[61] Adam Tomkins, *Our Republican Constitution* (Hart Publishing, 2005) 46–52.

[62] For example, see Neyer (n 1).

The importance of a secure society is undeniable in the EU. However, if there is too much security, can there still be justice? How the balance should be struck between security needs and the need to ensure adequately high human rights standards and thereby guarantee fairness and justice is a longstanding question, one that is best asked through the framework of constitutionalism and the notion of justice. For about a decade now, the EU's internal security mission, in line with global trends, has dominated the policies of the AFSJ, and has been expressed as part of the fight against terrorism. For example, the market-based approach to the EU's fight against crime and the financing of terrorism has led to a preventive approach, a coupling of the market and the effort to achieve security through penal measures and with EU agencies acting as imposers of sanctions, often under very unclear guidelines.[65] For instance, the EU has imposed criminal law sanctions for financial crime and cybercrime that amounts to a combined threat of financing terrorism as part of an effort to stabilise the market by getting tough on white-collar crime.[66] These are only brief illustrations, but at their core there is an innate need for the EU to work out a strategy for the AFSJ. It is true that the EU's multi-annual AFSJ programmes and the plans set out in the ambitious agendas of the European Commission reflect a wish among EU institutions to be firm about the future application of the rule of law.[67] However, there is a striking absence in the political discussion of concern over how to shape this area and what justice can add to the debate.

Perhaps it could be asked what domination comprises in EU law. Thinly reasoned judgments by the CJEU or badly drafted legislation—where arbitrariness manifests itself in a lack of proportionate reasoning by EU agents, overriding member state concerns—are candidates. Thus, the security discourse requires a more elaborate vocabulary and a more nuanced approach to what is actually at stake when it is invoked as a blanket term. The sweeping generality in which the concept of security is being used could be an instantiation of domination, thereby seriously hampering freedom and justice.

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[63] Max Weber, *Economy and Society*, Guenther Roth and Claus Wittich (eds) (University of California Press, 2013) vol 1. See also Rainer Forst, 'Noumenal Power' (2015) 23(2) *The Journal of Political Philosophy* 111.

[64] Pettit (n 56).

[65] Ester Herlin-Karnell, 'Constructing Europe's Area of Freedom, Security, and Justice through the Framework of "Regulation": A Cascade of Market-Based Challenges in the EU's Fight Against Financial Crime' (2015) *German Law Journal* 171.

[66] For example, see Fourth Anti-Money Laundering Directive 2015/849 [2015] OJ L141/73; Directive 2013/40/EU On Attacks Against Information Systems [2013] OJ L218/8.

[67] European Commission, *A New EU Framework to Strengthen the Rule of Law* (2014), COM (2014) 158 final, online: <http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf>.

4.1. Realising the freedom component? Key challenges in AFSJ law and on the burden of justification

For anyone trying to construct the AFSJ by looking at the components of ‘freedom, security and justice’, and in particular its implications as a conceptual space for justice, such an endeavour might appear overly theoretical (or even ironic or utopian) against the background of the present, almost daily, occurrence of migrants drowning off the coasts of Europe. The EU migration crisis has hardly escaped anyone’s notice and casts dark shadows over the concept of a common European solidarity.[68] The inevitable question is whether it is legitimate to claim that the EU should create a justice space within the AFSJ, one which excludes third country nationals. Should we accept the cosmopolitan claim of a duty of justice towards outsiders?[69] While it would seem politically naïve in the current European climate to claim a cosmopolitan-based justice,[70] and while some ‘old’ member states still have problems with ‘new’ member states, the conception of justice could still inform the interpretation of European treaties when they refer to ideas such as solidarity. It is precisely here that a justice deficit exists and it is here that the question of what kind of justification the EU owes to those on its territory becomes a burning issue. The impact of a constitutional meaning of justice that could be grounded in the EU Charter and EU treaty values, and the extent to which it could function as a visualising tool for remedying some of the problems facing the EU in the current wave of populism and isolationism in some member states, remains a considerable challenge and dilemma for the construction of the AFSJ.[71] Justice, in the constitutional sense of providing a justification, is critical in that it insists on more than an empty assertion of justice and involves more than simply procedure.[72] In legal terms, these values may be deduced from the EU Charter and the preamble of the TEU. As suggested above, the AFSJ is an area currently marked by too little justice-oriented reasoning in its institutions, and is a space where security-related measures have tilted the balance in favour of pre-emption.[73]

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[68] Sangiovanni (n 1).

[69] For example, see Mattias Kumm, ‘The Cosmopolitan Turn in Constitutionalism and the Cosmopolitan State: An Integrated Conception of Public Law’ (2013) 20(2) *Indiana Journal of Global Legal Studies* 605; Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press, 2014); Daniel Halberstam, ‘Local, Global and Plural Constitutionalism: Europe Meets the World’ in Gráinne de Búrca and Joseph HH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press, 2012) 150; Claudio Corradetti, ‘Judicial Cosmopolitan Authority’ (2016) 7(1) *Transnational Legal Theory* 29.

[70] See, however, Mathias Risse, ‘Taking up Space on Earth: Theorizing Territorial Rights, the Justification of States and Immigration from a Global Standpoint’ (2015) 4(1) *Global Constitutionalism* 81.

[71] TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2003). See also Aharon Barak, ‘On Constitutional Implications and Constitutional Structure’ in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations Of Constitutional Law* (Oxford University Press, 2016) ch 3.

[72] For example, see Sionaidh Douglas-Scott, *Law after Modernity* (Hart Publishing, 2013).

As stipulated in Article 67 of the TFEU, the AFSJ sets out to secure justice and freedom through a high level of security. The notion of 'freedom', as stated in the AFSJ paradigm, is not defined philosophically but is rather a re-affirming of the right to free movement, ie through the EU's fundamental freedoms and the safeguarding of the rule of law. Yet the idea of freedom, if the aspiration is for the AFSJ to become a justice space, must be tied to the quest for non-domination. This is where the link between justice and freedom becomes visible. The idea of the EU constructing an area of *freedom* and *justice*, while at the same time ensuring *security*, might, at first sight, signify a striking imbalance between the different parameters. The construction of a true AFSJ space requires a balance, though achieving it is a messy task for the EU. Therefore, as noted above, it may not be justice in any administrative sense that is being balanced, but a broader conception of' 'justice' as a European notion of fairness, which is central to the constitutional architecture of the EU.

Indeed, lawyers may propose that the imaginative creation of citizenship, as developed in CJEU case law, has to some extent resolved the democratic problem in the EU and ensures a European concept of freedom.[74] In light of this, they may use the law strategically, in combination with participation rights and citizen initiatives (see Article 18 of the TEU), to put some flesh on the bare European skeleton. However, this seems to place the burden of justification for attaining freedom on citizens and not on the EU or its member states when they are determining AFSJ policies such as security regulation. This apparent revised burden of justification is highly problematic in a security-related context since the notion of justification may be deeply relevant to the question of how to create a European legal culture in AFSJ matters that genuinely cares for the individual and confirms the idea of due process.

In the context of the normative foundation for human rights, Allen Buchanan has asked what it would take to produce reliable factual information *of the sort* that is likely to be relevant for specifying and justifying claims about human rights.[75] If one were to translate this into the AFSJ context, access to justice would seem central to the ambition of realising freedom and thereby ensuring rights. But it is not enough, as the facts are also contingent on the 'robustness' of the system as a whole, thus highlighting the need for a normative debate in AFSJ matters. Accordingly, the EU legal system might encompass a broader notion of 'justice' than that subsumed by the basic constitutional principle upon which other EU principles are based, namely the rule of law. For all these reasons, there has to be a connection between the aspiration for justice and that of the overall legal architecture or governance ambition of securing legitimacy in the European system. However, in order to be legitimate, a regime must not only aim to be just, it must also aim to demonstrate a level of justice that defines the conditions under which the state may rightly justify its coercive power.[76] This is particularly important in the context of the AFSJ and as will be explained in the following section, the idea of proportionality might help us achieving this.

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[73] See also Murphy (n 19).

[74] Case C-85/96, *María Martínez Sala v Freistaat Bayern* [1998] ECR I–02691.

[75] Buchanan (n 42).

