

How Do Institutional Arrangements or Diversity Evolve Over Time in Established Federations?

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I will dedicate my reflections to the European Union political system and try to provide prospective thoughts on the above question. However, having the EU as a case study might make generalisation more difficult than in any other cases for a few reasons. Taking into account the wording of the question, it is difficult because the EU is not an established federation – but rather a federation in becoming: for some, the 50 years old European polity is still very young and not mature, especially as it is going through continuous regular transformations. However, I consider that the European Union has shown enough stability, both political and institutional, in order to be considered here. Also, diversity at EU level isn't shaped by the existence of a clear majority and one or several minorities.

Despite the difficulty to generalise, the European case is interesting to analyse as the EU could be considered as a system on its way towards the realisation of the genuine federal idea that is the free and durable association of sovereign states, whose aim is not to reproduce the nation-state model at the federal level. Thinking federalism beyond the scheme of the nation-state is certainly one key of the general reflection on accommodating diversity at supranational level and in our societies in general.

1. The EU: a System where Diversity is the Norm

Diversity constitutes the EU: the EU is composed by 27 different member states, with their own identity and culture. The states themselves are marked by internal diversity, be it institutionalised or not. “United in diversity”, so is the slogan of the EU (it was going to become official with the defunct Treaty establishing a Constitution for Europe), and so is its reality too.

Being different is the European norm: there is no single language, ethnic group or nation that can command majority support inside the EU. The EU has 27 different member states. They have various political systems. Four are federal or quasi-federal, as many are regional states or have implemented asymmetrical devolution. There are many minority nationalisms and ethnic minorities (some cross state boundaries) and regional movements. The EU has 23 official languages, among which are Maltese and Irish. Catalan, a regional language, now has a special status thanks to a specific agreement struck between the EU and

the Spanish government. On the top of that, there isn't – yet? – a feeling of common identity binding all Europeans. The European puzzle is therefore quite different from countries where a majority and one or several minorities cohabitate: at the EU level there are only minorities, themselves constituted internally by majorities and minorities.

European integration is based on the wish of these diverse components to build a polity together and have common policies to deal with common issues and pursue common objectives, the first of which is not economic strength, as many believe, but peace. There is a sense that this common quest is what unites this diversity.

2. Arrangements for Diversity at the EU Level

In the EU, the primary question is not about *accommodating* diversity - you *accommodate* something that is foreign to you and with which you're not totally happy. In the EU, "in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail",¹ the issue is to respect diversity while "building a common future."

The EU has many features that give room to the expression of its diversity. It is an important symbol of diversity that the seats of the European institutions and agencies are spread all over Europe and not all concentrated in Brussels.

The whole legislative rationale of the EU itself is based on the respect for diversity via the instrument of framework laws, i.e. directives. Directives leave space for accommodating national or regional preferences via their transposition by national or regional parliaments. The EU relies on the national administrations for the implementation of large parts of European law according to their own practice. Also, a proportionate representation of nationals of all member states is a requirement for the composition of European civil service. The composition of the administrative bodies of the Commission and the Council should not be neglected as their staff hold the pens for European legislation. A proper nationality mix is therefore essential to keep the representation of diverse sensibilities balanced in the preparation of European laws.

Decision making requires building large coalitions among Member States in the Council of ministers and among members of the European Parliament from various countries and political parties. The composition of the Commission ensures that the sensibility of all countries is represented. The rotating presidency of the Council of ministers offers a tribune

¹ Draft reform treaty, art. 2 and Treaty establishing a Constitution for Europe, art. I-2.

for the presiding government to push forward its own priorities. These institutional arrangements need to be reformed, as they are not sustainable in a Union with 27 Member States. Discussions over these reforms mainly revolved around the necessity to provide a fair representation of all Member States while having a more effective system. We point here one important tension between two necessities of European integration: respecting diversity and reaching efficiency.

3. Managing Diversity among Diversity

Even if diversity is at the core of European integration, i.e. it isn't a minority attribute but instead defines all the members of the community. It does not mean that the European Union does not face the necessity to accommodate specific differences. Member States are equals in their differences, but sometimes one might have specific features requiring special treatment. That country could request that its national or regional situation be taken into account in the design of the Union's structures or policies.

For example, the Treaty on the European Union does not apply, in part or in total, to certain territories of the Member States (Article 299), like the Faeroe Islands or Greenland, which voted to leave the European Community in 1982. However, while Greenlanders are full European citizens via their Danish citizenship, Danish nationals residing in the Faeroe Islands are not to be considered as nationals of a Member State within the meaning of the treaties and consequently not to be considered as citizens of the European Union. Citizens of these territories have a relation to European citizenship as diverse as their history. Citizens of the overseas countries and territories (ex: Bermuda, Mayotte, St Pierre et Miquelon) are citizens of the EU although their territories are not part of the EU, and EU law applies to them only in so far necessary to implement the association agreements. A specific treatment is also foreseen for the "Outermost regions": the Portuguese Islands Azores and Madeira, the Spanish Canary islands and the French overseas departments. European law applies in these seven regions of EU Member States but derogations may be given to take account of their "structural social and economic situation [...] which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development"(Art. 299(2)).

