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What Can Asymmetric Federalism and Differentiation in EU Law Learn From Each Other? Asymmetric Federalism as an Explanatory Model for Differentiation in EU Law.

by

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Abstract

The article applies the concept of asymmetric federalism to differentiation in European Union (EU) law. By doing this, it brings together two strands of literature that share many similarities but have seldom been considered in parallel. It discusses the two theoretical frameworks in terms of their common features and their underlying normative idea, namely, the accommodation of diversity. Additionally, the article also offers refinements of the asymmetric federal model based on the EU's experience with differentiation. The two refinements proposed, namely to integrate the importance of asymmetry and subnational (constitutional) identity in the studies on asymmetric federalism, have the potential to provide a more exact analytical model which would better explain the dynamics of accommodation of diversity in quasi-federal systems.

Keywords

Asymmetric federalism, differentiation, European Union, quasi-federal systems, identity

1. Introduction[i]

The purpose of this article is to link two theoretical approaches to the accommodation of diversity in multilevel systems: asymmetric federalism and differentiation in EU law. Although this may imply a Eurocentric approach to asymmetric federalism, the article aims to show how the parallel study of asymmetric federalism and differentiation in EU law may not only be beneficial for a better understanding of the EU but can also offer insights into the possible new approaches to the accommodation of diversity in other quasi-federal systems[ii] based on the EU's experience with differentiation. The article approaches the task set out by dividing it into two limbs.

Firstly, it analyses the correspondence between asymmetric federalism and differentiation. It briefly outlines the theoretical underpinnings of each of the two approaches to establish the level of substantive correspondence. As shown in the article, this is beneficial primarily to better understand and analyse the existing dynamics within the EU, positioning them into the wider context of (asymmetric) federalism studies. Asymmetric federalism can be adopted as a model that helps to better understand and explain the struggle between unity and diversity in the EU. In that way, the article attempts to combine two sets of literature, which share many similarities but have seldom been considered in parallel.

Secondly, the article attempts to draw lessons for asymmetric federalism from the EU's experience with differentiation. Based on the previous part of the article, it offers two potential refinements of the asymmetric model of federalism which may produce an analytical framework potentially more apt to better explain the dynamics of accommodation of diversity quasi-federal systems. In that respect, the article uses the EU's experience to expand upon the existing theoretical framework of asymmetric federalism.

2. Comparing Asymmetric Federalism and Differentiation in EU Law[iii]

2.1 Introduction

The discussion in this section brings together two strands of literature that share many commonalities, which have not been studied in detail in the literature. The first is asymmetric federalism and the second is differentiation in EU law. On closer inspection, it becomes

apparent how these two theoretical approaches to the accommodation of diversity, the first within federal states, and the second specifically within the EU, employ similar strategies and legal mechanisms. The purpose of this section is to analyse the overlaps as well as dissimilarities, aiming to show that approaching differentiation from the perspective of asymmetry may be beneficial in terms of more precise legal analysis. The comparison also serves as the foundation for the discussion in Section 3 on the possible refinements of the theoretical model of asymmetric federalism developed in federalism studies, based on the experiences with differentiation in EU law.

2.2 Asymmetric Federalism: Regular Federalism on Steroids?

In the additional exploration of asymmetric federalism, this article follows a relatively straight line of literature that has developed on the topic, especially in the last few decades. While there are few monographs specially devoted to asymmetric federalism (e.g. Agranoff 1999a), the study of asymmetric federalism, including this article, draws from the intellectual pool of ideas produced by some of the giants in the field of federalism studies in general.

The starting point for the study of asymmetric federalism is the fact that all federations are states that are founded upon the recognition of difference and diversity (Burgess 2009: 21; Elazar 1987: 12). Paradoxically, federations are therefore formed to institutionalize conflict, competition and cooperation in a way that perpetuates complex problems and may produce instability. The system is constructed to accommodate diversity in a way that creates the conditions for both a stable and an unstable state (Burgess 2009: 21). Since federal states are purposefully built upon divergent socio-economic and cultural-ideological bases, asymmetry is present in any federal arrangement: Social, political and economic differences ensure that no federal system is completely symmetrical. In that sense, asymmetric federalism can be viewed to present merely one end of the federalism spectrum, where the degree of differences among the constituent units is more pronounced and where this diversity is, more than usually, reflected in the legal (constitutional) treatment of those constituent units by the central (federal) authority. Accordingly, we could speak of asymmetric federalism as one 'extreme' of the application of the general federal idea under the conditions of manifest diversity, usually occurring in multinational multilevel systems.

Unsurprisingly, since symmetry is perceived as the embodiment of equality of constituent units of a federal system (Delmartino 2009: 37), the traditional federal approach, expressed for example in the commonly referred-to piece by *Tarlton* (Tarlton 1965), views asymmetry with suspicion (cf Sahadžić 2021: 3; Burgess 2006: 213–15). Conversely, recent research proves that asymmetries do not necessarily promote disunity (Sahadžić 2016: 135–147). As practice in the last decades has shown, asymmetry can also be adopted with notable success to stabilize quasi-federal systems in the processes of decentralization to promote sustainable pluralism in diverse societies (Palermo, Zwilling, and Kössler 2009: 7).

