



Contesting Political Differentiation

European Division and
the Problem of Dominance

ERIK O. ERIKSEN

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PREFACE AND ACKNOWLEDGEMENTS

In the European Union (EU), differentiated integration is a pragmatic response to political challenges of a fundamental character. It is a way to hold together a controversial system by sectioning off particular policy areas and countries from centralised rule. Differentiation has become a means of handling or bypassing various forms of crises and various forms of opposition to integration. The consequences of differentiated integration are, however, not trivial; they are severe. Types of political differentiation affect identities, political statuses, and self-rule, and threaten the integrity and viability of the EU. As 2018 draws to a close, the British debate on Brexit, which is growing more intense by the day, is a stark reminder of the perils of differentiated integration.

In this book, I seek to clarify the basic problem of political differentiation under conditions of complex interdependence and economic integration. The consequences of what might be a benign plea for sovereignty and independence, can in fact lead to the opposite. Many fight supranationalism and the EU, or they opt for political differentiation in the name of freedom and democratic self-rule. They see flexibility and differentiation as a way to strengthen the autonomy of the member states and citizen' self-rule. For many, differentiation denotes flexibility and the dispersion of democratic control. However, under conditions of far-reaching legal, administrative and economic integration, political differentiation can have malignant consequences. It can undermine the fundamental conditions of democratic self-rule. The claim of this book is that differentiation is not an innocent instrument for handling conflicts in interconnected contexts.

This book stems from the research project *Integration and division: Towards a segmented Europe?* (EuroDiv),¹ a large-scale, cooperative project on European differentiation, which lasted from 2012–2017. The project was established by ARENA Centre for European Studies at the University of Oslo and funded by the Norwegian Research Council’s research initiative ‘Europe in Transition’ (EUROPA). It focused on the implications of the European crises for democracy and integration and what it means that countries both inside and outside the EU are integrated to different degrees. The project involved most of the researchers at ARENA, as well as partners from all over Europe. It has resulted in many publications and a series of seminars, workshops and conferences has been organised over the years.

Learning from a plethora of studies on the multifaceted problem of differentiation, in this book, I set out to draw some general conclusions of what differentiation means for democracy under present conditions of interconnectedness in Europe. I set out to clarify why a differentiated Europe faces a problem of dominance—a problem that Brexit will only increase.

This book has also profited from previous published works;

- ‘A Cosmopolitan European Future’, in *The Normativity of the European Union*. Palgrave, 2014.
- ‘Despoiling Norwegian democracy’, In Erik O. Eriksen and John E. Fossum (eds) *The European Union’s non-members: Independence under hegemony?* Routledge, 2015.
- ‘Structural Injustice: The Eurozone Crisis and the Duty of Solidarity’, In Andreas Grimmel and Susanne My Giang (eds) *Solidarity in the European Union. A Fundamental Value in Crisis*. Springer, 2017.
- ‘Political differentiation and the problem of dominance: Segmentation and hegemony’. *European Journal of Political Research* 57(4), 2018.

I am grateful for a wealth of input from colleagues in Oslo and elsewhere, to a host of reviewers of published books and articles and to critical interlocutors at seminars, workshops, public events and conferences

¹For more information about the project, see: <http://www.sv.uio.no/arena/english/research/projects/eurodiv/index.html>.

where bits and pieces of this book project have been presented—in London, Oxford, Hamburg, and the 2017 European Consortium of Political Research (ECPR) conference in Oslo. In particular, I am indebted to John Erik Fossum, Christopher Lord, Águstin Menéndez, Helene Sjørnsen and Hans-Jörg Trenz for cooperation, discussion and comments. I am indebted to Andreas Eriksen and Kjartan Mikalsen for comments on Chapter 8. I am immensely grateful for excellent assistance by Ragnhild Grønning and Kaja Meeg Valvatne.

Oslo, Norway
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Erik O. Eriksen

CONTENTS

1	Introduction: The Predicaments of Differentiation	1
2	Autonomy Versus Arbitrary Rule	23
Part I A Politically Differentiated Europe		
3	Dimensions of Political Differentiation in Europe	59
4	Dominance Through Segmentation	71
5	Hegemony Through Self-Inflicted Subservience	93
6	Contested Multilateral Dominance	121
Part II Overcoming Illicit Divergence		
7	Constituting Power in Europe	159
8	Structural Injustice and the Paradigm of Solidarity	191

9	Differentiation as a Vehicle of Integration	219
10	Conclusion	259
	Index	267



Introduction: The Predicaments of Differentiation

DIFFERENTIATE OR BUST?

Brexit has been a shock, awakening us to the instability of the present European political order. Instability may lead to more political differentiation, and can pave the way for a *multi-speed* or a *two-tiered Europe*. The many crunches in the wake of the 2008 financial crisis, the refugee crisis as well as destabilised neighbourhoods and new global challenges all call for action. Several European leaders now support the idea, spearheaded by Germany and France, of formalising the concept of a multi-speed Europe, where member states could choose the speed of their integration.¹ Integration as a one-way street may thus end. We may see a change from a union of different speeds to one of different statuses—a two-tiered Europe. Is this type of political differentiation a problem, and if so, what kind of problem is it?

