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Differentiated integration as a fair scheme of cooperation

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ABSTRACT



Differentiated integration (DI), whereby some MS opt out or are excluded from certain common EU policies for sovereignty or capacity reasons, may be thought to undermine the EU's functioning as what John Rawls called a fair scheme of cooperation, grounded in norms of impartiality and reciprocity. However, we argue that different forms of DI can be compatible with either fair cooperation between states on the model of Rawls' Law of Peoples or cooperation among citizens on the model of Rawls' two principles of domestic justice. Meanwhile, the EU has features of both, being an international Union of states and a supra- and trans-national Union of citizens. We defend the coherence of this combination and contend that DI can provide a justified mechanism for ensuring fairness between states remains compatible with fairness between citizens both within and across states. Indeed it offers a potential model for other forms of international cooperation.

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1. Introduction

Differentiated integration (DI) has figured prominently in recent discussions of the future of the European Union (EU). DI involves some member states (MS) either integrating further and faster than others, or – temporarily or permanently – opting out of, or being excluded from, certain policies. As a result, MS possess different rights and obligations in these areas. In a context of lasting economic crisis and rising cultural and socio-economic heterogeneity among MS (Bellamy & Kröger, 2017), there is a growing awareness that the 'one-size-fits-all model simply cannot work' (Tsoukalis, 2016, p. 199). Pragmatically, DI helps European integration to proceed by both widening and

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deepening. Normatively, DI allows divergent national capacities and preferences to be accommodated. However, allowing such institutional diversity raises the question of whether DI will yield a form of EU cooperation all participants could find mutually acceptable. In certain respects, DI within the EU reflects demands for 'special and differentiated treatment' in negotiations within the WTO (Christensen, 2015), and variations in the 'nationally determined contributions', such as 'capacity building' measures, in the Paris Agreement on climate change (Caney, 2010), which seek to balance the needs of developing and developed countries. As in these cases, DI within the EU plays a role in fairly accommodating three levels of cooperation: national cooperation between citizens within each of the MS, international cooperation between MS, and supra- and trans-national cooperation among citizens (Sangiovanni, 2013, p. 217). DI operates most straightforwardly in rendering international cooperation consistent with different forms of national cooperation. Yet, in so doing it may detract from supra- and trans-national cooperation. This article explores these tensions and proposes how they might be resolved.

Why does the fairness of proposals for DI matter? First, the EU places procedural and substantive fairness among its core values (Art. 2 and 3 TEU). Second, if DI is perceived as unfair, it will not generate the support it needs to work and might even foster rather than propitiate Euroscepticism. Examples include the institutional power imbalances between 'ins' and 'outs' in the Eurozone, or the demands creditor states have imposed on debtor states in the context of the Euro crisis. Third, if the institutional design of DI is perceived to be unfair, it will fail in its purpose of reconciling MS that want to integrate to different degrees, and at different speeds. Fourth, DI has been seen as allowing MS to leave their fundamental disagreements about the nature and the finalité of the EU unresolved by permitting some to integrate further than others. However, DI can also contribute to creating new divisions, as the Euro crisis and its crisis management measures have shown. Indeed, one could say that DI itself is an expression of new divisions in the EU (Michailidou & Trenz, 2018), and entails a given conception of the EU. When and for which policies DI is thought acceptable, by and among whom and on what grounds, with which distributional results as to the costs and benefits of membership and decision-making, are all questions that involve a notion of the 'nature of the beast'. There are different ways of designing DI, and different institutional designs involve different notions of fairness. Though DI may seem a way of depoliticising highly political questions, it proves 'a deeply political process and a way of relating to conflicts. There are winners and losers, and outcomes often reflect prevailing power constellations rather than efficient solutions to policy problems' (Fossum, 2015, p. 799). Therefore, fair design in DI matters if it is to contribute to greater acceptance of the EU rather than creating additional divisions.

We shall explore DI from the perspectives of political justice, or procedural fairness, and social justice, or substantive fairness, respectively. If procedural fairness concerns fair participation within, and the legitimate exercise of power by, the political institutions of the EU; substantive fairness concerns the just distribution of social and economic goods, such as income and opportunities. Following Rawls (2001, p. 6, 15), we see impartiality and reciprocity as core norms of both kinds of fairness. We shall argue that while DI can be a source of unfairness, it can also facilitate forms of cooperation consistent with these norms by accommodating diversity. However, Rawls distinguishes international cooperation among state peoples from national cooperation among a state's citizens, with fairness in the former case involving far thinner commitments than in the latter. This distinction proves pertinent to the EU, which has been viewed as both an intergovernmental association of MS (Moravcsik, 1993, p. 480) and a supranational polity in the making composed of individual European citizens (Haas, 1958, p. 16), and to some degree shares elements of each (Kröger & Friedrich, 2013). That suggests a possible conflict may arise, whereby DI that seems acceptable from a statist and intergovernmental perspective, to support cooperation at the national level, would be unacceptable from a supranational perspective, focussed on fair cooperation among all EU citizens, and vice versa.

Some philosophers have argued on cosmopolitan grounds that we should necessarily prefer the EU to the national level of cooperation (Van Parijs, 2019). We demure from this position. To be action guiding and legitimate, a theory must emerge from critical reflection on existing practices and respect the value they may have for those involved – conditions Rawls associated with what he called a 'realistic utopia' (Rawls, 1999, pp. 11–23; Bellamy, 2019, pp. 15–20). Adopting this approach, we start from the intergovernmental view, that sees the EU as a voluntary association designed to protect and enhance national forms of cooperation in an era of global interconnectedness, while acknowledging that in the process such an arrangement also gives rise to mutual obligations among the MS and a more limited set of supra- and trans-national EU rights for the citizens of the MS that supplement but do not supplant those they enjoy at the national level. MS must therefore balance their obligations to each other in ways that allow them to fulfil their obligations to their own peoples or *demos*, on the one hand, and to the *demos* of EU citizens, on the other. Adapting Cheneval & Schimmelfennig, 2013, we call this way of conceiving the relations between the domestic, inter-state and EU levels of cooperation *demicratic*. On this account, DI can be defended to the extent it enables MS with heterogeneous political and socio-economic systems to cooperate in ways that facilitate their meeting both their domestic and EU commitments.