Asymmetry in federations refers to the differential status and rights among the constituent units of the federation and between them individually and the federation as a whole (Burgess 2006: 209). It follows from differentiation in the degrees of autonomy and power among constituent units of a state (Watts 2005: 2). Different analytical categories have been developed under the theoretical framework of asymmetric federalism for descriptive and analytical purposes. Firstly, there is a division between the conditions and the outcomes of asymmetry. Outcomes are further divided among *de iure* (constitutional) and *de facto* (political) asymmetries (e.g. Watts 2008: 125-30; 2005: 2; 2000: 12–30; 1999: 30-42; Burgess 2006: 218-21; Burgess and Gress 1999: 50–54; Popelier and Sahadžić 2019: 5-6; Sahadžić 2021: 16-44).

Asymmetry is conditioned by objectively identifiable differential societal factors, defining asymmetry as an empirical reality that actually exists within a given society (Burgess 2009: 24). If we draw once more from the traditional federal studies, we see that *Livingston* already identified a set of diversities that drive federalism: Differences of economic interest, religion, race, nationality, language, variations in size, separation by great distances, differences in historical background, previous existence as separate colonies or states, and dissimilarity of social and political institutions (Livingston 1952: 89–90). These empirical facts can also be extended to asymmetric federalism, forming preconditions for asymmetry. From the above, two categories of preconditions can be identified: socio-economic and cultural-ideological (Burgess 2006: 215).[iv]

These preconditions lead to outcomes of asymmetry (Burgess 2009: 24). Asymmetrical outcomes involve the actual relations generated by state activity (Agranoff 1999b: 17) and reflect preconditions in the legal setup of a federation (Burgess 2006: 217). They are defined by the relations between constituent units of a system and other parts of the system, the

central authority and the system as a whole (Watts 2000: 8). Based on the ensuing disambiguation, *de facto* asymmetries (political asymmetries) refer to the asymmetric practice or relationships, which result from the preconditions (Burgess 2006, 217). They encompass practices and relationships based on linguistic, religious, cultural, ethnic, social, economic, political, and other differences among sub-national entities and between sub-national entities and the central level. More specifically, they are based on differences such as the size of the population and the territory, the economic character, resources and wealth and the party system of the sub-national entity (Sahadžić 2021: 17). They present themselves as differences in the constituent state units, fiscal power and autonomy, representation and protection in federations and political parties and party systems (Burgess 2006: 217–220). As different expressions of *de facto* asymmetric federalism, they are the outcomes of the underlying objective social reality (Burgess 2009: 24–25). *De iure* asymmetries (constitutional asymmetries) refer to the legally and constitutionally entrenched differences (Burgess 2009: 25; Agranoff 1999b: 16). They produce variations among sub-national entities and between sub-national entities and the central level within one constitutional system under the law and correlate to differences in constitutional design and distribution of powers and competences (Sahadžić 2021: 17) – constituent units are treated differently under the federal law (Burgess 2006: 217). These asymmetries include territorial delineation, distribution of competences, representation in the chambers of the central legislature, the entrenchment of the Bill of Rights and general divergences between federal and constituent state legislation (cf Burgess 2006: 217, 220–221; Sahadžić 2016: 143–45; Watts 2000: 21–30). Contrary to *de facto* asymmetries, *de iure* asymmetries are not present in all federal systems (Sahadžić 2021: 17–18). Accordingly, *de iure* asymmetric federalism is broadly defined by *Burgess* as a policy choice of converting social reality into a formally differential status, embodying the constitutional, legal and political expression of unique socio-economic and cultural-ideological identities that require protection, preservation and promotion *via* constitutional entrenchment, legal recognition and other special procedures (Burgess 2009: 25).

In theory, the relationship between the two types of asymmetry is often only vaguely explored. In this article, they are understood not to be mutually exclusive. As pointed out by *Sahadžić*, *de facto* asymmetries form the basis and function as a prerequisite for *de iure* asymmetry (Sahadžić 2021: 17). This means that *de iure* asymmetries are adopted in the presence of pre-existing *de facto* asymmetries to protect the underlying pluralism and ensure

substantive equality among the constituent units of a system. However, this is not the only possible interplay between the two concepts. While *de iure* asymmetry may therefore lead to *de facto* asymmetry, *de facto* asymmetries may also arise when the law treats the component units of the system symmetrically, but the different exercise of their power (due to the existence of preconditions for asymmetry) nevertheless leads to factual asymmetric relations or outcomes. This means that asymmetry is, therefore, either a result of an asymmetric *distribution* of power or an asymmetric *exercise* of (either asymmetric or symmetric) power (cf Palermo 2009: 11–12 esp. n 4).[v] In the latter case, asymmetry is the result of non-exhaustive regulation of an issue at the federal level. This is important because if *de facto* asymmetries are seen as a defining feature of asymmetric federalism, non-exhaustive symmetric legal regulation at the federal level should also be considered an instrument for achieving the underlying aim of asymmetric federalism, namely the accommodation of diversity. This proposition is more exhaustively developed and explained in Section 3.2 of this article. Note, however, that situations where symmetrical powers are used to produce asymmetric application of those powers is labelled in federal theory as 'asymmetry in the outcome' (not to be mistaken with outcomes of asymmetry discussed above) (Sahadžić 2023: 7).[vi]

2.3 Differentiation in EU Law: A Variation on a Federal Theme?

The EU Member States are marked by heterogeneity related to differences in territory and population, languages, cultures, political differences, as well as social and economic differences. Some of these also lead to constitutional diversity (e.g. Albi and Bardutzky 2019) where differing values are expressed in differential constitutional arrangements (Kos 2023a). Under differentiation theory, this value pluralism has been distilled into two analytical categories: economic and social, on the one hand, and political and cultural value diversity, on the other (Bellamy 2019: 179 ff).

