6. Framing justice claims as legal rights: how law (mis-)handles injustices

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6.1 INTRODUCTION

Does law integrate justice considerations, and should it? Can law effectively address injustices, such as misrepresentation, maldistribution or misrecognition (Fraser 2009), through the conferral and enforcement of legal rights? This chapter addresses these questions, drawing on research carried out in the ETHOS project under the heading of ‘law for – or against – justice?’. It involves a theoretically informed ‘black-letter’ law analysis of international, European, national and local legal frameworks which regulate voting, housing and education in six European countries (Austria, Hungary, the Netherlands, Portugal, Turkey and the UK).¹

We start with briefly outlining the relative importance of rights as a vehicle for justice in the European context, before introducing key theoretical debates on the relationship between law, rights and justice, and relevant conceptual features of legal rights. We also point to some of the challenges of framing different justice claims as rights in Europe. We then explore the scope and limits of addressing injustices through legal rights. We do so by analysing how legal systems handle justice claims when formulated as legal rights, and how they manage the confrontation between competing conceptions or dimensions of justice, expressed as conflicts between rights, between rights and other legally protected interests, between overlapping and competing legal orders, and between law and politics. We conclude on the implications which this institutionalization of justices through rights has for achieving greater justice in Europe, and in particular the prioritization of certain justice claims, groups or processes over others.

6.2 LAW, JUSTICE AND RIGHTS IN EUROPE

In Europe, rights have become a key instrument for fighting all forms of injustices, ranging from school segregation of ethnic minority children, to the

political disenfranchisement of disabled persons, or homelessness. However, using rights to pursue justice comes with a number of theoretical and conceptual challenges, and with concrete implications for fighting injustices, which need to be identified and considered before seeking to frame justice claims as legal entitlements.

6.2.1 Rights as the Main Vehicle for Justice Claims in Europe

The protection of rights is central to the notion of constitutional democracy, and a core tenet of legal liberalism, which are the basic foundations of European societies. Even so-called ‘hybrid’ regimes, such as Turkey and Hungary, operate within a formal framework of rights (Bozóki and Hegedüs 2018). In this context, rights have become, and are likely to remain, a primary legal vehicle for making justice claims in Europe (Douglas-Scott 2017).

The commitment to rights protection already featured prominently in early European cooperation and integration projects (see Chapter 5), and found a strong expression in the 1950 European Convention on Human Rights (ECHR), to which state parties to the Council of Europe (CoE), including the six countries covered in this study, must adhere.

Moreover, Article 2 of the Treaty on the European Union (TEU), the European Union (EU) foundational document, states that respect for human rights is a core EU value. The Treaty therefore provides for a sanction mechanism against member states which pose a serious threat to human rights (Article 7 TEU), a procedure which has recently been initiated against Hungary and Poland. It also requires candidate countries, such as Turkey, to respect fundamental rights (Article 49 TEU). The EU’s own commitment to rights protection has been further reinforced with the Lisbon Treaty in 2009, which confers legal authority to the EU Charter of Fundamental Rights (CFR) over measures adopted by EU institutions and member states when they implement EU law (Article 51(1) CFR), and provides for EU accession to the ECHR (Article 6 TEU).

This centrality of rights in the way the EU and European states approach justice questions has implications for fighting injustices, given the complex and contested relationship between law and justice and the peculiar nature of legal rights.

6.2.2 Law, Morality and Justice

Legal theory distinguishes between legal and moral rights, and the discipline is structured by a long-standing debate on the separability of law and morality. To the extent that moral rights are closely related to notions of what is just and fair in a given society, or for human beings in general, the choice of

perspective determines whether law should integrate justice considerations at all, and if so, whether legal rights are an appropriate vehicle for that purpose (Kochenov et al. 2015; Granger et al. 2018).

On one side of the debate, positivists argue that law and morals should be separated. They consider law has its own system of validation and basis of authority, which is different from morals, and thus accept the legal validity of immoral laws. This is not to say that justice considerations are irrelevant, but rather that they are treated as *external* criteria for determining whether laws are ‘good’ or ‘bad’, without however affecting their validity. Natural law proponents, in contrast, insist on the necessary moral foundations of law, and most argue that grossly unjust laws are invalid and illegitimate (Salát 2018, pp. 8–14).

Constitutional and international law, and their formal inclusion of fundamental/human rights, testify of a trend towards recognizing a core morality and justice component in law, which can be invoked to challenge the validity of unjust laws. Where legal theorists agree that justice can be pursued through law, they may still disagree as to what legal rights are actually about, and their role in fighting injustices.