The paper proceeds as follows. Section 2 develops a categorisation of the main types of DI. We distinguish between sovereignty and capacity DI, with the first reflecting cultural and political heterogeneity and the second

socio-economic heterogeneity. Section 3 then turns to the issue of fairness. Drawing on John Rawls' accounts of justice as fairness between (1999) and within (1971) states, we distinguish the requirements of procedural and substantive fairness between peoples, on the one hand, and among individual citizens, on the other. Whereas intergovernmental accounts of the EU tend to adopt the first, statist, view of justice; supranational accounts tend to adopt a more cosmopolitan version of the second view, that regards the demands of justice among EU citizens as being similar in kind to those among citizens of an MS. As we shall see, an EU conceived as a fair scheme of cooperation among states places fewer constraints on the legitimacy of both sovereignty and capacity DI than an EU conceived in terms of individual citizens. However, Section 4 argues these two positions can and should be combined. Developing democratic accounts of the EU (Cheneval & Schimmelfennig, 2013), we argue that the EU is best conceived as a contract between both the demois of the MS to mutually regulate their interactions in fair ways, and their individual citizens, who together form a demos at the EU level with a distinct interest in ensuring supranational institutions and transnational rights operate fairly with regard to EU citizens. As a result of this dual contract, EU integration ought not to diminish the ability of MS to function as fair schemes of cooperation among the citizens of their respective demois. Sovereignty and capacity DI may in certain cases support that objective for a given MS, but would be fair only if they did not at the same time diminish the ability of other MS to provide a similar scheme of fair cooperation for their own citizens. At the same time, though, the EU also operates as a scheme of cooperation among EU citizens of a supranational and transnational kind, at least in those policy areas where MS have integrated. In this case too, MS have a duty not to diminish the fairness of the scheme of cooperation among citizens at the EU level. However, there is a similar duty on the EU not to impair the fairness of the different schemes within each of the MS. As we shall see, DI can under certain conditions also help achieve this balance.

2. Categorising DI

The existing conceptual literature on DI offers a broad range of conceptualisations and ways of looking at the topic, though generally not in a normative way. For our purposes, it is helpful to distinguish the drivers fuelling the demand for DI from the supply of different types and forms of DI. The drivers can be related to cultural and political heterogeneity, on the one side, and social and economic heterogeneity, on the other (Bellamy & Kröger, 2017). The corresponding forms of supply of DI can be linked respectively to Thomas Winzen's (2016) distinction between 'sovereignty' and 'capacity' DI.

Sovereignty DI occurs when competences in core state powers are transferred to the EU in the context of treaty revisions and a government chooses to

opt out of a policy transfer due to constitutional and identity concerns (Schimmelfennig & Winzen, 2014, p. 355). These concerns may reflect ideological or pragmatic choices by certain political actors, as when governments of largely Eurosceptic countries, who either are ideologically opposed to further integration or fear domestic opposition to it, seek a permanent or temporary opt-out. However, they may also reflect deeper cultural and political differences, 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 and seek to opt out if it is integrated, so as to protect the predominant cultural values of their demoi. Or it may result from diverging views about how much political integration is desirable. For example, the euro and the migration crises have produced a growing constraining dissensus among domestic electorates fearing that EU pressures are eroding economic and social policies at the state level designed to support the losers from globalisation (Hooghe & Marks, 2009).

Such attitudes can also reflect capacity concerns. Capacity DI arose with regard to EU enlargements and was 'motivated by efficiency and distributional concerns' (Schimmelfennig & Winzen, 2014, p. 355). It occurs when either existing MS temporarily *exclude* new MS from certain policy areas because they 'fear economic and financial losses as a result of market integration with the new MS, the redistribution of EU funds or weak implementation capacity' (Schimmelfennig & Winzen, 2014, p. 361); or new MS seek to be *exempted* temporarily from integration in a given area and be granted more time to adapt to EU rules and market pressures. In such constellations, DI is seen as a temporary and transitional measure that ideally aids both sides.

However, if these differences in capacity are seen as reflecting '*structural economic and social heterogeneity*' then that can imply 'less space for uniform integration overall and might lead to some more durable forms of DI than the transitional ones linked to enlargement rounds' (Bellamy & Kröger, 2017, p. 629). Not all MS may have the same stake in given collective goods – be these public goods, such as defence, that are non-rivalrous and non-excludable, common pool goods, such as fish stocks, that are non-excludable but rivalrous, or club goods, such as a custom union, that are excludable and non-rivalrous (Lord, *forthcoming*).

With regard to club goods, there are clear advantages to restricting the club to those with a roughly equal ability to pay for its production and a common interest in it. If costs would be distributed asymmetrically between MS and they value the benefits to an unequal degree, then provision of that good at the EU level risks being sub-optimal and involving free-riding, thereby justifying DI and the formation of an exclusive club of a subset of MS. The deciding factor is the ratio between the advantages of reducing production costs by sharing them among as many MS as possible, and the loss of benefits as the gap between the distance of the individual preferences of an MS from the collective

preferences under which the good is provided widens (see Kölliker, 2001). The more heterogeneous the group of participating MS becomes, therefore, the greater the likelihood that either the EU will refrain from producing a given collective good, leaving it to MS, or that some MS will decide to set up a 'club' that excludes others.

