

13. Mechanisms that impede justice

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13.1 INTRODUCTION

Various chapters in this book have investigated mechanisms that generate injustice as well as mechanisms that contribute to justice. Some (Chapters 4, 5 and 6) have examined legal rules and practices related to the exercise of specific rights, others (Chapters 7 to 10) explored discursive constructions of justice-related tensions in political and advocacy discourses or analysed struggles for justice by bringing in the perspective on (in)justice of vulnerable populations and stakeholders in the domains of welfare benefits and care. The focus was on social groups that are defined as vulnerable by the European Court of Human Rights (ECtHR), in European Union (EU) law and in EU legislation such as ethnic and national minorities, people with disabilities, frail elderly, migrant care workers and young unemployed women. Together they embody intersectional categories of age, class, ethnicity and gender in specific configurations.

This chapter aims to unravel mechanisms of redistributive, recognitive and representative justice causing outcomes for vulnerable populations in Europe that are supportive for reaching the capability to live the life one values (focus on individual development) and participatory parity (focus on equal social participation). Such mechanisms consist of entities (with their properties) and the activities that these entities engage in bringing about change. Section 13.2 conceptualizes mechanisms that impede (in)justice and outlines the theoretical and methodological approach of the chapter. Section 13.3 elaborates entities as mechanisms of (in)justice and Section 13.4 focuses on activities that impede (in)justice. The final section of this chapter is a concluding one that reflects on the findings.

13.2 THEORETICAL AND METHODOLOGICAL CONSIDERATIONS

In its most evidential description, a mechanism is something that brings forward something else. Jon Elster (1989, pp. 3–4) formulates the crucial role of mechanisms as follows:

To explain an event is to give an account of why it happened. Usually ... this takes the form of citing an earlier event as the cause of the event we want to explain. [But] to cite the cause is not enough: the causal mechanism must also be provided, or at least suggested.

For instance, it is insufficient to explain increasing inequality (Piketty 2013; Inchauste and Karver no year) in Europe by the increasing dominance of neo-liberalism; for a real understanding of the relationship between the two phenomena, mechanisms of deregulation, trade in worthless financial packages, dominance of financial over economic capital, interinfluences of political and financial elites and political reactions to economic crises should be analysed. In the same way, the well-being of disabled people cannot be explained by the absence or reduction of public care services only; it also needs to explain what images of disabled people circulate in the political and media discourse, what alternative forms of care exist and how these create forms of (in)dependency between care receivers and care givers. The main purpose of using the concept of ‘mechanisms’ is to offer a causal and intelligible analysis of regularities being observed by specifying in detail how they were brought about. Peter Machamer et al. (2000, p. 5) state that ‘It is the entities that engage in activities, and they do so by virtue of certain of their properties’ while it is activities that are the producers of change. Hence, mechanisms consist of, for instance, social institutions such as welfare offices (entities) with their legally regulated social policy, client managers and target group of stakeholders (properties) and the evaluation of deservingness, means-testing and surveillance (activities) in bringing about change. The type of change brought about depends upon the properties and activities of the entities and the relations between them. A mechanism, thus defined, refers to a constellation of entities, properties and activities that are organized such that they regularly bring about a specific outcome (Hedström and Ylikoski 2010).

In this chapter, we crosscut the three aspects of justice as defined in the ETHOS research programme (Chapters 1 and 4) by focusing on mechanisms as entities and activities regarding the theoretical assumptions (Chapters 1 to 4) and the empirical findings (Chapters 5 to 11) on justice of the ETHOS project with the aim to define the building blocks of a more coherent understanding of justice in Europe. Methodologically we opt for a non-ideal theorizing

approach. This approach, as Bert van den Brink and colleagues (2018) state, implies ‘partial’ instead of ‘full’ compliance with the demands of justice, ‘fact-sensitivity’ and articulating ‘transitional’ improvements towards greater justice (Chapter 3 in this volume). The focus is on injustices and thinking about the ways in which these could be overcome by way of a bottom-up theory construction and inclusion of subjective experiences of marginalized persons, while at the same time generalizing such experiences in order to identify shared values and practices. Consequences for analysing mechanisms of justice are a search for social institutions and activities that either promote or hamper ‘participatory parity’ (Fraser 1997, 2003) and capabilities (Sen 1999), that is, the possibility to partake in the social, political and private realms on an equal footing with others with an open eye for understanding diversity in people’s capabilities to function in ways that make their lives valuable.

