

# Justifying the Imperfect: Differentiated Integration and the Problem of the Second Best

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*Abstract.* This article deals with the problem of the *second best* in a politically differentiated Europe. Drawing on Kant's category of *permissive law of public right*, it establishes the missing link between ideal and nonideal theory and then an *indirect legitimation theorem*. This theorem provides tools to contain damages and unlock practices and dynamics that obstruct reforms and lead to counterproductive outcomes. The theorem, which is equipped with a time and knowledge index, awaits the formation of favourable circumstances of integration. It establishes the conditions under which differentiated integration would be nonregressive. The theorem rules out backsliding solutions, which undermine the European integration process.

## 1. Introduction

In Europe, differentiated integration (DI) is a way to keep together a controversial political system by sectioning off particular policy areas and countries from centralized rule.<sup>1</sup> Opt-outs and escape clauses have become a means of handling (or bypassing) various forms of crises and various forms of opposition to integration. DI is a pragmatic response to political challenges of a fundamental character, but the consequences are not trivial. Some forms of DI involve *regression* and run counter to the ideal of a united and democratic Europe. A return to a Europe of independent nation-states would forfeit the normative achievements of the European integration process and increase interstate dominance.

The point of departure in this article is that DI is not ideal at the same time as integration is a duty—a “must.” Integration is a means to banishing dominance, that is, to domesticating and democratizing international relations in Europe. It makes the affected parties members of a unified legal order. According to Immanuel Kant ([1795] 1996), when people live close by and/or cannot avoid affecting one another's rights adversely, they have a duty to establish a *rightful order*. However, when greater integration is not on the table, and disintegration should be avoided, there may be reasons in favour of DI. How can DI be legitimated when it falls short of

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what we rightly can expect? In order to clarify this predicament, I will analyse DI with reference to the relationship between ideal and nonideal theory and the *problem of the second best*. DI raises the problem of the second best as it violates one of the core principles of the ideal state of affairs.

John Rawls (1971) saw ideal theory as a necessary precursor to the kind of nonideal theory that should guide our action in the real world. While ideal theory works out the principles that regulate a well-ordered society under favourable circumstances, nonideal theory deals with obstacles to such a society that are owed to unfavourable circumstances: injustice and socioeconomic limitations (Rawls 2001, 13). However, the political will may also be lacking. Under unfavourable circumstances, nonideal theory would have to prescribe solutions that are suboptimal from the point of view of ideal theory. In that case, we may encounter the approximation problem of the second best, that is, when first-best options are unavailable, piecemeal efforts to approximate the available elements of the ideal can actually generate new injustices and wrongs. Nonideal theory risks being regressive, bringing about states of affairs that are inferior to what is normatively defensible; in fact, it can generate outcomes that are worse than the status quo.<sup>2</sup>

As the problem of the second best reveals, there is a *missing link* between ideal and nonideal theory. Measures needed to make sure that departures from the ideal do not generate counterproductive outcomes should, however, not be left to intuition. Kant's category of a *permissive law of public right*, which permits the postponement of reform until conditions are favourable, can be seen to intermediate between ideal and nonideal theory. By specifying this category into an *indirect legitimation theorem*, this article establishes the conditions under which DI would be nonregressive. The *nonregression proviso* states that no arrangements are permitted that foreseeably reduce the protection of basic rights, including the right to correct prior decisions, and undermine the ideal of integration.

DI describes differences not only in sectoral and territorial dimensions of integration, but also in temporal dimensions, as is alluded to by concepts like "a Europe of different speeds," "Core Europe," and the "Europe of Concentric Circles." The latter dimension is of particular interest, as the different forms of association have to date been seen as *interim arrangements* in the advent of EU membership based on equal rights and statuses, which equality, if only for the sake of the argument, we take to constitute the ideal state of affairs. If these arrangements are actually stepping stones toward EU membership, DI would not be a threat to the European project, but rather a necessary means to its realisation under unfavourable conditions, viz., when the requisite basis for integration is lacking.

The article begins by clarifying the core normative problem of DI. It then outlines the indirect legitimation theorem relating to the distinction between ideal and nonideal theory. Thereafter, it establishes conditions of legitimacy and discusses justifying reasons for DI. Lastly, it addresses the European *bonum commune* to be preserved, and whether it is plausible to expect that ideal normative principles will remain unsatisfied when it comes to European integration.

