A demoicratic justification of differentiated integration in a heterogeneous EU

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Earlier scholarship assumed differentiated integration (DI) was pragmatic and temporary and that member states should and would converge on the same policies. By contrast, we contend that many instances of DI can be normatively justified on democratic grounds of fairness, impartiality and equity as suitable ways to accommodate economic, social and cultural heterogeneity. We distinguish between instrumental, constitutional and legislative differentiation and relate them respectively to problems of proportionality, partiality and difference. In so far as member states have unequal stakes in EU level collective decisions, reflecting, their economic and social heterogeneity, or apply distinct constitutional norms to them, reflecting their cultural heterogeneity, then fairness and impartiality in decision-making justify respectively instrumental and constitutional DI, while the equity of regulations when applied to relevantly different agents and agencies warrant legislative forms of DI.

1 Introduction

Up to the mid-1990s, domestic constellations were conducive to ever-closer political integration. Because European integration did not extend into 'core state powers' (Gentschel and Jachtenfuchs 2016), EU affairs had low levels of political salience and national political elites could operate at the European level with few electoral constraints. The post-Maastricht period has witnessed the collapse of this 'permissive consensus'. As integration has moved into core areas of state sovereignty, deeply affecting national economic, financial and welfare policies, public opinion has turned more Eurosceptic. Consequently, integration-friendly political elites now face a 'constraining dissensus' (Hooghe and Marks 2009).

The emergence of this ‘constraining dissensus’ correlates with the increased use of differentiated integration (DI) (Thym 2016), though various forms of DI have always existed (Schimmelfennig 2014). We define DI as EU member states having different rights and obligations in regard to specific EU policies, as some member states agree to cooperate on a specific policy or conform to a given standard, whilst others either opt out or adopt different standards. These forms of differentiation can be time limited or permanent, and operate inside or outside the treaties. By allowing states to integrate to different degrees and at different speeds, DI addresses a classic collective action problem, whereby a policy that is advantageous to most or all concerned can get blocked or rendered sub optimal, say by the adoption of lowest common denominator policies (Tsoukalis 2016: 199), by those who disagree with, feel disadvantaged by, or have less of an interest in it. The divergent views of member states on the general purpose and ultimate goal of the EU, and growing criticism of the trend towards a political union, make it increasingly difficult to achieve a consensus on the course EU integration should take. Instead, DI allows member states to leave their fundamental disagreements about the *finalité* of European integration unresolved by allowing certain members to adopt different policies to others. As such, it provides ‘one of the main sources of pragmatic compromise in EU politics’ (Lord 2015: 784).

Earlier scholarship assumed that DI would erode over time (Kölliker 2001), with member states converging on the same policies at different speeds (Stubb 1996), rather than dividing permanently into ‘ins’ and ‘outs’. However, the ensuing integration process has disproved this expectation. Post Maastricht, DI has substantially increased. Indeed, the Conclusions of the European Council of 26/27 June 2014 noted that ‘the concept of ever closer union allows for different paths of integration for different countries’, while the leaders of the founding member states responded to the British leave vote by announcing an initiative aimed at more ‘flexible’ integration, recognizing that the ‘one-size-fits-all model simply

cannot work' (Tsoukalis 2016: 199). DI even forms one of five scenarios for the future of Europe outlined by the Commission (2017).

Naturally, views of DI vary. Those welcoming DI see it as a means of reconciling continued integration with an ever more heterogeneous membership (Lord 2015) and call for a pragmatic approach to EU law that accommodates the dynamics of integration and disintegration within the EU legal order (Dehousse 2003). In a more heterogeneous EU, a multispeed approach and some variable geometry may offer flexibility, allowing member states to choose policies more aligned to their needs and preferences (Lord 2015). Likewise, it might make decision-making more efficient and effective.

Scholars who view DI less positively argue that opt-outs undermine the legal unity and authority of the EU (de Burca and Scott 2000; Curtin 1993), as well as the uniform composition of EU institutions. They fear it creates a differentiated citizenship that threatens the liberal model of universalist citizenship characteristic of modern constitutionalism. It erodes solidarity between member states and constitutes a challenge to any prospect of developing the EU into a political community based on shared rights and obligations of membership. They also fear DI weakens mutual trust between states, especially when accompanied by a narrative of insiders and outsiders, as is partly the case with the Eurozone members (Adler-Nissen 2016). Moreover, DI strengthens the power of strongly pro-integration member states by improving their bargaining position, since negotiating beyond the limits of a specific policy area is more difficult for states that only participate in some of the relevant areas. As a result, those who opt out of certain policies lose influence in the EU, thereby creating different classes of citizens (Jensen and Slapin 2012).