The focus of the chapter is on ‘vulnerable populations’, a paradoxical concept (Granger et al. 2018; Rippon et al. 2018) because it refers to the universal and intrinsic precarious human embodiment as well as to the particular and situational causes and conditions of individuals or social groups (Mackenzie et al. 2014, p. 7). Vulnerability might result in ‘precarity’ when the attempt to alleviate someone’s vulnerability leads to ‘the paradoxical effect of exacerbating existing vulnerabilities or generating new ones’ (Mackenzie et al. 2014, p. 9). Being categorized as vulnerable is a Janus-faced qualification of, on the one hand, being acknowledged in one’s needs and, on the other hand, being labelled as weak and dependent. In order to illuminate the Janus-faced nature of vulnerability, this analysis focuses on mechanisms – entities, their properties and activities – entailing justice principles by providing or withholding resources via public goods to cater for the special needs of vulnerable populations, and mechanisms that create vulnerable populations as categories of difference with or without their consent.

13.3 ENTITIES (WITH THEIR PROPERTIES) AS MECHANISMS OF JUSTICE

In Europe multiple entities are involved in creating (in)justice, ranging from the supranational level of the United Nations (UN), the World Bank, International Monetary Fund (IMF), EU’s Parliament and Commission, the European Council and the European Courts (both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR) to the national and sub-national governmental levels but also social institutions as schools, media, courts, care systems and welfare offices. While the international and European entities provide a legal and discursive framework for justice, the translation of these principles at the level of the nation state and their subsequent interpretation in national laws and regulations and practices

like work, care, education, media and law do not always operate on the basis of the fundamental assumption of participatory parity. In a levelling-down process the justice principles of the highest supranational level set out in binding law like Conventions, Regulations and Directives but also in Declarations, Charters and Guidelines gradually lose meaning in the constitutional hierarchy due to preoccupations, scarce resources or exclusionary practices.

Illustrative for the relationship between various governmental entities is the redistributive justice principle of the *right to housing* as an accepted human right at supranational levels like the International Covenant on Economic, Social and Cultural Rights (ICESCR). Recognizing the right of everyone to ‘an adequate standard of living ... including adequate ... housing ...’, the UN Committee on Economic, Social and Cultural Rights (CESCR) set out that ‘freedoms, such as a protection from forced eviction and arbitrary interference, as well as entitlements, such as the security of tenure and equal and non-discriminatory access to adequate housing’ should be guaranteed. Also, the Human Rights Committee (HRC) and the Revised European Social Charter (R-ESC) insist on the right to housing (Granger et al. 2018). In addition, other UN Treaties contain many of the Covenant’s rights to housing, and entail minimum core obligations in the field of housing with respect to specific groups, such as persons with disability, children and refugees. It is left to the nation states, however, to take the appropriate and necessary measures to implement these rights (Granger et al. 2018). The maximum commitment expected from nation states is to work progressively towards the full realization of that right without discrimination. The analysis of Granger et al. (2018) shows with some exceptions the right to housing assistance is categorized only as a ‘principle’. Such a principle is meant to guide legislative and policy action and judicial interpretation but, generally, cannot be enforced in court.

This example is not intended to claim that at the supranational entity justice principles are of the highest degree and that these are spoiled, denied or neglected by lower (sub-)national entities. Paradoxically, the EU and Member States themselves have minimized the possibility of the realization of these justice principles by proclaiming liberalization of the housing market and by enforcing cutbacks in public spending on social housing, housing subsidies and tax reductions. These policy reforms contradict the supra-nationally agreed right to housing, with the effect of outsourcing responsibility for social housing to the free market and the sub-national level of local government. Redistributive justice regarding the right to housing now depends on multiple governmental levels as well as the free market with its specific properties, values and resources. These developments show that universal justice principles are substituted by *sufficientarian* coupled with *prioritarian* justice principles in a process of austerity and liberalization (Granger et al. 2018; see

Chapter 2). The free market principles of demand and supply nor local governments will and can compensate for its un-equalizing effects.

In the field of *recognitive* justice, this levelling down of the fundamental assumption of participatory parity also becomes clear. The recognitive justice principles, as set out in international and European human rights treaties and EU law, become diffused, dispersed, fragmented and contrasted and contested in social institutions, discourses and in daily practices. Illustrative for a contentious tendency towards recognitive justice are public discourses on commemoration of national histories (Akkan and Hiah 2019) and on education for minority group children (Buğra and Akkan 2019; Lepianka 2019). Involved in the discourse are media, politicians and opinion leaders each representing ‘power elites’, that is, entities having the power to define situations and setting the rules of the game (Goffman 1959; Bourdieu 1979; Miller 1999). In defining (in)justice and the principles according to which claims to justice might be established and/or evaluated as legitimate the type of remedies that might be sought to correct for injustice, they have epistemic power. The exclusion of certain voices by missing out or ignoring certain public interests and misrepresenting common interest (Pettit 2004) result from and reflect unequal power relations.

