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Solidarity in the Eurozone

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SOLIDARITY IN THE EUROZONE

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Abstract:

Proposals for Eurozone reform aim to complete its institutional architecture by securing stability without creating moral hazard. Such policy arguments inevitably rely, however, on implicit assumptions about justice, or on what is owed to whom. A common assumption is that member states are solely responsible for what happens to them. This paper, written from the point of view of public law and legal theory, asks if this assumption is correct. The relevant idea is often considered to be that of solidarity. Yet, solidarity is a puzzling concept. Although it is mentioned in the EU treaties, it does not appear to create any clear duties of mutual assistance. Many prominent legal theorists argue that solidarity will only become relevant in the future, when new European institutions bring citizens together under a single Europe-wide political community. This paper argues, however, that these arguments are misleading. They are at least incomplete in that they miss the key role played by corrective justice. Unlike distributive justice, which applies within states but not among states, corrective justice applies to cooperative arrangements creating interdependence. Corrective justice creates a principle of redress, which requires that those who are unfairly burdened by an agreement should be compensated by those who caused the unfairness. Any state that was unfairly burdened by the Eurozone's flawed architecture, may thus have a claim of redress for the losses it incurred as a result of the unfairness. It follows that the programmes of financial assistance were not merely actions of self-preservation or prudence by the Eurozone. They were also manifestations of an existing European principle of solidarity based on corrective justice.

Keywords: Eurozone, fairness, corrective justice, distributive justice, European Stability Mechanism, European Union treaties, solidarity.

JEL Classifications: K12, K42, N10, N20.

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1. Introduction

Twenty years after its creation, the Euro has become the second most important currency in the world: it is used by 340 million people in 19 countries; it accounts for 36 per cent of global payments and 20 per cent of all central banks' foreign reserves; in all countries of the Eurozone a majority of the population is in favour of continuing membership.[1] Its success is partly the result of its adaptability. The financial crisis of 2008 resulted in important changes to the architecture of the Eurozone, including the creation of the European Stability Mechanism and the first steps towards banking union.[2] These reforms, however, have left the basic architecture intact.[3] In the past few years European leaders have been discussing bringing about more ambitious institutional reform in order to correct flawed practices and institutions but progress has been slow. Some inconclusive steps were taken at the Euro Summit held in December 2018, when it was decided to strengthen the European Stability Mechanism and to create 'a budgetary instrument for convergence and competitiveness for the euro area'. The details will be decided in the coming year. The delay is a result of the serious policy disagreements between member states.

The debate on a more ambitious reform of the Eurozone was started by the Report 'Towards a Genuine Economic and Monetary Union' issued by Herman van Rompuy, then President of the European Council, in December 2012 and the Commission's 'A blueprint for a deep and genuine economic and monetary union: Launching a European Debate'.[4] These reports were important in bringing about

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1 See Valentina Romei, 'Unfinished Business: Europe's Currency 20 years on' *Financial Times*, 30 December 2018.

2 For some general discussions see Loukas Tsoukalis, *In Defence of Europe: Can the European Project be Saved?* (Oxford: Oxford University Press, 2016), Jean Pisani-Ferry, *The Euro Crisis and Its Aftermath* (Oxford: Oxford University Press, 2014), and Federico Fabbrini, Ernst Hirsch Ballin, Han Somsen (eds.),*What Form of Government for the European Union and the Eurozone?* (London: Bloomsbury, 2015).

3 These measures were held to be fully within the existing law by the Court of Justice. See for example: C-70/12 *Pringle v Government of Ireland*, CJEU, EU:C:2012:756, Joined Cases C-8/15 P *Ledra Advertising v Commission and ECB*, Case C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag*, CJEU Grand Chamber 16 June 2016, EU:C:2015:400 and Case C-9/15 P *Eleftheriou and Others v Commission and ECB and others*, General Court, September 2016.

4 See https://www.consilium.europa.eu/media/23818/134069.pdf, and https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0777:FIN:EN:PDF

banking union and were followed in July 2015 by the more comprehensive 'Five Presidents' Report which set out plan for strengthening Europe's Economic and Monetary Union.[5] The Five Presidents Report set out three different stages for reform. At stage one, called 'Deepening by Doing', the union would use existing instrument and the current treaties to boost competitiveness and structural convergence and completing the financial union. At stage two, 'completing EMU', more far-reaching actions would create legally binding instruments for economic convergence, which may include a 'euro area treasury'. A third stage is envisaged to be completed at the latest by 2025 with more ambitious, if unspecified, reforms. The five Presidents proposed the launching of a European Deposit Insurance Scheme (EDIS), the creation of an advisory European Fiscal Board (which would coordinate and complement already existing national fiscal councils) and greater parliamentary involvement and control at both national and European levels, especially when it comes to the Country Specific Recommendations.

The Commission's White Paper on the Future of Europe was published on March 1, 2017.[6] The Commission published more concrete proposals in May and December 2017.[7] Separately, in September 2017 the new French President Emmanuel Macron published extensive proposals for creating a new fiscal capacity and effectively sharing risks within the Eurozone.[8] As we saw above, the Euro Summit has now started discussing these proposals for reform, but there has not been so far much progress towards agreement.

Separately from these official proposals, there have also been a series of policy suggestions by various academics and think tanks, some of which are listed below:

- A Common Budget,[9]

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5 https://ec.europa.eu/commission/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en

6 http://europa.eu/rapid/press-release_IP-17-385_en.htm

7 https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-emu_en.pdf.

8 President Emmanuel Macron, 'Initiative pour l'Europe: Discours d' Emmanuel Macron pour une Europe soveraine, unie, démocratique', available at elysee.fr and in English: http://international.blogs.ouest-france.fr/archive/2017/09/29/macron-sorbonne-verbatim-europe-18583.html

9 See e.g. Pisany Ferry, ch. 18, and Henrik Enderlein et al., 'Completing the Euro: A Road Map towards Fiscal Union in Europe' report of the Padoa-Schioppa Group, Notre Europe, Paris, June 2012,

- A Euro-Assembly,[10]
- Eurobonds,[11]
- A European Redemption Pact**,**[12]
- Eurobills**,**[13]
- Safe Bonds,[14]
- A Deposit Guarantee Scheme**,**[15]
- A compromise between risk sharing and market discipline.[16]

This debate has focused mostly on issues of economic policy, not on issues of wider constitutional principle. The various proposals seek effective ways in which a new architecture could potentially protect the Eurozone from further shocks, without creating wrong incentives and moral hazard. This debate, however, inevitably raises wider questions of fairness and legitimacy. The proposals try to avoid proposing too much burden sharing among the member states, in an effort not to challenge deeply held views in Germany and other states. Such proposals often take it for granted as an implicit starting point that the treaties create something like a 'sole responsibility' principle, whereby the member states of the Eurozone stand on their own against headwinds and do not owe obligations of assistance to one

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http://www.delorsinstitute.eu/011-3317-Completing-the-EuroA-road-map-towards-fiscal-union-in-Europe.html. See also Guntram Wolff, 'A Budget for Europe's Monetary Union', Bruegel Policy Contribution No 2012/22, December.

10 As proposed by T. Piketty**, '**What would a democratic Euro Zone Assembly look like?' *Le Monde Blog*, 22 March 2017, http://piketty.blog.lemonde.fr/2017/03/22/what-would-a-euro-zone-assembly-look-like/

11 See European Commission, *Green Paper on the feasibility of introducing Stability Bonds*, 2011, http://ec.europa.eu/economy_finance/articles/governance/2011-11-23-green-paper-stability-bonds_en.htm

12 German Council of Economic Experts, 'A European Redemption Pact', VoxEU.org, 9 November, 2011, http://voxeu.org/article/european-redemption-pact.

13 Philippon and Hellwig, 'Eurobills, not Eurobonds' VoxEU, 2011, http://voxeu.org/article/eurobills-not-euro-bonds

14 M. Brunnermeier et al., 'ESBies: safety in tranches', *Economic Policy* 2017, pp. 175-201.

15 Dirk Schoenmaker and Guntram Wolff, 'What Options for European Deposit Guarantee?' *Bruegel*, 8 October 2015), http://bruegel.org/2015/10/what-options-for-european-deposit-insurance/

16 As proposed by a group of German and French economists: Benassy-Quere, Agnes, Markus K. Brunnermeier, Henrik Enderlein, Emmanuel Farhi, Marcel Fratzscher, Clemens Fuest, Pierre-Olivier Gourinchas, Philippe Martin, Jean Pisani-Ferry, Helene Rey, Isabel Schnabel, Nicolas Veron, Beatrice Weder di Mauro, and Jeromin Zettelmeyer, *Reconciling Risk Sharing with Market Discipline, A Constructive Approach to Euro Area Reform*: *Policy Insight No 91* (CEPR, London, 2018).

another. I believe that we have good reason to question this view. This is what I propose to do in this paper.

The 'sole responsibility' assumption underlies much of the current debate. Many take it for granted for example, that the current position is that 'transfers' from one state to another are not required (so many German politicians explain how they will resist the introduction of a 'transfer union'). Even critics of the standard view accept this as an implicit assumption.. The German philosopher Jürgen Habermas, for example, has written that the present economic rationales of the Eurozone are incompatible with social justice and democratic legitimacy. Although he advocates 'transfers' in the Eurozone he accepts that they are not required under the current institutional scheme. Habermas warns that without a sense of justice, the project of reform will make the political climate worse, not better for the European project. He writes: 'A technocracy without democratic roots would not have the motivation to accord sufficient weight to the demands of the electorate for a just distribution of income and property, for status security, public services and collective goods when these conflict with the systemic demands for competitiveness and economic growth'[17] His proposal is therefore to bring about radical change. Habermas contrasts 'technocratic' blueprints for dealing with the crisis and a project for a 'supranational democracy in the core of Europe'.[18] He ultimately agrees with the aims of the Commission proposals for completing the EMU by creating both coordination of economic policies and an EU budget 'for the purpose of country-specific stimulus programmes' as well as 'eurobonds' and a 'partial collectivization of state debts'.[19]

Habermas finds these unrealistic, however, without prior changes in 'democratic legitimacy'. His argument is that the present arrangement is unsatisfactory from the point of view of democracy because of an asymmetry between the democratic mandate of each member state government and the very

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17 Jürgen Habermas, 'Democracy, Solidarity, and the European Crisis' in Luuk van Middelaar and Philippe van Parijs (eds.), *After the Storm: How to Save Democracy in Europe* (Tielt: Lannoo, 2015) 101. See also Jürgen Habermas, *The Lure of Technocracy* (Cambridge: Polity Press, 2015).

18 Habermas, 'Democracy, Solidarity, and the European Crisis' 98.

19 Habermas, 'Democracy, Solidarity, and the European Crisis' 100.

much wider scope of the Eurozone's effects. Citizens understand that their own economic conditions are affected by decisions over which they have no influence, since they were taken outside their own political community. Since they cannot participate in the most important decisions that affect them, they become alienated from the political process. He believes that the loss of legitimacy that we observe in election after election in the past few years is due to this asymmetry. Hence, for solidarity to become a true principle of the European Union, we must first have a cohesive political community with strong institutions that inspire democratic legitimacy. Habermas proposes, thus, that the members of the EU should bring about a new supranational democracy by expanding EMU to 'political union', by a 'core' of members, as follows:

> 'The decision for such a core Europe would amount to more than merely a further evolutionary step in the transfer of particular sovereign rights. With the establishment of a common economic government, the red line of the classical understanding of sovereignty would be crossed. The idea that the nation states-states are 'the sovereign subjects of the Treaties' would have to be abandoned'.[20]

One of the advantages of this political transformation, for Habermas, is the fact that after this change happens, solidarity will finally become a relevant consideration throughout the Union. The argument assumes that solidarity is not full part of the current obligations of the member states. They remain free of those obligations while the structure is still intergovernmental or international.

In what follows, I will challenge this assumption by suggesting an entirely new way of interpreting the European Union.[21] I will argue that obligations of solidarity are real under the present treaties. This is so even though these treaties put in place an internationalist framework, which does not resemble a federal or any other political community, such as the one Habermas has in mind. In the view that I will

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[20] Habermas, 'Democracy, Solidarity, and the European Crisis' 103.

[21] I seek to develop this 'internationalist' way of understanding the European Union in a forthcoming book, which I tentatively call: *A Union of Peoples: Europe as a Community of Principle*.

defend, solidarity does not need a radical new framework that approximates a political community. This is because obligations of solidarity derive directly from the existing agreements and the recent practices of interdependence of the member states, where the flow of risks, opportunities and costs is already a matter of common ‘structural’ responsibility. This is so because obligations of solidarity arise not from distributive justice but from an understanding of corrective justice as it applies to the cooperation of states. Their rationale is not one of fair distribution, but one of fair redress for a loss caused by some wrongful act. Solidarity in the European Union, I will argue, is not a matter of social justice, as Habermas implies, but a matter of fairness in cooperation, which informs the current European agreements and gives content to their interdependence.

2. The question of solidarity

The question of solidarity in Europe has become real and pressing after the financial crisis of 2008, which affected the member states of the European Union very differently. Some states were less well prepared to withstand the drying up of credit. The Union took steps to assist the worst affected economies of the Eurozone: Greece, Ireland, Portugal, Spain and Cyprus.[22] The member states made available funds for emergency loans.[23] In due course, the members of the Eurozone sought to amend and supplement the treaties. They created a new international institution, the European Stability Mechanism (‘ESM’) with a mandate to assist member states in financial troubles.[24] In a significant shift of policy, the European Central Bank started purchasing sovereign bonds. The response to the crisis has therefore been both significant and innovative.

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22 In addition, there were also programmes of assistance to some non-Eurozone states, such as Hungary, Latvia, and Romania.

