

Justice in the EU

The Emergence of Transnational Solidarity

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Introduction

The question of justice is receiving more and more attention in the European Union. A ruling by the European Court of Justice in November 2014 in *Dano*, a case concerning access to minimum subsistence benefits for economically inactive EU migrants, made it to the front pages of *Le Monde*, *The Guardian*, *La Stampa*, and the *Frankfurter Allgemeine Zeitung* the following day.¹ In the discussion that ensued, the ruling was alternatively presented as ‘saving the welfare state’ by allowing Member States to exclude non-working EU migrants from accessing certain benefits, or as allowing for xenophobic and nationalistic narratives to be employed in limiting the emerging ideas of solidarity among the people of Europe.

European Union law generates these types of ‘conflicts of justice’ on a continuous basis throughout its territory. Properly understood, these conflicts suggest that the Member States and the EU have a very different idea of what justice is, means, and requires. This book has two objectives. First, it explains the differences between how Member States and the EU understand justice, in both institutional and normative terms. Second, it analyses to what extent these ‘conflicts of justice’ can be overcome by articulating forms of *transnational solidarity* that reflect the connections between citizens in the EU *across* borders.

Examples of the ‘conflicts of justice’ that EU law produces come in many different forms. A Hungarian doctor, for example, educated at the expense of the Hungarian taxpayer in order to ensure that the nation’s citizens can access high-quality healthcare, moves to the UK to live with her Italian boyfriend, and finds employment there in the NHS. Does this create justice or injustice? Is it ‘more’ just that a Hungarian national is free to live and work

¹ Case C-333/13 *Dano* [nyr] ruling of 11 November 2014.

wherever she wants or 'less' just that Hungary cannot recoup the costs of training doctors, and UK doctors might be crowded out in access to a job? If the Hungarian national has a child with her Italian boyfriend, should she be eligible for childcare benefits in the UK, despite not being a national? And if so, is this on the basis of her residence or her employment? Should she still receive such benefits if she were to lose her job after two years? A Swedish pensioner, having worked his whole life in Sweden, decides to move to Spain to enjoy the sun and good food. After having lived in Spain for two years, he loses his eyesight. Should he be entitled to receive disability benefit from the Swedish state, where he paid taxes his whole life, or from Spain, where he now lives? And does Spain have to offer healthcare treatment to all resident pensioners—even if this imposes a disproportionate burden on their taxpayers and medical infrastructure? Does Greece have to refund its nationals if they go abroad to have open-heart surgery, on the basis that the domestic healthcare facilities are not adequate to guarantee high-quality treatment (courtesy of the troika)? Can an Estonian company build a school in Austria while paying its workers Estonian wages (and protecting its competitive advantage) or should it pay Austrian minimum wages (thus protecting the Austrian *and* Estonian workers)? Can a French student who decides to study in Romania ask the Romanian state to offer student benefits, or should she direct that demand to the French state? Can a jobless German national who has lived in Poland for three years demand access to Polish minimum allowance provision, meant to allow citizens to live their life with a basic level of dignity, or should he be left to fend for himself?

It is very likely that the reader has an intuitive sense of how to answer these questions. It is also very likely that different readers come up with different answers. This is, simply put, the problem with justice: each person adheres to a different conception of what it is. In discussing the development of justice in the EU, moreover, we face an additional problem. While the Member States have come up with solid institutional mechanisms to mediate how different citizens think about justice, and are thereby able to articulate a *collective* idea of justice, the EU has not. The EU does not dispose a sufficiently sophisticated democratic structure that can settle the above 'conflicts of justice' in a legitimate manner and that can articulate an autonomous, supranational, and communal idea of justice. This book, instead, suggests an alternative way of settling the 'conflicts of justice' that emerge in the EU. It suggests that EU law implicitly articulates diverse types of *transnational solidarity*, which help us to make sense of these 'conflicts of justice' by telling us *why* we owe certain specific commitments of justice to individuals

beyond our own political community. At the same time, these different forms of transnational solidarity tell us something about the 'idea' of justice that is emerging in the EU.