Properties at stake in the educational discourse are legal and policy instruments to define the distributive and recognitive inclusiveness of the educational systems as well as the school curriculum representing the moral values and societal norms that the education system incorporates. Buğra and Akkan (2019) highlight three related problems of capability deprivation in education: (1) the segregated character of the education system and the inequalities of access to education due to different quality of schools according to the class- and ethnicity-based neighbourhoods; (2) difference blindness and misrecognition towards the worth of different cultures limit education in meeting the expectations about capability development, social cohesion and an erosion of trust in society; (3) minority claims for cultural recognition are seen as a threat to social cohesion, and they do not have the opportunity to adequately express their grievances and claims and to contest stereotyping and stigmatizing tendencies. Dorota Lepianka (2019) in addition focused on the media as relevant entities in informing and influencing public discourse. Their properties consist in communicating a specific rank-ordering of ‘social problems’ that demand public attention and expressing popular discontent with existing educational practices. The analysis shows that media debates about justice principles are contextualized and revolve around the question of whether and ‘how’ the current educational system succeeds in fulfilling its fundamental social mission, be it enhancing educational attainment, passing on values and/or strengthening social cohesion. Many debates touch upon questions of access to (quality) education and educational segregation (often

discussed in terms of redistributive justice) and the assimilative agenda of schools, which in general offer minorities very few opportunities to nourish their own identity, thus infringing on minority claims to recognition (Lepianka 2019). Recognitive justice is also at stake in media debates on distinguishing ‘better’ and ‘lesser’ languages and cultural backgrounds, and in an ambivalent evaluation of minority recognition claims as self-exclusion which disadvantages the individual, the group in question, as well as the national community. Media outlets as entity for redistributive grievances permeate discussions about access to quality education, school admission policies, education tracking systems, and redistribution of public resources among various types of schools. Underpinning all those claims is a firm belief in the role of education in nourishing talent and ambition, and its significance for the alleviation of social inequalities. The debates expose tensions over the principles that govern the allocation of ‘justice’, and – indirectly – groups whose well-being is, often implicitly, prioritized.

Social institutions as entities dealing with populations depending on income support and/or care have a few *properties* in common. While economic rights are increasingly regulated at the supranational and international level, social rights, not covered by the four freedoms (mobility of capital, goods, services and labour) of the European internal market but regulated by national social laws, have to be put in practice by local or regional authorities or are outsourced to markets (see Chapters 7 and 11). Other involved entities are advocacy organizations and client organizations assumed to represent clients’ interests. Regarding care systems and cultures, Bridget Anderson and Pier-Luc Dupont (2019) and Trudie Knijn (2019) conclude that among European countries there are dissimilarities in the institutionalization and organization of care and income support. Consensus on redistributive justice principles and on which needs will be recognized is absent. Also care workers’ rights show a rich variation ranging from strict national labour regulations for care work, cash-and care and personal assistance systems to unregulated private contracts. Moreover, care provision is very vulnerable to policy reforms that define the responsible entities; shifts from the family to residential settings and vice versa seem to be less inspired by the voices of involved care givers and care recipients than by austerity measures or processes of individualization. Most important however, is that families as private entities of care and income support are included in an often unrecognized way without being compensated or at a very low level. Mechanisms that impede justice in the domain of care exist in multiple redistributive constraints: limited budgets, low quality residential settings, low wages, limited labour protection and work pressure are serious barriers for participatory parity of people in need of care and care workers. Recognitive constraints pertain to an underestimation of the meaning of family dependency and a still patronizing attitude towards frail elderly and

disabled persons undermining the capabilities of care recipients, caring family members and the mostly female (migrant) care workers.

Regarding welfare benefits, local welfare offices are entities deciding on redistribution in the context of national welfare states' regulations and laws. They are funded by mandatory taxation, potentially redistributive, specific in its aims, compulsory and surveilling. Social assistance is the most basic non-contributory benefit all over Europe. It is targeted at individuals and households living under a defined minimum income and in some cases is reserved for specific categories, such as families with children or poor elderly people (Anderson and Dupont 2019). Social assistance is implemented by social workers and claimant managers with some discretionary power in direct contact with the welfare clients with their multiple identities. While individual conditions and characteristics of clients vary, the interpretation of their needs and deservingness depends on social workers in an unequal power relationship. Therefore, the study signals a trade-off between transparent procedures and clear formulations of rights of claimants, criteria for sanctions, surveillance and accountability allowing for tailor-made approaches, on the one hand, and insecurity about the rules and procedures, on the other hand. Claimants' capability to decide what one needs is hard to secure and thus participation on equal grounds.

