

# Principles of Distributive Justice Within the EU

Written by Maurice Dunaiski

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## Principles of Distributive Justice Within the EU

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MAURICE DUNAISKI, APR 5 2013

### What Principles of Distributive Justice Should Apply Within the European Union?

#### Introduction

The political theory of the EU, as a field of research, is still very much in its infancy. It has largely focused on two questions: whether or not there is a 'democratic deficit' in the EU, and whether or not there is a 'European identity' (see Friese & Wagner, 2002; Moravcsik, 2002; Schmitter, 2003; Follesdal & Hix, 2006). So far political philosophy has paid little attention to the question of which, if any, principles of distributive justice should apply within the EU. This essay will contribute to the nascent normative debate on distributive justice within the EU (see Maduro, 2000; Rawls & Van Parijs, 2003; Van Parijs, 2006; Sangiovanni, 2012a & forthcoming). I understand principles of distributive justice to be comparative. They are not merely concerned with how individuals or states fare in absolute material terms, but also in comparison with other states of the same kind (Abizadeh, 2007). The EU is neither a *state* nor a conventional *inter-state* organisation, but something in between (Schmitter, 2003). I will therefore draw on both the 'domestic justice' and the 'global justice' literature in order to advance my argument. I will outline and defend a *transactional practice-dependent approach* to principles of distributive justice. I will then apply this normative framework to the institutions of the EU. It will be shown that the current European regime gives rise to problems of 'background injustice' and that more redistribution within the EU is necessary to counter this development.

#### (1) Practice-dependence vs Practice-independence

Proponents of the *practice-independent* (or nonrelationist) approach to principles of distributive justice hold that any elaboration of first principles (for e.g. rights, well-being, or human flourishing) must be conducted *independently* of existing social practices. In the literature on global distributive justice this approach is expounded by theorists such as Singer (1972), Caney (2005) and Nussbaum (2002). For these theorists existing institutions and practices – such as the EU – matter only insofar as they are conducive or obstructive to the realization of their unitary globe-encircling principles of redistribution. Obligations of solidarity hold among individuals *as such*.

The *practice-dependent* (or relationist) approach holds that any elaboration of principles of distributive justice which go beyond humanitarian assistance must take into account already existing practices and institutions. However, and importantly, this approach does not require us to negate the existence of values which *could* be justified independently of existing forms of social interaction. This is because institutions and existing practices *condition* rather than determine appropriate criteria of justice (Sangiovanni, 2008). In the literature on global distributive justice this approach has followers as diverse as Walzer (1980), Blake (2001), Nagel (2005), Risse (2006), Julius (2006), Cohen & Sabel (2006), Sangiovanni (2007) and Ronzoni (2009). It is beyond the scope of this essay to systematically justify the practice-dependent approach to distributive justice. I will therefore (only) defend it against the two most common criticisms levelled at it by the practice-independent camp.

*Criticism 1:* The practice-dependent approach favours the status quo. The status quo is, at best, the product of historical contingency and, at worst, the result of past injustices. Accordingly, the practice-dependent approach lacks the tools to critically assess existing social arrangements (see Cohen, 2008).

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The practice-dependent approach is indifferent to Criticism 1 because it can build fundamental values such as human rights or procedural fairness into its justificatory framework for principles of distributive justice. In this 'moralized' version of the practice-dependent approach, existing practices only *condition* rather than determine the scope of distributive justice (James, 2005, Sangiovanni, 2008). Crucially, the 'moralizing' values (e.g. procedural fairness) *themselves* need to be understood as practices; although as more fundamental ones than the practices or institutions for which we are 'constructing' principles of distributive justice. I will elaborate on this point in section 3.

*Criticism 2:* Proponents of the practice-dependent approach commit what has been termed the 'fallacy of restricted universalism'. "A distributive theory, that ascribes rights and claims on the basis of certain universal attributes of persons, cannot at the same time restrict the grounds for those claims to a person's membership or status within a given society" (Caney, 2005, p. 357).