The Paradox of Justice

The development of the 'idea' of justice in modern societies is premised on a paradox. On the one hand, the claims made in the name of justice are necessarily universal. Something that is 'good' or 'bad', 'right' or 'wrong', 'appropriate' or 'inappropriate' is not logically confined to a particular spatial context. On the other hand, the institutions required to actually 'do' justice, in the form of democratic, administrative, or redistributive institutions, are tied to a particular territorial structure: the nation state. In other words, national institutions are indispensable in the attainment of justice, but can never fully realize the potential of justice. This paradox has led many commentators to argue that there is no space for a cosmopolitan or distinctly European 'idea' of justice as a result of the lack of sophisticated political communities and democratic institutions that transcend the nation state.² In fact, the question of justice is hardly ever explicitly discussed in the EU or in its law.³ Of course, the integration project's original intentions of establishing lasting peace and generating economic prosperity on a shattered continent were not unrelated to ideas of justice and the 'good life', but the integration process was never meant to engage in what justice is, means, and requires. Those tasks were left to the Member States, where redistributive criteria are elaborated and legitimized through robust democratic institutions and public spheres.

At the same time, it has increasingly become clear in recent years that the EU, as a transnational institutional structure that situates itself between

² See e.g. T. Nagel, 'The Problem of Global Justice' (2005) 33 *Philosophy and Public Affairs* 113; A. Sangiovanni, 'Justice and the Priority of Politics to Morality' (2008) 16 *Journal of Political Philosophy* 137ff., and 'Global Justice, Reciprocity and the State' (2007) 35 *Philosophy and Public Affairs* 2–39. See, for the opposite view, J. Cohen and C. Sabel, 'Global Democracy?' (2005) 37 *NYU Journal of International Law and Politics* 763ff.

³ Notable exceptions include A. Williams, *The Ethos of Europe* (Cambridge: CUP, 2010), whose understanding of justice does not go much beyond a commitment to liberal-democratic values, and A. Somek, *Engineering Equality* (Oxford: OUP, 2011), whose account is much more sophisticated but limited to the Union's non-discrimination agenda.

the nation state and the global level, almost inevitably engages in the redistribution of resources, and that its norms (and to a lesser extent its institutions) intuitively conform to some kind of ill-defined and *transnational* idea of justice. This expansion of ideas of justice beyond the structures of the nation state poses formidable problems, in both institutional and normative terms. While it opens our eyes to the associative ties between citizens across borders—be it in economic, social, or political terms—and suggests that these ties might be as valuable as the ties of nationality as a motive for sharing resources between individuals, it also clearly highlights that the institutions that can dependably produce justice have remained on the national level. The challenge, then, is to understand how national institutions can produce a type of justice that takes account of the relationships between citizens across borders.

This book argues that EU law can indeed serve as an instrument for the extension of the values of justice beyond the nation state. While the nation state ‘does’ justice, it does not, after all, fully exhaust what justice requires. The EU’s tiered institutional settlement offers a novel and fascinating way of extending the values of social justice beyond the nation state. It does so by standing on the shoulders of the national welfare state construction, and adding a transnational dimension to its values. Such a tiered understanding of the idea of justice in Europe, however, raises three issues: (1) it challenges us to think beyond the contractarian reflex that equates justice with political self-determination of a *demos*; (2) it demands that we create a tiered institutional and normative model, involving both the nation state and the EU, that can make sense of the new ties between individual citizens that the process of European integration, and in particular its norms of free movement, continue to generate; and (3) it requires that we construct novel concepts of transnational solidarity that help us understand what those new ties—which may come in economic, social, or political forms—tell us about our transnational obligations of justice. This book attempts to address all three.