<sup>2</sup> See Alter and Lafont 2019; Berg 2019; Brennan and Pettit 2005; Coram 1996; Lipsey and Lancaster 1956; Simmons 2010; Swift 2008; Wiens 2016.

## 2. Preemption of Choice and Self-Inflicted Harms

The EU consists of multiple overlapping groupings: Not all countries are members of the euro or the Schengen areas. Currently the eurozone consists of only nineteen out of twenty-eight EU member states. In the Schengen Area of passport-free travel, not all EU member states are included but some nonmembers are. There are also *transitional arrangements*, which limit the newcomers' access to the rights and benefits of membership. The EU is differentiated internally as well as externally, which raises different kinds of normative concerns. While some DI forms do not affect the partner's status and standing, others do. In the latter case, we have to do with arbitrary rule or *dominance*, which designates forms of illegitimate rule, as well as of disenfranchisement, exclusion, and discrimination. The core of dominance is dependence on others' unauthorized discretion (see Eriksen 2020; Pettit 2010).

Exclusion from lawmaking processes—decision-making exclusion—is the general problem with the *enhanced cooperation clause*, which confers the right to vote only on members of the Council representing the member states participating in it (Art. 20 TEU). There are two types of sources of arbitrary rule: In the *internal dimension of integration*, DI, mostly due to quandaries in the eurozone, creates large power and voting-rights asymmetries between member states. The eurozone-specific regime of economic governance introduces an incongruence between the Single Market and the single currency as well as between debtors and creditors in the eurozone. As a consequence, the power of citizens' representatives is highly uneven depending on which constituencies they represent. The ability to control the political agenda is not level. Consequential decisions are largely made by the most powerful members.

Exacerbating this incongruence are the financial-assistance programmes established in the wake of the financial crises, especially the Fiscal Compact, which were established in 2012 outside the Lisbon Treaty and the Stability and Growth Pact—outside the ordinary legislative procedure. The debtors' freedom of choice is limited because their unbalanced budgets compel them to accept conditions imposed by the financial-assistance programmes. Loans and credit are conditional on reforms that are not initiated by citizens' representatives or justified to the affected citizens. Quite the contrary, governments are required to write a doctrine of fiscal responsibility into binding legislation. Some choices, opportunities, and alternatives have been removed from the political agenda. There is a preemption of choice (see Eriksen 2018).

The EU's internal differentiation is reflected in its *external relations* with its nonmembers, ranging from the European Neighbourhood Policy and Turkey's Customs Union to the UK's and Switzerland's bilateral approaches and the multilateral European Economic Area Agreement (EEA) for Norway, Iceland, and Lichtenstein. With regard to the first group mentioned, there are formally no dominance relations, as the states are not members of the Single Market (or of the Customs Union) and so are not subject to EU law.

In contrast, due to the EEA Agreement, the *associated nonmembers* are granted access to the Single Market as long as they implement the relevant legal acts of the EU. They are exempted from membership in core institutions, but not exempted from the effects of these institutions' decisions. As regulations and directives are to be uniform

and have the same effect across all EU member states as well as on EEA members, they are bound by them. The *doctrine of homogeneity* applies and trumps sovereignty. Only member-state law counts as EU law. The homogeneity requirement can be found in the preamble to the EEA Agreement, but is also an “unwritten rule” governing the Schengen and other agreements with the EU. The associated nonmembers are excluded from decision-making fora; they have become decision-takers (on the receiving end of decision-making) (see Eriksen 2015).

The EEA countries inflict wrongs on themselves because they prioritise access to the European common goods whilst not being EU members with participatory rights. They manage their relations with the EU through a contractual framework under international law, a framework premised on the power of interest and the formal equality between the contracting states. The EEA members are small countries unable to back their claims against the Community with credible threats—external sanctions or reciprocity—whereas the EU could unilaterally destroy the whole arrangement with negligible costs. The associated nonmembers are free to annul their arrangements with the EU, but have chosen not to face the costs of such an act. Exit options have so far been perceived as unrealistic.

Switzerland concluded the first bilateral trade agreement with the EU in 1999 and was granted unhindered access to the internal market. In the unique Swiss form of sectorial bilateralism, there is no set of supranational arrangements to ensure coherence. However, despite important formal differences, the Swiss form of sectorial bilateralism has generated obligations that are similar to those of the EEA agreement (Lavenex and Schwok 2015). As long as the homogeneity principle applies, adaption takes place on the EU’s terms: Hence the term *autonome Nachvollzug*.