5. The turn to justification: proportionality as reasonable disagreement

Arguably, the question of what the EU's political structure ought to look like is one that fundamentally concerns the common good.[77] Taking for granted such an idea, the justice movement, and the basic right to justification, is readily transferable to the transnational level, since it concerns a political concept of justice. Assuming we start from a common justice platform where fundamental rights are fully respected in practice, justice must be politically grounded. Yet, it may not be possible to precisely separate procedural and substantive justice in EU law. After all, the debate on justice in EU law arguably concerns how to justify the EU project as a whole, and it is therefore also a question about the quality of EU decision-making and what is considered 'just'. Applying a Rawlsian account to the theory of justice would, in any case, imply using reasonableness as an adequate standard for measuring legitimacy at an EU level and for linking it to the broader debate on justice. The principle of proportionality can be viewed as pointing in the same direction as 'reasonableness'; in other words, it can be a yardstick for legal reasoning.

However, elements of adjudication are not sufficient, and the question of the robustness of the AFSJ and the justifications it requires is one that should be high on the EU's political agenda and embraced by the EU's political institutions, where a constitutionalised concept of justice adds to the integrity of AFSJ law. For Forst, as explained, the notion of justice is grounded in the principle of justification and is the first and overriding virtue in moral, political and social contexts.[78] The question of justification is reflected in the legal notion of proportionality. Proportionality constitutes an important value in AFSJ law by insisting on a reasonableness element in the law. At a more theoretical level, the very notion of proportionality—the question of balance—is about ensuring fairness.[79] This connects the argument back to the question of justice discussed above, as Rawls constructed justice as fairness upon the basis of fundamental ideas that are generally accepted in contemporary liberal democracies.[80] Indeed, 'reasonable disagreement' has become the guiding dictum for deciding when something is just and thereby connected to the basic right of justification. The elements of 'reasonable' and 'disagreement' are what courts are asked to rule on when they discuss the proportionality of disputed measures. There is a conflict of rights, or a limitation of a specific right in question, and there is a disagreement as to whether the infringement is reasonable or not.[81] The point of justification is that individuals have a right to reasoned decisions, and the function of courts is to assess whether the public authority taking the decision in question can be justified by public policy. Thus, the question of 'good reason' is perhaps most clearly identified in the principle of proportionality, which functions as a justification tool.[82]

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[76] Forst (n 32).
[77] Sangiovanni (n 1).
[78] Forst (n 32).
[79] See Dworkin (n 7).

In the legal context, an effective way of dealing with reasonable disagreement is through the proportionality test, which is a legally constructed tool. It is also, as Aharon Barak explains, a more specific methodological device.[83] Proportionality is made up of four components: proper purpose, rational connection, necessary means and proper relation between the rationale gained by realising the proper purpose and the harm caused to the constitutional right.[84] The core message is that the limiting law must uphold these four components in order to withstand constitutional scrutiny.[85] The use and importance of proportionality in EU law is far from new, and has been one of its driving principles since its early days. Yet, the AFSJ seems to have been largely excluded from it as the preventive approach it has taken has outweighed other values, such as, most prominently, the basic right of due process and the full package of defence rights (access to a lawyer, the presumption of innocence, etc.) for those accused of terrorism and other security-related offences.

Proportionality is also about how to create a European culture as a judicial weighing mechanism in terms of the legal classification of 'rightness' in concrete court cases. In the following, I examine the practical implications of justice as reflected in the legal right to justification manifested in the proportionality test. In doing so, it is fitting to turn to what Mattias Kumm has referred to as 'Socratic contestation', which is the practice of critically engaging authorities in order to assess whether the claims that they make are based upon good reason.[86] As Kumm argues, 'one important function of proportionality analysis is to function as a filter device that helps to determine whether illegitimate reasons might have skewed the democratic process against the case of the rights-claimant'.[87] But, who decides which reasons are 'good' enough? One way to resolve this problem would be to anchor 'good' reasons in the EU Charter. Indeed, the principle of proportionality appears to play a key role in both its scope and limit. Nonetheless, Article 52(1) of the EU Charter sets out some important exceptions to its application. It provides:

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[80] John Rawls, *Justice as Fairness: A Restatement*, Erin Kelly (ed) (Harvard University Press, 2001).

[81] On the rights model and proportionality, see eg Kai Möller, *The Global Model of Rights* (Oxford University Press, 2012).

[82] For recent studies of proportionality, see Barak (n 3); Jackson (n 3); Klatt and Meister (n 3); Jud Matthews and Alec Stone-Sweet, 'All Things in Proportion? American Rights Doctrine and the Problem of Balancing' (2010) 60(4) *Emory Law Journal* 799; Möller (n 3); and the contributions in Huscroft, Miller and Webber (n 3).

[83] Barak (n 3).

[84] *Ibid*.

[85] *Ibid*, 131.

> Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

Thus, the scope of the EU's human rights protection in legal terms seems to turn on the elasticity of the proportionality principle, which could pave the way for circular reasoning if a limitation of rights could also be justified on the basis of proportionality. For the AFSJ to constitute a justice space, it is necessary to employ a critical reading of not only justice but also proportionality (as the right to justification) in order that these ideas not take on a utopian character, but become capable of improving the real lives of Europeans. So, a general consequence of justice would mean that there are limits to what member states may deny their citizens upon the basis of proportionality. It is also important to note that member states also have a right to justification if they oppose EU action. With Kumm, a Socratic model that investigates the actual impact of a system that requires reasoned action from both the EU and the member states points in the direction of a federal balance.[88] Such a model would also result in a nuanced proportionality test which focuses on reasons for EU action.

While the principle of proportionality is part of the EU's arsenal for deciding on the degree of legislative authority given to the EU legislator, it is also a principle that is applicable to individuals in the free movement context. This is usually called the *strict* proportionality aspect of the otherwise rather state-centric proportionality test. The problem—for a long time—has been that the AFSJ seems to have been largely exempted from this golden rule of balancing. This may be because the AFSJ is legally thorny terrain, with complex ties between the EU, member states and citizens, despite it also being closely connected to national sovereignty and the protection of human rights. For example, important legal measures in this area with regard to arrest warrants, which introduced the concept of mutual recognition in the fight against crime, seem to have excluded such a proportionality test.[89] Yet, in the very recent case of *Aranyosi and Căldăraru*,[90] the CJEU held that the judicial authority executing an arrest warrant must respect the requirement of proportionality laid down in Article 52(1) of the EU Charter, with respect to the limitation of any right or freedom recognised by the EU Charter. The CJEU held that '[t]he issue of a European arrest warrant cannot justify the individual concerned remaining in custody without any limit in time'.[91] The CJEU also stated that the consequence of the execution of such a warrant must not be that that individual suffers inhumane or degrading treatment (Article 4 of the EU Charter). This sounds self-evident, but the case was handed down in 2016, indicating that there was a somewhat bizarre situation with regard to arrest warrants in Europe where mutual trust was still largely considered a blind concept.

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[86] Kumm (n 3).

[87] *Ibid*.

[88] *Ibid*.Kumm (n 3).

With regard to the possible usefulness of balancing in concrete cases and of applying Barak's view of proportionality as inherent in the balancing test, it is useful to turn to the mutual recognition arena.[92] The notion of 'trust' has been crucial for the development of mutual recognition, ie that no additional barriers should exist between the Member States in AFSJ law.[93] The assumption inherent in the AFSJ is that Member States trust each other sufficiently to not insist on additional legal safeguards or checks. The most radical example of this is, as mentioned above, the European Arrest Warrant (EAW), which remains controversial in member state legal systems because it abolishes the requirement of dual criminality (that an offence is punishable in both states concerned) as a pre-condition for extradition.[94] As one Advocate General put it:

> … the principle of mutual recognition which lies at the heart of the mechanism behind the [EAW] cannot conceivably be applied in the same way as it is in the case of the recognition of a university qualification or a driving licence issued by another [m]ember [s]tate.[95]

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[89] Council Framework Decision of 13 June 2002 on *The European Arrest Warrant and the Surrender Procedures Between Member States* 2002/584/JHA [2002] OJ L190/1.

[90] Joined Cases C-404/15 and C-659/15 PPU, *Judgement of the Court (Grand Chamber) of 5 April 2016* [2016] OJ C211/21.

