

Part Four

*Social Justice in the European
Union: The Puzzles of Solidarity,
Reciprocity and Choice*

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I. INTRODUCTION

WHAT HAVE WE learned about social justice from the Eurozone crisis? One lesson, we believe, is that there are limits to apprehending social justice between European peoples simply as enlightened mutual advantage, when, in Brian Barry's apt formulation, 'justice is the name we give to the constraints on themselves that rational self-interested people would agree to as the minimum price that has to be paid in order to obtain the cooperation of others'.¹ But if, in fact, social justice in the European context is not reducible to even a sophisticated and indirect pursuit of self-interest then what exactly is it supposed to be? One alternative to think about justice is common and indeed common sense: one starts by asking how much Europeans stand to gain collectively from social cooperation relative to a world where they did not cooperate, and one then suggests principles for fairly distributing the social surplus they have created together, taking into account such things as how much each Member State and its citizens has given up or contributed, or how costly participation in the EU has been. Brian Barry called this common sense view justice as reciprocity. It is a 'hybrid theory of justice' because it combines *justice as mutual advantage* with *justice as impartiality*.²

Why do we mention Barry's insights as a starting point for a discussion of social justice in the EU? We think that his discussion, in particular his analysis of justice as reciprocity can help shed light on some of the current positions that prevail in both academic and popular intellectual discussions. In particular, it can help illuminate some of the challenges we face when attempting to construct a theory of social justice for the context of the EU compared to more familiar contexts. More tentatively, we suggest that the EU is (ever so slowly) transforming itself from a social practice whose normative basis can be captured adequately in terms of intuitions about mutual advantage into an institutional arrangement to which more demanding

¹ B Barry, *Theories of Justice* (Los Angeles, CA, University of California Press, 1989) 7.

² B Barry, *Justice As Impartiality* (Oxford, Oxford University Press, 1995) 46.

principles of socio-economic justice apply. So while remaining, for the time being, a *demoicracy*—a union of political communities who govern together but not as one—sustaining togetherness and fairness in this union calls for increasingly demanding principles of social justice.³

In this chapter, we do not pursue the challenging task of formulating such principles. More modestly, we lay out systematically some of the building blocks that need to be developed and some of the core questions that need to be answered for such an account of social justice in the EU to be persuasive. In order to better understand its particular normative context, we compare and contrast the EU to two domains of political philosophy in which questions of substantive justice have been hotly debated, namely first, the ‘standard’ case of a closed society for which received theories of socio-economic justice such as John Rawls’s *A Theory of Justice* were conceived and, second, more recent debates concerning global justice. Neither our exercise in comparison, nor the topics we single out for future research in the EU context have any claim to exhaust the myriad of differences that exist between, on the one hand, the EU as an institution and any contemporary modern state and, on the other hand, the EU and the global institutional architecture. Our goal is merely to sharpen the focus on those normative differences most relevant to the issues of social justice, that is, those features that will make further investigations of ‘EU justice’ interestingly different from the more well-trodden paths of domestic and global debates.

But before we venture into the intricacies of different ways of thinking about social justice, we feel the need to briefly comment on the worry that developing an account of justice for the EU might produce the deeply problematic effect of pre-empting and delegitimising its—already weak—process of democratic deliberation.⁴ We share the basic liberal commitment that the wielding of coercive political power, including the kind of public power exercised by the EU, can only be rendered legitimate when it operates against the background of political procedures that express the free and equal status of participants. And such procedures must be democratic ones. However, we do not think that a fundamental commitment to this principle of liberal legitimacy stands in the way of developing and refining accounts of social justice for the EU. Quite to the contrary, the task involved in theorising justice is a necessary one that complements democratic legitimacy. Our point here is conceptual rather than substantive: whereas the reflection on adequate principles of legitimacy helps us to recognise the procedures through which political decisions ought to be made—namely democratically—an account of social and distributive justice helps us work out in a systematic fashion to what end political power should be exercised. At the same time, we do not believe that these ends ought to

³ K Nicolaïdis, ‘The New Constitution As European “Demoi-cracy”?’ (2004) 7 *Critical Review of International Social and Political Philosophy* 76; K Nicolaïdis, ‘The Idea of European Demoi-cracy’ in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford, Oxford University Press, 2012); K Nicolaïdis, ‘European Demoicracy and Its Crisis’ (2013) 51 *Journal of Common Market Studies* 351.

⁴ This is in fact Agustín Menéndez’s worry, formulated in the opening paragraphs of his contribution to this volume: ‘Justice has been deployed as a rhetorical device with the help of which to pre-empt, to set aside or to hollow out democratic politics’ (this volume, 137, at 138).

be invoked to bypass the democratic process but rather as a (contested) referent for the transnational democratic debate in Europe. Seen in this light, different accounts of social justice provide indispensable philosophical groundwork precisely for those citizens jointly deliberating about how to democratically create their political order in the common good, whether on a national, supranational or global level.⁵

The structure of this chapter is as follows: First, we explain in more detail what we (and philosophers in the liberal egalitarian tradition of John Rawls and Brian Barry) understand to be the content of domestic principles of social and economic justice, and we suggest why some people may think that this kind of justice only applies within states. This latter point refers to what has often been called the *grounds* of social justice. Subsequently, we focus on three aspects in respect of which the EU interestingly differs from both the contemporary nation state and the global sphere to demonstrate that the EU provides a fertile testing ground for hybrid theories of justice. The first claim we analyse is the position that justice requires solidarity, and that therefore substantive (especially: distributive economic) justice could not be realised amongst EU citizens because solidarity is lacking between them. This issue raises important questions about the sociological prerequisites of substantive social justice, and the EU provides a unique intermediate case between domestic and global conditions in terms of the forms of solidarity that currently exist or plausibly could exist. Second, we look at the claim that social justice in the EU context is different because the goods that ought to be distributed as a matter of reciprocity amongst citizens domestically is very different from those that we find amongst EU citizens. Conceiving of justice as fair reciprocity raises interesting questions about the content of such principles, and again, the EU with its unique features provides an interesting example. Third, we assess the view that the EU could not necessitate substantive requirements of social justice because it is ultimately a voluntary association amongst states. Although we make some substantive arguments about the promise that each of these areas of philosophical analysis bear, the general aim of this chapter is much more exploratory than conclusive: we seek to work out what renders the EU a particularly interesting object to consider questions of social justice, not to 'solve' these questions by advancing a definitive theory.