Duties to support public goods and common pool resources might be regarded as stronger than those to support club goods, with DI less acceptable in such cases (Lord, *forthcoming*). This seems especially the case in 'morally mandatory' areas where a failure to support these goods might result in basic rights being violated – as in action to mitigate climate change. These considerations certainly imply all MS have a moral obligation to do something, with that something being determined by whatever justice might require of them according to some principle. However, it need not mean they have an obligation to cooperate with others within the EU in doing that something, unless that could only be achieved through cooperative action at the EU level (Christiano, 2012, pp. 388–390). Nor will that obligation necessarily be the same for all – it might be justified for it to be differentiated. For example, although the EU has committed to the 'polluter pays principle' with regard to the environment (TFEU 191), the Paris Agreement gives developing countries partial exemptions on the grounds that historically they industrialised later and have polluted and benefitted less than developed countries that, as a result of past pollution, are better able to pay and so have a duty to pick up the slack (Caney, 2010). As a result, even in this area, some temporary capacity DI might be warranted. Likewise, the economies of some countries may be more dependent on certain common-pool resources than others, making exemptions justifiable for them, while other countries may only have an indirect interest in them and so are naturally excluded.

A more recent development – enhanced cooperation – can be employed if no consensus for adopting a new common policy exists in the Council. As such, this mechanism reflects sovereignty and capacity concerns and produces the corresponding forms of DI. It allows a vanguard group of at least nine MS to cooperate in an area covered by the Treaties but not an exclusive competence of the EU, with the exception of defence (TEU Art 20, TFEU Arts 326–334). Current instances include divorce law, patents, the property regimes of international couples, and an agreement for some MS to levy a financial transaction tax. Such cooperation must be consistent with the Treaties. Non-cooperating MS cannot block such cooperation but must be able to join it at any time provided they meet the conditions for participation.

Assessments of DI vary. Those who welcome 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 MS to choose policies more aligned to their needs and preferences (Lord, 2015). Likewise, it might make decision-making more efficient and effective. Other scholars view DI less positively. They fear it erodes solidarity between MS and constitutes a challenge to any prospect of developing the EU into a political community based on shared rights and obligations of membership. They argue that opt-outs undermine the legal unity and authority of the EU (Curtin, 1993; de Burca & Scott, 2000) as well as the uniform composition of EU institutions. As a result, they worry it creates a differentiated citizenship that threatens the liberal model of universal citizenship characteristic of modern constitutionalism.

In what follows we shall relate these two divergent perspectives to two different views of the fairness of DI that stem respectively from whether the EU is seen as a scheme of cooperation between MS or individual citizens. While both points of view find certain forms of DI either fair or unfair, some of those forms of DI that may render inter-state cooperation fairer can also potentially create unfairness among EU citizens. The next section explores fairness from each of these points of view; while the subsequent section seeks to resolve the tensions that may arise between them.

3. Two views of DI as a fair scheme of cooperation

Following John Rawls' (1971) seminal account of justice as fairness, we shall understand a fair scheme of cooperation as one in which the main political and social institutions are regulated by publicly recognised procedural and substantive rules which the cooperating parties accept that all can and should abide by as appropriate ways of treating them as free and equal (Rawls, 2001, pp. 5–6). Two sets of ideas that prove important for both the justification and assessment of DI underlie Rawls' account. First, to be generally accepted these rules need to be impartial in two respects. They must acknowledge that people can pursue a plurality of reasonable conceptions of the good and not be partial to any one of them. They should also acknowledge that people might have numerous physical, mental and social advantages and disadvantages for which they are not responsible, so that fair rules should abstract from their natural endowments and social position (Rawls, 2001, p. 15). Second, fair rules of cooperation involve an idea of reciprocity, whereby all who do their bit, as the rules require, should benefit to an agreed standard (Rawls, 2001, p. 6, 49 n. 14). We shall argue that DI will only be fair to the extent that it can be justified as consistent with, and (we shall suggest) to some extent even required by, such norms of impartiality and reciprocity.

As well as the central role of fairness within Rawls' theory, two other features of his account make it an appropriate starting point in this context. First, he portrays his account as reflecting the core values underlying the public culture of a democratic society (2001, p. 5), such as those to which the EU is

formally committed in Article 2 TEU. Second, he makes a distinction between fairness among different state peoples (Rawls, 1999), on the one side, and among citizens of a state (Rawls, 1971), on the other. While many philosophers of global justice contest the validity of this distinction (Beitz, 1999), it captures the current reality of the EU. As liberal intergovernmental theorists note, states remain ‘masters of the treaty’, enjoying preeminent decision-making power within the EU and political legitimacy for their citizens (Moravcsik, 1993). Yet, as neo-functionalists contend, the EU has developed many state-like features, providing individuals with a range of supranational and transnational rights as European citizens (Haas, 1958). To that extent, the EU has moved beyond Rawls’ ‘law of peoples’. Accordingly, the rest of this section explores the fairness of sovereignty and capacity DI from each of these perspectives, starting with a statist/intergovernmental view and then turning to a more supranational/EU citizen view.