[91] *Ibid* [101]–[3].

[92] Barak (n 3).

[93] For example, see Christine Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press, 2013).

[94] For example, Koen Lenearts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice' (Sir Jeremy Lever Lecture 2015, Oxford University, Oxford, 30 January 2015), online: <https://perma.cc/NTZ3-5GGM>.

[95] Case C-42/11, *Da Silva Jorge* judgment 5 September nyr, opinion delivered by AG Mengozzi on 20 March 2012. Para 28.

The CJEU confirmed this view by asserting that there is not an absolute obligation to execute arrest warrants, while at the same time it emphasised the duty of national courts to ensure the full effectiveness of the actual application of the EAW framework decision.[96] Furthermore, in *NS*,[97] a case concerning the EU asylum system, the ECJ asserted that if there are substantial grounds for believing that there are systematic flaws in the asylum procedure in the member state responsible, then the transfer of asylum seekers to that territory would be incompatible with the EU Charter. The CJEU further held that, where there is a serious risk of breaching the applicant's rights as guaranteed by the EU Charter, member states should enjoy a wide 'margin of discretion'.[98]

6. Practice dependence or context: the question of good enough justification

This section aims to draw on some further examples from practice, and argues that these examples represent an important testing ground for the resilience of justice-based reasoning. It also explains why this matters in the context of security. By investigating the impact of proportionality in the context of mutual recognition, I seek to demonstrate the force and power of proportionality as a governing principle, and why it is needed as a device for constructing the AFSJ space. The crucial point here is that the proper application of proportionality functions as a rebuttal of the previous assumption that there were no, or very few, limits to mutual recognition in this area. When human rights are at stake, the CJEU must provide good justification for relying on trust. For example, in the much debated *Melloni* ruling,[99] which concerned the validity of the amendments made to the EAW by Framework Decision 2009/299/JHA[100] and addressed the application of the principle of mutual recognition to trials *in absentia*, the CJEU stated that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that this does not compromise the level of protection provided for by the EU Charter, as interpreted by the CJEU, and the primacy, unity and effectiveness of EU law.[101] It could also be argued, however, that Article 53 enables the EU to adopt a higher standard of fundamental rights protection if it so wished. If the national constitution provides for a higher standard and if the objective of the EU is to establish an AFSJ with a high level of human rights protection, such an increase in standard may be adopted. The interesting question in the present context is what would happen if the European Court of Human Rights (ECtHR) were to provide for a higher standard of human rights protection? As the rights set out in the ECHR are also general principles of EU law, it seems likely that the CJEU would then allow for a higher level of protection of human rights in line with the ECtHR. So the CJEU is generally not willing to go any further than the ECHR and is also not willing to let the member states carry out any free standing checks if EU law is in compliance with the ECHR. Yet, the concern as expressed by the CJEU in its ruling in Opinion 2/13 and the insistence on not allowing the EU Charter to be used as a tool to derogate from EU law obligations seems to run counter to *NS*.[102] The point is that the CJEU has, in some cases, agreed that mutual recognition is not absolute, and, in other cases, seems more concerned with upholding the effectiveness of the instrument.

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[96] *Ibid.*

[97] C-411/10 and C-493, judgment of 21 December 2011 [*NS*].

[98] Massimo Fichera and Ester Herlin-Karnell, 'The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights?' (2013) 19(4) *European Public Law* 759.

[99] Case C-399/11, *Criminal Proceedings Against Stefano Melloni* [Melloni].

[100] Council Framework Decision 2009/299/JHA [2009] OJ L81/24.

[101] *Melloni* (n 99) [60].

Despite the bleak picture painted above, there is reason to be hopeful that the CJEU can be a successful guardian of the AFSJ and foster justice. One reason for optimism is the recent case of *Digital Rights*,[103] which is a touchstone of justice-inspired reasoning by the Court. In that case, the CJEU annulled the 2006 Data Retention Directive, which was aimed at fighting crime and terrorism and which allowed data to be stored for up to two years. It concluded that the measure was disproportionate on the grounds that it had a too sweeping generality and therefore violated, *inter alia*, the basic right of data protection as set out in Article 8 of the EU Charter. The CJEU pointed out that access by the competent national authorities to the retained data was not made dependent on a prior review carried out by a court or by an independent administrative body whose decision sought to limit access to the data to what was strictly necessary for the purpose of attaining the objective pursued. Nor did it lay down a specific obligation on member states to establish such limits. The EU legislator had provided insufficient justification for the EU Charter breach—it was simply not good enough from the perspective of EU fundamental rights protection. The same approach was confirmed in the recent *Schrems*[104] and *Tele 2 Sverige*[105] cases, where the Court held that:

> legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter.[106]

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[102] *NS* (n 94).

[103] Case C-293/12, opinion of AG Cruz Villalón delivered on 12 December 2013, judgment of 8 April 2014.

[104] Case C-362/14, *Schrems*, judgment delivered on 6 October 2015, nyr.

[105] Joined Cases C-203/15 and C-698/15, *Telia 2 Sverige*, judgment of 21 December 2016.

[106] Case C-293/12, *Digital Rights*, judgment of 8 April 2014.

Regardless of its attractiveness as a judicial principle, proportionality is often attacked on the ground that it involves judicial weighing of incommensurables. Moreover, it is often accused of being a far too pragmatic and thus simply too mechanical as a legal principle. The argument hinges on the concern that moral values cannot be adequately balanced as the interests at stake cannot actually be weighed on any sort of scale.[107] In short, critics argue that there is too much ambiguity with the proportionality test, and that it fails to deliver what it promises: transparency and rationality. It is therefore seen as lacking legitimacy and granting judges too much power.

As explained above, Kumm has tied the principle of proportionality to the right to justification in human rights law.[108] Requiring the EU to think through its AFSJ vision and to guarantee its citizens justice, in terms of justification, serves not only a political function but also as a legal method. This appears particularly important in the case of the EAW, where an individual could be deprived of his or her basic legal rights depending on what member state he or she is located in, and where the EU Charter will function as a balancing mechanism for ensuring a high AFSJ standard of justice throughout the EU. The debate on the future of AFSJ law must address the question of what exactly is the AFSJ's *raison d'être*. While this question remains largely unanswered, the commitment to consistency in the EU's pursuit of justice is often considered a paramount concern in the European process. The idea of proportionality for ensuring justification and ultimately justice seems a very valuable principle.

While this paper has provided a rather abstract view of the AFSJ while discussing what justice reasoning can add to the debate, its main ambition has been to highlight how a critical reading of justice helps to tilt the AFSJ towards a better balance between being a justice space and being too security-focused. How useful is a justice-oriented approach in AFSJ law? As I attempted to show, serious attention to justice as a critical legal concept could add democratic credibility to the AFSJ if it is read as a basic right to justification, which safeguards due process rights and helps the EU to achieve its agenda in this policy field. Its usefulness thus lies in its potential to place the focus on the individual by requiring a sufficiently coherent system which guarantees adequate human rights protection in an area where it is most needed. Justice as non-domination is also intrinsic to the constitutional structure of the AFSJ.

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[107] Timothy AO Endicott, 'Proportionality and Incommensurability' (2012) Oxford Legal Studies Research Paper No 40/2012, online: <https://ssrn.com/abstract=2086622>; and Webber, *The Negotiable Constitution* (n 3).

[108] Mattias Kumm, 'Democracy is Not Enough: Proportionality and the Point of Judicial Review' (2009) NYU School of Law, Public Law Research Paper No 09-10, online: <https://ssrn.com/abstract=1356793>.

7. Concluding remarks

A turn to the (neo-republican) notion of freedom as non-domination can help us to understand EU security regulation and to view it as part of the EU constitutional trajectory towards justice. The next challenge will be to explore the right to justification. This is possible if non-domination is seen as *justice*. I adopted the Forst-inspired view that justice and justification are interlinked. The right to justification as developed in political theory can be mapped on to the EU's constitutional legal framework. The question of justice and justification in the EU security-related context is ultimately a question of providing 'good enough reasons' and the establishment of the AFSJ is a question of constitutionalism as such.[109] The critic may well ask what is the added value of this view? I have argued that viewing justice as non-domination informs and shapes the constitutional structure of the AFSJ in the direction of a culture of fairness.

