

WZB

Berlin Social Science Center



Ester Herlin Karnell
Poul F. Kjaer

Dimensions of Justice & Justification in EU and Transnational Contexts

Discussion Paper

SP IV 2015–801

September 2015

Center for Global
Constitutionalism

WZB 

WZB Berlin Social Science Center

WZB Berlin Social Science Center
Reichpietschufer 50
10785 Berlin
Germany
www.wzb.eu

Copyright remains with the author(s).

Discussion papers of the WZB serve to disseminate the research results of work in progress prior to publication to encourage the exchange of ideas and academic debate. Inclusion of a paper in the discussion paper series does not constitute publication and should not limit publication in any other venue. The discussion papers published by the WZB represent the views of the respective author(s) and not of the institute as a whole.

Wissenschaftszentrum Berlin für Sozialforschung (2015)

Ester Herlin-Karnell

Poul F. Kjaer

Dimensions of Justice & Justification in EU and Transnational Contexts

Discussion Paper SP IV 2015–801

Affiliation of the authors other than WZB:

Ester Herlin-Karnell

VU University Amsterdam, Faculty of Law, De Boelelaan 1105, 1081 HV
Amsterdam, The Netherlands

Poul F. Kjaer

Copenhagen Business School, Solbjerg Plads 3, DK-2000 Frederiksberg,
Denmark

Abstract

Dimensions of Justice & Justification in EU and Transnational Contexts

by Ester Herlin-Karnell and Poul F. Kjaer¹

This discussion paper is part of a series of contributions to the conference 'Towards a Grammar of Justice in EU Law', which took place on 6-7 November 2014 at VU University Amsterdam, sponsored by ACCESS EUROPE Amsterdam, VU Centre for European Legal Studies and the Dutch Research Council VENI grant.

The introduction to this special issue presents the contributions and explains the main idea behind this collection of papers. Specifically, the special issue explores a grammar of justice and justification through political theory, legal and sociological perspectives and discuss their relevance in EU and transnational governance. In addition, this introduction links the papers together and supplies some concluding thoughts.

Key words: Justice, Justification, EU Context, transnational context, transnational politics, global governance, democracy.

¹ Poul F Kjaer's work is supported by the European Research Council (ITEPE-312331).

Both authors thank Mattias Kumm and Hilde Ottschofski for making this special WZB discussion paper issue possible.

1. Introduction

This special issue sets out to explore the force of justice and justification and their role for the development and understanding of the EU and transitional realm. As the EU is increasingly facing a constitutional crisis, adjacent to the financial crisis, and perhaps most urgently the EU crisis of 2015; the migration and refugee catastrophe in the Mediterranean, at various levels in the EU decentralized and centralized hybrid system, the European journey to an 'unknown' destination seems to have momentarily come to an end.² Or at least it is in need of a navigation tool for any further expansion and exploration of the Union project. It appears as if the EU has lost its narrative.³ Similar developments can be observed within, for example, the WTO, which has been in stalemate until recently. It is on this background, that the concepts of justice and justification have recently become important yardsticks within scholarly debates for understanding constitutionalism in the EU and other transnational context. The concepts of justice and justification however remain essentially contested concepts just as the two concepts might not be equated. In spite of this or maybe exactly because of this they however serve as useful starting points for raising some intriguing questions regarding the role of legitimacy in transnational contexts.

On that background, we have invited several high profile political and social theorists and legal scholars and asked them to reflect on the deeper meaning of justice and justification in the EU and other transnational contexts. The debate on justice and justification is certainly not new.⁴ While departing from the ongoing debate this special issue also goes beyond it in several important ways. It not only takes stock on the continuing discussion but makes a tighter coupling between, on the one hand, political and legal theory and, on the other hand, sociological approaches. This coupling is particular apparent in the first and the last contribution which both looks at the conditions which need to be in place in order for justice and justification practices to unfold. In addition, the special issue

² J Weiler, *Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration*, 31 *J. JMCS.* 417, 437 (1993).