II. DOMESTIC SOCIAL JUSTICE: CONTENT AND GROUNDS

Let us begin by looking at justice in the 'standard case', the contemporary nation state: liberal theories of social justice take for granted that states realise social justice only when they serve certain functions and bring about certain distributions of justice-relevant goods amongst those subject to their authority.⁶ Setting up the issue of social justice in this way raises two important questions: First, in terms of what

⁵ The argument sketched here is of course Rawls's. See, eg, J Rawls, *Justice As Fairness: A Restatement* (Cambridge, MA, Belknap Press of Harvard University Press, 2001).

⁶ We exclude in our discussion here the important issues of rectificatory and criminal justice as well as inter-generational justice. For an illuminating discussion of the application of these kinds of justice to the EU as an institution, see A Williams, 'The Problem(s) of Justice in the European Union' in this volume, 33.

goods must we measure the outcomes that basic institutions bring about? Second, what kinds of distributions should basic institutions bring about? Aside from anarchists who deny that state institutions could ever be just, nearly everybody agrees that as far as the first question is concerned, one necessary feature is that basic institutions provide certain public goods, for example, national defence, policing, the rule of law, healthy environments and other non-rival goods which it is assumed improves all participants' lives. It is an intrinsic feature of these core public goods that when a state provides them, it dispenses them (in some respect) equally to all. But from a liberal–egalitarian perspective, justice also includes the realisation of a just distribution of private (excludable) benefits.⁷

Following John Rawls, we understand the relevant primary social goods to include rights, liberties, opportunities, income and wealth and social bases of self-respect.⁸ The enumeration may appear daunting, but we can exclude from redistributive considerations the 'constitutional essentials' among those, for example, the basic liberties understood as those civil and political rights normally guaranteed by a society's legal and political order and focus on 'basic justice', that is, what constitutes a just distribution of resources and opportunities to attain positions of advantage in the economic sphere.⁹ What then ought to be guiding principles with respect to the latter, *economic* justice?

A. Benchmark of Equality

What grounds egalitarian shares and fair equality of opportunity as a matter of justice is the conviction that states owe those subject to them particular forms of equal treatment. Rawls argues that states must be understood as fair systems of social cooperation characterised by reciprocity amongst participants and that no person can claim a greater share of the social product than any other without there being a justification for offsetting this benchmark of equality.¹⁰ The argument that Rawls presents is that (a) cooperative practices raise questions of distributive justice concerning what he refers to as common productive surplus, that (b) a state's 'basic structure' is a cooperative practice whose productive surplus comprises nearly all prerequisites for human flourishing, that (c) cooperative practices require equal shares when participants have equal claims to its benefits (subject to considerations of efficiency). Rawls therefore concludes that a state must distribute shares of primary social goods equally amongst participants of social cooperation subject to considerations of efficiency.

⁷ For some major contributions to the vast 'currency of justice' literature, see M Clayton and A Williams, *The Ideal of Equality* (New York, NY, St Martin's Press, 2000). A defence of primary social goods as the most adequate currency of social justice is presented in J Rawls, *A Theory of Justice* (Cambridge, MA, Belknap Press of Harvard University Press, 1999) and T Pogge, *Realizing Rawls* (Ithaca, NY, Cornell University Press, 1989).

⁸ Rawls, *A Theory of Justice*, n 7 above, 79–80.

⁹ The distinction is from J Rawls, *Political Liberalism* (New York, NY, Columbia University Press, 1996) 230.

¹⁰ This formulation permits Rawls justification of inequalities in line with the difference principle: where inequalities make the worst off better off it is plausible that nobody could have a reasonable objection to such inequalities.

Interpreting society as a fair system of social cooperation is not necessarily the only way in which we may arrive at a ‘benchmark of equality’ in determining what counts as a just distribution of the primary social goods of wealth and income. There are alternative grounds for substantive principles of justice that have a benchmark of equality. One thought is simply that equal needs or equal vulnerability to the contingencies of human life (which the basic institutions of society can mitigate to some extent) may be sufficient to ground such an argument, provided that there are no antecedent claims on the good that is to be distributed. One could interpret Rawls as hinting towards this when he mentions the pervasive and comprehensive effect that the basic structure exercises on every person subject to it from the beginning of his or her life.¹¹ Another argument for equal treatment may derive from further facts about *how* the state relates to those subject to its power, namely by inducing and if necessary forcing people to obey its legal norms. Perhaps there is something specifically problematic about forcing individuals to obey, and the only way to redeem the morally problematic character of such acts is to be found in equal treatment that extends to an equal distribution of primary social goods.¹²

B. Fair Equality of Opportunity

Given such a benchmark, the motivation for a principle of fair equality of opportunity stems from two considerations, one empirical and one normative. The empirical claim is that, given plausible assumptions about human motivation, the complexity of modern societies, and the positive effects of a division of labour on the provision of adequate levels of primary social goods, any institutional system must permit some inequalities in its distribution.¹³ Of course, accepting this empirical claim in no way implies accepting the degree of actual material inequality we find in contemporary capitalist societies—but it *does* imply that some incentives are permissible and potentially positively desirable if they can motivate the more talented to be productive in ways that improve the condition of those worse off.¹⁴ The second, normative, assumption is that once an arrangement for social cooperation allows some people to attain more desirable positions in terms of wealth, income and authority, it would be unfair if some would be advantaged in obtaining these positions for reasons unrelated to the task of fulfilling them in ways that serve the common interest.

