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**CONCEPTIONS OF JUSTICE FROM BELOW:
DISTRIBUTIVE JUSTICE AS A MEANS TO ADDRESS LOCAL CONFLICTS
IN EUROPEAN LAW AND POLICY**

Fernanda G. Nicola

Conceptions of Justice from Below:

Distributive Justice as a Means to Address Local Conflicts in European Law and Policy

Fernanda G Nicola*

Abstract

The impact of European Union (EU) law and policy on social groups has been examined in important scholarly work on European Law.¹ Mainstream European legal scholarship, however, makes seldom use of a ‘law and society’ methodology, committed to an understanding of law, its internal logic and its practice yet influenced by external political and social forces.² By means of two different theoretical perspectives, American legal realism and Amartya Sen’s idea of comparative justice, this chapter focuses on the impact of European decision-making on social groups and local actors embracing different conceptions of justice from below.³ Lawyers, judges and policy-makers in the EU appear more concerned with institutional demands of justice rather its social realization as revealed by local actors with conflicting visions of justice. The chapter uses distributive justice as a means to reconcile such different visions of the good life.

* Professor of Law, Washington College of Law, BA and JD Turin University, PhD Trento University, SJD Harvard Law School, I am indebted to Dmitry Kochenov, Brishen Rogers, Daniela Caruso, Cathy Mc Cauliff, Gianluigi Palombella and Lucia Scaffardi for their comments on this chapter. Forthcoming in EUROPE’S JUSTICE DEFICIT, DIMITRY KOCHENOV, GRÁINNE DE BÚRCA AND ANDREW WILLIAMS EDS. (2014).

¹ See LAWYERING EUROPE: EUROPEAN LAW AS A TRANSNATIONAL SOCIAL FIELD (ANTOINE VAUCHEZ AND BRUNO DE WITTE EDS. 2013); KENNETH ARMSTRONG, GOVERNING SOCIAL INCLUSION: EUROPEANIZATION THROUGH POLICY COORDINATION (2010); Antonia Layard, *Freedom of Expression and Spatial (Imagination of) Justice*, in EUROPE’S JUSTICE DEFICIT, DIMITRY KOCHENOV, GRÁINNE DE BÚRCA AND ANDREW WILLIAMS EDS. (using legal geography as a tool to show how law, space and geography are mutually constituted and reflective).

² See David S. Clark, *History of Comparative Law and Society*, in COMPARATIVE LAW AND SOCIETY 1-36 (David S. Clark ed., 2012). Even though the law and society methodology was prevalent in Europe during the early twentieth century, this methodology remains more predominant in the US legal academia rather than in EU law.

³ See BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW, DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003).

Introduction

Even though EU law is not supposed to intervene in domestic disputes arising solely within a Member State without implicating EU norms directly,⁴ European judge-made law inevitably redistributes power and resources among private and public actors inside national jurisdictions.⁵ The disconnect between the declared duality of EU law and its inexistence due to an overreaching European judge-made law has been central to the work of several authors.⁶ In addressing such disconnect, this chapter takes a distinctive local or municipal perspective. The ‘from below’ point of departure shows how EU law redistributes power to local actors, groups, and cities with multiple and conflicting conceptions of justice.

Rather than romanticising cities and regions for their communal territorial ties,⁷ or praise them as urban innovators to rescue struggling markets,⁸ local actors depending on the territorial and jurisdictional context have different preferences that are shaped by and in turn shape EU law. In particular, EU law destabilizes traditional and internal distribution of powers by creating unstable multilevel governance alliances with conflicting political goals and different conceptions of justice. This chapter argues that such unstable political local alliances driven by the different conceptions of justice from below rarely surface in European decision-making. For instance, in applying general principles of uniformity and proportionality in its interpretation, the the Court of Justice of the EU (CJEU) does not openly address conflicting notions of justice from

⁴ See Miguel Poiars Maduro, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, in *THE FUTURE OF EUROPEAN REMEDIES* 117 (C. Kilpatrick, T. Novitz and P. Skidmore eds., 2000) and for critical views see Niamh Nic Shuibhne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move On?* 39 *COMMON MKT. L. REV.* 731 (2002) and D. Kochenov and R. Plender, *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, 37 *E.L. REV.* 369, 383 (2012).

⁵ See Fernanda G. Nicola, *Invisible Cities in Europe*, 35 *FORDHAM INTL. L.J.* 1282 (2012).

⁶ See Allott, Philip, *The European Community is Not the True European Community*, *Yale LJ* (100) 2485; Gareth Davies, *Constitutional Disagreement in Europe and the Search for Pluralis* (Eric Stein Working Paper No. 1/2010, 2010)

⁷ See Richard Thompson Ford, *Bourgeois Communities: A Review of Gerald Frug's "City Making,"* 56 *STAN. L. REV.* 231 (2003).

⁸ See EDWARD GLAESER, *TRIUMPH OF THE CITY* (2011).

below that arise in European adjudication.⁹ The local and municipal viewpoint often disappears in the CJEU deliberations in which subnational actors have limited standing¹⁰ or their viewpoint is collapsed into the one of their Member States.¹¹

A first theoretical insight relies on the influence of American legal realism¹² in departing from an understanding of the federal judiciary as a neutral arbiter determining the competences between States and the Federal government as two absolute powers within their spheres.¹³ Instead of acting as a neutral umpire, the federal judiciary enables the trade-off of powers and resources between various actors at the federal, state and local level according to the Court's political goals.¹⁴ Likewise, in the EU scenario the European judiciary enables unstable multilevel alliances which create trade-offs of power and resources vertically, among various supranational and national actors, but also horizontally, and most importantly among various domestic actors.¹⁵ Local jurisdictions in Europe are not neutral actors, nor "creatures of the states," but rather places that acquire or lose power in constant negotiation with each other and with their central

⁹ See Stavros Tsakyrakis, *Disproportionate Individualism*, p. 5 (explaining how the judges in the US and the EU have mainstreamed proportionality as a give method in adjudication).

¹⁰ See Case C-95/97, *Région Wallonne v. Commission*, 1997 E.C.R. I-1787; Case C-180/97, *Regione Toscana v. Commission*, 1997 E.C.R. I-5245; see also Case T-81/97, *Regione Toscana v. Commission*, 1998 E.C.R. II-2889; *Regione Siciliana v. Commission*, 2006 E.C.R. I-3881; Case C-15/06 *Regione Siciliana v. Commission*, 2007 E.C.R. I-02591. Several commentators have addressed this problem, Daniela Caruso, *Direct Concern in Regional Policy: The European Court of Justice and the Southern Question* 16 EUROPEAN LAW JOURNAL 2011; Joanne Scott, *Regional Policy: An Evolutionary Perspective*, in THE EVOLUTION OF EU LAW 625, 636-37 (Paul Craig & Grainne de Búrca eds., 1992) (commenting on the lack of legal standing of individual applicants); Steven Weatherill, *The Challenge of the Regional Dimension in the European Union*, in THE ROLE OF REGIONS AND SUB-NATIONAL ACTORS IN EUROPE (Stephen Weatherill & Ulf Bernitz eds., 2005 p. 1-32 at p.7-8) (in which Steven Weatherill explains: "the EC pays for its regional-blindness. [...] Its formal lack of regard for domestic constitutional arrangements may be combined with activity that in practice severely disturbs those internal patterns.")