The post-Brexit UK may face a similar fate. It may find itself bound by EU regulations, even though it is no longer a EU member (EU-UK Trade and Cooperation Agreement 2021). This is so because the trade relationship involves a commitment to upholding the EU’s Single Market standards. According to the terms stated in the EU-UK Trade and Cooperation Agreement, actions by the UK to cut regulatory standards risk being met with immediate retaliation in the form of new tariffs. This runs counter to the very motivation for departing from EU rules. Hence, after Brexit, the value of recuperated sovereignty may not count for much.

Under conditions of economic integration and complex and asymmetric interdependence political differentiation may undermine democracy and state autonomy. DI affects the core principle of the ideal state of affairs, that is, of being able to influence the laws that you are obliged to abide by. Types of differentiation threaten the integrity and viability of the EU by cherry-picking public goods; they affect identities, political statuses, and the conditions for self-rule. In a differentiated EU, states and citizens experience unequal statuses. DI subjects some of them to rules and powers they cannot influence on equal terms. In that case, DI undermines democratic autonomy and increases heteronomy in the form of arbitrary rule, viz., dominance. Together with the rule-of-law principle and basic equal-rights protection, *participatory rights* constitute a core component of an ideal European order.

### 3. Second-Best Problems

Rawls coined the term *ideal theory* in his work on justice to identify principles for guiding the basic institution of a society in which certain idealized conditions were

satisfied (Rawls 1971, 246). The parties are generally supposed to know that the order in question—a well-ordered society—exists in the circumstances of justice. Under reasonable favourable circumstances, it is expected that people comply with the principles of justice. Under such conditions, a constitutional regime is possible “provided the political will exists” (Rawls 2001, 13, 101). Political-will formation is, however, contingent on material, psychological, cultural, and social factors; hence even under favourable socioeconomic conditions the requisite solidaristic basis for collective action may not exist.

Nonideal theory deals with the problem of unfavourable circumstances posing an obstacle to a well-ordered society. It deals with injustice and the principles for transitioning to the ideal. Nonideal prescriptions are in need of ideal theory because it is very unlikely that justice will be served equally well by all incremental and short-term reforms. Ideal theory based on a conception of a just society is needed to identify the objective at which nonideal theory ought to aim and thereby gives nonideal theory its ultimate target. As Rawls (1999, 90) puts it, “until the ideal is identified [...] nonideal theory lacks an objective, an aim, by reference to which its queries can be answered.” In its *target role*, then, ideal theory helps nonideal theory answer the question: What shall we do here and now given the ideal endpoint we want to reach? And how to ensure that nonideal arrangements—short-term reforms—do not yield counterproductive outcomes?

The general *theory of the second best* holds that political ideals provide inappropriate targets for real-world reform. It was developed by economists to deal with problems in the welfare economy. The theory is premised on Pareto optimality, which requires the simultaneous fulfilment of several conditions (Lipsey and Lancaster 1956, 12). The theorem warns that disjointed efforts to meet features of the ideal may lead us astray and even generate worse outcomes. Even when long-term goals are upheld, we cannot assume that bringing about some of the elements of the ideal theory will get us closer to achieving final goals. Transformed into the sphere of politics, where several ideals are in play, the challenge of the second best consists not merely in the weighing of ideals and establishing trade-offs between them. In the real world, such weighing is required for any of them to be realized. Rather, the point is that in a second-best world, there are interdependencies among ideals, and realizing one and not others may lead to counterproductive outcomes:

When our ideals cannot all be realized simultaneously, the general theory of the second best comes into play. It warns us against assuming naively that it is better to implement more of our ideals rather than fewer (or indeed to implement each of them to a greater rather than lesser degree). (Goodin 1995, 54)

When we move into the political sphere for action, however, we need to switch from the analytical framework of economics to the *normative* one of political theory. In this latter framework, the problem is not about assumed constitutive conditions that may or may not be fulfilled, but about derived conditions related to satisfied or nonsatisfied principles (Wiens 2016, 141). This change entails a shift in focus from what happens when idealised conditions do not apply, which is more often than not the case, to what happens “when one of the principles that characterize an ideal state of affairs fails to be satisfied” (*ibid.*, 133).<sup>3</sup> The second-best theorem warns against approximation; when the ideal remains utopian, individual steps

toward improvement may turn out to be regressive. Even though the condition that normative principles will remain to be unsatisfied is controversial, and even more so in our case (a point I will come back to), the theorem reveals problems that need to be solved, damages that need to be contained. The second-best theorem reveals that there is a *missing link* in the relationship between ideal and nonideal theory.