It is vital to clarify this issue also because it is still unclear what the European integration project is ultimately meant to achieve. The European integration process is unfinished and the European Union a project under construction. The lingering question is whether there is a third way between inter-governmentalism—based on treaties between sovereign states—and supranational state building. At the age of 60, the

¹Belgium, Luxembourg and the Netherlands—who, with France, West Germany and Italy, formed the ‘inner six’ of the original European communities—have already expressed their support (Boffey and Rankin 2017).

European Union needs more flexibility to revitalise itself, argues The Economist (2017) in a special research-informed report on the ‘Future of the European Union’ in March 2017. Under the heading ‘Differentiate or bust’, The Economist claims that the EU must embrace greater differentiation or face potential disintegration. In stark opposition to this view, the distinguished German professors Claus Offe and Ulrich K. Preuss (2016: 21) argue that the EU and modern societies in general ‘typically suffer from excessive or misguided degrees of differentiation that jeopardize their capacity to gain and maintain control over their collective fates’. For them, the brute alternative is, ‘integrate or bust’.

Instead of setting out to examine who is right in this question, I will analyse the basic problem of differentiated integration, what it is, and why it could be a problem from a democratic point of view. One aspect of the problem, which eventually will shed light on the question of the relationship between integration and economic success, is whether a politically differentiated Europe can be stable. The EU is already differentiated and the effects are discernible. I shall address the principled problem of political differentiation—why it is or can be contested. Many are concerned with the economic and social effects of differentiation; whether it is beneficial in terms of prosperity and welfare and whether it produces negative externalities and represents a moral hazard. However, who decides about this? A democratic sovereign is needed to define and address externalities and moral hazard correctly and non-arbitrarily. Therefore, I locate the problem of differentiated integration as one of political freedom—of *democratic autonomy*.

The book deals with the principled problem involved in political differentiation under conditions of complex interdependence and economic integration. Pace Keohane and Nye (1977), I use the concept complex interdependence as a description of the multifaceted ways that patterns of interconnectedness and affectedness have evolved all over Europe. The term economic integration describes forms of cooperation of a more encompassing nature, not only interconnected and aligned economies but a highly regulated state of affairs. Members of the Single Market are required to adopt all relevant EU regulations and accept the jurisdiction of the European Court of Justice. Under such conditions, parties may exclude themselves from decision-making processes, without being able to exclude themselves from all or any of the effects of these. Under such conditions, often less by design than default, political differentiation can undermine the fundamental conditions of democratic self-rule.

The claim of this book is that types of political differentiation affect the requisite conditions for a functioning self-ruling republic. Equal freedom for all, which is the first principle of justice, is at risk in a politically differentiated order. When those subjected do not have the same rights and duties, when different policy fields and groups of countries are governed by different rules, there is a risk not only of legal uncertainty, but of *arbitrary rule*, of dominance. Dominance is linked to asymmetries arising from political differentiation, which in itself may have roots and causes in the asymmetric distribution of power and resources. The basic problem, which political differentiation raises under conditions of cascading interdependence, is the exercise of *arbitrary power* as parties are obliged to follow laws, the making of which they cannot influence.

This book sets out to identify the basic problem of political differentiation in Europe and what it takes to overcome it. To identify problems and discuss solutions, I apply a conception of democratic autonomy, which requires that those subjected to laws are at the same time their authors. By applying this normative standard to certain developments of the European differentiation processes, I clarify dominance relations and specify their causes and implications. Through this analysis, I also establish what the standard implies with regard to assessment criteria and institutional reform. I draw on the insights of sociological theory and international relations theory to conceptualise the systemic effects of differentiation. There are not only policy consequences of differentiation, there are also polity ones. I will analyse the consequences of differentiation on the EU as a polity through the concepts of segmentation and hegemony, which will be explained in more detail in Chapter 2. The overall aim is to establish the conditions under which political differentiation raises a problem of dominance.

THE DEVELOPMENT OF A DIFFERENTIATED EUROPE: CORE AND PERIPHERY

The idea of a Europe of different speeds is not a new one, and ideas of differentiated integration have been discussed since the very beginning of the European integration process. Policy makers and academics have discussed several models of differentiation, including the multi-speed and multi-tiered Europe, avant-garde Europe, concentric circles, variable geometry, Europe à la Carte, and enhanced cooperation, to mention but

a few. Today, however, more EU policies than ever are marked by concentric circles of integration and lack of uniform application (De Witte et al. 2017).

The EU currently consists of multiple overlapping groupings: not all countries are members of the Euro or of the Schengen zone, and groups of countries can work together on defence, or decide to pass a new law because of flexibility in the EU rulebook. However, until recently, this type of differentiation has been seen as temporary. The states that are not members of the core, of the Eurozone, have been under an obligation to join at some later stage. The financial crisis, in particular, changed the situation. It was the Eurozone crisis that first reinforced differentiated integration, and the development of the Monetary Union in its aftermath is the clearest example of differentiated integration.