¹¹ Case C-137/09, *Josemans v. Burgemeester van Maastricht*, Judgment of the Court 2010 E.C.R. I-13019. For a similar analysis in US law see Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059(1980) (Frug has showed how the invisibility of cities in the US constitutional structure influenced the Supreme Court's jurisprudence that reduced cities to either public actors as "creatures of the State" or as private actors as mere market participants).

¹² See AMERICAN LEGAL REALISM (William W. Fisher, et al. eds., 1995).

¹³ See DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (2006).

¹⁴ See Richard Thompson Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 921 (1999); GERALD E. FRUG & DAVID BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION (2008).

¹⁵ See Fernanda G. Nicola, *Another View on European Integration: Distributive Stakes in the Harmonization of European Law*, in PROGRESSIVE LAWYERING, GLOBALIZATION AND MARKETS: RETHINKING IDEOLOGY AND STRATEGY 233-260 (Claire Dalton, ed., 2007).

governments or the Union.¹⁶ In its application of the principle of proportionality, the CJEU reconciles conflicting moral values arising in its internal market jurisprudence between the States and the Union.¹⁷ In the Court's deliberation, however, the ongoing horizontal conflicts and collaborations often disappear or they are subsumed within the classic narrative of mediation of federal versus national tensions.

A second theoretical entry point of this chapter is Amartya Sen's idea of comparative justice.¹⁸ In the *Idea of Justice* Sen both departs from and enriches the dominant theory of distributive justice elaborated by John Rawls.¹⁹ Sen reveals the gap between people's opportunity to obtain primary goods and what people really enjoy because of their preferences. His analysis begins with assessing inequalities instead of creating institutional structures committed to the allocation of primary goods.²⁰ This consequentialist approach to law overlaps with the "bad man" theory elaborated by Oliver Wendell Holmes.²¹ In departing from abstract legal principles Holmes focuses on the practical consequences of legal norms which range from paying damages to imprisonment. Sen contributes with his capability approach to enrich Rawls' theory of justice: genuine opportunities that help us value the way we live should be the basis for the equality.²² Our individual capabilities should be the barometers for evaluating when opportunities will allow us to achieve the desired well-being. Equality of suitable opportunities for the person in question will ensure that societal conditions are just for the carpenter, the musician as well as the banker.

Sen assesses the development of a community or a country characterized by territorial and cultural heterogeneity according to the functioning of each locality and its capacity to realize the model of development each particular community values. At times the access to valuable functioning that communities aspire to achieve is constrained by the fact that these are located at

¹⁶ Fernanda G. Nicola, 'Creatures of the State': Regulatory Federalism, Local Immunities, and EU Waste Regulation in Comparative Perspective, in *COMPARATIVE ADMINISTRATIVE LAW*, (Susan Rose-Ackerman & Peter Lindseth eds., 2011).

¹⁷ See PAULETTE KURZER, *MARKETS AND MORAL REGULATION CULTURAL CHANGE IN THE EUROPEAN UNION* (2001); Floris de Witte, *Sex, drugs & EU law: The recognition of moral and ethical diversity in EU law*, 50 *COMMON MARKET LAW REVIEW*, 6, pp. 1545–1578 (2013).

¹⁸ See AMARTYA SEN, *THE IDEA OF JUSTICE* (2009).

¹⁹ See JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

²⁰ See AMARTYA SEN, *INEQUALITY REEXAMINED* (1995).

²¹ See Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 460-61 (1897).

²² Amartya Sen, *Development as Capability Expansion*, 19 *J. DEV. PLAN.* 41, 43 (1989).

the periphery rather than the core of the Union.²³ Yet these communities' limited options and aspirations should be compared in order to assess existing inequalities in our society and different moral conceptions of the good life.

This chapter foregrounds conflicting conceptions of justice from below emerging in European jurisprudence that the Court fails to address through the interpretation of EU proportionality and subsidiarity principles. These conceptions of justice from below shed light on existing ethical differences and unresolved conflicts in order to achieve the social realization of actors who are differently situated. Rather than tying local actors and social groups to decisions based on abstract legal principles and institutional demands, the starting point is why injustice arises in particular socio-economic settings. This framing of the justice/injustice question could put European judges or policy-makers in the position to anticipate and clarify the unintended effects of their decision-making on specific territories and social groups. More importantly, it could provide the opportunity to European judges, lawyers and policy-makers to clarify their normative position over conflicts reclaiming different conceptions of justice.

1. Displacing the Neutrality of the Federal Judiciary and its Federalism Doctrines

Pre-realist and formalist ideas of a neutral federal judiciary and its federalism doctrines have played an important role in US and EU adjudication. Scholars who have rejected and criticized such doctrines have engaged in judicial debates addressing the social tensions mediated by federalism while mapping the shift from dual to cooperative federalism in the Supreme Court's jurisprudence.²⁴ Such doctrinal shift in the US Supreme Court's adjudication reflected the political economic shift from *laissez faire* to new deal interventionism in the twentieth century. A central figure in US legal realism was the economist and jurist Robert L. Hale.²⁵ His work on private law set aside the pre-realist idea that the free market was a natural condition that led to predictable and efficient outcomes without state intervention. Instead Hale viewed the

²³ See Damjan Kukovec, *Justice at the European Periphery - The Discourse of Justice and the Reproduction of the Status Quo*. Available at (last checked March 28, 2014) http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/29.europeanuniversityinstituteprof_kochenov_nl_eui_justice_wp_en.pdf

²⁴ See ROBERT SCHÜTZE, *FROM DUAL TO COOPERATIVE FEDERALISM: THE CHANGING STRUCTURE OF EUROPEAN LAW* (2009).

²⁵ See BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (2001).

market as a regulated environment where groups of buyers and sellers constantly acquire or lose their relative bargaining power *vis-à-vis* other groups and the state.²⁶ An analogy to the free market idea is the pre-realist notion that the federal judiciary was a neutral umpire meant to police the clashes between independent federal and state absolute spheres of authority.²⁷

From a legal realist perspective, federal adjudication rather than interpreting neutral principles created a series of trade-offs among federal, state, and local powers.²⁸ The outcome of federal adjudication was unstable multilevel alliances over specific political and legal outcomes.²⁹ Therefore for legal realists neither free market policies nor federal legal doctrines offered neutral solutions to the redistribution of resources and power according to a fair criterion of justice.