23 Some scholars argued against this initial assumption with regard to Art. 122(2) TFEU. See for example Tuori and Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge: Cambridge University Press, 2014) 138 ff.

24 Extensive and very helpful accounts of the constitutional legal aspects of the crisis are offered by Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge: Cambridge University Press, 2014), Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford:

The Court of Justice has found that these rescue operations were lawful.[25] But what was their moral character? The question remains controversial. Were they manifestations of justice*,* discharging an obligation of solidarity towards the weaker states? Some believe that the Eurozone did too little to assist its weakest members.[26] Others think it did too much.[27] All of these positions may rely on some conception of what is fair or unfair. These matters depend on our interpretation of the purpose and nature of the Eurozone agreements but they also turn on deeper assumptions about the moral obligations arising out of long-term cooperation. This vocabulary of justification is not optional. Answering the question of justice and legitimacy will inform both further interpretations of the treaty, but also the proposals for treaty reform into the future. If requirements of justice exist, they will inevitably inform the appropriate interpretation of legal principles in future cases.[28]

So we should ask: was the emergency assistance provided by the EU to some member states required by some *deeper* obligation of social justice inherent in the law of the treaties? Was it perhaps the expression of a new form of transnational solidarity generated by European integration? Or was it the opposite, an unjust decision which went beyond what had been agreed?

Oxford University Press, 2015) and Federico Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (Oxford: Oxford University Press, 2016).

25 See Case C-370/12, *Pringle*, ECLI:EU:C:2012:756 and Case C-62/14, *Gauweiler et al. v Deutscher Bundestag,* ECLI:EU:C:2015:400, which was a preliminary reference from the German Constitutional Court in BVerfG, Beschluss des Zweiten Senats vom 14. Januar 2014 - 2 BvR 2728/13 - Rn. (1 - 24).

26 See for example Ashoka Mody, *Eurotragedy: A Drama in Nine Acts* (Oxford: Oxford University Press, 2018) and Joseph E. Stiglitz, *The Euro: How a Common Currency Threatens the Future of Europe* (New York: Norton, 2016) 85-144.

27 For example, Udo di Fabio, 'Karlsruhe makes a Referral' 15 *German Law Journal* (2014) 107-110 and Hans Werner Sinn, *The Euro Trap: On Bursting Bubbles, Budgets, and Beliefs* (Oxford: Oxford University Press, 2014) 343. Sinn thought that rather than new loans, Greece should have been given significant debt relief: 'The right mixture of debt relief, privatization, and wealth levies could be jointly negotiated in a Paris Club debt conference convened to reset the Eurozone. The European debt crisis has many causes, and creditors and debtors alike share the responsibility. A way to distribute the burden fairly should thus be sought—and it is important that it be found soon' (p. 343).

28 For this general view of law see Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), N. E. Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007), Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Oxford: Oxford University Press, 2009). My own defence of this view is in Pavlos Eleftheriadis, *Legal Rights* (Oxford: Oxford University Press, 2008) and more recently in Pavlos Eleftheriadis, 'Power and Principle in Constitutional law' 45 *Netherlands Journal of Legal Philosophy* (2016) 37-56.

The most common way of asking the question of solidarity is within a single political community, where each citizen owes duties to other citizens. This is, for example, the way in which Jürgen Habermas discusses solidarity in the European Union. As we saw above, Habermas criticises the European Union for running the risk of becoming 'a technocracy without democratic roots'. When he speaks of democratic roots he implies that solidarity needs to be supported by the identification of each person with a single political community as its citizen. He says that the EU's 'technocratic' response runs the risk of lacking 'the motivation to accord sufficient weight to the demands of the electorate for a just distribution of income and property, for status security, public services and collective goods when these conflict with the systemic demands for competitiveness and economic growth'.[29]

Habermas' argument has a compelling logic, which is shared by standard defences of the welfare state. The argument assumes that citizens of the same state will have the psychological motivation to recognise a duty of solidarity to one another, normally expressed by ideas and principles of social justice. Citizens do not have the same identification with outsiders. They believe that they do not owe the same duties of solidarity to those outside their own borders.

Europe's task, for Habermas, is to recreate the bonds that exist within states so as to extend social justice outwards. For that reason the Union needs its own and novel 'democratic roots'. If Habermas is right, then the introduction of meaningful solidarity in the European Union presupposes the transformation of its institutional architecture and its understanding of citizenship. Habermas is clearly aware of the seriousness of the political challenge. He proposes a 'real political union', which will change the circumstances of European citizens.[30] Social justice can then become a component of a sharing in power under the institutions of a political community. In

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29 Jürgen Habermas, 'Democracy, Solidarity, and the European Crisis' in Luuk van Middelaar and Philippe van Parijs (eds.), *After the Storm: How to Save Democracy in Europe* (Tielt: Lannoo, 2015) 95-107, at 101. See also Jürgen Habermas, *The Crisis of the European Union: A Response* (Cambridge: Polity Press, 2013).

30 Habermas, 'Democracy, Solidarity, and the European Crisis' 100.

order to achieve solidarity, we will need to abandon borders within Europe so as to produce a single, integrated political community.

Is this a valid argument? I do not think it is. Solidarity is not simply a matter of political union. There are two reasons. First, solidarity is not limited to the model of distribution of resources from citizen to citizen on the basis of fair shares. Second, solidarity can encompass relations between persons in relationships that occur in contexts outside that of citizenship. As I will argue in the pages that follow, solidarity also makes sense as an act of assistance under a principle of mutual aid or a principle of redress, without any thought of fair shares.

We must however start our discussion by returning to the European Union treaties themselves. They are not silent on solidarity. The treaties provide at article 3(3) TEU that the Union shall 'promote social justice' and promote 'economic, social and territorial cohesion, and solidarity among Member States'. Solidarity is therefore, part of the scheme of the treaties. It is not entirely clear, however, what these general statements mean. The requirement to 'promote' solidarity is an odd choice of words. It seems to refer to an intention to create something in the future. It does not refer to a pre-existing bond of solidarity giving rise to existing duties. Perhaps, like other general statements of principle of this part of the treaties, these statements do not intend to create clear obligations, moral or legal, on the institutions of the European Union or the member states.[31]

These statements are supplemented by the mention of solidarity in particular policies. Solidarity is mentioned in the context of asylum policies[32] the general

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31 See Esin Küçük, 'Solidarity in EU Law: An Elusive Political Statement or a Legal Principle with Substance?' 23 *Maastricht Journal of European and Comparative Law* (2016) 965-983 and Malcolm Ross, 'Solidarity – A New Constitutional Paradigm for the EU?' in M. Ross and Y. Borgmann-Prebil (eds.), *Promoting Solidarity in the European Union* (Oxford University Press, 2010) 23-45. For a discussion of the (relatively limited) role of the Charter of Fundamental Rights in the protection of social welfare rights see Síofra O'Leary, 'Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union' in Grainne De Burca (ed), *EU Law, and the Welfare State: In Search of Solidarity* (Oxford: Oxford University Press, 2005) 39-87.

32 See Article 67 TFEU, which states that the EU's asylum policy shall 'ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals'. In addition, Article 80 TFEU provides: 'The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts

‘solidarity clause’ in case of natural or man-made disasters,[33] and in the detailed mechanism for distributions of funds to the member states. These funds are very important for the distribution of resources from the wealthier states to the poorer ones. Nevertheless, the total amount of spending on such projects is small in relation to the overall EU economy. The small size of these transfers strengthens the argument that solidarity in the European Union is not really a functional principle, or that it is unrelated to social justice. It is not a relevant principle, or it is only in its early stages of development.

Many sophisticated commentators observe that the social dimension of the EU is minimal. For example, commenting on the ‘patchwork’ of social justice provisions in EU law, Gráinne de Búrca wrote that solidarity had a ‘constructive potential’ which could gradually ‘promote a degree of solidarity and mutual responsibility—however tentative and limited at first—between states, citizens, and other residents within the enlarging European space’.[34] Such cautious endorsements of solidarity, however, cannot hide the fact that social justice is a very small part of the EU. So they encourage the view that since the EU is not a state, the normal rules of distributive justice do not apply to it – such principles apply instead onto the states.

This is a view reflected in the writings of influential legal scholars[35] Professor Christian Joerges, a leading scholar on European Union law, argues that the European Union is incapable of having a proper policy towards social justice. Joerges refers to and endorses the argument made by Friedrich Carl von Savigny, the leading German legal scholar of the nineteenth century that justice applies to private

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adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle’. The principle has not, however, made any difference in practice. See Joined Cases C-411/10 and C-493/10 *N.S. and M.E.*, EU:C:2011:865, par. 93.

33 Article 222 TFEU.

34 Gráinne de Búrca, ‘Towards European Welfare?’ in Gráinne de Búrca (ed.), *EU Law, and the Welfare State: In Search of Solidarity* (Oxford: Oxford University Press, 2005) 9.

35 This is also the view defended by Andrew Williams, *The Ethos of Europe : Values, Law and Justice in the EU* (Cambridge: Cambridge University Press, 2010), Alexander Somek, ‘The Preoccupation with Rights and the Embrace of Inclusion: A Critique’ in Dimitry Kochenov, Gráinne de Búrca, Andrew Williams (eds), *Europe’s Justice Deficit?* (Oxford: Hart, 2015). 295–310, and Neil Walker, ‘Justice in and of the European Union’, in Dimitry Kochenov, Gráinne de Búrca, Andrew Williams (eds), *Europe’s Justice Deficit?*) 247–258, which he concludes with these words: ‘And this leaves us with no alternative but to continue to seek to fashion a basic structure of political institutions that satisfies the right to justification of all Europeans’.

relations but not to the relations between states. In Joerges' reading, Savigny has shown that 'interstate relations … remain in an unruly state of nature governed by power and politics rather than law'.[36] From Savigny's premise Joerges draws the conclusion that the European Monetary Union is *incapable* of imposing a uniform architecture of social policy. It does not have the means. Europe has instead created a competitive 'single market' where each state seeks to have a social policy on its own, allowing for great 'socioeconomic diversity', which the institutions of the EU cannot address.

Joerges adds that the various economies have diverged rather than converged since the creation of the Union. In the process, they have rendered any EU social aspirations powerless. Europe's idea of 'a highly competitive social market economy' results in the undermining of social justice and solidarity everywhere in the EU. He says that 'the socioeconomic diversity of the Union was treated with benign neglect and an institutional framework with the potential to manage the implication of this move was not established'.[37] He finds this 'fateful' for the 'prospects of Social Europe'.[38] The only policy that, for Joerges, is working at EU level is that emanating from the European Central Bank, which in his view is insensitive to the concerns of social justice. Hence, the 'Maastricht arrangement was an ill-defined political compromise, rather than a sustainable accomplishment of constitutional validity and strength', which has led to 'authoritarian managerialism'.[39] The only way of overcoming this stalemate, for Joerges, is through the creation of a 'transnational democracy' through federal institutions. He insists that such a transformation is

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36 Christian Joerges, 'Social Justice in an Ever More Diverse Union' in Frank Vandenbroucke, Catherine Barnard and Geert de Baere (eds.), *A European Social Union after the Crisis* (Cambridge: Cambridge University Press, 2017) 92-119, at 94 (citing from Savigny's *System des Heutigen Römischen Rects,* vol. III, 1849).

37 Joerges, 'Social Justice in an Ever More Diverse Union' 107.

38 Joerges, 'Social Justice in an Ever More Diverse Union' 107.

39 Joerges, 'Social Justice in an Ever More Diverse Union' 111. Joerges follows here similar arguments made by Fritz W. Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' 40 *Journal of Common Market Studies* (2002) 645–70.

urgent, because the present arrangements do not provide a solid basis for solidarity and social justice.[40]

In a similar spirit, Udo di Fabio, a former Judge at the German Federal Constitutional Court who was a member of the court in some important decisions relating to the EU, has reached even more extreme conclusions.[41] He is the most outspoken advocate of the 'sole responsibility' principle and has argued against the Eurozone's rescue of Greece, Portugal and Ireland on both legal and moral grounds. In his view, each member state of the EU must be the master of its own fate. If the states of the periphery could not survive in the Eurozone, this is their problem, he suggests. They must face the consequences of their actions *alone*, even if this will lead their peoples to poverty and destitution. Di Fabio argues that the Eurozone crisis was caused by 'bad Europeans', who 'fudged their budgetary numbers or watered down, sometimes even disregarded, the stability criteria'.[42] In his view, the crisis was 'largely caused by massive violations of the law', and was therefore the responsibility of those member states that took wrong decisions. For di Fabio the creation of the European Stability Mechanism 'was a reaction that was not particularly well-aligned with the spirit of the European Treaties' because the currency union, in di Fabio's views, 'insists on the budgetary autonomy of each and every Member State'.[43]

Such views on the essentially national nature of social justice are also evident, although not explicitly articulated, in the 2011 judgment of the German Constitutional Court regarding the constitutionality of the EU programmes of

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40 A similar view is taken by Frank Vandenbroucke, who proposes a new 'Social Union' as the appropriate response to the current absence of proper institutions of solidarity. See Frank Vandenbroucke, 'The Idea of a European Social Union: A Normative Introduction' in Frank Vandenbroucke, Catherine Barnard and Geert de Baere (eds.), *A European Social Union after the Crisis* (Cambridge: Cambridge University Press, 2017) 3-46.

41 Di Fabio is also an outspoken advocate for conservative values. In his book *Die Kultur der Freiheit* (Munich: C. H. Beck, 2005) di Fabio rejected 'uncritical internationalism' and advocated a return to traditional values requiring a renaissance of marriage and family, a return to the religious community and the nation as the 'common destiny'.

42 Udo di Fabio, 'Karlsruhe makes a Referral' 15 *German Law Journal* (2014) 107-110, at 110. In fact, this sentence is not true. Spain and Ireland needed financial assistance but did not violate the Growth and Stability Pact whereas Germany and France violated the Growth and Stability Pact and did not require assistance.