The Place of Justice

The first chapter focuses on how to think about social justice beyond the nation state. It suggests that justice requires us, primarily, to make sense of the very different conceptions of ‘the good’ that different participants in society adhere to. Some citizens might think that the ‘good life’ entails access

to shelter and food; others that it entails being able to live a life without outside interference; others yet that it entails helping fellow citizens aspire to be whatever they want in life. The mediation between these different views, and the generation of collective ideas of 'the good' that can be enforced through the administrative machinery of the state, however, presupposes significant and long-term processes of social structuring. For justice to be 'produced', we need a sophisticated political system that is able to collect different voices, mediate between them, and legitimize a specific collective understanding of justice. This, in turn, requires closure of the boundaries of the polity, the creation of a strong centre, political loyalties, and cleavages in society that articulate distinct and competing conceptions of justice.

At the same time, the production of norms of justice entails the existence of a *motive* for individual citizens to share their resources with fellow citizens. Without such a redistributive commitment, usually referred to as 'solidarity', all ambitious conceptions of justice would collapse. Typically, solidarity is thought of as being inextricably linked to the nation state: the motive for sharing our resources with fellow citizens is that we are all Irish, or Spanish. The ethno-cultural similarities between citizens, built through history, language, and culture, and solidified by the creation of communities of fate and the nation state with its 'fiction of eternity', mean, in other words, that solidarity is primarily based on kinship. The motive for sharing our resources with one particular group of people is that they are 'like us'. Nationality or national citizenship, in turn, are shorthands for the definition of the citizens that fall within this category. It is unsurprising, then, that most academics, politicians, and citizens share the intuition that justice 'belongs' on the national level.

Some commentators have taken a more nuanced view of the interaction between the nation state and the development of justice, and have emphasized that it is the *state* (with its institutional connotations) rather than the *nation* (with its ethnic connotations) that is crucial in the development of justice. Simply put, this argument suggests that justice and solidarity follow not from certain ethno-cultural similarities, but from the specific associations or relationships between citizens. The *political* association between citizens to a polity, in other words, constitutes in itself a *motive* for sharing resources between the members of that group. As Thomas Nagel has put it:

Sovereign states are not merely instruments for realising the pre-institutional value of justice among human beings. Instead, their existence is precisely what gives the value of justice its application, by putting the fellow citizens of a sovereign state

into a relation that they do not have with the rest of humanity, an institutional relation which must then be evaluated by the special standards of fairness and equality that fill out the content of justice.⁴

Properly understood, then, it is the associative connection between citizens that generates commitments of solidarity and sustains the production of norms of social justice. Perhaps the political association between citizens within the nation state is the most structured configuration in which justice and solidarity may occur. At the same time, understanding justice as a *relational commitment* between citizens that stand in a particular relationship with each other opens our eyes to new sites for the emergence of solidarity and the articulation of norms of justice.⁵ More specifically, it suggests that the emergence of new types of association between citizens across borders—be it in economic, social, or political forms—come with claims of justice and solidarity of their own.

The emergence of these new associative connections between citizens across borders exposes a significant problem for the development of justice in the EU. The Union is unable to create a sufficiently sophisticated institutional framework that can legitimately ‘translate’ the new cross-border associative connections between citizens in Europe into specific norms of justice. At the same time, the only institutions that are sophisticated enough to undertake this exercise can be found on the national level, and are structurally insensitive to relational commitments (in economic, social, or political forms) across borders. The pursuit of justice in the EU thus has to contend with a fundamental asymmetry between the institutional mechanism that produces and stabilizes norms of justice (that has remained on the national level) and the nature of the relationships between citizens that give rise to claims of justice (which increasingly take place *across* borders).

Tiered Justice in the EU

The Union’s incapacity to create an institutional structure that can translate the commitments between its citizens (in economic, social, or political

⁴ Nagel, ‘The Problem of Global Justice’, 120.

⁵ P. Rosanvallon, *The Society of Equals* (Cambridge, Mass.: Harvard University Press, 2013).

forms) into norms of justice does not, however, mean that the Union is agnostic when it comes to justice. The second chapter argues that the central norms of EU law—the free movement provisions—can be seen to articulate two very precise claims of justice. These claims attempt to overcome the normative problems created by the development of norms of justice through *national* institutions.