In this section multi-level governments, social institutions and public discourses as entities (with their properties) are analysed as mechanisms of justice from the perspective of their contribution to improving capabilities and to participatory parity. Justice takes shape within these contexts and these entities setting the rules of the game, being positioned to decide on public resources, influencing public opinion and representing its battlefield. Justice for vulnerable people depends on how they are imagined, classified and treated by governments, social institutions, courts as well as discourses. In Europe, with its diverse and pluralistic societies, supranational entities intend to promote recognitive justice principles for women, ethnic minorities and migrants as well as for disabled persons. The application of these principles in new recognitive frameworks goes along with tensions that arise from nationalistic discourses. At the same time, redistributive justice principles are constrained and in decline due to austerity policies, cutbacks in public spending driving national governments and social institutions to misrecognition of needs.

13.4 ACTIVITIES AS MECHANISMS OF JUSTICE

Mechanisms of justice exist in entities that 'are' and 'do' by their activities. In an interactive process of affirming and transforming justice principles, activities as mechanisms of justice recognize identities, give shape to voice and representation and conclude on deservingness and needs by setting standards

for appropriate behaviour and living. The shape, content and form of these actions may differ per social sphere (Walzer 1983).

A main consideration in analysing these activities concerns the relationship between equality and inclusion as two poles of distinction, that is, on the relationship between redistributive justice and recognitive justice. Equality and inclusion may follow different ‘logics’ though a sharp distinction between the two poles of justice cannot be made if only because the rules of the game dictate who is ‘up’ or ‘down’, or ‘in’ or ‘out’ (Silver 2007). Exclusion – on whatever basis, being race, ethnicity, religion, gender or age – has consequences for inequality (Nullmeier et al. 2019). Nonetheless, activities contributing to enforcing equality differ from activities promoting inclusion even if the entities that operate in bringing forward justice in both arenas are the same. Inclusion may take two routes: categorization of perceived identities or individual differentiation, meaning that differentiation which is unavoidable and even needed in reaching justice in diverse and plural societies may contribute to injustice if based on perceived identities. Here we outline differentiating activities that impede (in)justice as: (1) categorization of difference; (2) having access and being eligible; (3) deciding on deservingness; and (4) negotiating justice based upon participatory parity and capabilities.

13.4.1 The Categorization of Difference

Categorization of group difference points at the controversy between universalist liberal principles and politics of identity (Buğra 2018). This controversy exists in the tension between, on the one hand, justice principles and activities in a pluralistic society inspired by group differences which inform different experiences and shape different aspirations and demands concerning participation in society. On the other hand, justice principles and activities accounting for non-homogeneity of group identity, reconciliation of group difference with the common good of the society, and plurality and dynamics of individual lives. Individual non-conformity and dissidence remain important.

A core question is whether activities like minority policies (that is, differentiation based on categorization) contribute to participatory parity. Regarding groups like Roma it is not easy to juxtapose a universalistic versus a minority group discourse (see Chapter 8; Anderson and Dupont 2018; Buğra and Akkan 2019; Lepianka 2019). In contemplating participatory parity, recognition of Roma minority culture could bring forward activities (segregated schools) resulting in exclusionary outcomes for individuals’ capabilities aimed to promote participatory parity. Roma’s positioning as a disadvantaged minority group is also problematic as redistributive policies suffer from a mixture of colour-blindness (not acknowledging minority cultures) and discriminating institutional practices. Illustrative is the denial by local authorities of the legit-

imate human rights-based claim for living in mobile homes, in combination with the stigmatizing treatment of all Roma in social welfare practice (Hiah and Knijn 2018). If the willingness of the minority group to contribute to the majority claim of the common good is doubted the non-homogeneity of the group is overlooked and individuals are treated as representing ascribed identities. Categorization of difference regarding Roma populations that reduce individual options to escape also affect representative justice. The ideological constructs of a dominant group contribute to the negative self-definition of minority group members' reason why minority candidates may be less likely to put themselves forward as political representatives of a stigmatized group (Anderson and Dupont 2018).

