

Douglas-Scott, Sionaidh

Working Paper

Human rights as a basis for justice in the European Union

WZB Discussion Paper, No. SP IV 2015-804

Provided in Cooperation with:

WZB Berlin Social Science Center

Suggested Citation: Douglas-Scott, Sionaidh (2015) : Human rights as a basis for justice in the European Union, WZB Discussion Paper, No. SP IV 2015-804, Wissenschaftszentrum Berlin für Sozialforschung (WZB), Berlin

This Version is available at:

<https://hdl.handle.net/10419/121482>

Standard-Nutzungsbedingungen:

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

Terms of use:

Documents in EconStor may be saved and copied for your personal and scholarly purposes.

You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.

If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.



Sionaidh Douglas-Scott

Human Rights as a Basis for Justice in the European Union

Discussion Paper

SP IV 2015–804

September 2015

Center for Global
Constitutionalism

WZB 

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)

Sionaidh Douglas-Scott

Human Rights as a Basis for Justice in the European Union

Discussion Paper SP IV 2015–804

Affiliation of the authors other than WZB:

Sionaidh Douglas-Scott

The Faculty of Law, University of Oxford, St Cross Building, St Cross Road,
Oxford OX1 3UL

Abstract

Human Rights as a Basis for Justice in the European Union

Sionaidh Douglas-Scott

Justice is a contested concept. A more graspable version of it, it is argued in this paper, is an understanding of it in the context 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. There will always remain a gap between the aspiration for justice and its achievement. While the notion of an EU that does not aspire to justice is unthinkable, and EU law must at least hold out a prospect of justice, the gap between aspiration and achievement remains huge.

However, 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, 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.

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.

Key words: Justice, Injustice, EU as an Ethical Entity, Human Rights.

1. Why Justice Is Particularly Perplexing for the EU

Justice seems essential as a normative basis for the EU.¹ 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 21st century – the threat from terrorism, the financial crisis, the problems of migration – have forced justice onto the agenda² for the EU in a way that might have seemed inconceivable in the 1990s, when some commentators were forecasting, somewhat smugly, in the wake of the fall of the communist bloc, an ‘end of history’,³ as if the west had emerged into a Kantian age of perpetual peace.

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 points, set out immediately below.

5 failures of justice in the EU:

- a) Justice is not specifically stated as an EU value
- b) It is inadequately conceived in the context of the Area of Freedom, Security and Justice (AFSJ)
- c) Social justice is almost impossible to fulfil in EU law
- d) The Eurozone crisis illustrates a lack of solidarity and disregard for justice
- e) 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*)

¹ I have pursued some of the ideas in this paper elsewhere: *removed for anonymity*.

² See now, G de Burca, D Kochenov and A Williams (eds) *Europe's Justice Deficit* (Hart publishing 2015).

³ See eg F Fukuyama, *The End of History and the Last Man* (Free Press, 1992).

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 call to motivation. 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 the paper will set out these arguments in greater detail.

a) 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 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 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, 'Justice is the first virtue of social institutions'⁴ – 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*.

b) An inadequate concept of Justice in context of the Area of Freedom, Security and Justice

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. In 1997, in the treaty of Amsterdam, the EU created the AFSJ. This was supposed to make the EU citizen feel more included by the EU, as well as solving some particular functional issues. Within the scope of the AFSJ, the EU

⁴ J Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p 3.

adopts many measures not traditionally associated with EU action, including measures on terrorism, migration, visas and asylum, privacy and security, the fight against organized 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's Charter of Fundamental Rights 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,⁵ or very broad EU definition of terrorism.

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, 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'⁶ (i.e. an attempt to remain stable by any means in the face of a stream of irrational events). However, also highly significant is the fact that the interpretation given to justice in the AFSJ is very narrow, focussed on the Administration of Justice.⁷ 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 Plan⁸ asserted the need of 'bringing 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, for judicial co-operation. Justice is perceived as a means of dealing with those who threaten society. This understanding leaves little room for any richer sense of

⁵ See eg European Arrest Warrant (EAW), (Framework Decision 2002/584/JHA 1 (EU) on the European arrest warrant 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.