Brexit will contribute to the *formalising of European differentiation*. Because of it, a more differentiated European Union is foreseen. Even though the incongruence between the Single Market and the Single Currency will decrease when the UK leaves the Union, any arrangement involving the UK as an ex-member will necessarily be a new departure in differentiated integration (Lord 2017). These developments raise the prospect that states may come to permanently occupy different roles and *statuses*, and that this will come to be considered a defining feature of the EU. The internal differentiation between a political Euro-Union working ever-closer together—Core Europe—and a periphery of hesitant member states that can join the core at any time would then not be a temporary phenomenon.

In the recent years, many have argued in favour of various forms of differentiated integration as a solution to EU's challenges. In 2012, Jean-Claude Piris, official chief legal adviser to the Council of Ministers, wrote a book advocating a two-speed Europe. The ideas of enhanced cooperation and a multi-speed Europe have also recently received interest. Earlier in 2017, Angela Merkel and Francois Hollande urged their fellow leaders to commit themselves to a union of 'different speeds' (*Deutsche Welle* 2017). 'We must have the courage to accept that some countries can move forward a little more quickly than others,' Merkel stated. Further, a European Commission white paper on the Future of Europe presented five possible scenarios one of which was labelled 'those who want more do more' and outlined a multi-speed model of differentiation for the EU. Accordingly, 'Coalitions of the willing' may join forces and work together in specific areas (European Commission 2017).

This view is, however, not shared by all European leaders. States that risk being left on the periphery are reacting negatively to such a development. There is fear of new divisions and dividing lines in Europe, of first and second-class Europeans.² Leaders from Hungary, Czech Republic and Poland have expressed concern over the possible shift to a multi-speed Europe, worried that it could side-line their views (Strzelecki 2017). Denmark and Greece have also objected to the idea of a two-tier Europe, fearing they would be treated as outsiders and excluded from important decision-making forums. Another concern regarding the idea of a differentiated Europe is that if the EU members are not able to agree on common principles, the Union will eventually fall apart. Finally, there is a fear that too much variation within Europe will lead to a highly inefficient and unstable political order.

Three Orders of Differentiation

There are several different models and conceptions of differentiation. By 1996, Alexander Stubb (1996) claimed to have identified as many as 30 forms of differentiated integration. Differentiated integration depicts institutional variation and different forms of association. Yet political differentiation is a theme with variations.³ It can describe differences in sectoral, territorial, or temporal dimensions, such as the concepts of Variable Geometry or Europe *à la carte*, Core Europe or the Europe of Concentric Circles, and Two- or Multi-speed Europe, respectively. The temporal 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. If these arrangements are not actually stepping-stones towards membership, we find ourselves in uncharted territory. That being the case, we can talk of a uniquely

²The Visegrád group—comprising Czech Republic, Hungary, Poland and Slovakia—is already alarmed (Wintour 2017).

³For an overview of political differentiation, see Leruth and Lord (2015) and De Witte et al. (2017). For the political science debate see Fabbrini (2015), Schimmelfennig (2014), Leuffen et al. (2013), Piris (2012), Lord (2017), Fossum (2015), Genschel and Jachtenfuchs (2016), Fossum and Graver (2017), and Eriksen and Fossum (2015). See further Kreuder-Sonnen (2016), Schwarzer (2015), Verdun (2015), and Niemann and Ioannou (2015). For some legal approaches to political differentiation see Avbelj (2013), De Witte et al. (2017), Brunkhorst (2014), Menéndez (2013), White (2015), Joerges (2014), Somek (2015), and Tuori and Tuori (2014). See also Levy, Pensky and Torpey (2005).

structured political order, in which the present level of political differentiation is upheld or increased even more with consequences for the idea of a united and democratic Europe.

Different orders of differentiation can be discerned, according to Matej Avbelj (2013: 193). There are inclusive and exclusive as well as static and dynamic forms of differentiation. There are also lax and severe forms of differentiation. Avbelj divides the different models and conceptions into three orders of differentiation, moving from the least to the most differentiated legal arrangements. Only the third one represents a uniquely structured order—it entails differentiated legal solutions—raising the problem of arbitrary rule. Other conceptions of differentiation are already authorised in EU primary law—order one—as are others even though they involve derogation from EU primary law—order two.

In the first order, ‘differentiation stands for the range of both formal and semi-formal legislative, executive, and judicial techniques of regulation, whose regulatory outcomes (intentionally) fall short of requiring and establishing uniformity’ (Avbelj 2013: 193). These regulations are normally explicitly authorised in EU primary law and executed in the form of secondary EU law, often following the technique of minimum or partial harmonisation. Additionally, there are instances of options, derogation clauses, and different transitional periods of implementation for different countries in some secondary EU law. The construction and interpretation of a particular term in EU legislation is often left to the Member States, leading to differentiation of the first order.