A reading of justice that is linked to the question of justification—as a key idea of the overall structure and fairness of the AFSJ-EU system—could help construct a fair AFSJ which fully takes into account how sensitive this area is. A turn to justification via the legal tool of proportionality could help benefit the debate on the future of the AFSJ in the sense that it offers a better chance for justice to inform the outcome, helping to ensure a balance in the AFSJ as a force of good governance. Such an understanding pre-supposes a political reading of justice that takes it beyond mere moralism or what it means to be a good European, and forces the EU to work out a sufficiently thought-through policy agenda as the leader of the project, with the member states to follow, and with the concerns of the individuals being part of this agenda. This does not mean, however, that national law is outdated once and for all; if it can offer the EU something with regard to the interpretation of new concepts in AFSJ law, then the EU would be very wise to keep it for the time being.[110] 'United in diversity', as is stated in the TEU, can only work if a shared sense of legal culture also means a grammar of justice,[111] and thereby elevates the AFSJ to more than mere ideal theory. The AFSJ instead needs to be a policy area that sets the concerns of the individual as its main priority, and ensures a balance against the current domination trend of security.

While security concerns have dictated the AFSJ discourse as an EU crisis-management tool for tackling terrorism since 9/11, the general security mission within the AFSJ has now had to deal with the increasing migration and refugee crisis of 2015–2016, which has had the effect of jeopardising the legitimacy of the EU as an AFSJ space. Regardless of whether one is a consequentialist focusing on outcome, or if one cares about the law as such,[112] justice seen as non-domination has important implications for how we think about the AFSJ. This is why a serious reflection on what 'freedom, security and justice' really means for Europe and the rest of the world is so important.

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[109] On constitutionalism and why it matters, see Alon Harel, *Why Law Matters* (Oxford University Press, 2014) ch 2.

[110] Along the same lines in the context of co-operative constitutionalism, see Anneli Albi, 'Erosion of Constitutional Rights in EU Law: A Call for "Substantive Co-operative Constitutionalism" Part 1' (2015) 9(2) *Vienna Journal of International Constitutional Law* 151. On plural constitutionalism, see Halberstam (n 68).

[111] Rainer Forst, on the Grammar of Justice, see *Justification and Critique* (Polity Press, 2014).

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[112] Harel (n 106).

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Equal respect, capabilities and the moral limits of market exchange: denigration in the EU internal market

Lyn K. L. Tjon Soei Len

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Equal respect, capabilities and the moral limits of market exchange: denigration in the EU internal market

Lyn K. L. Tjon Soei Len[a,b]

[a]Assistant Professor, Women's Studies Program, Law and International Feminist Studies, University of New Hampshire, Durham, NH, USA; [b]Researcher, Centre for the Study of European Contract Law, Amsterdam Law School, Amsterdam, The Netherlands

ABSTRACT
The EU's central task is to improve the lives of European citizens. The EU acts out that task by enhancing its internal market, on the assumption that market exchanges are a primary way individuals pursue their own conceptions of the good life. While the EU aims to enable market exchange through its legal structures, it does not demarcate the moral limits of its internal market. As such, the EU approach to the internal market has decoupled market logic from morality. However, justice requires that European citizens are treated with equal respect and that the exchanges they wish to pursue are subject to a generalisable normative standard. This paper explores the question of how and where the moral limits of the internal market are drawn as a question of justice, and argues that the current European approach to this question fails to safeguard European citizens from denigration.

KEYWORDS Capabilities; political liberalism; moral limits of the internal market; sexual morality; denigration

1. Introduction

The EU portrays the establishment of the internal market as one of its biggest achievements within the larger project of European unification. However, concerns about a disjunction between, on the one hand, European integration through the internal market and, on the other hand, ideals of justice have become widespread.[1] Particularly, the EU has been scrutinised for failing to ensure justice in the internal market through a legal framework that governs the foundations of private exchange, that is, general rules of contract law.

CONTACT Lyn K. L. Tjon Soei Len ✉ Lyn.TjonSoeiLen@unh.edu Women's Studies Program, University of New Hampshire, 203 Huddleston Hall, Durham, NH 03824, USA

[1] In relation to contract law, see Daniela Caruso, 'Qu'ils mangent des contrats: Rethinking Justice in EU Contract Law' in Gráinne de Burca and others (eds), *Europe's Justice Deficit?* (Hart Publishing, 2015). All websites accessed 24 April 2016.

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First, to the extent that the EU enacts legal instruments that aim to promote internal market exchange, critics argue that the dominant justificatory narrative of economic efficiency and market growth displaces substantive notions of justice.[2] Second, the failure to enact, on a European level, a system of legal rules that safeguards even a minimum standard for just market conduct represents an important justice deficit in the EU, revealing an internal market without an institutional framework that provides background justice.[3]

In part, these justice concerns regarding the EU relate to a broader set of worries about the changing role that markets play in human lives. Channeled as marketisation and commodification concerns, they express the idea that some 'things' and relationships should be sheltered from the market and its rationality.[4] Said differently, some exchanges should simply not occur on the market at all, because they are beyond its moral limits. Currently, there exists no European legal articulation of the moral limits of internal market exchange. This means that on a European level, there are no proposed or enacted rules of general contract law that set substantive standards for the validity of private exchanges. In other words, the EU leaves it up to Member States to determine if the private exchanges that people may wish to engage in on the European internal market, are legally binding, and qualify as binding contracts to begin with.

Viewpoints on the appropriate moral limits of market exchange vary widely between the national contract laws of different European states. If the EU strives to be just, it must set some limits to private exchange.[5] The question of how and where these limits should be drawn is a matter of justice within the larger project of an ever-closer EU.[6]

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[2] See Gert Brüggemeier and others, 'Social Justice in European Contract Law: A Manifesto' (2004) 10(6) *European Law Journal* 653; Marija Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) 21(5) *European Law Journal* 572.

[3] See Martijn Hesselink, 'Unjust Conduct in the Internal Market' (2016) Centre for the Study of European Contract Law Working Paper Series 2014–14, online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532375.

[4] See Margaret Jane Radin, *Contested Commodities. The Trouble with Trade in Sex, Children, Body Parts, and Other Things* (Harvard University Press, 1996); Martha Ertman and Joan C Williams (eds), *Rethinking Commodification: Cases and Readings in Law and Culture* (New York University Press, 2005); Debra Satz, *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* (Oxford University Press, 2010); Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Farrar, Straus and Giroux, 2012).

[5] Without such limits, those who are disadvantaged may be willing to engage in desperate exchanges (eg exchanging organs for money), unable to engage in political life (eg market for political votes) or unable to afford police protection. For a powerful illustration, see Joseph William Singer, 'Things That We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society' (2006) 2 *Harvard Law & Policy Review* 139.

[6] The idea that contract law in Europe is subject to requirements of justice has been explored and argued elsewhere. This paper moves forward on the premise that the EU can be appropriately regarded as subject to requirements of justice. For a discussion of this connection within the political liberal tradition of justice, see Hesselink (n 3); Josse Gerard Klijnsma, 'Contract Law as Fairness. A Rawlsian Perspective on the Position of SME's in European Contract Law' (2014) Centre for the Study of European Contract Law; Lyn Tjon Soei Len, *The Effects of Contracts Beyond Frontiers: A Capabilities Perspective on Externalities and*

This paper argues that the European approach to the moral limits of its internal market gives rise to an important justice concern that is distinct from issues of marketisation and commodification. Namely, the approach gives rise to a political liberal concern regarding denigration, that is, a failure to treat European citizens with equal respect. From one perspective, the European approach can be portrayed as aspiring to a 'neutral stance' towards plural, and potentially conflicting conceptions of the moral limits of market exchange on a national level. As such, the EU appears responsive to issues of plurality and divergence on the matter of values among the Member States. However, if the aspiration of neutrality is understood from a political liberal perspective on justice, the European approach to the moral limits of its internal market may fail to live up to its ambition. In a pluralistic society, the purpose of the state's neutral stance is to treat citizens with equal respect; neutrality serves to avoid denigration of *persons*, as they pursue their own conceptions of the good. From this political liberal viewpoint, the state should abstain from endorsing any particular (controversial) ideal of the good life and granting advantages to those who pursue it, while denigrating and disadvantaging those who do not. However, the EU's approach of noninterference does not safeguard persons from denigration, but rather focuses on neutrality between national articulations of the market's moral limits. This paper argues that by leaving the matter of the moral limits of the internal market to the Member States, the EU fails to ensure that the legal structures that govern internal (European) market exchange will treat its citizens with equal respect.