Although the EU's principled stance has been to integrate by unification (cf Thym 2017: 56; de Witte 2017: 9), it has also had to overcome the challenges stemming from diversity by adopting different mechanisms of differentiation (Kos 2023b: 207–9). To accommodate differences, Member States may be assigned different rights and obligations in different policy areas (cf Bellamy 2019: 178–79; Bellamy and Kröger 2017: 628; Kölliker 2010: 40–41). It is relatively clear how this approach resembles what was discussed in the previous

subsection under the terms of *de iure* asymmetry, whereby constituent units of a quasi-federal system are explicitly treated differently under federal law to accommodate the underlying social disparities.

In academic discussions, the terms differentiation and differentiated integration are often linked to 'flexibility' (Stubb 1999; Avbelj 2008; Přibáň 2010; Closa 2015: 7; Böttner 2021: 2). While being defined in different ways by different authors, the two terms are either used interchangeably, or differentiated integration is the preferred term (cf Tuytschaever 1999: 1; Sielmann 2020: 39). What the definitions of those concepts hold in common is the consensus that the key feature of the described approach is the facilitation or accommodation of a degree of difference between Member States in what would otherwise be common (unified) EU policy. Differentiation is adopted to enable the integration process to proceed despite objective and value-based differences (de Witte, Hanf, and Vos 2001: xii), leading to different levels of integration among the Member States (Sielmann 2020: 39). This includes differentiation in the narrow (*stricto sensu*) and in the wider sense (*sensu lato*) (cf Tuytschaever 1999: 2–3).

As traditionally used in the literature, differentiated integration can be understood as a synonym for differentiation *stricto sensu*, defined as the differential validity of EU rules across Member States (Schimmelfennig and Winzen 2014: 356). Under this variety of differentiation, EU law (primary or secondary) applies different rules to its addressees: Some Member States are explicitly excluded from the scope of application of EU law, or obligations under the law differ among the Member States (Tuytschaever 1999: 2; de Witte 2019: 1; Schimmelfennig and Winzen 2020: 3–4). Differentiation *sensu lato*, on the other hand, covers situations falling within the scope of common EU law regulation, but where these rules are nevertheless implemented differently in different EU Member States, which employ the discretion left to them by the EU legislator. This occurs when EU legal acts do not contain measures of total harmonisation or unification (meaning partial or minimum harmonisation or the employment of other approaches which entail a degree of deference). Under this variety of differentiation, the relevant EU rule formally treats Member States equally: The same rule applies to all of them, but it also allows all of them a margin of discretion in its implementation, enabling them to adopt differentiated (implementing) rules. This approach to differentiation is sometimes also referred to as differentiated or flexible implementation or application (de Witte 2019: 1) and in some studies on the topic it is

considered to be an example of uniform, rather than differentiated integration (Sielmann 2020: 41, 369).

Differentiation has fared importantly throughout the constitutional history of the EU (Hanf 2001; Kos 2023a) and most forms of differentiation were maintained, with some being additionally refined under the Treaty of Lisbon (e.g. Sielmann 2020: 76–83). There are hence numerous examples of this approach to accommodating subjective and objective differences among the EU Member States. Under the Treaty of Lisbon, four Member States procured opt-outs from Treaty obligations (Tuytschaever 1999, 122–23; Sielmann 2020, 354–61). By opting out, rules adopted in those areas do not (fully) apply to those states, typically due to concerns related to sovereignty (Tuytschaever 1999, 121–22). The central Treaty mechanism of differentiation is enhanced cooperation, governed by Arts. 326–334 TFEU, which has long been posited as the flagship approach to differentiation, but has so far failed to deliver (see, for example: Beneyto 2009; Fabbrini 2012; Martinico 2015: 6; Thym 2017: 40–49; Martinico 2014: 284–85; de Witte 2018: 237–38; 2019: 6–7; Sielmann 2020: 296–322; Böttner 2021: Kos 2023a: 211–13). Notably, the Treaties also entail mechanisms of differentiation in the single market and secondary legislation in general (Closa 2015: 21–22). These include safeguard clauses[vii] in primary law, such as the possibility to maintain stricter national standards in social policy, consumer protection, environmental policy and public health,[viii] as well as universally for legislation adopted under Art. 114 TFEU[ix]. These mechanisms of differentiation are then also used in acts of secondary law.[x] Secondary-law differentiation also results from non-exhaustive, most often, but not limited to minimum harmonization (cf Vos 2001: 148–54), allowing the Member States to provide or maintain higher standards. Differentiation may also materialize by way of derogation clauses either in primary or secondary law (cf Sielmann 2020: 365–66).[xi] Differentiation outside EU law (international *inter se* agreements)[xii] has been widely used in the wake of the financial and economic crisis post-2008 (Sielmann 2020: 166 ff; Kos 2023b: 213–17).