Existing attempts to theorise DI have mostly used the conceptual tools of traditional integration theories, asking whether a seemingly inverted process of integration could be explained by the same factors used to describe the integration process itself. Such approaches

are bound to be limited, not least because they fail to take into account how the increased heterogeneity between member states impacts both the economic space for integration and the political willingness to integrate further. By contrast, we shall argue that increased heterogeneity forms the common thread linking the various forms of DI and that it is the conceptual absence of heterogeneity as a defining feature of European integration which has prevented the emergence of a positive account of DI. Rather than seeing DI as a failure to integrate in a uniform way or as confining certain member states to a 'second-class' status within the EU, we hold that DI offers a tool which allows for the accommodation of heterogeneity and thereby the stabilisation of European integration, particularly in times of a severe nationalist and/or populist backlash against integration. As a result, this contribution focuses on the hitherto neglected normative question of which forms of DI can be said to be democratically justifiable.

Democracy can be described as a fair and impartial process that treats participating citizens with equal concern and respect (Rawls 1993: 14; Christiano 2008). In various ways, fairness, impartiality and equity can all be become problematic within a heterogeneous political system. As will be argued below, a fair democratic process assumes that all involved have a roughly equal stake in any collectively made decisions, and that condition may not always hold in a large and complex polity. As a result, a degree of demos-shaping may be necessary in certain policy areas to ensure each member state has a say proportional to their stake (Brighouse and Fleurbaey 2010). Democratic impartiality involves an absence of substantive as well as formal bias towards, or against, particular values or groups. As such, it implies there must be shared criteria and a degree of solidarity among those making a collective decision. However, scholars of multicultural and multinational democracies note that among a heterogeneous people involving different cultural and national groups, collective decisions may reflect the cultural partiality of the dominant or majority group.

They suggest various forms of 'differentiated citizenship' may be needed to overcome this problem (Young 1989). Finally, equal concern and respect may involve treating a heterogeneous membership in different ways rather than in the same way if the oppression of diverse minorities is to be avoided. One rule for all may be inappropriate. Hence, one can expect legislation to include opt-outs and derogations.

Adopting a demoicratic perspective, that conceives the EU as consisting of different demoi, we argue that just as the existence of economic and cultural heterogeneity within most of the member states has led many to adopt greater or lesser degrees of differentiation in policy-making, allowing some regions and groups to opt out of certain common measures and occasionally adopt different ones of their own, then so must the EU. The next section explores how the existing literature has conceptualised and explained DI, criticising its failure to appreciate the EU's heterogeneity. We distinguish between 'instrumental' DI, in the form of opt-outs or exclusions from participating in policies designed to produce collective goods at the EU level, be these non-excludable 'public' goods, or excludable 'club' goods; 'constitutional' DI, involving an opt-out from a given policy or measure because it conflicts with a domestic constitutional norm or cultural practice; and 'legislative' DI, motivated by one or the other of the above reasons, where all states participate in the common measure but there are derogations from, or variations within, shared standards. We relate all three to different forms of heterogeneity: the first to economic and social heterogeneity; the second to cultural and constitutional heterogeneity; and the third to lesser forms of both. The third section argues that from a normative perspective these different forms of differentiation can be democratically justified in so far as they correspond respectively to the three democratic values of fairness, impartiality, or equity. The fourth section illustrates this argument by considering examples of instrumental, constitutional and legislative integration. The final section concludes.

2 Heterogeneity as the driving factor of differentiated integration

Conceptual research about DI began in the mid-1990s (Stubb 1996), leading to no less than 30 models of DI. Since then, a variety of conceptualisations have been proposed, most of which can be grouped in one of three categories – time, space and policy. Conceptualisations focused on time are commonly linked to the idea of a 'multi-speed Europe', whereby some member states advance with integration and others are expected to follow later. Space-related differentiation is often associated with a 'variable geometry', whereby different geographic tiers have different levels of integration. Finally, policy-related differentiation is allied to a 'Europe à la carte', where member states pick the policies they wish to join. Among these three models, 'multi-speed' would be closest to the idea of 'ever closer' integration, whereby all member states ultimately reach the same level of integration, whereas 'Europe à la carte' involves only a small number of shared competences. In both academic and political contexts, it is the 'multi-speed' concept that has dominated the debate. Overall, conceptual fuzziness prevails**.** In this paper, DI means that EU member states may have different rights and obligations in regard to specific EU policies, possibly only temporarily, as some member states agree to cooperate on a specific policy whilst others opt out or adopt different standards.

