

On Europe's justice deficit, and how to reduce it

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Is there a justice deficit in Europe? Let us imagine I were a practising lawyer hired to argue that there is no such thing. I would have my arguments. Legally speaking, I could argue that this position is groundless on the merit and inadmissible in principle. On the merit: I am a European, and in this continent we have banned for decades the death penalty. We continuously criticize the US on this, and were happy to congratulate Nebraska a few days ago because this state joined other 18 American member states in abolishing the death penalty, which means, however, that it is still there. A guy was executed yesterday after 30 years of jail waiting for the death penalty to be executed. Respect to the fundamental of life is an essential feature of justice, of course. And I have it here. Others somewhere else don't.

There are of course other angles to look at justice. Intergenerational justice is one of them: Europe is a front runner, like it or not, in defending the environment for future generations. No other continent is so advanced in limiting pollution. And I could continue.

But I could also say that this an inadmissible charge against Europe. Juri Viehoff and Kalypso Nicolaidis argue in their contribution to the „Europe's Justice Deficit“ book that you cannot apply to Europe, as a union of states and not a state, not even a democracy but – according to Kalypso – a „demoicracy“, criteria like legitimacy based on justice that requires a polity, that requires common and deeply shared responsibilities, that requires a common past and a common future, finding a notion of justice in a shared patrimony of values. You cannot apply to the European Union the theories of justice that lead to legitimacy. I must say that is quite a good argument.

I could continue with arguments, but nobody is paying me as a lawyer, so I will stop. I will say that, yes, this lawyer has arguments. But things are not so simple. It is certainly true that the initial mission was creating a common market, integrating national economies. And it was due to the decision to limit the common future, at least initially, to the economy, that economic and social matters were decoupled. It was a clear cut decision. The economy will go up to the European level, social matters will remain under member states' responsibilities, full stop. In the first treaty of 1957 you do not find clauses of competences, not even of coordination, for the – at the time – European Community with respect to social responsibility. But already at the time there was something more: The real intention of the founding fathers was to build something beyond the common market, something they had in mind in the late 1940 and early 50s – something that could be a European Federation.

They tried to do it. The European Community of Defense should have been a vehicle to a politically integrated Europe. It was not approved, and they passed

to the common market as a sort of bypass of the political difficulties they met – Konrad Adenauer, Alcide de Gasperi, Robert Schuman, Jean Monnet. That small elite, based on common predispositions on how and why to federalize Europe, kept that ultimate goal in their minds. They did what Robert Schuman had written in his famous declaration issued on 9th of May 1950 before the Steel and Coal Community was formed: He said that Europe will not be created at once, but in a step after step process as long as solidarity will grow among Europeans. He was well aware that in order to build an integrated community you need solidarity among the members, because if they don't trust each other they will not accept integration. The growing of solidarity on the basis of an experience of how putting their interests in line instead of fighting each other could be practical, could give benefits without costs. This could be a platform for something more.

Solidarity is one of the essential ingredients of justice, because it implies that I see you as I see myself. I do not expect you to have less than you deserve because I do not expect me to be treated so badly as to receive less than what I deserve. So, little by little something new entered that reduced the clear-cut distinction between economy only and the rest. Several things happened: First of all, funds were introduced to reduce the distance among the states and regions of Europe in terms of average income, regional funds, cohesion funds. Countries with less than 70% of the average income of the others were entitled to receive community money for development projects. I was Prime Minister in 1992 when Italy passed from the position of a net beneficiary to a net contributor in the allocation of European funds. Portugal and Spain had entered the union, the cohesion fund was built up for them, and at that point Italy passed on to the other camp of net contributors.

But that is not all. The market by itself produces commutative justice, but only between consumers and producers, and only as long as there is an anti-trust authority that takes care of it. Spontaneously the market tends to produce power, not justice. We started heading on to other values, to communitarian values. Think of gender inequality: that became one of main threads of the European Community, and the Court of Justice had to decide on cases of discrimination based on sex. Other forms of discrimination were also reduced if not entirely abolished. And social rights and social justice entered the scene of the Community. That was the time of the Convention that drafted the new Constitution Treaty that after some years entered into force as the Lisbon Treaty. Article 2 of the EU treaty says that the Union is founded on the values of respect for dignity, freedom, democracy, equality, the rule of law and human rights including the rights of minorities. That goes far beyond the market already. These values are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, equality between women and men prevail. The following Article 3 says that the Union shall, among others, combat social exclusion and discrimination, promote social justice and protection and equality between woman and men. Even more important in my view is what we did in the Treaty on the Functioning of the EU which requires in whichever policy to respect equality between men and women, promotion of a high level of employment, guarantee of adequate social protection, fight against social exclusion and for a high level of education, training and protection of human health. So all the battery of goals inside the wide fields of social policy is here.