43 di Fabio, 'Karlsruhe makes a Referral' 109.

financial assistance for the Eurozone.[44] The Court asserted that the German constitution created a principle of 'budgetary autonomy'. This was not created by an explicit provision in the text of the Constitution, but through the establishment of a fundamental individual right to vote in an election (in Article 38 of the Basic Law) so that 'there is a violation of the right to vote if the German Bundestag relinquishes its parliamentary budget responsibility with the effect that it or a future Bundestag no longer exercise the right to decide on the budget on its own responsibility'.[45] In other words, for the Court, any decision that affects the German budget must be taken by the German Parliament itself. For the German Constitutional Court sharing the process of decision-making with other countries would be unconstitutional, if it did not give the last word to the German parliament.

This principle of 'budgetary autonomy' was a new development, which had not been stated in exactly those terms in the earlier Maastricht and Lisbon Treaty judgments of the Court. Put in such broad terms, the principle may have far-reaching consequences. It may cast doubt on Germany's participation in the European Monetary Union. By joining with other states in giving the European Central Bank exclusive competence in monetary policy, Germany exposes itself to policy risks that its Parliament cannot control, in potential violation of 'budgetary autonomy'.

Nevertheless, in its 2011 judgment the Court concluded that neither the Euro nor the programmes of financial assistance violated the principle of 'budgetary autonomy'. In particular, as designed and implemented the financial assistance programmes provided that Germany would only 'guarantee' and not pay the loans of other member states. Such guarantees were in line with budgetary 'autonomy', the court said, because the amount of money lent to Greece was both fixed and not too high and therefore was 'constitutionally unobjectionable'.[46] The Court ultimately found that the system of Eurozone financial assistance did not change the arrangement set out by the Lisbon Treaty federal law of 2008, whereby Germany did

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44 Federal Constitutional Court, Judgment of 07 September 2011, 2 BvR 987/10, paras. 1-142. Di Fabio was one of the judges in this case.

45 Federal Constitutional Court, 2 BvR 987/10, par. 121.

46 Federal Constitutional Court, 2 BvR 987/10, par. 135.

not 'submit to the automatic creation of a liability community which is complex and whose course can no longer be controlled'.[47]

It is hard to make sense of this judgment. Is the problem the size of the potential programme of assistance? But this was decided by the elected Parliament, so it cannot be contrary to a 'right to vote' – how can a decision taken by parliamentary vote be contrary to the principle of parliamentary control? Is the problem the uncertainty in the total amount of potential liability? Yet, there is no uncertainty in any of the programmes. The guarantees created a ceiling for Germany's liability..

Although the Court does not say so explicitly, it seems to imply that the underlying principle is something else: any risky or open-ended budgetary commitment to outsiders will not be acceptable under the German Constitution, if it is not fully within the exclusive control of *German* institutions.[48] This would apply, one supposes, for example to a state-backed scheme of social benefits or pensions for European citizens, such that we find in other currency unions, for example in the United States. It follows that for the Court, social justice must be a national matter or at least something that applies only within a state's borders – at least until the European Union replaces those institutions with pan-European scope. The sharing of financial risks with foreign partners is therefore held to be 'undemocratic', even if decided by democratic institutions, for example the German parliament. It is hard to see how this argument works within any familiar understandings of democracy.[49] A parliament can decide to enter into multi-lateral cooperation with other states

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47 Federal Constitutional Court, 2 BvR 987/10, par. 137.

48 The court concludes at par 137: 'The German Consent Act to the Treaty of Maastricht (Federal Law Gazette II 1992 p. 1253; now as amended by the Treaty of Lisbon, Federal Law Gazette II 2008 p. 1038) continues to guarantee with sufficient constitutional detail that the Federal Republic of Germany does not submit to the automatic creation of a liability community which is complex and whose course can no longer be controlled …'.This judgment of the Court has many obscure points, not least the idea that it is unconstitutional for a government to take risks in economic policy. For a detailed discussion see Pavlos Eleftheriadis, 'The Euro and the German Courts' 128 *Law Quarterly Review* (2012) 216.

49 See Pavlos Eleftheriadis, 'Democracy in the Eurozone' in WG Ringe and P Huber (eds), *Legal Challenges Arising out of the Global Financial Crisis: Bail-outs, the Euro, and Regulation* (Oxford: Hart Publishing, 2014), 27-52 and Pavlos Eleftheriadis, 'The Euro and the German Courts' 128 *Law Quarterly Review* (2012) 216-220.

without abdicating its powers. Any international commitment can be withdrawn. A parliament remains therefore in control, since it can legislate again on the same matters, if it wishes. Indeed the Court of Justice of the European Union recently confirmed this in the recent *Wightman* case, where it concluded that the United Kingdom may unilaterally revoke its notification under Article 50 TEU.[50]

It is unclear, moreover, why the Court believes that such a principle of budgetary autonomy is a constitutional principle at all. There is nothing undemocratic in permitting parliament, or the government, if suitably empowered by parliament, to decide to share its economic future with that of other nations. Indeed, the European Monetary Union is precisely such a domain of shared risk, where the German taxpayer's contributions may be dependent on decisions taken elsewhere. The German Constitutional Court held such an arrangement constitutional in its *Maastricht* judgment, when it approved Germany's participation in the European Monetary Union. Why take a different view now? It is much more plausible to say that Germany's decision to share its monetary policy was precisely a democratic decision taken by democratic institutions. The same applies to the financial assistance set up in response to the financial crisis created through the European Monetary Union. The German Constitutional Court does not explain why democracy permits the sharing of monetary policy in principle, but does not allow taking measures that become necessary because of that monetary policy. It merely assumes this to be the case, without providing any reasons.

In summary, the views we have examined by Habermas, di Fabio and the German Constitutional Court, suggest that solidarity is in effect limited to the national domain. I will now argue that this assumption is mistaken. I will criticise in particular the premise that solidarity applies only within states and that solidarity does not apply to international or intergovernmental structures. I will argue that solidarity is not the exclusive preserve of a relationship of citizenship. A decision to give aid to someone in need, or the decision of a state to provide aid to an impoverished neighbour can be an expression of solidarity, because solidarity has

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[50] See Case C-621/18, *Wightman v Secretary of State for Exiting the European Union, Court of Justice of the European Union* (Full Court), 10 December 2018, ECLI:EU:C:2018:999.

two separate bases, one deriving from *distributive* justice and one deriving from *corrective* justice. Only the first is restricted to the domestic case.

3. Distributive and corrective justice

The distinction between distributive and corrective justice is very old and was first noted by Aristotle in the *Nicomachean Ethics*. Yet, with some exceptions, it has not yet been deployed in the debates concerning international justice.[51] It appears that when scholars refer to justice in an international context they have in mind only distributive justice. They seem to work on the presupposition, or at least the mental picture, of solidarity relying on a central distribution of a good to beneficiaries according to criteria of need or merit. This is the typical model of the distribution of fair shares outlined by Aristotle and repeated many times in modern philosophy. It is the standard model of distributive justice as justice in distribution. John Rawls too identifies social justice with distributive justice when he says on the 'subject of justice' that: 'the primary subject of [social] justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation'.[52] In the case of the state the distribution takes place through central taxation and social welfare schemes. The distribution is not from state resources, but effectively from the mostly better off taxpayers to the least well off, as they receive public assistance through public funds or through freely available services, such as education and health care.

It is clear that such a model of distributive justice cannot apply to the European Union. This is so for a number of reasons. First, there is no central taxing authority. Second, there is no central spending power. Third, there are not in place any institutions with the appropriate powers for deciding on the appropriate test of

51 See for a valuable exception, Thana Campos, *The Global Health Crisis: Ethical Responsibilities* (Cambridge: Cambridge University Press, 2017), where the right to health is recast as an obligation of 'commutative' justice and not 'distributive' justice.

52 John Rawls, *A Theory of Justice*, revised edition (Oxford: Oxford University Press, 1999) 6. Rawls refers to Aristotle's *Nicomachean Ethics* 1129b-1130b in support of his view of social justice; Rawls, *A Theory of Justice* 9.

distribution. Fourth, we do not have clear institutions for the accountability of such decisions. Fifth, we do not have the underlying 'community' or 'demos' which would see the public support the transfer of funds from one part of the community to another. For these reasons the advocates of political union as a pre-condition of institutions of solidarity, such as Habermas, di Fabio and Joerges, must be right to rule out a general distributive principle for the European Union under the present institutional arrangements. If social justice makes sense only within a territorial state, then it can have no application to the European Union as it is today.

This argument, however, is not the end of the matter. The relations between states just like the relations of persons are subject to a second dimension of justice, which since Aristotle we call 'corrective justice'. Corrective justice does not provide for the distribution of something from a central source, but accounts for the just relations among two or more parties in the event of cooperation, exchange or reparation.[53] Corrective justice addresses injustice by restoring the original positions between a person that suffered a loss and the person who gained a profit from the other's expense. The just redress is the arithmetic mean between the part of the earner and the part of the loser.[54] In Ernest Weinrib's apt description, the organizing idea is that of 'correlativity'. The 'elements of liability under corrective justice can be explicated only in terms of concepts whose normative force applies simultaneously to both parties'.[55] Unlike distributive justice, corrective justice takes the parties to be equal. For corrective justice 'liability involves a conception of fairness that recognizes the equal normative status of the two parties and treats their normative positions as mirror images of each other'.[56] These ideas have generated some very sophisticated arguments about the substance of the law of tort, contract and unjust enrichment. There is no need to rely on these theories in any detail here. What we need for the purposes of our argument about the European Union is only the idea that states are independent agents, similar to corporations or other collective agents are subject to

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53 For a general historical account of Aristotle's distinction between distributive and corrective justice see Izhak Englard, *Corrective and Distributive Justice: From Aristotle to Modern Times* (Oxford: Oxford University Press, 2009).

54 See Englard, *Corrective and Distributive Justice* p. 8.

55 Ernest J. Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) 10.

private law when they are cooperating towards a common project, sharing in the process rights, obligations and risks.

Such relations create mutual moral obligations from each state to all others that are analogous to legal obligations arising in contract law. I say that are merely analogous and not identical, because there is no contract law in the international sphere. Strictly speaking, since there is no central power of enforcement in international law and since all legal obligations are to some extent provisional under public international law, there cannot be contract law. So the analogy with contract is imperfect. Still however, states do owe each other duties on the basis of their agreements.

This is not an original thought. In the *Law of Peoples*, Rawls argues that the international community must be based on principle of fairness that apply to states. He argues that such principles would have been adopted by states or peoples in a hypothetical original position for the law of peoples. In Rawls' account, the relevant agents here were the states, not their citizens directly. Rawls argues that inequalities between states may be unjust 'because of their unjust effects on the basic structure of the Society of Peoples, and on relations among peoples and among their members'.[57] He further argues that in such a scenario the parties, by which he means the states, will 'formulate guidelines for setting up cooperative organizations, and will agree to standards of fairness for trade as well as to certain provisions for mutual assistance'.[58]

Nevertheless, the principle of justice Rawls has in mind does not presuppose a central distributing mechanism. It applies in a decentralised way among the various states, as a constraint on their foreign policy. In this account, the principles of international justice bind states horizontally, in their mutual relations: they create obligations to exercise a particular kind of policy or to discharge their natural duties to each other. One of the eight principles of the law of peoples is that: 'Peoples have a duty to assist other peoples living under unfavourable conditions that prevent their

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56 Weinrib, *Corrective Justice* 10.

57 John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999) 113.

58 Rawls, *The Law of Peoples* 115.

having a just or decent political and social regime'.[59] The obligation to assist binds the people as a whole. It exists only up the point at which decent societies overcome these 'unfavourable conditions' and create appropriately open and tolerant institutions. It is not strictly speaking a matter of distribution, but of lifting our fellow human beings from a state of destitution. Rawls' example of solidarity does not require a framework of distribution. It is solidarity in assistance, not solidarity in fair shares.[60]

Although Rawls does not use the term 'corrective justice' for this type of bilateral obligation, it is clear that what he has in mind for the *Law of Peoples* is very different from the kind of justice that applies to the basic structure of a single political community. It is not a principle of distribution of fair shares, but a bilateral relationship crated by the face to face encounter of one person or one state with another. This is a different moral relationship to that of citizenship. When we encounter each other as citizens we look at the whole picture and we also raise the question of the existence of inequality in the distribution of 'primary goods' among us through the central authority of the state. In the international domain, by contrast, the relations are strictly bilateral, without a central authority organising them. What matters for the duty of mutual aid identified by Rawls is only whether there is absolute destitution for whatever reason. Rawls presents the obligations of solidarity or justice in the international case as arising out of the reasonable terms under which states would join a system of international law as equals. Rawls' argument introduces in this way the idea that fairness should be a precondition of general international law, whatever else agreements may establish as binding

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59 Rawls, *The Law of Peoples*, 37.

60 There is an analogy with the idea of a duty of mutual aid among strangers. Such a duty is ethically fundamental outside any legal or institutional framework. I follow here Barbara Herman, 'Mutual Aid and Respect for Persons' 94 *Ethics* (1984) 577-602, who applies the idea of the 'dependence' of human beings to the process of the categorical imperative and concludes: 'The duty of mutual aid has its ground in the facts that we are dependent beings with ends it is not rational for us to forgo: ends set by "true needs" whose satisfaction is a necessary condition for the exercise of rationality. As we are rational agents, we set ends… AS a person's true needs are those which must be met if he is to function (or continue to function) as a rational, end-setting agent, respecting the humanity of others involves acknowledging the duty of mutual aid: one must be prepared to support the conditions of the rationality of others (their capacity to set and act for ends) when they are unable to do so without help' (p. 597). See also Barbara Herman, 'Being Helped and Being Grateful: Imperfect Duties, the Ethics of Possession, and the Unity of Morality' 109 *Journal of Philosophy* (2012) 391-411.

obligations. There is a clear analogy here with the way corrective justice supports distributive justice within states.