6.2.3 Theoretical Perspective on (Legal) Rights and the Who, What and How of Justice

Whilst space restrictions preclude a detailed theoretical elaboration on the concept of legal rights (for more, see Granger et al. 2018; Salát 2018), a few particularly relevant aspects must be highlighted, on the nature, subjects and functions of rights, and their relationship with interests.

Dominant perspectives in legal theory tend to emphasize the individualized nature of rights (Granger et al. 2018). Most human/fundamental rights frameworks recognize the individual rights of ‘natural persons’ (individuals), and sometimes also that of ‘legal persons’ (such as companies, or non-governmental organizations (NGOs)), but they are reluctant to accept the notion of collective (or group) rights. Consequently, before a court, collective claims are usually framed in terms of individual rights (and non-discrimination), and brought forth by individuals (or NGOs, if these have ‘standing’ to challenge measures which undermine the rights and interests they protect and promote).

In the European context, the notion and recognition of ‘vulnerable groups’, and associated special protection needs, has influenced the interpretation and application of individual rights (Granger et al. 2018), to sometimes incorporate a duty to facilitate a group’s special way of life (for example, in relation to Roma and housing, see Granger 2019).

Despite their conceptual reservations towards group rights, legal systems work with formal qualifications *de facto* resulting in group-differentiated

rights. As such, they contribute to defining the ‘who’ of justice (Granger et al. 2018). A typical such category is citizenship, which continues to condition access to many rights and resources, and is generally considered as a legitimate and lawful ground for treating people differently (for the discussion of the role of citizenship in defining the scope of justice, see Chapter 14).

Moreover, scholars (like practitioners) disagree as to who is, or should be, the duty bearer. Traditionally, fundamental/human rights were viewed as imposing obligations on states and their various organs (state agencies, ministries, cities or public bodies). More recent trends suggest that they can also place duties on private actors (for instance, employers, landlords or church-run private schools) (in relation to the EU Charter, see Chapter 7).

Legal philosophers, furthermore, debate the function of rights: are they claims, privileges, immunities or powers (Hohfeld 1919)? Depending on the answer, invoking rights would generate different expectations and reactions from public and private actors.

Another point of contention is the relation between rights and interests. Human rights protect the dignity and the fundamental interests of individuals. The proponents of, respectively, will- and interest-based theories disagree as to whether individuals can waive their rights, and the corresponding duties. The answer matters particularly for individuals whose agency is limited or lacking, such as children or persons with severe mental illnesses (MacCormick 1977). International and national legal instruments, for instance, usually protect children’s right to education by making school attendance mandatory until a certain age, in line with an interest-based perspective, but allow for parental choice with regard to religious education to differing degrees.

Whilst fundamental and human rights primarily centre on protecting core individual interests, they may also promote broader societal interests. The right to vote, for example, is seen as ‘crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law’.²

Not all private or public interests can be framed as individual rights, however, which results in legal blind-spots when addressing justice claims through rights. Typically, legal systems are reluctant to recognize a right to a clean and sustainable environment, although recent litigation initiated in the Netherlands suggests that it is possible to (re)frame the fight against climate change as a human right, to exert legal pressure on political leaders (Nollkaemper and Burgers 2020). In any case, even when individual and societal interests, and the conceptions of justice which they carry with them, are translated into legal rights, that does not mean they all have the same leverage. Indeed, the legal operationalization of rights affects the relative weight of justice claims when these are framed as legal entitlements.

6.3 RIGHTS CLASSIFICATION AND JUSTICE HIERARCHIES

The different conceptualizations of rights in legal theory (along subject, object, functions or purpose) translate, in legal doctrine, in distinctions and classifications between rights, and create particular frames and hierarchies through which justice claims are processed and evaluated.³ Although these are not rigid, and evolve over time, they can still be quite ‘sticky’. Moreover, these analytical differentiations between rights, and thus between the justice claims which they project, do not always neatly align with the categorization of justice claims as identified in all other disciplines, such as the triadic redistribution, recognition and representation approach (Fraser 2009). To the extent that they are not evident to non-lawyers (or even to lawyers trained in different legal traditions), features of the legal operationalization of rights in the European context, such as the multiplicity of legal sources (international law, constitutions, EU law, legislation, or executive administrative regulations), the nature of obligations involved (positive versus negative rights), evolutionary elements (generations of rights), and considerations related to the nature of rights (substantive versus procedural rights) are briefly reviewed, together with their relevance for fighting injustice.