3.1. Fairness among states: a statist intergovernmental perspective

Although there are variations among statist positions, all concur in regarding membership of an association with the characteristics of a state as providing a necessary context for considerations of fairness of an egalitarian nature to apply (Blake, 2001; Nagel, 2005). A state can be defined as possessing jurisdiction and control, backed by coercion, over resources, people and goods within the borders of a given territory, and the right to control and defend those borders. Its key characteristics consist in providing a system of common rules, policies and goods for those individuals living within its borders that make possible and facilitate their mutual interaction and flourishing. Moreover, these common rules, policies and goods can be seen as in large part the product of cooperation among the members of the state, and would not exist without their efforts. Given nobody could be said to have an entitlement to them prior to the forms of cooperation that brought them into being, and all have a shared interest and roughly equal stake in them, fairness suggests a presumption in favour of their equitable distribution and control (Sangiovanni, 2007).

Rawls (1971, pp. 3–5) proposed his two principles of justice as appropriate impartial rules of procedural and substantive fairness for such a scheme of reciprocal cooperation. The first principle seeks to guarantee each citizen an equal right to the most extensive system of basic liberties compatible with a similar system for all; while the second principle seeks to guarantee equality of opportunity and to allow inequalities only in so far as they benefit the least advantaged – the so-called difference principle (Rawls, 1971, pp. 60–61). Rawls saw his principles as addressing not simply the forms of intense institutionalised cooperation to produce collective goods typical of a state, but also as involving the shared culture and practices through which members of a state come to identify as a people through a history of multiple iterations of

collective self-determination. He prioritised political over social justice, seeing fair procedures as allowing different peoples to co-author and legitimise the various socio-economic rules to which they were subject.

Rawls' concern to allow for a plurality of conceptions of the good applied to different peoples as much as to their individual members (Rawls, 1999, pp. 34–35). Consequently, he contended that international fairness differs from domestic fairness and applied to the relations between the free and equal peoples of states rather than free and equal individuals (Rawls, 1999). He considered that international society was even more heterogeneous and plural than most domestic societies, making agreement on shared principles of political justice that could accommodate a plurality of reasonable forms of life and avoid dominating discreet and isolated minorities even harder. As we shall see, these considerations play a role in justifying sovereignty DI.

Rawls also believed the extent and degree of interaction among individuals at the global level was insufficient to generate the conditions that might justify a demand for egalitarian principles of justice among them. Most controversially, he regarded peoples as being significantly responsible for the level of wealth they have through the socio-economic and political choices they have made. Consequently, he thought an egalitarian redistribution between states would be unfair. As we shall see, these considerations play a role in justifying capacity DI.

Given states interact, the question arises 'What fair terms of cooperation would free and equal peoples agree to?' Rawls contended these terms for the most part would be fairly minimal (Rawls, 1999, p. 37). Procedurally, he thought peoples should honour basic human rights and respect the freedom and independence of other peoples by observing a duty of non-intervention, contracting Treaties on the basis of free and equal agreements, and observing their duly undertaken obligations. Substantively, he argued states only have a 'duty of assistance' to aid 'burdened' societies that were unable to realise principles of justice for their peoples. Conceivably, this argument could support global action to secure 'morally mandatory' goods by tackling dire global poverty and catastrophic climate change. However, as we noted in the Introduction, while there might be a duty to act in these areas, that need not involve an obligation to create some form of global governance – voluntary cooperation suffices. States could even act independently in ways that credibly address these issues but accord better with their resources and political culture than participation in a collective policy might do.

Nothing in this argument rules out the possibility of states voluntarily cooperating in more intensive ways, as in the EU. However, Rawls feared a federal EU would come at the moral cost of undermining the distinctive political cultures of the various MS and, given he thought a deep European political culture unlikely, erode social solidarity (Rawls & Van Parijs, 2003) – indeed, that possibility had attracted Frederick Hayek to European integration as far back as 1939.

Nonetheless, a more intergovernmental conception of the EU might avoid Rawls' fears and be consistent with the normative assumptions underlying Rawls's Law of Peoples. On this account, to be procedurally fair the EU would need to remain a voluntary association of democratic states, the terms of which were mutually agreed between the elected representatives of their peoples and with their on-going consent. Meanwhile, substantive fairness could allow MS to cooperate to generate certain club goods where that seemed mutually beneficial, and to split the costs and benefits on the basis of their contribution. However, no MS would be obliged to either join the EU or belong to any of its clubs or help other states to do so. Moreover, while all MS might have a moral obligation to support those public and collective pool goods necessary to uphold basic rights, they would have no such duty to do so within the context of the EU. Needless to say, this conception of the EU allows considerable sovereignty and capacity DI as consistent with, and even required by, both procedural and substantive fairness.

3.2. *Statist intergovernmentalism and DI*

A case can be made for treating certain central features of the EU as consistent with Rawls' peoples-centred view. After all, the Treaty echoes Rawlsian terminology in seeking an 'ever closer Union among the *peoples* of Europe' (Article 1, emphasis added). While that aim has been read as implying their ultimate merging into a single European people, it could be as plausibly understood as merely involving their greater association so far as that enhances their mutual peace and prosperity (Article 3). As Article 5 TEU insists, the EU's competences are limited to those conferred upon it by the MS in the treaties, and while Article 4 obliges them to abide by their resulting obligations in a manner consistent with 'the principle of sincere cooperation', it also commits the Union to respecting their equality 'as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.' Seen in the light of these articles, the EU can be viewed as a voluntary association of sovereign states (Bellamy, 2019). Even if there is no compulsion to join the association, however, it might still be thought a requirement of doing so that all MS should have equal rights and duties. That constraint certainly rules out some forms of DI. Nevertheless, we shall argue it need not render all DI procedurally and substantively unfair.