The theorem of the second best lacks a *transitional component* (see Simmons 2010, 25) and ideal theory is *incomplete* (Berg 2019). It is incomplete not because there is disagreement over ideals, over conceptions of justice (Sen 2009), but because there is a lack of categories for handling or containing the approximation problem. “The measure of departures from the ideal is left importantly to intuition” (Rawls 1971, 246). Nonideal theory will require political and social scientific knowledge about what is morally permissible, politically feasible, and effective. It will also need specialized knowledge of the structure and workings of particular societies (Simmons 2010, 19). The question is whether Kant’s category of a *permissive law of public right* equipped with a time and knowledge index can fill the gap between ideal and nonideal theory.

#### 4. The Indirect Legitimation Theorem

The category of permissive law of public right opens the door for societies to move out of injustice and into an ideal prescribed by justice—a rightful political order—by considering empirical constraints. By introducing this category of law, Kant made possible the integration between morality and political knowledge. Public right concerns the juridical relationship between a state and its own members (or between states) and involves “a permissive law (*lex permissiva*) of practical reason” (Kant [1797] 1996, 406; AK 6:246). This principle authorises the temporary delay of a necessary reorganisation of an unjust order when the “implementation of immediate reform would counteract the ruler’s duty to reform the legal order as a whole” (Weinrib 2013, 108). True politics draws on empirical knowledge and prudent judgement of the circumstances under which the existing legal system can be brought into conformity with its own standard of adequacy.

Since the severing of a bond of civil or cosmopolitan union even before a better constitution is ready to take its place is contrary to all political prudence, which agrees with morals in this, it would indeed be absurd to require that those defects be altered at once and violently; but it can be required of the one in power that he at least take to heart the maxim that such an alteration is necessary, in order to keep constantly approaching the end (of the best constitution in accordance with laws of right). (Kant [1795] 1996, 340; AK 8:372)

Permissive rights exempt action from necessity and permit the postponement of reform until circumstances are favourable. It does so without losing sight of the end. The permissive principle justifies delays but not the status quo. When applied to DI, it amounts to an *indirect legitimation theorem* specifying the conditions under which nonideal solutions would be nonregressive. In order to establish the conditions under

<sup>3</sup> Under the theorem, then, “if one of the principles that characterize a fully just state of affairs remains unsatisfied, then the best state of affairs under the circumstances does not necessarily satisfy as many of the remaining principles as possible” (Wiens 2016, 133).



which DI would not be regressive, the permissive principle needs to be equipped with a *time and knowledge index*: DI would enjoy the presumption of being acceptable for affected parties at a particular moment in time and corresponding to the actual level of knowledge.<sup>4</sup> This index makes it clear that under certain conditions, DI, despite its normative deficiencies, would satisfy the presumption of being legitimate: It would be seen to represent a common interest.

This theorem's *time index* is directed at handling the problem of forming the opinions and political wills necessary for integration. It awaits the requisite solidaristic basis for integration to come about. This has to do with establishing well-feeling and trust and with learning about long-term interests—in short, the civic bonds and enlarged mentalities necessary to sustain democratic processes of integration. DI would only be legitimate for the period of time needed to learn and change opinion.

The *knowledge index* deals with the actual level of information about what is at stake in the integration process. This index links the legitimacy of DI to the current level of knowledge, viz., the established facts about the state of affairs and beliefs about probabilities. The legitimacy of DI depends on knowledge about opinions and popular sentiments, about power constellations, about positive and negative externalities, about avenues for problem-solving and conflict resolution, etc.

The nonregression proviso forbids arrangements that foreseeably reduce the protection of basic rights, including the right to revise prior decisions. When subjected to such constraints, DI would be nonregressive and seen to embody a common interest. The indirect legitimation theorem requires that it be possible to present parochial, selfish reasons for DI as public reasons—as putatively valid for everyone affected.