Among European lawyers some have challenged the supposedly neutral and pre-realist interpretation of the CJEU often driven by the need uniformity in EU law rather than by politically driven motivations. For instance Gareth Davies has shown how the preliminary reference procedure allows the CJEU to decide a question of “competence allocation” in a way that undermines its status as a neutral umpire or “infantilizing” national courts.³⁰ In a similar vein, Daniela Caruso demonstrated that the CJEU has used neutral and technical principles in private law adjudication to achieve the consolidation of “institutional gains” for European integration.³¹ Finally, Tamara K. Hervey has called “imaginative jurisprudence” a progressive approach aiming at rewriting the *Kohll* decision³² addressing one of the central social rights preserved in the EU legal system namely the right to health care.³³ Rather than using a strictly

²⁶ See generally Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

²⁷ This conception of the federal government was the predominant one during nineteenth century Classical Legal Thought. See Duncan Kennedy, *The Globalizations of Law and Legal Thought*, in THE NEW LAW AND DEVELOPMENT: A CRITICAL APPRAISAL (David Trubek & Alvaro Santos eds., 2006).

²⁸ See Mark Tushnet, *Following the Rules Laid-Down: A Critique of Interpretivism and Neutral Principles* 96 HARV. L. REV. 781, 824 (1983).

²⁹ See generally David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377 (2001).

³⁰ See Gareth Davies, *The Division of Powers Between the European Court of Justice and National Courts: A Critical Look at Interpretation and Application in the Preliminary Reference Procedure* in REGULATING THE INTERNAL MARKET (Niamh Nic Shuibne ed., 2006).

³¹ See Daniela Caruso, *Private Law and State-Making in the Age of Globalization*.39 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS, 1 (2006).

³² *Kohll v. Union des Caisses de Maladie*, E.C.R. 1998I-1931, (1998).

³³ See Tamara K Hervey, *Re-judging Social Rights in the European Union*, p. 345-368 at 246 in CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE, EDS. DE BURCA, KILKPATRICK AND SCOTT (2014) explaining that in

European framework, the work of all three scholars exemplifies how legal realist lenses have crossed the Atlantic. In particular their work has become part of a global critical discourse in the conceptualization of legal institutions, private law and socio-economic rights.³⁴

The relevance of legal realism and critical thought bears meaning for the judicial interpretation of American federalism. For instance, the Supreme Court has developed during the nineteenth century the pre-realist doctrine of dual federalism conceived of state and federal power as two separate spheres of authority.³⁵ This doctrine was displaced from the 1930s until the early 1990s in favor of from the principle of plenary powers that conceives instead states as autonomous from but nevertheless embedded in federal authority. This shift in doctrinal interpretations is coupled by a federal judiciary initially supporting *laissez-faire* legislation to the New Deal legislation committed to social policy.³⁶ In contrast to dual federalism, American and European scholars committed to social justice have advanced cooperative federalism as prescriptive theory that enhances federal and state collaboration.³⁷ The US federal judiciary has used these doctrines at different times to achieve different political economy goals depending on the political shifts on the bench.³⁸ Legal elites have supported free market liberalism by interpreting the dual sovereignty doctrine, whereas social justice scholars have used cooperative federalism to enhance welfare reforms.

However with the 1990s, the Rehnquist court began promoting its new federalism doctrine selectively.³⁹ In doing so, the Supreme Court resuscitated in part the dual sovereignty

rejecting some fundamental premises that shape EU law and policy, such as the creation of a liberal market and that the EU is not a human rights organization, we can engage in imaginative jurisprudence by “a literal rewriting of seminal cases through a critical lens.”

³⁴ See Duncan Kennedy, *The Globalization of Critical Discourses on Law: Thoughts on David Trubek's Contribution*, 3-14 in CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE, EDS. DE BURCA, KILKPATRICK AND SCOTT (2014).

³⁵ See *Parker v. Brown*, 317 U.S. 341 (1943) (providing an example of dual federalism doctrine in which the states and the federal governments are depicted as two autonomous spheres). While some commentators have criticized the inconsistency of the new federalism and the recurrence of federalist arguments over time others have promoted alternative and more interactive approaches to federal power. See Philip Weiser, *Federal Common Law, Cooperative Federalism and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 246 (2005).

³⁶ See ROBERT R SCHÜTZE, FROM DUAL TO COOPERATIVE FEDERALISM (2009) p.123.

³⁷ *Id.*, supra 36 p. 241.

³⁸ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

³⁹ See Richard H. Fallon, *The 'Conservative' Paths of the Rehnquist Court's Federalism Decisions*, 69 U. Chi. L. Rev. 429 (2002); David J. Barron, *A Localist Critique of the New Federalism*, 51 Duke L.J. 377 (2001).

doctrine even though this appeared long time abandoned.⁴⁰ The new federalism doctrine of the Rehnquist court conceived overlap between state and federal authority even though these remained separate spheres of power. The new federalism doctrine shows that even though scholars like Robert Schütze have declared the death of dual federalism, in light of the predominance of cooperative federalism in both the EU and the U.S., such eulogy has remained a normative aspiration rather than a judicial praxis to interpret federal doctrines.⁴¹ Legal realists have warned against the false expectation that legal doctrines, despite their ideological genealogies, might not always lead to desired normative outcomes.⁴²

Cooperative localism, albeit different from cooperative federalism, resonates with the federal doctrine of plenary powers developed by the Supreme Court to support the legislative supremacy of Congress enacting New Deal legislation.⁴³ Scholars have used the notion of cooperative localism to highlight the beneficial interaction between federal and local governments in the realm of federal regulatory policies. This cooperation creates pockets of local autonomy often in tension with state-level power.⁴⁴ In addition, the cooperation between local and federal authorities at times limits state control on local decision-making which enhances local experimentation.⁴⁵ For instance, some federal spending programs that are directly allocated to counties or municipalities have spurred opposition at the state level against local control of federal funding.⁴⁶ The downside of such federal-local cooperation happens when it ends up

⁴⁰ Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 142 (2001).

⁴¹ See Erin F. Delaney, *Book Review* in 41 *publius* 349 (2011) (doi: 10.1093/publius/pjq017) reviewing ROBERT SCHÜTZE, *FROM DUAL TO COOPERATIVE FEDERALISM: THE CHANGING STRUCTURE OF EUROPEAN LAW* (2009)

⁴² See Felix Cohen, *Transcendental Nonsense and the Functional Approach* 35 *Colum. L. Rev.* 809 (1935) and Duncan Kennedy, *Form and Substance in Private Law Adjudication* 89 *HARV. L. REV.* 1685, 1697 (1976).

⁴³ See, e.g., Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 *CORNELL L. REV.* 656, 682 (2000) (noting that, after the New Deal, "the Court desisted from enforcing the non-delegation doctrine, thus allowing Congress broad discretion to allocate legislative power).