Procedural fairness requires impartiality towards the different ways of life of the peoples involved. As such, it dictates that the terms of the association be approved by the citizens of each MS according to domestic constitutional norms and be consistent with those norms unless these are explicitly changed via a legitimate domestic process. These conditions govern not only accession to the EU and any changes to the Treaties but also withdrawal under Article 50, as was the case with the UK. That suggests the possibility of sovereignty DI,

at least in principle, if an MS believes it infringes certain fundamental constitutional structures or lacks popular support. It can also allow MS whose peoples wish to integrate further than some other MS desire to do so through enhanced cooperation. Yet, if the rationale behind these stipulations is to ensure that membership of the association does not diminish the self-determination of the people of an associated state without their consent, then any decision by some MS to integrate either less or further than others should be governed by a similar constraint that it does not diminish the self-determination of the peoples of these other states, for example by producing negative externalities that might undermine the decisions of either the cooperating or opting out MS to secure certain public or common pool goods.

Opt outs have hitherto arisen during treaty negotiations. While an MS can use its veto to negotiate non-participation, these opt outs require the agreement of all other MS, thereby treating the self-determination of all associated states with equal concern and respect. Additionally, as is affirmed by the Copenhagen criteria for membership and Article 7, no government should be allowed to invoke sovereignty DI to diminish the self-determination of the people they represent or infringe the basic rights inherent to an association of sovereign democratic states, such as those outlined in Articles 2 and 6 TEU. Meanwhile, enhanced cooperation in any new policy area should remain subject to the broader EU framework and be overseen for compliance by bodies, such as the Council and the EP, involving the entire membership of the association. In that way, non-participants can guard against it having a negative impact on their self-determination in going beyond the Treaty framework. Moreover, those states temporarily excluded for capacity reasons ought to have the ability to signal concerns about decisions that might render their joining prohibitive for the foreseeable future.

Substantive fairness and considerations of reciprocity enter here. As we saw, on this view states have no moral duties to form an association if they can fulfil the limited obligations of the law of peoples without doing so. The rationale for joining thereby becomes a matter of mutual advantage, with members having no obligation to equalise the positions of states within the association or to distribute any surplus to non-members. Rather, three less egalitarian criteria for substantive fairness hold. First, the cooperation must be considered a Pareto improvement by each of the participating states, a condition that is met by membership being voluntary and democratically approved by the peoples of all MS. Second, MS must be able to fulfil the ensuing obligations of the association in a reciprocal way, as defined in the case of the EU by the Copenhagen criteria. Third, MS have a duty to assist those they have accepted as members that suffer unexpected losses through membership of the association, and to support those members that, through no fault of their own, prove temporarily unable to fulfil their contractual obligations, especially if the association itself might be put at risk as a result.

The EU can be considered as an association that operates over a number of policy areas, in which cooperation produces club goods for their members. Given the above criteria, accession to any given club, such as the Eurozone, can be made conditional on meeting certain capacity criteria, while the option not to cooperate could be defended on similar grounds. For example, it would be fair to exclude a state that would be unable to do its bit in supporting the production of a given good, or that would render the club sub-optimal for the other participants – at least until such time as that was no longer the case. It would also be reasonable for a state to decline to join a club that it considers would worsen social justice for its people, even if their involvement would be beneficial to the other associated peoples. Meanwhile, enhanced cooperation by a minority would only be fair if it was considered a Pareto improvement also for those states excluded on capacity grounds. However, it would be allowable for the new club to increase the relative inequality between members and non-members. Finally, how much DI any MS can practice will be limited by its continued need to fulfil its obligations towards sustaining the club good of the association taken as a whole (Art 3 TEU) – herein lies the distinction between states within and those outside the EU, with the latter having a distinct Treaty arrangement to the former. What about withdrawal from a club or even the EU as a whole? In both cases, an MS merely has an obligation to honour the substantive undertakings it has made to other club and association members.

3.3. Fairness among individuals: a supranational cosmopolitan perspective

We observed above how some philosophers have disputed Rawls's distinction between intra- and inter-state fairness, and have argued that we should apply globally the principles he associates with domestic justice (Buchanan, 2000). From this cosmopolitan perspective, individual human beings have ultimate value and each individual human being has equal moral value, with these two conditions applying to all human beings (Barry, 1999, pp. 35–36). Consequently, political institutions should operate so as to treat 'every human being' as having 'global stature as an ultimate unit of moral concern' (Pogge, 1992, p. 49). On this view, the nation-state and the exclusive national identity it fosters forms an obstacle to treating all individuals with equal concern and respect. Birth into one state rather than another is morally arbitrary, making discrimination on the basis of nationality as morally repugnant as discrimination on grounds of race or skin colour (Caney, 2001, p. 115 n 3). Therefore, political and social justice should be global in scope, and focused on securing individuals, not state peoples, an equal right to flourish as autonomous agents.

Philosophers have tended to invoke two different types of arguments to ground this claim. Some appeal directly to the equal moral personality of

individuals (e.g. Caney, 2011). Others concede to statist that universal moral equality only entails egalitarian principles of justice when individuals belong to an institutionalised scheme of cooperation that conditions the lives of individuals in ways that are largely unavoidable and to some extent necessary for them, and is capable of being under their collective control (e.g. Moellendorf, 2009). However, they contend that the world economy has created such an institutionalised scheme at the global level, reflected in the development of international trade law and bodies such as the WTO. Meanwhile, related processes of globalisation in areas such as security and communications have had a similar impact, gradually altering the situational geography of political and social life. As a result, these cosmopolitans see no reason not to apply similar principles of procedural and substantive fairness to those Rawls advocates for the domestic level to the international level.