The establishment of the internal market enables European citizens to engage in exchange with each other, and to improve their lives in accordance with their own conceptions of the good. The central task of the EU—to improve the lives of European citizens—is embedded in the commitment to enhance the functioning of the internal market. Legal demarcations of moral limits to market exchange aid in this task. This paper considers the European approach to these legal demarcations from a political liberal perspective on justice. This view holds that the state should not impose serious burdens on individuals as they pursue reasonable conceptions of the good by excluding them from the advantages attached to the availability of state power for the enforcement of their exchanges. If the exclusion is based on moral standards that denigrate the reasonable conceptions of the good that some citizens hold and pursue, that places them at a serious disadvantage and would fail to treat them with the equal respect that they deserve as citizens. It is not the aim of this paper to comprehensively show that the national diverging moral standards for market exchange are disrespectful in this way. Nor does this

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Contract Law in Europe (PhD thesis, University of Amsterdam, 2013) and Lyn Tjon Soei Len, *Minimum Contract Justice* (Hart Publishing, 2017). See for a critical view, though not specific to contract law, in this issue: Sionaidh Douglas-Scott, 'Human Rights as a Basis for Justice in the European Union' doi:10.1080/20414005.2017.1321907.

paper argue that the EU approach should be viewed from the political liberal viewpoint presented here. Instead, the paper aims to show that the EU fails to safeguard its citizens from being subject to national moral standards that could be disrespectful, because it does not preclude the applicability of national standards that denigrate (some) European citizens. In short, the paper will argue that if denigration—the failure to treat European citizens with equal respect—is a serious justice concern, there are compelling reasons to explore alternative approaches to the legal demarcation of the moral limits of the internal market. This paper shows that, as it stands, the EU legal framework that governs internal market exchange does not ensure that the applicable national standards of morality do not disrespect European citizens.

Section 2 sketches the contours of the European approach to the moral limits of the internal market in its legal framework, focusing both on the moral exceptions that are ensconced in the EU constitutional framework and in the national private law rules concerning contractual immorality. Section 3 outlines a capabilities-oriented interpretation of political liberalism that is committed to the political value of equal respect and emphasises the importance of the lives that individuals are able to live to questions of justice. This interpretation of political liberal justice focuses on the creation and preservation of a space of substantive individual freedoms to formulate, hold and pursue one's reasonable conceptions of the good. The paper advances its arguments by understanding the EU's aspiration to neutrality through this political liberal lens. This section ends by detailing some of the implications for demarcations of the moral limits of the market in the EU's legal structures. Section 4 illustrates the risk of denigration in the internal market through the example of sexual morality and will discuss a range of legal demarcations of the moral limits of the internal market that would be incompatible with the political value of equal respect.

2. The EU's approach to the moral limits of the internal market

The EU seemingly take a 'hands-off approach' towards demarcating the moral limits of internal market exchange in its legal structures. The EU demonstrates this approach in (1) its constitutional framework and (2) its approach to contract law on a European level. In effect, the European approach to the moral limits of its internal market reflects the legal competence and ultimate authority of Members States to demarcate the moral limits of internal market exchange.

2.1. Moral exceptions in the EU constitutional framework

Within the EU's constitutional framework, fundamental freedoms are central to the creation of a single market, the ideal of which includes the absence of internal obstacles to the free movement of goods (Articles 34–36 TFEU). In pursuit of that ideal, the EU's constitutional framework guarantees, in principle, the free movement of things that are lawfully produced or marketed in one Member State, across the internal market as a whole.[7] The EU aims to preclude national measures if they discriminate against imported goods in a protectionist manner,[8] in order to overcome obstacles that divergences among national standards may otherwise present. Yet even when a good lawfully enters (or is created in) the EU's internal market, Member States may still impose, as a matter of exception to the general rule, diverging standards for moral reasons. Namely, the EU provisions on the free movement of goods allow measures that restrict the movement of goods on grounds of public morality (Article 36 TFEU).[9] Member states enjoy a considerable margin of discretion when it comes to the moral demarcation of the internal market space of free movement, demonstrated by a 'hands off approach' of the Court of Justice in its case law that addresses the justification of public morality exceptions.[10]

The public morality exception played an explicit role in *Henn and Darby* and *Conegate,* regarding restrictions imposed by Member States on the import of pornographic goods. In *Henn and Darby*, the Court held that 'in principle, it is for each Member State to determine in accordance with its own scale of values and judgment of its appropriate form, the requirements of public morality in its territory'.[11] The particular case involved the import of pornographic books and films that were deemed to be of an indecent or obscene nature in (parts of) the UK, that is, offending a 'recognized standard of propriety'. The goods considered 'obscene' were to be barred on the ground that they tend to 'deprave and corrupt those exposed to the material'.[12] While the Court stated a condition of non-discrimination—the applicable rules for similar domestic goods must comprehensively, prohibit the making and marketing of such goods—it demonstrated a ‘hands off approach’ to the national conception of morality itself. In *Conegate*, involving the import of life-size female shaped dolls, the Court rehearsed this approach stating that ‘although Community law leaves the Member States free to make their own assessments of the indecent or obscene character of certain articles’ public morality reasons

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[7] On the principle of mutual recognition, see Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837; Case 120/78 *Cassis de Dijon* [1979] ECR 649.

[8] Gareth Davies, 'The Court's Jurisprudence on Free Movement of Goods: Pragmatic Presumptions, Not Philosophical Principles' (2012) 2 *European Journal of Consumer Law* 25.

[9] The general exceptions to the free movement of goods are stated in the *Treaty on the Functioning of the European Union*, 13 December 2007, C115/47, online: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:12012E/TXT> at art 36.

> The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

'Public morality' and 'public policy' are used interchangeably in this paper to express legal demarcations of the moral limits of the internal market.

[10] See Christine Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press, 2013) 42–43.

[11] Case 34/78 *Regina v Maurice Donald Henn and John Frederick Ernest Darby* [1979] ECR 3795, [15].

[12] *Ibid* [6]–[7].

> cannot be regarded as sufficiently serious to justify restrictions on the free movement of goods where the Member States concerned does not adopt, with respect to the same goods manufactured or marketed within its territory, penal measures or other serious and effective measures intended to prevent the distribution of such goods in its territory.[13]

In these cases, the court demonstrated its ‘hands-off approach’ with regard to where and how Member States demarcate the moral limits of EU free movement on the internal market qualifying only for reasons of discrimination. In *Jany* the Court affirmed the margin of appreciation concerning national morality standards with regard to the provision of sexual services. As to remind the Member States of their authority in determining what is to be considered immoral, the Court stated that

> So far as concerns the question of the immorality of that activity […] it is not for the Court to substitute its own assessment for that of the legislatures of the Member States where an allegedly immoral activity is practised legally.[14]

In other case law, the ECJ demonstrated a similar approach with regard to the authority of Member States to demarcate the moral limits of the internal market on the basis of fundamental rights. In *Omega* and *Schmidberger*, the Court held that ‘the protection of [fundamental] rights is a legitimate interest which, in principle, justifies a restriction of […] a fundamental freedom guaranteed by the Treaty such as the free movement of goods’.[15] In these cases the Court left it to the assessment of the Member States to draw the moral limits of the internal market, on the basis of values protected through national fundamental rights. While the Court held that Member States cannot determine the scope of public policy unilaterally,[16] the control on a European level is restricted to the standard of proportionality, that is, ‘only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures'.[17] It thus remains a matter of Member State authority to provide a substantive conception of public policy—for instance through fundamental rights—and assess whether internal market activities are contrary to it. While the aforementioned ECJ cases do not directly address internal market exchanges between private actors, they impact the ability of EU citizens to engage in internal market exchange. On a European level, the task is to determine whether in invoking morality, Member States employ restrictions that are non-discriminatory and proportionate.