4. The symmetry principle

How does cooperative justice apply to the European Union? We need to take into account the way in which states act together through the various agreements. How this works in the practice of trade relations has been very clearly explained by the American philosopher Aaron James. In his book *Fairness in Practice*, James argues that a structure of shared responsibility for states is created through institutions of international trade. James describes the process of creating institutions of international trade as an international 'social practice', a practice of 'mutual reliance on common markets' which, in his view, creates 'a distinctive class of fairness responsibilities'.[61] These responsibilities go beyond the explicit commitments of the parties. They are *structural* in that they require that the structures of international trade meet certain requirements of 'structural equity'.

James argues that the states that create these structures of international trade are jointly responsible for any harm and unfairness that such structures bring about. In James' argument, the states' negotiation has, in effect, the same effect as direct legislation.[62] The states are structurally responsible for their processes of negotiation, just as much as if they were directly legislating the resulting consensus. What are the principles of fairness that bind the states, when they act in this way? For James, these principles require 'due care' for those who unfairly lose out from the system overall as well as principles of 'fair distribution among states' and 'fair distribution within states'.[63] In short, the states that participate in the international social practice of trade are jointly responsible for setting up mechanisms for compensation to the losers of free trade, as well as mechanisms for maintaining equality in the distribution of benefits *among* states and among populations *within* states.

61 See Aaron James, *Fairness in Practice: A Social Contract for a Global Economy* (Oxford: Oxford University Press, 2012) 131.
62 James, *Fairness in Practice* 91-93.

An argument along these lines concerning structural responsibility is clearly applicable to the European Union. In this case the member states have actually legislated the terms of their own cooperation, under the European Treaties and subject to the enforcement powers of the Commission and the authority of the Court of Justice. So their actions have gone much beyond a mere practice, as described by James. Therefore, the structural responsibility of the member states is even more direct. More than the creators of diffuse systems of cooperation, such as the World Trade Organization or systems of international arbitration, the members of the European Union are responsible for the good or bad results that are caused by their decisions.

Cooperative structural fairness applies thus to the member states in two ways. At the first stage, which we may call 'basic fairness', the principle of fairness asks if an agreement to cooperate, given its formation and substantive content, is fair overall at the point the parties first enter it. This test requires, for example, that when the parties enter into some agreement to cooperate, they do so willingly and having been in a relatively even bargaining position to one another. The principle also assumes that, absent special circumstances, the cooperating parties would strike an agreement by which they would receive a fair return on their investment over time. Otherwise, the agreement might have been the result of exploitation or undue pressure.

At a second stage, which we may call 'fairness in practice' the principle asks if the parties respected each other as their agreement unfolded in real life. This aspect of fairness asks of the content of the respective obligations of the parties after the agreed rules are put into effect. John Rawls explains the relevance of fairness in practice in the following way. He says that fairness creates obligations on the participants in a mutually advantageous cooperative venture to continue to acquiesce by its terms.[64] As Rawls puts it: 'we are not to gain form the cooperative

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[63] James, *Fairness in Practice* 203-245.

[64] Rawls, *A Theory of Justice* 96. Rawls was also referring to H. L. A. Hart, 'Are There any Natural Rights?' 64 *Philosophical Review* (1955) 185.

labors of others without doing our fair share'.[65] This goes beyond the basic fairness that was in place at the starting point. Although some of the ongoing cooperation will be based on the originally agreed rules and commitments, practice often brings changes. New obligations may also arise from the conduct, practices and expectations created and relied upon by others after the cooperative project started. The question of fairness may therefore evolve.

Basic fairness rules out terms of cooperation that impose unjustified inequalities, or terms that are the result of unfair imposition, monopolies, cartels and other competitive restrictions.[66] Any such terms must be void and unenforceable. Can we organise these intuitive wrongs in a more coherent whole, so as to cover less obvious but still real unfairness? And how do we apply these intuitions to a multilateral cooperative project?

One argument was provided, as we saw above, by Aaron James with reference to the world trade order. James argues that the relation among states must be subject to a principle of 'international relative gains' according to which: 'gains to each trading society, adjusted according to their respective national endowments (e.g. population size, resource base, level of development), are to be distributed equally, unless unequal gains flow (e.g., via special trade privileges) to poor countries'.[67]

James then argues that 'the gains of trade are socially created, by the joint practice of market reliance'.[68] This of course is the starting point for the responsibility of states, although not a sufficient reason for equal shares. He goes on

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65 Rawls, *A Theory of Justice*, 96.

66 See John Rawls, *The Law of Peoples*, 42-43, where Rawls writes: 'Consider fair trade: suppose that liberal peoples assume that, when suitably regulated by a fair background framework […] a free competitive -market trading scheme is to everyone's mutual advantage, at least in the longer run. A further assumption here is that the larger nations with the wealthier economies will not attempt to monopolize the market, or to conspire to form a cartel, or to act as an oligopoly. With these assumptions, and supposing as before that the veil of ignorance holds, so that no people knows whether its economy is large or small, all would agree to fair standards of trade to keep the market free and competitive (when such standards can be specified, followed, and enforced). Should these cooperative organizations have unjustified distributive effects between peoples, these would have to be corrected, and taken into account by the duty of assistance…'.

67 James, *Fairness in Practice* 203.

68 James, *Fairness in Practice*, 221.

to say: 'Because each trading country has a morally relevant interest in greater rather than lesser national income gains, equal treatment requires equal distribution of gains, unless we can specify a relevant difference among participating countries'.[69] James identifies two such 'relevant' differences as possible grounds for inequality of gain. First, relevant endowments of each country, such as population size, natural resources, degree of economic development. Second, 'inequality of gain is fair if greater benefits flow to people who are worse off in absolute terms'.[70]

I find James' arguments for equal shares and for requiring priority for the worse off unconvincing. What James recognises as the 'endowments' exception cannot be limited only to the features he sets out. Other considerations are relevant too. The performance of a state in trading with other states does not depend only on the state structures themselves, but also on the success of producers, entrepreneurs and workers that produce relevant tradeable products that appeal to consumers abroad. There is always uncertainty in this kind of economic competition. Economic success or failure cannot therefore be imputed only to each state. This is why James' principle of equality in outcomes seems to me unconvincing – and at odds with his general framework. He seems to leave out the element of uncertainty inherent in economic competition.

Here is how, I believe, the argument for basic fairness among states must be restated. Remember that the relevant principle is corrective justice as it applies to cooperative projects. We need to identify the threshold of wrongful conduct which generates a one-off claim for redress from one party to another. We are not looking to bring about a general pattern of fair distribution. I propose the following formulation of the appropriate standard of background fairness in trading among states, which I call the 'symmetry principle':

> *The Symmetry Principle:* An agreement of states to cooperate for the purposes of international trade in goods and services is unfair and potentially unenforceable, if it is shown to create asymmetrical opportunities for gain

[69] James, *Fairness in Practice*, 221.
[70] James, *Fairness in Practice*, 222.

and risks of loss for the parties involved, taking into account the parties' original position, endowments and prospects when the agreement was reached.

Following the principle of symmetry, a structure of cooperation will be unfair, if it creates asymmetrical opportunities for gain and risks of loss. The symmetry here refers both to the level of risk but also the gravity of the injury it may cause. Irreparable harms must be given much higher value than temporary harms. Similarly, permanent gains (e.g. those associated with education or long term health) are to be assessed differently from transient gains, economic or social.

I now return to the idea of 'fairness in practice' as it applies to the parties of an agreement that act towards one another under an in principle fair agreement. This standard asks if, given their practices the parties to an agreement should continue to honour it. The question arises especially if one of the parties fails to comply with it or if, in the event of unforeseeable events, the burden of complying has become too high for some of them. Because the test depends on the practices of the parties, I call this test fairness in practice.

In principle, continuing to comply will be fair, if cooperation was fair at the start and if other parties have been keeping their share of the bargain as agreed and no unexpected events have taken place. Compliance may be unfair, however, and may not be required, if other parties have failed to honour a structurally fair cooperative agreement, or if unforeseen and unforeseeable events, e.g. a destructive earthquake, have changed the balance dramatically. In such cases, an originally symmetrical agreement to cooperate may have become radically asymmetrical and therefore unfair. The principle of fairness in practice is therefore an application of the same ideas that guide basic fairness.

5. An unfair union?

What does the symmetry principle entail for fairness in the European Union? Has it been respected by the member states? Has the EU been structurally fair? If not, what are the reforms that would render it a fair cooperative project among nations? These are the question we need to address now. We must move from the heights of high theory to the lowlands of practice.

It is clear that the European Union treaties do not introduce anything like a principle of distributive justice for the Union. Habermas and Joerges are right to point this fact out. The treaties recognise the division of the Union into states and an associated division of them into welfare states.[71] The question of solidarity in the Union will not be, therefore, a distributive matter. Solidarity in the EU does not promise social justice among all the various people who live within the geographical territory of the European Union. It promises only redress for wrongs of injustice.

It follows that the mere fact of great inequalities of wealth between the various nations of the European Union do not by themselves constitute a violation of European solidarity under the EU treaties. Such a conclusion would only proceed from distributive justice, which into part of the agreement among the states. It also follows that fact that the budget of the European Union only corresponds to about one percent of the gross domestic product of its members is not, by itself, unfair. It is not evidence of any neglect to take justice seriously. It is merely a reflection of the fact that the European Union is not a state and does not have its own social welfare functions. This is because the member states have decided to leave such matters to their own domestic political systems. According to all the OECD data, the member states of the European Union spend the highest percentage of their Gross Domestic Product in social welfare payments in the world.[72]

The question of solidarity as fairness from the point of view of corrective justice asks something else. It looks at the relations of the states with one another as they interact in the single market and – for those that participate in it - the monetary union. We may look at the relevant costs and benefits for each relationship

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71 This point is also well set out in Jürgen Neyer, *The Justification of Europe: A Political Theory of Supranational Integration* (Oxford: Oxford University Press, 2012) 35-55. For an interesting debate on this between Neyer (who sees the European Union as a project that does not seek to be federal) and Forst (who follows Habermas in accepting the federalist interpretation) see Jürgen Neyer, 'Justice and the Right to Justification: Conceptual Reflections' in Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds.), *Europe's Justice Deficit?* (Oxford: Hart, 2015) 211–226 and Rainer Forst, 'Justice, Democracy and the Right to Justification: Reflections on Jürgen Neyer's Normative Theory of the European Union' in E*urope's Justice Deficit?* 227–234.

72 OECD, *Society at a Glance 2016: OECD Social Indicators*, (Paris: OECD Publishing, 2016)

separately or for the relationship of each state with the rest of the European Union considered as a single agent. The relevant tables of actual contributions and receipts from the EU's budget show that some countries are systematic contributors into the budget and others are recipients.[73] Yet, that does not, by itself, show any unfairness. The question of the symmetry of risks and losses from membership is not a matter of budget contributions. Member states may be happy to contribute more into the budget because through the single market, they calculate, they will benefit greatly through growth in economic production or in share of other EU markets.

The single market has very complex costs and benefits for each economy of the member states through private transfers of goods, services, capital and of course workers. It is extremely hard to calculate precisely those benefits or costs for each economy. It is even harder to estimate what the risks were at the inception of the single market for each state, although various surveys show that the single market has been largely beneficial for all of them. But such a precise calculation may be unnecessary in any event. What the principle of symmetry requires is a view on whether the expected distribution of risks and opportunities is symmetrical or fair, irrespective of whether any of the risks or opportunities were actually realised. The question we ask is whether it would have been reasonable for each party to take those risks, had they understood them fully at the time. If the answer to this question is no, then the agreement is unfair and its unfairness is not cured by the fact that consent was freely given.

We can ask the question with reference to the European Union as a whole. This is a very complex question, given the various layers of cooperation and interdependence and especially the distinction between those who are inside or outside the Eurozone. The question will perhaps be more interesting, if we ask the question with reference to the European Monetary Union alone. Here is where we have the largest inequalities and the most heated arguments. The question here is not just about the single market, but also on monetary union and financial regulation and coordination. So in what follows I will only ask the question of the fairness of the

[73] The European Parliament has created a very useful tool showing where the EU budget goes and from where, according to each member state, in this link:

Eurozone and concentrate on the fate of each member. As we will see many economists have made the case that the costs and benefits for the member states were unequal both at the start and when the financial crisis struck. I will examine these issues by focusing on three separate points in time: a) the creation of the Eurozone, b) the Eurozone's first ten years and c) the emergency response to the financial crisis.

a) <u>The Basic Fairness of the Eurozone</u>

I start with the question of the basic fairness of the Eurozone at the point of its inception. When the European Monetary Union was first proposed, it was hoped that the common currency would create conditions of economic and political convergence among the member states.[74] Looking at the history of the Eurozone, however, it is clear that this aim was not achieved. When we look at the economic performance of the various members we see that the Eurozone remains fragmented between states of the 'core', that have low unemployment, high rates of investment and healthy growth and states of the 'periphery', which have high unemployment - especially among the young – low levels of savings and investment and very low rates of growth. Some of the most distinguished commentators have linked this failure to the design of the Eurozone. [75]

The American economist Kenneth Rogoff, who has co-authored one of the leading studies of financial crises,[76] has given a categorical rejection of the Eurozone's design. He has said that 'the problem at the heart of the euro crisis' is that 'the eurozone is a half-built house' and that 'it was a catastrophic mistake to put monetary union ahead of fiscal and political union'.[77] The absence of central fiscal policy, for Rogoff, meant that European policy makers did not have the tools to

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http://www.europarl.europa.eu/external/html/budgetataglance/default_en.html

[74] The main case for the Euro had been made in the European Commission's paper, *One Market: One Money; An evaluation of the potential benefits and costs of forming an economic and monetary union* (Brussels, October 1990). For the history of the creation of the EMU see Harold James, *Making the European Monetary Union* (Cambridge, Mass.: Harvard University Press, 2014).