2.4 Overlap Between Differentiation in EU Law and Asymmetric Federalism

This article is not the first piece of academic research to draw the quite clear parallel between asymmetry and differentiation (see, for example: Delmartino 2009; Martinico 2013; 2014; 2015; 2016; Bardutzky 2018; Van Cleynenbreugel 2019; Sahadžić 2021: 6). In the

literature on federal asymmetry, sporadic mentions of differentiation or differentiated integration in the EU can sometimes also be found (e.g. Watts 2000: 24).[xiii] However, an overall schism between the studies of asymmetric federalism and differentiation has been noted (Delmartino 2009: 38). One of the main aims of this article is to attempt to bridge that gap by pointing out the key overlaps of the two theoretical approaches to the accommodation of diversity in multilevel systems. Four of those can be identified based on the foregoing theoretical overviews in the previous subsections.

Firstly, the causes of each of the two phenomena, as identified in the literature, both relate to different types of social, cultural, political and economic diversity. All the differences between the Member States that exist within the EU neatly correspond to the preconditions of asymmetry in asymmetric federalism. The existing heterogeneity within the EU aligns with preconditions or inputs of asymmetry. In both cases, we are talking about economic, social and political differences which feed different legal approaches under the overarching central (EU or federal) legal structure. The overlap between distinctive analytical categories of socio-economic and cultural-ideological preconditions for asymmetry (Burgess 2006: 215) and between economic and social, and political and cultural value diversity in the EU (Bellamy 2019: 179ff) is quite clear. Both approaches are the result of and driven by the demands of the same diverse social reality.

Secondly, both strands of literature introduce analytical approaches which explain the abovementioned causes of the two phenomena in corresponding ways. The literature on differentiation broadly identified two groups of reasons for differentiation and accordingly two types of differentiation in EU law: subjective and objective. *Tuytschaever* showed that the overall causes of the differentiation in EU law were the existence of objective differences, entailing socio-economic factors, and of subjective political differences (Tuytschaever 1999). His distinction follows *Ehlermann's*, who separated economic and social factors on the one hand from the 'purely political phenomena' on the other as relevant for flexibility arrangements (Ehlermann 1984: 1289). Objective differentiation is grounded on existing socio-economic differences between the Member States or between regions within the Member States (Tuytschaever 1999: 218–19; cf Bardutzky 2018). In political science *Winzen* and *Schimmelfennig* label this instrumental differentiation (Schimmelfennig and Winzen 2014: 355; also see: Bellamy 2019: 179–80, 188–89). Subjective differentiation, on the other hand, is based on political differences (Tuytschaever 1999: 122–23). *Winzen* and *Schimmelfennig* call

this constitutional differentiation, concerning primarily issues of sovereignty and identity (Schimmelfennig and Winzen 2014: 355). Similarly, in the realm of asymmetric federal theory, *Watts* analysed asymmetries as either politically or capacity-driven, depending on the types of inputs of asymmetry (Watts 2000: 7). The first group refers to situations, where a territorially defined group presses for a differentiated political relationship with the central government. These demands are often, but not exclusively based on self-determination claims, stemming from ethnic differences and also related to identity. The second group encompasses situations where diverging capacities to provide effective sub-national governance lead to claims for asymmetric treatment. These may, for example, stem from limited financial or human resources (Watts 2000: 7–8). While those from the former group would presumably lead to permanent forms of asymmetry, those from the latter are usually construed as transitional (Watts 2000: 10–11). *Watts'* categorization clearly mirrors the difference between objective and subjective differentiation in EU law.

Thirdly, the outcomes under both approaches vastly correspond as well. As briefly outlined in Section 2.3 above, the EU employs different mechanisms of differentiation which include either explicit differential treatment of different Member States or symmetrical treatment that enables differentiated implementation or application. On the other hand, in asymmetric federalism, *de iure* asymmetry (or symmetry, as discussed in Section 3.2) is used to reach the same goal in quasi-federal systems. Accordingly, we see that *de iure* asymmetry would presumably mostly fall along the lines of differentiation *stricto sensu*, while federal symmetry (which gives some deference to constituent units) would align with differentiation *sensu lato*. The different forms of differentiation in EU law therefore also correspond to different types of asymmetry (or in some cases symmetry) according to asymmetric federalism. Similar legal mechanisms, such as opt-out clauses or different degrees of legislative harmonization and/or unification, are adopted under each of the noted approaches.

Lastly, the correspondence follows also from the overarching normative premise of both asymmetry and differentiation. The predominant narrative explains differentiation as an institutional response to the increasing diversity and divisiveness of the EU, resulting from its widening (cf Böttner 2021: 1–2; Avbelj 2008: 139, 142–43; Přibáň 2010: 26–27) and deepening (cf Avbelj 2008: 138–39; Closa 2015: 7; de Witte 2017: 10; 2018: 227–28; Antoniolli 2019: 85). The more complex and diverse the EU became, the more it employed

different mechanisms of differentiation to secure deepened and wider integration. Differentiation has therefore been employed to accommodate differences and to preserve and foster the unity and integrity of the EU multilevel legal system. Similarly, the overarching premise of asymmetry is constituted by the formal politics of recognition: Its root is in the respect for and toleration of difference in quasi-federal systems (Burgess 2006: 222). Asymmetry in federalism is a governance practice to confront ethnic, social, economic and other diversity (Agranoff 1999b: 21), a normative choice to formally recognize difference and diversity (Burgess 2009: 25). Asymmetric federation is an instrumental device for accommodating differences to provide the overall political stability of the system (Burgess 2006: 222; also see: Sahadžić 2021: 52). The accommodation of diversity and the unity and stability of the system are the two main normative ideals behind both concepts (cf Burgess 2009: 34).