Caney's target seems to be Nagelian statism, which affirms universal values but at the same time restricts the scope of distributive justice to shared citizenship (Nagel, 2005). This criticism, however, also leaves the practice-dependent approach unscathed. Our approach can accept the cosmopolitan's notion of universal values without 'globalizing' principles of distributive justice, as long as the justification of those principles does not *solely* rely on the notion of universal values (Risse, 2011). The coercive institution of the state does the justificatory work for Nagel's scope-restricted principles of social solidarity. Hence, the 'fallacy of restricted universalism' can only be committed by those proponents of the practice-*independent* approach who would argue for scope-restricted principles of distributive justice.

In addition to being immune to the above-mentioned criticisms, the practice-dependent approach has a practical advantage over the practice-independent approach. Any justification of the principles of distributive justice needs to formulate reasons why some ought to provide what is significant to both the providers and the claimants (Risse, 2011). The practice-independent camp must appeal to the notion of shared humanity (or an equivalent notion) to make this case. The practice-dependent camp, however, can incorporate this notion *and* appeal to shared practices. As Risse puts it:

"If we seek to argue for obligations pertaining to relative standing without making use of relations, there is little we can say in the first place. We can [perhaps] derive more demanding obligations if we can resort to relations" (2011, p.16).

## (2) Transactional Practice-dependence vs Statism and Cultural Conventionalism

Before we can apply the 'transactional practice-dependent approach' to the institutions of the EU, we first need to defend it against two contesting approaches from *within* the practice-dependent camp: statism and cultural conventionalism. Again, for the sake of brevity, my argument will be negative. I will show that neither statism nor cultural conventionalism can offer convincing justifications for *any* principles of distributive justice.

For statisticians such as Blake (2001) or Nagel (2005) the full panoply of social solidarity only becomes operative within associations where membership is nonvoluntary – i.e. states. For these theorists there can be no obligations of distributive justice beyond humanitarian assistance within the EU because it is a voluntary association of member states[1]. I argue that nonvoluntary subjection to state authority cannot plausibly give rise to distributive principles which *don't apply independently* (see Sangiovanni, 2012b). What makes voluntary associations (e.g. golf clubs) different from the state is that, by joining, we agree to their terms, even if they, for example, discriminate against some members. Only as members of the state can we make justice-based demands such as claiming the right to nondiscrimination. Ostensibly, we have this right because membership of the state is nonvoluntary. However, and contrary to the Nagelian thesis, our justice-based entitlement (nondiscrimination) in the two cases remains constant. In one case we waive it through consent, in the other we simply cannot. The justice-based entitlement, however, applies *independently* of our consent. The statist premise that state coercion gives rise to special obligations of justice is implausible because it relies on the "spurious role of consent" (Sangiovanni, 2012b, p.107).

At the risk of doing injustice to cultural conventionalists such as Walzer (1980) or Miller (1995), I will summarize their

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position as follows: Solidarity requires mutual trust, and mutual trust requires a common identity grounded in a shared nationality. There is no European nationality, therefore solidarity within EU territory is limited to humanitarian assistance. This position is untenable for three reasons. Firstly, the argument is purely instrumental and not normative. It eschews the question which I am trying to answer. Secondly, the premise that *only nations* are capable of the collective agency required for distributive justice to apply is dubious (Sangiovanni, 2012a). Surely other identities which draw on shared gender, religion, class or race (and often cut across national identities) can claim to be capable of the same collective agency. Thirdly, the notion of *national culture* is notoriously indeterminate and protean (see Smith, 1996; Connor, 2004; Scheffler, 2007). It is therefore inappropriate for the task of establishing principles of distributive justice.

Both statism and cultural conventionalism fail to develop convincing arguments from *within* the practice-dependent approach. In the following section I will outline an alternative practice-dependent approach, based on *material transaction* and the Rawlsian concept of 'background justice'.