Traditional integration theories have struggled to come to terms with DI (Hooghe and Marks 2009: 3; Jensen and Slapin 2012: 780; Kölliker 2016: 117), and so 'have become less useful guides for research on the European Union' (Hooghe and Marks 2009: 3). This difficulty arises from their neglect of different forms of heterogeneity and their implications for the EU. Neo-functionalism cannot explain why spill-over only occurs in certain areas but not in others, and why it does not affect all states equally where it occurs. Nor can it explain why we find DI in certain areas but not in others. Liberal intergovernmentalism cannot

explain why the 'threat of alternative coalitions and exclusion' (Moravcsik 1993: 502) by member states pushing for integration does not create a sufficient incentive for hesitant member states to join in. As for constructivist approaches, they do not explain why socialisation processes have not created those shared norms that would prevent some member states from wanting to opt out of certain policies. What these approaches share is that they privilege collective goods or common norms over the existing heterogeneity among member states. This bias rests on an implicit tendency to assume that, over time, differentiation will give way to uniform integration, with DI suboptimal and normatively undesirable.

What do we mean by saying heterogeneity lies at the root of DI? Heterogeneity comes in two main versions. First, increasing economic and social heterogeneity means that not all the member states may have the same stake in given collective goods – be these goods public goods, such as clean air, that are non-excludable, or club goods, such as a custom union, that are excludable. In both cases, costs may be distributed asymmetrically and not all those involved may value the benefits to an equal degree. Without compulsion, there can also be incentives for free-riding. The deciding factor is the ratio between the advantages of reducing production costs by sharing them among as many members as possible, and the loss of benefits as the gap between average collective preferences and individual preferences widens (see Kölliker 2001). Therefore, the more heterogeneous the group of participating states becomes, the greater the likelihood that either the EU will refrain from producing a given collective good, leaving it to member states, or that some members states will decide to set up a 'club' that excludes others – thereby leading to differentiated integration.

Schimmelfennig and Winzen partly captured the resulting kind of DI with the term 'instrumental differentiation' which 'is motivated by efficiency and distributional concerns' (Schimmelfennig and Winzen 2014: 355). They contend it is by definition transitional. It occurs either when existing member states temporarily *exclude* new member states from

certain policy areas because they 'fear economic and financial losses as a result of market integration with the new member states, the redistribution of EU funds or weak implementation capacity' (ibid.: 361); or when new member states seek to be *exempted* temporarily from integration and be granted more time to adapt to EU rules and market pressures. In such constellations, temporary differentiation aids at least one side of the equation and ideally both, thereby overcoming deadlock in accession negotiations. However, the analysis by Schimmelfennig and Winzen is restricted to temporary forms of DI and does not address the increased *structural* economic and social heterogeneity, which implies less space for uniform integration overall and might lead to some more durable forms of DI than the transitional ones linked to enlargement rounds. We will nonetheless use their term of *instrumental* differentiation.

Second, heterogeneity in the values of different member states has given rise to *constitutional* differentiation. Such heterogeneity of values comes in two versions The first concerns policies involving cultural differences, often rooted in religious traditions, such as those related to marriage and divorce, abortion, the use of stem cell research or euthanasia. In such areas, some governments may be reluctant to integrate a policy or seek to opt out if it is integrated, so as to respect the predominant cultural values of their demoi. Traditional integration theories do not sufficiently take into account the continuing importance of these identity-related forces. Legal scholars, by contrast, have noted how EU law has faced demands for a degree of differentiation since the 1970s so as to accommodate cultural diversity, leading to new concepts of differentiated citizenship (de Witte 1991).

The second involves issues of sovereignty and diverging views about how much political integration is desirable. In the context of the Euro and migration crises, it has become clear that member states differ as to how much integration they wish to achieve, and of which kind. The alarming electoral successes of right-extreme parties that typically defend

anti-EU positions indicates how, for some citizens, the boundaries of European integration have been pushed too far. As a result, governments of largely Eurosceptic countries, who are either ideologically opposed to further integration themselves or fear domestic opposition to it, are either unwilling or incapable of negotiating a compromise at the EU level and instead seek a potentially permanent opt-out from further integration. Heterogeneity of this kind proves particularly salient when core state competences are transferred to the EU in the context of treaty revisions, and is usually associated with a discourse of 'sovereignty' (Winzen 2016).