⁴⁴ See Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 *VA. L. REV.* 959, 968-74 (2007) (explaining new forms of federal local cooperation in the aftermath of September 11, post hurricane Katrina and on fiscal federalism).

⁴⁵ See Susan-Rose Ackerman, *Cooperative Federalism and Co-optation*, 92 *YALE L.J.* 1344 (1983); Joshua Sarnoff, *Cooperative Federalism, the Delegation of Federal Power and the Constitution*, 39 *ARIZ. L. REV.* 205 (1997); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 *N.C. L. REV.* 663 (2001).

⁴⁶ See *Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256 (1985); see also Davidson, *supra* note 202; Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 *EMORY L.J.* 31 (2007).

substituting federal power to state power thus rendering local government once again creatures of the state rather than experimenting or freely allocating funding according to their needs.⁴⁷

The realist lesson is that advocating for dual federalism, cooperative federalism or localism *per se* does not produce the normatively desired results for social justice. Legal realism has taught us that legal entitlements, namely the rules of private and public law that undergird institutions, such as markets or federal governments, determine which parties enjoy which sorts of viable legal claims with regard to those institutions.⁴⁸ Because all institutions have bundles of rights and entitlements, however, one often risks a categorical error by assuming that the particular bundles will be assigned and distributed in the same way in different jurisdictions and at different time periods.⁴⁹ The outcomes of federal doctrines mediating the tensions of political and federal conflicts involving levels of governments need to be evaluated on a case by case analysis. In order to take political decisions that will promote distributive justice in the EU, the CJEU will have to set aside its neutral umpire role and openly recognize its counter majoritarian yet democratic role.⁵⁰

2. Distributive Justice in Adjudication

A mainstream approach to law relies on redistribution of resources and power via tax and transfers, rather than adjudication. According to legal economists, judges should pursue efficiency and set aside distributive goals in adjudication because it is difficult or impossible to redistribute through legal rules, whereas legislatures have the competence to deal with distribution of resources.⁵¹ Legislative decisions and the government's tax and transfer systems,

⁴⁷ See Fernanda Nicola, *'Creatures of the State': Regulatory Federalism, Local Immunities, and EU Waste Regulation in Comparative Perspective*; in "Comparative Administrative Law," Susan Rose-Ackerman and Peter Lindseth Eds. (Elgar Publishing, 2011).

⁴⁸ See Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327 (1991).

⁴⁹ See Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) and Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 Wis. L. Rev. 975, p. 993-994 (explaining Hohfeld's fundamental error).

⁵⁰ This position has been prominently advocated by JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) in his response to the counter-majoritarian difficulty of undemocratic judicial review articulated by well-known constitutional theorist such as ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

⁵¹ See LOUIS KAPLOW & STEVEL SHAVELL, *FAIRNESS VERSUS WELFARE* 31-35 (2002).

are likely to be more precise than the decision of a random judge.⁵² Even liberal philosophers such as John Rawls who elaborated a rational and normatively grounded theory of distributive justice with “well-founded justifications” to eliminate arbitrary discrimination was skeptical about relying on judges to apply it. Rawls’s difference principle and its “maximin” distributive criterion aim to redistribute primary social goods to maximize the welfare of the least advantaged.⁵³ However, Rawls did not view the difference principle as guiding judicial reasoning, instead confining it to the legislative sphere.⁵⁴ According to Rawls’s difference principle, rational and reasonable beings in the original position would not choose principles mandating total equality among all individuals.⁵⁵ Rather, they would choose principles mandating that inequalities must be to the benefit of the worst-off—as, for example, when inequalities “set up various incentives which succeed in eliciting more productive efforts.”⁵⁶ In the global and possibly transitional context, however, scholars have shown the limits of the Rawlsian approach tailored to a national situation.⁵⁷

However, critical scholars have shown that redistribution can be carried out not only through tax and transfer programs, but also through adjudication.⁵⁸ Accepting that members of the judiciary decide on what legislatures deliberate daily might undermine courts’ autonomy and legitimacy, especially in civil law countries in which at least, at the declaratory level, judges should be *the mouth of the law*.⁵⁹ Even though jurists have long criticized such notion of judicial

⁵² See ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 4 (1999).

⁵³ See RAWLS, *supra* note 13, at 62-92.

⁵⁴ See Brishen Rogers, *Justice at Work: Minimum Wage Laws and Social Equality*, 92 TEX. L. REV. ____ (2014).

⁵⁵ See RAWLS, *supra* note 13 at 151.

⁵⁶ *Id.* at 152.

⁵⁷ See generally THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS (2000). See Joseph Heath, *Rawls on Global Distributive Justice: A Defence*, 31 CAN. J. PHIL. 193 (2005), available at <http://homes.chass.utoronto.ca/~jheath/defence-of-rawls.pdf>.

⁵⁸ See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, app. B at 654 (1982).

⁵⁹ See JOHN HENRY MERRIMAN, THE CIVIL LAW TRADITION (1969) citing Montesquieu’s *De l’Esprit des Loix*; at pp.17-8.

discretion by showing that civil law courts have wide room of interpretation of statutory texts,⁶⁰ civil law court's judicial styles still tend to conform to that narrow belief.⁶¹

In the same tradition the judges of the CJEU have been careful not to overstep their boundaries and exercise prudently their judicial discretion. Even when they make decisions that redistribute power and resources within the Member States, European judges tend not to acknowledge openly the costs and benefits of their decisions. The style of their decisions and the lack of dissenting opinions obscure the distributive consequences at stake in each judgment.⁶² Several commentators have criticized the CJEU for its rejection to engage in comparative law by citing or dialoguing with other courts, especially with the ECtHR, to increase the transparency of its decision-making processes.⁶³ However from the interpretation of European private law directives to the application of anti-discrimination principles, European judges redistribute resources and power according to efficiency criteria rather than a principle of distributive justice⁶⁴ Instead of empirical reality, the efficiency claim made by judges to reduce the barriers to trade the single market bears rhetorical power to legitimate new legislative and judicial action on behalf of the EU.⁶⁵ European judges attribute the results of their decision-making process to the sophisticated balancing between conflicting interests in light of a proportionality criterion which in their view entails effects on the Union, the member states but only rarely local actors, cities, territorial groups and citizens.

⁶⁰ See Bernard Rudden, *Courts and Codes in England, France and Soviet Russia*, 10 LA. L. REV. 431 (1949). Mitchel de S.-O.-I'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 Yale L. J. 1325 (1995).

⁶¹ See Mitchel de S.-O.-I'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 Yale L. J. 1325 (1995).

⁶² See Jeffrey L. Dunoff and Mark A. Pollack, *International Judicial Dissent: Causes and Consequences* Paper prepared for presentation at the Conference of Europeanists, Washington, DC, 14-16 March 2014.