## (3) Methodology

The shared practice around which we can build an alternative approach is neither state coercion nor nationhood, but the transaction of goods and services between rational agents – either individuals, corporate identities, or states. As with all practice-dependent approaches[2], the principles of distributive justice vary according to the context which they are intended to regulate (Sangiovanni, 2008). We therefore need to adjust our principles depending on the *intensity* of transactions and the *nature* of the agents involved. In order to justify any principles of justice, we also need an interpretation of the point and purpose of the institution(s) – in this case, the EU – that the principles are intended to govern (Sangiovanni, 2008, p.142; James, 2005). Without this interpretive step, our task would be purely descriptive. I will interpret the point and purpose of the EU in section (4).

To avoid Criticism 1, we should furthermore introduce 'moralizing' values which can reasonably be shared by all actors involved in the transactions. For the EU, it seems reasonable to suggest that the value of 'procedural fairness' is acceptable to all agents – states, groups and individuals – involved in material transactions. This is because procedural fairness constitutes the 'bedrock value' of liberal democracy (see Rawls, 1999). For any transactions to be considered procedurally fair, the two contracting parties must (i) have an adequate range of alternative options available to them, and/or (ii) have sufficient bargaining power to influence the terms of the contract (see Ronzoni, 2009, p.239). These conditions are necessary to ensure that one party cannot be coerced by the other party into accepting the terms of the transaction. In this sense, procedural fairness is not concerned with equality of outcomes, but with equality of opportunities between the parties involved in the transaction (Rawls, 1999).

Crucially, the cumulative effect of many separate, cross-cutting and seemingly fair transactions between rational agents will eventually skew the distribution of resources and opportunities in ways that make the procedural fairness of *further* transactions impossible (Rawls, 1999; Scheffler, 2008). If there are transactions, but neither (i) nor (ii) applies, we have a case of 'background injustice'. The purpose of distributive justice is to offset this 'background injustice' (see Rawls, 1993; Ronzoni, 2009). Therefore we might need to introduce *new* redistributive institutions in order to allow already existing practices (see Practices 1 & 2 in the following section) to continue according to the requirements of procedural fairness (Ronzoni, 2009). Importantly, procedural fairness is not an independently justified right or value, but rather a more fundamental practice, which guides the other practices (sovereignty, markets, games) of most agents (states, groups, individuals) within liberal democracies (see James, 2005). We should also note that these principles are not scope-restricted. They apply wherever transactions of goods and services take place under conditions of background injustice.

If we are to apply this transactional practice-dependent approach to the institutions of the EU we need a plausible interpretation of the EU's *raison d'être*. Upon this interpretation we can then construct principles of distributive justice which can guarantee the procedural fairness of those practices enshrined in the EU's *raison d'être*.

## (4) The Interpretive Step

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We can interpret the purpose of the European project on at least two levels: the inter-state level and the individual level. This is because the EU speaks not only in the name of its member states but also in the name of every individual citizen (Sangiovanni, forthcoming). According to the most plausible account, the European project serves to consolidate the following two practices, in addition to securing fragile peace in the post-war period[3].

*Practice 1:* On the inter-state level the EU's purpose is to guarantee the *effective* sovereignty of its member states so they can implement their independent welfare policies (Van Parijs, 2006). In order to consolidate their newly established welfare systems, European states needed to increase their revenue through expanding 'market access' within the EU (Sangiovanni, forthcoming). Paradoxically, growing international economic competition increasingly required states to give up their formal sovereignty in order to protect their effective one with regard to welfare policy (Ronzoni, 2009). It can therefore be said that through growth-promoting measures the EU seeks to enhance the practice of *effective* sovereignty i.e. the problem-solving capacity of its member states.

*Practice 2:* On the individual level the EU institutions seek to enshrine the practice of 'liberal democracy'. Individuals within the EU have been "granted a series of evolving civil, political, and social rights under EU law" (Sangiovanni, forthcoming, p.25). These laws flow from the notion that all EU citizens are both free to engage in market exchanges and equal to engage in these exchanges according to the requirements of procedural fairness (Sangiovanni, forthcoming). The trappings of liberal democracy – the Copenhagen Criteria – are also a precondition for states which want to join the EU in the first place (see EC, 1993). It can therefore be said that the EU seeks to act as a regional guarantor for the practice of 'liberal democracy'.