The second order of differentiation entails more profound legal arrangements in the form of derogations from EU primary law. This category comprises the safeguard clauses, instances of various opt-outs and opt-ins, and other derogations in favour of a selected member state (Avbelj 2013: 194). Derogations in this order are usually an exception to the uniformity rule, established for only one Member State, in a single and narrowly specified policy field, for an unlimited period of time. This type of differentiation is always a result of intergovernmental negotiations and is not covered in the Treaties.

Finally, the third order of differentiation entails the most differentiated legal solutions for the EU (Avbelj 2013: 195). This type of differentiation is more general and envisaged for a larger number of Member States, in broader policy sectors. There are several types of differentiation models that can be placed within this order, including the *à la carte* model; the multi-speed Europe; the Europe of concentric circles; and the

model of enhanced cooperation, which is entrenched in the Treaty of Lisbon. The *à la carte* model subjects Member States to a limited set of uniform legal regulations, and gives states room to pursue policies independently; the other models have a broader scope of uniform rules. The multi-speed and concentric circles models differentiate between states, while enhanced cooperation differs by policy sector. The concentric circles model is permanent, while the multi-speed and the enhanced cooperation models are more temporary solutions.

The Economist special report sees the solution to the challenges faced by the EU as differentiation of the third order, i.e., a multi-speed and multi-tiered Europe consisting of all 48 European countries. In this model, the core group will comprise the countries that share the euro. These countries will need more integration and shared institutions, from a proper banking union to a common debt instrument. The next group (or tier) will consist of a looser network of EU members that do not want to join the euro. The rest of Europe should, according to the Economist report, be able to choose which area of the EU they want to participate in. For example, Norway and Switzerland can be bound by the European single market, while Britain might not want to accept the single market and rather trade freely with the EU.

Calls for Differentiation

The Treaty of Rome contained several safeguard clauses and protocols dealing with derogations. There have also been several calls from influential European figures to pursue a differentiated model for the European Union. The debate about differentiated integration began in the 70s when German Chancellor Willy Brandt and former Belgian Prime Minister Leo Tindeman introduced the idea of a multi-speed Europe. The Union would be divided into two groups—those more advanced and those less advanced. While these calls had no practical effect at the time, the idea of differentiation was again brought up in the 80s with the implementation of the Schengen Agreement. Several new differentiating legislative techniques were included in the Single European Act, allowing Member States to set their own regulatory standards in already harmonised fields.

In 1993, the Treaty of Maastricht introduced a pillar structure, giving rise to structural viability, with different policy sectors being governed by different rules. The creation of the European Monetary Union (EMU)

led to a higher degree of differentiation. Some countries opted out of the EMU and some of the ‘social agenda’.⁴ In 1994 Edouard Balladur, France’s then prime minister, proposed a Europe of three concentric circles: an inner core of the single currency, a middle tier of those in the EU but not the single currency, and an outer circle of non-members with close links to the EU. The same year, Wolfgang Schäuble and Karl Lamers, two then members of the German Parliament, called for the creation of a core Europe based on the founding states, which would be closed to other states. Britain on the other hand, wanted an *à la carte* solution, in which all Member States would be involved only in a small number of EU policies, and choose freely to opt into other policy fields where they wanted to participate.

The enhanced cooperation model was entrenched in the Treaties of Amsterdam and Nice in 1997 and 2001 respectively; the former has a general clause opening for differentiation in some areas. These moves added fuel to the debate about differentiation. The former German Minister of Foreign Affairs, Joschka Fischer, stated that the present EU-27 should be forgotten and called for a reconstruction of the EU. Jacques Chirac suggested creating a pioneer group with a flexible coordination mechanism, and Tony Blair supported enhanced cooperation under stringent conditions.

The 2007 Treaty of Lisbon has in one way reinforced a second order differentiation through the introduction of exceptions, most notably in the Charter of Fundamental Rights, where both the UK and Poland have opted out. However, no major changes were made to the idea of enhanced cooperation included in the Amsterdam treaty, and these provisions have only been used a limited number of times since. After the financial crunch, differentiation has again been brought up as a way to combat the crisis. A number of prominent politicians and government leaders—spearheaded by French President Emmanuel Macron—have highlighted the need for a future EU that is differentiated in a core and a periphery. Former President of France Nicolas Sarkozy has also spoken in favour of a two-speed Europe, with an *avant-garde* represented by the members of the euro zone, while other states would be a loose confederation attached to the core.

⁴The European Social Charter of the Council of Europe is referred to in the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU) as one of the sources inspiring the social objectives of the EU (European Union 2012).

Academics have voiced concern over the new push for differentiated integration. Joseph H. H. Weiler (2012: 1) contends that ‘the two-speed Europe solution is the refuge not only, like patriotism, of scoundrels [...] but normatively and technically scrap[es] from the bottom of the barrel’. As alluded to, Offe and Preuss criticise the degree of differentiation in the EU. In a chapter with the telling title ‘The Union’s Course: Between a Supranational Welfare State and Creeping Decay’, they urge the EU to harness its integration drive and focus its efforts more on conciliating the imperatives of the internal market and the requirements of economic convergence (Offe and Preuss 2016: 26).