6.3.1 Legal Sources and Justice Hierarchies

Legal systems classify rights according to their legal ‘source’. The terminology of ‘fundamental rights’ usually refers to rights enshrined in constitutional law, and ‘human rights’ to those laid down in international law (although the distinction is often blurred in legal doctrine). Rights are, moreover, frequently laid down in legislative or regulatory acts (‘statutory rights’). In any case, even when they are guaranteed in general terms in constitutional and international instruments, rights often require ‘concretization’ – a more precise delineation of their implications, through legislative, regulatory or administrative implementation, or in contractual terms (Granger et al. 2018).

The right to vote (Theuns 2019), like the right to education (Salát 2019), is often explicitly laid down in national constitutions. In contrast, the right to housing rarely gets an express mention in constitutional texts and courts have been weary of recognizing its constitutional authority in the absence of explicit textual instructions (Granger 2019). Moreover, the right to vote and the right to education are recognized by various international treaties, such as the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of Persons living with Disabilities (CRPD), as well as European rights instruments, such as the ECHR and the EU Charter; in contrast, inter-

national and European treaties for the protection of socio-economic rights, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) or the Revised European Social Charter (R-ESC) acknowledge only a (limited) right to housing (Granger et al. 2018).

Through processes of constitutional and judicial dialogue, there is a general convergence in the recognition and general definition of rights across sources. Yet, there remain strong variations in the way these rights are interpreted in different jurisdictions, and implemented in specific regional, national or local contexts (Salát 2018; see also Granger et al. 2018; Granger 2019; Salát 2019; Theuns 2019). For example, whilst the right to vote of citizens is recognized in all relevant international and constitutional instruments, at national level it may be subject to various limitations, which disenfranchise certain citizens, such as expatriates and prisoners in the UK, or mentally disabled persons placed under legal guardianship in many EU states (Theuns 2019).

The legal source of a right matters, as it defines its position in relation to other rights or legally recognized interests enshrined in different legal sources. Courts use interpretative techniques to reconcile apparently conflicting provisions across different sources. However, where this is not possible, the right, or the version of it which is recognized in the most authoritative legal source in a given situation, would technically prevail.

In Europe, the traditional picture of legal hierarchy is that of a pyramid, with the constitution at the apex and all other norms deriving their authority and validity from it. Whilst the pyramidal, and state-centred, representation of legal hierarchies is both normatively and empirically challenged, notably by constitutional pluralism (Walker 2002), it still bears on legal interpretation and practice (Granger et al. 2018). Constitutional texts and case law therefore still feature as primary references for fundamental rights protection, with international and European treaties and charters coming to complement them, where they align.

There are variations across jurisdictions though. The Dutch constitutional system, for example, is particularly sympathetic towards international law, which occupies a strong legal position. The UK, which does not have a formal written constitution, follows a different approach, informed by the principle of parliamentary sovereignty, and a dualist perspective towards international law. There, international human rights instruments, and the norm they contain, are incorporated into domestic law through an act of Parliament (such as the Human Rights Act, incorporating the ECHR).

The legal and practical relevance of the constitution in claiming justice as a matter of rights depends on whether it includes, explicitly or implicitly, fundamental rights. The Austrian constitution, for instance, does not contain a bill of rights, with the result that the ECHR and the EU Charter serve as primary sources of rights. The importance of rights contained in the constitution is also

influenced by whether it can be judicially enforced, in particular against legislative or executive acts. In the Netherlands, for example, judges cannot review legislation for compatibility with the constitution, but they can check that it complies with ECHR or EU law. European instruments have therefore come to occupy central stage in litigation and judicial decisions as sources of rights.

Even in countries which have formal judicial review mechanisms, threats on judicial independence, often accompanied by a weakening of constitutional rights, limit the capacity of courts to stand as a buffer against government-driven or sponsored injustices (for instance, in Turkey and Hungary).

EU law occupies a special position in the legal orders of EU member states. According to the case law of the Court of Justice of the European Union (CJEU), provisions of EU law (even when laid down in ‘technical’ EU Directives or Regulations) that confer rights to individuals and are precise enough prevail over any conflicting national law provisions, even constitutional ones.⁴ The Luxembourg court’s vision of the unconditional supremacy of EU law is contested though. National (constitutional) courts usually accept that EU law norms ‘trump’ provisions contained in national legislative and lower ranking acts, but many insist that, ultimately, the constitution remains supreme. They therefore limit their acceptance of the supremacy of EU law to situations which fall under EU competence, and under the condition that it does not conflict with national (constitutional) identity (such as national conceptions of human dignity, democracy, rule of law or the social state).⁵ Still, the (super) constitutionalization of EU law creates a systematic bias in favour of its economically liberal outlook (Scharpf 2010). A good example is the way property developers and real estate agencies leveraged EU free movement rules and state aid law against Dutch social housing schemes; or, more recently, threats of legal action by flat-sharing platforms like Airbnb invoking EU Directives on services and e-commerce, against attempts by cities to regulate their activities in order to keep rents and house prices at reasonable levels and prevent speculation and gentrification (Granger et al. 2018; Granger 2019).