⁶ JGA. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, 2nd edn (Princeton University Press, 2003)

⁷ See also E Herlin-Karnell, 'Justifications and Europe's Area of Freedom, Security and Justice' in this volume.

⁸ 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.

justice, and therefore justice, in the context of the AFSJ, is elided and impoverished in meaning.⁹

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 realization 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 a deeper understanding of it as a social and political good,¹⁰ which might also require the nurturing of freedom and realization of justice. Effective supranationalism also requires states to have trust in each other's criminal justice provision, 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 (i.e. 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, this is at the expense of progress in human rights, freedom or justice. Justice in the AFSJ is curtailed by the problems of supranationalism.

c) The lack of a shared conception of social justice

Art 3 TEU¹¹ states that the EU 'shall promote social justice.' Yet is it possible to secure 'social justice' in an EU which has for so long focussed on market ideology? Admittedly, EU Law has resulted in benefits in equal treatment of men and women. However, for the most part these benefits have been market driven, by the need to secure a level playing field in

⁹ See further on these points, E Herlin-Karnell, 'Two Conceptions of Justice in EU Constitutionalism – the shaping of security in Europe' Inaugural lecture, VU University Amsterdam.

¹⁰ See L Zedner 'The Concept of Security: An Agenda for Comparative Analysis', *Legal Studies*, 23 (2003); A Williams, *The Ethos of Europe* (Cambridge University Press, 2010).

¹¹ Art. 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.'

an area of free movement, rather than 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, e.g. of 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, as illustrated by polarized reactions to the Lisbon Treaty, with some states seeing earlier drafts as too free market and Anglo-Saxon in approach, or by the squabbles as to how to deal with the financial crisis of the euro. In such an environment, EU joint action is restricted to low minimum standards acceptable to all states, or the very limited redistributive functions in the fields of regional development policy and the varying budgetary contributions of its Member States.

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.¹²¹³

¹² F Scharpf, 'The European Social Model: Coping with the Challenges of Diversity', *Working Paper 02/08*, Max Planck Institut für Gesellschaftsforschung.

¹³ See also C Joerges, 'The *Rechtsstaat* and Social Europe: How a Classical Tension Resurfaces in the European Integration Process', (2010) 9 *Comparative Sociology*, 65-85.

The failure to reconcile market liberalization 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 (housing, education, healthcare etc.). This could be funded by a levy on the economic interests that benefit from immigration – eg 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,¹⁴ when so many of its members would veto such a role for it (no doubt in many cases due to an absence of solidarity feelings), 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.

d) 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.¹⁵

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 these measures has been formidable, as for example, those imposed by the 'conditionality' clauses in bailout agreements. The conditions imposed by the Greek bailout in 2010 required Greece to end its deficit situation by adopting measures (described by one author as 'the most drastic intervention in a member State's economic and social policy ever decided by the EU'¹⁶) including: to reduce pensions; the reduction of public investment; and a reform of wage

¹⁴ See e.g. J. Habermas, 'Why Europe needs a Constitution', *New Left Review*, 11(2001), 5-27.

¹⁵ For further on these matters see the special issue in the *European Law Journal* on 'authoritarian liberalism' – (2015) 21:3 *European Law Journal*.

¹⁶ R Bieber, 'Observer, Policeman Pilot: On Lacunae of Legitimacy and the Contradictions of Financial Crisis Management in the EU' *EUI Law Working Paper* 2011/16.

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',¹⁷ or the 2012 'Fiscal Compact Treaty',¹⁸ under which EU Institutions may scrutinize national budgets prior even to scrutiny by their states' parliaments (a huge challenge to democracy in itself) and if states fail to reduce their 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 governments' economic sovereignty, have taken place.