Differentiation based on categorization operates in various ways for different groups. Activities contributing to the participatory parity of elderly and/or disabled people recognizing their autonomy and capabilities are increasingly put on the supranational, EU and domestic political agendas. Nonetheless, categorizations like 'the elderly' or 'the disabled' do not justify the rich variety of capabilities and lifestyles within and among people of age and disabled persons (Anderson 2020; Knijn 2019). From the perspective of recognitive justice, it is imperative not to be colour-blind to their – and their families' needs – by requesting autonomy and self-responsibility, not to classify elderly and disabled persons as vulnerable categories of the population per se and to avoid a patronizing approach that neglects their freedom to live the life they value.

Legal mechanisms are developed internationally and at the European level to exercise anti-discrimination practices. These mechanisms of categorizing differences pertain to prioritize and protect the needs and rights of certain groups classified as *disadvantaged and vulnerable*. For political reasons these categories are non-specified such as ethnicity and religion-based minorities or women, children, older persons and persons with disability (Granger et al. 2018). In applying this to the right to education, activities that pursue 'anti-discrimination' emerge as mechanisms of accommodating the exercise of rights to education at individual and group level. Orsolya Salát (2019) highlights a complex case law developed by ECHR prohibiting discrimination and requiring to 'pay particular attention to the special needs of vulnerable persons (be they ethnic or religious minorities, persons living with disabilities, etc)'. The Court emphasizes inclusive education as a guarantee of universality and non-discrimination for pupils with disabilities, as well as to the ethnic minorities. In line with this understanding, ECHR jurisprudence has set out positive obligations, as well as procedural and substantive requirements regarding segregated schools. This activity to impede injustice is followed up by all countries operating within the framework of non-discrimination, although their constitutional contexts differ (Salát 2019).

Discursive practices of media and politics, operating by labelling, othering of ethnic and religious minority members and negative stereotyping (Lepianka 2019) can be labelled activities that impede justice. For instance, the categories of race as a mechanism of exclusion operate at different levels: by applying the term 'black' to denote schools with over 50 per cent of a non-western background inherently applying this to children with Moroccan, Syrian, Iranian, Surinamese, Latin American and African background as is the case in the Netherlands. Or by presenting insulting and pejorative images of Africans as 'primitive peoples' with no history of their own in Portugal. Activities of over-emphasizing, as in Austria, the 'otherness' of members of religious and ethnic minority groups whose mother language is not German that pursue reducing difference through education could undermine their self-esteem, their sense of belonging and their ability to participate on equal grounds. Many activities are captured between either defining minority cultures as different, thus less worthy, or difference blindness in the discursive framing of equal opportunities. Yet where the disadvantages are dissociated from the underlying social and cultural inequalities, the recognition of disadvantage might easily articulate with discriminatory tendencies.

In understanding categorization of difference as an activity, the interplay between temporality and history in shaping (ideas about) the socio-economic order, the vision of the common good, the permanence of class structure, and/or the permanence of ideas about justice claims of minority and marginalized populations is imperative. In many cases (minority) claims to recognition and/or representation can be understood through the lens of history or rather, a specific memory of (national) history, which may differ between various social groups (Anderson and Dupont 2018; Lepianka 2018; Akkan and Hiah 2019). The categorization of difference as a mechanism operates at different levels in different entities. The activities that are scrutinized in the realm of entities like law, media, education and the welfare state operate with a categorization of difference; such categorization determines who has access to certain resources, whose identity and claims are recognized and whose voice is heard.

13.4.2 Having Access and Being Eligible

Openness of the public domain, and availability of resources, relevant institutions and people are major conditions for realizing capabilities and participatory parity. However, access to quality education, residential care, social housing, employment and welfare benefits are increasingly limited due to a combination of reduced public budgets, flexibilization of the labour market and the neo-liberal self-responsibility paradigm. Giving access is one side of the coin accentuating minority and vulnerable populations' dependency on powerful institutions dominating the redistribution of public goods and allow-

ing for the recognition of minority cultures and lifestyles. Claiming or taking access is the other side of the coin expressing resilience of people defined as marginal or vulnerable who oppose differentiation based on categorization. Anderson and Dupont (2019) and Knijn (2019) show that this giving and taking access is partly reached in the case of personal assistance for disabled people, which is an effective materialization of the access claim of the Independent Living Movement (ILM) (Chapter 10) and in the case of welfare benefits and social housing for temporary status holders (Knijn and Hiah 2019). In most cases, however, austerity politics combined with repsonsibilization cause an imperfect application of having access and being eligible as justice activities. What happens can best be illustrated by the case of young women's access to the labour market (Meneses et al. 2018). Activities of the EU and the European Council during the economic crisis in alliance with the IMF and the European Central Bank (ECB) exist in forcing the Southern Member States to accept austerity policies, reducing public spending and outsourcing public goods. In particular the Southern countries had to redefine the 'common good' by prioritizing economic market principles above principles of redistributive justice. Hence, universal social rights are substituted by deservingness and reciprocity principles that limit redistribution of public goods. It has increased gender inequality and leads to 'adaptive preferences' of the economic vulnerability of especially young – female – persons and their acceptance of the neo-liberal 'rules of the game', setting aside their plans for the future in a permanent struggle for jobs (Meneses et al. 2018).