The structural strength of EU law serves well certain justice goals though. The EU has, indeed, elaborated a relatively strong non-discrimination legal framework, laid down in both Treaty provisions and legislation, with a strong focus on the discriminatory grounds of gender and race in economic matters (employment, access to goods and services). Article 21 of the EU Charter, furthermore, prohibits discrimination on a broad range of grounds by EU institutions as well as states (although only when they implement EU law). This legal framework, together with the ECHR non-discrimination provisions, and relevant equality provisions in national constitutions and legislations, can be mobilized by civil society organizations against rules and practices (such as segregated schooling or racial prejudices in flat rental practices) which have

adverse effects on vulnerable individuals, such as persons with disabilities, or members of minorities, such as Roma, or persons of immigrant descent. The capacity of EU non-discrimination law to influence national laws, policies and practices nonetheless depends on the ability of those affected, and the organizations that support them, to mount and sustain advocacy campaigns and litigation strategies to pressure policymakers and judges for an alignment on European legal requirements. The legal mobilization of EU law has for long been a playground for companies fighting national restrictions on business activities; but women's organizations have also effectively used EU law and processes to promote women's rights causes (Conant et al. 2018).

Where justice claims are framed as rights, the source of the rights will therefore determine their relative authority and strength in a given context. Yet, not all rights trigger the same expectations on public and private actors, therefore promoting or, on the contrary, undermining certain dimensions of justice.

6.3.2 Negative and Positive Rights and Obligations

Legal rights can be classified depending on the duties they generate. They are 'negative', in the sense of protecting the rights-holder from interference, or 'positive', as in imposing obligations on others to take measures to bring about their realization. A single right often involves both negative and positive dimensions. Negative obligations are more readily recognized and protected than positive ones. In Europe, international and constitutional instruments and their interpreters are reluctant to impose strong policy interventions through legal rights, especially where their realization involves substantial redistribution (Granger et al. 2018; Granger 2019).

Constitutional texts either comprise, or have been interpreted as imposing, both negative and positive obligations in relation to the right to vote and education (Salát 2019; Theuns 2019). For instance, the Dutch constitution requires the state to guarantee sufficient access to public school, and to fund both state and special confessional or alternative schools. The Turkish and Portuguese constitutions spell out positive obligations towards disabled children and immigrant children to education. Legal systems are, however, more reluctant to impose positive obligations in housing matters (Granger 2019). National constitutions, when they refer to a right to housing at all, tend to stay clear of them, in particular if some reallocation of resources is involved. Only the Portuguese constitution comes closer to it, listing specific duties imposed on the state under the right to housing (Granger 2019).

National or local legislation, as they result from domestic political processes and explicit policy choices, are, expectedly, more inclined towards positive obligations, including redistributive ones. For instance, UK legislation recognizes a 'conditional right to housing', placing a duty on local authorities

to provide accommodation for particularly vulnerable individuals (Granger 2019); relevant UK education acts also lay down positive duties on local authorities to secure diversity in school offerings, and to provide free meals, transport and milk for those in need (Salát 2019).

Some international human rights instruments and their implementation bodies (special monitoring committees and courts) take, at times, a more generous stance on positive obligations than national constitutional texts (although they often phrase them in moderate and conditional terms). The following examples reveal the ambivalence of international and European human rights bodies in the field of social rights, when it comes to directing policy choices and imposing costly redistributive measures on state parties through the recognition of strong positive obligations. The ICESCR, widely ratified, covers a range of social rights, including the right to housing (Article 11(1)), but specifies that states commit to ‘working progressively towards the full realization of the rights’ (Article 2(1)). The Revised European Social Charter (R-ESC), the main CoE social rights instrument, requires states to take measures to ensure the effective realization of rights, but the European Committee on Social Rights, monitoring its application, declared that social rights, such as the right to housing, could not be interpreted as imposing an ‘obligation of results’ (Granger 2019, p. 24).

Specialized human rights instruments, informed by the specific need for protection of particularly vulnerable groups, lay down stronger positive redistributive obligations. The Convention on the Rights of the Child (CRC), for example, requires states to provide material assistance and support programmes towards housing for the benefits of children (and their families), and the CRPD calls on states to take necessary measures to ensure that disabled persons can effectively exercise their right to vote (Granger et al. 2018).