Finally, both socio-economic and value-heterogeneity may lead not to opt-outs from a collective policy or a given measure, but rather to *legislative* differentiation, whereby different regulations or standards apply to different states participating in a given common policy area. Currently almost 40% of EU legislation is differentiated in this way. Although many CJEU decisions acknowledge, often tacitly rather than explicitly, that different regulations and may apply in different jurisdictions, a tension exists between the trend in EU law to regard non-discrimination as requiring uniform standards that apply in the same way everywhere, and growing claims to special rights which argue that non-discrimination within an economically and culturally heterogeneous legal sphere requires differentiated law (de Witte 2005).

3 The democratic argument for differentiated integration

The accounts of DI discussed above are essentially descriptive and analytical categories. This section develops a democratic rationale for DI that can legitimise some, if not all, forms of instrumental, constitutional and legislative DI. Democracy is standardly defended as offering members of a political community a legitimate mechanism for making necessary collective

decisions about which they may disagree by giving them an equal say (the fairness argument), on the basis of a common process and criteria (the impartiality argument), to produce decisions likely to treat those involved with equal concern and respect (the equity argument) (Christiano 2008). However, as we shall show below, all three arguments assume a degree of homogeneity among the decision-makers. A fair, impartial and equitable democratic system proves compatible with some forms of heterogeneity but not with others. To adopt the terminology of pluralist theorists of democracy, whereas horizontal, cross-cutting cleavages promote many democratic practices; vertical, segmental cleavages, tend to fragment the demos and require more differentiated forms of citizenship and decision-making of a kind associated with theories of multiculturalism and consociationalism (Dahl 1989: chs 16-18). These forms of democracy can be related to what in the EU context has been called demoi-cracy (Nicolaïdis 2013). What follows explores three classic political aphorisms guiding the fairness, impartiality and equity arguments for democracy respectively, noting how heterogeneity raises a problem for each that can justify differentiation as to which collective decisions may be taken, among whom and in what form.

The first aphorism decrees 'what touches all should be decided by all'. This aphorism appeals to the fairness argument but assumes a roughly equal stake in the relevant collective decision (Christiano 2008). On this view, if each individual is the best guardian of his or her interests, and the interests of every individual in the polity are equally at stake in the decision, then in fairness all these individuals are entitled to play an equal part in making the decision to ensure their interests are equally taken into account. Therefore, a democratic system based on one person, one vote assumes that all involved have a roughly equal stake in the overall package of decisions, if not in each and every one. If that was not the case and a significant group had less of a stake in the generality of collective decisions than most others, an equal vote might lead to the underfunding of public services or the rejection of public regulations

on which many people's well-being depends. Consequently, a democratic case exists for either so shaping the demos that all those involved do have a roughly equal stake or in giving individuals a vote proportional to their stake, and thereby treating them fairly and with equal respect, if not literally equally in the sense of exactly the same (Brighouse and Fleurbaey 2010). We shall call this the 'proportionality problem'.

Demos-shaping to create an equal stake among citizens is fairly common within most democracies. For example, most states devolve certain public services to local communities for reasons of fairness as well as efficiency. States are generally heterogeneous: urban areas differ from rural areas, some regions have an aging population and others a higher proportion of children and young people, and so on. The central state may have certain regulations that can be reasonably regarded as in the equal interest of all, but there will be a reasonable case for differentiated integration in other respects. Demographic and socio-economic differences can all make the spending priorities of one region legitimately different to another, at least on those matters that impact mainly local residents. A democratic system that allowed, say, urban areas to determine all the policies of rural areas (or *vice versa*) could be regarded as failing to take account of the unequal stakes citizens had in the relevant collective decisions, so that a disproportionate stake was given to some citizens.