First, EU law suggests that national political communities are not very good at incorporating each citizen's idea of 'the good' in the collective structuring of society. To be precise, while every citizen has the periodic possibility of voting, in return that citizen is forced to adhere to a collective conception of 'the good' that may have little to do with his or her own needs, wishes, or desires. European Union law, and in particular the right to free movement, cut across this limitation to the individual's capacity to pursue his or her own conception of the 'good life'. The right to free movement allows all European citizens to move across borders and in doing so emancipates them from the constraints imposed by their own Member State—in both normative and practical terms. Citizens may choose to move to another Member State for reasons of love, for work, in order to understand a language, skill, culture, or cuisine; for reasons of tax legislation, the range of civic or social permissiveness, education, the weather, or simply the adventure. The first claim of justice that is implicit in EU law, then, is that the development of justice through national institutions is not sufficiently sensitive to the individual's preferences as to what constitutes a 'good life'.

The second justice claim that is implicit in EU law addresses equal citizenship. Free movement across borders in the EU upsets the internal dynamic within nation-states: only nationals are allowed to vote in general elections, even if the outcome of such elections has consequences for the lives of non-national residents. The very criterion that creates 'justice' *within* the Member States—political deliberation between insiders—thus automatically excludes all non-nationals. The normative problem created by this mismatch can be explained in different ways. On the one hand, it violates the basic procedural condition of liberal democracy that equates objects and subjects of rule, in so far as it 'taxes' non-nationals without them being represented. On the other hand, it makes the domestic political system structurally insensitive to the life experiences of non-nationals, as well as to the associative connections *between* non-nationals and nationals. If justice is, after all, an associative obligation, physical co-presence of nationals and non-nationals in the territory of a Member State, or their economic interdependence in the market of that state, suggests that resident non-nationals

should obtain certain rights in the host state. In other words, the associative connection between a resident non-national and fellow residents in his or her host state engenders specific obligations of justice that the national political process is unable to take into account. European Union law attempts to prevent this, and uses quite a blunt instrument to ensure that commitments internal to the nation state are extended to cover resident migrants: the prohibition of discrimination based on nationality. As soon as the mobile EU citizen finds him- or herself in the host state, he or she must be treated in the same manner as a national.

This brave attempt by EU law to ensure that the institutional system on the national level is sensitive to the associative connections between citizens *across* borders comes, of course, with problems of its own. To put it as simply as possible, while EU law is very sensitive to such associative connections, it is not sensitive to their *specific* nature and strength. The principle of non-discrimination presumes that a Spanish national who has worked in Hamburg for 20 years is in the same position as an unemployed Finnish citizen who has only just arrived in Ljubljana. Clearly, they do not stand in the same associative connection with nationals in their host state, and they cannot, in consequence, make similar claims on the basis of solidarity or justice. Simply extending, say, unemployment benefits to all EU citizens who reside in the territory of a host state means that EU law is insensitive to the *internal* commitments of justice between citizens on the national level. This possible blind spot of EU law—in so far as it is both disruptive of and parasitic upon the existence of domestic welfare entitlements—has led to claims that EU law destabilizes the workings of the welfare state. European Union law, in this argument, allows for welfare tourism, whereby migrants can extract resources from the communal pot without being forced to put anything in.⁶ This argument is particularly resilient in British politics, where all mainstream parties are committed to limiting the right of mobile EU citizens to make use of UK welfare entitlements, even if empirical research suggests that the narrative of the ‘welfare tourist’ is a myth.⁷

⁶ ‘Editorial Comment: The Free Movement of Persons in the European Union: Salvaging the Dream while Explaining the Nightmare’ (2014) 51 CML Rev. 729; and the pamphlet by D. Chalmers and S. Booth, ‘A European Labour Market with National Welfare Systems: A Proposal for a New Citizenship and Integration Directive’ (2014) Open Europe Policy Brief.