This second argument has particular force in the EU. With the development of the single market built around the four freedoms guaranteeing free movement of goods, capital, services and labour, the EU has established a legal and institutional framework that guarantees individual EU citizens transnational rights that the Court of Justice treats as applying with direct effect to them and having primacy over the relevant domestic law within each of the MS. Moreover, all individual citizens also have a set of supranational rights, including the right to vote in elections to the European Parliament (EP) wherever they happen to reside within the EU. As such, the EU has sufficient state like qualities for it to be argued that Rawls's two principles should apply at the supra-national as well as the national level (e.g. Van Pariis, 2019); at least (and this proviso is important) in the policy areas where MS have conferred competence on the EU.

As a result, procedural fairness should involve giving all individual citizens of the EU an equal influence and control over collective decision-making at the EU level, while substantive fairness should involve the resulting decisions applying uniformly to all citizens across the EU so as to treat them with equal concern and respect, including providing equal opportunities to take advantage of the single market and an egalitarian distribution of the benefits. Nonetheless, as Rawls (1993) argued, within a pluralist society procedural fairness may require a degree of differentiated integration to accommodate differences among cultural and social groups (see too Kymlicka, 1995), while the difference principle might justify substantive inequalities that maximise the welfare of the least well off.

3.4. Supranational cosmopolitanism and DI

The EU, therefore, can be regarded as having institutionalised ties among individuals that justify treating them with a high degree of procedural and substantive fairness of an egalitarian character of the kind advocated by

cosmopolitans. Yet, both sovereignty and capacity DI might be justified nonetheless to accommodate relevant differences among individuals.

Procedural fairness might be thought to render sovereignty and capacity DI uncongenial to cosmopolitans, since they give the citizens of different states different political and civil rights with regard to EU policies that might lead to their being treated unequally. Yet, many states – including several MS – give special self-government, representation and ethnic rights to particular groups for sovereignty and capacity reasons related to considerations of impartiality and reciprocity. For example, multiculturalism and minority nationalism have led to a significant degree of sovereignty differentiation within MS such as Spain and Belgium to accommodate cultural and linguistic diversity. Such measures have a liberal egalitarian basis as necessary to allow individuals an equal opportunity to develop and pursue a plan of life consistent with a plurality of reasonable cultural norms (Kymlicka, 1995), a point conceded by many cosmopolitan democrats (e.g. Van Pariis, 2011). Likewise, democratic equality suggests that only those with an equal stake in a given collective good should have an equal say in its production and distribution (Brighthouse & Fleurbaey, 2010). However, different sorts of collective goods may be relevant to different territorially located sections of the population. As a result, capacity differences can lead to different competences being devolved to different regions. For example, the competences of densely populated urban areas may differ from those of poorer and more sparsely populated rural areas.

The EU affirms that subsidiarity and proportionality dictate that EU competences should only extend to areas that are best dealt with at the European level, with most policies being more appropriately tackled as close to the citizens with an equal stake in a given policy as possible. Yet, that need not necessarily involve a uniform application of subsidiarity across the EU (Bellamy & Kröger, 2017). With regard to sovereignty DI, the EU is also committed to respecting both the ‘rich cultural and linguistic diversity’ of the Union (Art 3 TEU) and ‘the different legal systems and traditions of the member states’ (Art 67 (1) TFEU and Art 4 (2) TEU). Likewise, capacity DI might be appropriate to accommodate the different economic and social circumstances of MS, so that the citizens of poorer MS are not disadvantaged through being involved in policy areas that are either irrelevant or would impoverish them.

Sovereignty DI in such cases could be procedurally fair if, as to some extent is already the case, such moves require the endorsement of the representatives of all other EU citizens. Moreover, different constitutional arrangements would need to be consistent with the basic individual rights and the principles of democracy and the rule of law, as outlined in Art 2 and 6 TEU and the EU Charter of Fundamental Rights. Similarly, for capacity DI to be procedurally fair it would need to be guided by the principle of openness and implemented within the existing legal framework, so as to (a) protect the EU’s legal and institutional unity; (b) enable the continuous development of the *acquis communautaire*;

(c) preserve the prerogatives and powers of the European Commission, the EP and the CJEU so as to ensure established mechanisms of scrutiny; and (d) avoid a split between 'ins' and 'outs'. Indeed, these principles inform the mechanism for enhanced cooperation, which must respect the objectives, values and legal integrity of the Union, involve at least nine participants, so as to prevent too much fragmentation within the EU, and seek to 'promote participation by as many MS as possible' (Art. 328 (1.2), TFEU).

This last element also proves important for the substantive fairness of DI on this account. Sovereignty DI would not be substantively acceptable if its aim was to avoid contributing to collective policies that raised the welfare of the citizens of the least well-off states or had the sole purpose of giving the MS involved a competitive advantage vis-à-vis other MS. Yet, capacity DI could be substantively fair as a transitional exclusion or opt-out to allow an enlargement of the EU to new MS so long as it was aimed at levelling up the new members to full membership. Enhanced cooperation among wealthier states could also be justified as an interim measure (as per Art 20 (2) TEU) in terms of Rawls' difference principle if it (a) created a surplus that was larger than would be the case if all MS were involved, (b) this surplus was redistributed so as to improve the welfare of the poorer and less well-developed MS more than would otherwise have been the case, (c) the excluded were supported so as to be able to join the common policy area eventually, and (d) the common policy areas of the EU still operate in the equal interests of those involved and retain their integrity, without distorting competition or introducing new forms of discrimination (points insisted in Art. 326 (2) TFEU regulating enhanced cooperation). Of course, such policies are only targeted at individuals indirectly, via the likely location of the richest and poorest citizens. Yet so is much domestic policy.