The ECHR, which is backed up by a relatively robust compliance regime (individual complaints and court-monitoring), and generally endowed with significant legal authority in domestic law systems, has been interpreted to create positive obligations, and especially in relation to vulnerable groups (Granger 2019).

As already noted, EU law exerts a relatively strong influence on its member states’ legal systems, through a comparatively strong institutional enforcement regime. However, in matters of voting, housing and education, its influence is limited, as it creates very few positive obligations (such as EU citizens’ right to vote in EU and local elections, or housing assistance to asylum-seekers under the EU Reception Directive, Granger et al. 2018).

International and European instruments may thus impose certain positive obligations on the state, but their actual influence on domestic policies depends on their ratification and implementation, the effectiveness of monitoring and compliance mechanisms, and national constitutional and judicial attitudes

towards those instruments (Granger 2019; Salát 2019; Theuns 2019). The Austrian constitutional court, for example, considers that the Austrian constitution prevents the imposition of positive obligations in housing through reliance on the ECHR. In contrast, the Dutch human rights committee interpreted the relevant Dutch constitutional provision in the light of international human rights instruments, as imposing a duty to ensure sufficient, affordable and qualitative housing, and a special duty to pay particular attention to vulnerable groups (Granger 2019).

6.3.3 Rights Generation and Hierarchies of Justice Claims

The distinction between negative and positive rights runs through the so-called ‘three generations’ of (human) rights, an influential conceptual human rights framework (Vasak 1977), which persists despite the 1993 Vienna Declaration on the indivisibility of human rights, and generates a hierarchization of rights.

Civil and political rights, such as the right to vote, are first generation rights. These freedom-rights, generally associated with negative obligations, are widely acknowledged and recognized as creating enforceable subjective legal rights, and tend to be supported by strong judicial enforcement mechanisms, at national or at least European and international level. The second generation, social, economic and cultural rights (such as the right to housing), and the third generation, collective or solidarity rights (for example, environmental rights), are typically perceived as involving positive obligations, and consequently less amenable to judicial enforcement. When recognized at all in constitutional settings, they are often classified as principles of a programmatic nature which guide policy action but cannot be invoked in judicial review, even in countries with strong welfare traditions, like Austria or the Netherlands.

The hierarchy of human rights implied by the generational approach is not neutral for justice. Indeed, justice claims which can be framed as first generation rights tend to have more legal purchase than those laid down as second or third generation rights. This logic is visible in the context of housing, where the CJEU relied on the first generation right to private and family life (Article 7 CFR) as a basis for recognizing a right to accommodation protecting mortgage holders from eviction (Granger 2019). In the same vein, although in a different policy context, the Dutch climate change case was argued, and won, on the basis of a violation of the right to life and right to private and family life under the ECHR, and not any third generation right to a clean environment (Nollkaemper and Burgers 2020).

6.3.4 Procedural versus Substantive Rights and the Rule of Law

Law traditionally distinguishes between substantive and procedural rights. Stemming from the field of criminal justice, procedural guarantees (such as notification requirements, the right to be heard, the duty to give reasons or the right of access to one's file) and associated institutional infrastructures (notably independent and impartial tribunals, administrative review mechanisms and ombudsbodies) now infuse all legal and policy areas. The distinction between substantive versus procedural rights is of limited relevance though, as so-called substantive rights, such as the right to education, vote or housing, also entail institutional and procedural requirements. For instance, the European Court of Human Rights (ECtHR), interpreting Article 8 ECHR on the right to private and family life, clearly stated that the right to a home includes both procedural and substantive dimensions (Granger 2019).

Invoking procedural guarantees can help ensure that the bodies entrusted with allocating such benefits made their decisions on the basis of the proper considerations (such as actual needs) and not based on irrelevant or illegal reasons (such as prejudice, personal interests, institutional convenience or expediency). However, procedural justice serves substantive justice only to the extent that the legal system has committed to substantive justice goals. The ECtHR, for example, could rely on Article 6 ECHR (the 'procedural' right to a fair trial) to require a state party (France) to provide accommodation to an (immigrant) claimant who invoked a substantive (and enforceable) right to housing under domestic law (Granger et al. 2018). In the absence of such substantive commitments, however, procedural guarantees may well reinforce institutionalized injustices.