[75]See Jeffrey Franks, Bergljot Barkbu, Rodolphe Blavy, William Oman, and Hanni Schoelerman, 'Economic Convergence in the Euro Area: Coming Together or Drifting Apart?' *IMF Working Paper, 18/10* (January 2018) (Washington, DC: International Monetary Fund, 2018).

[76] Carmen M. Reinhart and Kenneth S. Rogoff, *This Time is Different: Eight Centuries of Financial Folly* (Princeton: Princeton University Press, 2009).

address the crisis. He concluded: 'Monetary policy is simply one side of fiscal policy. Monetary union without fiscal union is an accident waiting to happen'.[78] Similarly, the distinguished American economist C. Fred Bergsten wrote that 'the European crisis is rooted in a failure of institutional design' and that 'the absence of crucial policy tools constrained Europe's ability to reach a solution quickly, triggering severe market reactions that continue to this day'.[79] In Bergsten's view the response to the crisis required that the members of the Eurozone 'rewrite the eurozone's rule book and complete the half-built euro house'.

It is important to add that this view is not a recent one. Many economists had expressed concern about the structural flaws in the design of the Euro well before it was created. As early as 1971 the British economist Nicolas Kaldor wrote that a common currency in Europe would only succeed, if the stronger nations agreed to finance the weaker nations on a permanent basis. In the absence of such transfers a common currency was bound to divide European states rather than unite them.[80] Kaldor wrote that the single market as conceived at the time would presuppose 'full currency convertibility and fixed exchange rates among the members, whilst leaving monetary and fiscal policy to the discretion of the individual member countries'.[81] Such a system, for Kaldor, would entail that some countries would tend to acquire excessive surpluses in their trade with other members, whist others would face corresponding deficits. This could have destabilising effects. Kaldor concluded that a full monetary and economic union would fail without a full political union bringing about fiscal *integration* not just fiscal harmonisation.

The American economist Martin Feldstein gave a parallel assessment of the common currency a generation later.[82] At a time when the Euro was being

77 Kenneth S. Rogoff, 'Crash Time' *Project Syndicate*, 08 September 2018.

78 Rogoff, 'Crash Time'.

79 C. Fred Bergsten, 'Why the Euro Will Survive' *Foreign Affairs*, September/October 2012, 216.

80 Nicholas Kaldor, 'The Dynamic Effects of the Common Market' in N. Kaldor, *Further Essays On Applied Economics* (New York: Holmes and Meier, 1978) 187-220.

81 Kaldor, 202.

82 Martin Feldstein, 'The Political Economy of the European Economic and Monetary Union: Political Sources of an Economic Liability' 11 *Journal of Economic Perspectives* (1997) 23–42. The standard analysis of 'optimal currency areas' in light of the risk of asymmetric shocks in different parts of a currency area, supports Feldstein's skepticism. See Robert Mundell, 'A Theory of Optimum Currency

introduced, Feldstein wrote that the Euro would not achieve its aims because of its structural flaws. In his view 'the standard of living of the typical European would be lower in the medium term and long term, if EMU goes ahead than if Europe continues with its current economic policies of a single market for trade in goods and services, the free flow of capital and labor, adjustable exchange rates within broad bands, and domestic monetary policies aimed at low inflation'.[83]

The European Commission did not entirely dismiss the risks identified by Kaldor and Feldstein. It noted that the creation of the EMU would create costs in adjusting to economic shocks. But the Commission believed that they would be small:

> 'The main potential cost of EMU is that represented by the loss of monetary and exchange rate policy as an instrument of economic adjustment at the national level. This loss should not be exaggerated since exchange rate changes by the Community in relation to the rest of the world will remain possible, whereas within the EMS the nominal exchange rate instrument is already largely abandoned, and EMU will reduce the incidence of country-specific shocks. Relative real labour costs will still be able to change; budgetary policies at national and Community levels will also absorb shocks and aid adjustment, and the external current account constraint will disappear'.[84]

Nevertheless, Feldstein was not convinced by such arguments. In his view the EMU would deliver some trade benefits to its members, but would still create more significant macroeconomic risks, loss of policy options and, in some cases, higher unemployment. He observed that the members of the EMU would lose the automatic adjustments of their currency in case of a decrease in aggregate demand, namely the decline in the real interest (in response to the decline in the demand for

Areas' 51 *American Economic Review* (1961) 509-517. For further discussion see Jean Pisani-Ferry, *The Euro-Crisis and Its Aftermath* (Oxford: Oxford University Press, 2014) 20-25.

83 Feldstein, 'The Political Economy of the European Economic and Monetary Union: Political Sources of an Economic Liability' 24.

money and credit) and the real value of the currency, which would come as a natural result. For Feldstein the member states would also lose the power to adjust interest rates in order to bring down unemployment, since they would be tied to a single interest rate and to a fixed exchange rate.

Feldstein observed that these problems were made worse by the fact that the member states of the EMU differed so much in the structure of their economies. He also noted that in the United States, where the currency union also brings together states with very different economies, such problems were addressed through fiscal transfers. In the United States, a fall in demand in one state triggers a set of fiscal transfers from the federal government through various federal social programmes (to which that state will contribute less, as its tax income falls). Feldstein calculated that in the US: 'The combination of reduced federal income and profits taxes and increased transfer payments (unemployment benefits and welfare) implies that a $1 fall in a state's GDP is counterbalanced by about a 40 cent change in the net flow between the residents of that state and the federal government in Washington'.[85] There was nothing like that provided for in the European Monetary Union blueprint (and even today nothing like that exists, in spite of the financial crisis and its aftermath). Feldstein noted that there was 'no similar cyclical net transfer in Europe, since taxes and benefits are almost exclusively the responsibility of the national governments'.[86] His conclusion was therefore unequivocal: 'It is clear that the countries of the European Union do not constitute a natural monetary union and that forcing a single currency on the area would raise cyclical unemployment in response to adverse demand shocks'.[87]

These and other problems of the Monetary Union project were ignored, for Feldstein, because political leaders saw EMU as a means for an eventual federalist

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84 European Commission, *One Market: One Money; An evaluation of the potential benefits and costs of forming an economic and monetary union* (Brussels, October 1990), p. 11.

85 Feldstein, 'The Political Economy of the European Economic and Monetary Union: Political Sources of an Economic Liability' 36.

86 Feldstein, 'The Political Economy of the European Economic and Monetary Union: Political Sources of an Economic Liability' 36.

87 Feldstein, 'The Political Economy of the European Economic and Monetary Union: Political Sources of an Economic Liability' 36

union. But he found this hope mistaken: the economic failure of the monetary union would drive the member states apart, rather than bring them closer together. In a separate article published at about the same time Feldstein warned that the economic failure of the Euro would have serious political consequences: 'Instead of increasing intra-European harmony and global peace, the shift to EMU and the political integration that would follow it would be more likely to lead to increased conflicts within Europe and between Europe and the United States.'[88]

Feldstein returned to his predictions fifteen years later, after the financial crisis had hit the Eurozone. He considered that the subsequent history vindicated his prediction:

> 'The euro should now be recognized as an experiment that failed. This failure, which has come after just over a dozen years since the euro was introduced, in 1999, was not an accident or the result of bureaucratic mismanagement but rather the inevitable consequence of imposing a single currency on a very heterogeneous group of countries'.[89]

The trigger for the Eurozone's failure was the financial crisis, which unleashed forces that were already inherent in the experiment. Feldstein believes that the structural flaws of the Euro created the sovereign debt crisis, weakened European banks and ultimately created the high levels of unemployment we see in many European countries. Feldstein writes that the tough anti-inflationary policy of the ECB, which is required by the treaties, caused interest rates to fall sharply but unjustifiably in the countries of the periphery, signalling to households and governments that they could increase their borrowing in response to the lowering of the cost of credit. This lead in some countries to bubbles in real estate and to excessive public deficits in others. The risks were increased by the failure of the market to appreciate the underlying risks:

> 'The result was rapidly rising ratios of public and private debt to GDP in several countries, including Greece, Ireland, Italy, and Spain. Despite the

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88 Martin. Feldstein, "EMU and International Conflict" *Foreign Affairs*, November/December 1997.

increased risk to lenders that this implied, global capital markets did not respond by raising interest rates on those countries with increasing debt levels. Bond buyers assumed that a bond issued by one government in the European Monetary Union was equally safe as a bond issued by any other government in the union, ignoring the "no bailout" provision of the Maastricht Treaty'.[90]

The fact that interest rates on Greek and Italian bonds were similar to those of German bonds sent entirely the wrong signal. Rather than reduce a country's borrowing, the market suggested that the risk was negligible. The monetary union eliminated the pre-existing market signals and precluded the rise in interest rates that would otherwise have limited household or state borrowing. The result was that both countries and households borrowed too much. In Feldstein's account the failure was both structural and market driven.

A very similar view of the failure of the Eurozone has been given by the distinguished scholar of the European Union Andrew Moravcsik.[91] The causes of the Eurozone crisis, in Moravcsik's account, are mostly structural and they are similar to those identified by Feldstein, namely that the crisis of the Eurozone was 'the result of a fundamental disequilibrium within the single currency zone, which applies a single monetary policy and a single exchange rate to a diverse group of countries'.[92] Nevertheless Moravcsik adds the further dimension that Germany refused to accommodate its own policies to the needs of the other member states during the period before the crisis. He observes that the EMU 'imposed high risks on some European governments', those who had been operating deficits such as Greece and Italy, because they could only survive in the Eurozone if, on entering the Eurozone, they adopted 'German standards of wage discipline, government spending and international competitiveness'. This, however, was practically very difficult. Still, these states were 'betting their future prosperity' on their own abilities of doing so.

89 Feldstein, 'The Failure of the Euro'.

90 Feldstein, 'The Failure of the Euro'.

91 Andrew Moravcsik, 'Europe After the Crisis: How to Sustain a Common Currency' *Foreign Affairs*, May/June 2012, 54-68.

92 Moravcsik, 'Europe After the Crisis: How to Sustain a Common Currency' 54-55.

This was their only way of survival, since they had given up their normal policy tools for offsetting the gap with Germany, namely 'unilateral control over interest rates and the money supply, restrictions on capital flows, and the manipulation of exchange rates'. Having lost those policy tools, the peripheral states of the Euro were left without a safety net in case of an economic shock – which eventually happened through the 2008 financial crisis. Without their macroeconomic policy tools, when the crisis hit, these states would have to 'act directly to push down economic activity through wages, private consumption, business investment, and government spending. This is a risky course for any government, because it imposes immediate and visible costs across the entire society'.[93] Moravcsik also adds that Germany persistently ignored the risks to the economies of the periphery of its own lowering of labour costs, something to which I will return in the next section.

Finally, a similar structural account of the causes of the crisis has also been offered by the former Director of the Bruegel think tank and former advisor to the French President, Jean Pisani-Ferry. In his authoritative account, *The Euro Crisis and its Aftermath*, Pisani-Ferry effectively agrees with Feldstein and Moravcsik.[94] Pisani-Ferry argues that the economic misgivings that had been expressed by the American economists were acknowledged in Europe as the EMU was being designed, but they were outweighed by three other considerations. First, European economists were strongly averse to exchange rate fluctuations on account of the particular European experience (not shared by the US) with inflation and hyperinflation.[95] Second, the autonomy of monetary policy in Europe was in any case severely limited because of the liberalization of capital movements in the early 1990s. The EU countries could not have stable exchange rates, free capital movement and independent monetary

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[93] For a similar critique of the design of the Eurozone – peppered with passionate and perhaps unhelpful polemic against the supposed ideology of 'neo-liberalism' that in the author's view lies behind European Monetary Union - see Joseph E. Stiglitz, *The Euro: How a Common Currency Threatens the Future of Europe* (New York: Norton, 2016) 85-144. The book' analysis of the Euros flaws is compelling - and I rely on it below. But the book treats the Euro as an economic project of a federal union, without recognising the inherent tensions in achieving consensus among states with conflicting interests that occasionally make decisive (Keynesian) action in practice impossible. The book does not sufficiently deal with the problem that the European Union is only a project of the law of nations and it never had the political or economic firepower to attack the financial crisis on its own, in the way the United States as a single federal state did in 2008.

[94] Jean Pisani-Ferry, *The Euro Crisis and its Aftermath* (Oxford: Oxford University Press, 2014).

policy at the same time.[96] By creating the European Monetary Union, the member states chose to give up autonomy in order to secure stability. Finally, the third reason was political. French President Mitterrand saw EMU as a way of binding Germany firmly into European integration.[97] For all these reasons, the members of the EU went ahead with the experiment in full knowledge that it created important risks.

Pisani-Ferry agrees with Feldstein and Moravcsik that the overall architecture was seriously flawed. The criteria for membership were excessively formalistic and did not provide for real convergence between the various economies.[98] The United Kingdom set out its own tests for membership that include substantive convergence, but other countries did not follow in setting out their own preconditions of success.[99] There was no provision for crisis management. The assumption was that there would be no shocks if everybody played by the rules. Pisani-Ferry concludes that the Euro was an 'orphan currency' with serious structural problems:

> 'The common currency was thus created without significant political foundations. It was logically bereft of any mechanisms for solidarity between countries, since these could not be created without a significant degree of trust, and Europe has made little progress in this field… In the end, the euro's architects made a choice. In the absence of a proper "community" to speak of, and in the absence of a European state, each of the participating countries was left to face alone the challenges and risks involved in their participation in the common currency'.[100]

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95 Pisani-Ferry, *The Euro Crisis and its Aftermath*, 22-23.