Based on the above, we see a significant degree of overlap between asymmetric federalism and differentiation in EU law: they share preconditions, theoretical explanations, outcomes and normative bases. Both are designed to tackle the same social realities by adopting similar techniques with overlapping normative premises.

Admittedly, the EU does not fit perfectly into the analytical and explanatory model of asymmetric federalism; specifically, while asymmetry has mainly been ascribed to fragmenting systems, the EU is a typical example of an integrative system (Sahadžić 2021: 6).[xiv] Accordingly, in the EU, differentiation has been analysed almost exclusively from the point of view of its role in the further integration of the EU. In that sense, talk has, as noted, mostly been about 'differentiated integration'. Conversely, due to its modern-day role in the processes of decentralization (cf Palermo 2009: 13), asymmetrical federalism rather focuses on subduing identity-related claims for asymmetry in multinational quasi-federal systems, stressing their impact on the stability, and most often being linked to politically sensitive questions of governance. These dissimilarities should, however, not overshadow the clear conceptual overlap between differentiation and asymmetry. While context defines the standout issues and solutions, the underlying objective generally remains the same: the accommodation of diversity to provide stability and legitimacy of a multilevel system (Kos 2023c: 181).

In conclusion, we can determine that the relation between differentiation and asymmetry is one of *species* and *genus*. Differentiation represents a specific emanation of asymmetry in the

context of the EU being an EU-specific example or manifestation of asymmetry, which can more generally be applied in any quasi-federal system (Kos 2023c: 197).

The foregoing linkage of the two theoretical approaches helps the EU for explanatory, analytical and normative reasons. On the one hand, it can serve as an analytical tool applied to the European Union, but can also be extended to other quasi-federal systems. When viewed through the prism of asymmetric federalism, the dynamics within the EU can be better understood and, most importantly, placed into the realm of wider discissions on asymmetry in quasi-federal systems. This provides a better understanding of why, when, how and which mechanisms of accommodation are used and how they operate. On the other hand, it also gives structure to the discussion on how to accommodate diversity when this is normatively desirable. This means that it can offer solutions for a better construction of the EU (as well as any other quasi-federal system) in the future.

3. Two Refinements of the Model of Asymmetric Federalism: Lessons from the EU

3.1 Introduction

In terms of conclusions that can be drawn from the comparison between the EU and asymmetric quasi-federal systems for the further development of the theory of asymmetric federalism, this article offers two refinements: (1) the need to consider symmetric solutions as venues for the accommodation of diversity and the preservation of pluralism, and (2) the need to distinguish between the different types of preconditions of asymmetry. In this part of the article, the benefits of the parallel study of the two theoretical approaches reverse the relatively Eurocentric approach by searching for potential lessons the analysis of differentiation can offer to asymmetric federal studies.

3.2 The Pronounced Role of Symmetry in Asymmetric Federalism: An Oxymoron Overcome

While it may at first glance appear as contradictio in adiecto, the employment of symmetric legal solutions as mechanisms for the accommodation of diversity under asymmetric federalism should also be underlined. Building on the initial remarks on the

relationship between different types of federal asymmetries in Section 2.2, this part of the article aligns the role of symmetry in differentiation and asymmetric federalism.

As we saw from the example of the EU, differentiation sensu lato, although understudied for its constitutional relevance in the EU, is commonplace. It occurs when the EU treats all Member States in the same way, i.e. (legally) symmetrically, but leaves them a margin of discretion that they may use in the implementation or the application of the EU's standards. As discussed above, this approach is designed to align the relevant legislation to the underlying social fabric, espousing the principle of substantive equality among the Member States.

Although some authors writing on asymmetric federalism have noted that symmetric legal arrangements may (nevertheless) produce de facto asymmetries (cf Palermo 2009: 11 n 1.)[xv], under the study of asymmetric federalism, the possibility of employing symmetry to attain the normative goal of accommodation of diversity has not featured prominently. The reason may be found in the fact that the initial focus of the studies on de facto asymmetries was meant to show that even in de iure symmetrical federations, asymmetry may follow from the underlying social diversity. This was to overcome the initial position that relations within a federation are always symmetrical and, as per Tarlton, that federal symmetry and stability are directly proportionate (Tarlton 1965: 873; cf Sahadžić 2021: 3). De facto asymmetry was therefore understood as an addition to possible de iure asymmetries: A system may be de iure asymmetrical; but even systems that are not de iure asymmetrical (which implies that they are therefore de iure symmetrical), may exhibit signs of de facto asymmetry. It was, therefore, implied that de facto asymmetries (in federal theory) may emerge when the treatment of component units at the federal level is symmetrical. If initially, the aim was to explain the (asymmetric) relationships that may emerge in a generally symmetrical federal system, this article stresses the fact that asymmetry may also be consciously employed to accommodate diversity and secure substantive equality. Instead of looking at the results of the employment of asymmetrical mechanisms, it analyses asymmetry for its potential use as a mechanism that can be adopted to achieve these results. This shift in focus shows that the normative ideal of the accommodation of diversity (and the linked stability of the system) can be reached both by either de iure symmetry or asymmetry. The extent of the level of accommodation of diversity by the central level of a quasi-federal system will depend on how and in what circumstances mechanisms of asymmetry or symmetry are adopted.