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[13] Case 121/85 *Conegate Limited v HM Customs & Excise* [1986] ECR 1007, [15].

[14] Case 268/99 *Aldona Malgorzata Jany and Others v Staatssecretaris van Justitie* [2001] ECR I-8615, [56].

[15] Case 112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR 5659 [74]; Case 36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn.* [2004] ECR 9609, [35].

[16] Case 36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn.* [2004] ECR 9609, [30].

2.2. Contractual immorality

The morality of individual market exchanges on the EU internal market is not evaluated and governed by a European instrument of general contract law, but instead by national rules of private law. National legislators (in the case of civil codes) enact open norms (eg good morals) that govern the question of contractual immorality, leaving it to the courts to determine its substantive content in reference to the facts of a particular case.[18] Case law also varies greatly with respect to which exchanges are considered immoral and which sorts of reasoning are applied. Among other methods, courts give effect to fundamental and constitutional rights in private relationships through the concept of contractual immorality.[19] Such references to constitutional rights occur alongside reliance on other legal sources, that is, treaties, legislation, case law and general principles of law, which are understood to express a society's common view of morality over time.

Through contractual immorality, courts demarcate the moral limits of exchange, holding that certain exchanges are contrary to society's *common* or *shared* view of morality. This idea is sometimes expressed by referring to common social opinion (Netherlands),[20] but also by reference to the views that are shared and endorsed by 'the right thinking' members of society.[21] Although courts interpret these open norms in specific cases, it remains obscure how one can fathom which moral viewpoints ought to be regarded as common and shared in these ways and, for instance, whether the degree of consensus that is desirable for such a label is, for instance, of a majoritarian or minimum nature.

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[17] *Ibid* [36].

[18] See Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*]) (FRG) Section 138. and article 3:40 DCC (Dutch Civil Code).

[19] See Chantal Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Kluwer Law International, 2008).

[20] Vincent van den Brink, *De rechtshandeling in strijd met de geode zeden* (Boom Juridische Uitgevers, 2002) 128–9.

[21] The German term *Anstandsformel* refers to a sense of decency in those who are reasonable and fair thinkers. This older term of reference is criticised for its lack of determinate guidance, though this legal formula may still offer value by excluding the use of certain methodologies for determining contractual morality. Christian Armbrüster, *Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB Band 1 Allgemeiner Teil* (Beck Juristicher Verlag, 2012) 1652.

On a European level, several initiatives initially moved towards the creation of a comprehensive European Civil Code and later, the creation of a common frame of reference and a Common European Sales Law (CESL).[22] These developments revealed diverging stances towards a common European norm of immorality for contractual conduct.[23] While some projects explicitly intended to avoid diverging national conceptions of immorality by referring to fundamental principles found across the EU,[24] the most recent initiative, the CESL, excluded issues of contractual morality from its scope entirely.[25] The latter approach is in line with the status of moral exceptions in the EU constitutional framework discussed in the previous section. Namely, the CESL deals with the rights and obligations that arise from contracts entered into on the internal market; yet, it does not govern whether an internal market exchange qualifies as a binding contract to begin with. The latter is a matter of diverging national conceptions of contractual immorality, which define what is and is not to be considered a contract, that is, which private exchanges are beyond the moral limits of the internal market.

The underlying reasons for the continued absence of a common European standard on contractual morality, and consequently on the moral limits of the EU internal market, are in part related to cultural and nationalistic defenses of private law.[26] The diversity of national private laws, and in particular of the moral conceptions contained in them, has been fiercely defended as representations of national identities and traditions. And it has proven difficult to find political support for the articulation of common European standards in a context where ideas about a European shared identity and community are shaky. Yet, as a justification, national tradition is not a compelling reason as to why the EU should refrain from demarking the moral limits of its own internal market.

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[22] European Commission, *On European Contract Law* (2001) COM (2001) 398 Final. European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* COM (2011a) 635 Final.

[23] For instance, the Part I of the Principles of European Contract Law (PECL) excluded the subject matter from its scope

> because of the great variety among the legal systems of Member States as to which contracts are regarded as unenforceable on these grounds […] further investigation is needed to determine whether it is feasible to draft European Principles on these subjects.

Ole Lando and Hugh Beale, *Principles of European Contract Law* (Kluwer Law International, 2000) Article 4:101. Part I, C 4, art 4:101. But Part III included the following rule in the chapter on 'illegality': 'A contract is of no effect to the extent that it is contrary to principles recognised as fundamental in the laws of the Member States of the European Union'. Ole Lando and others, *Principles of European Contract Law: Parts III* (Kluwer Law International, 2003) s 15:101.

[24] For instance, in the PECL and the Draft Common Frame of Reference (DCFR). 'A contract is void to the extent that: a) it infringes a principle recognized as fundamental in the laws of the Member States of the European Union; and b) nullity is required to give effect to that principle'. Christian von Bar and others, *Draft Common Frame of Reference: Principles Definitions, and Model Rules of European Private Law (Outline Edition)* (Sellier European Law Publishers, 2009) Book II, C 7, s 301.

[25] See Commission, *Proposal for a Regulation on a 'Common European Sales Law'*, COM (2011) 635 final, 20.

[26] For an elaborate treatment of these issues see Guido Comparato, *Nationalism and Private Law in Europe* (Hart Publishing, 2014); and Ralf Michaels, 'Why We Have No Theory of European Private Law Pluralism' in Leone Niglia (ed), *Pluralism and European Private Law* (Hart Publishing, 2013).

Instead, we may interpret the EU approach as an ambition for justice. Namely, the EU approach to the question of how and where the moral limits of the internal market are drawn can be read as an aspiration to neutrality amidst divergent moral views in a pluralistic society.[27] This neutral stance resembles a central commitment to justice understood within a political liberal framework.

However, the European 'hands-off' approach is not a truly political liberal conception of justice. Political liberal justice is informed by the active defense of equal respect for persons. If the EU's central task is to improve the lives of its citizens, its current approach allows for the denigration of people in the internal market and raises concerns of justice.

3. Equal respect and capabilities

Political liberal conceptions of justice envision a state that aspires to be sufficiently neutral in response to the problem of our diverse and possibly conflicting comprehensive views of justice and the good.[28] At its core lies the political value of equal respect, which holds that the state ought to refrain from endorsing—and thereby giving preferential treatment to—any one comprehensive conception of the good. The question arises: What does it mean for a state (in this case, the EU) to be sufficiently neutral in this way?[29]

There are multiple interpretations of what political liberalism entails, which share a general commitment to a stance of sufficient neutrality towards variations of *reasonable* conceptions of the good, while making no such commitment to *unreasonable* conceptions of the good. This paper postulates that the EU's aspiration for neutrality, understood as a political liberal project, reflects an account of the distinction between *reasonable* and *unreasonable* conceptions.[30] This account posits the acceptance of the political value of equal respect as the only decisive, and distinguishing factor between *reasonable* and *unreasonable* conceptions of the good. Nussbaum refers to the distinction in the following way:

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[27] For instance, in a Communication on the CESL, the European Commission prefaces the exclusion of immorality by stating that topics that are 'very important for national laws […] will not be addressed by the Common European Sales Law'. Commission Communication 'A Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market', COM (2011) 636 final, 8. The views that Member States express on matters of morality are presented as having deep ties with national identity. See Comparato (n 26).

[28] John Rawls, *Political Liberalism* (Columbia University Press, 1993); Charles Larmore, *The Morals of Modernity* (Cambridge University Press, 1996); Martha Nussbaum, 'Perfectionist Liberalism and Political Liberalism' (2011) 39:1 *Philosophy and Public Affairs* 3.

[29] This paper does not claim that the EU is a state in all respects, but rather that its structures can be appropriately evaluated in light of the requirements of political liberal justice, in part because the EU has a basic and pervasive influence on the lives that its citizens are able to live.

[30] See Nussbaum (n 28).