³ See e.g. G De Burca, 'Europe's Raison d'Être' in *The European Union's Shaping of the International Legal Order* (F Amtenbrink and D Kochenov, ed., Cambridge University Press, 2014) 21

⁴ Most notably: R Forst *The Right to Justification* (Columbia 2012), see also J Neyer, *The Justification of Europe* (Oxford University Press 2012). In EU context, see recently G de Burca, D Kochenov and A Williams (eds), *Europe's Justice Deficit* (Hart publishing 2015), A Sangiovanni, 'Solidarity in the European Union' (2013) *Oxford Journal of Legal Studies* 33: 2

empirically explores the social and legal praxis of justice and justification within specific policy areas and regimes: The EU policy areas 'freedom, security and justice' and the Internal Market. So far the debate on justice and justification has mainly been confined to the EU context. This special issue however deliberately expands the perspective into the global arena by including a comparative perspective on the WTO as well as re-conceptualisations which gives the justice and justification vocabulary a more generic global reach.

Hence, the notions of justice and justification in this special issue are approached from different angles keeping the legal, political and social as essential navigation tools.

2. The structure of the special issue

The first section introduces central notions of justice and justification within political theory and links them to the project of EU and transnational law and governance.

In the first paper Enzo Rossi and Jan Pieter Beetz sketches the theoretical problems in the EU and how to tackle them which help setting the scene for the questions raised in this special issue. They analytically outline what conceptions need to be clarified in order for us to engage in a fruitful debate on the future of EU integration. This is done by supplying a conceptual analysis of the EU's legitimation status through the lens of a realist account of legitimacy. 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 Union, the legitimation story offered by the member states to its citizens draws upon a tradition of popular sovereignty that fit badly with the supranational pooling and delegation of sovereign powers that characterizes the EU rule. 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. On that note, legitimacy remains the burning question and questions of justice will have to tackle this as part of the democratic deficit problem. This question is discussed in the subsequent paper. Ben Crum approaches the specific question of justice from the perspective of 'public reason' and contrasts the structural setup guiding the possibility for public reasoning to unfold 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 hand, recognizes the privileged status of the nation-state. As public reason has come to be thick and strongly entrenched within the confines of the nation-state, it 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 operationalization of the concepts of justice and justification in the EU contexts but also clarifies the factual conditions under which political obligations can be successfully unfolded. Next, Sionaidh Douglas-Scott turns to the legal theory domain and assesses the usefulness of justice as a critical legal concept when discussing human rights protection in the EU and she does so by scrutinizing the rule of law in political and legal theory context. She argues that since justice is a contested concept, a more graspable version of it is an understanding of it in the shape of what is deemed as 'injustice' rather than justice. As such the paper takes a markedly different approach than the perspectives which have emerged so far. A main theme of this 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 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, 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 second section focuses on the EU proper. Ester Herlin-Karnell asks how the contested concept of justice conceivably could become an integrated part, assuming that it should, of the vocabulary of EU constitutional grammar by explicitly turning to the notion of justification. She takes as her starting point the claim 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 domination trend of security. Specifically, the paper sets out to explain why justice theory in EU constitutionalism matters 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) as one of the most intriguing testing fields for justice in the contemporary EU. In doing so, she investigates the link between justice and 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 providing a case study of a number of recent cases that are set to change the dynamics of AFSJ law. The paper argues that these cases demonstrate the potentials of 'justice' reasoning in practice and thereby addresses the greater question of 'justifications' beyond the state. Thereafter, Lyn K.L. Tjon Soei Len follows up with a study of the moral limits of the EU's internal market and how they are drawn up with specific emphasis on justice as a device for understanding what limits should be imposed on free trade and what it tells us about justice. She argues that the EU's central task is to improve the lives that European citizens 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 consider the demarcation of the moral limits of its internal market as a European task. As such the EU 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 drawing on recent debates – requires that European citizens are treated with equal respect and that the exchanges they wish to pursue are subject to a generalizable normative standard. The paper shows that the question of how and where the moral limits of the internal market are drawn is a question of justice, and that the answer matters for the abilities that individuals have to do and be what they regard as valuable.

