
Authority or Stability

Flexibility in the Light of Constitutional History

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I L'Europe, roseau réfléchissant*

Lawyers are functional optimists: any weird instrument to come out of the political process they will eventually put to some good use. Thus it will be with the new instrument of flexibility: no doubt some day it will be found to afford the way out of an awkward situation. Then we shall know what it can do.

One may also, however, appreciate the instrument without waiting for its ultimate use: as the result of the show down in Amsterdam, summer 1997. Flexibility in the form it was put down into the Treaties (and subsequently altered in Nice) may be seen as a choice made. The first question then is: which were the options? The second: which of them was adopted? These are the questions inviting the following remarks.

All forms of flexibility in the last instance have been called forth by two opposed trends in the Union's development. The one is that of its growing comprehensiveness, exclusiveness and entwining. The opposite is that of increasing diversity in the Union's membership as to economic development and European political commitment.

The first tendency, the entwining of policy fields and membership, makes the Union special in the international community. Binding forms of cooperation are normally diverse and isolated as to subject matter and participants, which expresses the members' autonomy or sovereignty. This is not so with the Union. No surprise then, the Union's entwining provokes all sorts of internal forms of diversity, down to the core of the Union's legal system: the common (or internal) market. Minimum-harmonisation is a case in point. It indicates common rules or standards that nevertheless leave to committed members the choice of a stricter norm. Another sign is the ineradicable exceptions or safeguards to Union obligations that propagate themselves from primary into secondary legislation of the Union.

One may explain and even conjure these phenomena in part by tackling them piecemeal, but in the last instance they will not disappear, resulting as they do from the lack of a compelling State-structure which would bring about uniformity as a self evident element of the social contract.

The second tendency, of increasing heterogeneity of members with each new enlargement and certainly with the coming one East, has been expressly adduced as a motive for introducing flexibility in the Amsterdam Treaty. In Nice it re-appeared for relaxing the flexibility clauses.

* *L'homme n'est qu'un roseau...mais c'est un roseau pensant*; Pascal, pensée 347-200.

That a necessity should be generally felt to reconcile the two trends is not to say that all involved conceive of it in the same terms. Quite to the contrary, even. Which are the opinions? They may be contrasted by placing flexibility in a constitutional and historical perspective and thus undoing it of its new clothes. A preliminary question then arises: do we take a federal or a confederate perspective?

2 Federal systems

A federal system is marked off from a confederate one by the absence in the composing states of important external powers, by their uniform system of administration and by the centralisation of existential and communicative state functions such as defence, diplomacy, police, justice, market and currency.

Enhanced cooperation, the European Union's term for flexibility, is possible between groups of states in a federal system. It is even quite common. In Germany and the US there are all sorts of cooperative schemes, sometimes these are even legally provided for, especially between contingent states. Even in unitary systems such as the Netherlands there are such forms of cooperation. In France you have the '*communauté de communes*'.

These schemes are, however, fundamentally different from the new European Union formula in the fact that they each have their own institutions of cooperation, which remain at the lower level. They do not make use of central instances.

To become comparable to the Union's varieties there would have to be for the states, districts or municipalities the possibility to call in central authority and central institutions, as is provided by Article 43 EU. This sort of instrument is not normally a part of federal nor even unitary systems.

The other side of the same medal is equally hard to imagine in federal systems. It would consist of the possibility for the federated parts to *withdraw* from central authority, institutions, obligations, in certain fields.

In this way the federal model indicates well, albeit *a contrario*, what is the gist of flexibility in the Union. It is cooperation between some members which does not take place at their common level, but at the higher, central, level, and which affects the power balance between the members and the Union. Now this of course can happen either in a regulated or in a non regulated fashion. The European Union Treaty's ambition is mostly to bring such non-regulated forms of partial cooperation affecting the balance, into the harness of the Treaties.¹

¹ For the way sub-systems may affect the centre: Philippe de Schoutheete, "The European Community and its sub-systems", in W. Wallace (ed.), *The dynamics of European Integration*, London, 1992.

This means the instrument serves the compelling and exclusive nature of the Union's institution in exchange for a certain permanent freedom of the sub-groups. These are clothed with the authority and given the means of the Union institutions, in return for moulding their initiatives to suit the Union. But they do not point towards a higher degree of federal order.

The true nature of flexibility, as incorporated in the Union Treaties, is better understood from confederate systems than from federal ones.

3 Confederation systems and flexibility

In confederate systems, such as the (first) German Empire (936-1806), the Dutch Republic (1579-1795), the American confederacy (1776-1789), the German confederation (1815-1866) and Switzerland (1355-1848 interrupted by the French period), cooperation of the partners which affects the centre or which even is organised by it, is quite ordinary, even though it is not usually regulated constitutionally. The initial period of the Dutch Republic has striking similarity with that of the Union. The (leading) province of Holland sought close cooperation with Zeeland on the basis of an existing Union between the two from 1576, and with Utrecht. Jonathan Israel writes: 'Priority was given to negotiating with Utrecht as part of what we might term the inner confederate bloc of the three to which the outlying provinces would have no choice but to subordinate themselves.'² The provinces of Overijssel, Gelderland and Groningen at first did not even get a seat in the Council of State.³

The Dutch inner core brought authority and cohesion to the Republic and would ultimately help to bring about unity. This is what is expected to happen in the Union context as well, as one may read in the well-known piece by Schäuble and Lamers of 1994, in which they put forward the idea of a 'hard core'.⁴

² *The Dutch Republic. Its Rise, Greatness, and Fall 1477-1806*, Oxford, 1995, p. 217.