Equality of opportunity is a widely shared ideal, not confined to conceptions of social justice of the egalitarian brand. But what Rawls called ‘fair’ equality of opportunity is in fact a very demanding egalitarian ideal, for it requires that ‘those

¹¹ Rawls, *A Theory of Justice*, n 7 above, 82; A Abizadeh, ‘Cooperation, Pervasive Impact, and Coercion: On the Scope (Not Site) of Distributive Justice’ (2007) 35 *Philosophy & Public Affairs* 318.

¹² This is the position defended by Michael Blake and (subject to some further complications) Thomas Nagel. M Blake, ‘Distributive Justice, State Coercion, and Autonomy’ (2001) 30 *Philosophy & Public Affairs* 257; T Nagel, ‘The Problem of Global Justice’ (2005) 33 *Philosophy and Public Affairs* 113.

¹³ ‘[A]ny modern society, even a well-ordered one, must rely on some inequalities to be well-designed and effectively organized.’ Rawls, *Justice As Fairness*, n 5 above, 55.

¹⁴ Nonetheless, there are powerful arguments stemming from social equality and fraternity that (we think) conclusively speak against permitting inequalities in income and wealth beyond a certain level.

who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system, that is, irrespective of the income class into which they are born'.¹⁵ Defended in these terms, the idea extends beyond the concern that it would be wrong to discriminate between candidates for a position based on features irrelevant for fulfilling the job adequately because equally talented and motivated persons should have equal *prospective* chances of ending up in a desirable position of advantage, independent of contingent facts about such as their social class or family background. Realising fair equality of opportunity thus seems to require basic institutions either to limit well-off persons' abilities to alter others' probabilities of success in economic life, or to significantly extend forms of 'compensation' for those from disadvantaged backgrounds who have not received such additional benefits.

To be sure, the content and ground of social and especially economic justice as laid out by Rawls have been extensively debated. But this is not our object here. Instead, the reasoning we propose is one of differential. Surely, the requirements of justice in the EU can only be equal to or less than those applicable domestically. So the issue for us is to assess one by one the reasons invoked for why these principles might not be applicable to the EU. We do so under three headings, namely, solidarity, reciprocity and choice.

III. IS SOCIAL JUSTICE UNAVAILABLE IN THE EU? SOLIDARITY AS A PREREQUISITE

One objection voiced against the argument that the EU could be subject to forms of socio-economic distribution closer to that which we find within its Member States is that the EU lacks the motivational resources to persuade (citizens in) richer states to comply with demands to redistribute primary social goods to (citizens in) poorer states: there is a lack of *solidarity* amongst EU Member States and citizens that makes talking about substantive justice futile. To adequately evaluate this argument requires addressing at least two distinct questions. On the philosophical level, we must clarify how the concepts of solidarity and justice are connected. Is solidarity merely the empirical prerequisite for institutions that provide substantive social justice? Or is the connection between these values more complex? We begin with a brief conceptual analysis of how we think solidarity is best understood, before tackling the question of how it is related to justice. The further question, which we only touch on peripherally concerns the empirical prerequisites of EU solidarity relations: How deeply engrained are existing solidarities? How likely are they, if at all, to change over time in a more European direction?

A. The Meaning of Solidarity

First, solidarity is a *hybrid* concept, used to describe both an observable *empirical* behaviour amongst people and the normative grounds on which there *ought* to

¹⁵ Rawls, *A Theory of Justice*, n 7 above.

be such behaviour. Thus, we could observe both that there is solidarity between members of a group where there ought to be none and that there ought to be solidarity between individuals where there is none at present. Moreover, solidarity is a *social* concept that describes a relation between agents: one is not in solidarity with oneself.¹⁶ However, the fact that solidarity is ‘social’ still leaves open what it takes to be the proper object or subject of solidarity: can solidarity only exist between actual persons or can it relate to non-human animals or future or past generations. It also begs the question of the kind of relationship that might qualify as such. Some writers—especially those concerned with empirical research—assume that solidarity is necessarily expressed through actual *behaviour* by agents.¹⁷ Other authors think that solidarity does not require particular kinds of behaviour but is better understood as a *disposition* to behave in a specific ways.¹⁸ Second, therefore, solidarity speaks to *motives*. Behaving (or being disposed to behave) in a specific way is not sufficient to be in solidarity. Such behaviour needs to be accompanied by an appropriate kind of *belief*.¹⁹ Acting in ways that benefits somebody else is not sufficient to establish that one is acting *from* solidarity: one might be acting only out of pure self-interest. In all cases, our shared beliefs about the kind of relationship that connects ‘us’ need to be compatible with the moral reasons that justify acting *from* solidarity: It is fundamental to paradigmatic cases of group solidarity that members of the group believe that they are united by a *just* (morally justified) cause.