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, public spending, and restrict collective bargaining certainly do not enhance the objective of social justice set out in Article 3 TEU. Further, the conditionality clauses in the bailout agreements, imposing restrictions on the availability of collective bargaining, show little concern for the freedom of association recognized in the ECHR and EU Charter of Fundamental Rights.¹⁹

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 Council to support the Commission in its decision to take disciplinary proceedings against another member state, and to base their voting decisions exclusively on matters of fiscal probity, ie to have no regard to other matters, such as key constitutional principles, and human rights matters. 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 in Article 2 TEU. As Articles 2 and 3 of the TEU make clear, the EU is not a one-dimensional organization established for, and limited only to, the aim of implementing austerity.

¹⁷ 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).

¹⁸ This treaty is an intergovernmental treaty, signed by all members of the EU, except the Czech Republic and the UK.

¹⁹ Further, all EU member States have ratified the 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 appear to be in direct contradiction to the EU's avowal of social justice in Article 3 TEU, as well as infringing some human rights, e.g. those of collective bargaining and freedom of association in the EU Charter of Fundamental Rights. 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.²⁰

e) 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 that 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'. 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 probably fair to assume that no such theory can be developed.²¹

²⁰ ie EMU 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.

²¹ C. Douzinas and A. Geary, *Critical Jurisprudence* (Hart Publishing, 2005), Ch. 4.

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, private parties – may clearly also have different obligations of justice.

The very nature of the EU itself causes problems – it is unfinished, inchoate, and there exists no consensus as to its nature. Should we conceive of it as an international organization, as evolving into some sort of ‘superstate,’ or as a *sui generis* organization? Clearly, the ways in which we conceive the EU will colour 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 affective 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 states 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, Eurozone – will require swift solutions, which, however, the EU will be perceived as lacking the full legitimacy to dispense.

So 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

globalization – global financial markets, security threats – render cooperation necessary, and with it the injustices rendered by the failures and imbalances of integration.²²

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

- i) Justice is undervalued, in that it is not specifically named as a value for the EU in Art 2 TEU (although it is more indirectly referenced). It is also undervalued in that its interpretation in the context of the AFSJ has been reductive – to that of the ‘Administration of Justice,’ and therefore instrumentalized.
- ii) There are specific problems in generating a sense of justice for the EU – namely, how to agree such a concept in a transnational context where there is no shared culture, or sense of solidarity, or indeed 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 subject to plural interpretations and contested.

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’, proposing 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’?²³ Well, not quite.

This paper continues with 3 suggestions for taking the debate further:

- a) 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

²² For a very different, Rawlsian approach, see in this volume: Ben Crum, ‘Multi-Layered Justice and Public Reason in the EU and beyond.’

²³ U Haltern, ‘Pathos and Patina: the failure and promise of constitutionalism in the European imagination’ (2003) 9 *ELJ*.

practice. Any attempt to articulate a notion of justice for the EU should work with this intuition: our concepts of justice should be motivating and practicable.

b) 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*.

c). It suggests human rights as the most motivating and progressive ethical component for the EU.

2. 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, 'We 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.' 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.

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 theorizing about justice. A notable exponent of this is the Nobel laureate, Amartya Sen, who has been critical of accounts such as those of Rawls, for being overly focussed 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

²⁴ C Douzinas and A Geary, *Critical Jurisprudence* (Hart Publishing, 2005).

²⁵ See, in contrast, Crum's Rawlsian approach in this volume.

judging how to reduce injustice and advance justice, rather than aiming only at the characterization 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 'realization focussed comparison' focusses 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 this is so. For example, we may not agree on the reasons why we believe the war in Iraq to be unjust but we 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, 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 in *Theory of Justice* assumes a closed, self-contained society.²⁸ Instead of Rawls' 'Original Position', Sen prefers the approach adopted by 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

²⁶ A Sen, *The Idea of Justice* (Allen Lane, 2009).