## 5. Transitional Differentiation

The permissive principle, which justifies delays but not the *status quo*, makes clear that only under certain conditions would differentiation be legitimate. Ultimately, the presumption of legitimate DI is warranted only if the consequences and side effects of its observance under unchanging conditions can be accepted for good reasons by the affected parties. When specified as a legitimation theorem, conditions for legitimate, temporary variants of DI can be arrived at, i.e., as long as opt-outs do not

- obstruct the duty to abolish arbitrary rule;
- undermine the ability to form common policies;
- foreclose future membership and/or Treaty change; or
- undermine the reasons for seeking membership.

The benefits of differentiated integration should not outweigh the benefits of integration or undermine the creation of European public goods. Nonmembers' ability to freeride and cherry-pick "club goods" should thus be limited. Consequently, escape clauses should not "limit the degree to which states integrate by offering them an opt-out that would not otherwise exist" (Jensen and Slapin 2012, 782).

Moreover, DI would have to

<sup>4</sup> On legitimacy and a time and knowledge index, see Günther 1993, 36.

- also be open and transparent on the downsides of not being a full member;
- involve ongoing debate about EU membership or Treaty change; and
- include institutionalised possibilities for review and revision of positions.

Under the conditions specified, DI is a second-best solution to integration, that is, to the ideal of a well-ordered Europe, a united and democratic political community. Under such conditions, DI would be a temporary phenomenon and be seen as part of a long-term plan for abolishing the present forms of illicit divergence. In due time, the presumption is that people will learn and appreciate the effects of European integration, and will abolish the self-imposed abandonment of being involved in politically shaping their future.

The indirect legitimation theorem derived from the *lex permissiva* principle constrains DI in the *sectorial*, *territorial*, and *temporal dimensions* of integration. It would not allow or encourage arrangements in the sectorial dimension, which undermine established public goods and the ability to initiate common policies. In the territorial dimension, it would ban arrangements that undermine established patterns of solidarity and promote identitarian projects in opposition to European integration. In the temporal dimension, which is progressive, pointing to the Euro-republic, the theorem would ban arrangements lacking a time limit. By banishing *backsliding solutions* and by specifying time limits, the theorem prevents arrangements that undermine the pursuit of the ideal of a united and democratic European political order.

One may question whether present arrangements comply with these nonregressive requirements and whether they are realistically achievable in light of the lack of readiness to partake in the European integration process. After all, Euroscepticism prevails. On the other hand, DI is not meant to be permanent. This is the case with both the EEA Agreement and Eurozone differentiation. Still, the condition of institutionalised possibilities for review and revision of positions is hardly complied with. With reference to associated nonmembers, the EEA Agreement was initially established as a temporary arrangement in the advent of membership. Norway's last referendum on EU membership was in 1994, and a new one is not on the table. A public debate on the negative and positive effects of the EEA Agreement, though, exists; and paradoxically, according to opinion polls, a clear majority of citizens supports this agreement, while only a minority is in favour of EU membership.

The Eurozone arrangements were also said to be temporary. The Fiscal Compact stated that

within five years at most following the entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken [...] with the aim of incorporating the substance of this Treaty into the legal framework of the European Union. (European Council 2012, Art. 16)

However, the promised Eurozone Treaty change is blowing in the wind. The non-regressive conditions are still not unrealistic, as there is a vibrant public and political debate over reform. In 2017, the European Commission put forward a number of ideas for reforming the EMU. These included a European Monetary Fund to replace the intergovernmental European Stability Mechanism (ESM), a specific euro-area budget; unified Eurozone external representation; a full-time permanent chair



for the Eurogroup; and integration of the Fiscal Compact into EU law (EC 2017). It was met with resistance from the northern member states (Middelaar 2019, 38). There is the danger that temporary arrangements, which are means for handling various forms of crises and various forms of opposition to integration at particular moments in time, become permanent. Yet the European Council's July 2020 decision to adopt common European bonds for a recovery fund may be a move to bring about change.<sup>5</sup>

## 6. Requisite Solidarity

The indirect legitimation theorem, derived from the permissive law of public right, allows for the moral possibility of an intermediate order—of nonideal, proxy arrangements. This view sits well with Kant's general understanding of being in a transitional stage—between international and cosmopolitan law. In his view, a vanguard of peaceful republics could take the lead: "For if good fortune should ordain that a powerful and *enlightened people* can form itself into a republic [...], this would provide a focal point of federative union for other states," which "would gradually extend further and further" (Kant [1795] 1996, 327; AK 8:356; italics added). For today's vanguards, spearheaded by France and Germany, and as underscored in the 2017 European Commission White Paper on the Future of Europe,<sup>6</sup> DI is seen as an important *strategic option* for the reform and future development of the EU (Schimmelfennig 2019, 176). Normative reasons also count in favour of DI, that is, when it allows and awaits the formation of political opinion and will: the development of trust and agreement, of civic virtues and enlarged mentalities. In the case of profound conflict, the vanguardists would be advised to slow down integration rather than catch up, this in order to avoid excessive widening of differences between those who are fully members of the community and those who are not. However, normative concerns cut deeper, and strategic actors operate in an environment they do not control.