Jürgen Habermas, who is a true defender of a federal EU, has surprisingly argued in favour of differentiated integration. In 2003, Habermas and Jacques Derrida argued in favour of a ‘Core Europe’, in their article ‘February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe’. In this appeal, Habermas and Derrida (2003: 292) urged the core European nations to make use of the mechanisms for enhanced cooperation to move towards a common foreign, security and defence policy. Also with regard to the Eurozone crises, Habermas sees this kind of differentiation as the only way to convince the populations of Member States that want to hold on to their sovereignty that the European project makes sense (Habermas 2016a, b). I will discuss Habermas’ model for the legitimization of the EU in Chapter 8, and in Chapter 10, I address the possibility of differentiated integration as a vehicle of integration. One should not, as Monnet said, mistake setbacks for failures.

What I find puzzling in the many analyses of differentiation and pleas for more differentiation is the lack of concern for democratic legitimacy, or rather that concerns for legitimacy are related to outcome-oriented standards. If differentiation pays off in functional and economic terms, or if it calms the EU sceptics, then it is conceived of as a good thing. The policy effects rather than the polity effects are in focus. Instead of seeing differentiation as solely a policy question or the technical task of managing externalities—as a question of pareto optimality—one should see it as a deep political and hence democratic question. Democracy is about more than satisfying preferences and improving welfare; it is about a polity securing the equal freedom of all: essentially, it is about the ability of all affected to be able to participate in shaping a common future. Technocracy prevails when only outcomes provides for legitimization and not procedure. Apathy, resentment and alienation thrive in the wake of

technocratic politics. Euroscepticism may have economic causes insofar as those suffering from the negative consequences of globalisation are overrepresented in the Eurosceptical group; but they also report feeling disenfranchised. An important purpose of this book is therefore to develop the standard according to which differentiation can be deemed good or bad. Which forms of political differentiation are democratically sustainable and which are not? This standard is inspired by the proposition that dominance—or arbitrary rule—is the essence of injustice. Throughout the book, I expand on the precise meaning of dominance as the capacity to exercise arbitrary power, and what it takes to overcome it. For the latter task, I highlight the basic principles of democracy and the importance of deliberation and egalitarian structures of decision-making.

EQUAL FREEDOM FOR ALL

This book deals with the normative problem of differentiated integration, both in its vertical and its horizontal dimensions. It sets out a new perspective on political differentiation, seeing it as involving aspects of arbitrary rule. Dependence on an arbitrary will is the core of dominance and the main contrast to freedom. An entity exerts normative power when rights and freedoms are affected and when duties are imposed. While differentiation has connotations of flexibility, dispersion of control and independence, it may under present conditions of intense interdependence, proliferate problems and interstate conflict; it may increase transaction costs, negative externalities and moral hazard. A ‘return’ to a Europe of independent and sovereign nation states under international law would mean a more instable Europe. There would be no public coercive framework in place capable of tracking the interests, views, or wills of the citizens, nor of ensuring equal political rights of affected parties across Europe.

Political differentiation is thus not merely about preferences and interests, about *politics* and *policy*, it is also about *polity* and political order. In political science, politics refers to the distribution of preferences and interests, their contested nature, and claims for (re)distribution, recognition and representation. By policy, we generally understand political resolves: problem-solving and conflict resolution processes that terminate in collectively binding decisions (cp. Easton 1953). Some analysts discuss differentiation basically with reference to what goes on in terms of political and policy processes (states getting opt-outs or exemptions from

institutional arrangements, laws and policy measures) (see, e.g., Leuffen et al. 2013; Adler-Nissen 2014). The problem with these types of analyses is that they miss the core problem of political differentiation, namely that it is about the polity and the constitutional make-up of Europe. It is about a basic structure; ‘the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation’ (Rawls 1971: 7). By polity, we understand the basic structural-institutional make-up of the political system and its constitutional fundamentals.

Political differentiation is about the political order and how it affects the statuses of states and citizens in Europe, i.e., the distinctive conditions enabling self-rule and shared rule. All models of European political differentiation share a minimum common denominator, namely that within the scope of EU competences, not all member states are subject to the same uniform EU rules (Avbelj 2013: 193). Without applying the same laws to all affected, without effective voting rights how can there be equality before the law and how can there be political autonomy?

Differentiated integration—a two-tier Europe—is thus not innocent. It is not a neutral means to achieve political results. It is political through and through as it affects the principles of government, of how to rule in the name of the people. Political differentiation is a question about the political order of Europe and thus the rights and duties of the citizens.

The normative vision of the European integration process, which has been couched in constitutional terms, is hard to replace. It is hard to give a normative defence of political differentiation under conditions of interdependence and the supremacy of EU law. A politically differentiated order, where not all are subject to the same rules and where different sections are governed by different rules, can be in breach of the principle of equality before the law, giving rise to arbitrary interference. As I discuss in detail in Chapter 9, political differentiation can be a necessary ‘evil’, justified as a temporary status, but as it involves power asymmetries under the said conditions, it can amount to a form of dominance. It takes political integration to banish dominance. Democracy comes with the promise of an association in which the wielding of power takes place under conditions of equal freedom of all the members.