⁷ At least in the institutional sense: EU migrants contribute more to the public purse than they take out. See C. Dustmann and T. Frattini, ‘The Fiscal Effects of Immigration to the UK’ (2014) 124 Economic Journal 563.

What these narratives suggest, at the same time, is that EU law needs to be sensitive to the stability of domestic welfare regimes. The Spanish national who has worked in Hamburg for 20 years needs to be treated differently from the jobless Finnish citizen who has only just arrived in Ljubljana. Each stands in a different associative connection to (the citizens of) his or her host state, and—given that justice is a relational or associative commitment—each should be incorporated in domestic welfare structures in a different manner. Differences such as length of residence in the host state, or economic activity in that state, may suggest that the Spanish national should more readily have access to social benefits in Hamburg (if necessary) than the Finnish national should in Ljubljana. In other words, in order not to destabilize domestic redistributive commitments, EU law must pay close attention to the specific commitments that link individuals to different polities—which might come in economic, social, or political forms.

The Court indeed increasingly incorporates such nuances in its case law when settling ‘conflicts of justice’. In *Prinz and Seeberger*, for example, the Court had to decide when exactly a student can be considered as sufficiently integrated in a state to ‘deserve’ access to student benefits: ‘That may be the case where the student is a national of the State concerned and was educated there for a significant period or on account of other factors such as, in particular, his family, employment, language skills or the existence of other social and economic factors.’⁸

The role of EU law, then, is to articulate not only which associative connections *across* borders have emerged since the start of the integration project (these come—as will be argued further—in economic, social, or political form) but also which exact commitments of solidarity follow from such connections. The determination of the types of solidarity that are implicit in the EU, in other words, at once makes the Member States sensitive to the obligations of justice that have emerged by way of relationships between citizens across borders *and* rationalizes the limits of free movement and non-discrimination so as not to impose an unreasonable burden on the national welfare state. For EU law to be able to contribute to the pursuit of justice rather than obstruct it, then, we need carefully to articulate the different types of transnational solidarity that have emerged in the course of the process of integration as well as their limits.

⁸ Joined Cases C-523/11 and C-585/11 *Prinz and Seeberger* EU:C:2013:524.

Three Worlds of Transnational Solidarity

The bulk of this book discusses the three different types of transnational solidarity that can be traced in the EU. It does not try to suggest that the EU institutions and the Court should decide to conform to them. Rather, it suggests that the EU institutions and the Court are *already* conforming to the norms of transnational solidarity (albeit in an implicit, incomplete, and incoherent manner). The objective of Chapters 3 to 5 is to rationalize and explain the emergence of transnational solidarity, and to problematize it by revealing its ambiguities and limits.

The process of European integration has generated three types of associative relationship between citizens across borders. The first involves the economic relationship between citizens on the internal market, the second the social relationship between residents in the same Member State (be it nationals or non-nationals), and the third the political relationship between all EU citizens by virtue of their (Member State's) participation in the integration project. Each of these new types of relationship constitutes a potential motive for citizens to share resources with each other; that is, each makes a distinct claim on the basis of solidarity. Each relationship, however, contains a distinct and specific claim of solidarity, with distinct and specific limits: the position of a Spanish national who has worked in Hamburg for 20 years is, after all, different from the position of a Finnish national who has only just arrived in Ljubljana.

The first transnational solidarity that will be traced throughout EU law reflects the relationships produced by interactions on the transnational internal market. This 'market solidarity' tells us something about the way in which transnational economic interactions—ranging from the right for workers to work in another Member State to the way in which the collectivities of 'labour' and 'capital' interact on the internal market—reshape our commitments of justice. It suggests that the economic relationship between actors alone (rather than their nationality, or the political and social links between them) constitutes a motive for sharing resources. It is reminiscent of Durkheim's concept of organic solidarity,⁹ and argues that the mutually advantageous division of labour in a market engenders rights and obligations of solidarity. Market solidarity,

⁹ E. Durkheim, *The Division of Labour in Society* (Basingstoke: Palgrave, 1984) 68–86.

then, serves to integrate the associative connections that emerge through economic interactions on the internal market within the domestic structures of the welfare state.