B. The Solidarity Compass: Interest, Community, Altruism and Obligation

The intensity of the bonds that exist between members of the myriads of communities of solidarity we recognise around us, as well as the breadth of the issues to which solidarity applies, vary immensely.²⁰ These two are usually correlated: the broader the set of issues covered by the solidarity relationship, the greater the intensity of the solidarity bonds amongst its participants. But what unique factors account for the intensity of solidarity bonds in solidarity groups, and does solidarity require a threshold level of intensity or range of issues? Here, there is much disagreement in the literature. With an eye to the EU setting, we make a ‘pluralist’ case about the nature of solidarity bonds, or the motives and contexts that constitute solidarity. In order to do so in a stylised fashion we offer a ‘solidarity compass’ which locates solidarity at the intersection of two continuums, namely one between (*self*) *interest* and

¹⁶ This section draws on K Nicolaïdis and J Viehoff, ‘The Choice for Sustainable Solidarity in Post-Crisis Europe’ in G Banji, T Fischer, S Hare and S Hoffmann (eds), *Solidarity: For Sale? The Social Dimension of the New European Economic Governance* (Gütersloh, Bertelsmann Stiftung, 2012).

¹⁷ See, eg, the discussion in H Thome, ‘Solidarity: Theoretical Perspective for Empirical Research’ in K Bayertz (ed), *Solidarity* (Dordrecht, Kluwer Academic Publishers, 1999).

¹⁸ W Rehg, ‘Solidarity and the Common Good: An Analytic Framework’ (2007) 38 *Journal of Social Philosophy* 7, 8.

¹⁹ J Harvey, ‘Moral Solidarity and Empathetic Understanding: The Moral Value and Scope of the Relationship’ (2007) 38 *Journal of Social Philosophy* 22, 22.

²⁰ We use, eg, the term solidarity simultaneously to characterise the close relationship between husband and wife in a marriage, to refer to transnational activist movements focusing on a single political issue or to speak of our feelings about the victims of natural disasters in near and far places.

community, and one between *altruism* and *obligation* (Figure 19.1). We argue that relationships of solidarity usually fall somewhere on these two continuums but not at either extreme.²¹ Solidarity therefore describes a relationship that is motivated to some extent by each of these powerful motives, but irreducible to either one of them—this makes it analogous to Brian Barry’s definition of reciprocity mentioned earlier.

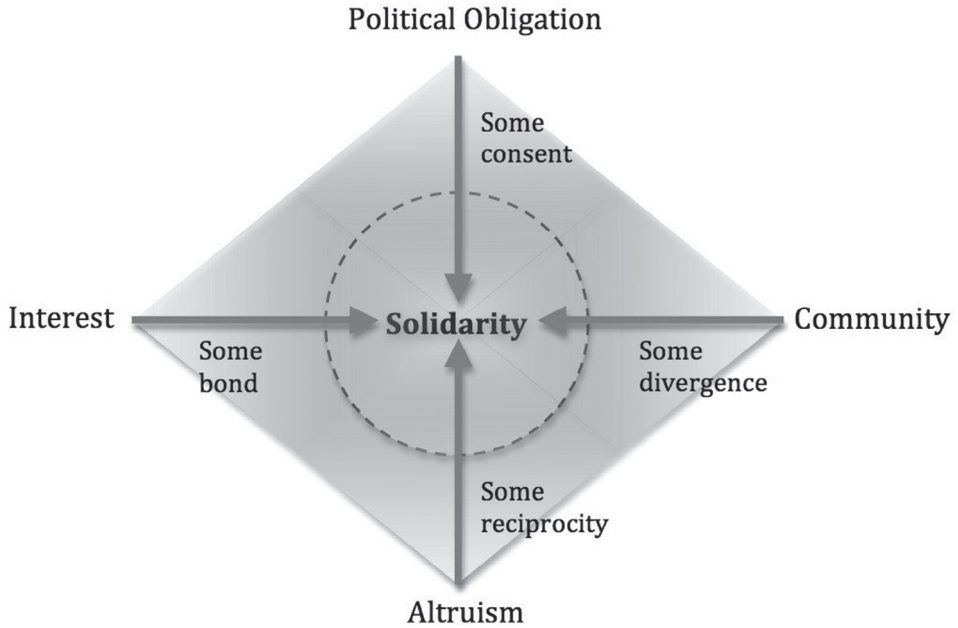


Figure 19.1: The Conceptual Space of Solidarity

(i) *Self-Interest versus Community*

The most often invoked argument in today’s EU debates is that ‘solidarity is in Germany’s (or France’s, etc) interest’. To be sure this is usually qualified as ‘enlightened’ self-interest or ‘long-term’ interest, either because it carries expectations of reciprocity or because the positive externalities induced by such solidarity buy a desired outcome (eg sustaining the Eurozone). Abstracting from the EU, we see that for different solidarity groups, there can surely be larger or smaller commonality of such baseline interests, which exist independently from the relationship and which do not internalise others’ interests. Commonality simple means that each of person, group or country stands a better chance of realising their independently given interests by participating in the group. If we take the extreme case where individuals

²¹ By ‘display’ we here mean that these factors would be mentioned by participants when asked about their reasons to participate in the solidarity group. Our use of ‘reasons’ throughout is meant to pick out those subjective reasons that agents think they have for participating in a relationship.

cooperate *only* to each realise their independent interest, then few would speak of solidarity at all (but rather of a cooperation or coalition between agents). So mere commonality of interest is not sufficient for solidarity.