⁶³ See Gráinne De Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?* Forthcoming, Maastricht Journal of European and Comparative Law, Vol. 20 (2013); Christopher McCrudden, *Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared*, Cambridge Yearbook of European Legal Studies: Vol. 15, no. 1, pp. 383-415(33) 2013.

⁶⁴ See Case C-183/00, *González Sánchez v. Medicina Asturiana SA*, C-183/00 judgment, 2002 E.C.R. I-03901; Int'l Transp. Workers' Fed'n v. Viking Line ABP (*Viking*), Case C-438/05, [2007] E.C.R. I-10779; *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet (Laval)*, Case C-341/05, [2007] E.C.R. I-11767.

⁶⁵ See generally Fernanda Nicola, *Transatlanticism: Constitutional Asymmetry and Selective Reception of U.S. Law and Economics in the Formation of European Private Law*, 16 CARDOZO J. INT'L & COMP. L. 87 (2008).

There are counterexamples to the judicial style of the CJEU. For instance the opinion of Advocate General Eleanor Sharpston in the *Government of the French Community and Walloon Government v. Flemish Community*⁶⁶ that was not followed by the Court called on to strike down a reverse discriminatory scheme in Belgium. The French Community in Belgium challenged an insurance scheme adopted by the Flemish government which was open only to individuals who both lived and worked in the Flanders region of Belgium and not, for example, to those working in Flanders but residing in the Walloon region. The CJEU decided this case by drawing the distinction between two categories of workers: those who have exercised their freedom to move within the EU,⁶⁷ and those who have not done so who were prevented from using the insurance scheme.⁶⁸ The paradoxical outcome was that EU citizens (non-Belgians) residing in Belgium were better protected than Walloon Belgian citizens who did not move around the Union. Thus, EU law offered more protection than Belgian law. Rather than abandoning the wholly internal situation doctrine, the Court adventured in a careful analysis of which groups could be protected under EU law because of their ability to move and those who could not.

In her opinion, Advocate General Sharpston suggested a different doctrinal path and rationale that was not followed by the CJEU. While she made the same classification of the CJEU in distinguishing between Belgians who have exercised their right of free movement and other EU citizens versus those Belgians who did not move, Sharpston suggested to interpret the Treaty provisions on European citizenship more broadly than the Court eventually did. Thus suggesting the elimination of the purely internal situation in the case, she advocated for extending the coverage of the insurance to all Belgian citizens connected to the Flemish region.⁶⁹

The rationale in Sharpston's opinion was even more significant than her doctrinal interpretation. In mentioning that judges should be open to evaluate the territorial regulatory schemes, she explained that a discriminatory scheme might discriminate *per se* or it might seek

⁶⁶ Case C-212/06 *Government of the French Community and Walloon Government v. Flemish Government* [2008] ECR I-1683 (hereinafter *Belgian care insurance scheme*)

⁶⁷ *Id.* Case C-212/06 para 37-38. First, those “Belgian nationals working in the territory of the Dutch-speaking region or in that of the bilingual region of the Brussels-capital but who live in the French or German-speaking region and have never exercised their freedom to move within the European community.” The CJEU held that for these workers “Community law clearly cannot be applied to such purely internal situations.”

⁶⁸ *Id.* para 4. For a second category of workers, “both nationals of Member States other than the kingdom of Belgium working in the Dutch-speaking region or in the bilingual region of the Brussels-Capital who live in another part of the national territory and Belgian nationals in the same situation who have made use of their right to freedom of movement,” the CJEU held that EU law precluded the Flemish scheme..

⁶⁹ Opinion of A.G. Sharpston in the Flemish care insurance case (C-212/06) delivered on 28 June 2007, ¶¶ 143-44.

to promote development in underdeveloped territories. In either case, she argued, European judges are well-situated to understanding the conflict at stake as well as the effects of a domestic regulatory scheme on different local and transnational communities.⁷⁰ Basically Sharpston was suggesting an evaluation of the distributive effects of the insurance care scheme creating non-medical assistance and social services for people affected by a prolonged disability adopted by the Flemish Community. This reasoning was more along the lines of what the Belgian Constitutional Court had already decided in its judgment on April 2006 before referring its two questions to the CJEU.⁷¹ In its 2006 decision the Constitutional court had found that “the Flemish legislation did not infringe the economic and monetary unity of Belgium due to the small amount of money involved and the limited impact of the criticized measures on the free movement of persons in Belgium”.⁷²

In their insightful essay, Peter Van Elsuwege and Stanislas Adam show that what should have been a dialogue between the CJEU and the Belgian Constitutional court through the preliminary ruling became instead a long dispute revealing different conceptions of justice as well as institutional perspectives.⁷³ For instance, what they call the “discongruence” between EU and Belgian law arises over the notion of social security, the different conceptions of free movement and the recognition of regional autonomy are based on a mix of problems arising from institutional design as well as divergent visions about which level of government should bear redistributive policies addressing a particular territory or community.⁷⁴ The tension in this case arises between subnational redistributive mechanisms that have become politically uncontroversial at the national level but are now put in question by EU Law, whether directly or via CJEU decisions.⁷⁵ However even if the Court refuses to intervene directly it may rely on the fact that EU law background rules already constrain Member States’ action.⁷⁶

⁷⁰ *Id.* E.C.R. I-1683, I-1687, ¶ 155.

⁷¹ See Belgian Constitutional Court., 11/2009, 21 Jan. 2009, para. B.12.3. T.A.J.A. Vandamme, ‘*Prochain Arrêt: La Belgique! Explaining Recent Preliminary References of the Belgian Constitutional Court*’, 4 *EuConst* (2008) p. 127-148.

⁷² See Peter Van Elsuwege and Stanislas Adam, *The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination. Constitutional Court of Belgium, Judgment 11/2009 of 21 January 2009* (2009) *European Constitutional Law Review*. p. 327-339 at 330.

⁷³ *Id.* at p. 328.

⁷⁴ *Id.* at 335-7.

⁷⁵ See Daniela Caruso, *Limits of the Classic Method: Positive Action in the European Union after the New Equality Directives*, 44 *HARVARD INT’L L J* 331 (2003).

⁷⁶ See Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 *COLUMBIA L REV* 603-628(1943) and Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!* XV:4 *Legal Studies Forum* (1991).