> […] respect in political liberalism is, first and foremost, respect for persons, not respect for the doctrines they hold, for the grounding of those doctrines, or for anything else about them. […] A 'reasonable' citizen is one who respects other citizens as equals. A 'reasonable' comprehensive doctrine is one endorsed by such a reasonable citizen, that is, including a serious commitment to the value of equal respect for persons as a political value.[31]

In other words, if we understand the EU's commitment to neutrality from this viewpoint, the state's stance of sufficient neutrality is directed towards individuals who hold conceptions of the good that are compatible with their endorsement of the value of equal respect for political purposes. In this view, unreasonable conceptions of the good are identified by their incompatibility with equal respect and nothing else. From this perspective, the political liberal view on the appropriate role of the state is that it should refrain from endorsing any particular comprehensive conception of the good to show equal respect for persons.

More perfectionist liberal views of justice argue that the state should promote a conception of the good; its appropriate role is to encourage and enable people to live their lives in accordance with a more comprehensive conception of what the good life entails.[32] From these viewpoints, the commitment of political liberalism to the *political* value of equal respect is too minimal: it leaves too much room for conceptions of the good that are incompatible with what is ultimately valuable in human lives.[33] And from a perfectionist liberal stance, there is no compelling reason for the state to support such pursuits.

It is beyond the scope of this paper to explore these debates and critiques in full, but for the purpose of the current argument it should be noted that the implications of a more perfectionist liberal view for the legal demarcations of the moral limits of the market seem to align with current legal practices.[34] This paper, then, results in a critical reflection of those practices. Namely, if we pursue the idea that the EU's commitment to justice can be read, in part, as a political liberal commitment to neutrality, its approach to contract law's function of demarcating the moral limits of the market is problematic.[35]

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[31] *Ibid.*

[32] For an example of a perfectionist understanding of private law, see Hanoch Dagan, 'The Utopian Promise of Private Law' (2016) 66(1) *University of Toronto Law Journal* 392. Dagan presents the enhancement of autonomy as the ultimate purpose of private law.

[33] For instance, autonomy as self-authorship, see Dagan (n 32).

[34] Notably, this conception aligns with the ways in which legal conceptions of contractual immorality refer to common moral views. See for examples, section 'The Case of Exchanges of Money for Sex' below.

[35] While the current paper details the problem in terms of disrespect and denigration of persons who hold conceptions of the good that differ from those that the state may endorse, a similar neutrality concern

3.1. The ability to engage in exchange and moral limits to the internal market

A capabilities-oriented interpretation of political liberalism emphasises the creation and preservation of a space of substantive individual freedoms. For individuals to have the substantive freedom—true ability or capability—to do and be what they regard as valuable, the state ought not only abstain from imposing restrictions, but also engage in the (positive) creation of the necessary preconditions that enable them to freely choose to do and be what they regard as valuable.[36] The political value of equal respect requires that a society ensures that each individual has the ability to pursue reasonable conceptions of the good on equal grounds with others. Market exchanges form important means through which individuals pursue their own conceptions of the good and live the lives they deem valuable, for example, how they obtain income, where they live, what they eat.[37] In order to speak of any meaningful ability to engage in exchange on an equal basis with others, people need support from legal institutions. Such support is dependent on the rules that define contractual relations. These rules—notably including standards of contractual immorality—determine if the private exchanges that people may wish to engage in, are legally binding, and as such are regarded *as contracts*.[38] In fulfilling this function, contract law excludes some exchanges from contractual recognition explicitly for reasons of morality. The defining structure of contractual relations is important for substantive individual freedom, because it determines if private parties can rely on the power of the state to help them realise their individual pursuits through exchange.[39] In such cases, the transacting parties are excluded from using the coercive power of the State to enforce of their exchange because their endeavor is considered to be morally unacceptable by the State. That evaluation of the morality of private exchange and market conduct represents the private legal mechanism of demarcating the moral limit of market exchange.

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could be couched in terms of disrespectful paternalism. See Dagan (n 32) 18, and more elaborately Seana Shiffrin, ‘Paternalism, Unconscionability, and Accomodation’ (2000) 29 *Philosophy and Public Affairs* 205.

[36] See Amartya Sen, *Inequality Reexamined* (Oxford University Press, 1992); Amartya Sen, *Development as Freedom* (Oxford University Press, 1999); Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000); Martha Nussbaum, *Frontiers of Justice* (Harvard University Press, 2006).

[37] Some have argued that the ability to decide one’s own consumption pattern can be closely tied to individual identity and self-determination through lifestyle. See Alan Strudler and Eleonora Curlo, ‘Consumption as Culture: A Desert Example’ in David A Crocker and Toby Linden (eds), *Ethics of Consumption* (Rowman & Littlefield Publishers, 1998) 269–6.

[38] See Tjon Soei Len (n 6).

[39] For an account of contractual capacity as a precondition for market participation, see Simon Deakin, ‘Capacitas: Contract Law and the Institutional Preconditions of a Market Economy (2006) 2 *European Review of Private Law* 317.

3.2. Contractual recognition and denigration

While exclusion from the advantage of state contractual enforcement is pertinent to issues of distributive justice, the state's expression of moral disapproval is significant in light of equal respect. What does it mean for the state to exclude certain exchanges from the advantage of contractual recognition?

First, the legal structure that demarcates the moral limits of the market grants advantages (ie the availability of state enforcement) to some over others by supporting the life plans (ie market pursuits) of some individuals, while barring those of others. Concerns about fair distributions of advantage and disadvantage are thus salient to the question of moral limits of markets. Second, the exclusion from contractual recognition and enforcement is based on moral standards that are independent of the moral views held by the contracting parties.[40] When the state refuses to recognise a market exchange as a contract for reasons of the sort examined in this paper, the state also expresses moral disapproval of the market pursuits that parties are engaged in. At the same time, the state expresses its endorsement of the moral views on which that disapproval is based. Political liberalism requires that state refrains from endorsing any particular *comprehensive* conception of the good when doing so, and instead, performs this task in accordance with the political value of equal respect. Endorsing a comprehensive view of the good while condemning alternatives, denigrates citizens who hold and pursue an incompatible, but reasonable conception of the good. In short, legal standards that exclude market exchanges on comprehensive moral grounds would create a market order where some individuals' moral views are denigrated.

The current EU approach risks denigrating some of its citizens, because it allows for the potential prioritisation and endorsement of some comprehensive views of the good when demarcating the moral limits of the European, internal market (Section 2). The latter would be incompatible with the political value of equal respect and thus unjust within a political liberal framework (Section 3). The last section of this paper aims to illustrate this risk through the example of sexual morality and will discuss a range of legal demarcations of the moral limits of the internal market that would be incompatible with the political value of equal respect.

4. The risk of denigration in the internal market: an illustration through sexual morality

There are many different accounts of why certain goods or activities may be regarded as morally objectionable, and why they should be blocked from markets.[41] Although a separate question, these normative accounts often resonate with the justifications offered for legal measures that block certain types of exchange from the market, or withhold collective support for the recognition and enforcement of those exchanges through contractual immorality. To the extent that these accounts are, however, based on comprehensive conceptions of the good, they ought not to be endorsed by the State as demarcating accounts of the moral limits of the internal market. This section briefly outlines a range of accounts of the legal demarcation of sexual morality to illustrate how the EU approach risks denigration of some of its citizens in the internal market.[42]

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[40] See Tjon Soei Len (n 6).

4.1. The case of exchanges of money for sex

National conceptions of sexual morality, expressed in the legal treatment of prostitution, vary greatly across the EU. While some Member States recognise exchanges of money for sex as legally binding contracts, many others do not, either because certain activities associated with prostitution are criminalised (eg consumption, solicitation, procurement) or because standards of contractual morality deem them morally unacceptable.[43] On what normative grounds could national legal standards regard exchanges of money for sex morally objectionable?

First, some accounts rely on particular religious traditions to inform a moral objection to market exchanges of money for sex. These accounts invoke a comprehensive (religious) conception of the good to justify the moral limits of the internal market. For instance, the laws of Member States with a strong Catholic tradition have long been influenced by comprehensive doctrines that regard all forms of sexual activity outside a heterosexual monogamous marital relationship as immoral, that is, sinful.[44] The endorsement by the state of such a comprehensive conception of the good, however, is incompatible with equal respect. In so doing, the State disrespects and denigrates individuals who hold different conceptions of the good.