If we first look at de iure asymmetry, we see that it can be used to either entrench and protect, or to iron-out and diminish the differences between the constituent units of a system. The central authority can adopt de iure asymmetry in favour of some or all constituent units, leading to de facto asymmetry.[xvi] This either leads to the entrenchment of the existing de facto asymmetries or counterbalancing (ironing-out) of the existing de facto asymmetries. The effect de iure asymmetry at the federal level will have on de facto asymmetry will depend on the type of underlying diversity (i.e. preconditions for asymmetry).[xvii] In both cases, constitutional asymmetry at the federal level will restructure the constitutional framework to account for the underlying heterogeneity, resulting in the accommodation of diversity and ensuring (substantive) equality among the constituent units (cf Kos 2023c: 189–93).

However, similar results may follow when applying de iure symmetry as well. At the central level, de iure symmetrical treatment of constituent units can either be implicit or explicit. The first occurs when the central level omits any regulation whatsoever, leaving the constituent units free to regulate the field as they prefer. This will lead to de facto asymmetry in the case of underlying diversity among the units. The second option is for the federal system to explicitly adopt de iure symmetry via central regulation, applicable to all constituent units in the same way. However, this regulation can either be exhaustive or non-exhaustive. This choice is related to the extent of federal pre-emption of subnational constitutional autonomy (cf Palermo and Kössler 2019: 131–32). If symmetrical regulation is exhaustive, the result in terms of accommodation of diversity will depend on the type of asymmetry: it may either entrench or override de facto asymmetry. Conversely, when symmetrical regulation is non-exhaustive, the constituent units are allowed to deviate from the common standard, depending on the extent and depth of the central regulation. Despite de iure symmetrical treatment, this will also produce de facto asymmetry and by adopting it the central level of the system will accommodate diversity among its constituent parts (cf Kos 2023c: 189–93).

The key outtake from the above is that if we start from the proposition that the overall goal of asymmetry (and differentiation) is the accommodation of diversity, this can be achieved both by de iure symmetrical and de iure asymmetrical regulation at the central level. This means that when pursuing the policy of recognition of diversity, both symmetrical and asymmetrical legal mechanisms may be considered. Which will fit the purpose of

guaranteeing substantive equality of constituent units of a quasi-federal system better will ultimately depend on the type of diversity that needs protecting. This proposed refinement adds another layer to the accommodation of diversity under asymmetric federalism, which has not been fully captured thus far. The parallel study of asymmetry and differentiation therefore proves useful both for the study of asymmetric federalism as well as for differentiation in EU law.

3.3 Is there Space for Constituent (National or Constitutional) Identity in (Asymmetric) Federalism?

In the EU, a long strand of literature has been devoted to the issue of Member State national or constitutional identity, especially since the adoption of the Treaty of Lisbon (see, for example: Reestman 2009; Besselink 2010; von Bogdandy and Schill 2011; Claes 2013; Dobbs 2014; Cloots 2015; Kos 2019; 2021; Scholtes 2021; Millet 2021; Martinico 2021; de Witte and Fromage 2021; Scholtes 2023). This concept has often been studied as something particular to the integrative dynamics and specificities of the EU as an integrative project. The question arises whether the concept can be (or has been) of use in quasi-federal systems as well. A closer look warrants careful conclusions as more comparative research specifically devoted to this issue would be needed to provide a clear answer. However, when adopting the approach advocated above, a clearer distinction between the different types of preconditions for asymmetry under asymmetric federalism can potentially be established based on differentiation in EU law.

As discussed, under differentiation in the wider sense, the EU may leave different degrees of autonomy to subsequent Member State regulation, which is related to the doctrine of pre-emption in federal studies (cf Kos 2023c: 133–37). Essentially, the central legislator allocates a degree of deference to constituent units to autonomously regulate certain issues within the confines of the central legislation. When the central authority gives constituent units such a margin for a differentiated implementation or application of the law, there may be more or less acceptable reasons for the deviation from the common, symmetrical standard. In some cases, there may be stronger, even constitutional arguments which warrant the allocation of such a margin (cf Kos 2023a). Here, it is posited that the normative weight of the subnational argument may also be determined precisely by the circumstance of whether or not a specific

type of diversity is constitutionally protected – either at the central, or the constituent unit level. In the EU, this is exemplified by the identity clause from Art. 4(2) TEU and the corresponding doctrines developed under Member States' constitutional law (e.g. Kos 2019: 44–51). The fact that the EU must respect the national identities of the Member States shows that if a specific emanation of a societal value is expressed in the constitution of the Member State, especially if the national constitution gives this value a specific, higher, hierarchical position, such a value may demand recognition at the central level (cf Faraguna 2016: 494–95). This requirement may be reflected either in the adoption of new (central) legislation, or in its practical application within the states.