3. In Search of Distributive Justice in Cohesion Policy

The most obvious mechanisms to address the uneven distributive impact of Europeanization was the European Regional Development Fund (ERDF) that was created in the 1970s by the Community. By 1986 European regional or cohesion policies attempted to balance socio-economic inequalities among European regions stressing in the Single European Act an egalitarian commitment to “harmonious development by reducing the differences existing between the various regions and the backwardness of the least favoured regions.”⁷⁷

In the Lisbon Treaty EU regional or cohesion policy becomes explicitly an economic development policy aiming at “reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions,”⁷⁸ which clearly implies addressing disparate levels of wealth, unemployment, and capital income across the regions of Europe.⁷⁹ In 2009 the Barca report indicated the weaknesses as well as the potential of the current regime that was essential to complement the unification of the internal market the single currency and the erosion of the national welfare state in order to offer “equal gains from unification, to have equal access to the opportunities so created as well as equal possibility of coping with risk and threats.”⁸⁰ The report attempted to revamp solidarity and distributive justice as constituent of EU cohesion policies well before the current pledges made by Jürgen Habermas and Claus Offe to revamp solidarity and democracy in the aftermath of the European financial crisis.⁸¹

Since the 1970s there have been numerous challenges that the EU has encountered in the application of a rational criterion of distributive justice to its cohesion policy. First, the amount of wealth that ought to be redistributed from wealthy centers to poor peripheries is clearly

⁷⁷ Art. 130a, b, c, d. in the Treaty establishing the European Community, see Fiona Wislade, *EU Cohesion Policy: Facts, Figures and Issues*, p. 29 in COHESION POLICY AND EUROPEAN INTEGRATION: BUILDING MULTI-LEVEL GOVERNANCE (Gary Marks & Liesbet Hooghe eds., 2000).

⁷⁸ Article 174,2 TFEU.

⁷⁹ See COHESION POLICY AND EUROPEAN INTEGRATION: BUILDING MULTI-LEVEL GOVERNANCE (Gary Marks & Liesbet Hooghe eds., 2000).

⁸⁰ Barca Report (2009), p.7 http://ec.europa.eu/regional_policy/archive/policy/future/pdf/report_barca_v0306.pdf

⁸¹ See Jürgen Habermas, *Democracy, Solidarity and the European Crisis*, <http://www.social-europe.eu/2013/05/democracy-solidarity-and-the-european-crisis-2/> and Claus Offe, *Europe in the Trap* <http://www.eurozine.com/pdf/2013-02-06-offe-en.pdf>

insufficient to fulfill the promises of a “regional policy reducing regional economic and social disparities across European states and regions.”⁸² At a more substantial level, distributive justice is hard to achieve when Member States are unable to agree that eliminating wealth inequalities among their territories is a foundational commitment for all of society, and not only a benefit for the poor. As a result many Member States have used cohesion policies as a bargaining chip to obtain resources in return of political compromises. Finally, promoting redistribution on the basis of cooperation among its twenty-eight member states, with partial surrender of their sovereignty *vis-à-vis* the Union, will not succeed without such adherence to the requirement of a distributive justice policy. At different times, EU cohesion policies have been used instrumentally by the Member States as a trade-off for political and diplomatic compromises. Often EU cohesion policies were negotiated “as a side-payment and a redistribute mechanism for budgetary contributions” to compensate states in the context of a new enlargement.⁸³

A more dramatic example in 2013 was the freezing by the European Commission of its cohesion and regional funds disbursement to Hungary as a way to put pressure on a Member State that did not respect basic democratic guarantees.⁸⁴ While many commentators have reported the “illiberal” turn in Hungary since 2010 after the constitutional changes led by the conservative Fidesz party,⁸⁵ this situation has revealed the lack of mechanisms within the Union to address the infringement of basic democratic and rule of law commitments by the Member States.⁸⁶ Due to such lack, cohesion policies have become the more ready available political tool

⁸² See Marco Brunazzo, *Regional Europe*, in EUROPEAN UNION POLITICS (Michelle Cini & Nieves Perez-Solorzano Borrigan eds., 3d ed. 2010).

⁸³ See Fiona Wislade, *EU Cohesion Policy: Facts, Figures and Issues*, p. 30 in COHESION POLICY AND EUROPEAN INTEGRATION: BUILDING MULTI-LEVEL GOVERNANCE (Gary Marks & Liesbet Hooghe eds., 2000).

⁸⁴ See Kester Eddy and James Fontanella-Kahn, *Brussels suspends funding to Hungary over alleged irregularities*, FT August 14, 2013. For a report on the unstable situation of fundamental rights in Hungary see the Tavares Report, at <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN>

⁸⁵ See Miklós Bánkúti, Gábor Halmai, Kim Lane Scheppele Hungary’s Illiberal Turn: Disabling the Constitution Vol 23:3, *Journal of Democracy*, 138-46 (2012) For a report on the unstable situation of fundamental rights in Hungary see the Tavares Report, available at (last checked os/31/2014)<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN>

⁸⁶ See Kim Lane Scheppele, *What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systematic Infringement Actions*’ (2013),

http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/45.princetonuniversityscheppelesystemicinfringementactionbrusselsversion_en.pdf; Carlos Closa, Dimitry Kochenov and J.H.H. Weiler, *Reinforcing Rule of Law Oversight in the European Union* (March 4, 2014). Robert Schuman Centre for Advanced Studies Research Paper No. 2014/25. Available at SSRN: <http://ssrn.com/abstract=2404260>

used as a short time and not satisfactory remedy attempting to force Member States to change their behavior.⁸⁷

In these examples the notion of territorial cohesion remains a vague concept that is not anchored to a distributive justice principle. Such vagueness has allowed for more or less noble reasons the Member States and the European Commission to use cohesion policies, for lack of better tool, as a tool to address European crises in ways that had very little to do with territorial cohesion. Cohesion and regional policies have become a stunning example of how the deliberative forum to express local interests and create more stable multilevel alliances has been taken over by either Member States or EU overriding goals.⁸⁸ Despite the prominent debate over the renationalization thesis and its critiques led by political scientists,⁸⁹ the missing focus has been the lack of a distributive justice commitment in cohesion policies.

4. The *Idea of Justice* as a Comparative Development Framework

Amartya Sen's *Idea of Justice* introduces a pragmatic theory of justice that departs from Rawls' foundationalism about institutional structures and their relation to justice. Sen starts from the ground up, thinking about the realization of justice rather than its definition as an abstract principle.⁹⁰ His theory addresses everyday inequalities while also ambitiously providing both a rational and universal theory of justice. Instead of an ideal theory committed to long-term and extensive institutional reforms, *transcendental institutionalism*, Sen engages with an impartial method of reasoning to assess the comparative justice of alternative states of affairs called *realization-focus comparison* emerging from the Enlightenment tradition.⁹¹ *Transcendental*

⁸⁷ Carlos Closa, Dimitry Kochenov and J.H.H. Weiler, *Reinforcing Rule of Law Oversight in the European Union* (March 4, 2014). Robert Schuman Centre for Advanced Studies Research Paper No. 2014/25. Available at SSRN: <http://ssrn.com/abstract=2404260> at p. 19-20.

⁸⁸ See Nicola, *supra* note **Error! Bookmark not defined.** (showing how cohesion policies and especially its legal implementation has been unsuccessful in tailoring and differentiate their interventions to a particular territory or regions).