Such a narrative of fear also operates in other domains and regarding other social groups; 'adaptive preferences' we see in frail elderly adapting to reduced care provisions (Anderson and Dupont 2018; Knijn 2019) and among welfare recipients and social workers accepting deservingness and reciprocity criteria (Anderson 2020). A representative justice perspective is at stake because organizational and political choices are neither transparent nor the result of a democratic process in which all voices are heard. Moreover, precarity, expressed in increasing vulnerability and exploitation in the labour market, invokes lives already characterized by uncertainty and instability (Meneses et al. 2018).

Being eligible is conditional to getting support in creating and improving justice by stimulating capabilities and choosing the life one prefers. Setting eligibility criteria is an activity that defines the right to receive resources and to get access to organizations that matter, such as schools, (health)care, media, trade unions or legal processes. Human rights outline the broad criteria for eligibility but do not suffice for its specification due to diversity of human beings and their specific needs. Setting eligibility criteria is an unavoidable as well as a normative activity in welfare organizations, public healthcare, education migration offices, social housing and even in the media. By consequence,

eligibility criteria intended to be inclusive inevitably define the boundary lines of belonging, and of acceptable behaviour often with the intention to minimize the target group. Hence, eligibility criteria per definition contrast with universalism. For example, although entire populations of Europe suffered from World War II, not all can claim compensation. It took many years to put in place restorative justice, and some populations that extremely suffered were recognized more easily than others, with Roma as the latest category being recognized for restorative justice. Eligibility criteria can be defined as just and fair if they define target groups on the basis of criteria that are in tune with the intention of the redistributive character of the public good, recognize the needs of minorities and individuals within minority groups, are transparent and democratically debated, and exclude all other implicit criteria. Eligibility for social housing and social assistance therefore should only be based on income, not on ethnicity, cultural or religious background or gender. Eligibility for good quality schools at all levels should be universal given its importance for development of individual capabilities as well as for society at large, and the same goes for healthcare. Nevertheless, it becomes clear from our studies that many eligibility criteria are not appropriate from the perspective of justice. This is related to several assumptions on eligibility criteria that impede its implementation such as prioritization and localism. Eligibility for housing and social benefits as well are increasingly tied to reciprocity as societal contribution and integration, meaning being employed or actively looking for jobs, being committed to the local community, having children and displaying good behaviour (Anderson and Dupont 2019; Granger 2019).

13.4.3 Deciding on Deservingness

A third form of justice creating activities can be viewed as a subcategory of having access and being eligible. Selectivity and conditionality divide deserving from the undeserving vulnerable populations grounded in criteria of equity, need and reciprocity, resulting in increasing numbers of homeless people, poor households including poor children, and job and income insecurity. Moreover, the empirical ETHOS studies manifest that exclusion and polarization between the ‘us’ that belong to the political community that owes us and to which we are due and the ‘them’ that undermine our sense of belonging as well as our public goods is just one of its manifestations. In this context scapegoating is a performative mechanism expressed in the (social) media by politicians and the populations at large blaming a certain category of the population as the cause of ‘the problem’. For instance, in the Netherlands one speaks about ‘migrant benefits’, because the majority of welfare beneficiaries are migrants coming from third countries (Knijn and Hiah 2019) and in Portugal prejudice against Roma as allegedly being dependent on subsidies creates a feeling of

injustice among claimants, although most of the time this is based on wrong information and years of racism institutionalized against this group (Araújo and Brito 2018). Self-blaming or blaming one's group identity is a way to adapt one's preference to being defined as 'undeserving'. Disabled persons and elderly in need of care blame themselves for not being able to 'live independently', the righteous claim of the disability movement may impute those who are 'passive' care dependents (Knijn 2019). In the same vein, welfare beneficiaries blame each other for not doing their very best to get a job (Anderson and Dupont 2019) and young unemployed women blame themselves for not having a regular job (Meneses et al. 2018).