The second aphorism holds that 'for justice to be done, it must be seen to be done'. This aphorism underlies the impartiality argument and the need for democracy to be not only fair but also publically and demonstrably so. One reason for insisting all have a fair say in collective decision-making rather than trusting in a benevolent dictator arises from people's inevitable partiality to their own point of view. Such partiality results from the unavoidable limitations in our reasoning about others, particularly in large societies where the details of most people's lives are a mystery to us (Christiano 2008: chs 3 and 6). Even the most conscientious, well intentioned and best informed of us cannot avoid drawing on our own

experiences and reasoning in the light of values and facts that resonate with us but may not do so with others. A democratic system of one person, one vote offers a formally impartial system that endeavours to integrate our multifarious points of view and so promote policies that reflect our various concerns and circumstances. Nevertheless, to do so the process must incorporate incentives for us – or, more realistically, the decision-makers we elect – to go beyond a partial perspective and 'hear the other side' in ways that move policy-making towards an impartial consideration of what is in the public interest rather than simply responding to the private interests of various particular groups.

To achieve this result, the process must involve a more substantive notion of impartiality, whereby policy-makers address the commonly avowable interests of citizens by appealing to reasons that are widely shared as suitable criteria for collective decision-making and justifying decisions in terms of their contribution to the common good (Miller 2009; Christiano 2010). Two notions of a public render such an appeal possible. First, citizens must conceive themselves as forming a public. In part, that results from their participating in a scheme of social cooperation in which all have a roughly equal stake. In part, it stems from a shared history, culture and institutions. Second, citizens must share a sense of what count as public reasons, and the ability to reason in public – notions typically associated with the presence of a shared public sphere, involving a common language and media. Democratic systems that lack these public qualities are likely to allow politicians to play different groups off against each other. It also gives rise to the danger of consistent minorities, in which particular groups with distinctive cultural or other priorities are persistently excluded from collective decisions. These issues create what we call the 'partiality problem'.

Again, many member states contain cultural and national minorities and adopt various types of differentiation when making and applying collective policies to address this problem. These mechanisms standardly take the form of differentiated group rights. Following Will

Kymlicka, we can divide these rights into self-government rights, special representation rights, and poly-ethnic rights (Kymlicka 1995). All involve asymmetrical arrangements between regions or groups of citizens. These types of differentiation address the partiality problem by seeking to incorporate heterogeneous groups of citizens in a unified public decision-making process. Self-government rights involve the devolution of particular competences to certain territorially concentrated cultural or other minorities, as in Scotland or Catalonia; or the ability for such groups to control certain services, such as publically-funded faith schools that are run by particular religious groups. Special representation rights involve giving such groups a guaranteed level of representation to ensure their voice gets heard. Finally, poly-ethnic rights involve special dispensations from certain general laws for particular groups, such as allowing the slaughter of animals in ways that are otherwise prohibited to accommodate the dietary code of certain religious groups.

The third aphorism enters here. Related to the equity argument, it dictates that democracy involves the 'rule of law, not persons'. On this view, democracy ideally removes the possibility for arbitrary rule by preventing any person or group of persons from ruling in a wilful and capricious way, without consulting the interests of those subject to their rule (Pettit 2012). Instead, they must rule by a duly constituted democratic process. Suitably adjusted to take into account the proportionality and partiality problems, such a democratic process creates incentives to govern as equitably as possible by placing governments under the equal influence and control of the governed, and removable and replaceable by them, making all citizens rulers and ruled in turn.

A simple account of laws that meet the equity requirement of the rule of law is that one should have 'one law for all'. Yet, this simple account turns out to be simplistic. Most people accept that exceptions can exist – for example, that ambulances may exceed speed limits when rushing a sick person to hospital, even if we expect them to exercise due care and

attention when doing so. Likewise, it seems reasonable to look at the heterogeneity of different types of provider of a given service when setting and applying regulatory standards. So certain health and safety rules may differ with regard to small and large firms. Similarly, there can be rules designed to benefit specific groups of people, albeit in the interests of equity, such as regulations aimed at facilitating access to buildings for the disabled. As a result, a more accurate principle of equity in the case of laws would be the Aristotelian maxim that 'one treats like cases alike, and unalike cases differently'. Yet, a difficulty arises in deciding when a difference is relevant or not with regard to the policy at hand. We call this the 'difference problem'. A well-designed democratic system responds to this problem by allowing different groups within society to 'hear the other side' and share the costs and benefits of differential treatment reciprocally (Bellamy 2007: 80-83). However, this process will only operate in a fair and impartial manner that respects difference to the extent the proportionality and partiality problems are taken into account.