Under conditions of complex interdependence and economic integration, a politically differentiated Europe diminishes citizens’ ability to control their own vulnerability. Political differentiation also leads to loss of autonomy for smaller states—for the associated non-members. Thus

it can be contested on principled grounds. This book applies a two-track approach to political differentiation. One track, which clarifies the normative problems of political differentiation and how to overcome them, is derived from a theory of deliberative democracy. The other track consists of a set of middle range categories tailored to analysing the systemic effects of integration. The latter approach draws on insights from organisational theory about loose couplings and on international relation theory about power asymmetries.

Irregular Politics

This book undertakes a normative analysis of the political differentiation of Europe and some of the ways to overcome the problems proceeding from it. It establishes a normative standard for identifying dominance relations derived from democratic theory. The standard of *democratic autonomy*, and hence of a European sovereign, which hinges on the idea of rational consensus, is necessary for normative and critical purposes. However, we also need other conceptual tools to help us grasp the systemic effects of differentiation when no consensus on a common framework exists. When a higher-level consensus about procedures for handling pressing affairs is lacking, specific tasks are handled by specialist institutions, technologies and actors according to functional logics. We need to understand social cooperation under conditions of functional interdependence and normative disagreement. This two-track approach is needed because of the limitations of conventional approaches to European integration in light of the current state of affairs.

Neo-functional, intergovernmental and institutionalist approaches differ on many accounts, but they explain processes of differentiation in similar ways. These standard approaches see political differentiation as an attempt to minimise conflict in light of increased discrepancy between exclusive Union and member state competences. They have not clarified the legitimacy problems involved in political differentiation. Several critical scholars have been prompted by the constitutional irregularities to address such problems using the dramatic vocabulary *emergency politics*—of normless emergency—and authoritarian rule. On the face of it, the concept of emergency politics alludes to Carl Schmitt's idea of state of emergency. Those who control the state of emergency, he contends, are sovereign (Schmitt 1996 [1932]). However, the EU is not a sovereign possessing a legitimate monopoly on violence. Neither does it have the

competence to increase its own competences ('Kompetenz-Kompetenz'). The EU is not a state but rather 'a government of government' (Scharpf 2009). The responses to the Eurozone crisis may be in breach with rule of law requirements, but the law has not been suspended. Consequently, there is a need for an alternative conceptual strategy to grasp the dynamics and democratic problems of differentiated integration. We need categories to analyse the present irregular state of affairs that do not mistake the object of study and that enable us to identify the systemic effect of differentiation without forsaking normative standards.

An alternative approach is also needed to get to grips with the fact that there may be patterns of differentiated integration *and* differentiated disintegration operating simultaneously. Brexit is a case of the latter. Due to the constraints and needs of particular policy fields and the *sui generis* character of the EU, processes of integration/disintegration will be uneven. Political differentiation and disintegration are structural features of the European political order.

Systemic Effects: Segmentation and Hegemony

In Europe, differentiation has both a horizontal and a vertical dimension. Vertical differentiation—'where policy areas have been integrated at different speeds and reached different levels of centralisation'—has to be distinguished from horizontal differentiation along a 'territorial dimension' in which 'many integrated policies are neither uniformly nor exclusively valid in the EU's member states' (Schimmelfennig et al. 2015: 767). This book identifies the systemic effect of differentiation in the vertical dimension as *segmentation*. This concept describes the coping with increased complexity by establishing autonomous systems of governance within different policy domains. A segmented political order in Europe is a source of arbitrary power because it decouples the decision-making structure from the (democratic) access structure. When the mapping of choices onto decision-makers is decoupled from the mapping of problems onto choices, there is arbitrary rule. This concept applies because the unified procedure to ensure equal access and public accountability have been side-lined by the Eurozone crisis management.

Segmentation occurs when policy fields are selectively integrated. The hypothesis is that the Eurozone represents a segment in which dominance occurs in the form of exclusion from decision-making bodies and

denial of choice opportunities. A comprehensive *Eurozone-specific regime of economic governance* has occurred, reflecting creeping competences and new decision-making bodies as well as new tasks for existing institutions. The changes to the Eurozone have segmented the management of decisions by removing them from parliamentary agendas and compartmentalising them in convoluted, executive-driven decision-making processes spearheaded by the European Council.⁵ Under this structure, important economic issues are not managed within a unified political framework.