This naturally leads to the thought that acting from solidarity requires that one acts in the belief that there also exists some form of loyalty, some kind of pre-existing bond with those one is in solidarity with, which in turn would justify some uncertainty on the nature of the 'return on (the solidarity) investment'. At the opposite end of pure self-interest, therefore, lies what we call the ideal of perfect *community*. Each member identifies with each other member to such an extent that self-interest becomes indistinguishable from common interest: the realisation of each individual's self-interest entails that each other individual's interests are satisfied, that is, they each see the success of their own life as dependent on the success of the group as a whole.²² We say that solidarity is located somewhere in between the notion of pure self-interest and ideal community, because surely no such comprehensive loyalty is required to invoke the notion of solidarity between members of a group.²³

What does this tell us about the existence or absence of solidarity in the EU? Member States have come to define their shared interests as ensuring long-term stability in their relationship rather than seeking the highest possible economic benefit for various powerful national constituencies in the short term. This is consistent with saying that there is nothing more than a commonality of interest. But there are also aspects of the EU that seem to transcend the realm of self-interest and to come (at least a little) closer to the ideal of community. Formally, the Treaty of the European Union speaks of an 'ever closer *Union*'. This might not be quite the same as a pledge of full-scale economic solidarity, but the implication is that Member States see themselves as taking part in something that is more than a convenient tool to realise self-interest, namely a relationship of solidarity.

(ii) *Altruism versus Political Obligation*

Our second continuum is that between altruism and (enforceable) moral obligation. Some think that altruistic behaviour, for example, charity or the simple generosity displayed by the good Samaritan's response to the stranger in need on the side of the road, are also possible instances of solidaristic behaviour. If that were true, then it would show that for some instances of solidarity, there does not seem to be any self-interest or reciprocity involved. But this seems doubtful: While we can imagine being in solidarity with others who cannot reciprocate immediately, we are somewhat wary of the suggestion that solidarity can characterise a relationship without *any* degree of reciprocal link. At the very least, a relationship is more rightfully

²² Feinberg says that the best way to judge different levels of community is by looking at our reactive attitudes: To what extent do I see praise for that person or group as praise *for me*? When that person or group commits a moral wrong, do I feel ashamed? J Feinberg, *Harmless Wrongdoing*, vol 4 (Oxford, Oxford University Press, 1990) 234.

²³ We leave open here the question whether it is perhaps even false to speak of 'solidarity' within families, precisely for the reason that they (ought to) realise the perfect ideal of community. The important point is that we can speak of political solidarity where no such strong forms of loyalty exist.

called solidaristic the more people have the ability to influence each other's destiny. But there is also another important aspect that the discussion of altruism brings to the forefront: altruistic acts are in many instances—for example, the case of the good Samaritan—supererogatory, that is, they go beyond what morality strictly requires us to do.²⁴ By contrast, many things we do in political life we consider non-supererogatory: morality does not make it optional whether we perform them. For example, citizens of states pay taxes, respect the law of the land, serve in times of war.²⁵ More generally, citizens in a political community plausibly owe obligations of fairness in cooperation to one another such that they mutually uphold each other's rights (see the next section). Not only do most people think that such political obligations are non-optional, but they are also such that most people think they are enforceable.

With this understanding of solidarity in mind, the analogy to the two core debates about domestic social justice and global justice are instructive here: On the one hand, solidarity amongst EU citizens falls short of the kind of solidarity we find amongst co-citizens or co-nationals. It is much less characterised by the kind of sense of obligation or a sense of community. On the other hand, the EU should be seen as much more plausibly as a possible future object for relations of solidarity than the relations amongst everyone on a global scale, amongst whom there is much less by way of community or identifiable interests that can only be realised in the process of cooperation.²⁶

Our discussion also points to a second, normative part of the EU solidarity puzzle: Why *should* the existence or absence of solidarity in the EU matter for whether or not egalitarian principles of social justice are to be implemented? After all, the fact that some people fail to see and act on their duties of justice seems an improper basis to conclude that there are no such duties. The best argument here is to be found in the latter Rawls: the relatively weaker developed sense of solidarity amongst citizens of the EU matters once we adopt a certain perspective about what it is that we want a conception of social justice to achieve; it matters if we aim for what Rawls called a *political* conception of justice with a public criterion. Such a conception of justice is not only persuasive to the removed observer but points to the motivational basis of citizens' actions. Once we assume that our conception of social justice requires such a public criterion, we must

show not merely that it delivers plausible judgments of justice but also that it would perform well in its political role. One must examine how it would be understood, implemented, and followed by actual citizens, what institutional designs they would actually implement under

²⁴ See the discussion in J Seglow and N Scott, *Altruism* (Maidenhead, Open University Press, 2007) 30–31.

²⁵ See, eg, P Eleftheriadis, 'Citizenship and Obligation' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of EU Law* (Oxford, Oxford University Press, 2012). See also G Klosko, *Political Obligations* (Oxford, Oxford University Press, 2005) and JA Simmons, *Moral Principles and Political Obligations* (Princeton, NJ, Princeton University Press, 1979).

²⁶ Of course, the realisation of common global problems like climate change might also change the disposition of everyone globally to accept that there is a form of community whose interests require joint action. But the sociological basis for this kind of solidarity appears quite weak at present when compared to the EU case.

its guidance, how they would live under such social institutions, and to what extent they would continue freely to endorse this public criterion and any basic structure designed on its basis.²⁷

The danger resulting from the lack of solidarity, therefore, is that it could render unachievable the desideratum of being publically acceptable by all participants to social cooperation. Rawls thought that a political conception of justice required a form of social union in which ‘human beings have in fact shared final ends and they value their common institutions and activities as goods in themselves’.²⁸ If EU citizens fail to see themselves as participants in such a social union, then there would be no room for a public political conception of justice.