Democratic decision-making about common policies can only be fair, impartial and equitable to the extent it takes into account the proportionality, partiality and difference problems, which can all arise within heterogeneous states. Such heterogeneity creates different demoi, making it necessary to conceive how these different groups can govern together but not as one (Nicolaïdis 2013). Applying the argument to the EU, the next section argues that the proportionality problem can justify excluding, temporarily or permanently, some member states from participation in certain club goods. It proves less legitimate with public goods, where they cannot be excluded from the negative or positive externalities they produce. Fair-play arguments of political obligation suggest in such cases, all should contribute (Rawls 1964). However, unless such goods relate to upholding basic rights, it would be illegitimate to force people into accepting benefits they do not value (Nozick 1974: 90-95). At some point, all the member states would need to be involved in deciding whether

and how far such goods should be provided. The partiality problem enters here, since this allows for those who conceive of themselves as a distinct public with divergent public norms to make their own decisions as to what collective goods they should support in circumstances where they feel their distinct but reasonable views will not get an impartial hearing. Finally, the difference problem suggests that when groups with different interests and values belong to a club, then collective rules need to accommodate these differences to some degree. Figure 1 summarises the argument so far, indicating how we will relate these three arguments respectively to instrumental, constitutional and legislative differentiation in section 4.

Figure 1

Democratic value	Fairness	Impartiality	Equity
Social/cultural preconditions	Equal stake	Shared values	Co-incidence of equal with uniform treatment
Type of heterogeneity	Different socio-economic stakes in a given collective good	Cultural differences -> lack of identification as a public or absence of shared public reasons	Moderate relevant differences of either stakes or diversity
Form of DI	Instrumental	Constitutional	Legislative

4 Instrumental, constitutional and legislative differentiation

As the EU slogan 'unity in diversity' indicates, the EU recognises the proportionality, partiality and difference problems to some degree, not least in the demoicratic character of many of its governance structures (Cheneval and Schimmelfennig 2013). So far as the treaty-making and accession processes are concerned, the EU remains a union of member states and their peoples rather than straightforwardly of European citizens. This feature has allowed the proportionality, partiality and difference problems to be partly accommodated through

temporary exclusions, opt-outs and differentiated legislation. The emphasis on subsidiarity and the use of national parliaments to police it also reflects an awareness of these problems (Kröger and Bellamy 2016). Issues better regulated at the European than at lower levels are likely to be those where member states possess an equal stake and a shared perspective. Where they have different stakes, subsidiarity operates in a similar manner to the devolution of many services to local government even within unitary states. Where cultural differences exist, subsidiarity operates similarly to granting self-government rights to different linguistic and other cultural communities within multinational and multicultural federal systems, which can extend to different legal, health and education systems and include extensive tax raising powers. As in many domestic systems, countries have also requested Treaty opt-outs that lead to an asymmetric retention of power by certain member states in matters that most countries agree can be EU competences. Thus, Denmark and the UK have four Treaty opt-outs each, Ireland two and Poland one. Meanwhile, much EU legislation is increasingly differentiated so as to apply differently in different member states. Below, we explore the case for such opt-outs on grounds of fairness, impartiality and equity in the context of a heterogeneous EU.

With regarded to fairness, we noted above how economic and social heterogeneity can be problematic in the case of collective goods. Even when all countries have an equal stake in a common measure, they may not have equal incentives to resource it. However, differences in population size, varieties of capitalism, economic specialisation and wealth may lead to different stakes, giving rise to the proportionality problem. Giandomenico Majone has observed how the logic of collective action often militates against the optimal provision of a collective good, particularly among a large and heterogeneous group (Majone 2016). If all members benefit from a collective good because it is a public good or membership of the club producing it is automatic, they will have an incentive to free-ride on the efforts of others and to contribute less than their fair share to its provision. In a small

group, wealthier participants may be willing to cover more than their fair share, accepting that they gain more from the good and would suffer a greater loss from its not being supplied than in paying disproportionally to provide it. Selective incentives can also be offered to encourage compliance. For instance, the Common Agricultural Policy originated as part of a grand bargain between France and Germany to gain French support for further European integration in other areas. As the club gets bigger, such trade-offs get harder to arrange, especially if the balance between wealthier and poorer countries tips decisively towards the latter, as has happened post Eastern enlargement whereby Denmark has a GDP/capita that is 7.5 times that of Bulgaria (Eurostat GDP/capita 2016). The poorer and/or smaller states will tend to exploit the wealthier and/or larger states. Clubs with a larger membership that possess such asymmetries are also more likely to include members for whom the costs outweigh the benefits associated with the good. There are also likely to be disagreements as to which collective goods should be provided in the first place, increasing the transaction costs of obtaining consensual agreement among all concerned.