⁸⁹ See Mark Pollack, *Regional Actors in an Intergovernmental Play: The Making and Implementation of EC Structural Policy*, in Rhodes, C. and Mazey, S., (eds.) *The State of the European Union, Vol.III*, 361-90 (1995) and for a critique see John Bachtler and Carlos Mendez, *Who Governs EU Cohesion Policy? Deconstructing the Reforms of the Structural Funds*, Vol 45:3, 535-564 (2007).

⁹⁰ In a similar way Neil Walker's essay Justice in and the European Union suggests a very incisive instrument of justice in the European Union that is "justice as a low-tariff, context-specific concept" p. 12).

⁹¹ See SEN, *supra* note 8, at 6 (explaining *transcendental institutionalism*). Sen portrays ideal theories as insufficient to decide political issues because they are designed to apply to a hypothetical world and not real world circumstances.

institutionalism has spurred fundamental work on just institutions with underlying ethical imperatives. In contrast the *realization-focus comparison* is concerned with social realizations inspired by comparative approaches to justice.⁹² The idea at the heart of the approach that Sen pursues in his work is that competing reasons for justice can coexist and should be better understood by assessing social inequalities.

Sen's approach resonates with the work of those comparative lawyers engaging with *positive-sociology functionalism* to understand legal change in the context and the territory in which legislation is likely to be implemented, reformed or transplanted.⁹³ Comparative scholars engaged in legal reform, however, often fail to confront the "gap" between legal and social practice.⁹⁴ Important scholarly work shows how unintended consequences of legal reform and the problem with a one-size fit all approach to law end up undermining, rather than consolidating legal reforms.⁹⁵

In addressing the question on how to promote legal change to spur economic development, David Trubek and Mark Galanter realized after an intense law reform activity that they achieved less than they hoped, this was, in itself, a significant realization.⁹⁶ In their famous 'self-estrangement' article, Trubek and Galanter show a number of misleading liberal legalist assumptions that heavily constrained the agenda of legal reformers.⁹⁷ The gap between the social and legal context was clearly a recipe for failure when attempting to reform a legal regime embedded in socio-economic realities different from those in the United States. Thus a cautionary note is warranted when applying principles of liberal law reform in rapidly changing societies like the EU.

⁹² *Id.* at 7.

⁹³ See Fernanda G. Nicola, *Family Law Exceptionalism in Comparative Law*, 58 AM. J. COMP. L. 777 (2010).

⁹⁴ See *Law and Society*, HARVARD: THE BRIDGE, <http://cyber.law.harvard.edu/bridge/LawSociety/essay1.htm> (last visited Oct. 14, 2013).

⁹⁵ See Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75 (2008).

⁹⁶ See David M. Trubek & Mark Galanter, *Scholars in Self-Estrangement: Reflections on the Crisis in Law and Development Studies in the United States*, 4 WIS. L. REV. 1062 (1974).

⁹⁷ *Id.* at 1077 stating that "The law and development model assumes that state institutions are the primary locus of social control, while in much of the Third World the grip of tribe, clan, and local community is far stronger than that of the nation-state. The model assumes that rules both reflect the interests of the vast majority of citizens and are normally internalized by them, while in many developing countries rules are imposed on the many by the few and are frequently honored more in the breach than in the observance. The model assumes that courts are central actors in social control, and that they are relatively autonomous from political, tribal, religious, or class interests. Yet in many nations courts are neither very independent nor very important."

The liberal legalist assumptions bear a lot of resemblances with the “economic technology” within EU post-national regimes promoting economic development and growth while heightening wealth disparities and sovereign debt crisis in some of its poorest regions.⁹⁸ Furthermore, the EU remains characterized by profound differences among Member States with diverse economic, political and social stability. Many have recent histories of dictatorships with experiences akin to colonialism not so different from the developing world’s experience. Thus the challenge for a European idea of justice is to resist the notion that the EU Member States are territorially homogenous, in full respect of the rule of law and they are free from poverty, corruption and informal norms.

5. Three Children, a Flute and the CJEU Jurisprudence

Sen’s theory is very much in tune with the notion that justice should be understood according to the types of human lives that people can actually live and the capabilities they have.⁹⁹ The famous story that Sen uses to illustrate his theory is the one of the three children and flute in which each child has a competing and compelling reason to claim that flute.¹⁰⁰

In Sen’s example, Anne claims the flute for herself because she is the only one among the three children who can play the flute. Bob also claims the flute because he is the poorest and he does not own any toys. Finally, Carla claims the flute for herself because the existence of the flute is a result of her work and her devotion and commitment to making it. Each child represents a starting point for our conceptions of justice in which Anne makes a utilitarian argument, Bob an egalitarian and Carla a libertarian one. Each argument is based on an “impartial and non-arbitrary reason.”¹⁰¹ Each one of them needs serious consideration because there is no “perfectly just social arrangement” that will allow each of them to achieve what he wants and consequently agree with one solution.

This part uses as an analogy the flute story to explore the different conceptions of justice from below emerging in a judicial deliberation of the CJEU. The distributive effects of the

⁹⁸ See Michelle Everson, *The Fault of (European) Law in (Political and Social) Economic Crisis*, Law and Critique, Vol. 24, Issue 2, pp 107-129 (2013).

⁹⁹ See SEN, *supra* note 8, at 18.

¹⁰⁰ See *id.* at 12-15.

¹⁰¹ See *id.* at 13.

Court's decisions, siding with one rather than another conception of justice, are likely to impact unevenly the economic and social development of a specific territory.

The *Rüffert* judgment is an excellent example of conflicting conceptions of justice from below that continues the saga of the *Laval* judgment interpreting the Posted Workers directive 96/71 that regulates the free movement of workers posted for a limited period of time in another Member State.¹⁰² Even though the directive was drafted with the aim of protecting workers against social dumping, especially in the construction industry, its interpretation in *Laval* has created an opposite outcome with the influx of former Eastern European workers into Western Europe.¹⁰³ The directive was interpreted by the CJEU to allow only national or collective bargaining agreements, “universally applicable,” rather than local ones to apply to posted workers. So labor protections that are not universal, and that do not apply on the entire national territory, were not considered valid by the Court.¹⁰⁴

In *Rüffert*, the *Bundesland* of Lower Saxony awarded a German contractor who employed a subcontractor established in Poland a public procurement contract to build the Göttingen-Rosdorf prison. The German company signed a contract for an amount of over eight million Euros that included certain provisions for the protection of workers deployed in public contracting tenders. These provisions required that the contractor and its subcontractors would commit to pay workers the remuneration prescribed by the collective agreement in the place where the obligation was performed. Moreover, these provisions entitled Lower Saxony to impose a penalty or terminate the contract in case local labour standards were not respected.¹⁰⁵ When the Land found that the contractor had employed a subcontractor who had hired fifty-three

¹⁰² See Case C -346/06 *Rechtsanwalt Dr. Dirk Rüffert v. Land Niedersachsen [2008]* interpreting Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services Official Journal L 018 , 21/01/1997 P. 0001 – 0006 and the free movement of services guaranteed in the Treaty under article 56 TFEU

¹⁰³ See <http://www.eurofound.europa.eu/eiro/1999/09/study/tn9909201s.htm>, explaining that “The posted workers Directive, which came into force in December 1999, seeks to prevent free movement of labour within the EU from causing distortions of competition and bringing forms of “social dumping”. The basic principle of the Directive is that working conditions and pay in effect in a Member State should be applicable both to workers from that State, and those from other EU countries posted to work there.”