Not only has the EU's internal order become differentiated, so has the geographical scope of the Union's political authority. Some non-members are more EU members than others. In the horizontal dimension, the systemic effect of differentiation is hegemony. The problem of dominance arises, then, not only for the debtor members of the Eurozone but also for the *associated non-members*. States like Switzerland and Norway are excluded from the EU's political institutions, but not from the effects of their decision-making. Under conditions of complex interdependence and economic integration, the problem of dominance in the differentiated European political order is most severe for legislators in associated non-member states. This pertains in particular to the European Economic Area (EEA) Agreement, which the EU offers as a second-best alternative to full EU membership to qualified candidates. One question to ponder is how close to this status the UK will come after Brexit.⁶

In international affairs, the dominator is a hegemon—a hegemonic state—that wields power over other units. The EU takes the shape of a hegemon that autocratically rules the associated states because of the way its affairs with the associated non-members are organised. The EU is not in itself a hegemon, but the agreements, as an unintended consequence, position it over and against the associated states. The EU dominates the EEA countries, not by intention, but by default. Because they have rejected membership, but seek access to the internal market,

⁵[T]he lead on measures to address the Euro crisis has been taken by the European Council, and by Germany and France acting partly within the European Council and partly through bilateral discussion' (Craig 2014: 36–37).

⁶Article 50(1) TEU states that '[a]ny Member State may decide to withdraw from the Union in accordance with its own constitutional requirements' (European Union 2012).

the EEA members become subjected to the EU. It is, so to say, a default strategy on the part of the EU, which undermines national self-determination. Asymmetric power relations are what causes hegemonic dominance. People are dominated when there is no parity of power and/or when there are no possibilities to participate in systems of joint decision-making.

In addition to analysing differentiated integration, this book contributes to the debate on dominance. Heteronomy is the case when people cannot moderate or influence their own vulnerability; when they are dependent on somebody else's choices. The one who dominates has the capacity to exercise power arbitrarily. Parties are vulnerable to the choices of others when they cannot control or influence decisions that affect them. Hierarchies become systems of domination when those affected are excluded from participating in decisions (decisional exclusion); when they experience the rule or the system as unjust; and when they are subject to forms of rule that are arbitrary, non-transparent and generally inattentive to democracy and legitimacy.

However, with differentiation in the external horizontal dimension of political integration, we face the phenomenon of self-inflicted subservience. The associated non-members have voluntarily, through referenda and parliamentary decisions, subjected themselves to the EU, which as an unintended consequence has become a hegemon. Are these states, then, really dominated? In Chapters 2 and 6, I develop a concept of dominance, which builds on the Kantian insight that freedom can only be restricted for the sake of freedom itself. Hence, a person may be dominated even when consenting to subjection. Even the happy slave is not free. To handle this problem, we must move beyond Philip Pettit's conception of domination as a question of the unchecked capacity to interfere with others without being obliged to consider their legitimate interests. Political freedom is not foremost a matter of non-interference and tracking preferences, but rather of institutions securing the equal freedom of all. Only democratic orders can ensure legal certainty and rightful assurance, viz., banish dominance. Democracy prioritises the rule of rulers to the rule of law. From this vantage point, it becomes clear that political differentiation—also in the horizontal dimension—represents an instance of dominance. I use the term 'domination' when referring specifically to Philip Pettit's theory of 'freedom as non-domination' and 'dominance' for the more general notion of it as subjection and arbitrary rule, which is developed in this book.

CONTESTING POLITICAL DIFFERENTIATION

The book is divided into two parts. Part I identifies the systemic effects of differentiated integration as segmentation and hegemony. It analyses differentiation of the internal structure of the Union as well as its differential relations with non-members. Part II discusses solutions to the problems caused by political differentiation and identifies ways to overcome divergence and dominance. It establishes what model of European democracy can accommodate diversity, how to banish the structural injustice of the Eurozone and whether learning through setbacks—through differentiation—is possible.

Prior to this, however, Chapter 2 will introduce and clarify some of the main concepts of the book; political differentiation, democratic autonomy, segmentation and dominance. Chapter 2 deals with the assessment standard—democratic autonomy—and how to deal with the systemic effect of differentiation. It sets out a normative standard for democratic rule and of dominance as an indicator of illicit rule. The former revolves on the idea of a consensus on constitutional essentials. Non-normative analytical categories are, however, needed in order to analyse the present state of ‘irregular affairs’. Chapter 2 thus adds a set of middle range categories adapted from sociological and international relations theory; the concept of segmentation grasps the effects and dynamics of vertical differentiation, while the concept of hegemony grasps the effects of horizontal differentiation.

Part I: A Politically Differentiated Europe

Chapter 3 provides a synopsis of vertical and horizontal differentiation in Europe. Vertical differentiation entails variation at different levels of centralisation—i.e., some policy areas are more centralised than others. Horizontal differentiation, on the other hand, means that policy fields have a certain level of territorial extension—i.e., some policies are accepted and implemented by some member states, but not by others. Differentiation is not new, but the vertical differentiation of the Economic and Monetary Union has grown significantly in response to the 2008 financial crisis. Horizontal differentiation is also extensive, both internally and externally.

Chapter 4 deals with differentiation in the vertical dimension of integration, and how the Eurozone crisis changed everything. In terms of

agreements, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union or the Fiscal Compact formalised the distinction between members and non-members of the Eurozone, while fundamental issues regarding the EU's competences have been executed outside EU treaties. The Eurozone-specific regime of economic governance amounts to a segment. It involves an incongruence between the Single Market and the single currency as well as between debtors and creditors in the Eurozone.