Therefore, my initial argument as a lawyer is getting weaker: I can go on saying that Europe is not a state, but I cannot say that justice is actually about something different from the something else upon which the European Union has its own responsibilities. Caring of social justice has become one of its main obligations.

Now, has the Union actually cared? Have these provisions been properly applied? Here I cannot disagree with the sceptics. The economic and financial crisis and the methods and policies by which we reacted to it, the victimized immigrants: Europe is not a state, agreed, but it is much less a state than it could have been. At the time of the Maastricht Treaty when the decision to adopt a single currency was taken, they could and should have conferred to the supranational level of government the necessary powers to balance the unavoidable restrictive impact of austerity measures that are unavoidably needed when there is excessive debt. The great majority of economists said the Euro will not work without some sort of fiscal capacity at the European level to be used to adopt anticyclical measures in the parts of Europe hit by the cyclical impact of austerity measures in case of difficulty.

In order to preserve their national prerogatives Germany, France and the others said: No. Coordination of national policies will be enough to produce such a convergence of our economies that nothing will happen. It wasn't so. We remained as different as we were, the crisis had asymmetric effects, austerity measures were adopted in several countries, and at that point on some sides social protection went heavily down. Furthermore immigrants were seen more as competitors than as poor people coming to improve their lives.

This is an impressive chapter of European life. In 1999, at the European Council of Tampere, we concluded that the first aim was to fight the roots of poverty in the countries of origin. Not only that. We also started to envision giving a right to some form of assistance not only to political refugees entitled by tradition and by most of our constitution to asylum, but also to economic refugees, people abandoning their countries not because there is a regime that endangers their lives, but because there is nothing to eat or nothing to do for them where they are. During the crisis all of this has disappeared. And the discussion now is that only those entitled to political asylum shall stay, all others we are either to get rid of or to not allow them to arrive, the rest is their problem. This has not much to do with justice.

Is that due to the fact that Europe is not a state? Also my second argument gets weakened a little bit. We remain a union. But to give so much power to the intergovernmental institutions of the Union, to the effect of disrupting solidarity, dividing us into creditors and debtors, hard-working Northerners and profligate Southerners, and therefore destroying most of the patrimony that we had built throughout the years: It was possible to do something different, but we have not done it.

So the question is: where do we go from here? Personally, I think that we should do our best to restore solidarity, to start all over again from the beginning, take steps restoring some sort of mutual trust, and then of course to work once more for more integration. Please, give a look at the „New Schuman Declaration“ by Elisabeth Guigou, Vaira Freiberga and myself, all of us picked by Joseph Weiler,

who appears on the document as „secretary“. The document can be found in the site of the European University Institute and you may read in it several suggestions on what the Union should initially do, without any kind of treaty change. Among them, setting a minimum threshold of social and health protection (we have included health thinking of what happened in Greece). A minimum threshold means that the states remain responsible, but in this union that has adopted Articles 2, 3, 9 social protection cannot go below this threshold. If it does there has to be a fund by which in a subsidiary way, should one of the member states not have sufficient resources to restore an appropriate level of protection, the Union intervenes. It would be just a sign that social justice has a small European instrument that corresponds to the great declarations in principle to which nobody should object.

And the courts? The chapter of immigrants is something our constitutional courts are taking care of. The illegal migrant for several governments of ours is *res nullius*, a thing, not a human being with his or her own rights. To the contrary for our courts he/she is entitled to fundamental rights and have decided that, even if you are illegal, there is an essential core of sanitary assistance you are entitled to. If you are pregnant, any hospital has to accept you without asking who you are. Any child that happens to be in Europe is entitled to education even if the father and mother are without legal status here. So, something can be done to restore the idea that at this point we can do what is needed.

Not everything, though. The main obstacle nowadays to communities that are perceived as such is the level of inequality that we have reached in our societies. Tony Judt, before he died, wrote that I cannot perceive someone as a member of my community if the distance of my income to his is too big. Taxation is what we need and what we can use. But this requires something beyond of what Europe can do. When the idea of a tax on financial transactions was brought forward, the famous Tobin tax, Europe decided to take it seriously. Not all of our member states agreed, though, and therefore it was one of the few cases of enhanced cooperation between some of them. That was pointless, because if only few states adopt a tax on financial transactions, such transactions will simply emigrate. Joseph Stiglitz and Paul Krugman proposed a sort of a minimum average tax on the giants of the internet, Google, Amazon, Facebook, run by very nice people, friendly to everyone in the world but gaining enormous amounts of money without paying taxes. They propose to establish a minimum tax they have to pay in all the countries where they get revenues.

This requires something much bigger than anything European integration can ever achieve: global governance.

In more than 50 years we have not succeeded as yet creating an appropriate European governance. Some of you will know if in another 50 years we will have succeeded in taxing Google and the others at the global level. I will not be with you. But I wish you luck.

This article is based on a talk given by the author at the book launch event at the London School of Economics on June 4th, 2015.