Is this argument convincing? Rawls himself also provided a powerful response to this line of argument by suggesting that individuals governed by an effective sense of justice will *want* to live on terms characterised by principles of justice with others, if and when they find themselves cooperating in the production of social goods. The upshot from this line of argument for the EU might be the following: rather than being conditional upon the prior existence of certain social bonds and relationships of mutual benefit, justice may *motivate* us to create and sustain such bonds and relationships once certain kinds of (institutional) interaction obtain between us. In other words, solidarity, properly understood, cannot be reduced to an ex-ante emotional attachment but can also be an ex-post effect of reflecting on how we should regulate our actually existing social and political interdependence. The argument is all the more important in the light of our historic knowledge that existing bonds of solidarity—for example, in the case of national citizenship—are more often than not the result of intentional exercises in institutional and social engineering. This of course, was Brian Barry’s argument when he concluded (in the context of international justice) that we must complement justice understood as enlightened self-interest with considerations about fairness that do not derive from social bonds or mutual advantage.²⁹ We do not aim to resolve the difficult question about the sociological prerequisites of just institutions here. But we think that more reflection on the nexus between sociological solidarity and the applicability of substantive principles of justice is required, and that the EU provides a prime example for evaluating some of these questions.

IV. IS SOCIAL JUSTICE FUNDAMENTALLY DIFFERENT IN THE EU? RECIPROCITY AS THE COMMON CORE

The second reason that can be invoked to argue that issues of justice are fundamentally different at the national and EU level has to do with justice as fair reciprocity. At the beginning of this chapter, we discussed the idea defended by Rawls and others that in a society conceived of as a fair scheme of cooperation, those benefiting

²⁷ T Pogge, *John Rawls: His Life and Theory of Justice* (Oxford, Oxford University Press, 2007) 38–39.

²⁸ Rawls, *A Theory of Justice*, n 7 above, 458.

²⁹ B Barry, ‘Justice As Reciprocity’ in B Barry (ed), *Liberty and Justice: Essays in Political Theory 2* (Oxford, Clarendon Press, 1991) 237.

more from cooperation owe those less well off duties of reciprocity in the form of egalitarian shares of primary goods (income and wealth) as well as fair equality of opportunity. If we consider reciprocity a valid ground for social justice domestically, what follows for the institutional arrangement of the EU? In a recent string of publications, Andrea Sangiovanni has provided just such an account of social justice in the EU, which he calls a reciprocity-based internationalist (RBI) conception of EU solidarity.³⁰ The core proposition is that egalitarian socio-economic requirements ‘at all levels of governance can be understood as demands for a fair return in the mutual production of important collective goods’.³¹ So whenever individuals or collective agents jointly provide such goods, requirements of socio-economic justice come into play. But because such goods can be provided by different institutional systems or practices to different degrees and in different ways, there is no single set of distributive principles that is triggered by them: where the full set of important collective goods is cooperatively provided, social justice of the kind ideally found at the state level is appropriate (see section II). But where goods are provided to a lesser extent or perhaps in different ways, less demanding and less egalitarian requirements ensue. Given that the kind of distributive principle varies with the institutional form that it is meant to govern, RBI must accomplish the challenging task of deriving such a principle anew for each cooperative context.

To do so, we must ask what kind of collective goods are being provided in each case to determine what kind of socio-economic requirement follows. Sangiovanni identifies three such contexts in the EU case, which he calls *national solidarity* (joint production of collective goods within Member States), *Member State solidarity* (cooperation between EU states), and *transnational solidarity* (cooperation between EU citizens). Unsurprisingly, he finds that (both) principles of solidarity specific to the EU will be less demanding than at the national level.³² Sangiovanni thinks that the appropriate normative principle applicable to solidarity between Member States is a kind of fair distribution of the surplus that the EU generates paired with an insurance device against those risks of economic disadvantage or harm that states incur as a result of EU membership. Importantly, this principle is subject to the constraint that Member States and their citizens may keep whatever they entered the institutional arrangement with.³³ Thus, social justice amongst EU citizens either directly or through the relationship between their state is not subject to the equality-favouring principles discussed earlier which considers all individual talents to be a ‘common asset’ that must serve all and especially the worst off.

Approaching EU social justice through the lenses of fair reciprocity is clearly an innovative and potentially very fruitful approach. One core advantage of it is that it pays attention to the *distinctive character* of the EU as a supranational institutional

³⁰ A Sangiovanni, ‘Global Justice, Reciprocity, and the State’ (2007) 35 *Philosophy & Public Affairs* 3; A Sangiovanni, ‘Justice and the Free Movement of Persons: Educational Mobility in the EU and the US’ in D Hicks and T Williamson (eds), *Leadership and Global Justice* (London, Palgrave, 2012); A Sangiovanni, ‘Solidarity in the European Union’ (2013) 33 *Oxford Journal of Legal Studies* 1.

³¹ Sangiovanni, ‘Solidarity’, n 30 above, 6.

³² *ibid.*, 19.

³³ *ibid.*, 22–23.

arrangement that has taken on important public goods provisions for persons under its authority, and is in this sense very different from the global political landscape whilst obviously still falling short of the full range of goods that states provide to their citizens. Despite this crucial positive point, we want to rehearse here briefly arguments against theories that solely base demands for social justice on fair reciprocity.