Europeans are not only in possession of a moral right to justification for decisions affecting their freedom, they also have bankable legal rights due to their European citizenship. A citizenry that can hold decision-makers to account, and toward whom legitimacy claims can be directed, is in place. Hence, it is not only the current strategies and preferences of states that should be taken into account when analysing the viability of DI. In democracies, those who compel (i.e., states) can themselves be compelled (by the people). Governments' strategies may be subjected to a critical test in democracies. This is yet another reason for the focus on the formation of the requisite *solidaristic basis for integration*. In democracies, integration prototypically is premised on voters' volitions and mentalities. Democracy may strike back.

<sup>5</sup> The Franco-German alliance proposed a COVID-19 *recovery fund* built on long-term EU borrowing that leaves the austerity politics of the Eurozone behind. The decision of the European Council to adopt common European bonds is remarkable in the history of European integration. Five hundred billion euros in grants aimed at helping the most needy member states in the form of nonrepayable grants can bring about the most important integrationist step since Maastricht.

<sup>6</sup> The paper on the Future of Europe presented five possible scenarios, one of which was labelled "those who want more do more" and outlined a multispeed model of differentiation for the EU (EC 2017, 20–1).

Lack of control is also due to the fact that solidarity can neither be bought nor administratively brought about. Solidarity springs from commitments to care for affected parties, from common interests that can be articulated, from the virtues of cooperation and relief that can be mobilised in civil society. Solidarity is a question of the will and the onus of compatriots to care for each other's misfortune, a will which depends on a common vision—on a conception of the common good, a shared form of life. Solidarity therefore does not raise a categorical claim of necessity but an imperfect duty of beneficence. According to Kant, it stems from the claims for help that those who are deprived make against those who are well off, without which help they will succumb (Kant [1795] 1996, 328–9; AK 8:357–8). The commitment-entailing power of the duty of beneficence stems from virtues and ethical duties—from citizens' moral conscience and compassion. The sources of obligation relate to communal and associative bonds, and these duties are not imperative, as they contain a permission to limit one rule of obligation by another (see Faggion 2020).

Nonetheless, solidarity, in its modern, French tradition, is progressive and forward-looking (see Brunkhorst 2005). It does not merely invite us to fulfil our dues and help our fellows in dire need, but to participate in the struggle for a better future for all. Whether or not we have benefited or are in debt, we are obligated, as compatriots, to abolish dominance and repair unjust structures (Kolars 2014, 428). In Europe, the integration process has generated political obligations in the form of *forward-directed duties*, referring to the kind of solidarity that is required by an intended community—a project under construction (Eriksen 2019, 211–2). Solidarity is the building block of any democratic society: It expresses a norm of equal membership and of reciprocity (see Habermas 2015, 22). But it is a building block that may be on the construction site for some time. It takes time to change hearts and minds, to develop *enlarged mentalities*. The (not insignificant) achievements the European integration process has so far made reflect efforts to come to grips with a disastrous past as well as with present challenges. They have brought about public goods that give actors reasons to accept imperfect solutions.

## 7. European Public Goods

The states are interwoven and so are, increasingly, European societies. They cannot avoid affecting each other, adversely or benignly. The freedom and welfare of the citizens are affected by the European integration process. European states constitute opportunity structures and task environments for each other. The level of interdependence and interconnectedness, the externalities and general affectedness of citizens, the many cross-border problems that need to be addressed, the many conflicts that need to be resolved, among other things, speak to the need for integration. To paraphrase Kant, actors whose conduct regularly affects others' rights, and who refuse to abolish an unjust order—the unregulated “state of nature”—and bring about a rightful political-legal order are collectively breaking their natural duty of justice. When people live close by and/or cannot avoid affecting one another's rights, they have a duty to establish a fair scheme of cooperation: a rightful order. Thus, any group of individuals whose acts regularly affect one another's rights and who do not currently have a set of legal and political institutions are obliged to create such institutions (see Stilz 2009, 199; see also Waldron 2002).