²⁷ See also H 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 EU, as the positing of a single, self-contained society seems to remove the possibility of transnational justice.

other people', and from the viewpoint of 'real spectators'. Thus the plurality of impartial reasoning is ensured, more appropriate in the transnational, multi-cultural EU.

The key point here is that we place unrealistic demands on citizens if we start with justice as an ideal, pre-existing, neutral, and self-produced by a rational conception, such as 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 Amartya 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 – realization of an improvement in the lives of actual peoples.'

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.

3. The Rule of Law and Critical Legal Justice

Law is not merely a theoretical pursuit, 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?

²⁹ Kant, *Groundwork for the Metaphysic of Morals*.

The Rule of Law is what is very often understood by the concept of 'legal justice', importantly acknowledging it 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 recognising the equality of subjects before the law.³⁰ Some would add to this the protection of fundamental rights,³¹ although if it includes too many rights then the simplicity of the Rule of Law is lost, and it begins to look more like a complete social philosophy.³² 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 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 – fundamental for any notion that is to find purchase in the EU.

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.³³ 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 Art 2 TEU, whose content is empty and undefined.³⁴ 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

³⁰ See eg J Raz 'The Rule of Law and its Virtue' (1977) 93 *LQR* 195 at 196.

³¹ See for example, Lord Bingham, *The Rule of Law* (Allen Lane, 2010).

³² J Raz 'The Rule of Law and its Virtue' 195.

³³ Namely, those understandings of the Rule of Law that have been perceived as overly formalist and blind to difference.

³⁴ Notably the Rule of Law is nowhere defined in the EU treaties and different member states have different understandings of it – i.e. *Etat de Droit* in France, *Rechtsstaat* in Germany, and so on. See also L Pech, 'A Union Founded on the Rule of Law' (2010) 6 *European Constitutional Law Review* 359.

criminal law pillar of the EU (at least until the Lisbon treaty); or in the lack of institutional balance which has granted too much power to unelected, unaccountable agencies such as Eurojust and Europol, or to member state executives in the Council; and in less than transparent, almost secretive lawmaking.³⁵ This lack is also evident in the Eurozone, of whose measures Steve Peers has commented: '(they) 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.'³⁶ 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 of US flights in the course of 'extraordinary rendition,'³⁷ and the unwillingness of the EU to take any action against those states under Art 7 TEU, also suggests that the Rule of Law, along with human rights, has been lost in a search for 'expedient' measures.

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 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.

³⁵ See e.g. 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 lawmaking.

³⁶ Per S Peers, 'Analysis: Draft Agreement on Reinforced Economic Union' *Statewatch*, 21 December 2011.

³⁷ For which see *Al Nashiri v Poland*, (2015) 60 EHRR 16, in which the European Court of Human Rights 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.

4. And Finally... Human Rights

It is hard to be a critical lawyer or philosopher, and yet to 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 supra national human rights systems? I believe it is possible for human rights to function as basic value system and vehicle of normative legitimacy for the EU, and I set out why briefly below.

Human rights as the solution to the violation of justice

In *The Ethos of Europe: Values, Law and Justice in the EU*,³⁸ 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'. It has not taken justice seriously. Williams' suggested solution to the EU's failure to take justice seriously is to propose 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

³⁸ A Williams, *The Ethos of Europe* (Cambridge University Press, 2010).

notions of justice'.³⁹ 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,⁴⁰ 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 its own as a doctrine from the 18th century.⁴¹ 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 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'⁴² for our times, or, as depicted by Sousa Santos, a 'political esperanto',⁴³ 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).

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 of Fundamental Rights (and also in the 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

³⁹ Ibid.

⁴⁰ 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.

⁴¹ See eg L Hunt, *Inventing Human Rights* (Norton, 2007).