In these circumstances, it becomes rational to employ instrumental forms of DI that reduce the club involved in producing a given collective good to a smaller group than the whole so as to overcome the proportionality problem. Two mechanisms have been employed to achieve this result. One approach, suggested as early as 1975 in the 'Leo Tindemans Report', involves allowing a small, 'pioneer', group to forge ahead with cooperation in a given policy (Piris 2012: 67). However, since Amsterdam the Treaties have authorised both 'in-built' cooperation for certain members in policy areas specifically mentioned in the Treaties, such as the Schengen and Euro areas, and allowed certain members to employ EU institutions for 'enhanced cooperation' on a case by case basis should at least nine member states wish to do so (Piris 2012: 70-75). A corollary of such measures has been to exclude those states that fail to reach a given threshold sufficient to make them fair participants in a

particular club good, although hitherto such exclusions have been seen as temporary. The most significant example of this approach is participation in the Euro, which depends on the fulfilment of certain pre-conditions, although arguably these criteria have proved neither stringent enough nor been applied with appropriate rigour. Likewise, the exclusion of Bulgaria, Romania and Croatia from the Schengen Area might be justified on the grounds that they had a disproportionate interest in free movement in order to access better jobs in other member states. However, an injustice might be thought to be committed where the stake an excluded country has in a collective arrangement is greater than those that are included. For example, in the case of free movement the potential costs to existing member states of an influx of cheap labour could be said to be less than the benefit to the new member states when such temporary arrangements were introduced, so that the latter were unfairly treated in having their interests weighed equally with those of the former.

A second approach to the proportionality problem involves taking subsidiarity seriously and accepting that different functional tasks may be assigned to a wide variety of different levels involving different groups of states and even of regions not only for reasons of efficiency but also to reflect the degree of interest each of the participants has in it. Such a solution would extend the EU's variable geometry, yet no more than is common within many unitary federations that allow the asymmetrical devolution of various competences to different regions. Again, a Treaty basis already exists for such flexibility (Piris 2012: 75-77). Protocol 25 on the exercise of shared competences makes explicit that even in areas where the EU has adopted legislation, member states can legislate nationally and conclude agreements with other states in those areas not specifically governed by the relevant EU act. Indeed, since the 1980s the Commission has limited many measures to 'minimum' or 'partial' harmonisation. Article 100A(4) of the Single European Act even introduced the possibility of a partial opt-

out from a given harmonisation if ‘a member state deems it necessary to apply national provisions on grounds of major needs referred to in Article 36’.

Public goods raise a potential problem for DI through being non-excludable. Consequently, they generate positive externalities from which non-club members still benefit or negative externalities that disadvantage them further. However, EU policies with this property are exceptions not the norm. Not even all environmental policies tackle EU wide public goods or bads. Negative or positive externalities cannot provide a justification for a common policy on beach cleanliness, for example. Here, the advantages or disadvantages accrue largely to local residents and so can be differentiated.

Likewise, since Maastricht, the Treaties have recognised the possibility of constitutional differentiation to address the partiality problem. For example, Article 3 TEU asserts the Union ‘shall respect its rich cultural and linguistic diversity’, Article 67 (1) TFEU that it will ‘respect … the different legal systems and traditions of the member states’ and Article 4 (2) TEU that it ‘respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.’ More specifically, Articles 83 (3) and 151 TFEU assert that relevant Union measures must respect national practices in the operation of the criminal justice system and social policy. These and similar articles reflect tensions from the 1970s onwards between national constitutional courts and certain rulings of the Court of Justice regarding areas where the former held domestic constitutional norms legitimated restrictions on the free movement of goods, services, capital and labour that the latter sought to uphold. This conflict was at the heart of a whole series of key cases where the Court of Justice was criticised for extending the range of its jurisdiction and interpreting rights in a largely market manner that showed scant respect for national constitutional values: notably, *Cinéthèque*, *Groener*, *Bond, ERT* and *Grogen* (De Witte 1991, Coppel and O'Neill 1992).

Such issues have played an important role in a number of key opt-outs, such as the Danish Protocol allowing a permanent derogation prohibiting the purchase of second homes by non-Danes and regarding its non-participation in the European Policy on Defence and Security, or the Irish Protocol on Article 40.3.3 concerning the prohibition of abortion. Denmark and the United Kingdom also have opt-outs from certain central EU policies relating to the free movement of persons and the Euro, on the grounds that these are core powers of sovereignty. Calls for such opt outs have spread to other countries due to the pressure to share the burden of refugees in the wake of the migrant crisis and to introduce constitutional measures regarding public spending following the Euro crisis.