4. Democracy: combining statism and cosmopolitanism?

Although supranational cosmopolitanism potentially allows for more DI than some contend (e.g. Eriksen, 2018), it is nevertheless more limited than statist intergovernmentalism would permit. Procedurally, statism prioritises decision-making within and between state peoples over that of EU citizens; while substantively it constrains redistribution from wealthy to poorer states that would make the former less well off than they currently are. However, we have noted how the EU combines elements of both. Take procedural fairness. On the one hand, the EU respects the equality of MS, their territorial integrity, distinct national identities and political and constitutional traditions (Art 4 TEU), with the competences of the EU governed by the principle of conferral and explicitly under the control of the MS (Art 5). On the other hand, the EU bestows a distinct set of rights on the individual citizens of the MS through the status of citizenship of the Union and the Charter of Fundamental Rights of the European Union, including voting rights in a common political institution,

the EP. It is also committed to a principle of non-discrimination on grounds of nationality so far as the application of the Treaties is concerned (Art 18 TFEU), a provision many consider requires the uniform application of European law – not least the CJEU. The same applies to substantive fairness. The EU is ambivalent as to whether it provides for equality and solidarity among state peoples (e.g. Art 3 TEU), with solidarity limited to a duty of assistance to deal with terrorism and natural and man-made disasters (the ‘solidarity clause’ Art 222 TFEU); or among individual EU citizens (Art 2 TEU), of an explicitly cosmopolitan character (Art 21 TEU).

How coherent or desirable is this mix? The dual character of the EU as a union of states and individuals has been standardly resolved by regarding it as a multilevel system, in which MS create a supranational union with competences in specific areas that operate transnationally across all of them – notably the single market and customs union. However, DI complicates this picture by producing asymmetries among the MS with regard to which EU policy areas they belong to. This section addresses this dilemma by arguing that the EU’s combination of statism and cosmopolitanism can be reconciled and justified from a democratic perspective and that DI can support this mix by facilitating forms of procedural and substantive fairness suited to a Union of states and EU citizens. Both pragmatic and principled reasons can motivate this stance. Pragmatically, states remain the main locus of justice for individuals. Nevertheless, their gradual involvement in an association such as the EU can be regarded as a transitional step, whereby states become agents of a shift towards cosmopolitanism (Ypi, 2008). A democratic account can guide realistic action in the present towards a cosmopolitan utopia in the future. However, it might also be defended on principled grounds as a realistic utopia in itself. The International Covenants on Civil and Political and on Economic, Social and Cultural Rights both defend as Article 1 the right to self-determination of all peoples to determine these rights. Democracy might be seen as building on Rawls’ Law of Peoples to show how in an interconnected world the pluralism secured by self-determination might nonetheless be part of a scheme of fair cooperation among both peoples and their individual citizens (Bellamy, 2019, pp. 14–15).

4.1. Fairness among states and individuals: a democratic perspective

As Francis Cheneval (2008) has argued, the democratic account departs from Rawls’ pure statism by noting how international associations among state peoples also establish a direct relationship both with and among the individual citizens of these peoples of a supranational and transnational nature respectively. Consequently, an international association involves a contract between both state peoples and the individual citizens of the association. This dual contract combines the statist and cosmopolitan position (Bellamy, 2019, ch.1). It recognises that states continue to be the main locus of social and political

cooperation for most individuals, but that states increasingly interact in ways that an association such as the EU can enable them to mutually regulate so as to maximise the possible benefits and minimise the potential harms that may result from cooperation. At the same time, individuals can benefit from or be harmed by the opportunities or lack of them resulting from cooperation between different states. They may also have interests as members of the association that relate to the impact of supra-national decisions and institutions and the costs and benefits of transnational cooperation that are distinct from those interests they have simply as citizens of one of the MS.

From this democratic perspective, the crux lies in combining procedural and substantive fairness among citizens at the state level with that between peoples and citizens *qua* members of the association at the supra- and transnational levels. Procedurally, statisticians consider membership of the association must be voluntary, with primary law made by consensus among the contracting MS so as not to undermine national self-determination. Cosmopolitans, however, consider all individuals *qua* members of the association should be treated as free and equal, suggesting that once the association is formed the EP should become the legislature, with the Commission replaced by an elected EU government. Democrats draw on elements of both views (Cheneval & Schimmelfennig, 2013, pp. 342–343). Like statisticians, they consider the states the masters of the treaties. However, the secondary law needed to implement primary law should be co-decided by the representatives of state peoples, on the one side, and, as cosmopolitans desire, of their individual citizens *qua* citizens of the association, on the other, with the Commission a bureaucracy appointed by and serving peoples and citizens (Cheneval & Schimmelfennig, 2013, pp. 344–345).

Substantively, statisticians argue the costs and benefits of the association should be a Pareto improvement for the peoples of the states concerned. States must honour their undertakings in forming the association or a given club but have no obligation to reduce inequalities between states. The duty of assistance apart, their responsibility is to maximise the social and economic position of the least well-off of their own people, and to maintain the distinctive institutions and culture that are the source of a people's wealth (Rawls, 1999, p. 108). Cosmopolitans, however, only regard inequalities between states as justified if they benefit the least advantaged citizens within the EU. The long-term aim should be to build a universal, EU wide social welfare system (Van Parijs, 2019). Meanwhile, fair equal opportunity should allow free movement across the EU and access to whatever social as well as political rights are granted to citizens of the MS in which they happen to reside. Again, democrats balance the two perspectives. They share the statist concerns that a federal EU not only might be incapable of mobilising the social solidarity required for a welfare system as generous as those found in the richest MS, but also that a moral loss would be incurred with the disappearance of the distinctive social and political cultures

of the different European peoples. As an association of state peoples, therefore, the EU should enhance the prospects for peace and prosperity within an interconnected world for all its MS but need not equalise their relative economic standing (Cheneval, 2008, pp. 54–55). However, democrats agree with cosmopolitans that as an association of citizens, the EU should grant all individual members of these peoples an equal opportunity to move, seek employment, trade and live across all the MS of the EU, without discrimination on the basis of nationality (Cheneval, 2008, p. 55). Nevertheless, democrats contend the interests of mobile citizens need to be balanced against those of sedentary citizens and the different peoples – indeed, the opportunity to move and choose between different social and political systems rests on their doing so (Cheneval, 2008, pp. 45–46). Therefore, if free movement diminished the social and political position of the least well off within either a host or a home MS, then certain constraints on the entitlements of mobile citizens might be justified (Bellamy, 2019, p. 166).