The large number of protocols annexed to the Treaty on the European Union dealing with specific Member States and regional situations do testify of the necessity certain Members States had to get special conditions recognised. The recent reform attempts did not

try to reduce the number of these arrangements, thus acknowledging their legitimacy. Among them, let's mention the anecdotic but revealing protocol nr. 10 of Austria's accession treaty ensuring that a.o. "Paradeiser" and "Erdäpfel", specific Austrian denominations for tomatoes and potatoes differing from the German ones, find their way to the German versions of European legislation. That is EU's flexibility to deal with diversity.

Additionally, arguing of particular national socio-economical preferences, certain Member States have requested to opt-out from major European policies such as the introduction of the single currency, the Euro (UK, Denmark) or the Schengen agreement on the elimination of internal border controls and creation of common entry rules (UK, Ireland). Opt-outs are permanent exemptions from a Treaty provision as opposed to temporary derogations. The latter are for example attributed to new Member States for a few years until their legislation is adapted to the EU requirements. In 1997, the Amsterdam Treaty institutionalised the will of the Member States to enable a majority of them to deepen integration in certain European policy areas outside of the EU's exclusive competences. With the "enhanced cooperation", Member States gave themselves the option of variable geometry or "Europe à la carte" in order to deal with their heterogeneous ambitions of integration: some could "opt-in" for more integration. Whether this kind of cooperation should take place inside or outside the EU framework was of course an issue but Members States agreed to rather integrate this mechanism inside the single institutional EU framework. Several conditions were also laid down in order to ensure such initiatives further the EU's objectives and respect European law and the powers of the various parties, be they part or not of enhanced cooperation. As this reveals, the EU has shown innovative institutional solutions to deal with its heterogeneity.

Looking at the way institutions work, diversity is also to be found in the representation in the Council of ministers, as a mirror of the internal diversity of certain Member States, especially those with federal or quasi-federal systems. By means of internal arrangements, federated entities of a few Member States such as Belgium and Germany, do represent themselves directly in the Council of minister when certain questions related to their fields of competences are on the agenda. This practice does find a formal transcription in the EU treaties as the Council of ministers is formally composed of a representative "at ministerial level." Member States have hence agreed to give space to their partners' constitutional practice inside the European realm. Though they left them the in charge to internally arrange the way representation would be organised as this is not set by European arrangements. But here again recent reforms in Germany highlight the tension between the

wish of federated entities to act autonomously and be represented as such and the quest for efficiency. In the framework of the 2006 federalism reform, German Länder did accept to limit their right of self-representation at the Council of ministers to only three very specific areas of European policy making. Their resources being limited, they would rather invest them in the early decision making process than at the end of it, because they consider little can be changed at that stage.

4. The EU and Institutional Arrangements for Diversity – Prospective Thoughts

I mentioned the tension arising in the EU between respect for diversity and efficiency. This is not new. It was already present in 1948 at the European Congress of The Hague in discussions opposing partisans of a loose political Union open to all European States (that became the Council of Europe in 1949) and partisans of a tighter project-oriented union of States, a political, economic and monetary Union of Europe (which led to the creation of the ESCC in 1951, the ECs and today's EU). It seems that this tension has grown stronger since the 2004 Enlargement. It brought in a large number of new countries and hence raised the level of diversity inside the EU. Enlargement in itself is not to blame for this rising tension, but rather the incapacity of the EU to reform itself before enlargement in order to be able to function efficiently with such a large number of members.

How to conciliate respect for diversity with efficiency in institutional arrangements and public policies is to me one of the core challenges of current EU reforms. It is a very delicate balance to keep, especially as each Member State, each nation, each citizen might have a different understanding of where the ideal balance lies.

One could develop various formulas of the diversity / efficiency equation. I would like to identify two of them which may print their mark on the EU in the future. The ground has been prepared for them in recent years and as the pressure for institutional reforms is growing stronger but is not – yet – leading anywhere, there might be two easier ways for political leaders to take until reforms are ripe.

While these two ways might first appear contradictory because of their denomination, in practice they would rather reinforce each other.

4.1 Rising Heterogeneity Leads to Fragmentation in Homogenous Clusters

The development of enhanced cooperation seems to be a very serious possibility in a near future. This is already the way certain policies work and it will certainly be fostered in the future as the EU is still not technically ready to have coherent policies elaborated by and for

27 Member States. The Draft reform Treaty to replace the draft European Constitution does place the option of enhanced cooperation at the heart of the reforms (Art. 10 Draft Reform Treaty). As the Constitution did, it simplifies recourse to enhanced cooperation and broadens its scope to foreign policy. So far all Member States may participate in discussions, though only those participating in the cooperation may vote. The recourse to variable geometry seems unavoidable in a Union of 27 heterogeneous states. The EU is not likely to deeply reform itself soon and a few Member States have already announced their intention to go forward in smaller groups if the 27 as a whole do not support their initiatives for further integration in certain fields.