The rationale behind the insistence on constitutional differentiation lies in the fact that the different demoi of the member states have already developed their own constitutional and juridical orders that reflect the distinctive and diverse public cultures of their citizens. As a result, impartiality in the application of constitutional norms may not be possible at the EU level. Even if all the member states endorse broadly the same set of rights and democratic principles, they may have legitimately different views about their scope and relative weighting with regard to both each other and other important values and interests that reflect valid cultural differences. The right to freedom of expression is accepted by all member states, for example, but in certain countries it is interpreted as warranting the special protection of linguistic minorities or a national language on the grounds that a people's culture provides the necessary context within which they express themselves as possessors of a specific identity. Such reasoning led the German Federal Court to affirm in its 2009 Lisbon Judgment that European unification should ‘not be achieved in such a way that not sufficient space is left to the member states for the political formation of economic, cultural and social living conditions.’

Nevertheless, basic rights if not EU law can limit how much constitutional differentiation is justifiable. The Polish stance on homosexuality, for example, is problematic in itself, not just because it can restrict mobility and non-discrimination in the EU. Likewise, the degree to which Hungary and Poland are currently adhering to the principle of democracy and the rule of law, and hence should be allowed full membership of the EU, has become increasingly debateable for a number of commentators (Kelemen 2017).

Of course, constitutional opt-outs are the exception rather than the rule. However, we noted how 40% of EU legislation involves derogations and differences among member states in applying a given measure. During the 1960s and 70s, European institutions took the view expressed in the landmark *Costa* judgment that the 'executive force of Community law cannot vary from one state to another … without jeopardizing the attainment of the objectives of the treaty'. However, as the membership has grown and become more varied, so the formulation of specific EU secondary law has allowed for flexibility that acknowledges the need on grounds of equity to recognise relevant differences. This need involves both economic and social differences involving the proportionality problem and constitutional differences involving the partiality problem. For example, with regard to the proportionality problem, although Transport Minister Chris Grayling declared that as a result of Brexit the UK would now be able to set the height of its own railway platforms, the relevant EU regulation (EU) No 1299/2014, allows considerable diversity to accommodate the extraordinary variety of gauges and heights currently present across Europe. The interoperability of trains across Europe is an important collective good, but not at a cost that would undermine the likely benefits. Similarly, with regard to the partiality problem, the, Commission has proposed amending Regulation (EC) No 1829/2003 to give member states decisional power regarding the use on their territory of genetically modified food or feed that has been authorized at the EU level.

5 Conclusion

We have argued that traditional European integration theories are ill-equipped to address the demands for DI because they ignore both how social and economic heterogeneity may render some collective goods inefficient and inequitable for all member states, and the cultural heterogeneity underlying sovereignty and identity-based claims. To address these shortcomings, we have proposed a democratic rationale for different categories of DI. Such an approach focuses on criteria that can render differentiation democratically legitimate. Democracy provides a fair and impartial process for the legitimate making of equitable collective decisions. However, the suitability of such a process assumes that all citizens have an equal stake in the collective decision and conceive themselves as a public capable of arguing from a shared set of public reasons. We have argued that to the degree groups of citizens are heterogeneous and have unequal stakes in a collective decision then one can expect instrumental differentiation, which reflects the proportionate degree of interest given groups may have in any policy. Likewise, to the extent groups have heterogeneous public cultures and feel they belong to distinct demoi, then collective decision-making risks not being impartial thereby justifying differentiated group rights that will lead to an asymmetric distribution of self-government between different member states and a number of exemptions typical of constitutional differentiation. Both types of heterogeneity will also produce legislative differentiation even when all adopt common policies.

None of this should be surprising. States with significant national minorities have often adopted forms of consociational governance that involve elements of proportionality and partiality. In collective decision-making the various groups are represented separately in ways that give them a proportionate say or protect them from partial views, with considerable

devolution of decisions to the relevant regions, often to different degrees and in different policy areas. Such states also have a considerable amount of differentiated legislation, granting special rights to different groups. A number of analysts (Costa and Magnette 2003; Papadopoulos and Magnette 2010) have noted the consociational features of current EU decision-making arrangements, and these can be expected to increase to the extent the heterogeneity between member states increases.

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