4.2. Democracy and DI

As we have seen, both statism and cosmopolitanism can allow elements of sovereignty and capacity DI to accommodate relevant differences arising from political and cultural heterogeneity, on the one side, and, social and economic heterogeneity, on the other. What we wish to suggest is that DI can help states meet their supra- and trans-national commitments, thereby supporting procedural and substantive fairness among individuals at the EU level, while DI at the supra and trans-national level can make these latter commitments compatible with procedural and substantive fairness within as well as between states.

With regard to procedural fairness, both sovereignty and capacity DI should be agreed either by the representatives of state peoples as a matter of primary law or, as per the ordinary legislative procedure for secondary law, by both a majority within the Council and a majority in the EP, while all legislation should guarantee the entitlements of EU citizens under the Charter of Fundamental Rights of the European Union. Meanwhile, opted out states should have consultation but not voting rights in the relevant policy area. Subject to such constraints, sovereignty DI allows for constitutional and cultural diversity within the EU as per Article 4 TEU and, as with Sweden's special dispensation regarding Snus, can facilitate an MS's participation within the EU. In the case of enhanced cooperation, it should be subject to oversight by supra-national bodies to which MS have conferred this authority. Meanwhile, suggestions that particular forms of DI, notably the Euro, might lead to a separate parliamentary assembly for its members, should also be avoided (Curtin & Fasone, 2017). They provide insufficient scope for non-members to control what may be adverse knock-on effects or to ensure that a credible path remains open for them to become members. However, here too consultation rather than voting rights on

Eurozone decisions within the Council and EP would be appropriate (Heerman & Leuffen, 2020).

With regard to substantive fairness, allowing various forms of capacity DI may increase the willingness of wealthier MS to integrate further and accept the potential costs in terms of insuring against any exogenous shocks. For example, had a capacity requirement been more rigorously imposed on Eurozone membership, delaying the accession of Greece, then arguably MS might have been more willing and able to endorse structural investment rather than bailouts that simply serviced debt. Nevertheless, in clubs possessing the qualities of a symmetric N-person Prisoners' Dilemma, democrats would wish to prevent states free-riding or backsliding by locking in membership and having an independent authority to sanction violations. They would also wish to protect core policies that are either constitutive of the association, such as the four freedoms of the single market, or involve public or common pool goods and generate positive externalities or guard against negative externalities.

At the same time, democrats seek to uphold the trans- and supra-national rights of citizens. However, they note that the individual citizens of the MS have an interest in free movement between states, not only for themselves to take advantage of opportunities in other states on equal terms to nationals, but also for non-nationals to come and enhance the promotion of collective goods of their own state. Therefore, democrats seek to ensure that both the sending and the receiving state are able to maintain the same level of substantive fairness for their citizens as before. DI may aid that win-win situation materialising. For example, cosmopolitans argue that transnational substantive fairness creates an egalitarian case for a fair distribution among EU citizens of the surplus generated through involvement in the single market. Some have suggested that this might fund an EU basic income (Van Pariis, 2019; Viehoff, 2017). Yet, statisticians would see no justification for such an egalitarian redistribution, especially as such a measure risks undermining the capacity for the social systems of the different MS to provide citizens with a wide range of welfare goods – particularly given the cost of such an EU level scheme risks being very high. Democrats agree with statisticians that social systems should remain differentiated but agree with cosmopolitans that this surplus could be redistributed among MS in ways that benefit the poorer states (Sangiovanni, 2013, p. 240). Moreover, all MS could put in place measures appropriate to their distinct social systems to protect and support sedentary citizens for whom transnational mobility either imposes costs or proves costly to take advantage of. For example, MS should be allowed to restrict in-work benefits to national citizens.

Conclusion

Equality as per the Aristotelian formula involves treating like cases alike and different cases in relevantly different ways. Both sovereignty and capacity DI may

support procedural and substantive fairness when they reflect relevant differences, yet be unfair if they involve treating like cases unlike. We have compared statist intergovernmental and supranational cosmopolitan approaches and argued both can accommodate forms of DI for peoples and individuals respectively. However, the two approaches can diverge given that the latter prioritises EU level decision-making and redistribution over those at the state level favoured by the former.

We have argued for a democratic view of the EU, as a union of both state peoples and individual citizens, that combines these two approaches. We have contended sovereignty and capacity DI can prove useful ways of preserving this balance by fostering a Union in which MS can simultaneously meet their obligations to their own people as well as to EU citizens and the peoples of other MS by not integrating when the latter might conflict with the former. However, a democratic perspective raises considerations of procedural and substantive fairness that limit how far DI can go. DI can be regarded as procedurally unfair if it diminishes the exercise by citizens of certain basic political and civil rights at either the state or the EU level, and as substantively unfair if it fails to be a Pareto improvement for all MS and diminishes the social entitlements of the poorest citizens within one of them. Outside these constraints, however, DI may enhance both procedural and substantive fairness by promoting the EU's aspiration to be united in diversity.

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