The procedural justice dimension further comes through in the context of eviction. The ECtHR, again, insists on the need to provide procedural guarantees before evicting or expelling individuals and families from their home, in particular when they are already in a vulnerable situation (Granger 2019). The CJEU, for its part, reads EU consumer protection directives in combination with the EU Charter to offer procedural guarantees in eviction related to mortgage default and repossession procedures (Granger 2019). National laws too provide for (more or less) stringent procedural guarantees (involving, typically, notification, counselling, mediation, extensions or the intervention of a bailiff) to afford some (temporary) relief and protection to those at risk of losing their home. However, in some countries, like in the UK, the multiplication of shorter term or more flexible tenancy contracts in the private rental market undermine this protection (Granger 2019).

Procedural guarantees appear weaker in relation to redistributive justice. Decisions on the granting of benefits, although they would generally be

expected to follow procedural steps, can rarely be challenged in court, even on procedural grounds (Granger 2019).

The operationalization of rights in legal doctrine, as exposed above, advantages certain dimensions of justice, or (groups of) claimants; it also places varying responsibilities for delivering on justice claims on public and private actors, and engages special decision-making and policy processes, driven by legal logics. In doing so, it projects its own picture of the who, what and how of justice. Moreover, it provides for its own way of engaging with conflicting justice claims.

6.4 RIGHTS AND THE BALANCING OF COMPETING JUSTICE CLAIMS

The definition of justice and the identification of injustices are influenced by the legal confrontation between individual rights, or between them and protected collective interests, or between legal orders pursuing different objectives and prioritizing different sets of values. The way legal systems manage these conflicts determine where justice eventually lies, at least in formal and institutional terms.

6.4.1 The Scope and Limits of Rights

All legal systems in Europe balance the individualized justice perspective carried by human rights frameworks with the collective needs of society. International and European instruments as well as constitutional documents treat (most) individual rights as not unlimited and absolute: they accept that their exercise can be restricted, to protect either others' rights or recognized public interests. Moreover, they use specific analytical methods to decide on the scope and limits of rights, and to draw the line between the competing visions of justice articulated through conflicting rights and interests, such as the so-called proportionality analysis.

Apart from the freedom from torture, and in some constitutions, human dignity – hence the attraction, in such contexts, of linking a right, such as housing, to 'dignity' – other rights, including the right to vote, housing and education, can be subject to limitations in their exercise. National and international courts have developed detailed argumentative frameworks and standards for this purpose, which display increasing formal and structural convergence.

The judge normally starts with defining the 'scope' of the right, and then examines whether the problematic measure interferes with the so-defined right at all. Then she looks at whether it pursues a legitimate aim: these can be either the protection of others' fundamental rights or a recognized public interest, such as public order, public health, morals or national security.

The judge further examines whether the measure is proportionate to the aim pursued, in the sense of being necessary and suitable, and providing for the least-restrictive means (Salát 2018). In case of a conflict of rights, judges would assess the respective ‘weight’ of the conflicting rights, and try, as far as possible, to ‘maximize’ or ‘optimize’ both (Alexy 2002). Most restrictions are, in any case, justified on public interest grounds.

Competing justice concerns are therefore channelled into the balancing exercise through their formulation as either individual rights or public interests. Within this framework, the exercise of property rights by landlords can be limited in order to protect individual rights, such as tenants’ right to a home concerning eviction-related procedural guarantees or a right to affordable housing for rent control measures. Alternatively, restrictions, such as the Vienna rental regulation which lowered rent for certain types of flats by 80 per cent, may constitute justified restrictions on landlords’ right to property, on grounds that the policy pursued, in a proportionate manner, the legitimate general interest of ‘making accommodation more easily available at reasonable prices to less affluent members of the population, while at the same time providing incentives for the improvement of substandard properties’.⁶

EU law applies a similar framework, except that the default position of the ‘right’ is taken by EU free movement rules, and restrictions aimed at protecting other human rights or other recognized public interests are the ones which need to pass the proportionality test (meaning that they cannot limit free movement disproportionately). The CJEU ruled, for instance, that a local policy to prevent gentrification, which required local connections to be allowed to buy or rent property in a particular area, restricted EU free movement rules. It recognized that the objective of securing sufficient housing for lower-income and other disadvantaged local population was generally a legitimate one, but found that the particular measure failed the proportionality test, because it did not guarantee that it would (primarily) benefit the poorer or most disadvantaged. The Court’s approach signalled that EU law would tolerate housing policies which interfered with cross-border movement, but only where they were clearly targeted at lower-income and other vulnerable populations; in doing so, it rubber-stamped prioritarian housing policies, and placed under suspicion policies aimed at preserving particular social, linguistic or cultural communities (Granger et al. 2018).