When discussing the preconditions for asymmetry, this means that it may be beneficial to see whether some preconditions of asymmetry are constitutionally entrenched (either in the constituent units of a federal system or in the federal constitution) and whether in quasi-federal systems other than the EU, this carries any normative significance of the kind described in the previous paragraph. It may be presupposed that the constituent units would be more reluctant to comply with a common central rule that goes against a core value at that level (*e.g.* protection of a minority language, religious practices, cultural specificities or distinct ethical or moral views within that particular community) especially when it is considered to be (nationally or subnationally) constitutionally protected. Similarly, the federal level may potentially be more receptive to such arguments, adopting its legislative policies (*i.e.* the choice regarding the degree of pre-emption) accordingly.

As conflicts of rules in federal systems are dominated by supremacy clauses (e.g. Palermo and Kössler 2019: 130),[xviii] it may be difficult to imagine how a subnationally protected constitutional value could play a role at the level of federal regulation. When a conflict arises, the federal rule generally overrides the subnational (constitutional) rule. Furthermore, the distinction between integrative and fragmenting systems appears relevant here as well. The role of subnational values, constitutionally protected in subnational constitutions, could presumably only appear in integrating systems, since only in those systems, subnational constitutions predated the federal constitution and may potentially warrant additional protection as a precondition for joining the federal system. The only situation where subnational constitutional specificities could play a role would therefore seem to be when the federal constitution itself specifically safeguarded some aspects of subnational constitutional autonomy. In that sense, it would not be the subnational constitution, but

rather the federal constitution safeguarding the subnational constitutional variance. In fact, this is how national identity functions in the EU as well. In that sense, comparative studies may point to jurisdictions such as Canada, where due to a specific approach to the allocation of competences, the doctrine of pre-emption or paramountcy does not necessarily favour the central level of government, meaning that, depending on the type of competence, it can also be expressed so that sub-national laws prevail over federal legislation (Hartery 2023, 18; Newman 2011, 4–5; Ryder 2011, 577).[xix] In some cases, local (subnational) autonomy may, therefore, carry a higher normative value than the pursuance of the federal unitary approach.

In that sense, the proposed widening of the analytical approach under preconditions for asymmetry may be beneficial. It may lead to the realization that some differential social values present in specific subnational units must also be recognized at the central level. Even if comparative analysis shows that in most federal systems this may be irrelevant when a concrete and specific conflict of rules emerges, it may nevertheless, even in those cases, play a role in the process of adopting a federal rule, regulating a sensitive issue. The central legislature may opt for a broader level of deference toward constituent units. In situations where the federal constitution adopts special protection of certain aspects of subnational constitutional autonomy, such as in Canada, the usefulness of the proposed approach may be more pronounced. In that sense, pointing out the role of subnational (constitutional) identity, which has extensively been discussed in EU law, for asymmetric quasi-federal systems as well, provides a sharper picture of when diversity is and should be accommodated at the federal level. In that sense, it is a refinement based on the EU's experience which helps to better understand (analyse and explain) other systems that employ asymmetry as well.

4. Conclusion

The purpose of this article was twofold. The first aim was to draw attention to the parallels between the concepts of differentiation in EU law and asymmetric federalism. For this purpose, the article explained the basic tenets of differentiation in EU law and asymmetric federalism. Next, the analysis showed that at least four levels of overlap between the two concepts exist. Firstly, they both share the input or the preconditions side. Just as asymmetric federal arrangements, the EU is also permeated with structural diversity among its Member States. This is relevant as this structural diversity is understood in theory as the

precondition and the driver of both differentiation and asymmetry. Secondly, theoretical analyses of the drivers of differentiation and asymmetry overlap. Thirdly, there is also considerable overlap when it comes to the (legal) outcomes of this underlying diversity. Both asymmetric federal arrangements and the EU use different mechanisms that allow differentiation or asymmetry among their constituent units. In both cases, this may entail either explicit differential legal treatment of constituent units or other (symmetrical) mechanisms that implicitly allow such differentiation. Lastly, and perhaps most importantly, it has been shown that theoretical takes on both concepts identify common normative bases. The proposition is that asymmetric federalism can also be used to analyse and explain differentiation in EU law. It follows that the dynamics in the EU are not unique: Similar trends can be observed in some federal arrangements. Differentiation in EU law is presented as just one example of asymmetry, its specific emanation within the EU.

Based on the comparison between the two theoretical concepts, the second aim of this article was to, reversely, propose two refinements to the theory of asymmetric federalism based on differentiation in EU law. The first is addressed to the realization that not only asymmetrical but also symmetrical legal treatment can lead to the accommodation of diversity. This helps to better analyse the existing mechanisms, and also construct new mechanisms that can be employed for this purpose. The second refinement stems from the fact that the EU showcases how especially in some cases of symmetrical legal treatment (differentiation in the wider sense), the question of whether or not the differences among the constituent units are constitutionally entrenched is also relevant. Constitutionally entrenched differences may carry higher normative weight. Therefore, to better understand when and why differentiation or asymmetry may be used, a look at how the sources of diversity are treated in the constitutional systems of either the constituent units of the quasi-federation is also useful.