The equity principle is detected in the ETHOS studies on welfare benefits and social housing. The existence of needs regarding these public goods are accepted but envisioning it as the result of a self-inflicted need gap leads to the ambiguous criterion of desert that simultaneously speaks to charity and justice (Anderson and Dupont 2019). 'Reciprocity', 'contribution' or 'counter-achievement' are put central in times of austerity exacerbating the restrictive tendencies of the deservingness paradigm. For instance, since 2008, public work programmes in Hungary aim to replace benefits as a quasi-punishment for there is no welfare without work (Meneses et al. 2018). Deservingness criteria encourage suspicion-based activities towards claimants' purported needs and contributions and the relegation of large sections of the population to the ranks of the undeserving.

13.4.4 Negotiating Justice on Behalf of Participatory Parity and Capabilities

As stated in the theoretical approach above, mechanisms of justice may also create vulnerable populations as categories of difference. Negotiating vulnerability, its categorization and the resources to overcome unequal participation and incapability are imperative activities from a justice perspective. The ETHOS studies present various activities giving shape to vulnerability that result from their legalization in human rights and EU law, institutionalization in voting rights, charters and dialogues, discussed memorization practices, and lived social interactions. Interestingly, in EU law the use of the notion of vulnerability and its relevance is growing. Developed in the context of human rights law, it increasingly serves as a point of reference for the design of EU policies, and in the interpretation of EU law. Though the concept of vulnerability is not yet explicitly included in Treaty provisions (Granger et al. 2018), its use in international law such as the Convention on the Rights of the Child and the Convention on the Rights to Persons living with Disabilities has an increasing influence on migrant, minorities and disabled persons' rights, for instance, in the sphere of access to education and inclusiveness. This adds to

the complexity in which these legal orders interrelate, and which is legally managed by concepts like the ‘the margin of appreciation’ (ECHR) and subsidiarity, supremacy and constitutional identity (EU law). However, national constituencies define whether substance rights follow from the recognition of vulnerability.

Negotiations on the right to vote also show up in the ETHOS project. Protected by international human rights instruments sensibility for the voting rights of vulnerable and marginalized populations increases. Pressure by both the ECHR and EU law resulted in a greater enfranchisement of immigrants, and mentally disabled persons, and in a partial re-enfranchisement of convicted prisoners. Although with limitations and conditionalities regarding foreign residents, mentally disabled persons, and criminals potentially undermining the foundations of the democratic system of government, increasing enfranchisement boosts representation of those categories (Theuns 2019).

A quite different conclusion is drawn from the analyses of the recognition and protection of vulnerable groups when it comes to their work-related social rights. A tendency to ‘economize on justice’ has detrimental practical implications in respect to the realization of social justice. Castro Caldas (2017) argues that the separation between economy and moral philosophy is not obvious and unavoidable although European economic policy is mostly aligned with the rules of financial markets. In searching for formal and informal activities of negation and deliberation that may offer instruments for overcoming the negative implications of redistributive injustice ETHOS studies show disappointing results. De Vries and Safradin (2018; Chapter 7) explain that strengthening the Treaty system of the European Social Charter within the Council of Europe and its relationship with EU law is vital for implementing social rights for many vulnerable groups of citizens. Especially the elderly, youth, persons with disabilities and migrants have been undermined in effectively enjoying their fundamental rights. In contrast, the responsible European Court of Justice has taken a cautious approach in dealing with national cases that challenged austerity measures based on fundamental rights. This illustrates that the EU’s social model has been seriously undermined during the Euro zone crisis, although the recently launched European Social Pillar is conceived as a recognition that the EU’s commitment has neglected its social dimension (de Vries and Safradin 2018).

Path dependency is a determinant for institutional change, for instance, in representative justice as Araújo and Meneses (2018) show. Protection of vulnerable groups depends on social dialogue structures that are under pressure even in countries where their presence had deeper roots. Trust between social partners built up in a strong welfare state tradition is imperative for protecting workers and national economies. A lack or disruption of such a tradition (such as in the UK, Portugal, Hungary and Turkey) is a fundamental part

of the problem. Araújo et al. (2019) studying alternative dispute resolution (ADR) mechanisms as functional instruments such as mediation to improve access to labour justice see potential in ADRs to surpass some of the barriers to access justice. ADR is less expensive, faster and geographically closer to citizens than courts and uses an understandable language. In multiplex situations ADR allows a deeper comprehension of the conflicts and helps to solve the superficial dispute as well as underlying problems. The authors warn, however, of a dual justice system, with courts serving first class citizens, and informal justice serving second class citizens that cannot afford or understand courts procedures. This may result in the reproduction of societies' power asymmetries, the possibility of being co-opted by the state, and the risk of an individualized approach undermining collective action in a neo-liberal and fragmented labour market (Araújo et al. 2019).