⁴² E Wiesel, 'A Tribute to Human Rights', in Y Danieli, E Stamatopoulou, and C Dias, (eds) *The Universal Declaration of Human Rights: Fifty Years and Beyond* (Amityville, NY: Baywood, 1999).

⁴³ B de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (Butterworths, 1995), at 348.

we may be critical of some caselaw, 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 ECJ's focus on autonomy in its *Opinion 2/13* finding that the EU draft agreement for accession to the ECHR was not compatible with EU law⁴⁴). Although there has been criticism of the EU Charter, and the ECHR (particularly from the UK) and these documents may present their own problems, nonetheless, they 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, as within the AFSJ, 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 Charter of Fundamental Rights. 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 which is partly the product of so many (different and competing) causes and movements claiming them for themselves. Bentham's critique of 'nonsense on stilts' highlights the wobbly conceptual foundations of rights, 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'.⁴⁵ 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

⁴⁴ *Opinion 2/13 Accession to the ECHR* [2014] ECR 000. See further, S Douglas-Scott, *Opinion 2/13 and the 'elephant in the room': A response to Daniel Halberstam*, *VerfBlog*, 2015/3/13.

⁴⁵ C Gearty, *Can Human Rights Survive? (Hamlyn Lectures)* (Cambridge University Press, 2006).

interest. Marx's critique⁴⁶ 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 becomes not a means of ensuring law's justice, but the reverse.

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 limit 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 instrumentalized to further European integration.

⁴⁶ Karl Marx, 'On the Jewish Question' in Waldron ed. *Nonsense upon Stilts* (Methuen, 1987).

⁴⁷ 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 G de Burca, 'The language of rights and European integration', in G More and J Shaw, eds, *New Legal Dynamics of European Union*, (OUP, 1996).

⁴⁸ For further on this see, Eg J Coppel and J O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 *CMLRev* at 689; S Douglas-Scott, 'Human Rights in the European Legal Space?' in Shaw, Tierney, 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.

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 prime ethical motivator 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.

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 in 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 as to how they shape policy and take decisions (this is evident in the requirement that EU officials take account of the EU Charter in all their decision making) and 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: 'It 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

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 emptiness⁵² – 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 what Nietzsche described as, '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,⁵⁵ what is needed to combat this nihilist drift is a philosophical activism – an empowering concept of ethics.

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, thus reducing scope for injustice, but fail to establish any more active duties. They fail to inspire visions of a better society.

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

⁵¹ HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961),

⁵² Emile Durkheim, *Suicide* (1897)

⁵³ Nietzsche, *On the Genealogy of Morals* (1887), trans. Kaufmann (New York, 1969) 5.

⁵⁴ Ibid.

⁵⁵ S Critchley, *Infinitely Demanding* (London, Verso, 2007).

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 attainment of our fantasy. Human rights play the role of Lacan's *petit objet a*, 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 its 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.

5. 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 – no adequate foundation can be found for them, 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 skeptical 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, a means of importing morality and ethics into law, the basis for substantive justice, a reminder that we should not tolerate the intolerable, suffer the insufferable.

⁵⁶ For an expression of these views, see C Douzinas, *The End of Human Rights: critical thought at the turn of the century* (Oxford: Hart, 2000); R Salecl, 'Rights in Feminist and Psychoanalytic Perspective', (1995) *Cardozo Law Review* 1121.

⁵⁷ Eg P Williams, *The Alchemy of Race and Rights* (Harvard University Press, 1991); A Sachs, *The Strange Alchemy of Life and Law* (Oxford University Press, 2010) a work by South African constitutional court judge discussing human rights cases.

⁵⁸ Per F Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights*, (Harmondsworth: Penguin, 2000)

⁵⁹ Eg C Douzinas, *The End of Human Rights* (Oxford: Hart, 2000).

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. Maybe 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

⁶⁰ M-B Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge, 2006).

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

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>