To determine obligations for reciprocity, we must ask what counts as having contributed to a particular cooperative scheme and hence who falls under the scope of distributive justice in the first place. A familiar objection, formulated by Brian Barry a long time ago, was that grounding our conception of justice solely on cooperation or reciprocity may have unacceptable moral consequences since it excludes those most vulnerable in contemporary society (children, the severely handicapped, etc) from justice's reach: they would effectively 'fall through the grid', meaning that they would not be owed anything because they have not brought anything to the table.³⁴ To avoid this charge, Sangiovanni interprets the idea of contribution in a very lax way in the domestic case: it is sufficient to 'make it possible' for others to derive benefits from the state. In short, 'national solidarity says that an individual is integrated into a society when he aids in the reproduction of the state through his participation, contributions, and compliance'.³⁵ So Sangiovanni avoids Brian Barry's objection to reciprocity theories. But then in turn, one might think that this interpretation creates problems for transnational EU solidarity, or those outside the domestic context. In order for the most vulnerable citizens to be owed egalitarian shares, it must be strictly speaking the case that passive compliance is actually *sufficient*: quite frequently, all that we can say about the contributory effort of the least endowed is that they are not actively undermining the cooperative scheme, for example, that they do not transgress and undermine existing property rules, labour regulation, public order directives and so forth.

But if a person's 'mere passive acceptance', that is, non-interference when she counter-factually could, suffices for that person to be a contributor and owed equal shares, then those outside of a state's borders might also fit the bill. We can make the case that the very viability of states and the societies they protect and beyond this, the benefits that their citizens derive, is based on recognition by state outsiders, starting with territorial integrity and moving on to the recognition of jurisdiction, market standards or intellectual property rights. In the case of Economic and Monetary Union, citizens of some countries have 'made it possible' for citizens of other countries to disproportionately benefit from the scheme by merely passively tolerating the existing set of rules that work in the latter's advantage. So as a matter of theoretical consistency, it seems necessary either to remove from the egalitarian scheme passive compliers on the inside or add them from the outside, thereby questioning the categorical distinction between domestic and EU justice based on the broad notion of reciprocal contribution, making it instead a matter of degree.

³⁴ This was Brian Barry's main objection against (even fair) reciprocity-based theories of justice. Barry, 'Justice As Reciprocity', n 29 above, 235.

³⁵ Sangiovanni, 'Solidarity', n 30 above, 27.

In short, we believe that fair reciprocity ought to serve as a crucial ground but not the sole ground for obligations of substantive justice in the EU case. In this judgement, we are again indebted to Brian Barry who suggested that we must

see if there is not some principle of justice complementary to justice as reciprocity that comes into its own when we move outside the special case of justice among contemporaries who are members of the same society. I emphasize that it must be complementary because I believe that justice as reciprocity is here to stay. It is ... a cultural universal, and anyway it makes a lot of sense. Any theory of justice that tried to eliminate justice as reciprocity would be doomed from start. We must therefore seek to show how justice as reciprocity needs to be supplemented, not displaced.³⁶

To name just one principle that could supplement justice as reciprocity and might, at least in some cases, take the edge off the latter is the simpler concern that public institutional agents charged with distributing goods amongst persons must at least sometimes do so impartially, where impartiality also includes blindness as to whether or not a person has contributed in *any* meaningful sense to the cooperative surplus.³⁷

V. HOW IS SOCIAL JUSTICE DIFFERENT IN THE EU? CONSTRAINED CHOICE AS AN EU MARKER

A third prominent argument in favour of egalitarian socio-economic justice in domestic society starts from the observation that our membership in political society is ‘forced’, ‘coerced’ or ‘non-voluntary’. The substance of this argument is that the only way to justify or redeem our non-voluntary submission to the authority of the state is to organise the distribution of advantage from social cooperation in an egalitarian way.³⁸ One upshot of this kind of justification of substantive justice is that because of its non-voluntary character, domestic society and the principles of justice that it requires are categorically and fundamentally different from those private associations and institutions that we—individually and collectively—freely choose to join which do not call for just arrangements.

The implications for distributive justice at the EU level are clear: Membership in the European Union results from state consent. Therefore, at least from the perspective of the state as a collective agent, participation in the social cooperation that the EU gives rise to ought to be voluntary. Does this mean we are in the realm of (voluntary) solidarity not (obligatory) justice? Consider two key aspects of consent starting with *generality*. Every Member State has come to share in the costs and benefits of EU social cooperation by clearly and unequivocally consenting, and so

³⁶ Barry, ‘Justice As Reciprocity’, n 29 above, 235.

³⁷ See, eg, the discussion of such arguments in T Scanlon, ‘When Does Equality Matter?’ (2005), www.politicalscience.stanford.edu/sites/default/files/workshop-materials/pt_scanlon.pdf. This was of course also in certain respect the idea underpinning Barry’s conception of ‘justice as impartiality’. Barry, *Justice As Impartiality*, n 2 above.

³⁸ Two prominent recent defenders of such a view, based on the moral wrong of coercion, are Blake, ‘Distributive Justice’, n 12 above; and Nagel, ‘The Problem’, n 12 above. For a critique of the argument from non-voluntariness, see A Sangiovanni, ‘The Irrelevance of Coercion, Imposition, and Framing to Distributive Justice’ (2012) 40 *Philosophy and Public Affairs* 79.

no peripatetic justification concerning tacit consent is required. Moreover, such consent may be withdrawn and each Member State is at least nominally free to exit the institution at any point in time. Indeed, consent is restated for every major revision in the EU's legal and constitutional order since 'Member States are masters of the Treaties'. The second aspect is what we might call the *quality* of consent. We can relatively safely assume that consent to EU membership was in all cases adequately informed and intentional in that it followed after broad democratic deliberation of its costs and benefits. More succinctly: nobody ever signed the Copenhagen Criteria on a whim after a drunken night out. A further aspect of the quality of consent stems from the fact that it was given against a background of meaningful choice: States had and have, perhaps with some important qualifications, acceptable alternatives to EU membership available to them (one only needs to think of Norway or Switzerland). Most people in most states most of the time lack this liberty, either because they would be forced to cooperate should they fail to do so voluntarily, or because, where they have alternative options available to them—usually involving moving out of the country—these options are too costly to count as *acceptable* alternatives.³⁹ So if it is only the fact of forced or non-voluntary participation in a cooperative scheme that brings demanding requirements of socio-economic justice into play, then, consequently, we should conclude that the EU (being a voluntary association between states) will trigger no such requirements and we do not need a theory of distributive justice for the EU analogous to domestic political society.