Ulrich Beck (2013) maintained that if the EU did not exist, it would have to be established. The EU has contributed to a series of public goods, such as peace, stability, security, freedom of movement, nondiscrimination, and an internal market. These achievements include the removal of European states' self-help means of reciprocity and countermeasures. The EU has domesticated international relations in Europe with peaceful means. The states may not take the law into their own hands. Unlike international organisations, the EU has a constitutional identity and a legal personality. The European treaties are vital for protecting rights and have the function of a constitution: they establish both a unitary European citizenry distinct from national ones and a set of autonomous European bodies. The conditions for valid law are in place, consisting of a separation of legislative, executive, and adjudicative powers. Representative bodies make European wide decisions. The EU has established rights and provisions that amount to *nonexcludable public goods*.<sup>7</sup> These nontradable rights and provisions make up a European basic structure. Such a structure, and a political system premised on the separation of powers, constitutes a *public coercive framework* for claims-making, justification, and decision-making.

A return to a Europe of independent nation-states would eliminate these normative achievements. Under present conditions of cascading interdependence, the proliferation of problems, and interstate conflict, EU disintegration would increase transaction costs, negative externalities, and moral hazard. Disintegration would also have democratic costs. No *public coercive framework* would be in place capable of tracking the interests, views, or wills of the citizens, or of ensuring equal political rights for affected parties Europe-wide. Nor would there be European public goods to reap the benefits of integration. The achievements of the integration process constitute the justificatory context for DI.

## 8. Justifying Differentiated Integration

The indirect legitimation theorem equipped with a knowledge index makes the acceptability of DI conditional on the parties' experience and pertinent knowledge of probabilities and states of affairs. When it is well known that interdependence is intense and asymmetric and value conflicts thrive, when capacity is low and interests diverse, DI may be the solution. DI would enable cooperation in specific fields, lower transactions costs, and make it possible for more to reap the benefits of European public goods. At the same time, it would reduce the need to use the veto power and bargaining muscle to protect national interests. It would reduce the danger of intense and permanent minorities (Christiano 2010). Consequently, DI may be seen to express a common interest. Some mutually acceptable reasons for DI with a time limit can be identified, as when

- deep national disagreement prevails, with simmering popular sentiments centred around identity and "sovereignty" and longing for a specific way of life;
- DI would reduce the danger of intense and permanent minorities;
- DI would make possible choices that actors would otherwise be unable to make;
- DI is a means for managing diversity between the parties without recourse to force;

<sup>7</sup> For terminology, see Kölliker 2006.

- DI does not allow freeriding on nonexcludable public goods;
- DI prevents race-to-the-bottom deregulation, harmful tax competition, and competitive currency devaluations;
- DI helps produce positive externalities; or
- DI facilitates efforts to address collective action problems such as establishing binding measures to combat climate change.

Even though DI subjects parties to a constitutional order they cannot amend, they may find that preferable to nonassociation. This is so for several reasons. For one thing, the essentials of the EU's constitutional order are not alien—this order corresponds to national constitutions—and the parties are in principle free to withdraw from DI arrangements. For another, DI gives the parties access to a legally regulated international order, to a rights-based order encompassing most Europeans (see Blichner 2008). And, furthermore, DI gives the parties rights and duties on a par with ordinary EU members, such as the right to freedom of movement for goods, capital, services, and people; the right to seek employment, study, and stay in other member states; and the right to nondiscrimination on the basis of origin. Associated nonmembers are profiting greatly from a rights-based political order—an order which grants rights to laggards as well, ensures stability and predictability, and solves disputes through institutionalised procedures. Moreover, DI lends support to the principle of a legally domesticated international order. Apart from the many economic and political reasons that count in favour of DI, organised relationships with a voluntary union of European peoples, where entrenched rules have replaced the power of might, would *ceteris paribus* be preferable to being dependent on undomesticated international relations.

There are, then, reasons for associated nonmembers and others excluded from the EU core to prefer this type of membership to nonmembership for a period of time. Because these reasons overall refer to common interests, they can be presented as public, not private, self-serving, reasons, and hence would presumably be acceptable to all parties: to those outside the core, to associated nonmembers, and to EU members.