Proportionality analysis is a widespread technique used to decide between competing justice claims formulated as individual legal rights or public interests. It influences not only judicial decisions, but also legal and policy measures, as law- and policymakers anticipate judicial challenges (Stone Sweet and Matthews 2008). Whilst it appears to provide for a rigorous analytical framework for balancing justice claims, it is, in fact, a flexible tool giving judges significant discretion in deciding where the scale of justice tips. For

example, in the context of education, the ECtHR agreed that the Swiss ban on teachers in public schools wearing headscarves, which restricted their exercise of freedom of religion, pursued the legitimate aim of preserving religious harmony and state neutrality in education, and could be justified by the right of the child not to be indoctrinated, and the right of the parents to raise their children according to their own worldview. A similar German measure was however invalidated by the German constitutional court which, relying on the exact same arguments weighed differently, reached the opposite conclusion.⁷

6.4.2 Managing Competitions between Different Legal Orders and their Respective Visions of Justice: Margin of Appreciation and Constitutional Identity

Often, the question about justice is not who is entitled to what, but rather who is to decide, and how (Fraser 2009). In Europe, the confrontation between different visions and dimensions of justice framed as individual rights and public interests takes place at contact points between overlapping and competing legal orders, namely international (human rights) law, CoE/ECHR law, EU law and national (and even regional or local) law. These distinct (even if partly integrated) legal orders are driven by different aims and concerns: the protection of individual freedoms for the ECHR; economic and political integration for the EU; the preservation of national cohesion and identity for national constitutions; or the protection of local interests, communities and identities in local regulations. These, inevitably, impact on the way these different legal layers protect individual rights and balance between them and collective aims.

A wide range of legal methods exist to resolve the systemic tensions that different understandings of rights between legal orders that all claim legitimate authority generate, and help identify a solution. Two sets of particularly relevant modulating devices are worth outlining here: the ‘margin of appreciation’ in the relationship between the ECHR and national legal orders, and ‘constitutional identity’ in the EU–member states context.

The ‘margin of appreciation’ is a doctrine developed by the ECtHR, which consists in the Court renouncing jurisdiction to a certain extent (‘narrow’ or ‘wide’ margin) over a contested measure, handing back to the state party the matter of deciding whether it conforms to the ECHR (Granger et al. 2018). The doctrine does not follow a one-size-fits-all approach, but provides a flexible framework, which varies across rights, policy contexts and affected individuals or groups. For example, the Court leaves a wide margin of appreciation to states in relation to voting rights, but that should not amount to excluding individuals or groups of citizens from the country’s political life (Granger et al. 2018). In relation to housing, the Court made it clear that the margin of

appreciation narrows where the right in question is ‘crucial to the individuals’ effective enjoyment of fundamental or “intimate rights”’.⁸

The doctrine of ‘constitutional identity’ serves a similar function in managing the relationship between the EU and national constitutional orders. It has gained traction over the last decade, since the coming into force of the Lisbon Treaty (2009), which gave textual recognition to the need for the EU to respect member states’ ‘national identities, inherent in their fundamental structures, political and constitutional’ (Article 4(2) TEU). The German constitutional court actively invoked the national identity clause (or, in the past, other doctrines to the same effect) to protect its own vision of human dignity from adverse EU law interventions (Nowag 2016). Other courts have, however, avoided direct confrontation, by either claiming that EU law is not relevant to the case, or that it is not violated, or that it is clear, and therefore does not require CJEU clarification via a preliminary reference. For instance, the UK Supreme Court refused to consider an appeal against a judicial decision which ruled that the exclusion of British expats (emigrants) from the Brexit referendum vote did not interfere with EU free movement law and thus could not be reviewed under it (whilst at the same time hinting that it may be a discriminatory restriction on the exercise of the right to vote, under domestic law).⁹

6.4.3 Rights and Justice: Between Law and Politics

In the previous section, we looked at some of the techniques which legal systems have devised to decide which legal order, and which court (European or national), has the ultimate say on a particular right-claim. But a further question is whether questions about justice should be handed over to lawyers and courts at all.

To some extent, the answer depends on the ‘quality’ of each institutional and procedural set-up. If both processes are ‘well-functioning’, the question boils down to whether decisions about justice should be made through political debates, using lobbying and advocacy tools, and via representative or consultative institutions; or whether they should be determined by lawyers and judges, in the context of more or less inclusive judicial proceedings, triggered by and focused on the injustices faced by specific individuals in a given context (which may – or may not – reflect more systemic problems) and fitted in a straight-jacket of legal concepts and reasoning. Where political systems provide for inclusive, discursive and participatory processes for deciding who deserves what in a particular society (like in the Netherlands and a lesser extent the UK, Austria and Portugal), turning to a judicial venue appears both less appealing and legitimate than where a more authoritarian government runs the show (like in Hungary or Turkey). In the latter case, courts and their due process guarantees may be the only viable venue for justice activists (to the

extent that these institutions are still independent and robust enough to stand up to political and societal pressure).