Deliberation as an activity is another means to strive for participatory parity, for instance, in disputes on commemoration of minorities' past and present belonging to European societies (Akkan and Hiah 2019). Showing an increasing sensitivity to historical injustices, the ongoing effects of the colonial and imperial past points at awareness of the need for redefining the collective identity and for restorative justice. In that process deliberations on moral dilemmas identify the injustices in the majority/minority relations. Majority voices may favour the discourse of 'the past should stay in the past' or refer to the 'perception of complex figures in their own times', but clearly silencing is no longer an option in ensuring a sense of belonging to a society. Deliberating alternative narratives is a manifestation of a moral dilemma evident in plural and diverse societies.

Efforts to improve recognition of vulnerable groups and negotiate minorities' status exist in top-down as well as bottom-up activities in an entwined process of advocating, deliberating, convincing, processing and claiming as exemplified by the case of restoring disability rights. The Independent Living Movement contributed to a paradigm shift in the EU approach on disabled and ageing persons. Participatory parity has been stimulated by recognizing the claim to get equal access to all domains of life (education, employment, health services leisure activities) and by stimulating their human rights (Knijn 2019). Again, however, its success depends on the application of nationally defined redistributive justice principles. Where family dependency still is an unrecognized though substantial alternative for collective resources both people in care of need and their mostly female care givers remain vulnerable. There seems to be a trade-off between the discourse of self-determination and the recognition of care work, as is illustrated by the case of Austria, where service users reach a sense of self-determination at the cost of obfuscating the care work needed to get it done. If participatory parity of the one goes at the cost of the other (their work contract, dignity and voice) capabilities are not conferred by connection

with other people. The fact that both ‘family’ and ‘home’ care, whether paid or unpaid, is predominantly female seems to be taken for granted. Precisely because of its obviousness, the gendered nature of affiliation, emotion and interdependence thus remains an unspoken assumption.

13.5 CONCLUSIONS AND DISCUSSION

This chapter considered the mechanisms (entities and activities) that lead to justice outcomes in Europe. Regarding entities, one important mechanism is that of multi-level governance. All the countries considered are members of the Council of Europe with its dedication to human rights, democracy and the rule of law, and party to many UN Treaties. In addition, all – save for Turkey – are Member States of the EU. Within nation states, the sub-national levels of regional and local government play an important role in setting out understandings of justice as well. This creates a constitutional pluralism in which there is an interplay between local, national, EU and human rights-informed understandings of justice principles. Most striking in this complex governmental hierarchy is the ambivalent position of the EU regarding redistributive versus recognitive justice in the context of suboptimal representative justice. On the one hand, the EU is a profound defender of minority rights, of gender equality and LGBT and disabled persons’ rights and offers lots of programmes and initiatives to stimulate recognition of diversity. From that perspective one could say that participatory parity of under- or unrecognized groups and individuals as well as their representation in policy aims of Europe became an undeniable aspect of the European theory of justice and fairness, although lower governmental levels do not always adapt to these principles. On the other hand, the EU has promoted a free market of persons, capital, services and goods with strict economic budgetary restrictions to all its Member States, has stimulated austerity measures and put Member States under rigid regulations negatively affecting the participatory parity and capabilities of exactly these minorities, women, frail elderly and disabled persons. Nation states and local and regional authorities have reduced welfare benefits, excluded categories from welfare benefits, outsourced social housing programmes to the competitive market, reduced care facilities for elderly and disabled persons, and turned towards a paradigm of distrust based on reciprocity and deservingness. These developments challenge or even violate redistributive, recognitive as well as representative principles. In that process vulnerable populations are badly represented and instead adapt preferences with consequences for their capabilities and for affirmative and transformative remedies. Justice principles expressed in visions, codified and institutionalized in legal tradition and/or bureaucratic, professional, cultural and social practice, determine not only the shape, scope and site of justice experienced by individuals, groups and societies, but also

the choice of remedies, that is, the claims for justice to tackle the injustice. Power asymmetry stands in the way of differentiation without categorization, equal access to and eligibility of (public) resources while desert has substituted rights. Negotiation and deliberation as activities of representative justice are ongoing but so far have not resulted in realizing the full development of vulnerable people's capabilities nor in ensuring participatory parity.

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