Chapter 5 deals with differentiation in the external horizontal dimension. The exceptional precepts of *supremacy and direct effect* are but some of the aspects of the EU that serve to underline the Union's impact on member states, including associated non-members. Through their various arrangements with the EU, countries such as Norway and Switzerland are vulnerable to arbitrary interference. The EEA Agreement provides access to the EU's single market to Norway, Iceland, and Liechtenstein. The single market involves a regulatory regime that requires the same effect of EU's legal acts. The laws of the EU members constitute the basis of Union law, not those of the associated non-members. The EU allows access without membership but on terms entirely determined by the EU. The EU dominates the associated non-members—it makes them 'rule takers', not 'rule makers'—because of the built-in asymmetries in the agreements. Therefore, on the external horizontal dimension, the systemic effect of differentiation is hegemony vis-à-vis the associated non-members because of asymmetric power relations.

Differentiation under certain conditions can give rise to executive multilateralism and undermine the very conditions of self-rule, not merely the ability to solve collective problems. Chapter 6 discusses the associated non-members' relations with the EU in light of the processes of *cosmopolitanisation of nation-states*. The European integration experiment is part of a larger process of institutionalising human rights as basic rights and making them binding on the wielding of political power. Human rights clauses and other stipulations of supranational law are incorporated into national legislation. With some serious exceptions, sovereignty has become a question of complying with international standards of democracy and human rights. However, legal protection beyond the nation-state may increase citizens' private autonomy at the expense of their public autonomy. The chapter analyses the congruence requirement of democracy and the distinction between state sovereignty and popular sovereignty.

Chapter 6 also attends to the many faces of dominance involved in the vertical and the horizontal dimensions of political differentiation. In both cases, differentiation is self-defeating because it leads to instability and to calls for its abolition.

Part II: Overcoming Illicit Divergence

In Part II, I deal with ways to overcome harmful political differentiation; that is, ways to ensure ‘unity in diversity’ in a legitimate manner. European integration is the French Revolution of our time. Just as the French Revolution set the agenda for modern political thought by bringing the nation-state and democracy onto the historical stage, so now European integration trans-nationalises sovereignty and re-organises the legitimacy basis of political institutions. But is democracy possible without a state with the capacity to compel compliance? The sanctioning of non-compliance is a prerequisite for both justice and solidarity.

In Europe, sovereignty is pooled and bounded and decision-making power is shared by the European Union and member states. As I have addressed elsewhere, the Union contains several political innovations, signifying a new constellation of multilevel rule (see Eriksen 2017). Chapter 7 sets out the cosmopolitan dimension of Europe’s liberal political order. I find this framework to be a promising way to handle unity in diversity. Only respect for the individual—the ultimate unit of moral concern—gives modern law coherence and unity. It gives multinational unions a firm basis. This proposition constitutes the background not only for taking issue with state-based notions of democracy but also with Jürgen Habermas’ suggestion of shared sovereignty between the ‘citizens’ and the ‘peoples’ as two constitution-founding subjects.

Habermas makes use of the old idea of Emmanuel Sieyès and James Madison of mixed constituent power (‘pouvoir constituant mixte’) for solving the integrational problems in Europe (and of world citizenship). He gives the idea a new twist: the stateless euro polity, which is based on two constituent subjects—the citizens and the state—represents a new stage in the process of the constitutionalisation of international law without abolishing the achievements of the nation state (Habermas 2012). But can this work as the legitimation basis of an entity which is not a state but more than an international organisation? Will such a model of the EU be able to overcome divergence and eradicate dominance, or will it increase them?

Chapter 8 analyses the kind of duties triggered by the Eurozone crisis. The severe economic difficulties of the Eurozone effectively demonstrate the mutual vulnerabilities and level of global interdependence of the nation-state. The Eurozone has corralled its members into a community of fate, in which all are dependent on all, but where some profit and some lose out under the same economic regime. The problem involved is *structural injustice*, which raises the normative puzzle of injustices that benefit some and where no one in particular is liable to pay damages. The type of structural injustice generated by the Eurozone arrangement gives rise to collective, forward-directed duties—to correct wrongs akin to political justice. Forward-directed duties apply to interdependent actors and their ways of coping with contingencies and conflicts.

Chapter 9 asks whether differentiation can be seen as just a temporary break, a side step, leaving space for reluctant parties to rethink their position, and change their mind. Can it be a means to facilitate *learning*—extending the process of claims making and justification—so that states at a later stage can join the integration train? In this chapter, I briefly discuss how to move from an unjust to a just political condition. By introducing the category of *permissive law of public right*, Kant made possible the integration between morality and political knowledge. The permissive principle detaches action from necessity and permits the postponement of reform until conditions are favourable—without losing sight of the ultimate objective. It justifies delays but not the status quo. However, when the pressure is on, when push comes to shove, there is call for agency. Members of Core Europe have incurred a liability to the burdens required to meet the collective's obligations, and should hence be the peacemakers of reform—of integration.

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