96 Pisani-Ferry, 23-24.

97 Pisani-Ferry, 25 and 33-37.

98 Pisani-Ferry, *The Euro Crisis and its Aftermath*, 38-43.

99 Recently, in its invitation to Bulgaria to start the process of joining the Euro, the Eurogroup set out more substantive tests, including stress tests for the banking system and asset quality reviews. See Mehreen Khan, 'The euro's guardians are learning their lessons with Bulgaria' *Financial Times*, 13 July 2018.

100 Pisani-Ferry, *The Euro Crisis and its Aftermath*, 36-37. A similar conclusion is also reached by Ashoka Mody, *Eurotragedy: A Drama in Nine Acts* (Oxford: Oxford University Press, 2018). For the argument that the Eurozone is not an optimum currency area see P Krugman, M Obstfeld, and M Melitz, *International Economics: Theory and Policy*, 9th edn (London: Pearson, 2011) 587–615

What are the consequences of this analysis for basic fairness? The test we are applying is the test of the symmetry of risks, which asks whether the expected benefits, costs and risks of entering into the common currency were symmetrical for the various member states at the point of the Eurozone's creation in 1999. We may draw the following tentative conclusions:

- The potential opportunities for trade were symmetrically open to all member states of the Eurozone, on the basis of the single market for goods, services, capital under the effective supervision of the Court of Justice. Those gains, however, required appropriate competitiveness and a rise in productivity to be realised.
- The required changes in productivity depend partly on improving an economy's institutional framework.[101] Such structural reforms, however, take a long time to develop. Even if democratic states are in principle free to improve their institutions, by electing reformers, any such process takes a long time to bear results.
- The chosen monetary policy target of 2% inflation suited the 'core' countries, such as Germany, Netherlands, Finland with a strong history of fiscal prudence. It did not suit those countries with a history of more flexible macroeconomic policy who lost three traditional policy tools which they could have used otherwise, namely monetary policy, flexible exchange rate with other members of Euro area.
- The availability of cheap credit inside the Euro area worked as a disincentive for institutional reform. Research has shown that during the first phase of the currency union, Greece, Italy and Spain saw a worsening of the institutional

[101] This is shown both by broad economic reviews, such as Daron Acemoglu and James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and* Poverty (London: Profile Books, 2012) and Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation and Social* Rigidieies (New Haven: Yale University Press, 1982), but also in more detailed reviews of European economics: see Klaus Masuch, Edmund Moshammer, Beatrice Pierluigi, 'Institutions, public debt and growth in Europe' *ECB Working Papers Series*, No. 1963, September 2016. This paper argues, among other things, that the presence of very sound institutions appears able to offset the detrimental effect of high debt on long-term growth.

delivery indicator, following substantial windfall gains and capital inflows as soon as these states entered the monetary union. [102]

- The loss of these policy tools affected the most highly indebted states, whose debt from that point on became effectively a debt in a foreign currency. These states assumed a higher risk in case of a crisis, since they had lost their macroeconomic tools for dealing with a sudden loss of demand as well as their lender of last resort. In addition, the loss of the exchange rate mechanism also removed one element of accountability for their economic policy: taxpayers and voters could not take into account the fluctuations of the exchange rate as a market indication of the soundness of their government's economic policies. The Euro Area countries with debt higher than 60% ratio of debt to GDP in 1999 were: Belgium (113.7%), Germany (60.9%), Greece (100.3%), Spain (62.3%), Italy (113.7%), Netherlands (61.1%), Austria (67.3%).[103]

- A further source of instability was the banking system. Although the free movement of financial services and capital turned banking into a continental business, the regulation of banking remained in the member states' hands. There was no common deposit insurance scheme, nor a common mechanism for bank resolution.

What do these tentative observations mean for the symmetry test at the time of the Euro's foundation? It shows that the risks of entering the Eurozone were unreasonable for those states that met three criteria at the start: a) did not have a record of tight fiscal policy, b) had low productivity and weak institutions, which would take several years to repair and c) were already highly indebted. Entering the Eurozone under such terms, meant that these states assumed extremely high risks because they did not have the time at their disposal in which to make structural reforms. The states that met those three tests, were heavily disadvantaged by the Eurozone agreement. The agreement created for them the risk of sovereign

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102 See Masuch, Moshammer, Pierluigi, 'Institutions, public debt and growth in Europe' p. 7 and J. Fernández-Villaverde, L. Garicano and T. Santos, "Political Credit Cycles: The Case of the Eurozone", 27 *Journal of Economic Perspectives, (2013)* 145-166.

103 See Dagmar Hartwig Lojsch, Marta Rodríguez-Vives and Michal Slavík, 'The Size and Composition of Government Debt in the Euro Area' *ECB Occasional Paper Series*, No: 132, October 2011.

insolvency in the event of a sudden economic downturn. They faced a possible sovereign insolvency in case of an asymmetric shock, since they had given up the tools that would have allowed them to prevent it. Their entering into the monetary union was an extremely unwise decision. It was unfair, even though it was involuntary. Even though they willingly entered the union, they did so on terms that had they fully understood at the time, they would have considered unreasonable. The hidden risks were too serious. I shall call them the 'originally disadvantaged' states. Greece and Italy, I believe, fall into this category.

It is therefore arguable that the original Eurozone agreement was *unfair* towards the originally disadvantaged states, even though they consented to it. What follows? For the purposes of corrective justice, we need to ask if any party was harmed by the unfair agreement. If so, then the harmed party would have a claim for redress. Corrective justice would thus have entered the frame. Nevertheless, entering the Eurozone did not harm any party, at least not immediately. There was no immediate loss for any party. All the states experienced steady growth for the first ten years, or at least until the financial crisis struck. No claim for redress therefore arose at this point.

b) <u>Fairness in Practice: the Euro's first decade</u>

We can now turn to issues of fairness in practice, covering the period from the start of monetary union up to the present time. The narrative is very complex, so we will need to paint with a very broad brush. We need to divide our discussion between what happened before the crisis struck and what happened in response to it. This is because the circumstances were very different at each stage. Nevertheless, the assessment must be cumulative for the whole period, since everything that happened has its origin in the agreement as first made. We also need to distinguish between what each state has done towards each partners, for which it is individually responsible, as well as what all states were doing together, through the EU institutions or in other ways, for which all the member states are collectively responsible. We ask: was there unfairness in the way the states treated each other?

All the economic data show that the emergence of the Eurozone did not lead to convergence of the real economies of the member states. It led, for a while, to the convergence of bank lending rates. Yet, this convergence was a serious mistake. Cheap credit created bubbles in private lending in Ireland and Spain and in public sector lending in Greece and Portugal. This was partly a failure of market discipline, but it was also a result of state action, since the regulators failed to notice the risks building up in the banking system of the periphery. Neither the Commission, nor the European Central Bank took action to control this risk.

It seems, however, that the states did not pursue coordinated policies. In some cases the policy of one state was certain to harm the others. Andrew Moravcsik has described how that Germany pursued a policy that went beyond what was agreed and helped cause the crisis as it undermined the economies of the periphery. As is well known the Eurozone set a target of 2% for inflation, based on trends in Germany's labour market. Yet, as Moravcsik observes: 'Germany subsequently moved the goalposts by dampening its price and wage growth below that level'.[104]

Moravcsik calculates that between 1999 and 2008 the average unit labour cost in the countries that have lived with excessive deficits, i.e. Greece, Italy, Portugal and Spain, rose by one percent per year over the target of 2%. So they slowly lost competitiveness towards the other members of the Eurozone. Germany, however, during the same period saw its unit labour cost rise by an average of less than one percent per year, well below the European target. This happened by a combination of slow wage growth, weak domestic consumption, labour market reforms and cuts in government spending, linked perhaps to the costs with the unification of Germany. Yet, over time, this disparity of economic policy, with 'excessive rises in unit labor costs in some places and wage suppression elsewhere generated a 25 percent overall gap in competitiveness between Germany and its European partners'.[105] These policies benefited Germany greatly, because they allowed Germany's exports to grow everywhere in the Eurozone bringing healthy profits to the exporters, but 'at the expense not just of foreigners but also of German workers and taxpayers, whose wages were not keeping pace with inflation'[106].

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104 Moravcsik, 'Europe After the Crisis: How to Sustain a Common Currency' 58.
105 Moravcsik, 'Europe After the Crisis: How to Sustain a Common Currency' 59.
106 Moravcsik, 'Europe After the Crisis: How to Sustain a Common Currency' 59.

Moravcsik is not alone in making the observation that Germany's policies after the establishment of the Euro undermined the prospects of the other member states, who had lost the policy option of replying though the exchange rate. Joseph Stiglitz describes Germany's actions as 'competitive devaluation', which is, he says, a 'form of beggar-thy-neighbor policy: one country gains at the expense of its trading partners'.[107]

Jean Pisany-Ferry, a more dispassionate commentator than Stiglitz, also reports that the policies of Germany departed from those of its partners, so that 'at a time when most European – including the United Kingdom and central Europe – were spending, Germany saved'.[108] Pisany-Ferry also reports that the divergence of relative demand, with demand rising in Southern Europe and shrinking or stagnating in Germany, led to external deficits in the South and surpluses in Germany.[109] Pisany-Ferry concludes that 'the stagnation of demand in Germany can be said to have fuelled the housing boom in Spain'.[110] He concludes that 'Frenzy in the South and lethargy in the North; this was a powerful and self-perpetuating dynamic, which was allowed to go on for far too long'.[111] As a result, Ireland, Spain, Portugal, Cyprus and Greece were newly 'disadvantaged' states.

That such a mechanism of financial destruction existed is now common ground. What is still under discussion is whether the German policy was intentional, which appears to be the view pursued by Joseph Stiglitz, or unintentional, which is the view of Pisani-Ferry. For the purposes of corrective justice the symmetry principle, the distinction is obviously an important one. Intentional harm is surely more serious than unintentional harm. This is where the distinction between the period before the crisis and the period after the crisis is significant: after the crisis struck, it was clear to everyone that the imbalances in the Eurozone had actually harmed the disadvantaged states. In any event, the European Commission had

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107 Stiglitz, *The Euro* 105.

108 Pisani-Ferry, *The Euro Crisis and its Aftermath*, 49.

109 Pisany-Ferry, *The Euro Crisis and its Aftermath*, 50.

110 Pisany-Ferry, *The Euro Crisis and its Aftermath*, 50

111 Pisany-Ferry, *The Euro Crisis and its Aftermath*, 51. He adds: The German government was reluctant to end the country's penance, and the Spanish government did not want to crash the party. Both pushed on for as long as they could- until the crisis broke out'.

warned of these imbalances on the occasion of the Euro's tenth anniversary, when it said it reported 'substantial and lasting differences across countries'.[112] After that point the Germany policies must be held to be intentional.

Indeed, after the crisis broke out the European Union legislated changes to the way it monitors the European economies so as to prevent and correct any macroeconomic imbalances under the 'European Semester'.[113] Article 2 of the relevant Regulation defines imbalance as: 'any trend giving rise to macroeconomic developments which are adversely affecting, or have the potential adversely to affect, the proper functioning of the economy of a Member State or of the economic and monetary union, or of the Union as a whole'. It is therefore beyond doubt that Germany's policies created imbalances and fuelled the credit boom in the South. While it was not inevitable that such imbalances would be created, there was no mechanism inside the Eurozone for controlling Germany's policies. As a result, when the financial crisis struck, the states of the periphery were in a position of great weakness. Their banking systems in particular were hugely vulnerable.

I need here to add a note on Greece, since its problems were significantly different. The Greek government engaged in a very risky strategy of fiscal expansion in the period 2004-2009, making use of the very low interest rates at which Greece could borrow after having joined the Euro in 2002. The policy achieved high growth for a while, but it created a time-bomb. Fiscal expansion was increasing both the debt and the deficit. Eventually, the government lost control of public finances in 2007-2008 as the financial crisis reached Europe. At that point the government sought to cover up part of the relevant statistical data, especially as they affected health spending. In the end, in the summer of 2009, rather than taking drastic measures with spending cuts and tax rises, the Prime Minister Costas Karamanlis called an early election, which he lost heavily. When the new government took over, it discovered the true state of the public finances and the statistical inaccuracies. The new Prime Minister George Papandreou announced this to the world a few days

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112 European Commission*, EMU@10: Successes and Challenges after Ten Years of Economic and Monetary Union*, European Economy 2/2008, Luxembourg.

113 See Regulation (EU) No 1176/2011of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances

after the election. Within a few months Greece was frozen out of the markets and sought help from the European Union and the IMF.

The problems of Ireland were different still. Although the problems in Ireland (as everywhere else) were related to the Eurozone's architecture, they also had a strong domestic political component.[114] Ireland had respected all its obligations under the fiscal compact. Both its debt and its deficit figures were within the targets. As in Spain, its public finances were in surplus at the start of the crisis. But the safeguards in place in the Eurozone looked only at public finances. The architecture did not consider the underlying liabilities of the banking sector, which had grown exponentially during the boom years. When the credit crunch happened the Irish government issued a blanket guarantee to cover deposits and bondholders in order to rescue its oversized banking system. Irish public finances became unsustainable overnight – the guarantee cost the Irish tax payer approximately 40% of GDP, so that at the end of 2012 the Irish debt had risen to 118% of GDP.[115] The banking crisis transformed Ireland from solvent to insolvent overnight.