The legalization of justice claims through rights framing results in a judicialization of debates about justice. Thereby, what Hirschl (2008) calls ‘mega-politics’ questions (and therefore mega-justice questions) are taken out of the hands of politicians and political processes, and put in front of courts, which resolve them through legal arguments and techniques. As illustrated above, these can be flexibly applied, but they still constrain the decision-making process in a way which influences the outcomes, if only because they are presented as ‘given’ rather than up for deliberation. Moreover, the authority enshrined in law and legal decisions legitimizes certain justice claims, and delegitimizes others.

Courts in Europe are not always keen to take on the task of deciding on questions of justice, in particular where there is no consensus or when it involves redistribution of resources. They have therefore developed avoidance strategies, disguised behind legal doctrines, which go under different labels but can generally be described as ‘judicial deference’. Some of the doctrines touched upon in this chapter, such as proportionality, the margin of appreciation or constitutional identity, are regularly applied by European judges to avoid revisiting the policy choices made by national or local politicians, which sometimes enjoy strong political and social backing. National legal systems have similar legal devices through which courts exercise stricter or looser scrutiny over policy decisions.

6.5 CONCLUSIONS

The rise of human rights law and the perceived success of rights litigation have led policy actors, including activists and NGOs, to (re)frame many justice issues in rights terms. As illustrated throughout the chapter, framing justice as rights, and injustices as rights’ violations, has implications for who can make which claims, against whom, and who ultimately decides. Moreover, the organizing principles of legal systems, legal doctrines and reasoning, influence which justice claim prevails.

Beyond the black-letter law, which was the focus of our research, we must remember that core features of justice systems, and notably their speed, effectiveness, fairness and independence, matter significantly for the actual realization of justice claims through legal rights. Further, the conditions of access to court, including standing and admissibility requirements, and costs, as well as legal support infrastructure, make a difference in terms of bridging the gap between the law-in-books and the law-in-practice (Conant et al. 2018).

The presence of an effective judicial framework, however, plays in favour of justice claims which can be more easily fitted within an enforceable rights

framework. In the European context, they have supported judicial challenges against discriminatory practices, such as the disenfranchisement of foreigners, (former) criminals and mentally disabled persons, the placement of Roma children in segregated schools and the institutionalization of (mentally) disabled children. However, it has been more difficult to harness legal rights to promote redistributive housing policies or broader educational or political equality objectives. The evidence gathered in the ETHOS research project suggests that in the current European legal context, framing justice as rights serves better (certain) recognitive justice claims, the key issue there being which status receives legal recognition and protection, and on which basis (needs, deservingness or vulnerability). A rights-approach (in the sense of enforceable legal rights), however, runs into challenges with representative justice, in particular where the injustices lie at the collective or institutional level, and generally struggles with redistributive demands.

NOTES

1. The chapter draws primarily on, and refers to, the analysis and findings in Salát (2018), Granger et al. (2018), Granger (2019), Salát (2019) and Theuns (2019), ETHOS reports published at <https://ethos-europe.eu/>, and country reports on which some of these were based. Given space limitation and the nature of this chapter contribution, references to primary sources are kept to a minimum and we invite interested readers to consult the reports, listed at the end of the chapter, for further references.
2. ECtHR, *Hirst v the United Kingdom (no. 2)* [GC], App. No. 74025/01.
3. Legal doctrine refers here to both the interpretation and application of the law by legal practitioners, including judges, and its analysis by legal scholars, as both proceed with the same analytical logic.
4. European Court of Justice, Case 6/64, *Costa v ENEL*, ECLI:EU:C:1964:66.
5. For example, BVerfG, Order of the Second Senate of 14 January 2014 – 2 BvR 2728/13 –, paras. (1–24), ECLI:DE:BVerfG:2014:rs20140114.2bvr272813.
6. ECtHR, *Mellacher v Austria*, App. 10522/83, 11011/84 and 11070/84, 19 December 1989, para. 47.
7. BVerfG, Order of the First Senate of 27 January 2015 – 1 BvR 471/10 –, paras. (1–31), ECLI:DE:BVerfG:2015:rs20150127.1bvr047110. http://www.bverfg.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html (accessed 10 January 2020).
8. ECtHR, *Winterstein and others v France* App. No. 27013/07, 17 October 2013.
9. R (on the application of Shindler and another) v Chancellor of the Duchy of Lancaster and another – UKSC 2016/0105.

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