CHAPTER XII

Authority or Stability

Flexibility in the Light of Constitutional History

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AUTHORITY OR STABILITY

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

CHAPTER XII  AUTHORITY OR STABILITY

This means the instrument serves the compelling and exclusive nature of the Union’s institution in exchange for a certain permanent freedom of the subgroups. 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 Confederate 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.’ The provinces of Overijssel, Gelderland and Groningen at first did not even get a seat in the Council of State.

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’.

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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 1859/94, 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 neighboring powers: \textit{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, \textit{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 \textit{Urschwyz} (1355) the

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\(^5\) J.L. Price, \textit{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. \textit{Europe/political day} 6310, 8/9/94 p. 6.

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 Helvetian 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. 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.
FLEXIBILITY IN CONSTITUTIONS

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. 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.

- 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


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).
CHAPTER XII  AUTHORITY OR STABILITY

(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

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 quinze’. 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 2009/36.
from infection. On the other it is made easy on the unwilling members to frustrate or water down flexible cooperation.\textsuperscript{12}

This is not meant, however, to be a negative assessment of Amsterdam. Historical experience suggests, quite to the contrary, that to reject the leadership-model may have been an act of wisdom.

Nice altered the flexibility provisions, but does it accept the leadership-model?

5 Nice

Though Nice was meant to turn the flexibility provisions into a workable device, it still is possible for unwilling members to frustrate the creation of flexible cooperation. The adaptation of the formula of the Luxembourg Agreement has been deleted, but the authorisation decision still may be referred to the European Council. There is no more mention of unanimity in Articles 11 EC and 40a, par. 2 EU. The 'emergency brake' has not completely disappeared; it has at least been made less explicit.

Relaxation of the triggering mechanism can also be found in the altered condition that the core must start with at least eight members. As long as the Union does not take in any new members, it is going against the idea of a core-group. In an enlarged EU creation of a minority core-group will be possible. Since the negotiators were not willing to embrace the leadership-model, they made provisions on non-exclusion and last instance possibility (Articles 43b and 43a EU) more explicit.

After Nice, a core-group can be formed in theory. Nevertheless, the altered treaty provisions are certainly not an acceptance of the leadership-model.

6 Flexibility of balance

So what new technique has been adopted as closer cooperation? One should beware of the ‘antinomy-trap’. Rejection of a model does not automatically mean adoption of its terminological opposite. In fact it has been left up to time to show where the Treaty provisions are landing us. But on the other hand the possibilities are not infinite.

\textsuperscript{12} L.J. Brinkhorst, presently Minister for Agriculture, noticed that flexibility may even have an unintended effect in regard of candidate-members. The idea was to give them the opportunity to keep out of the most advanced areas of common policy. These states in fact will be eager to apply for any form of closer cooperation, irrespective of the consequences, so that it will have to be up to the others to keep them out-for which the rules do not provide the means.
Let us call the adopted model, liberally, the ‘flexibility of balance’. This is not a term with great defining force. On the other hand it is not totally without giving an idea of the situation. At least there is no dominant party able to impose its will, nor an established alliance tending to concret without the will to enforce its vision. There will be no great common acting capacity; the energies available will be spent on negotiations and the game of coalitions. Surely in this model flexibility, or closer cooperation, is essential too.

A balancing model is familiar from two different historical contexts. In the international society it goes under the name of the ‘balance of powers’, a concept developed by William Temple, F. de Lisola and the stadtholder-king William and practised by the British. In the domestic context it is both more ancient and more recent: one finds it in the doctrine of checks and balances as developed by American constitutionalists (with reference to Montesquieu and Locke), to correct Rousseau-like ideas about democracy. The theorem of checks and balances has deeper roots in feudalism and even reaches down to Aristotle, Polybius and Livy.

In confederations, in between international and domestic political organisation, it is traditional to seek balance. The Swiss example, above, is telling. It has lasted five centuries. The Roman Empire of the German nation is another case. Its stability was found in the flexible relationship between the larger participants on the one hand and the smaller on the other. This empire was flexible to the point of fluidity; it had no fixed centre nor even a fixed territorial definition. A cybernetics expert might call it a ‘self-governing system’, and historians fight over the question what held it together, but it did last eight hundred years. If constitutional historian Van Caenegem likens the Union to it, it is in part from admiration.