³ The denomination 'province' derives from the status which these territorial units had in the Burgundian state, from which they ended up under Spanish domination, against which they fought their independence.

⁴ CDU/CSU-Fraktion des Deutschen Bundestages *Überlegungen zur Europapolitik*, Bonn, 1.Sept. 1994. See *Europe/Documents* 1895/94, 7/9/1994: 'In addition to ensuring that the decision-making process within the European Union becomes more efficient and democratic, the existing hard core of countries oriented to greater integration and closer co-operation must be further strengthened. At present, the core comprises five or six countries. This core must not be closed to other member states; rather, it must be open to every member state willing and able to meet its requirements.'

FLEXIBILITY IN CONSTITUTIONS

How this is expected to happen is indeed demonstrated in the Republic, where obstinate members were forced by others back onto the right path.⁵

Government under such conditions is not a gentle affair. It requires the use of coalitions against the unwilling partners and even the threat or use of violence against them. Such 'flexibility' is, then, another word for the motto of the Roman Senate in its traffic with the neighbouring powers: *divide et impera*. Now is this a promise for the Union?

It is a condition for such a system to be workable that there should be one partner that clearly dominates, to manage the coalitions, as in the Republic the province of Holland. For a modern version one may look at NATO under American leadership, or Russia in the CIS, which draws the other participants into changing coalitions of which only itself is invariably a member, so that it can call the tune.

This model we shall call the 'authoritative' model, as it manages to generate authority out of a relatively loose set of partner-countries. The Republic was, in fact, a major player in the European world in spite of its internal divisions.

The authoritative model of flexibility is implicit in the Union's traditional terminology, such as in expressions of multi-speed, *plusieurs vitesses*. The metaphors picked from cycling races point to different groups of contestants who will each arrive at the same finish line, with those in the lead challenging the others to greater speed. The same model is implicit in metaphors such as a caravan or a convoy, as a whole on the way to a single destination and kept together by the captain and by the fear of otherwise becoming a lone prey to pirates.⁶

Above, I argued that the Dutch Republic in its formative stage bears some striking resemblance to the Union of today. But there is a great difference as well. In the Republic one of the territorial entities, the province of Holland, dominated. This proves to be a decisive difference. Situations where there is no single dominating entity are fully different. Jonathan Israel in his quoted book on the Republic, notes a contrasting weakness in the Spanish Netherlands, which he explains from the rivalry between centres of power in the South, notably the cities of the provinces of Brabant and Flanders.

A totally different situation from that in the Dutch Republic will follow from a leadership which is not based on a single party's domination. Take Swiss history. From the creation of the Swiss core, the *Urschwyz* (1355) the

⁵ J.L. Price, *Holland and the Dutch Republic in the Seventeenth Century; The Politics of Particularism*, Oxford, 1994. Price points out how Holland's predominance and authority was maintained through an intricate practice of negotiation, which had little relationship to the formal constitutional structure of the Union of Utrecht.

⁶ Helmut Kohl said that one ship should not slow down the convoy. *Europe/political day* 6310, 8/9/94 p. 2. H. and W. Wallace use the imagery of a gaggle of geese: *Flying together in a larger and more diverse European Union*, Den Haag, 1995, p. 11.

Swiss Confederation has led a dismal existence. The essence of this system is a complicated balancing act between the different nationalities composing it and between the surrounding states. Always there is the tendency of leagues between part of the cantons or between separate cantons and neighbouring powers. The temptations may be linguistic in origin, as from French, Germanic or Italian neighbour, or religious, as from the Netherlands and Britain after the reformation. It is a feeble system, finding its strength in its weakness and in the jealousy of the neighbours.

Then Napoleon disrupts the balance, creating the Helvetic Republic, a sort of unitary state. This does not last, as Napoleon is even forced to restore the cantons, but the liberal cantons have smelled modernity and create their own league. As an answer, the old core of William Tell creates its own *Sonderbund* (1844) and fires civil war, from which the modern federation of 1848 arises.

A similar fate strikes the age-old Roman Empire of the German Nation. In the German Confederation, successor after Napoleon's intermezzo of the *Reich*, the two rival parts of north and south make war (1866), from which ultimately rises modern Germany. This civil war had another consequence, interesting for the present theme. In the losing southern confederation a form of flexibility was created between Austria and Hungary, the dual monarchy. This was meant to give Austria a 'hard core' status and allow it to take wage revenge on the Prussians. But this hard core turned out to be just another step in the disintegration of the Habsburg empire, which would end in world war. These examples seem to suggest that the creation of stable cores of groupings between leagues or confederations, in which not a single power has the ambition and/or power to dominate, lead to conceit, irritation and ultimately violence. They are no way to controlled change.