Second, legal standards informed by a conception of a 'true' value of sex are incompatible with equal respect, as the state would express and endorse an authoritative view of the 'essential' value and meaning of sexual activity. Arguments from corruption offer an illustrative example. For instance, one may argue that sex is an intimate activity that would be inappropriately valued once exchanged for money on the market.[45] In this view, exchanges of money for sex reduce sexual activities to its monetary value, corrupting the real, intimate value of sexual activity.[46] Some argue that moral objections based on corruption are fundamental in determining whether or not goods should be sold for money on the market.[47] If such moral objections were to inform *legal* standards, the restrictions on people's abilities to engage in exchanges of sex for money would reflect a view on the ultimate meaning of sex by resounding the belief that money corrupts sexual activity. From a political liberal viewpoint, a state should not risk disrespecting reasonable persons, eg, those who embrace the idea of 'good matches' between intimacy and money,[48] by communicating that their views are morally wrong. Third, legal restrictions on commercial sexual activity can be informed by arguments from harm that point to the potential for physical and mental diseases, drug addiction and loss of self-respect for those engaged in these market exchanges.[49] This view relies on the idea that the moral limits of market exchange reflect an unacceptable risk of harm for transacting parties.[50] However, to the extent that these views would be offered as decisive justifications for the moral limits of the market, one would expect that many other risky market activities, for instance many forms of professional sports such as football, racing a car or kick-boxing, would be similarly regarded as morally problematic and at least morally suspicious. Concerns regarding harm do not seem to support the legal demarcation of the moral limits of the internal market, unless a wide range of other risky market activities would also be subject to it. A commitment to equal respect in the internal market would preclude that its citizens would be subject to the arbitrary application of legal standards of morality.

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[41] See (n 4).

[42] Sexual morality provides a relevant illustration as it is a central example in national doctrines of contractual immorality and is subject to broad national variance across the EU.

[43] See Lyn Tjon Soei Len, 'Consumer Protection, Sexual Services and Vulnerability: Exploring Social Justice in European Contract Law' (2015) 11(2) *European Review of Contract Law* 127.

[44] See Adam McCann, 'Ireland' (2014) 22(1) *European Review of Private Law* 199, online: www.kluwerlawonline.com/document.php?id=ERPL2014010. See discussion by Martha Nussbaum, 'Whether from Reason or Prejudice. Taking Money for Bodily Services' in *Sex and Social Justice* (Oxford University Press, 2000) 286.

Fourth, legal demarcations of moral limits of the market can be informed by concerns regarding gender inequality.[51] Market exchanges of money for sex are gendered phenomena, with an enormous majority of female service providers and a predominance of male consumers. Prostitution has therefore been described as 'a theatre of inequality' that reflects a practice of male dominance,[52] degrading women by reflecting female subordination to male sexual desire.[53] In this light, the moral limits of the internal market could be grounded in an aspiration to ameliorate the general socially inferior status of women, and could be compatible with a commitment to equal respect. In a sense, the socially inferior status of women could be viewed as an unacceptable negative externality addressed by the law. From this angle, gender inequality as a normative justification for the legal demarcation of the moral limits of the internal market need not encounter problems of denigration.

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[45] See for discussion of the view that money corrupts intimacy: Viviana Zelizer, 'Money, Power, and Sex' (2006) 18 *Yale Journal of Law and Feminism* 305

[46] There is a lack of empirical evidence for the claim that intimate sexual relations cannot coexist alongside commercial sexual services. See Ann Lucas, 'The Currency of Sex: Prostitution, Law and Commodification' in Martha Ertman and Joan C Williams (eds), *Rethinking Commodification: Cases and Readings in Law and Culture* (New York University Press, 2005) 253; Margaret Jane Radin, 'Market-Inalienability' (1987) 100(8) *Harvard Law Review* 1912–1913.

[47] See Michael Sandel, 'What Money Can't Buy: The Moral Limits of Markets' in Grethe Peterson (ed), *The Tanner Lectures on Human Values* (University of Utah Press, 19th edn 1998).

[48] See Viviana Zelizer, 'Money, Power, and Sex' (2006) 18 *Yale Journal of Law and Feminism* 307.

[49] See Peter de Marneffe, *Liberalism and Prostitution* (Oxford University Press, 2012).

[50] Two clarifications. First, legal restrictions of course include a wide range of potential regulatory measures, including safety regulation and minimum wages, that do not speak to the issue of moral market limits of the sort that this paper addresses. And second, I do not mean to suggest here that arguments from harm cannot be invoked as justificatory bases for legal restrictions by the state, but rather that those arguments should not be arbitrarily applied, if the state's commitment to neutrality is understood from a political liberal viewpoint.

[51] See European Parliament Committee on Women's Rights and Gender Equality, 'Draft Report on sexual exploitation and prostitution and its impact on gender equality' 2013/2103(INI) online: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-519.748+01+DOC+PDF+V0//EN.

However, the extent to which this normative justification can avoid the problem of denigration will depend on its precise application. There are at least two difficulties to navigate in this respect. First, exchanges of money for sex are not homogeneous phenomena, but internally diverse. While some exchanges may conform to images of male dominance and female subordination, others may represent countervailing phenomena of female empowerment.[54] For instance, well-compensated, high-end escorts may be able to exchange money for sex independently and under comfortable conditions, while streetwalkers may rely on pimps for protection. The state should be cautious not to invoke gender inequality as a comprehensive normative justification for the legal demarcation of the moral limits of the market as it regards all exchanges of sex for money. As a blanket justification, gender inequality can convert into a claim about the true meaning of exchanges of sex for money, that is, female subordination. As such, it would risk denigrating persons who view such exchanges as empowering, and as subversions of male domination. The objection would then follow the same structure as expressed in relation to arguments from corruption. Second, gender inequality is a pervasive factor in society that affects a wide range of market exchanges in explicit and implicit ways. The concern of equal respect arises, if gender inequality is not consistently invoked as a justification for the legal demarcation of the moral limits of the internal market in relation to exchanges that can serve as appropriate analogies to exchanges of sex for money. In that case, the objection follows the same structure as expressed in relation to arguments from harm.

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[52] See Debra Satz, *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* (Oxford University Press, 2010) 147.

[53] See Carol Pateman, *The Sexual Contract* (Stanford University Press, 1988); Catherine MacKinnon, 'Prositution and Civil Rights' (1993) 1(13) *Michigan Journal of Gender and Law* 29–30.

[54] See Katherine Franke, 'Theorizing Yes: An Essay on Feminism, Law and Desire' (2001) 101 *Columbia Law Review* 199.

From a capabilities-oriented interpretation of justice, each of the normative grounds discussed above can denigrate people. Notably, to the extent that the moral limits of the internal market can be and are demarcated by national standards that are based on comprehensive (and thus controversial) conceptions of the good the EU fails to safeguard (some of) its citizens from denigration in the internal market. If we understand the European approach to the moral limits of its internal market as an aspiration to justice in the neutral, political liberal sense, the EU should ensure that the applicable (national) legal standards do not denigrate European citizens. Legal standards that demarcate the moral limits of the internal market should be compatible with moral reasons of equal respect. Moreover, a capabilities-oriented interpretation connects the legal standards that demarcate the moral limits of the internal market to the EU's central task to improve the lives that its citizens are able to live. In this view, the moral limits of the internal market should strive to advance the substantive freedom of individuals to pursue their reasonable conceptions of the good when participating in the internal market.

5. Conclusion

The European approach to the moral limits of its internal market currently fails to ensure that European citizens are treated with equal respect when engaging in exchange. Currently, even if national legal standards of morality would be explicitly incompatible with the political value of equal respect the EU approach ensconces no opportunity for substantive scrutiny. As long as Member States apply national standards in a non-discriminatory and proportional manner, the endorsement of a comprehensive conception of the good encounters no objection within the foundational legal framework that governs the EU's internal market. This approach thus leaves open the possibility that legal standards would denigrate some European citizens, which constitutes an injustice in light of the political value of equal respect. If justice matters within the EU, it is important to explore the ways in which the internal market and its underlying legal structures advantage some over others, and to work towards ameliorating the position of those who are least advantaged in terms of the abilities they have to do and be what they regard as valuable.

Disclosure statement

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