In his brilliant pamphlet La fin de la démocratie J.M. Guéhenno asserts that in fact Europe is turning in its state organisation for an imperial one:

‘L’Europe ne sera pas une structure institutionnelle figée, assise sur un territoire définitivement borné, mais un élément dans un ensemble d’institutions concurrentes, n’obéissant à aucune architecture claire ... Cette concurrence institutionnelle – conséquence d’une diffusion de la puissance entre plusieurs structures qui se recoupent sans se superposer, qui se complètent sans pouvoir tout à fait éliminer la concurrence – étendra à un ordre politique en voie de disparition les mécanismes de régulation du pouvoir que nous voyons à l’œuvre dans les entreprises modernes.’

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15 Paris 1993, p. 80-81. Guéhenno also refers to a ‘sondage récent’ which indicates that a majority of Germans sees or wishes its future such as that of a large Switzerland.
This evocative prose of course is more accurate in its pointing out what is in the process of disappearing than what is coming into existence; one must appreciate the author’s respect for time. Less restraint we find in a German constitutionalist, Heinz, who asserts that Bismarck’s Second German Empire is the brilliant example for the Union’s constitutional structure. This Empire was essentially a confederation, with far reaching centralisation of government functions, but without the ambition of Herrschaft (authority or sovereignty). It would never have occurred to Bismarck, says Heinz, to have Bavaria outvoted by the others’ joined forces. The construct was perverted, writes Heinz, by the democrats’ obstinacy in the Reichstag (Parliament), which

‘...gesamtdeutsche Interessen anstelle gemeinsamer Interessen der Mitgliedstaaten fördernde und im Verein mit den gesamtdeutschen Bestrebungen Kaiser Wilhelms II. zur einer deutschen Grossmachtspolitik führte, die früher oder später im Weltkriege enden mußte, zunächst aber mit der Förderung preußischen Wesens eine unseelige Gleichschaltung der Deutschen Staaten bewirkte.’

7 Balanced constitution

Some definition may be given to the choice actually made by putting this into the context of other recent constitutional inventions for the Union. These are first the principle of subsidiarity and second the Central Bank’s independent status. It is not difficult to see how these two elements do prop up the Union into a proto-political status, while at the same time reducing the perspective of authority. The Union is in fact becoming a close-knit and stable system with a growing number of autonomous centres of decision. 17
Daintith, British constitutionalist, has coined for this situation, which he sees to grow out of Monetary Union, the term ‘balanced constitution’. The system of balanced power provides a check on the ‘democratic principle’ of majority power as found in democratic systems such as the US and the Federal Republic.  

In the context of Europe, which has no democratic majority-system, the ‘balanced constitution’ is not functioning as a check but in its own right. The objective is not so much to prevent the growth of power but to prevent violence by absorbing shocks, respecting essential interests and furthering a certain evolution. It is less a goal-oriented system than one meant to consolidate relationships by introducing limited impulses to change, more or less in the way a set of people condemned to live in proximity will set itself tasks just to avoid the members’ flying at each other and to ensure a change of guard and of responsibilities. Flexibility and equipoise are no recipe for authority but for reflection, delay, stability. Hence the motto ‘roseau réfléchissant’ (reflecting reed) for this piece.

Two questions remain. What does such a balanced model look like and how does it work; what does it offer a country as The Netherlands.

As to the first question, this is up to time to answer. It is right to realise that Europe is becoming a constitutional terra incognita. This is nothing to worry about, as the continent has always been a constitutional laboratory and it will meet this test also. Second, it is good to know that human ingenuity is limited and that it will always need to seek recourse to proven solutions. Third, a regression to ‘imperial’ situations, however strong the inclination, is probably unacceptable to modern and ‘enlightened’ Western man. But in order to see through the fast growing bush of legal complexity, ingenuity is needed more and more.

Then the Dutch position. Flexibility is a token but furnishes no cogent structure. The classical federalist future of Europe is (if it ever was) now past. This removes the ground under the old Dutch Europe-coalition between federalists, legal science and business, not to forget the law firms.

Politically it suggests for us to withdraw from the Franco-German ‘armpit’ (the image of warmth and shelter which was in vogue for a while). But lawyers too should read the signs and be prepared to look at the situation in a new spirit. If only in order to find a new coalition of facts and ideas working for the Dutch interests.

I think the Home and Foreign ministries should undertake or support together a project of historical and comparative constitutional study, for the purpose of better understanding the situation having arisen, and to get the most out of its quite limited amenability to be ordered.

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19 It was Bruno de Witte who pointed this out to me.