The second form of solidarity that can be traced throughout EU law can best be understood as ‘communitarian solidarity’. It reflects the commitments of justice that have emerged by virtue of the social, quotidian, interaction between citizens across borders. On this view, residence alone—and the daily social interactions that are implicit in co-presence in a certain place—engenders a certain degree of solidarity that extends to all residents, whether national or non-national. The motive for sharing resources with resident migrants, in other words, is their social integration in the functioning of the host state society. The extent to which residence alone can justify access to welfare entitlements in the host state depends on both the depth and nature of the migrant’s integration in the host state society, as well as the type of welfare benefit to which access is sought. In very simple terms: the Finnish national who lived in Ljubljana for four months without working may not have access to Slovenian student benefits, but he or she may be entitled to free emergency healthcare when hit by a car, simply by virtue of his or her residence. What communitarian solidarity demands, then, is not unconditional access for all residents to all welfare goods in the host state, but access that differs depending on the nature and function of a certain welfare good. Communitarian solidarity in the EU, in other words, is a normatively shallow but procedurally strong idea of membership, which serves to open up national systems of social sharing to *all* citizens (whether national or non-national) that demonstrate a social connection of a specific type to the host state’s society.

Polities grant their citizens specific rights not only on the basis of their role as an economic or societal actor, but also in accordance with the polity’s specific *political* aspirations. In the EU that specific aspiration has always been to check the coercive capacity of the state in limiting available realizations of the ‘good life’. The third type of transnational solidarity follows from this political commitment and can best be understood as an instance of ‘aspirational solidarity’. It suggests that Member States cannot in principle prevent their citizens from accessing the instruments that make up a ‘good life’—such as the labour market, public goods, or welfare benefits. There is a dark side to aspirational solidarity, however, as it has the potential to pit individuals in society against each other. Aspirational solidarity therefore finds a limit when the aspirations of *individual* citizens

risk undermining the capacity of *all* citizens to access welfare benefits. As will become clear by way of an in-depth analysis of the case law of the Court of Justice, aspirational solidarity can be traced in diverse areas of EU law—ranging from non-discrimination based on age to the right to export welfare benefits.

The precise elaboration of the nature and limits of each of these three different types of transnational solidarity serves both to reflect the new associations between citizens that have emerged in the course of the integration project, and to rationalize the extent to which national institutions, in their elaboration of norms of justice, need to take account of those new associations. Read together, the three types of transnational solidarity suggest that the EU *can* contribute in a meaningful sense to the pursuit of justice in Europe.

Conclusion

The EU has changed what justice is, means, and requires. European Union law, in turn, can be understood as a mechanism for the articulation of the ties that bind European citizens across borders, in economic, social, or political terms. As such, this book suggests that the European Union is an invaluable companion for the Member States in the pursuit of justice in three ways. First, EU law enhances the capacity of European citizens to move throughout the territory of the EU in search of their own version of the ‘good life’, whatever that may mean to the individual. As such, EU law resists the capacity of the nation state to oppress the individual by ‘locking’ him or her into very specific collective understandings of what such a ‘good life’ entails. Second, EU law offers an account of the associative commitments between citizens across borders in a way that the nation state cannot. If justice is indeed, as defended in this book, a *relational* commitment, engendered by the particular relationship between individual citizens, then we can no longer consider only the relationships that exist within the nation state relevant for the determination of what is ‘just’. Indeed, the process of European integration has engendered different types of *transnational* relationships—in economic, social, and political terms—that need to be reflected in how we think about justice. Third, EU law offers an account of the way in which these emerging forms of transnational solidarity relate to national conceptions of justice. As such, it tells

us something about the *limits* of transnational solidarity. Given that the development of justice in the EU is still to a large extent dependent on the institutions of the nation state, the articulation of the limits to transnational solidarity is vital to stabilize the welfare state and to legitimize the Union's involvement in its reorientation.

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