If we pause here to summarise our account of the early years of the Eurozone from the point of view of the symmetry principle, we could note the following:

- The Euro created a common financial space, where risk travels instantly from one country to the next and from one financial institution to another. The Euro became effectively a union of financial risk.
- Inflation in the member states of the Eurozone diverged persistently, even though all states were subject to similar nominal interest rates. The cumulative effect of small, but persistent inflation differentials and converging nominal interest rates was a loss of competitiveness for the high inflation states (Ireland, Portugal, Greece, Spain), which hampered real economic convergence.[116]

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114 See Fintan O'Toole, *The Ship of Fools: How Stupidity and Corruption Sank the Celtic Tiger* (London: Faber and Faber, 2009).

115 Pisani-Ferry, *The Euro Crisis and its Aftermath*, 54-56, 100-101.

116 See also Jeffrey Franks, Bergljot Barkbu, Rodolphe Blavy, William Oman and Hanni Schoelermann, 'Economic Convergence in the Euro Area: Coming Together or Drifting Apart?' *IMF Working Paper -*

- Once the member states were within the currency union, their policy options and their room for manoeuvre was limited, since it was impossible for them to adjust the exchange rate in any way or to have their own monetary policy.
- Germany's fiscal policies transferred risk to the states of the periphery, who had lost the policy tools to respond quickly to Germany's fall in demand.
- Greece, Portugal, Ireland, Cyprus and Spain made serious policy errors. The Greek government violated the explicit terms of the Eurozone agreements in 2007-2008. Greece and Portugal increased their debt in an unsustainable way. Spain and Ireland fuelled a real estate bubble. Cyprus, Ireland and Spain developed an unsustainable banking system.
- The consequences of these mistakes, however, were magnified by the Eurozone structures, since these states lacked the policy tools to address them effectively. Once they became highly indebted, these states could not devalue their currency in order to recover. If as happened in the European Monetary System crisis in 1992-1993, the governments of the periphery had been able to devalue, recovery would almost certainly have been more rapid.[117]
- Whatever the structural effects of the Eurozone architecture on them, at the end of the Euro's first decade several states founds themselves in a very disadvantaged position: Greece, Italy, Portugal, Ireland, Cyprus and Spain. On account of the level of their sovereign debt or the exposure of their financial system, these states found themselves open to disproportionate risks – and were duly hit very hard by the 2008 crisis.

In short, the structural defects of the Eurozone resulted in great losses for Greece, Ireland, Portugal and Cyprus during the crisis. These burdened member states were also culpable, however, for this outcome due to their own policy errors and excessive risk-taking. At this moment, however, the other member states did not sit idly by, even though the treaties implied that this is what they

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WP/18/10 (Washington DC, IMF, 2018) 10-11. The paper concludes: 'While there was nominal convergence of inflation and interest rates, real convergence of per capita income levels has not occurred among the original euro area members since the advent of the common currency'.

would do. The no-bailout clause was set aside and a huge programme of financial assistance was set up.

c) Fairness in Practice: The Emergency Response to the Crisis

There are many detailed and thorough accounts of the Eurozone's response to the crisis written by economists and lawyers.[118] The broad outlines are well known. The European leaders agreed a 80 Billion Euro package of bilateral loans for Greece in May 2010, offered similar assistance to Ireland in November 2010, to Portugal in May 2011 and to Cyprus in June 2012 as well as offering to dedicate up to 100 billion to Spain for the recapitalization of its banking system. In 2012 the Greek programme was adjusted in order to reduce interest rests on assistance loans to a non-punitive level and co-ordinated a programme of quasi-voluntary debt relief by way of the Private Sector Involvement (PSI), which saw a reduction of about 100 billion euros in the nominal value of the Greek debt. Each offer of assistance came with strict conditionality and the requirement to proceed to fiscal adjustment and structural reforms and supported by a system of close oversight by a 'troika' of officials from the European Commission, the European Central Bank and the International Monetary Fund. The most important intervention in the crisis was, however, the intervention of the European Central Bank, when Mario Draghi said in July 2012 that the Bank would do 'whatever it takes' to save the Euro.

The member states also acted to rewrite the rules of the Eurozone. They introduced more detailed rules regarding fiscal discipline in the Fiscal Compact of 2012 and then created the European Stability Mechanism for the members of the Eurozone, again by way of an international treaty, which was concluded outside the formal mechanisms of the European Union. They also legislated to move the financial assistance programmes fully within the scope of EU law, which they did by way of Regulation (EU) 472/2013. When Greece required a new programme in 2015, after the new populist government crashed the economy, the third Greek bailout

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117 See Mark Copelovitch, Jeffry Frieden and Stefanie Walter, 'The Political Economy of the Euro Crisis' 49 *Comparative Political Studies* (2016) 811-840, at 823.

118 See Brunnermeier, James and Landau, *The Euro and the Battle of Ideas*, 97-209, Pisani-Ferry, *The Euro Crisis and its Aftermath*, 77-128. See also the extensive and thorough internal review of the IMF:

was provided by the European Stability Mechanism on the basis of the new regulatory framework of EU law.

These changes took place in an atmosphere of extreme urgency, which was partly generated by the Eurozone structures themselves.[119] Studies have shown that during the euro-area financial crisis, interactions among sovereign spreads, sovereign credit ratings, and bank credit ratings appeared to have been characterized by self-generating feedback loops.[120] A large empirical literature has shown that the various fundamental variables that have been used in attempts to explain spreads have not able to account for either the very low spreads (measured relative to German sovereigns) that prevailed in the years preceding the outbreak of the euro-area crisis in 2009 or the very sharp rise in spreads that took place following the onset of the crisis. The general finding that spreads overshot (relative to the fundamentals) in a downward direction before the crisis and in an upward direction after the crisis holds regardless of (a) the mix of fundamental variables used to explain spreads and (b) whether the fundamentals are supplemented with additional variables.[121]

- The member states and especially Germany have been criticised for three things in relation to their response to the crisis. First, they acted slowly, allowing the crisis to drag on needlessly. Second, they did only what was minimally necessary to sustain the Euro at each step, without acting decisively to restore trust in the

Internal Evaluation Office of the IMF, *The IMF and the Crises in Greece, Ireland, and Portugal: Evaluation Report* (Washington, DC: International Monetary Fund, 2016).

119 Throughout this period the IMF and the Commission made very optimistic assumptions of the effects of the crisis, which almost always proved wrong. See Rogoff, 'Crash Time'.

120 George Soros has written as follows: 'For about a year after the Lehman bankruptcy, interest rate differentials remained unrealistically low because the European Central Bank was still discounting government bonds on equal terms, so that markets erred on the side of optimism. Then came the Greek shock, when the markets realized that Greece could actually default. Suddenly, the markets imposed very severe risk premiums on all heavily indebted countries, which therefore no longer had the fiscal strength to support their banks – and that was really the onset of the euro crisis. So markets first failed to identify the flaws in the euro structure, and once they became aware of them, they overreacted.'; see George Soros with Gregor Peter Schmitz, *The Tragedy of the European Union: Disintegration or Revival?* (New York: Public Affairs, 2014) 67-68

121 See Heather D. Gibson, Stephen G. Hall and George S. Tavlas, 'Self-fulfilling dynamics: The interactions of sovereign spreads, sovereign ratings and bank ratings during the euro financial crisis' 73 *Journal of International Money and* Finance (2017) 118–133.

financial system as a whole.[122] Third, by not giving Greece a debt restructuring in 2010 (but only in 2012), they effectively bailed out the private lenders that were co-responsible for Greece's colossal debt, while transferring the burden to Greece's taxpayers.[123]

- From the point of view of the symmetry principle we can summarise the response to the crisis with the following observations:
- The disadvantaged member states did not have a realistic option of leaving the Euro – since any exit would pose enormous risks for them. They therrefore had no realistic option of turning down any offers of help from the rest of the Eurozone.
- The response to the crisis was effectively a new beginning for the Eurozone: the rules were rewritten. Yet, the states agreed to the changes under extreme pressure.[124]
- The response to the crisis was almost entirely intergovernmental. The most important decisions were taken by government leaders in meetings of the European Council, or in the informal meeting of the Eurozone finance minsters, the Eurogroup, where the ordinary rules of EU decision-making did not apply. The discrepancy in power between the larger creditor states over the indebted smaller states, was overwhelming.
- The stronger states responded to the crisis by providing assistance to the weaker countries by way of loans, not grants. In effect the stronger members of the Eurozone took over some of the risks of default of the highly indebted countries, from the private sector.
- The IMF – and many economists - favoured debt relief for Greece from the start of the crisis, but was overruled by the ECB.[125] In the end the 2012 debt

122 See Mody, *Eurotragedy* 232 ff.

123 Just before Greece's debt restructuring Kenneth Rogoff wrote: 'Why should the Greek people (not to mention the Irish and the Portuguese) accept years of austerity and slow growth for the sake of propping up the French and German banking systems, unless they are given huge bribes to do so?'; see Kenneth S. Rogoff, 'The Euro's PIG headed masters' *Project Syndicate*, 3 June 2011.

124 For a detailed account see Jeffry Frieden and Stefanie Walter, 'Understanding the Political Economy of the Eurozone Crisis' 20 *Annual Review of Political Science* (2017) 371-390.

restructuring for Greece concerned private, not official debt (so the EU taxpayers did not suffer any direct losses).

- The European Union as a whole proceeded to rewrite the rules of the Eurozone, making first steps towards a banking union and creating a formal mechanism for programmes of financial assistance.
- The indebted countries did not have a real choice whether to accept the financial assistance programme or not, since without assistance they faced almost certain disorderly default and exit from the Eurozone with catastrophic social and economic consequences. The bailout negotiations were therefore one-sided, since the indebted countries had no option but to accept the rescue package offered by the EU and the IMF.
- The apparent imposition of economic terms by the Eurogroup on member states and the continuing monitoring of state budgets by the European Commission generated widespread criticism of the European institutions as undemocratic and authoritarian.
- In the spring/summer of 2015 Greece was offered the option of leaving the Eurozone. When the prospect of leaving became real after the Greek referendum of July 2015, the Greek government changed course and opted into the austerity programme prescribed by its EU partners and the IMF. The crisis has left Greece (at 180% to GDP in 2017) and Italy (at 132% of GDP in 2017) with extremely high levels of debt and few policy options as to how to reduce it. The post-crisis Eurozone finds them in a worse position than they had been in 1999 before they entered.

In short, the European Union reacted to the crisis by both assisting the states in need, and by changing the background rules for the future. The principle of 'no-

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[125] Kenneth Rogoff writes: 'From 2010 onward, I and others suggested that the eurozone needed to write down sharply the debts of Portugal, Ireland, Greece, and probably Spain. Yet, at the same time, the IMF and the European Commission were offering rosy forecasts for Greece, which, as we all know, went on to suffer a massive and sustained output collapse. Policymakers failed to take radical steps when they had the chance because they were being told to stay the course by economic forecasters who simply could not accept that financial crises can significantly amplify the depth and length of recessions.' See Rogoff, 'Crash Time'

bailout' gave way to a manifestation of solidarity. All the disadvantaged member states that faced problems were provided with emergency loans that helped them avoid sovereign default, at an interest that was reduced in all cases well below the market rate. The austerity measures imposed on them by the rescue packages by way of 'conditionality' were less drastic than the austerity that they would have to go through had they defaulted.

The changes brought into the Eurozone's general architecture, however, were not sufficient to address some of the systemic and structural problems initially addressed by Kaldor and Feldstein. The disadvantaged states were protected from the worst outcomes of the crisis, but they remain disadvantaged into the future, on account of their high levels of debt. A future crisis may create even more problems for them. Writing at the very end of the crisis Kenneth Rogoff said that in his view it is not obvious that the eurozone can survive another deep systemic crisis'. [126] He summarized the point by saying that: 'the eurozone is not going to survive in the long run without a system of EU-wide shared fiscal responsibility and, yes, transfers on a much larger scale than what currently exists'.[127] He was pessimistic about that, because of the lack of political leadership. He noted: 'Anyone raising the issue of transfers with the Germans will run up against the fact that Germany's elites sold the eurozone to their voters by promising that it would never become a "transfer union."[128]

6. Loss and redress

I now turn to the general assessment of the institutions of the Eurozone from the point of view of the symmetry principle, under the point of view of corrective justice. I ask three questions regarding fairness over the whole course of the Eurozone's lifetime.

First, was there an act or acts that *wronged* another party? Second, did any parties incur any *losses* as a result of the unfair actions of their partners? And, third, what could be the appropriate and proportionate *redress* from wrongdoers to the

126 See Rogoff, 'Crash Time'

127 See Rogoff, 'Crash Time'

128 Rogoff, 'Crash Time'

victims? The story, even as simplified in the pages above, is very complex. There was some wrongdoing on all sides. All the parties have behaved unfairly towards other parties in some way. I start with the collective responsibility that all states have as co-authors of the Eurozone's overall design. I will then turn to matters of individual responsibility.

The architecture of the Euro was flawed from the start. It created asymmetrical risks for several disadvantaged states, either through sovereign debt or through the banking system. There is a clear case of 'structural responsibility' burdening all the original members of the Eurozone. They are responsible for creating an economic practice with potentially disastrous consequences for some of them. The general architecture of the Eurozone was flawed, because it created a monetary union without a commensurate fiscal union, in exactly the ways observed by Kenneth Rogoff, Nicholas Kaldor and Martin Feldstein, as we saw at the start of this discussion. The EMU provided that monetary policy would be conducted by the European Central Bank, but that economic policy would remain in the hands of the Member States. It is now common grounds that the flawed design, for which all the founding members of the Eurozone must be held jointly responsible, contributed to the length and depth of the crisis.