In the long term it remains to be seen if and how “enhanced cooperation” initiatives are going to evolve in the larger EU framework: will they be creative laboratories for the whole Union or elitist clubs continuously leaving others a few steps behind, thus going away from the EU’s general objective of continental cohesion?

4.2 Efficiency Understood as Uniformity and Centralisation

In a second prospective thought I expect the legitimate quest for efficiency to overshadow the necessity to respect diversity because of the tendency to assimilate efficiency with uniformity and centralisation.

The argument that Europe needs to give more concrete results in order to be better accepted by citizens has made its way since the failures of the French and Dutch referenda on the ratification of the European Constitution. Some argued that the EU should concentrate on concrete improvements in the life of citizens and make more for them. European directives get more and more precise, too precise maybe. As a result national parliaments have less space for adaptation to the local environment when transposing them into national law. The development of enhanced cooperation could contribute to this development as such initiatives might be more likely to lead to the adoption of uniform policies for a group of Member States.

Additionally, the search for efficiency could lead to rising centralisation of policy making at the European level. While respecting the repartition of competences, more policy areas could be regulated at European level at the request of some Member States, the Commission or the Parliament. Second, there could be the temptation to extend the scope of European legislation to all aspects of a policy in the name of efficiency. That movement could be alimanted by the development of enhanced cooperation since they are more likely to be launched by States with more similar preferences or sharing the will to deepen their

integration in specific areas where the EU hasn't been involved yet, such as tax harmonisation.

Aware of these issues, representatives of national and regional parliaments promoted the inclusion of a formal subsidiarity control in the European Constitution. Without waiting for a hypothetical ratification of a Reform Treaty including that clause, a few national parliaments have already started to scrutinise European law along the subsidiarity criteria, even in non-federal countries such as France. This does prove that keeping the respect for diversity at the core of EU law is becoming a hot issue. It remains to be seen whether the promoters of subsidiarity are able to mobilise resistance and to promote European action only where really relevant.

In the quest for a better EU, one should not forget that neither efficiency nor integration implies uniformity – it might sometimes, but this is not automatic. When uniform solutions are chosen, one should also analyse the impact of a uniform measure on a diverse population. If it is badly received because it is not adapted to the local context, the costs of the decision might cancel the expected benefits. The call for output legitimacy shall not make leaders oversee the necessity to respect the internal diversity of the EU, the input of the system. If the output destroys the input, it will for sure meet grassroots resistance.

Efficiency does for sure mean to do better and in a way that is adapted to the reality. At the EU level, reality is marked by very diverse national, regional and local contexts. Setting up such a governance and policy making system requires a high degree of cooperation between all European actors, from the EU to the town administration and a high sense of one's own responsibility to assume the complexity of dealing with diversity.

5. Conclusions

In an attempt to answer the general question “How do institutional arrangements for diversity evolve over time in established federations?” I have voyaged through the EU institutional realm and am tempted to give a negative view concerning the evolution of arrangements for diversity. I hope I am wrong, but arrangements for diversity seem to face strong outside pressures. The quest for efficiency is one of them. Both are not contradictory but arranging diversity may seem, for too many, a hurdle in the way towards efficiency. On the contrary, it seems that policy making can not be really efficient if it does not take into account the genuine characteristics of the target. Moving from the goal of efficiency towards the one of effectiveness could be useful in order to escape the efficiency-diversity dilemma. Last, to be

genuinely democratic, governance mechanisms have to give an appropriate space to the diverse elements of a society.

Also, existing arrangements should not be taken for granted: arranging diversity can not be done with a for-ever disposition. It has to be a continuous concern of governance and policy making. It is all the more important as diversity evolves. Arrangements for diversity shall be therefore adapted in order to provide solutions in sync with society.

Last but not least, I consider institutional arrangements as essential but limited tools to deal with diversity. In themselves they are not enough. They shall be completed with broad initiatives to foster mutual understanding between people, through encounters and concrete projects. It is actually the responsibility of each actor to promote such actions and not only, for example, in the European case, the responsibility of the European Commission. It is also the responsibility of each political and institutional actor to communicate broadly when arrangements or policies are decided, whatever their implication for diversity is. This is a requirement to have people understand each others' reality, deal with differences and complexity and be able to accept concessions. If arrangements for diversity are not backed up by such concrete bridges between majority and minority, between people, then they will very likely backfire. In the EU we are lucky that backfires take the pacific form of ballot papers "NO."