¹⁰⁴ See *Rüffert*, para 21 and 22.

¹⁰⁵ *Id.* paragraphs 6-9.

Polish workers at about half of the minimum wage established by the local collective agreement, it issued a penalty notice of approximately 85,000 Euros and terminated the contract.¹⁰⁶

The question before the CJEU was whether Lower Saxony's higher standards for the protection of workers in public procurement contracts were consistent with the Treaty's free movement of services and the derogations of the Posted Workers directive.¹⁰⁷ The Courts held, in sharp opposition to the opinion of Advocate General Bot that Lower Saxony's *Landesvergabegesetz* did not comply with the Posted Workers directive.¹⁰⁸ The Court rejected a public policy argument made by the German government arguing that the restriction promoted by the Lower Saxony law was justified by the "objective of ensuring protection for independence in the organization of working life by trade unions."¹⁰⁹ Then it rejected, for lack of evidence, a national welfare argument that the provisions of Lower Saxony aimed at "ensuring the financial balance of the social security systems [that...] depends on the level of workers' salaries."¹¹⁰ These provisions only covered public and not private contracts and the minimum wage protections were geographically limited to the territory of Lower Saxony, rather than being universally applicable to the entire German territory. Therefore the Court held that the restrictions could not fall under the exception of directive 96/72.¹¹¹ The *Rüffert* court ruled in favor of free movements of services of the Polish construction workers posted in Germany at the expense of the local collective agreement on public procurement.¹¹²

The horizontal dimension of the conflict in *Rüffert* shows Lower Saxony had higher labour standards in public procurement contracts than other Länder. The goal of Lower Saxony's legislation was to provide minimum wage protections for employees in public procurement contracts over 10,000 euros. This law served as a model to mobilize other Länder as well as the federal government to adopt a nation-wide bill imposing higher employment standards

¹⁰⁶ *Id.* paragraph 11.

¹⁰⁷ See TEC art. 49.

¹⁰⁸ *Rechtsanwalt Dr. Dirk Rüffert v. Land Niedersachsen*, 2008 E.C.R., at paras. 38-43.

¹⁰⁹ *Id.* paragraph 41.

¹¹⁰ *Id.* at 42.

¹¹¹ See Parliament and Council Directive 96/71 of 16 December 1996 on the Posting of Workers, Article 3(8) and in *Rechtsanwalt Dr. Dirk Rüffert v. Land Niedersachsen*, 2008 E.C.R. para. 29.

¹¹² See Case C-346/06, *Rechtsanwalt Dr. Dirk Rüffert*, in his capacity as liquidator of Objekt und Bauregie GmbH & Co. KG v. Land Niedersachsen, [2008] ECR I-1989 Franzen, M; Richter, *Common Market Law Review* 47. 2 (Apr 2010): 537-554.

throughout Germany.¹¹³ The conflict among the Länder on labour standards in public procurement contracts went back to the late 1990s and lasted until 2000. At this time the conservative party took power and only six Länder out of sixteen were able to adopt higher labour standards in public procurement contracts creating what Florian Rödl called a “legislative patchwork” in German minimum wage law.¹¹⁴

If we apply the story of the three children and a flute to *Rüffert*, the libertarian Carla who made the flute is represented by the Polish workers who want to be able to dump their labor to be employed in the center and leave the periphery.¹¹⁵ The egalitarian Bob is Lower Saxony with welfare legislation protecting the workers’ minimum wages. The utilitarian Anne is represented by German business as well as other Länder taking advantage of the free movement of services at cheaper cost.

Once again each actor in the conflict has a strong justification for obtaining the flute. Each of their justification is relevant even though, as Damjan Kukovec cautions us, who is the “weaker party” in this story might change according to the center-periphery power relationship.¹¹⁶ While the *Rüffert* judgment reconciles the utilitarian positions of German business and those Länder against the minimum wage legislation with the libertarian position of the Polish workers, my point is that the Court does not engage with other distributive implications such as social dumping feared by the egalitarian Bob and the change in the power dynamics influencing the negotiation among the Länder and the German government.¹¹⁷

¹¹³ This case resonates with the living wage initiative launched by several cities in the US. See *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So.2d 1098 (La. 2002) (state law preempted the local minimum wage); LOCAL GOVERNMENT LAW, *supra* note 29, at 219.

¹¹⁴ See Florian Rödl, *The CJEU’s Rüffert-Judgement: A Case for “Undistorted” Wage Competition* (Harvard European Law Association, working paper, 2009); *La Corte di Giustizia CE nel caso Rüffert: per la “non distorsione” della concorrenza in materia salariale*, in: IL CONFLITTO SBILANCIATO. LIBERTÀ ECONOMICHE E AUTONOMIA COLLETTIVA TRA ORDINAMENTO COMUNITARIO E ORDINAMENTI NAZIONALI, A. VIMERCATI ED. (2009) pp. 131-141.

¹¹⁵ See Damjan Kukovec, *Taking Change Seriously - The Discourse of Justice and the Reproduction of the Status Quo*

¹¹⁶ *Id.* at FTN 41-44 (there are no page numbers in Damjan’s essay).

¹¹⁷ See Torsten Walter, *Germany - The practical consequences*, in VIKING – LAVAL – RÜFFERT: CONSEQUENCES AND POLICY PERSPECTIVES, EDS ANDREAS BUCKER AND WIEBLE WARNECK (2010) p. 50 explaining that “Due to the complicated nature of Germany’s federal structure and the associated legal situation regarding public procurement, the *Rüffert* decision has caused major problems [...] The two possible consequences are that either German companies are squeezed out of the market or that they are forced to cut their pay levels.”

Conclusion

The focus on conceptions of justice from below is on the plurality of interests at stake, both vertical and horizontal ones, and their economic development implications when conflicts arise in European law and policy. The chapter reveals the absence of a process and a normative commitment to deploy a criterion of distributive justice to drive cohesion policies and interpret European law. Instead of grasping the complexity of local and horizontal interests at stake that could have entered in the Court's proportionality analysis, or in the articulation of an economic development strategy in cohesion policy, lawyers, judges and policy makers in Europe appear more concerned with institutional demands of justice rather its social realization. In the attempt to shift this perspective, looking at the lens through the conceptions of justice from below sheds light on the imperfect relation between increasing regional disparities and social and economic inequalities on the one hand, and our different capabilities for individual enjoyment on the other.