This brings us to consider the 'Franco-German core' in the Union. This has no single leadership. The tandem of Germany and France implies that agreement between these two is a condition for anything to happen in the Union. But this is not the same as saying that this couple is in charge.⁷ It is mistaking consequence for cause to think that a number of countries manifesting itself as a core will generate the necessary authority. As long as the Franco-German core fails to show a minor member such as Greece its place for misbehaving in the Balkans or towards Turkey, to which all the means are available, or to press Luxembourg to reason in the subject of tax-evasion, why hope to take on a power such as the UK through technicalities such as flexibility?

⁷ If they play boss the result is trouble, even in minor matters. When France and Germany together wanted to push Belgium's Dehaene upon the others for Commission president, they had to cede to Britain-led opposition.

The 'leadership-model' of flexibility is also in direct contradiction with the spirit and logic of the European Treaties. Far from intending to create for Germany, the leading power by far, either with or without France, a dominant position, these are inspired by the idea to absorb Germany's latent dominance. Each form of physical compulsion or pressure, let alone violence, between the Member States (without which there can be no authority) is ruled out as a matter of principle.

Yet this leadership-model tends to dominate if not the facts then the minds. This is not only because of its clarity and simplicity, but also because the alternative is so opaque. What is the result of flexibility if not greater action capacity of the core? The answer to this question can only be given once it is understood how the negotiations leading up to Amsterdam have in fact proven to be a refusal of the 'leadership model'.

4 Amsterdam

The main feat in the skirmishes leading up to the Amsterdam summit is the gradual watering down and ultimate abandoning of the requirement that exceptions (of core members or of outsiders) be temporary. In the rich imagery coming with the leadership-model, between the lead-group in cycling to convoys and flocks of birds the idea is that all arrive at the same destination. Indeed during the whole IGC-process it was always emphasised that differences should be temporary.⁸ But in the Treaty-text the requirement is not to be found.

One may note that the disillusion had already been booked with Monetary Union, which originally established the provisional character of 'derogations' (see Article 122 EC). Yet the Danish and British in Maastricht won the right to keep out even if they complied with the conditions.

The next feat of arms is the requirement that the core be a majority of members, combined with non-exclusion and veto.

- *Majority-core*. In the original proposals the core would consist of a small group of 5-6 countries. It took the protagonists to sit down at Amsterdam before they swallowed the condition that the core must start with at least a majority. The condition is logical, as one could otherwise get rival groups. But it is a defeat for the core-group idea.⁹

- *Non-exclusion*. The principles of non-exclusion and facilitated access (Article 43(g) EU) are hard to reconcile with the idea of a core. In previous suggestions

⁸ See for the Belgian position, a good example, Duff (ed.), *The Treaty of Amsterdam. Text and Commentary*, London, p. 189.

⁹ In the EMU transition procedure it is, remarkably, the other way. First a majority is sought. If not found, a minority suffices (Article 121 EC).

(as in EMU) there was a preference for admission-requirements. They have not made it into the text. Then what is to keep an unwilling and/or unable member either to be included in the leading group or to send a few helpers along to frustrate it?

- *Veto*. The picture is completed by the actual veto-power each Member has, to block escapes. This veto-power is on the basis of an adapted formula of the notorious Luxembourg-compromise, to be found in Articles 40, par.2 EU and Article 11, par. 2 EC:

'If a member of the Council declares that, for important and stated reasons of national policy it intends to oppose the granting of an authorisation by qualified majority, a vote shall not be taken. The Council may, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity.'

In comparison with the Luxembourg-compromise: 'important interests' (my emphasis) this version is favourable to the spoilsport, who does not have to adduce national interests but only national policy, a lighter test. Interestingly he may have to account for his conduct in the European Council at the others' request, but may profitably stick to his guns, as a contrary European Council decision requires unanimity.¹⁰

A variety of this *over-representation of unwillingness* is to be found in the figure of Article 34, par.2 EU, third pillar conventions. The novelty is entry into force at ratification by half the members. France and Germany hoped to introduce a Schengen-like bypass into the Treaty. The result was perverted by the fact that *conclusion* requires unanimity in the Council, so that spoilsports are required to vote along with the text to be adopted, so they can water it down though they have no intention or obligation to move toward being bound.¹¹

To sum up: in the Amsterdam IGC a leadership-form of flexibility has not been adopted but rejected. Exceptions are without a time limit and on the other hand participation is not subject to strict tests. This causes the spoilsports to be present either in the creation of the flexibility, to water it down, or in its application, to be a nuisance. On the one hand the introduction of forms of flexibility is subject to strict conditions for the sake of protecting the Treaties

¹⁰ Luxembourg compromise: *Bulletin* 3/1966, p. 9.

¹¹ In the Franco-German document of October 17, 1996 addressed at the reflection-group, in which the idea was launched, the term used was 'des conventions à moins de quinzé'. To all probability this meant *conclusion* by less than all, as this is the only way to make a reduction in participants lead to a spiriting up of the text. *Europe Documents* 2009/96.