The final section goes beyond the EU by exploring the EU/WTO nexus as well as broader the broader field of transnational governance. Sivan Shlomo Agon opens the section by challenging what she consider as the rule- and compliance-oriented discourse on justice within transnational law and critically analyses the notion of justice as unfolded in the WTO dispute settlement system. The paper approaches justice from the domain of the

empirical and shows, through careful case studies in EU-WTO context, that justice is not only a contested concept but one that is intrinsically linked to the concept of fairness and embedded in praxis' of fairness. Whereas in the past, the primary, if not the sole role of international courts was that of settling disputes, in their modern legalized reincarnation these international institutions have come to be seen primarily as enforcement mechanism; mechanisms that have been put in place by states in order to give effect to their negotiated commitments and to hold states (or other entities) accountable for the international rules agreed-upon. Within this prevailing enforcement-centered discourse on international courts, in turn, "justice" has so far been captured mainly through its "legal" or "rule of law" dimension. Accordingly, justice is often assumed to be delivered by an international court when - following legal procedures that meet proper standards of fairness - the responding state discontinues its violates act and brings itself into compliance with its international obligations. Shlomo Agon's contribution challenges this rule-oriented discourse.

Finally, Poul F Kjaer returns to broader theoretical issues by asking the sociological question why a discourse on justice and justification has emerged within transnational settings and argues that principles of justification serve as normative forms of stabilisation of transnational regimes. The paper 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 reinforcing each other rather than standing in opposition. Within contemporary transnational regimes elaborated frameworks of justification have moreover emerged which serve as 'functional equivalents' to democratic processes within nation states. Such frameworks serve as reflexivity increasing frameworks which are aimed at normatively stabilising the regimes in questions and to enable them to approach the future. A central part of such frameworks are the regulatory counter-factual idea of 'complete inclusion', meaning the potential inclusion of all humans into a given transnational regime. 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.

3. Conclusion

It is thus our hope that this special issue will offer new perspectives and take the debate further on the future of EU integration by placing it in the context of the transnational reality. The modest suggestion is that what is really needed in the transnational and EU constitutionalism framework is a deeper reflection on the requirement of justifications in the transnational realm. The discussion on justice and justification offer counter measures to domination and asks the difficult question as to how to reconcile the democracy question with more general questions pertaining to non-domination and aspirations for freedom and equality. While as these papers demonstrate, the notion of justice is a highly multifaceted notion and while it might even be more fruitful to address injustice rather than justice, the common dominator that emerges in this special issue is a focus on the conditions of justice. We hope that this special issue will help steer the debate in the right direction for what it means to refer to justification in the contemporary EU and other transnational settings and illustrate why critically engaging – normatively and empirically and on the basis of realism or ideal theory– is crucial for the survival for a cosmopolitan perspective. We would like to welcome our readers to take part in this endeavour.

Discussion Papers of the Center for Global Constitutionalism 2015

Ester Herlin-Karnell and Poul F. Kjaer Dimensions of Justice & Justification in EU and Transnational Contexts	SP IV 2015-801
Jan Pieter Beetz and Enzo Rossi EU Legitimacy in a Realist Key	SP IV 2015-802
Ben Crum From Public Reason to Multi-Layered Justice	SP IV 2015-803
Sionaidh Douglas-Scott Human Rights as a Basis for Justice in the European Union	SP IV 2015-804
Ester Herlin-Karnell Justice and Justification in Europe's "Area of Freedom, Security and Justice"	SP IV 2015-805
Lyn K.L. Tjon Soei-Len The Moral Limits of EU Internal Market Exchange Equal Respect and Capabilities	SP IV 2015-806
Sivan Shlomo-Agon Noncompliance, Renegotiation, and Justice in International Adjudication: A WTO-EU Perspective	SP IV 2015-807
Poul F. Kjaer The Function of Justification in Transnational Governance	SP IV 2015-808

All discussion papers are downloadable:
<https://www.wzb.eu/en/publications/discussion-papers/trans-sectoral-research>