Individual member states were responsible in other ways. The government of Greece pursued unwise fiscal policies in the period immediately after joining the Euro. When the financial crisis hit in 2008 it violated the terms of the Eurozone agreements by covering up the true state of its finances. Portugal and Italy allowed their debt to grow against the explicit commitments they made under the Maastricht Treaty. Interestingly, Ireland and Spain kept their side of the Stability and Growth Pact and kept well within the targets for fiscal deficits. But they are at fault – as indeed are the European Central Bank and the Commission – for failing to properly regulate the financial sector and for fuelling a credit bubble that almost destroyed their banking systems and for failing to take precautionary measures when they had to. Germany too behaved with little regard for the effects of its policies for the rest of the Eurozone. Its own austerity policies harmed the economies of the periphery. It may not have anticipated this at the start, but by the end of 2010 the mechanism of imbalances was well understood. Finally, France and Germany failed to enforce the

Stability and Growth Pact at its infancy and allowed themselves to break the fiscal discipline required by the Maastricht Treaty. After they avoided sanction by the Commission, it was extremely hard to impose any sanctions on any other states in the future.

To complete this picture we must also say that the banking system failed to understand the risks of the Eurozone and mispriced debt throughout the pre-crisis period. Banks were to blame for the chaos of the crisis, even though many of them were protected from any losses by the delayed response to the crisis (and many of them were effectively bailed out during 2010-2012, when their losses were passed on to the Greek taxpayer). What does this mean for solidarity, understood as a manifestation of corrective justice? Corrective justice is not punitive, it is restorative. Although, for example, Greece violated the terms of fiscal responsibility, it is not clear that its violation caused anyone else any appreciable loss at all. There was no higher inflation, as a result for example, given Greece's small size. Of course, the Greek crisis set off a world-wide financial tremor. But the fear of contagion was not created merely because of what Greece did, but also because of the weakness elsewhere in the financial system and the public finances of other Eurozone countries, such as Ireland, Italy and Spain. The problems that the Greek crisis unearthed were wider.

The bailout programmes, moreover, did not cost any other member states any money. All the financial assistance from the member states (as opposed to the haircut that private investors accepted in 2012) took the form of loans, at an – admittedly discounted - interest. But while Germany had to increase its borrowing for lending to the indebted states, its costs of borrowing did not go up, since Germany became a safe haven during the crisis. Its bonds remained therefore a highly sought after asset throughout the duration of the crisis. Germany was exposed to the risk, of course, that Greece, Ireland, Cyprus and Portugal may end up defaulting. Nevertheless, it was always extremely unlikely that there would be such a default, since the Eurozone controlled all the cards over the member states (as the Greek government discovered in the summer of 2015).

In addition Germany has benefitted hugely through the ordinary channels of trade, because of the fixed exchange rate vis a vis the other states of the Eurozone.

According to Andrew Moravcsik's calculations Germany benefits every year from the current structure of the Eurozone:

> 'Because Germany is in the eurozone, its external competitiveness was not offset by a rising currency. Germany's real exchange rate today, under the single currency, is roughly 40 percent below where it would be if the deutsche mark still existed. The result: Germany's trade surplus, at $200 billion a year, is the world's largest, even greater than China's. Forty percent of the surplus comes from Germany's trade within the eurozone -- a total roughly equal to the combined deficits of the crisis countries' [129]

Similar benefits applied to the other states of the core, Netherlands, Finland and Austria. Although they could have incurred losses through the crisis, had the Euro disintegrated, they emerged without loss. The rescue operations cost them very little in real terms, if anything at all. So even though Greece and to some extent Portugal, Spain and Ireland are to blame for their own woes, they did not cause any loss to others. The issue of reparation to Germany and the other creditors does not arise. But how about the other way round?

Remember that corrective justice provides redress for wrongful loss. It is not hard to find the real losers of the crisis. The distinction is clear between the prosperous North and the struggling South. Ten years after the Euro came to being, the economies of Greece, Italy and Spain are now caught in a vicious circle of low growth, high indebtedness and high unemployment.[130] In the highly indebted states of the South millions of people remain unemployed, or only partly employed or trapped in low skilled and low-paid jobs. The political climate in these countries is toxic and hospitable to demagogues of all descriptions and not conducive to radical reform. It is now beyond doubt that their economic prospects and their political cultures would have been better had they never joined the Euro in the first place. At the same time, however, these states cannot leave the Euro, without running even

129 Moravcsik, 'Europe After the Crisis: How to Sustain a Common Currency' *Foreign Affairs*, 2012.

130 How the Eurozone contributed to this disparity was explained by Moravcsik and Feldstein, as we saw above For a telling summary of the Eurozone's division between North and South see Deborah Ball, 'Aftereffects of Eurozone Crisis Plague Europe's South' *Wall Street Journal*, 1 June 2018.

more serious risks of economic collapse, which would set back their own economic recovery even further.

It follows that the rescue operations were not just manifestations of charity. Given that the crisis had *systemic* roots, the rescue operations were morally obligatory for the Eurozone. Although the treaties provided for a 'no-bailout' rule and a unilateral default would technically have been within the rules, the programmes of financial assistance permitted the disadvantaged states to remain within the Eurozone agreement without suffering the worst consequences of defaulting. The programmes may well be seen as expressions of solidarity under the symmetry principle: they compensated the member states for the loss caused by the structural flaws of the Eurozone's design, although they also took into account those member states' culpability in not doing enough to avoid the worst aspects of the crisis during the boom years.

Corrective justice gives us an ethical account of the financial assistance programmes. Because where there was a wrong that caused loss, there had to be some redress. Redress under corrective justice aims at remedying the wrongful losses caused to the disadvantaged members by the mistakes committed by all of them as they set up the first architecture and as they applied it in the years 1999 to the present. The burden of redress was borne by the winners, but it had to be proportionate, given that the highly indebted states were also to blame for their fate, due to their own errors. Corrective justice does not work in a punitive way, but seeks to remedy wrongful loss where it finds it. It is important to note here that corrective redress does not entail *permanent* fiscal transfers from the core states. It only justifies redress for the losses caused in fact by the flawed architecture and individual actions, if such a loss can be sufficiently quantified.

This argument suggests that the programmes of assistance were expressions of solidarity under the symmetry principle for the period up until the crisis. There is an argument, however, that such programmes have not gone far enough. Although the assistance programmes alleviated the losses of the crisis in a proportionate way, they have not ensured that the lack of symmetry has disappeared for the future. Many leading economists have taken the view that without serious reform, the

Eurozone will continue to create the same disparities. In a thorough study of the institutional structure of the Eurozone Maurice Obstfeld, the IMF's chief economist, argues that the increased risks imposed by the Eurozone structure upon the highly indebted countries requires some form of fiscal union whereby some fiscal transfers will be made from the successful states to the less successful (through a mechanism that should eliminate moral hazard).[131] Similarly, a proposal for Eurozone reform by of senior French and German economists suggests that the euro area continues to be financially vulnerable and is likely to underperform with respect to long term growth, partly because of a 'poorly designed fiscal and financial architecture'.[132] The stagnation of the periphery is - partly – the result of the flawed architecture of the Eurozone, for which all member state are responsible. We have finally arrived at a link between an important *wrong* and a corresponding and identifiable *loss*. The mistaken architecture of the Eurozone, for which all the parties are responsible, has caused the current economic stagnation in the periphery.

What form can redress, realistically, take? One possibility is to create a temporary and one off 'Growth Fund', possibly funded by the ESM, which would support investment in the disadvantaged states, i.e. those with a legacy of high debt, low unemployment and low productivity. It can do so on the basis of strict conditionality, similar to that applying to the programmes of financial assistance. The fact that this will be a one-off programme, justified on the basis of the damage already caused to the burdened stats because of the flawed architecture of the Eurozone, rules out moral hazard. The temporary nature of the fund also would reassure taxpayers in the core states that the logic of this Fund is not one of permanent transfers, such that they occur in a social welfare state. The transfers would be time limited and have the clear aim of assisting the periphery to break the vicious circle of stagnation which was caused by the asymmetries of the Eurozone and the mistakes already made. The Fund would aim to return the periphery to a

131 Helge Berger, Giovanni Dell'Ariccia, and Maurice Obstfeld, *Revisiting the economic case for fiscal union in the Euro area* (Washington, DC: International Monetary Fund, 2018).

132 Benassy-Quere, Agnes, Markus K. Brunnermeier, Henrik Enderlein, Emmanuel Farhi, Marcel Fratzscher, Clemens Fuest, Pierre-Olivier Gourinchas, Philippe Martin, Jean Pisani-Ferry, Helene Rey, Isabel Schnabel, Nicolas Veron, Beatrice Weder di Mauro, and Jeromin Zettelmeyer, *Reconciling Risk*

position of symmetrical opportunity, which fairness requires that they should have had, at the start of the common adventure.

The funding for such a 'Growth Fund' need not burden Germany and the other winners of the Euro. If the member states permit the states of the periphery – as a one off measure – to borrow by way of 'Eurobonds', so that they exceed the deficit and debt targets undertaken under the Stability and Growth Fund but under the joint guarantee of the ESM, again as a one-off mechanism in order to ensure the lowest possible interest, then the states of the periphery will be able to invest in infrastructure and retraining programmes that, it is hoped, may bring down unemployment more quickly. If these loans have the long maturities and low interest rates offered to Greece in the summer of 2018, then the borrowing states will be able to pay them off over a long period of time, absorbing the additional cost without negative effects in growth today. By guaranteeing those loans – and sanctioning the potentially inflation increasing fiscal expansion in the highly indebted states – the core states will not be spending any money themselves. They will only be running additional risks. The greatest risk is that the borrowing states will default. Yet, the risk is small, given that the loans will be accompanied by strict conditionality backed by EU mechanisms for ensuring compliance. In any event, even if some loss does occur in the future, the core states will continue to benefit from the Eurozone's architecture and will receive great economic benefits through the single market. So this one off 'Growth Fund' would act as a fairness restoring remedy for the Eurozone's early mistakes, without much cost to the core states.

There is also a more ambitious argument, however. It has been made by Andrew Moravcsik, who wants the transfers from the core to the periphery to be permanent in order to bring about real economic convergence. He says: 'For as long as the Eurozone countries continue to take such radically different trajectories regarding labor costs, government spending, private-sector behavior, and competitiveness, Europe will remain no more of an optimal currency area than it was

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Sharing with Market Discipline, A Constructive Approach to Euro Area Reform: *Policy Insight No 91* (CEPR, London, 2018) p 2.

when the euro entered circulation'.[133] Moravcsik may be right about convergence. But the aim of our proposal is not convergence, which requires a certain outcome in the distribution of resources, but merely the *symmetry of opportunities and risks, irrespective of distributive outcomes.* Restoring fairness according to the symmetry principle demands redress for wrongs actually committed, if they cause loss. This is how corrective justice works. It does not involve a permanent distributive scheme with a view to converging prosperity.

Yet, Moravcsik's argument can be restated in line with the framework of corrective justice. We can say that if the parties make again the same mistakes and cause the same or similar loss to some disadvantaged parties in the future, they will then generate *new* claims of redress. The appropriate response to such an event will not be distributive but restorative. The redress will have to follow every event of wrongdoing. Inevitably, thus, we now enter the domain of institutional reform for the future in a way that may appear permanent. This would perhaps be the balancing mechanism for a permanent failure to restore symmetry and fairness in the Eurozone.

This proposal for a permanent transfer mechanism is, however, a distinct theoretical question. It asks if the members states should aim to restore symmetry well into the future and if for that purpose they should amend the rules in order to share fiscal risk (as argued, for example by Berger, Dell'Ariccia, and Obstfeld).[134] The ground for such a permanent mechanism set up by the parties by way of treaty amendment, will not be, strictly speaking, the requirements of redress under corrective justice, but the aim of redressing unfairness in a permanent way. Moreover, in case of treaty reform the basis of the relevant obligations will not just be the principle of corrective justice, but also the consent of the member states, assuming that a new treaty can be agreed (and assuming that the new treaty itself passes the symmetry test – because the risk of asymmetry may run the other way, with the formerly disadvantaged states becoming permanent recipients of

133 Moravcsik, 'Europe After the Crisis: How to Sustain a Common Currency'

134 Helge Berger, Giovanni Dell'Ariccia, and Maurice Obstfeld, *Revisiting the economic case for fiscal union in the Euro area* (Washington, DC: International Monetary Fund, 2018).

disproportionate largesse). The idea of a fiscal union has, therefore, two different manifestations. The first is a one-off attempt at redress for past injustice, the second is a permanent transfer union aiming at restoring fairness into the future.

7. Conclusion

We can now answer the questions we asked at the start. Was the financial assistance from some member states to those in need morally required as a manifestation of solidarity? The answer I have given is an affirmative one. Assistance was ethically required. This is so even though it was not required by distributive obligations of social justice, such as those that apply within a federation. Social justice on the basis of distributive justice only applies to a single state. But solidarity is not exhausted by distributive justice. Solidarity is also shown when we respond to wrongdoing and offer redress to someone whom we have harmed. The responsibility of providing redress is a matter of binding legal obligation in private law, but it may not be enforceable in international trade. Still, however, it is a moral obligation that arises in practical reasoning. The financial assistance programme can thus be seen to have been not only justified, but also required in the light of corrective principles of fairness in circumstances of interdependence created by the institutions of monetary union.

Our guiding framework has been that of corrective or cooperative justice. Since the member states jointly created a structurally flawed Eurozone, they remain jointly responsible for the asymmetric risks they created. When the crisis caused important economic and social losses to the disadvantaged states, the other states had a moral obligation of providing redress. Although the precise application of the principle to the historical facts requires careful factual argument about the extent of the damage caused and of the contributory responsibility of policy-makers in the disadvantaged states, a tentative conclusion can be drawn based on the evidence already available. The financial assistance programmes can be reasonably seen as the expression of a new form of solidarity generated by European integration. This kind of solidarity is transnational and corrective in nature, not constitutional and distributive. It is the result of states cooperating, not of citizens setting up common political institutions.

Solidarity as fairness is a fundamental principle of the European Union, seen as a union of peoples based on international law, not as a constitutional order in the making.

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