By drawing the parallels between differentiation in EU law and asymmetric federalism, the article attempted to bridge the divide between the two strands of research. In that sense, it should be read as a starting point for further research into the possible uses of asymmetry in the EU, as well as the potential benefits the study of federalism may reap from looking at the EU. The article therefore also attempted to go beyond the Eurocentric approach to the study of federalism. By looking at the specific developments related to the use of differentiation to provide further integration of the EU, it tried to transfer experience from

the EU to the realm of federalism studies. In that sense, a fresh look at asymmetric federalism may warrant some refinements for the existing theoretical model to be more apt to be applied to modern dynamics. However, as noted, this part of the article remains theoretical, and further comparative research into the existing federal systems will be necessary to validate the hypotheses put forward.

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[i] This article is based on the Author's research, done within the context of his PhD dissertation and is based on the findings of that PhD dissertation, specifically its Part 3. See: Kos 2023c. An early version of this article has been presented at the IACL World Congress in Johannesburg in 2022. The comments and suggestions received significantly helped in developing the ideas put forward in this article.

[ii] The term 'quasi-federal systems' is used in this article to encompass constitutional systems, which are not necessarily states, that apply the federal principles. It is similar to what Elazar dubbed as 'federal arrangements'. More recent literature also employs the terms 'multi-tiered systems' and 'multilevel systems'. See, in that sense, Elazar 1987: 38–64; Sahadžić 2021: 47–49 and literature referenced there; Popelier, Aroney, and Delledonne 2022: 1.

[iii] The Author has published (forthcoming) an article on the topic of this section of the article in Slovene language. See: Kos 2024.

[iv] More specifically, Burgess distinguishes elements such as political cultures and traditions, social cleavages, territoriality, socio-economic factors and demographic patterns as forming these two categories. The overlap with Livingston is apparent. His approach to asymmetry has been adopted by other notable authors in the field, such as Watts.

[v] This interpretation seems to be in line with Palermo's understanding of the relationship between the two concepts. He notes that the different divisions of power both in legislation and in the implementation of laws result in asymmetry. He gives the example of Germany, where legislation is usually symmetric, but its implementation is generally left to the *Länder*, carrying an inherent differential potential.

[vi] Sahadžić offers the examples of the regulation of immigration in Canada and variations in institutional and territorial design in Bosnia and Herzegovina. For a more detailed discussion, see Section 3.2.

[vii] There are provisions that allow the Member States to provisionally derogate from their obligations to maintain or introduce new measures under national law.

[viii] Arts. 153(4), 169(4), 193 and 168(4)(a) TFEU, respectively.

[ix] Art. 114(4) and (5) TFEU.

[x] Art. 114(10) TFEU mandates their use for legislation adopted under the said article.

[xi] For example, Art. 36 TFEU in connection to Art. 114 TFEU.

[xii] For the sake of comprehensiveness, this article discusses international side agreements as an example of differentiation, acknowledging that they are strictly speaking not examples of differentiation *in* EU law. However, they are usually adopted to overcome vetoes within the Treaty structure or to avoid excess rigidity of the Treaties. The linkage to EU law is provided by the common thread of the use of EU institutions in place of creation of *ad hoc* bodies as well as specific provisions referencing compliance of the international side-agreements with EU law.

[xiii] In this context, Watts noted the following: 'The European Union provides an example of asymmetrical integration. The EU in negotiating the accession of each new member, has often had to make some particular concessions. In addition, in order to get agreement upon the adoption of the Maastricht Treaty, the European Union found it necessary to accept a measure of asymmetry in the full application of that treaty, most notably in the cases of Britain and Denmark. Furthermore, the establishment of the European Monetary Union has not included all the members of the EU.'

[xiv] On the difference between integrative and fragmenting systems in general, see: Aroney 2016; Stepan 2005: 257–58; Sahadžić 2021: 44–45; Palermo and Kössler 2019: 40, 45.

[xv] He notes the following: 'A different degree of power can be labelled as de jure asymmetry, and a different exercise of (the same) power leads to de facto asymmetry.'

[xvi] This means that the existence of (de facto) asymmetry is not only dependent on the type of legal regulation

at the central level but also on the existence of diversity among component units: A system with the same symmetrical laws (e.g. no central regulation) can either result in symmetric relations (if there is no underlying diversity) or in asymmetric relations (if there is underlying diversity that fuels asymmetry). Therefore, one can not identify an asymmetric federation by simply looking at, for example, the federal constitution.
On the relationship between *de iure* and *de facto* asymmetry in this article, see above, Section 2.2.

[xvii] When looking for example at the representation in the second chambers of legislatures in federal systems, *de iure* asymmetric solutions may sometimes be used to downplay or limit *de facto* asymmetries (for example, where representation in the second chamber is not proportionate to population). Conversely, when discussing asymmetry in fundamental rights, *de iure* asymmetry at the federal level will entrench the existing *de facto* asymmetries between the subnational units.

[xviii] Supremacy clauses are generally blind with regards to the type of subnational legal act (constitution, statute, sub-statutory acts) as any subnational act must conform with the federal constitution – unless the constitution itself provides otherwise.

[xix] Under the doctrine of interjurisdictional immunity, central legislation may be invalidated if it interferes with core subnational competences. As noted by Newman, the practice of the Canadian Supreme Court shows that interjurisdictional immunity may protect provincial powers as well. Furthermore, he argues that such development of areas of provincial paramountcy is in fact a logical consequence of the principle of federalism. See: Newman 2011: 4–5.

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