If it turns out that transactions of goods and services enabled by EU integration undermine effective sovereignty *unequally* between member states, we have a case of inter-state background injustice within the EU. If it turns out that those transactions also undermine the capacity of EU citizens to engage in market exchanges on a free and *equal* basis, we have a case of trans-state background injustice within the EU. Accordingly, either more *inter*-state solidarity and/or more *trans*-state solidarity within the EU would be called for in order to offset this development.

## (5) Is the European Order a Case of 'Background Injustice'?

I argue that the current European dispensation gives rise to both inter- and intra-state background injustice. Firstly, member states within the EU are subject to *divergent* trends which are made possible by the 'four freedoms', i.e., the single market for labour, capital, goods and services (Van Parijs, 2006). For example, EU competition law undermines and opens up to judicial review the independent welfare policy of those states which have largely privatized welfare services or have made extensive use of 'public-private' partnerships. Member states which rely on the public provision of welfare services are not affected by this development (Sangiovanni, forthcoming). Furthermore, 'tax competition' within the EU puts significantly *more* pressure on those states which finance their welfare systems primarily through payroll taxes – as opposed to general taxation. This is because the latter method of taxation does not increase production costs as much as the former (Sangiovanni, forthcoming). In short:

"Given the heterogeneity in welfare regime type, taxation structure, level of development, and population size, member states face [...] different risks and distributional consequences by integrating" (Sangiovanni, forthcoming, p.19).

The current dispensation therefore allows some member states to benefit more than others. This situation shows that those member states which are 'losing out' on European integration do not have (i) an adequate range of alternative options available to them, and/or (ii) do not have sufficient bargaining power. In order to address this case of *inter*-state background injustice we need more inter-state solidarity within the EU. The extent of redistribution will be "given by the level at which each state would insure against the potential losses [...] had they known the distribution of risks but not their place in that distribution" (Sangiovanni, forthcoming, p.21). This EU-wide 'veil of ignorance' would guarantee the procedural fairness of the inter-state redistributive agreement.

Secondly, the 'four freedoms' make it increasingly difficult for European citizens to engage in market exchanges on a free and equal basis. This is because the current balance between social protection and market liberalization is

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skewed in favour of the latter by EU integration (Van Parijs, 2006). Problems of *trans*-state background injustice arise because the erosive effect of the single market on member states' welfare provision is not (yet) countered by an EU-wide safety net which can guarantee that individuals meet conditions (i) and/or (ii) when exposed to market forces (see Maduro, 2000). The example of the USA can put this development into perspective:

"Do you really think that the fact that so little redistribution is happening in the US *at the level of individual states* has nothing to do with the 'four freedoms' US residents have long enjoyed across states?" (Van Parijs, 2006, p.4, emphasis added).

The consequences of the four freedoms demand is that the minimum of social security, which Americans currently enjoy, is provided by the federal state. The effects of the current European dispensation therefore point us towards a centrally administered EU-wide safety net which would guarantee the continuation of Practice 2 according to the requirements of procedural fairness.

## Conclusion

The cursory application of the transactional practice-dependent approach to the EU has made it clear that we need more social solidarity within the EU than is currently the case. Unfortunately, a more thorough empirical investigation into 'European background injustice' was beyond the scope of this essay. However, I hope to have laid the groundwork for further research in this area. In light of the current debt crisis within the European Monetary Union, it would also be particularly interesting to investigate whether this monetary union entails additional 'background injustices' and whether even more far-reaching redistributory measures are therefore required within the Eurozone.

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[1] This is the case *even if* the EU meets Nagel's 'authorship' condition (Sangiovanni, 2012a).

[2] Except for the 'dualist' approaches which cannot justify different *degrees* of distributive justice

[3] For alternative accounts see Habermas (2001) and Rawls & Van Parijs, *Deuxième lettre* (2003).

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