When the integration project is not to be undermined, there is a normative basis for an argument for the internal differentiation between a political Euro-Union working ever closer together—a Core Europe—and a periphery of hesitant member states that can join the core at any time. DI makes it possible to safeguard against a loss of European public goods, which a return to a Europe of independent nation-states would eradicate.

## 9. A Realistic Utopia

The EU's differentiated political order is imperfect. It reflects the fact that integration takes place under unfavourable circumstances: citizens are not prepared to accept EU membership; states are not eligible for EU membership; necessary decisions cannot be made through the ordinary legislative procedure. When the democratic principle, which is one of the core characteristics of the ideal state of affairs, remains unsatisfied, DI may be unable to satisfy many of the other principles of the ideal state of affairs and may lock in technocratic practises and create new injustices.

From a normative perspective, DI would need to be contained and disintegration discarded: “Once democratic rights and institutions have been established and individuals have been awarded a supranational citizen status, there is no legitimate way back to the status quo ante” (Patberg 2020, 594). From this perspective, differentiated integration would only be conditionally legitimate. This type of differentiation, which entails infringements of democratic rights, is intrinsically linked to *the possibility of and the need for renewed integration* (ibid.). In order to prevent DI from undermining the ideal, by veering away from the first-best strategy, it must comply with principles, which rule out certain policies, ensure revision, and put time constraints in place.

In order to establish tools to contain the damage and unlock practises and dynamics that obstruct reforms and lead to outcomes that are worse than not being part of DI arrangements, I have suggested an indirect legitimation theorem equipped with a time and knowledge index. It is a category that intermediates between ideal and non-ideal theory. However, the condition that there be reason to expect that ideal normative principles will remain unsatisfied is rather unsubstantiated when it comes to the ideals of the European integration process. The ideals of a fair state of affairs—of a united and democratic Europe—has been on the agenda for a very long time. They do not constitute an unobtainable wish list incapable of guiding action. Today, the ideals appear not only in the EU’s political visions and founding texts, but also in legal documents—that is, in the Treaties, which have the function of a constitution—as well as in bankable legal norms and in the Union’s institutional architecture. The ideals are not pie-in-the-sky, utopian prescriptions; neither are they transcendental idealisations or hypothetical thought experiments. Rather, they are abstractions from existing practice, and thus have a grip on minds. They constitute “a realistic utopia,” which a majority of Europeans, according to opinion polls, already subscribe to.<sup>8</sup>

## 10. Conclusion

The development of a differentiated political order is a response to the difficulties in resolving problems within the EU’s common framework and its ordinary legislative procedure. From the point of view of legitimacy, DI is tricky. On the one hand, DI is associated with illicit governance. Citizens are subjected to laws the making of which they cannot influence on an equal basis. Some of those subjected to the decisions of the euro-polity are excluded from the decision-making bodies. As a consequence of DI, the political autonomy of some members is put into jeopardy, hence there is a case for dominance. On the other hand, DI allows for cooperation even when there is disagreement and when mutual dependence is unequal. DI is imperfect; still, it enables cooperation in specific fields, lowers transaction costs, and enables collective action. From the point of view of efficiency, DI is highly commended. Moreover, as it fosters cooperation, and possibly also learning about the merits of it and of the public goods created by European integration, DI has normative value.

The EU itself is an experiment in the domestication of international relations—in establishing a system of “undominating and undominated” states in Europe. When the ideal of a united democratic Europe is implemented under unfavourable

<sup>8</sup> See also Morgan 2008, dealing with the EU as a “realistic utopia” and contesting Rawls’s account European integration as an unrealistic utopia.

circumstances, we are faced with the problem of the second best violating one of the principles of the ideal state of affairs. Differentiation is thus not an innocent instrument for handling conflicts in interconnected contexts. It may undermine the fundamental conditions of democratic self-rule. If we are to establish the necessary tools for handling this problem, we need an intermediary category between ideal and nonideal theory. Specifying the permissive law of public right into a legitimation theorem with a time and knowledge index makes it possible to establish the conditions under which DI may enjoy the presumption of being mutually acceptable for affected parties. This index ties the legitimacy of DI to the level of available knowledge and to a particular point in time. The legitimation theorem is an antidote to the utopian prescriptionism commonly associated with ideal theory, as well as to the dangers associated with non-ideal theory.

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