How relevant is this apparent difference in terms of voluntariness between the EU and domestic society for questions of socio-economic justice? If we accept the argument from non-voluntariness at the normative level, one question that merits more detailed analysis is to what extent states and the collectives they represent actually do retain meaningful choices regarding distributive options in the actual basic structure of the EU. If EU policies, even while states have consented to them, involve internal distributional consequences which were either not foreseen or at least come to be constrained in ways that might not be foreseen under the initial conditions of choice and consent, then the circumstances of justice also change in the EU. In particular, individual states now start to be expected to uphold obligations stemming from these unchosen dynamics. Under such circumstances, could we not argue that Member States must either engage in egalitarian redistributions or have collective obligations *to restore* the possibility of meaningful choice in individual Member States, from exit from specific cooperative schemes to policy options whose consequences have become clearer? Moreover, we would argue that to the extent that the burden of internalizing such externalities could still be distributed in various ways, such distributions need to be the result of a collective choice on the part of the Member States. But the question remains how such collective choice is most justly delivered.

A different approach to the question of (non-)voluntariness in the context of the EU would be to deny its significance for grounding requirements of *socio-economic*

³⁹ For the general point, see Simmons, *Moral Principles*, n 25 above, ch 2. On the relationship between voluntariness and 'acceptable alternatives', see S Olsaretti, 'Freedom, Force and Choice: Against the Rights-Based Definition of Voluntariness' (1998) 6 *Journal of Political Philosophy* 53.

justice and to insist instead that questions about choice are ultimately questions about legitimacy or *political justice*, that is, the moral justifiability of the exercise of political power. Such questions we ordinarily think ought to be settled by implementing just procedures through which political decisions are reached in the EU. And it is in these procedures that individual national choice should be adequately reflected. In fact, the very idea of the EU as *demoicracy* relies on the thought that individual peoples freely choose to integrate their institutions, and the specific kind of legitimacy that strikes most as appropriate for the EU is one that proportionally combines elements of majoritarian supranational democratic decision making (which constrains *individual* choice) with the freedom to ‘pick and choose’ those policy areas in which states want to remain self-determining. Existing EU practices arguably seek to operationalise this idea, but all too clumsily and imperfectly.

Returning to the issue of economic justice that has been the focus of this chapter, the upshot of this view would be that our reasons for endorsing principles of socio-economic justice are analytically distinct from questions of voluntariness, coercion and political legitimacy. Where would this leave us? At the very least, it shows that if we want to construct a multilevel polity that is both just and legitimate, we face difficult questions about how much political choice at the Member State level is compatible with realising social justice at the EU level. The crucial insight that the EU conveys, one might think, is that the realisation of social and economic justice and the realisation of political legitimacy do not always fit nicely together and complement each other, and that we need to think much more about how political institutions (any political institutions!) can be organised in a way that realises both values to the fullest.⁴⁰ To bridge the gap as it were, the affect side of transnational solidarity and the kind of social recognition that underpins it matter enormously.

VI. CONCLUSION

Going back to some of Brian Barry’s reflections on reciprocity and justice beyond the state, our brief discussion has raised three issues that we consider of particular importance in thinking about the philosophical question of socio-economic justice in the EU. First: how are we to make sense of the claim that we ought not to aspire to a more egalitarian form of socio-economic justice in the EU because of the current lack of solidarity between EU citizens? Second: Even if we overcome the first preliminary objection, should we think that the requirements of social justice are fundamentally different because the EU provides different social goods to its members? Third: How real and how significant is the difference between the EU and domestic society concerning the voluntary nature of each of these associations? If we insist that the EU is distinct because its relevant agents are primarily states, then we must more directly address (a) the empirical accuracy of claims about acceptable alternatives to membership in the EU and in monetary union, and (b) the normative significance of voluntariness and consent for appropriate conceptions of socio-economic justice.

⁴⁰ A similar conclusion is drawn by Philippe Van Parijs in P Van Parijs, *Just Democracy: The Rawls–Machiavelli Programme* (Colchester, ECPR Press, 2011).

On a final note, we will not spare our readers Brian Barry's own assessment of the European project. Commenting in 2004 on its normative significance and future prospects, Barry doubted whether

the EU, in its present or any foreseeable future manifestation, will solve more problems than states could have solved by themselves in free co-operation with others. In fact, my contention is that it could do so only as the result of a total institutional transformation that is politically impossible. The worst thing about the EU has been that it banned most of the increasingly sophisticated policy instruments by which individual states had controlled their economies since 1918, but left their replacement to a decision process that was (and is) heavily stacked against equivalent EU-wide intervention ... This automatically inhibited politics from challenging markets successfully.⁴¹

He concluded by wondering whether 'those of us who accept the objectives of redistribution and a strong welfare state [should] be advocating the abolition of the EU right now?'⁴² We disagree with this grim assessment including on the need for total transformation; but we take these clear-headed observations to be a crucial reminder of how complex and how enormous the task of developing appropriate principles of socio-economic justice for the EU is going to be.

⁴¹ B Barry, 'What Did We Learn?' in P Van Parijs (ed), *Cultural Diversity Versus Economic Solidarity* (Louvain-la-Neuve, De Boek, 2004) 361–62.

⁴² *ibid*, 366–67.

